IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

CLARENCE EDWARD HILL,

Appellant,

versus

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

APPLICATION FOR STAY OF EXECUTION AND SUMMARY INITIAL BRIEF OF APPELLANT ON APPEAL OF DENIAL OF MOTION FOR FLA. R. CRIM. P. **3.850** RELIEF

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. **0125540**

THOMAS H. DUNN
Staff Attorney

JEROME H. NICKERSON
Assistant CCR
Florida Bar No. **0829609**

JUDITH J. DOUGHERTY
Assistant CCR
Florida Bar No. **0187786**

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida **32301**
(904) 487-4376

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This Honorable Court has before it the appeal of the circuit court's summary denial of Mr. Hill's motion for post-conviction relief, brought pursuant to Fla. R. Crim. P. **3.850,** and Mr. Hill's petition for a writ of habeas corpus, which is presently pending before the Court. A death warrant is currently pending against Mr. Hill, and his execution was scheduled for January 25, 1990. A stay of execution was entered on January **23,** 1990, pending further order of this Court. Given the time constraints involved in this action, Mr. Hill's counsel cannot provide this Court with the type of brief counsel would normally prepare.[1]

Given the pendency of Mr. Hill's execution, counsel has consolidated into this document Mr. Hill's application for a stay of execution. The claims presented by Petitioner/Appellant and the issues involved in this action are important and substantial. A stay of execution is proper. Given the time constraints, counsel cannot herein properly and professionally brief each of the claims presented, but each claim is specifically discussed and each is presented for the Court's **review.**[2] No claim presented in this brief or habeas corpus petition is waived or

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[1] At the time this brief was prepared, Mr. Hill's counsel has still not received a response from the State to his petition for a writ of habeas corpus.

[2] "Counsel apologizes for the length of this brief, but given the severe time restraints there was no time to edit this brief. Counsel feels compelled to provide this Court with a brief of this size given the recent ruling in Duest V. State, Nos. 75,039 and **75,254** (Fla. Jan. **18,** 1990).

abandoned, and each is asserted before this Court, irrespective of whether the issue is or is not professionally presented in this brief.

Reference to the transcripts and record of these proceedings will follow the pagination of the Record on Appeal. The trial proceedings will be referred to as "T. ___." References to the resentencing proceedings will be referred to as "R. ___ " References to the Rule 3.850 proceedings will be referred to as "H. ___."[3]

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[3]Because counsel is forced to prepare this brief without a record, we will be unable to provide a proper citation to the Rule 3.850 proceedings.

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The Circuit Court of the First Judicial Circuit, Escambia County, entered the judgments of conviction and sentence under consideration. Mr. Hill was indicted by a grand jury for first degree murder on November 2, 1982. After entering not guilty pleas, Mr. Hill was tried by a jury on April 27-28, 1983. Mr. Hill was convicted of first degree murder for the killing of a police officer during what this Court characterized as a "hopelessly bungled robbery." Hill v. State, 515 So. 2d 176, 1978 (Fla. 1987).

Penalty phase proceedings were conducted on April 28, 1983, and Mr. Hill was sentenced on May 24, 1983. The judge's sentencing order was entered on May 24, 1983.

Mr. Hill appealed his convictions and sentence. Hill v. State, 477 So. 2d 553 (Fla. 1985). His conviction was affirmed but the death sentence was reversed and a resentencing before a new jury was ordered.

A resentencing hearing was conducted on March 24-27, 1986. The jury rendered an advisory sentence of death. The judge sentenced Mr. Hill to death on April 2, 1986.

Mr. Hill appealed the death sentence and it was affirmed. Hill v. State, 515 So. 2d 176 (Fla. 1987). On April 4, 1988, certiorari was denied by the United States Supreme Court. Hill v. Florida, 108 S. Ct. 1302 (1988).

On November 9, 1989, Mr. Hill's petition for clemency was denied and his death warrant was signed.

This is Mr. Hill's first post-conviction action of any kind. Although the law provided for Mr. Hill to file for post-

conviction relief until April 4, 1990, that time period was arbitrarily cut short by the signing of his death warrant. As a result, counsel was unable to effectively represent Mr. Hill in the preparation of his motion to vacate judgment and sentence. By necessity, Mr. Hill filed a Rule 3.850 motion on December 11, 1989.

On January 18, 1990, after a brief oral argument, the circuit court summarily denied all relief without conducting an evidentiary hearing (H. ___). On January 22, 1990, Mr. Hill timely filed a motion for rehearing (H. ___), which was denied on January 22, 1990 (H.). Mr. Hill then filed a timely notice of appeal on January 22, 1990 (H.). That appeal and Mr. Hill's previously filed state habeas corpus petition are now before this Court.

The facts pertinent to Mr. Hill's claims for relief are discussed in the body of this brief.

CLAIM I

THE RULE 3.850 TRIAL COURT'S SUMMARY DENIAL OF MR. HILL'S MOTION TO VACATE JUDGMENT AND SENTENCE WAS ERRONEOUS AS A MATTER OF LAW AND FACT.

After only brief arguments from both sides, the lower court summarily denied Mr. Hill's claims without conducting any type of hearing, without adequately discussing whether (and why) the motion failed to state valid claims for Rule 3.850 relief (it does), without any adequate explanation as to whether (and why) the files and records conclusively showed that Mr. Hill is entitled to no relief (they do not), and without attaching those portions of the record which conclusively show that Mr. Hill is

entitled to no relief (the record supports Mr. Hill's claims). The lower court erred.

The lower court's findings of fact were fundamentally erroneous. The Court never allowed Mr. Hill the opportunity for an evidentiary hearing on issues of fact which were contested by the parties. Mr. Hill was and is entitled to an evidentiary hearing on his Rule 3.850 Motion, Lemon v. State, 498 So. 2d 923 (Fla. 1986), and was and is also entitled in these proceedings to that which due process allows -- a full and fair hearing by the court on his claims. Cf. Holland v. State, 503 So. 2d 1250 (Fla. 1987). Mr. Hill's due process rights to a full and fair hearing were abrogated by the lower court's summary denial of relief without sufficient factual findings, and without affording proper evidentiary resolution.

Under this Court's well-settled precedents, a Rule 3.850 movant is entitled to an evidentiary hearing unless "the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986); State v. Crews, 477 So. 2d 984 (Fla. 1985); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); State v. Sireci, 502 So. 2d 1221 (Fla. 1987); Mason v. State, 489 So. 2d 734 (Fla. 1986); Squires v. State, 513 So. 2d 138 (Fla. 1987); Gorham v. State, 521 So. 2d 1067 (Fla. 1988). Mr. Hill's motion alleged facts which, if proven, would entitle him to relief. The files and records in his case do not "conclusively show that he is entitled to no relief," and the trial court's summary denial of his motion, without an

evidentiary hearing, was therefore erroneous.

It is quite puzzling that in a case in which the need for an evidentiary hearing is so plain the State would have a court make findings of fact without affording the defendant evidentiary resolution. This is but another example of the State of Florida's refusal to admit that an evidentiary hearing is required. Such a niggardly approach to the due process rights of post-conviction capital litigants is not only clearly contrary to the requirements of the law, but a waste of this office's limited resources and this Honorable Court's valuable time. The State has been provided express instruction on this very issue before, by this Court, and the federal courts:

> In cases such as this one, where the need for a hearing is so clear, we are disappointed that the State prolongs the legal process by steadfastly refusing to recognize the obvious [that an evidentiary hearing is required].

Agan V. Dugger, **835** F.2d **1337, 1341** (11th Cir. **1987).** Lemon, **supra,** is also instructive. There, as here, the State vehemently opposed an evidentiary hearing. This Court found that the State was wrong and ordered one. After the evidentiary hearing, the circuit court granted a new trial. The State did not appeal that ruling. The question remains to be asked: Why is the Florida Attorney General's office so obstinate? The standards are clear. Lemon; Agan. An evidentiary hearing is required in a case such as this in order for the Court to have before it the facts necessary for a proper resolution of the defendant's claims. Here, a number of the claims presented by the defendant involved facts that were not "of record." The defense was prepared to conduct an evidentiary hearing. The trial court's failure to

allow one was improper. Without a hearing, there is no support for anything the State and the lower court said.

Mr. Hill's verified Rule **3.850** motion alleged, and was supported by specific factual proffers, the extensive non-record facts in support of claims which have traditionally been raised in Rule **3.850** post-conviction proceedings and tested through evidentiary hearings. Mr. Hill is entitled to an evidentiary hearing with respect to these claims: the files and records in the case by no means conclusively show that he will necessarily lose. Even if that was what the lower court judge believed, in such instances the judge must attach **"a** copy of that portion of the files and records which conclusively show that the prisoner is entitled to no relief **. . ."** Fla. **R.** Crim. P. **3.850;** Lemon, supra. Otherwise, an evidentiary hearing is proper. The lower court attached nothing to the order. The court's very conclusory findings of fact are far from dispositive of the ineffective assistance of counsel claims presented, does not say much of anything about the specific acts and omissions pled, and has nothing to do with the very significant mental health issues, and the State's presentation of false and misleading evidence. This case involves nonrecord matters that have been classically tested through evidentiary hearings. A court may not simply attribute tactical reasons to trial counsel when there is no evidence of such. There was no evidence of such here. Mr. Hill's claims and supporting proffers and appendices were more than sufficient to require evidentiary resolution. Nothing **"conclusively"** rebutted them, and nothing was attached to the order which showed that

they were "conclusively" rebutted. Lemon, supra. Indeed, in a case such as this, where facts are in dispute, the refusal to allow an evidentiary hearing makes no sense at all. Blackledse v. Allison, 431 U.S. 63 (1977).

The circuit court erred in denying an evidentiary hearing and in summarily denying Mr. Hill's motion to vacate. The circuit court accepted the State's invitation to apply erroneous standards to the questions of ineffective assistance of counsel, and the significant mental health issues. Facts not of record are at issue in this case; such facts cannot be resolved now by this Court, as there is no record to review.

The lower court was asked to determine the factual questions involved by properly presented claims that necessitated evidentiary resolution. Instead, the lower court substituted its judgments which were urged by the State, judgments unsupported by evidentiary resolution at a hearing, and which do not comport with the standards this Court has established. The trial court's summary denial of Mr. Hill's 3.850 motion was erroneous.

Obviously, the question of whether a capital inmate was denied effective assistance of counsel during either the capital guilt-innocence or penalty phase proceedings is a paramount example of a claim requiring an evidentiary hearing for its proper resolution. See Bassett v. State, 541 So. 2d 596 (Fla. 1989); State v. Michael, 530 So. 2d 929 (Fla. 1988); State V. Gorham, 521 So. 2d 1067 (Fla. 1988); State V. Squires, 513 So. 2d 138 (Fla. 1987); O'Callaghan V. State, 461 So. 2d 1354 (Fla. 1984). In fact, Mr. Hill has proffered an affidavit from his trial counsel who admits to deficient performance and directly

refutes any allegation that these deficiencies were the result of strategy or tactics. Such proffers must be taken at face value in determining whether an evidentiary hearing is necessary. Lishtbourne v. State, 14 F.L.W. 376 (Fla. Oct. 19, 1989). Mr. Hill's claim that he was denied a professionally adequate mental health evaluation due to failures on the part of counsel and the court-appointed mental health professional is also a traditionally-recognized Rule 3.850 evidentiary claim, see Mason v. State, 489 So. 2d 734 (Fla. 1986); Sireci v. State, 502 So. 2d 1221 (Fla. 1987); cf. Groover v. State, 489 So. 2d 15 (Fla. 1986). This claim and the facts proffered so clearly require an evidentiary hearing under this Court's ruling in Sireci, that the State's argument and the lower court's finding that such a hearing is unnecessary make absolutely no sense. Indeed, the claim here is borne out by even the proffered account of the original mental health expert. Moreover, obviously, Mr. Hill's claim that the State presented false evidence can only be resolved through an evidentiary hearing. See Lishtbourne, supra; Gorham v. State, 521 So. 2d 1067 (Fla. 1988).

In O'Callaghan, supra, this Court recognized that a hearing was required because facts necessary to the disposition of an ineffective assistance claims were not "of records." See also Vausht v. State, 442 So. 2d 217, 219 (Fla. 1983). This Court has not hesitated to remand Rule 3.850 case for required evidentiary hearing. See, e.g., Zeigler v. State, 452 So. 2d 537 (Fla. 1984); Vausht, supra; Lemon, supra; Squires, supra; Gorham, supra; Smith v. State, 382 So. 2d 673 (Fla. 1980); McCrae v. State, 437 So. 2d 1388 (Fla. 1983); Leduc v. State, 415 So. 2d

721 (Fla. 1982); Demps v. State, 416 So. 2d 808 (Fla. 1982); Aranao v. State, 437 So. 2d 1099 (Fla. 1983). These cases control: Mr. Hill was and is entitled to an evidentiary hearing, and the trial court's summary denial of his Rule 3.850 motion was clearly erroneous. Mr. Hill prays that this Court grant a stay of execution and then remand this case for a full and fair evidentiary hearing.

CLAIM II

MR. HILL WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Hill was denied the effective assistance of counsel at the guilt-innocence and penalty phases of his capital proceedings. Counsel's failure to fulfill the overarching duty to investigate and prepare directly resulted in Mr. Hill's conviction and death sentence, and directly resulted in the imposition of an improper sentence of death on resentencing. The difference between the Clarence Edward Hill presented at trial and the Clarence Edward Hill whose background and mental health problems would have come to light had counsel properly prepared is startling. The omissions and errors of counsel are glaring and refute any principled basis upon which the characterization of tactic or strategy can rest. Of course, without an evidentiary hearing, no such finding can be made, and the lower court erred in accepting the State's bizarre invitation to reject this claim based upon the record and in light of overwhelming evidence that conclusively established that an evidentiary hearing was necessary. Since the facts pled were that counsel

did not adequately investigate, nothing in the record can be deemed the result of a reasonably investigated strategy; in fact, Mr. Hill's submission was that these omissions were not strategic or tactical in nature and that trial counsel had admitted that he and his co-counsel were not reasonably prepared.

The specific omissions and errors of counsel are set forth below with their attendant legal analyses. Each individually warrants a stay of execution, a full and fair evidentiary hearing and ultimately the relief of a new trial and/or sentencing proceeding. All of the claims listed below are classic examples of ineffective assistance of counsel which were not, and could not have been raised on direct appeal. They are properly before this Court through the instant appeal from the summary denial of Mr. Hill's Rule 3.850 motion. An evidentiary hearing was and is required. The lower court erred in failing to order one.

In Strickland v. Washinston, 466 U.S. 668 (1984), the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 668 (citation omitted). Strickland v. Washinston requires a defendant to plead and demonstrate: 1) unreasonably attorney performance, and 2) prejudice. Mr. Hill pled each. Given a full and fair evidentiary hearing, he can prove each.

Courts have repeatedly pronounced that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980). See also Beavers v. Balkcom, 636 F.2d 114,

116 (5th Cir. 1981); Rummel v. Estelle, 590 F.2d 103, 104-105 (5th Cir. 1979); Gaines v. Hopper, 575 F.2d 1147, 1148-50 (5th Cir. 1978). See also Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982)("[a]t the heart of effective representation is the independent duty to investigate and prepare"). Likewise, courts have recognized that in order to render reasonably effective assistance an attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Carawav v. Beto, 421 F.2d 636, 637 (5th Cir. 1988); Herring v. Estelle, 491 F.2d 125, 129 (5th Cir. 1974); Rummel v. Estelle, 590 F.2d at 104; Lovett v. Florida, 627 F.2d 706, 709 (5th Cir. 1980).

Counsel have been found to be prejudicially ineffective for failing to impeach key state witnesses with available evidence; for failing to raise objections, to move to strike, or to seek limiting instructions regarding inadmissible, prejudicial testimony, Vela v. Estelle, 708 F.2d 954, 961-66 (5th Cir. 1983); for failing to prevent introduction of evidence of other unrelated crimes, Pinnell v. Cauthron, 540 F.2d 938 (8th Cir. 1976), or taking actions which result in the introduction of evidence of other related crimes committed by the defendant, United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978); for failing to object to improper questions, Goodwin v. Balkcom, 684 F.2d at 816-17; and for failing to object to improper prosecutorial jury argument, Vela, 708 F.2d at 963.

Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance in his or her performance in other

portions of the trial. Washinaton v. Watkins, 655 F.2d 1346, 1355, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). See also Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Even a single error by counsel may be sufficient to warrant relief. Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981)(counsel may be held to be ineffective due to single error where the basis of the error is of constitutional dimension); Nero v. Blackburn, 597 F.2d at 994 ("sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard"); Strickland v. Washinaton, supra; Kimmelman v. Morrison, supra.

Moreover, counsel has a duty to ensure that his or her client receives appropriate mental assistance, Blake v. Kemp, 758 F.2d 523 (11th Cir. 19855); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984), especially when, as here, the client's level of mental functioning is at issue, Mauldin, supra.

Importantly in this regard, in Mr. Hill's case -- contrary to the findings requested by the State and entered by the circuit court -- the expert involved at the time of the original and resentencing proceedings has agreed that had necessary information been provided to him, had the relevant questions been posed by counsel, and had he not missed a clear indication of brain damage, compelling mitigation would have been adduced.

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

prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976)(plurality opinion). In Gregg and its companion cases, the Court emphasized the importance of focusing the jury's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

The state and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration, object to inadmissible evidence or improper jury instructions, and make an adequate closing argument. Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985); King v. Strickland, 714 F.2d 1481, 1490-91 (11th Cir. 1983), adhered to on remand, 748 F.2d 1462, 1462-64 (11th Cir. 1984); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), adhered to on remand, 739 F.2d 531 (1984); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982); Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986). Trial counsel here did not meet these rudimentary constitutional standards. See O'Callaghan v. State, supra; Thomas v. Kemp, supra, 796 F.2d at 1325. As explained in Tyler v. Kemp, supra:

> In Lockett v. Ohio, the Court held that a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the jury receiving accurate information regarding the defendant. Without that information, a jury

> cannot make the life/death decision in a rational and individualized manner. Here the jury was given no information to aid them in the penalty phase. The death penalty that resulted was thus robbed of the reliability essential to assure confidence in that decision.

Id. at 743 (citations omitted). Mr. Hill is entitled to the same relief.

In O'Callaghan v. State, supra, 461 So. 2d at 1354-55, this Court examined allegations that trial counsel ineffectively failed to investigate, develop, and present mitigation evidence. O'Callaghan, supra, 461 So. 2d at 1355. The Court found that such allegations, if proven, were sufficient to warrant Rule 3.850 relief and remanded the case for an evidentiary hearing.

Counsel's highest duty is the duty to investigate, prepare and present the available mitigation. Where as here counsel unreasonably fails in that duty, and/or where as here counsel fails to properly challenge the State's case in aggravation of sentence, the defendant is denied a fair adversarial testing process and the results are rendered unreliable. See Stevens v. State, 14 F.L.W. 513 (Fla. Oct 5, 1989).

Each of the errors committed by Mr. Hill's counsel is sufficient, standing alone, to warrant Rule 3.850 relief. As to errors at the guilt-innocence stage, each undermines confidence in the fundamental fairness of the guilt-innocence determination. Furthermore, Mr. Hill's counsel (at the original sentencing and at resentencing) failed to meet reasonably acceptable standards. The wealth of significant evidence which was available and which should have been presented was inadequately presented, and mostly not presented at all. No tactical motive can be ascribed to an

attorney whose omissions are based on lack of knowledge, see Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979), or on the failure to properly investigate and prepare. **See** Nealy v. Cabana, supra; Kimmelman v. Morrison, supra. Mr. Hill's capital conviction and sentence of death are the resulting prejudice. Harris v. Duaaer, 874 F.2d 756 (11th Cir., May 16, 1989). In this case, as in Thomas v. Kemp,

> It cannot be said that there is no reasonable probability that the results of the sentencing phase of the trials would have been different if mitigating evidence had been presented to the jury. Strickland v. Washinston, 466 U.S. at 694. The key aspect of the penalty trial is that the sentence be individualized, focusing on the particularized characteristics of the individual. **Gregg** v. Georgia, 428 U.S. 153 (1976). Here the jurors were given no information to aid them in making such an individualized determination.

796 F.2d at 1325. The allegations are more than sufficient to warrant a Rule 3.850 evidentiary hearing. **See** O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Lemon v. State, 498 So. 2d 923 (Fla. 1987): see also Code v. Montgomery, 725 F.2d 1316 (11th Cir. 1983). The lower court erred in accepting the State's invitation to summarily deny relief without allowing a hearing.

At the requisite hearing, Mr. Hill **can** establish what his motion has alleged: that the unreasonable errors, omissions, and failings of former trial counsel, singularly and collectively, are more than sufficient to warrant Rule 3.850 relief.

Mr. Hill's motion to vacate judgment and sentence and his factual proffer, pled with particularity both Mr. Terrell's deficient performance and the resulting prejudice to Mr. Hill's

defense in both the guilt-innocence and resentencing phases of his trial. Furthermore, Mr. Hill specifically alleged Mr. Terrell's errors and omissions were the product of his inadequate investigation. Mr. Hill's allegations regarding counsel's ineffectiveness, which of necessity are premised on nonrecord facts, were precisely the type of allegations found sufficient to warrant an evidentiary hearing. O'Callaghan V. State, 461 So. 2d. 1354 (Fla. 1984). Notwithstanding this, the lower court found:

> THE COURT: Okay. Counsel, based on the prior discussion -- arguments, the Court does, in fact, find that counsel for the defense, Mr. Terrell, did, in fact, make knowing and informed tactical and strategic decisions in his approach to represent the defendant in this matter, Mr. Hill, and that Mr. -- I think the record supports that Mr. Terrell's record of conduct and performance did not fail or fall below any adequate effective representation of his client which operated to his client's detriment and, therefore, the Court finds that the assertion presented in the request for relief are either insufficient or refuted by the trial record. Motion for evidentiary hearing on those matters is denied.

(H. ___). The Court's summary denial was clearly erroneous.

The lower court assumed that trial counsel's failure to present any evidence of Mr. Hills' brain damage, chronic drug abuse in general and his specific use of cocaine on the day of the offense was the product of a tactical decision. Trial counsel's sworn testimony makes plain, as the record did, that he would have used all of this evidence at both phases of Mr. Hill's trial, and the failure to develop and present such evidence was but a function of his failure to investigate. Mr. Terrel explained that:

Prior to Mr. Hill's initial trial, the State gave us notice of the fact that Mr. Hill's blood had tested negative for the presence of illicit drugs. We did not make note of the fact that Mr. Hill's blood had been tested for drugs by a laboratory different from that used to test the blood of the alleged victims in the case. We made no efforts to have the test procedures or results evaluated by an independent expert. It did not occur to me that such an expert could have easily attacked the credibility of the State's expert. Other than knowing that Reid Leonard was a chemist of long standing in this community, we had neither tactical nor strategic reasons for failing to request an independent expert. In preparation of Mr. Hill's trial, sentencing, and re-sentencing the only evidence I had regarding Mr. Hill's drug use or the possibility of a voluntary intoxication defense was Mr. Hill's self-report and the statement of his co-defendant, Cliff Jackson. Although I spoke to a large number of witnesses, I failed to use effective investigative questioning to become aware of numerous witnesses who could have attested to a long history of substance abuse by Mr. Hill as well as his intoxication at the time of the offense. The additional information from these witnesses and additional witnesses, and the conclusions of mental health experts based upon this additional background material would have been critical, substantive evidence. In my considerable experience as a trial attorney, jurors place more reliance on testimony of mental health experts and other witnesses than they do on the self-report of the perpetrator of the crime. I believe that this would be critical, substantive evidence and go far beyond mere corroboration of the evidence which was presented. I failed to use effective investigation techniques to discover this evidence. Had I had this evidence, I would have presented it to the jury and the failure to present the evidence was not due to any tactic or strategy.

In addition to the substance abuse and intoxication evidence, it is important to establish other mitigating factors. I failed to use effective investigative techniques to discover evidence of child abuse, poverty, and life long history of mental dysfunction.

> I would have presented this important evidence to the jury had I had it. This evidence was not contrary to, nor would it have detracted from, the other evidence which I presented in Mr Hill's behalf.
>
> In preparation of Mr. Hill's sentencing and re-sentencing, I obtained the assistance of Dr. James Larson, Ph.D. Although I provided Dr. Larson with some background material, I did not provide him with any background information regarding Clarence Hill's history of child abuse, poverty or life long history of mental dysfunction other than school records. I did not provide Dr. Larson with more than the report of Cliff Jackson and Clarence Hill regarding a history of substance abuse and intoxication at the time of the offense. I did not provide information regarding Clarence Hill's and Cliff Jackson's underlying personality characteristics other than my belief and suggestion that Cliff Jackson seemed to dominate Mr. Hill. My failure to provide Dr. Larson with this additional background material was not the result of trial tactics or strategy. The lack of any information regarding these issues is the result of my failure to effectively investigate those aspects of Mr. Hill's case and not due to any strategy.
>
> Regarding the relationship of Mr. Jackson and Mr. Hill, I failed to effectively investigate information relating to the background of Mr. Jackson. This investigation could have further bolstered my opinion and intent to establish the domination theory regarding Mr. Jackson over Mr. Hill. I did not provide Dr. Larson with any further material other than my theory of Mr. Hill's domination by Mr. Jackson.

(H. ___). Mr. Hill can establish a case of ineffective assistance of counsel.

As trial counsel states, numerous family members, including Mr. Hills' three brothers, who could have supplied invaluable testimony regarding Mr. Hills' chronic drug and alcohol abuse, domination by his co-defendant, and indicia of organicity were

never contacted. Trial counsel clearly acknowledges his failure to investigate available witnesses who would have testified to Mr. Hill's cocaine use on the day of the offense. Similarly, trial counsel acknowledges his failure to develop information from witnesses known to the defense regarding Mr. Hill's chronic drug abuse, evidence of life-long mental dysfunction -- he was always different -- and domination of Mr. Hill by others, including his co-defendant Mr. Jackson.

Counsel failed to adequately investigate and prepare. Evidence to support a voluntary intoxication defense was available but not discovered. Expert testimony to explain the effects of cocaine on Mr. Hill's ability to form specific intent and premeditation was available and not presented. In order to ensure a reliable adversarial testing, defense counsel was obligated to bring to bear such skill and expertise as necessary to marshall the wealth of available evidence of intoxication.

Counsel failed to adequately investigate the only plausible defense available to Mr. Hill. The defense theory at trial was that Mr. Hill and Mr. Jackson got involved in a bank robbery that was totally doomed from the start (T. 1169), completely illogical and unplanned (T. 1171), and which ended in the unpremeditated killing of a police officer (T. 1177). In fact, this Court characterized the crime as "a hopelessly bungled robbery." Hill v. State, 515 So. 2d 176, 178 (Fla. 1987). Mr. Hill took the stand in his own defense, and admitted his involvement in the robbery. He explained that he never intended to kill anyone, but rather intended to force the officer to drop his gun and release Mr. Jackson. What was absent from the defense case was the one

factor that would explain this seemingly illogical scenario: Mr. Hill and Mr. Jackson were strung out on cocaine.

Establishing that Mr. Hill and Mr. Jackson were high on cocaine at the time of the offense would not only explain why they attempted such "a hopelessly bungled robbery," but it would also explain how Clarence Hill ever got himself into such a situation. Mr. Hill's involvement in this robbery and an alleged robbery shortly before this one was totally out of character for Mr. Hill. The explanation -- that Mr. Hill became involved in the abuse of hard drugs -- was never presented to the jury.

Voluntary intoxication is a valid defense to specific intent offenses such as first-degree murder:

> Voluntary intoxication is a defense to the specific intent crimes of first-degree murder and robbery. Bell v. State, 394 So.2d 979 (Fla. 1981); State ex rel. Gospel v. Kelly. 68 So.2d 351 (Fla. 1953). A defendant has the right to a jury instruction on the law applicable to his theory of defense where any trial evidence supports that theory. Bryant v. State, 412 So.2d 347 (Fla. 1982); Palmes v. State, 397 So.2d 648 (Fla.), cert. denied, 454 U.S. 882, 102 S.Ct. 369, 70 L.Ed.2d 195 (1981). Moreover, evidence elicited during the cross-examination of prosecution witnesses may provide sufficient evidence for a jury instruction on voluntary intoxication. Mellins v. State, 395 So.2d 1207 (Fla. 4th DCA), review denied, 402 So.2d 613 (Fla. 1981).

Gardner v. State, 480 So. 2d 91, 92-93 (Fla. 1985)(emphasis added). That voluntary intoxication is a defense to specific intent crimes is not a novel principle. See Garner v. State, 28 Fla. 113, 9 So. 835 (Fla. 1891); Mellins v. State, 395 So. 2d 1207 (Fla. 4th DCA), review denied, 402 So. 2d 613 (Fla. 1981); cf. Bryant v. State, 412 So. 2d 347 (Fla. 1982).

In Guraanus v. State, 451 So. 2d 817, 822-23 (Fla. 1984), this Court held that when specific intent is an element of the crime charged, evidence of voluntary intoxication, or of that matter evidence of any condition relating to the accused's ability to form a specific intent, is relevant. Relevant evidence is evidence tending to prove or disprove a material fact. Section 90.401, Florida Statutes. Evidence which tends to disprove the specific intent element of the crime charged is relevant and must be allowed. Thus evidence of a mental condition offered as bearing on the capacity of the accused to form the specific intent essential to constitute a crime is relevant. Case law from Florida and elsewhere indicates that petitioner had the right to present expert testimony on this issue.

Trial counsel failed to investigate this defense. Mr. Hill readily admitted that he was under the influence of cocaine at the time of the robbery. In fact, when questioned by his family shortly after the crime about why he attempted the robbery, Mr. Hill told his brother, Walter, that he was high on cocaine. Since the incident, Mr. Hill has consistently said that he was high at the time of the offense.

Despite this information, trial counsel never investigated nor developed this crucial evidence. Mr. Jackson verified that they both had been using cocaine throughout the morning of the crime (R. 573-74). Although none of this was presented at trial, at resentencing trial counsel was attempting to develop Mr. Hill's cocaine intoxication as both a statutory and nonstatutory

mitigating circumstance. In his attempt to establish these mitigating factors, counsel relied exclusively on the testimony of Mr. Hill and his codefendant Cliff Jackson that they began "snorting" cocaine on the early morning of October 19, 1982, and continued to ingest cocaine up to the time of the instant offense. As counsel was aware well in advance of the resentence, both Mr. Hill's and Mr. Jackson's testimony with respect to cocaine usage were ripe targets for a substantial bias inquiry on cross-examination. In addition to being easily attacked as the self-serving testimony of convicted felons, the State had the testimony of a purported expert witness in chemistry, Reid Leonard, who indicated that a blood test showed no evidence of drugs in Mr. Hill's blood (See T. 1148). It was therefore critical that counsel substantiate Mr. Hill's cocaine consumption on the date of the offense with evidence independent of the testimony of Clarence Hill and Cliff Jackson.

There were witnesses in Alabama that would have supported this theory of defense. Mr. Paul Wilson, a friend of Mr. Hill's, saw the sudden change in Mr. Hill brought about by his new found friendship with Mr. Jackson and his involvement with cocaine and other drugs. Mr. Wilson was aware that during the period just prior to the crime, Mr. Jackson was supplying Mr. Hill with cocaine and other drugs. He noticed that Mr. Hill's reasoning had been clouded by Mr. Jackson and drugs. Mr. Wilson knew that Mr. Hill was doing serious drugs and has seen him messed up on drugs (H. ____).

Ms. Shanivania Green Robinson, one of the State's witnesses, indicated that she saw Mr. Hill and Mr. Jackson with a vial of

cocaine on the morning of the crime, and that Mr. Hill offered her some. Ms. Robinson was a State witness at Mr. Hill's trial. She was interviewed by defense counsel's investigator prior to trial, but was never asked about drugs.

Ms. Veria Green saw Mr. Hill and Mr. Jackson on the morning of the offense. Her observations corroborate that Mr. Hill and Mr. Jackson were high on cocaine at the time of the offense. She explains:

> I clearly recall seeing Clarence the morning of the incident in Pensacola. He was with Cliff Jackson and they both seemed to be acting strange for early in the morning. It was about eight o'clock and they must have been high from the way they were acting. Clarence was not like himself. I had never seen him so openly bold before. Right out in the open he pulled out a bag of white powder and offered it to me. He said it was pure cocaine that had not been cut and would make me higher than the weed would. I stepped back in shock and surprise because I knew nothing about any drugs other than marijuana and I was a little frightened by what was happening. Cliff Jackson just stood back and laughed the whole time.
>
> That morning stuck in my memory because Clarence seemed so different from the person I thought I knew. Usually he was very discrete about his drug use, but on that morning he made no secret of what he was doing, and what he wanted me to do. I was really surprised because that was not Clarence's normal behavior. The next thing I heard was that Clarence had gotten into serious trouble in Pensacola. That was so unlike Clarence. I know he wouldn't have acted that way if he hadn't been high and had Cliff to influence him.
>
> Had I been asked about this by Clarence's attorney at the time of his trial, I would have said everything that I say now.

(H. ____). Ms. Green could have provided the material and

independent corroboration that was needed to establish Mr. Hill's use of cocaine at the time of the offense.

All of this evidence was readily available. In fact, undersigned counsel uncovered this in a few weeks, and there are undoubtedly many other friends of Mr. Hill who could provide information concerning his drug problem at that time. As reflected in a March 1983 Alabama Probation and Parole Report:

> Acquaintances of Hill speculate that his criminal activities began after he started using drugs.

The information was there, it just needed to be developed.

One reason for trial counsel's failure to investigate the defense of voluntary intoxication is undoubtedly the blood test results obtained by the State from a Mr. Reid Leonard. Mr. Leonard indicated that based upon his testing of Mr. Hill's blood, he found no evidence of illicit drugs. Trial counsel should have conducted their own investigation concerning Mr. Leonard's test results. Given Mr. Hill's representations that he was under the influence of cocaine, trial counsel should have retained an expert to review the test results of Mr. Leonard and to test the blood sample using the proper procedures. Counsel's failure to do so was not reasonable under the circumstances.

Counsel should have suspected that Mr. Leonard's procedures were unsound and that his results were inaccurate. The State had state of the art, accurate means available to properly test Mr. Hill's blood for evidence of drugs and chose not to use them.

According to Ms. Goodwin, a hospital employee, the blood sample was taken from Mr. Hill at 2:45 p.m. on October 19, 1982, shortly after Mr. Hill was admitted to the hospital (T. 1133).

The sample was stored in the lab at Baptist Hospital (T. 1132). The chain of custody document indicates that the sample remained there until October 21, 1982, when it was forwarded to the FDLE lab in Pensacola (H. ___). At the FDLE lab, Mr. Hill's blood was tested by "Gas Chromatograph" but only for the presence of alcohol (H. ___). The State had Mr. Hill's blood sample at their own lab with the proper means to test it for the presence of drugs and they did not do that. Counsel failed to even recognize this unusual procedure. Instead, the State forwarded the sample to Mr. Leonard, who used outdated and scientifically unsound procedures. Counsel failed in their duties to protect their client from extremely damaging and obviously useless evidence.

Counsel should have noticed further evidence of the State's ability to accurately and properly test Mr. Hill's blood for the presence of drugs, based upon the the test done on Officer Taylor's blood. As part of the autopsy, Officer Taylor's blood was screened by EMIT (H.). An expert would have advised counsel that both gas chromatography and EMIT are analytically sound testing methods. Both methods were available to the State, but neither were used to test Mr. Hill's blood for drugs. They used instead a scientifically questionable procedure which counsel failed to investigate or attack.

The State used this evidence to foreclose any possibility of a verdict other than premeditated murder and to prevent Mr. Hill from establishing mitigation based upon his use of cocaine at the time of the crime. When Mr. Hill testified at trial that he was under the influence of cocaine at the time of the robbery, the

State presented Mr. Leonard and his inaccurate evidence.

Armed with this evidence, the State not only argued that Mr. Hill was not under the influence of cocaine, but also that Mr. Leonard's test results proved Mr. Hill was lying. The defense's entire case depended upon the testimony of Mr. Hill that he never intended to kill the officer -- that there was no premeditated murder. The State effectively used this worthless evidence to destroy Mr. Hill's credibility.

In fact, trial counsel went to great lengths in an attempt to respond to this argument:

> He also tells you that Clarence told you he was under the influence of cocaine and that came back negative in the blood test, and so, he is lying there. All you have to do is recall yesterday afternoon what Mr. Johnson asked Clarence when he put him on the stand. He asked Clarence where he got the gun and when he got the gun and Clarence said I don't remember. He said why don't you remember. He said because I was on something.
>
> Now, what time in the morning in Mobile was that? We don't know for sure. He never--and then Mr. Johnson, through his statements here just a moment ago, said they kept on it. All the way to Pensacola. Now, if you remember that from anybody's testimony, you take that back there with you, because it didn't happen. There was never any such statement made except in Mr. Johnson's mind, which is kind of interesting.
>
> Some times people hear things or think they hear things that don't really happen. That's apparently what happened to Mr. Johnson and that's apparently also what happened to Clarence. Maybe he went up there and said--and intended to say halt or stop or something like that. Maybe he said it and nobody heard it. Because no one here said he didn't say it except Mr. Johnson. All the witnesses said they didn't hear just like Officer Larry Bailly only heard one shot out of that whole mess.

> Sometimes you don't hear things that happen under these situations and sometimes you don't say things or hear things that you think you hear.
>
> To Mr. Johnson, that is evidence of premeditation. Because he was lying to you. Now, the cocaine. There is no testimony as to what effect cocaine will have on a person. The only thing that you have in front of you is the doctor's--the chemist's testimony about cocaine to the best of his knowledge, and in answer to Mr. Johnson's question, cocaine reacts as far as he knows like any other drug. It's going to be out of the blood system within one to two hours.
>
> So, if he took it at 12:00 Noon when the car was taken from Mobile, you can assume that at 2:45 P. M. when the blood sample was taken, according to the chemist, the State's expert, and according to the answer to Mr. Johnson's question, it's not going to be there. And I assume that may be surprising to Mr. Johnson, but it's a fact. It's what his expert has testified to. But it doesn't make any difference if Mr. Johnson likes to say, because Clarence never told you he was under the influence of any drugs, he never tried to make that excuse. He answered it not in answer to any questions that I put to him, but in answer to Mr. Johnson's questions.

(T. 1233-35). Unfortunately, there was little that could be done by that time to rebut the inaccurate and devastating evidence.

Had trial counsel obtained his own independent expert witness in forensic chemistry, he could have impeached the procedures and findings of the State's **"expert"** with respect to the absence of cocaine in Clarence Hill's blood at the time of his arrest. Collateral counsel has recently obtained the services of a qualified expert chemist and his findings with respect to Mr. Reid Leonard are startling:

> I, William W. Manders, Laboratory Director, ToxiChem Laboratories, Inc.,

Gaithersburg, Maryland, being duly sworn on and under oath, hereby state that the following facts are true and correct to the best of my knowledge:

I received a Bachelor of Science degree in Chemistry in **1952** and a Master of Science degree in Biochemistry in **1960** from the University of New Hampshire, and a Doctor of Philosophy degree in Biochemistry from the University of Arkansas Medical School in **1968.** From July **1952** to November **1953,** I was on active duty with the United States Air Force. I was then assigned to the Ready Reserve until August **1962,** when I was recalled to active duty as a Missile Launch Crew Commander.

From September **1965** to June **1968,** I was assigned to the Air Force Institute of Technology as a doctoral candidate. Upon graduation, I was assigned to the hospital at Andrews AFB where I did a one year clinical laboratory internship. In June **1969,** I was assigned to the School of Aerospace Medicine at Brooks AFB and in October **1971,** I joined the staff of the Division of Toxicology at the Armed Forces Institute of Pathology (AFIP) as Assistant Chief of the DOD Drug Detection Quality Control Laboratory. I became Chief of the Division of Toxicology in September **1977.**

In March **1984,** I was transferred to David Grant USAF Medical Center as Chief of Clinical Laboratory Services. I retired from active duty in May **1985** and three months later joined the staff of ToxiChem Laboratories as Laboratory Director and Consultant in Forensic Toxicology. I have co-authorized **8** scientific papers, two of which deal with the analysis of 9-carboxy-THC, a marijuana metabolite, using gas chromatography and gas chromatography/mass spectrometry (GC/MS).

My major research interests are in the development of methods to detect and identify drugs and drug metabolites in biological specimens using gas chromatography/mass spectrometry and in developing quality assurance procedures for monitoring drug testing laboratories.

I have reviewed a package of documents

titled Drug Testing Results and Materials on Clarence Edward Hill, Volume I, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, FL 32301. I note the following in the testimony of Reid H. Leonard on January 11 and April 28, 1983, and on March 27, 1986.

1. Use of an untraviolet spectrophotometer (UV) for the identification of any possible drugs.

2. Normally would not use a gas chromatograph to search for drugs.

3. The statement that the ultraviolet spectophotometer was capable of producing tetrahydrocannabinol (THC) traces in two extraction fractions.

4. The statement that practically all the drugs show up in the untraviolet, including LSD.

In the mid 60's and early 70's, ultraviolet spectrophotometry was being replaced by gas chromatography, EMIT, radioimmunoassay and gas chromatography/mass spectrometry as analytical screening methods for drugs. Problematic with the ultraviolet procedure was the lack of sensitivity and specificity. It required a large amount of compound, usually in the microgram range, to produce a spectra which could easily be confused with the spectra of other compounds. Emit, radioimmunoassay, gas chromatography and gas chromatography/mass spectrometry in turn could analyze for compounds whose concentrations were in the nanogram (ng) range, thus giving these methods a thousand fold or greater degree of sensitivity over ultraviolet spectrophotometry. An article published in 1978 discussed the use of these techniques in the analysis of cocaine during the period of 1971 to 1976 [Finkle and McCloskey, J. For Sci. 23: 173-189 (1978)].

An article relating cocaine drug dosage to cocaine plasma level was also published in 1978. In this study four individuals were given 115 to 246 milligrams of cocaine, 100 mg being the normal recreational dose. The peak cocaine concentrations in the plasma ranged from 61 to 408 nanograms/milliliter (ng/mL) at 60 to 120 minutes, and then

> decreased gradually over the next 2 to 3 hours. The analysis was conducted by gas chromatography using a nitrogen-sensitive detector [Van Dyke et al. Science 200: 211-213 (1978)].
>
> It is my professional opinion that ultraviolet spectrophotometry cannot detect compounds such as THC or LSD where the blood levels are usually 10 ng/mL or less 30 minutes after exposure to the drug. As far as detection of cocaine, detection may be possible if an individual were given massive doses of this drug. Recreational doses would not be detectable.
>
> It is therefore my conclusion that the method of ultraviolet spectrophotometry used by Dr. Leonard lacked sensitivity and specificity to detect drugs such as cocaine, LSD, THC and even phencyclidine (PCP) which is normally screened to a level of 25 ng/mL. And that the blood specimen which was taken from Clarence E. Hill, could have contained any or all of these drugs as well as others.

(H. ___). Mr. Leonard's procedures and results should not have gone unchallenged. Mr. Hill's credibility hinged on counsel's ability to attack those findings. Mr. Leonard's procedures went unchallenged and Mr. Hill's credibility was seriously damaged.

Trial counsel also failed to obtain documentary evidence in existence which not only established Mr. Hill's abuse of illegal drugs prior to 1982, but also established the interrelationship between Clarence Hill's drug abuse and his out-of-character criminal behavior. This evidence could have reconciled for the the jury the portrait of Mr. Hill made out by the testimony of family members as a compassionate, docile, and nonviolent individual with the facts of the instant offense. Mobile Police Department Records indicate Clarence Hill's first contact with the criminal justice system in 1981 was for petty theft and possession of marijuana. His second arrest in 1982, for the

Mobile robbery which was ultimately used in aggravation, also led to the discovery of controlled and dangerous substances in his possession. This interrelationship between Mr. Hill's drug abuse and criminal behavior was also noted by Ms. Deborah Tinsley of the Alabama Probation and Parole Office:

> Hill has a fair reputation in the community. He has not been known to cause any disturbances in his immediate community. Hill had never been arrested for a misdemeanor or felony prior to March, 1982. Acquaintances of Hill speculate that his criminal activities began after he started using drugs.

This documentary evidence strongly supported not only a prior history of chronic drug abuse but also supported the proposition that Mr. Hill's criminal conduct was aberrational in nature and primarily a function of his drug abuse. All of this evidence was crucial to defending Mr. Hill at the guilt-innocence phase and at the penalty phase in establishing valuable statutory and nonstatutory mitigating evidence.

Finally, had counsel developed this information and provided it to a mental health expert they would have been able to provide an expert opinion concerning how the use of cocaine would have affected Mr. Hill's ability to form specific intent or premeditation. This is especially significant in light of his organic brain damage, his history of severe alcohol and drug abuse, and the stress he suddenly faced when the police arrived at the scene of the robbery. All of this evidence would have presented a compelling case that under the circumstances Mr. Hill was testifying truthfully when he said he went to the officer not with the intent to kill, but only to have him drop his gun and

release Mr. Jackson (See Claim 111, infra).

Here, counsel unreasonably failed to develop evidence of intoxication, present it to a mental health expert, and elicit available testimony regarding the effects of cocaine on Mr. Hill's state of mind at the time of the offense. Exculpatory evidence was not presented to the trier of fact. There was no adversarial testing and prejudice is presumed. However, the prejudice here is apparent and certainly undermines confidence in the outcome. But for the failure to present this exculpatory evidence, there is a reasonable probability of a different outcome.

Additionally, counsel failed to adequately investigate and prepare for the penalty phase of the capital proceedings. Counsel failed to discover and use the available evidence of Mr. Hill's extreme intoxication -- mitigating evidence without which no individualized consideration could occur. Furthermore, counsel failed to object to the court's refusal to instruct on the mitigating factor of "extreme mental or emotional disturbance" which was appropriate based upon the evidence that Mr. Hill was under the influence of cocaine at the time of the offense and his history of chronic drug abuse and below normal intelligence. Had counsel adequately prepared and discharged his sixth amendment duties, substantial mitigating evidence which would have precluded a sentence of death in this case would have been uncovered.

Counsel failed to discover that Mr. Hill grew up suffering the nightmare of constant child abuse and neglect. Mr. Hill was

raised in a small four bedroom house with fourteen other children. Heavy-handed discipline and a lack of affection best described the Hill household. Other children in the family relate how their mother whipped them severely and constantly with tree limbs, extension cords and anything else that was handy. She even purchased a whip to use on the children. Sometimes she made them whip each other. Counsel failed to investigate, develop and present this compelling mitigation evidence. This evidence was readily available.

Robert Hill, Clarence's brother, would have provided this significant information with respect to the Hill family:

> When I was growing up, our family didn't have much money. There were so many kids that my dad had to work all the time. My mother had her hands full just trying to make us behave. She gave us a lot of good whippings with whatever she could find to whip us with. She never had time for taking us to the beach, reading books, or even just holding us and putting us to bed like other mothers.
>
> Mostly we kids were left to raise each other. Because we were left to ourselves, we were pretty rough with each other, especially us boys. We would wrestle in a real serious way like jumping on each other and throwing each other around.

(H. ___).

Roger Hill, another of Clarence's brothers, described the abuse and neglect in the Hill home:

> When we were kids growing up, things were kind of hard for us. With 15 children to feed and clothe, my dad was always working. My mother was home but she didn't have the time to be giving us love or attention. We never had enough money to spend on things like movies or carnivals or to go to the beach.

> Mainly, we kids raised each other and we were very rough and tumble with each other. We would watch wrestling on TV and then go into our backyard and slam each other down and jump on each other just like they did on TV. We were pretty serious about it too and it wasn't just play acting.
>
> All of us boys teased Clarence a lot. For us it was just fun but it may have been hard for him. We would say things like, you want me to slap you upside the head? Or we would slap his head and then say someone else had done it.
>
> When our mother did give us attention, it was usually because we had done something that made her mad. She would give us really hard whippings with anything she had. She even bought a special whip to beat us kids with.

(H. ___).

Walter MaKaskill, Clarence's oldest brother, provided this information:

> When I was growing up, our family had a lot of children. My dad had to work all the time just to feed us. There was no money for any nice toys or clothes. My mother was pretty hard on us. She gave us some bad whippings with anything she had around.

(H. ___).

Bettie Hill, Clarence's sister, provided additional evidence of the abuse and neglect:

> Our mother really never had a lot of time to give to her children. One of the things I remember the most about growing up in our family is that our mother would really give us bad whippings. She would whip us with things like branches off the trees and extension cords. One thing that seemed strange is that if two kids had a fight, she would give us each a switch and make us whip each other. When she gave a whipping she would go all the way. We would get bad whippings for just the ordinary kinds of things that kids do.

(H. ____).

In addition to their own children, Clarence's parents also raised several other children. Ms. Tonita Hawthorne was one of them. She described growing up in the Hill home:

> My name is Tonita Hawthorne and I reside in Mobile, Alabama. I grew up in the same family as Clarence Hill. After my mother died, my three sisters and I were raised by Edna and Octavia Hill.
>
> There were 15 kids in the family. Along with Mr. and Mrs. Hill that made 17 people in a small four bedroom home. We were like sardines in the can. Needless to say we never had quite enough money to go around even though Mr. Hill and all the kids who were old enough worked.
>
> . . .
>
> I was three years older than Clarence but I always had a special place in my heart for him. Clarence was a very sensitive person and didn't seem able to deal with the problems of the world. Our family had a lot of hard times when we were growing up but they seemed to bother Clarence even more than the rest of us.
>
> When we were growing up, Mrs. Hill used to give us a lot of whippings. She wouldn't stop after just a little - she would beat us completely. She used anything she could get her hands on including a whip that was made to beat animals. Mr. Hill was just never there since he had to work all the time. It was as if she was the only parent we had. No one ever had time to hold us or love us. We just mainly raised ourselves.
>
> Since Clarence didn't have a father and his mother was always beating him, he became very close with his older cousin Tommy Lee, who also lived with us. When Clarence was in seventh or eighth grade, Tommy Lee died of some kind of sickness. It was a terrible blow to Clarence and it had a big effect on him. It was as if he had lost his only parent and role model.

(H. ____).

Other mitigation witnesses outside the family were also available to defense counsel who could have testified to the physical abuse and neglect Mr. Hill suffered at the hands of his mother while growing up. Once again these witnesses were never contacted by the defense. Mrs. Thelma Mingo, a neighbor of the Hill's, witnessed the physical beatings inflicted by Mrs. Hill and could have testified to the child abuse endured by Clarence Hill:

> My name is Thelma Mingo and I reside in Mobile, Alabama. I am a neighbor of the Hill family and lived across the street from them for many years. I know Clarence Hill because my children used to play with the Hill children. Clarence always acted like a good boy. He was polite and well behaved.
>
> . . .
>
> Mrs. Hill had a lot of children to raise but she really did whip the children very severely. She would use tree branches and whip them all the time for doing the things that children will normally do.

(H. ____).

Eric Mingo had made similar observations to those of his mother and was also readily available to defense counsel:

> My name is Eric Mingo and I reside in Mobile, Alabama. I am a neighbor of the Hill family and lived across the street from them for many years. I know Clarence Hill because I used to play with the Hill children.
>
> . . .
>
> Mrs. Hill had a lot of children to raise but she really did whip the children very severely. She would use tree branches and whip them all the time for doing the things that children will normally do. My mother made me behave but she never would have whipped me like Mrs. Hill did her kids. I really think it was hard on the children.

(H. ____).

Counsel also missed significant evidence of Mr. Hill's life-long mental dysfunction. Although counsel obtained the assistance of Dr. James Larson, he failed to provide Dr. Larson with adequate background information. This additional information would not only have provided additional indication that Mr. Hill may have been suffering from brain damage, but would have given Dr. Larson something more than the IQ test results upon which to evaluate Mr. Hill. On cross-examination, Dr. Larson was unable to say that Mr. Hill's low verbal scores and poor school grades were not the result of his lack of motivation and poor attitude in school. This additional evidence would have assisted Dr. Larson in answering those types of questions on cross-examination for it establishes that Mr. Hill has always been **"different".**

But for counsel's inadequate investigation, he would have discovered that Mr. Hill has always been mentally slow. His mother explains:

> Since he was a small child, Clarence was always different from the other children. He was always slower in his mind and didn't seem to grow up like he should. He spent a lot of his time playing with younger children. He wet the bed until he was nine or ten years old. He stayed to himself and didn't go out like the other children. He hardly ever went out with children his own age when he was growing up and did not date girls. He never read newspapers or books and spent most of his time by himself. If he did come out of his room, he would watch television. When he got older, he would listen to his music and sometimes he would play basketball.
>
> Clarence really had a love of animals. He had a dog who just disappeared one day.

> Clarence was really upset because he loved that dog so much. Clarence was a very quiet boy. He never caused any problems around the house such as starting fires or taking things apart. He never got in any trouble at school or with the law until he was grown.
>
> Clarence was a slow learner in school. He would try hard but never could do well. In our neighborhood, there were no special classes for slow children, so they just kept sending him through school even though he never could learn to read and write very well. He never caused any trouble at school, but he finally gave up and never was able to graduate from high school.
>
> Although Clarence never got into any fights or caused any trouble, he had a hard time at school because the other children teased him a lot about his eye. Clarence was born with one bad eye and the other children never let him forget that he was different.

(H. ___).

Clarence's sister Betty also noticed that Clarence was different much slower than other kids:

> Clarence was noticeably slower than the rest of the kids. He was never good at writing and reading but we didn't have any special classes where he could get help. I know about the problem because one of my children is also a slow learner. I think Clarence still has this problem because when we visit or write to him, we will tell him about people he knew in the neighborhood and he won't have any memory of that person.
>
> Clarence was also different because he stayed to himself a lot. He didn't go out and socialize with other kids. He just seemed really slow to grow up. For instance, he had toy cars that would run on a track and he would just watch them run around the track over and over until he was about 16 years old.
>
> When we were kids we had a very rough and tumble life. We were very rough with each other and would play games where we swung people around and their heads would get banged. We also climbed and fell out of a

> lot of trees. Clarence often complained of headaches and we had to give him aspirin a lot. I sometimes wondered if it was because his head had been hurt. There were times he would just sit and stare into space.
>
> I went to school with Clarence and he was never a behavior problem at school. He never created trouble or got into fights but the other kids did make fun of him because of his eye.
>
> I think that one thing that bothered Clarence is that he felt like an outcast in his own family. He felt that somehow he didn't fit in and that is why he stayed to himself so much. He seemed to be sad and never talked about his problems.

(H. ___).

Mrs. Thelma Mingo, a neighbor of the Hill's, recognized Clarence's mental deficiencies:

> Clarence was a little different from the other children. He seemed to be slow in growing up and would stay home all the time. He was always the type to follow along with what the other children wanted to do. He just didn't go out and make friends and engage in a lot of activities like normal children.

(H. ___).

Eric Mingo saw that Clarence was **"different"** also:

> Clarence was always a quiet sort of person. He was nice but he was a little different from the rest of the kids. He was always seemed to act younger than his age. He was slow in growing up and would stay home all the time. He was always the type to follow along with what the other children wanted to do. He just didn't go out and make friends and engage in a lot of activities like the rest of us did.

(H. ___). Counsel simply missed this valuable information. Information which should have been presented to Dr. Larson and later to the jury and judge (**See** Claim 111, infra).

Counsel attempted to show at resentencing that Mr. Hill was

under the domination of Mr. Jackson, his codefendant. In attempting to establish this he relied solely upon the testimony of Mr. Jackson and Mr. Hill, which was easily assailable on cross-examination. Additional evidence was available to support a case of substantial domination. There was significant information which would have established that Mr. Hill had been a withdrawn, unassertive follower all his life.

Roger Hill discussed his brothers inability to assert himself:

> Clarence was never a violent person. I am his brother and I can't remember him ever getting into a fight. He never made trouble or even argued with people. He would go along with other people.
>
> I think going along with other people helped get him into the trouble he is now. I didn't like the guys he was hanging around with. I knew one guy that Clarence let live with him did a lot of drugs. I said Clarence why do you let that guy stay at your house and Clarence said, well he doesn't have any other place to stay. I think he just couldn't say no to people who were using him.

(H. ____).

Tonita Hawthorne also noticed how others easily persuaded Mr. Hill. She was not contacted by the defense. She explains:

> Clarence was very immature. He was very slow to start dating. He didn't go out with girls until he was doing drugs and then it was with an older women who was more like a mother figure who used to exploit him for his money.
>
> Clarence was very easy to be persuaded. He just couldn't say no and would go along with whatever other people wanted him to do. I used to have long intimate talks with him about a lot of different things. He never discussed wanting to steal or commit any kind of crimes.

(H. ____).

Vicky Andrews, Clarence's sister, was never contacted by defense counsel. This unreasonable omission deprived Clarence Hill's judge and jury of additional evidence regarding Mr. Hill's passive nature:

> Clarence was always a very quiet person. He was noticeable a slower learner in school than the rest of the kids in the family. He was never good at writing and reading but we didn't have any special classes where he could get help.
>
> My brother Clarence was never in trouble around school. He never got into fights or bothered anybody. That is just the way he was - quiet and laid back. If he had any bad points, it was that he would go along with what other people wanted him to do and he had a drinking problem.

(H. ____).

Eric Mingo made similar observations:

> Clarence was always a quiet sort of person. He was nice but he was a little different from the rest of the kids. He was always seemed to act younger than his age. He was slow in growing up and would stay home all the time. He was always the type to follow along with what the other children wanted to do. He just didn't go out and make friends and engage in a lot of activities like the rest of us did.

(H. ____).

Ms. Patsy McKaskill, sister-in-law of Mr. Hill, also saw him as a follower:

> Clarence was always a very quiet, laid back person. He would come over to my house for "guy talk" with my husband, but even then he was never loud or rowdy. He was always polite and respectful of me. If he used a swear word, he would apologize to me.
>
> Clarence was a good worker. He would do

roofing and other odd jobs with my husband.

Although Clarence was a good worker, his thinking was noticeably slow. For instance, he had a hard time making decisions. Where someone else would just go ahead and make a decision in a situation, Clarence was always indecisive. He was also easily persuaded. Whatever someone else wanted to do, he would just go along with it. He was never the type to organize anything or come up with any ideas of how something should be done.

(H. ____).

Ms. Pauline Money, another neighbor described Mr. Hill as follows:

My name is Pauline Monley and I reside in Mobile, Alabama. I am a neighbor of the Hill family and lived next door to them for many years.

I know Clarence Hill because he lived right next door. Clarence always acted like a good boy. He was polite and well behaved. The only thing that was a little different about Clarence was that he was very quiet. He was always very easy going and never caused any trouble in the neighborhood.

I was really surprised when I had heard the trouble Clarence had gotten into because it seemed so out of character for him. He had never been one to stir up any trouble. He was just always quiet and went along with what other people wanted to do.

If Clarence's attorney had asked me about these things at the time of Clarence's trial or resentencing I would have been glad to say the same things then.

(H. ___).

Mr. Johnny Shelwood, one of Mr. Hill's teachers, described him as a quite and polite student:

My name is Johnny Shelwood and I reside in Mobile, Alabama. I have been a teacher and a coach in the Mobile public school system for twenty-five years. I remember Clarence Hill as a student at Toulminville

> High School in Mobile. Toulminville High School has since become LeFlore High School.
>
> I remember Clarence as a quiet and basically polite student. To my knowledge, he was not a problem student and was never in any trouble. Neither did he strike me as being a trouble maker or a violent person.
>
> Clarence was usually by himself for the most part and I was saddened to hear that he was involved in the incident for which he now faces execution.

(H. ____).

Throughout his life, Mr. Hill has been a quiet, shy and passive person. Had the jury and judge been told about this aspect of Mr. Hill's character, the fact that Mr. Hill was under the domination of Mr. Jackson would have been much more understandable.

Furthermore, the additional evidence available about Mr. Hill's history of drug and alcohol abuse and the effect that Mr. Jackson had upon Mr. Hill and his drug problem, would have made a compelling case of domination. Nevertheless, the jury, the judge, and Dr. Larson were deprived of this information because of counsel's deficient performance.

Robert Hill explained how Mr. Hill's drug problem took a turn for the worse upon his association with Mr. Jackson:

> In school Clarence never caused any problems. He never got into fights or caused trouble. But he did start drinking a lot and smoking a lot of reefer. Clarence always had a lot of reefer and he smoked it everyday and drank everyday.
>
> When he started hanging around with Cliff Jackson he started doing other drugs too like cocaine. Cliff was a completely different kind of person from Clarence. Cliff always came around to our house to get Clarence. I always heard that Cliff was bad

company. From what I knew about both of them, Cliff would be the one to plan something.

The only reason I can think that Clarence would do something like this is that he was on drugs and in bad company because he was never a violent type of person. I never heard about Clarence talking about doing crimes and I never knew him to do anything like this until he got arrested.

(H. ___).

Roger Hill made similar observations about the effect that Mr. Jackson had on his brother:

I met Cliff Jackson a few times. He was just the opposite of Clarence. He was very loud and pushy. He was a bully. I remember being in Church's Chicken and he was giving the girls who worked there a real hard time. He was like that. He was sent to Mobile from somewhere like California because he got into so much trouble and his parents couldn't handle him. He was a loud bragging person. I asked Clarence why he was spending time with someone like that but Clarence just couldn't say no to the guy.

I knew Clarence had a drinking problem and smoked a lot of reefer. I knew he was using cocaine too because I found a little cocaine bottle with a spoon in his car. After Clarence got arrested for murder, a fellow I know up the street came to me and told me Clarence had been at his house the night before the murder. Clarence had a large amount of cocaine and was using an unbelievable amount according to this guy. I got mad at him for not telling me sooner so I could have done something to help Clarence. I had no idea his habit had gotten that bad.

Drinking and drugs have hurt a lot of people in my community and in my family. My uncle was a bad alcoholic and so is my brother Walter. I can stop when I have had enough but Walter and Clarence just couldn't control it. Walter has had to have medical treatment because of his drinking problem. I more or less have to take care of him or I don't know what would happen to him.

When Clarence had his own house, he drew pictures on the walls. I remember one picture on the door that bothered me a lot. It was a picture of somebody behind bars and it said, somebody please get me out. It makes me wonder if that is how Clarence felt about his life.

When I heard about the murder, I just couldn't believe it. Clarence just wasn't like that. He never even got into fights or arguments. I don't think he would even have carried a gun if Cliff hadn't talked him into it because he just wasn't like that. The only way I can explain it is drugs and bad company. He just couldn't control either one. I was Clarence's brother. I talked to him a lot. He never once talked about stealing or hurting anyone. He never broke into anything or did anything like that until he started doing drugs and got arrested for robbery and then murder.

(He ____).

Walter MaKaskill, has a substance abuse problem like his brother. He explained Clarence's problem:

I think Clarence is a lot like me. For some reason I have had a bad time with my drinking. Clarence was like that too. It is as if drinking blocks out my troubles so I don't have to worry about them for a while.

I know Clarence's heart. He would never plan to hurt anyone because in his heart he is not that kind of person. He was a beautiful person -- always trying to help others out.

If Clarence did have worries or problems, he wouldn't tell people. He would just keep it to himself. He would go off in his own little world. He kept a lot to himself.

One big thing about Clarence, he was very loyal to the person he was with. He would never let someone down or violate their trust. He would never just walk away and turn his back on someone to help himself.

(H. ____).

Alvin Ladd was not contacted by defense counsel. However, he would have provided the following information:

> My name is Alvin Ladd and I reside in Mobile, Alabama. I was a friend of Clarence Hill.
>
> I grew up with Clarence Hill and have known him since elementary school. After we were in high school, a group of us started going around together. We were drinking and using drugs.
>
> We started out by drinking some beer and smoking some reefer. As time went on Clarence really was drinking a lot and using a lot of drugs. He didn't seem to be able to control his drinking. He used to drink all the strong liquor he could and didn't care whether it was whiskey, bourbon, gin, or whatever, as long as it was strong enough. He drank like this every day. One of the things we used to do was to snort THC.
>
> After I went to jail, he started going with some other guys and was doing even stronger drugs. As well as I knew Clarence back then I can tell you he was high all the time. If he could get a hold of drugs or something to drink, he was so far gone there was no way he could resist doing it.
>
> I know enough about using a lot of drugs and drinking a lot of strong liquor every day to say that you really don't think straight about what you are doing. Things just start happening and after you get sober you can't believe you did some of those things. You tend to listen to other people and do things you would never do if you were straight. From being around Clarence, I know he was drinking so heavy and using so many drugs that he really was a different person. I knew him before he started drinking and doing drugs and Clarence would never have done a robbery or shot anyone if he was straight.
>
> I would have been glad to tell these things to Clarence's attorney or a doctor at the time of his trial or his resentencing but no one asked me.

(H. ____).

Mr. Hill's sister Betty saw the strong influence that Mr. Jackson had on her brother:

> I think that one thing that bothered Clarence is that he felt like an outcast in his own family. He felt that somehow he didn't fit in and that is why he stayed to himself so much. He seemed to be sad and never talked about his problems.
>
> When Cliff Jackson started coming around, Clarence would follow along with what Cliff wanted to do. He seemed to want to please Cliff by going along with Cliff. Clarence was never a leader. He always followed along.
>
> I would have been glad to tell anyone the things I have said in this affidavit when Clarence had his trial and resentencing.

(H. ____).

Paul Wilson testified at Mr. Hill's original trial and excerpts of that testimony were given to the jury at resentencing. In addition to his original testimony at trial, Mr. Wilson had valuable information regarding Clarence Hill's longstanding chronic alcoholism, drug abuse, and his domination by Mr. Hill's codefendant Cliff Jackson: information which trial counsel failed to develop:

> My name is Paul Wilson and I reside in Birmingham, Alabama. I have known Clarence Hill since I was about eight years old. We lived on adjoining streets and were together almost all the time. Whenever one of us was seen the other was close behind. I am a few years younger than Clarence but we are closer than brothers.
>
> Clarence is a good person with a heart of gold. He would do anything he could to help anyone that needed it. I recall sometimes riding around Mobile with Clarence when he would go out of his way to prevent an enraged spouse or boyfriend from beating his wife or girlfriend in the streets. He hated to see people victimized or abused.

Clarence was a very talented person who was gifted in basketball, swimming and creative art. It was some time before I realized how slow he was in other areas. I came to realize that Clarence was barely able to read and didn't have the capacity to deal with worldly facts or some normal everyday situations. He didn't have the common sense to reason through or rationalize a situaiton from A to Z. He was a very trusting person who could be manipulated by people with greater intelligence or a devious nature.

Clarence and I used to hang out together and play basketball and party when we weren't at work. We would mainly smoke marijuana and drink beer and whiskey when we were with each other. Clarence had a tremendous appetite for pot and alcohol. I recall times when we went to clubs and my liquor tab alone was **$85** dollars or more.

Clarence continued to be a friend and good person until **1981** when Cliff Jackson moved to Lucky Street, where Clarence resided. I can still remember the day we all met at the basketball court as if it were yesterday. Cliff just showed up out of nowhere and started talking to impress us. Clarence was captivated by him faster than the blink of any eye. Even though Cliff was several years younger than me and at least five younger than Clarence, he was a smooth operator and manipulator. He impressed Clarence with tales of his drug experiences and lifestyle. It seemed like Clarence underwent a profound change almost at that instant. Clarence had never been the type that could articulate his inner feelings or views and Cliff must have appeared to be from a world unknown to Clarence. After Clarence met Cliff our friendship seemed to mean nothing to Clarence. It bothered me that Clarence could throw away our lifelong friendship for someone he didn't even know.

I became very concerned for Clarence because he was changing right before my eyes. He went from a very caring honest person to a secretive withdrawn person. He seemed to lose interest in everything and anyone but Cliff. I tried to talk to him to see if I could find out what was wrong but he wouldn't tell me. It made me even more concerned when

Cliff began to object to my questioning of Clarence, and even my presence around them. I recall one night when Cliff and I came to blows over the issue. Clarence broke up the fight without comment and went with Cliff anyway. Clarence was no longer Clarence. He was under the Spell of a superior intellect and I suspected serious drug use.

It wasn't until after Clarence and I separted that I learned that Cliff had been expelled from the local high school for overdosing on drugs. Cliff had transferred there from a priviate school somewhere else. I also found out that Cliff had been in constant trouble in and out of school, and that he had twice attempted suicide. I also found out that Cliff had been supplying Clarence with lots of cocaine and probable other drugs. The street drugs around Mobile at this time were speed, angel dust, TCH and cocaine.

After learning more about Cliff Jackson and observing Clarence's behavior, it became clear to me that cliff had gotten Clarence into drugs he couldn't handle. It made sense that Clarence avoided me at this time because I would make him face up to reality and the changes he had undergone. It was also clear that Cliff was violently opposed to me because without Clarence doing his bidding Cliff would only be a one-man gang.

I desparately tried to warn Clarence that Cliff would be his downfall. I tried to reason that Cliff was no good for him and asked him if he didn't think it was strange for Cliff to attack me for trying to get him home and out of trouble. It was no use, what little reasoning power Clarence had had been clouded out by Cliff and drugs. I knew Clarence was doing serious drugs because I saw him at a party one night after and he was really messed up.

I know Clarence Hill and his family very well and I can honestly say that the Clarence I knew could never in his right mind rob or hurt anyone. I believe that Clifford got Clarence involved with heavy drugs and used him for his own gain.

If I had been asked, I would have been glad to testify to all of these same facts at

Clarence's trial and resentencing.

(H. ____).

Tonita Hawthorne was aware of Mr. Hill's drug and alcohol problem:

> The only thing Clarence was really good at was drawing. While he still lived at home, he did a lot of drawings of cats and flowers. He did a painting of he and his four brothers. After he moved into his own apartment he started doing a lot of drugs. It was a very dark apartment. He said he wanted it that way. In that really dark apartment, he started drawing strange mazes all over the walls. There were hundreds of tiny lines. They were completely different from his earlier drawings. He wouldn't let anyone in the family except me see these really strange paintings. They seemed to express his emotions. I asked him to make one for me but he wouldn't do it.
>
> Clarence had a drinking problem. For a while he was smoking marijuana and I used to smoke with him. He was smoking it constantly, every day, every hour. It was some kind of an escape for him. He began to feel pressured, insecure. He told me fantasies about having girlfriends. He talked about wanting to leave. I think the marijuana was making him feel worthless. He lost his job. I tried to talk to him about stopping smoking because he was getting really depressed but he just didn't seem to be able to stop.
>
> At this time he started hanging out with creepy guys I didn't know. Sometimes he would bring them to my house but I wouldn't let them in. I was really surprised because he had always been a loner and stayed to himself. He had been so immature that he almost always rode a bicycle even after he was a grown man. I was shocked by the change. I know he went onto stronger drugs. He quit asking me for smoke (marijuana) and wanted hard drugs which I told him I didn't have. From the way he was acting, I think he was using drugs like dilaudid, LSD, hash. He was being used by drug people who were getting his paycheck money away from him. An older woman was exploiting him for his money.

She was a money grubber. He was so depressed by the abusive way this woman was treating him that he said, I might as well go back home. I told him to get a girl his own age but he didn't seem to be able to do it.

After Clarence lost his job, he had to move back home. He just didn't know how to keep his money for himself or how to manage it on his own. He would never ask me for money but sometimes I would go by and pay bills for him. I know that it was really hard for him when he had to move back home after he had finally been able to get away.

When he went on the really hard drugs in addition to drinking, his personality changed. He would go for days without eating. He had fantasies about flying and being invincible. He felt like superman. He really didn't know what was going on inside of him. He would talk more. He wouldn't remember doing things and would ask for forgiveness later.

I would never have believed that Clarence could do this. I sympathize with the officer's family but I know that this was not something thought out by Clarence. He was never a violent or mean person. He wanted to be his own man but he was afraid to stand up to the guys he was around. Those so-called friends were using him and taking his money. He would spend his paycheck trying to make his friends happy. Cliff Jackson would definitely be the leader between he and Clarence. Cliff was the more outgoing personality and Clarence was never smart enough to be a leader. Cliff was smart enough to have Clarence carry the gun while Cliff took the money.

Clarence was still like a kid when he went to prison. He has grown up since he has been in prison. After he had been in prison, he told me that, I'm finally waking up from this bad dream and it's real.

If I had been asked, I would have been glad to testify to all of these same facts at Clarence's trial and resentencing.

(H. ____).

Counsel unreasonably failed to develop mitigating evidence

from witnesses that were readily available. In addition to information regarding Mr. Hill's cocaine use on the date of this offense, Cliff Jackson, Mr. Hill's co-defendant, could have provided invaluable information regarding Clarence Hill's serious abuse of cocaine. Had defense counsel properly prepared Mr. Jackson's testimony, the jury would have also learned of Cliff Jackson's superior intelligence and his ability to dominate his intellectually handicapped co-defendant.

> My name is Cliff Jackson, Jr., and I am presently incarcerated at Florida State Prison in Starke, Florida.
>
> I have known Clarence Hill since 1981, when I moved into my father's house in Toulminville, Alabama, which was on Lucky Avenue, the same street that Clarence lived on with his parents.
>
> I met Clarence at a time when I had been expelled from public high school and Clarence had been laid off from his roofing job. Before moving in with my father, I had attended private schools up to the eighth grade and then attended the public high school because my family just could not afford the tuition anymore. By the time I got to the public high school I was so far ahead of the other kids, and what was being taught, I quickly became bored with school altogether, got into trouble, and ended up being expelled. In order to get back into high school in Mobile County back then you had to attend the Continuous Learning Center for at least two semesters before you could be readmitted back into school. Because my test scores at the center were so high, I was able to enroll back in high school after only one semester. Shortly after being readmitted to the public high school however I was once again expelled, this time for theft.
>
> Even though I was four years younger then Clarence and most of his other friends in the neighborhood, Clarence, soon started spending all of his time with me. It got to the point that Clarence would come over to my

house in the morning to wake me up and we would spend the rest of the day and most of the night together hanging out in the neighborhood, playing basketball, drinking and getting high. Pretty soon after we met Clarence stopped seeing all of his other friends that he had known since childhood and began to hang out exclusively with me. Clarence's other friend's soon became angry over the way that he ignored them and never understood why he no longer associated with them anymore and spent all of his time with me. Even I thought it was strange and never understood how Clarence could give up all his other life long friends almost overnight. Pretty soon I became the only friend that Clarence had left in the neighborhood.

Before I even met Clarence I had pulled off several robberies in Mobile and had stolen enough money to buy a car and have spending money for clothes and the drugs I wanted to buy. Clarence was also using drugs back then and many times we would just spend the entire day hanging out getting high together. Clarence was using cocaine back then on a daily basis and by **1982,** had developed a serious drug habit. Cocaine was not easy to come by in the neighborhood but, Clarence always knew where he could find a connection and would always buy as much as he could. Every time Clarence had money the first thing that he wanted to get was cocaine and the second was marijuana but, Clarence's first love always remained cocaine. I remember one night finding Clarence in a car in the neighborhood with a guy named J.C. Clarence was so high that he could barely talk and his eyes were just tiny slits. They were both so messed up I had to take Clarence's cocaine away from him because he was close to overdosing and would have ended up killing himself. Clarence's addiction to cocaine was like that, he just never knew when to stop, if he had cocaine he would just keep doing more and more until it was gone.

The day that we drove to Pensacola, was the same way. Clarence came over to my house in the morning and woke me up. He had some cocaine on him and we started to get high. As I testified to at the resentencing in **1986,** it was my idea to steal a car in Mobile and when we found ourselves in Pensacola, it was my idea to rob Freedom Savings. I was the one

that decided that we needed to get disguises, and once in the bank, I was the one that was doing the talking and telling Clarence to round up the tellers and get the money out of the vault. I was also the one that listened in on the phone call and told the teller what to say. And, I was the one that told Clarence to come out of the vault as the police were at the front door and we had to get out. The whole robbery was my idea and I was the one that knew how to pull it off.

All the time that I knew Clarence in the neighborhood, I never really understood just how much Clarence looked up to me and the affect that I had on him until after the officer was killed. Clarence had a lot of the money from the vault on him and was able to get out of the back door of the bank with out being detected by anyone. When the officers arrested me at the front door I thought that Clarence was gone. I knew that he had a good portion of the money from the vault on him and expected that he would just keep on going. To this day I am still amazed that Clarence just did not make a run for it but, came back to try and help me get away from the officers. It was only then that I realized that Clarence would do anything for me, including risking his freedom and even his life.

Clarence's attorney did come to talk to me but, he only asked me about what happened on the day of the robbery. At the resentencing in 1986, he never even talked to me before I testified other then to ask me if I thought I could testify without making a disturbance in court. If I had been asked, I would have testified about what Clarence was like back in Toulminville, and his addiction to cocaine.

(H. ____).

Vicky Andrews, Clarence's sister, was never contacted by defense counsel. This unreasonable omission deprived Clarence Hill's judge and jury of additional evidence regarding Cliff Jackson's domination of dim-witted Clarence Hill:

I knew both Cliff Jackson and Alvin Ladd. Cliff was always in trouble. He was

always fighting and he was finally expelled from school for threatening other students. Alvin drank a lot. Both of them were a lot smarter than Clarence. Clarence always went along with what they wanted him to do. It would be completely untrue to say that Clarence was a leader of either Cliff or Alvin. Cliff, was a very aggressive, trouble maker. Clarence was never like that.

Cliff was always coming by the house to get Clarence to go out with him. I feel sure that Clarence would never have tried to rob a bank if he had hadn't been high and with Cliff. Clarence would just never be able to organize it, and Cliff certainly wouldn't have let Clarence tell him what to do. I know Cliff well enough to know that if any trouble was happening, he was the one at the bottom of it. When Cliff is a troublemaker all his life and Clarence never made trouble, it doesn't make any sense to say that both of them changed their personalities for this robbery. I went to school with all of them every day and I know what they were like.

I would have been glad to testify to the things I have said in this affidavit when Clarence had his trial and resentencing.

(H. ____).

Eric Mingo made a similar observation:

When I heard about the trouble Clarence had gotten into, it really seemed out of character for him. He was never a trouble maker and never started any fights. I was really surprised. I heard that he had got onto drugs, was drinking heavily, and had got with a bad crowd. That is the only thing I can think of that would explain what he did because he was never a violent person or someone to cause trouble.

(H. ____).

Clarence's mother explained the relationship between her son and Mr. Jackson as follows:

When Clarence got out of school, he started going around with Clifford Jackson and Alvin Ladd. Clarence always wanted the boys to like him and would go along with

> whatever they wanted him to do. He was the type to follow along with the others. I never could understand how Clarence could do the things they said he did. I heard that he got onto drugs. I never saw him do any drugs but that is the only thing I can think of that would make Clarence go along with these things because he was never that kind of person. People just couldn't believe he would do anything like this. Those drugs must have made him crazy. They let my oldest son talk to him right after he was arrested and Clarence told him that he had been sniffing cocaine that day.
>
> I tried to explain some of these things to his attorney but I never felt that anybody really understood what had happened or what kind of person Clarence really was. My uncle had a drinking problem and my father used to have spells when he would pass out. His older brother has also had a problem with drinking. Maybe it is something that runs in the family. All I know is that Clarence never even got into fights and would always try to help other people. It is really hard to understand how this could ever have happened.

(H. ____).

None of this evidence was developed and presented to the jury or the mental health professional. However, if counsel had developed the mitigation and tried to present it, but was not allowed to do so because the trial court ruled it inadmissible, under Penry v. Lynaugh, 109 S. Ct. 2934 (1989), Skipper v. South Carolina, 476 U.S. 1 (1986), and Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), Mr. Hill would be entitled to a new sentencing proceeding because his death sentence would be unreliable. The same conclusion must follow here since the evidence did not reach the jury because of counsels' deficiencies -- Mr. Hill's death sentence is still unreliable.

In Strickland v. Washinston, the Supreme Court noted:

> [T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

466 U.S. at 696 (emphasis added).

In Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985), the Eleventh Circuit noted the interplay between Lockett and its progeny and the prejudice prong of Strickland v. Washinston:

> Certainly [petitioner] would have been unconstitutionally prejudiced if the court had not permitted him to put on mitigating evidence at the penalty phase. no matter how overwhelming the state's showing of aggravating circumstances. See Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (plurality opinion); Bell v. Ohio, 438 U.S. 637, 642, 98 S.Ct. 2977, 2980, 57 L.Ed.2d 1010 (1978). Here. [counsel's] failure to seek out and prepare any witnesses to testify as to mitisating circumstances just as effectively deprived him of such an opportunity. This was not simply the result of a tactical decision not to utilize mitigation witnesses once counsel was aware of the overall character of their testimony. Instead, it was the result of a complete failure--albeit prompted by a good faith expectation of a favorable verdict--to prepare for perhaps the most critical stage of the proceedings. We thus believe that the probability that Blake would have received a lesser sentence but for his counsel's error is sufficient to undermine our confidence in the outcome.

758 F.2d at 535 (emphasis added).

Here, had trial counsel conducted a reasonable investigation and imparted the results of that investigation to his mental health professional in advance he would have been able to present a very powerful penalty phase case and closing argument that not

only would have portrayed Mr. Hill as a redeemable human being whose life had value, but also as a person who was entitled to mercy because he had suffered poverty, extreme child abuse, mental deficiencies that made it impossible for him to learn to read, a history of severe alcohol and drug abuse and his use of cocaine at the time of the offense.

Similarly, in Deutschar v. Whitley, 884 F.2d 1152 (9th Cir. 1989), the Ninth Circuit noted the interrelationship between the Strickland prejudice prong and the testimony by competent mental health experts. Here, as in Deutscher, counsel's failure to investigate mitigating evidence of Mr. Hill's lifelong mental impairment, passive nature, history of substance abuse, and his intoxication at the time of the offense, and counsel's failure to place such information at Dr. Larson's disposal, would have made a difference as Dr. Larson now readily concedes (**See** Claim III, infra).

In the proceeding below, the State argued that all of this information was not presented because of tactical decisions. The State argued:

> We're talking about a resentencing proceeding as opposed to the trial and the original sentencing in this case. There was a period of time, I believe, it was approximately four years from the original sentencing to the second sentencing, at which time many of these matters could have been uncovered. Nothing is unique about Pat Fleming's testimony or her affidavit with regard to what they have developed. If this was information that could have been developed or should have been developed or necessarily needed to be developed, it certainly was within the parameters of defense counsel to do so, and I think there's been nothing in the allegations contained that reflect that information was not

obtained and, in fact, tactical decisions were made with regard to why it wasn't used.

(H. ____). Contrary to the State's contention, because we are dealing with a rehearing in this case, counsel had another opportunity to investigate, develop and present a sentencing case and to discover what he had unreasonably missed the first time through. Despite a second opportunity, counsel did nothing more to develop the case. Finally, for the State to argue that mitigation discussed in Dr. Fleming's report was tactically not developed and presented is ludicrous.

In considering whether a resentencing is necessary because of defense counsel's deficient performance, consideration must be given to the import of Lockett v. Ohio, **438** U.S. **586** (1978), and its progeny:

> **"In** contrast to the carefully defined standards that must narrow a sentencer's discretion to impose the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence." McCleskey v. Kemp, **481** U.S. **279, 304 (1987)** (emphasis in original). Indeed, it is precisely because the punishment should be directly related to the personal culpability of the defendant that the [sentencer] must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense. Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the [sentencer] is to give a "'reasoned moral response to the defendant's background, character, and crime.'" Franklin, **487** U.S., at **---** (opinion concurring in judgment)(quoting California v. Brown, **479 U.S.,** at **545** (concurring opinion)). In order to ensure "reliability in the determination that death is the appropriate punishment in a specific case," Woodson, **428** U.S., at **305,**

> the [sentencer] must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime.
>
> . . . Our reasoning in Lockett and Eddings thus compels a remand for resentencing so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett, 438 U.S., at 605; Eddings, 455 U.S., at 119 (concurring opinion). When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett, 438 U.S., at 605.

Penry v. Lynaugh, 109 S. Ct. 2934, 2951-52 (1989)(emphasis added). The prejudice to Mr. Hill resulting from counsel's deficient performance is also clear. Confidence is undermined in the outcome, and the results of the penalty phase are unreliable. An evidentiary hearing must be conducted, and, thereafter, Rule 3.850 relief must be granted and a new sentencing ordered.

CLAIM III

> MR. HILL'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE COUNSEL UNREASONABLY FAILED TO PRESENT CRITICAL MITIGATING EVIDENCE AND FAILED TO ADEQUATELY DEVELOP AND EMPLOY EXPERT MENTAL HEALTH ASSISTANCE, AND BECAUSE THE EXPERTS RETAINED AT THE TIME OF TRIAL FAILED TO CONDUCT PROFESSIONALLY ADEQUATE MENTAL HEALTH EVALUATIONS.

A criminal defendant is entitled to expert psychiatric assistance when the State makes his or her mental state relevant to guilt-innocence or sentencing. Ake v. Oklahoma, 105 S. Ct. 1087 (1985). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric

assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979). See also Deutscher v. Whitley, 884 F.2d 1152 (9th Cir. 1989). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background, see, e.g., O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984), and to assure that the client is not denied a professional and professionally conducted mental health evaluation. See Fessel, supra; Mason v. State, 489 So. 2d 734 (Fla. 1986); Maudlin v. Wainwright, 723 F.2d 799 (11th Cir. 1984).

Mr. Hill's defense counsel was unprepared for sentencing and thus never presented the wealth of statutory and nonstatutory mental health mitigation that was available. The sentencing judge found no statutory mitigating circumstances. Had the wealth of statutory and nonstatutory mental health and related mitigating evidence been presented the results would surely have been different. But critical evidence of Mr. Hill's substantial mental health problems, his brain damage and substance abuse never reached the sentencing judge and jury, because counsel rendered ineffective assistance and because professionally adequate mental health assistance was not provided. Trial counsel failed to provide necessary and relevant background information to the mental health professional and the mental health professional failed in his task, thus denying Mr. Hill his rights to a professionally adequate mental health evaluation. See Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); Ake v.

Oklahoma, **470** U.S. 68 **(1985).** Prejudice is apparent.

Had counsel and the mental health expert performed competently, substantial mental health evidence relevant to both guilt-innocence and penalty would have been developed. Although counsel failed to give the mental health expert sufficient background materials, clear indication of possible brain damage was evidence from the expert's limited testing. Moreover, Dr. James Larson, the mental health expert admits that he missed this clear indication of brain damage and that additional testing should have been done. During his testimony at resentencing, Dr. Larson admitted that he spent only an hour with Mr. Hill.

Counsel has recently obtained the services of two eminently qualified mental health experts, Dr. Pat Fleming and Dr. Ronald Yarbrough. Both agree that clear indicators of brain damage were inexcusably missed in Mr. Hill's case. Dr. Fleming explained:

> The Wechsler Adult Intelligence Scale - Revised (WAIS-R) was previously administered with full-scale score of **84.** The Verbal IQ of **76** was significantly different than the Performance IQ of 101. A difference of this magnitude does not occur by chance. A significant difference between verbal and nonverbal skills is an indication of brain damaae which should trigger further testing.
>
> . . .
>
> The previous evaluation of Mr. Hill was inadequate in that there were sufficient indications which should have triggered testing of organic impairment. One intelligence test and one personality test was administered. The background information and affidavits utilized in the present evaluation were not available during the **1982** evaluation. Mr. Hill is capable of answering concrete questions in an appropriate manner. When he is not under the influence of drugs and in a situation that requires the ability to analyze and synthesize information he may

> appear adequate. The affidavits from family and neighbors clearly indicate that Clarence has always been different. His poor school records and general knowledge indicate that Clarence is not able to understand information or remember the information. The present testing clearly documents the brain dysfunction. Additional testing should have been conducted. It would also be expected that if additional background information regarding the environmental problems, birth injuries, head injuries, and resulting brain dysfunction had been known, his behavior would have been interpreted differently and significant statutory and non-statutory mitigating evidence would have been apparent.

(H. ___). Interestingly, Dr. Larson agrees that such a difference between the verbal and performance scores can not be the result of chance or environmental factors. Further testing should have been conducted.

This evaluation was inadequate because of counsel's and the mental health expert's failures -- and both admit their errors. The deficiencies are obvious from a cursory review of the records. This is by no means enough, Mason v. State, 489 So. 2d at 735-37, and falls far short of what the law and the profession mandate. **See** State v. Sireci, 536 So. 2d 231 (Fla. 1988).

Florida law also provides, and thus provided Mr. Hill, with a state law right to professionally adequate mental health assistance. **See**, e.g., Mason, supra; cf. Fla. R. Crim. P. 3.210, 3.211, 3.216; State v. Hamilton, 448 So. 2d 1007 (Fla. 1984). Once established, the state law interest is protected against arbitrary deprivation by the federal Due Process Clause. **Cf.** Hicks v. Oklahoma, 447 U.S. 343, 347 (1980); Vitek v. Jones, 445 U.S. 480, 488 (1980); Hewitt v. Helms, 459 U.S. 460, 466-67 (1983); Meachum v. Fano, 4277 U.S. 215, 223-27 (1976). In this

case, both the state law interest and the federal right were arbitrarily denied.

In Mason v. State, 489 So. 2d 734 (Fla. 1986), this Court recognized that the due process clause entitled an indigent defendant not just to a mental health evaluation, but also to a professionally valid evaluation. Because the psychiatrists who evaluated Mr. Mason pre-trial did not know about his @@extensive history of mental retardation, drug abuse and psychotic behavior," id. at 736, or his "history indicative of organic brain damage,@@id. at 737, and because this Court recognized that the evaluations of Mr. Mason's mental status would be "flawed" if the physicians had "neglect[ed] a history@@such as this, id. at 736-37, this Court remanded Mr. Mason's case for an evidentiary hearing. Id. at 735.

In State v. Sireci, 502 So. 2d 1221 (1987), this Court recognized that the due process clause entitled an indigent defendant to a professionally competent and appropriate psychological evaluation. At trial, Sireci had been examined by two psychiatrists. During collateral proceedings, Sireci was examined by a third psychiatrist who, unlike the previous mental health examiners, took into account Sireci's past medical history. Highly critical of the procedures used by the original two psychiatrists, the third psychiatrist @@reached a vastly different conclusion.@@ Id. at 1222. The post-conviction psychiatric evaluation found that Mr. Sireci suffered from a form of organic brain damage. This Court affirmed the trial court's order setting an evidentiary hearing on Sireci's claim, reasoning that "a new sentencing hearing is mandated in cases which entail

psychiatric examinations so grossly insufficient that they ignore clear indications of either mental retardation or organic brain damage." Id. (emphasis added).

On remand, the state trial court vacated Mr. Sireci's sentence of death and ordered resentencing. This Court affirmed, accepting the trial court's finding:

> [T]here is substantial evidence that the Defendant's organic brain disorder existed at the time the defendant murdered Henry Poteet. That circumstances existed at the time of the defendant's pre-trial examination by the Court appointed psychiatrists which required, under reasonable medical standards at the time, additional testing to determine the existence of organic brain damage.
>
> The failure of the Court appointed psychiatrist to discover these circuces and to order additional testing based on the circumstances known deprived the defendant of due process by denying him the opportunity through an appropriate psychiatrist of the imposition of the death penalty.

State v. Sireci, 536 So. 2d 231, 233 (Fla. 1988).

Mr. Hill was evaluated by a mental health professional at the time of trial. Counsel failed to provide the mental health expert with independent evidence regarding Mr. Hill's lengthy history of alcohol and drug abuse and his intoxication at the time of the offense. Evidence already existed that indicated that Mr. Hill was brain damaged, alcoholic, drug addicted, mentally disordered and easily dominated, but that information was not adequately presented to the mental health professional and was never put before the jurors charged with deciding whether Mr. Hill should live or die. Finally, the mental health professional had clear indications that Mr. Hill was brain

damaged, the evidence was ignored and neuropsychological testing which would have established Mr. Hill's brain damage was never done.

With the evidence of Mr. Hill's use of cocaine at the time of the offense, extensive background materials, and testing establishing Mr. Hill's organic brain impairment, Drs. Fleming and Yarbrough's reports and findings are significant in comparison with Dr. Larson's.

Based upon their evaluations, Drs. Fleming and Yarbrough are able to testify to the existence of a wealth of statutory and nonstatutory mitigation. Evidence which was never given to the jury or the judge. Had counsel and the mental health expert performed competently, this evidence would have been disclosed.

Dr. Fleming, an eminently qualified clinical psychologist, has now reviewed the extensive background material and conducted the necessary neuropsychological testing. Her report, in stark contrast to the report produced at the time of trial, reveals the gross failures of counsel and the mental health expert:

> REASON FOR REFERRAL:
>
> A psychological evaluation of Clarence Hill was requested by the staff of the Office of the Capital Collateral Representative, State of Florida. Clarence Hill has been sentenced to death. The referral question requested information regarding psychological functioning, possible neurological deficits and mitigating circumstances.
>
> EVALUATION PROCEDURES
>
> Clarence Hill was evaluated at Florida State Prison on 12-09-89 for a total of six hours. The following tests were administered: Halstead-Reitan Neuropsychological Test Battery, Trail Making, Parts A and B; Strength of Grip, Reitan-Klove Lateral

Dominance Exam; Screening for Aphasia, Wide Range Achievement Test-Revised (WRAT-R); various tests of sensory and perceptual functioning, Wisconsin Card Sorting Test, Minnesota Multiphasic Personality Inventory. Peabody Picture Vocabulary Test (PVT).

The following records, among other documents, were reviewed and considered when reaching conclusions:

Mobile, Alabama School Records of Clarence Hill
Mobile, Alabama Police Records of Clarence Hill
Testimony of Clarence Hill - Resentencing **1986**
Statement of Clarence Hill, October **25, 1982**
Testimony of Officer Larry Bailly Resentencing, **1986**
Statement of Officer Larry Bailly, October **19, 1982**
Diagram of gunshot wounds to Clarence Hill
Statement of Janet Perce, October **21, 1982**
Mobile Police Department Records of Cliff Jackson
Evaluation of Clarence Hill by James Larson, Ph.D.
Testimony of James Larson Ph.D., Resentencing **1986**
Testimony of James Larson Ph.D., Trial **1982**
Files of James Larson, Ph.D.
Escambia County Jail Records of Clarence Hill from **1986**
Trial Court's Findings in Support of Sentence of Death
Hill v. State, **477** So. 2d **533 (1985)**
Hill v. State, **515** So. 2d **176 (1987)**
Master File from Florida State Prison
Affidavits from:
Aliese Griffin, Alvin Ladd, Bettie Hill, Edna Hill, Eric Mingo, Octavia Hill, Pauline Monley, Patsy McKaskill, Robert Hill, Roger Hill, Shantall Hill, Tonita Hawthorne, Thelma Mingo, Vicky Andrews, Walter McKaskill, Cliff Jackson, Jr.
Medical Records: Baptist Hospital
Florida Department of Corrections: records

SIGNIFICANT BACKGROUND INFORMATION

Clarence Hill is the son of Edna and Octavia Hill. Clarence was delivered by a midwife so no hospital records are available. Since birth Clarence has had a droopy right eye and

was described as slow by relatives and neighbors. In addition to the nine children of the Hill's, six additional children were reared in the small, four bedroom house. Mr. Hill worked constantly to provide basic necessities for the large family. Mrs. Hill had the bulk of the home responsibilities. The affidavits are consistent that the children reared themselves. Mrs. Hill was the main disciplinarian. She was harsh in her beatings which ranged from switches to whips designed to control animals.

Clarence's early years were difficult. He was teased and bullied by his more adept siblings. He was known to be the different one by family, neighbors, and friends. He was slow in all areas of development, wetting the bed until age nine, playing with toy trains at sixteen years, and even the day he was arrested had model cars in his room.

Clarence was described as shy and quiet. He stayed by himself and was essentially isolated. Affidavits support the fact that he did not get into trouble, was not belligerent nor hostile either at home or school. He was able to draw and this was his strength.

Academically he was a failure but given consistent promotions. He was also teased at school for his unusual eye and his inability to learn to read or spell. He dropped out of school in the middle of the 12th grade and never continued his education.

Clarence is described as a hard worker who rode his bicycle 12 to 15 miles one way to work. He maintained employment at Colonel Dixie in food service for several years. He was reported to earn extra money to provide for the family during his early years.

His health was apparently good except for frequent accidents. He mangled his finger in a drain when he was three years old and in third grade he was hit by a baseball bat on two different occasions. His siblings note that he was frequently physically assaulted by members of the family, hit on the head, and jumped on, since he was viewed as the low man in the pecking order. Clarence responded to the abuse by withdrawing and playing with his toys.

School records note that in sixth grade Clarence was in the lowest Stanine in Reading, Arithmetic, and Language. California Test of Mental Maturity, a group intelligence test administered 10/69 showed Non-language IQ 67, Language IQ 57 and Total IQ of 59. His grades were consistent with these scores and with his level of functioning, rendering him unable to meet the greater demands of more difficult work. Grades of B's and **C's** in first grade dropped to consistent D's in other grades, as the work became too difficult for his limited mental abilities. In 12th grade he had all unsatisfactory grades except for art and physical education. Clarence was never provided with the special education program he needed to help overcome his significant mental deficiencies.

In high school Clarence began using alcohol and smoking marijuana. He continued to increase his use and was described as a heavy alcohol and drug user. His parents were evidently unaware of the extent of his use. A few of the closer siblings were concerned about his change in personality and tried to persuade him to change friends and quit drinking. Clarence was not aggressive or hostile at this time but did not stop the drug and alcohol use.

The significant turning point in Clarence's life was his friendship with several individuals heavily involved in drug use and criminal activity, including Clifford Jackson, his codefendant. Clifford is clear in his affidavit that he was the leader and Clarence the follower. This is consistent with Clarence's history. Although he was younger than Clarence, Clifford already had been involved in robberies and was a heavy drug user. According to other affidavits Clifford was a loud, aggressive young man whom Clarence admired and followed. Clifford convinced Clarence to give him money to buy drugs and Clarence gave up most of his friends to be with Clifford. Clifford provided the approval and friendship that Clarence had consistently lacked. It was not until after the robbery that Clifford fully realized the control he exerted over Clarence. Clifford states that **"it** was only then that I realized that Clarence would do

anything for me, including risking his freedom and even his life for me" Clifford admits that he planned the car theft, the robbery and the disguise.

Both defendants admit heavy cocaine use for several days prior to the robbery. This was substantiated by other affidavits. Clarence had seldom ventured out of Mobile and the trip to Pensacola was something this sheltered, mentally impaired man would never have attempted on his own. The actual robbery was a bungled, haphazard attempt that ended in tragedy. After seeing a number of banks, they concluded that a bank was the logical place to get money. Sunglasses were viewed as adequate disguise. They made no advance plans, did not know the layout of the bank, did not even have a container for the money. The description of Clarence's role as an accomplice in this robbery is in marked contrast to his usual shy, hesitant behavior. When he realized that Clifford was in danger he believed that if he told the police to put down their guns, they would comply and he and Clifford would then walk away with the money. Clarence consistently denies an intent to harm anyone in the bank or the police.

EVALUATION RESULTS

Test Behavior and Observations

Clarence Hill is a 6'2", 210 pound black man who appears and acts younger than his actual age. He moves and talks slowly. His right eye has a significant droop. He smiles frequently, particularly when confused or when he does not know how to respond. At no time did he volunteer information or ask questions.

Grooming was adequate. Clothing was neat and clean. He smiled inappropriately in times of tension. Speech was significant in that the rate was retarded, there were numerous hesitancies, and little information was volunteered. Articulation was adequate. Speech showed a poverty of content and conversation was limited and concrete.

Rapport was adequate. Clarence is shy but he put forth good effort on the testing and cooperated. Apathy, depression, fatigue, and passivity were apparent.

Evaluation Results

The Wechsler Adult Intelligence Scale - Revised (WAIS-R) was previously administered with full-scale score of 84. The Verbal IQ of 76 was significantly different than the Performance IQ of 101. A difference of this magnitude does not occur by chance. A significant difference between verbal and nonverbal skills is an indication of brain damage which should trigger further testing. The mean of the WAIS-R subtests Scaled Scores is 10. Mr. Hill's scores ranged from Scaled Score of 3 to Scaled Score of 13. On those tests that best measure verbal comprehension (Vocabulary, Information, Comprehension and Similarities), Mr. Hill's average was 5.2. On those tests that measure spatial/perceptual skills, Mr. Hill's scaled score mean or average was 11.6, more than five points higher. This poor performance on the verbal comprehension subtests is in sharp contrast to the above average on the non-language tests almost always indicates dysfunction of the left hemisphere. The additional test findings supported this conclusion. Mr. Hill has retained limited information. During this evaluation he thought there were 48 weeks in the year, did not know where the sun set, could not name four recent Presidents of the United States. Vocabulary was limited. Mr. Hill did not know the meaning of a number of simple words, such as fabric, assemble, enormous, or conceal. On the subtest most sensitive to brain damage, Clarence has a Scaled Score of 4 (Digit Symbol). The mean of the subtest scores is 10. The verbal subtests from SS 10 to 13, show a significant scatter.

In general, the WAIS-R test results indicate low verbal intelligence. In addition, his fund or information is poor, a reflection of inability to learn in school. The scores were lowest on tests which are most sensitive to brain damage, with impairment of adaptive abilities dependent upon brain functions.

The neuropsychological evaluation revealed a number of impairments in areas which indicate that he has organic brain impairment. The Halstead Impairment Index is a summary value based on the tests in the battery and is determined by counting the number of tests on

which results fall in the range characteristic of the performance of brain damaged rather than normal subjects. Clarence earned a Halstead-Reitan Impairment Index of .7 (approximately 70% of the test results were in the brain-damaged range), a score distinctly indicating brain damage.

Mr. Hill had difficulty on the finger tip writing test, problems with finger tapping on the dominant hand, minimal impairment in copying simple figures, severe deficits with memory and alertness reasoning, and logical analysis.

On the Category Test, he had **89** errors when **50** errors is the cutoff for indicating possible brain damage. The Category score of **89** indicates that Clarence is seriously impaired in his ability to make observations, identify critical elements in analysis of the overall problem, or solve problems. On the basis of this score he would be expected to be very inefficient and ineffectual in any situation where he would be required to analyze the information, look at alternatives, or be able to use sound judgment. The Categories Test is one of the most sensitive overall indicators of brain impairment.

Left cerebral dysfunction is suggested by the test results. Poor performance was noted on the Tactile Performance Test with the dominant right hand. The total time on the Tactile Performance Test was also in the impaired range. In addition, the impaired finger tapping with the right hand, the slowness in tactile form perception with the right hand compared with the left, and a mild impairment of the right hand in the finger-tip number perception, is also indicative of left hemisphere impairment. The Aphasia Screening test is designed to detect the numerous signs of language disorder. The test is quite sensitive to brain damage. Reitan reports 86 percent accuracy when two or more signs are present. Aphasis is an impairment due to cerebral damage of receptive or expressive language abilities.

On the Aphasia Screening Test Mr. Hill showed significant deficits in his ability to deal with simple verbal material (spelling, reading, and enunciating). These errors were

of such magnitude that they could not have stemmed from inadequate educational training alone. Mr. Hill was unable to spell square (quer), or triangle. He could not repeat simple words, once again this is evidence of left hemisphere brain damage.

The Trail Making Test, Part A is a general measure of visuospatial scanning ability and motor and sequencing skills and requires the subject to draw from dot to dot. Mr. Hill performed satisfactorily on this task. On Part B, the subject must alternate between numbers and letters. He performed in the average range on this part also.

The Wisconsin Card Sorting Test is an assessment of perservation. Mr. Hill demonstrated deficits on this test indicating an inability to shift set or be flexible in the face of changes in problems or situations or a rigidity of approach to the solution of problems. This deficit was evident in Mr. Hill's behavior during the attempted robbery when he consistently was unable to change his response despite new information. Most adults would have left the scene of the crime when it was evident that the police had downed their accomplice and all facts led to the conclusion that he would be unable to escape. Clarence continued to think that they would take the money and leave.

Academic skills are significantly impaired. Spelling and Reading are below third grade level and Arithmetic at fourth grade level. This is congruent with his mental deficiencies disorder. Mr. Hill is a non-reader (dyslexic) for practical purposes. This impairment of reading ability and the understanding of the symbolic significance of words requires intact language function disorder.

The MMPI indicates emotional immaturity and dependency. He presents a great number of vague physical complaints that may be indicative of mental impairment or related to the wounds incurred during the robbery. The MMPI indicated a number of personality characteristics that may be associated with a substance abuse disorder.

The Magargee system of classifying male criminal offenders has been found to be a

useful typology for incarcerated individuals. Mr. Hill matches the **"George"** profile type of the Magargee system, typical of those who experience some stress in their adjustment to prison. Many individuals with this profile will have had liquor or drug related offenses. They tend to have less extensive criminal records and are viewed as somewhat more passive, less dominant, and less exploitative than other offenders. They usually do not appear as hostile or aggressive as other convicted felons.

IMPLICATIONS OF TEST RESULTS

The serious impairment shown by this man in the areas of abstraction, reasoning and logical analysis, coupled with his emotional dependence, limited verbal intelligence, and the previous drug and alcohol abuse are the most important aspects of the test results.

Mr. Hill's impairments undoubtedly have serious implications regarding his behavior during the offense and his previous behavior in everyday living. Persons with serious deficits in abstraction and reasoning skills, coupled with low verbal intellect, are frequently confused, do not get things organized properly, often complain of poor memory, are inconsistent in their behavior, do not analyze problems or understand the importance of doing things systematically and generally are less competent than their intelligence level would indicate.

The test results are consistent with brain dysfunction that is chronic and static in nature. The birth trauma and early developmental lags support lifelong dysfunction and deficits. Individuals with such damage may suffer from difficulty with impulse control, emotional lability, paranoia and slowness of thought. Clarence was also reared in a home where the parents could not provide the care and attention that this boy needed to survive. He did not fare better in school. He continued to be taunted, passed from grade to grade with no special education to meet his unique needs, and received absolutely no preparation for earning a living. He is still unable to read or write. The escape through drugs was an expected outcome.

The heavy polydrug use must be considered when evaluating Mr. Hill's behavior and cognition at the time of the crime. Mr. Hill's history of alcohol and substance abuse, and his use of cocaine just prior to the robbery are extremely relevant in evaluating his mental status at the time of the crimes. Such substances impair judgment and control, affect emotions and thought processes, and behavior. As previously stated, Mr. Hill was already functioning with limited capabilities because of his brain damage - damage which affects the processes that cocaine would affect. At the time of the offense, Mr. Hill was functioning under the combined effects of both brain damage and cocaine, and the resulting impairment as significant. A cocaine psychosis characterized by paranoia, agitation, hypervigilance, and hallucinations often occurs with high doses or chronic use. More chronic conditions resembling mania, paranoid schizoprenia, or generalized fatigue and lassitude are the subject of recent research into the effects of cocaine use.

MENTAL STATE AT TIME OF OFFENSE

At the time of the crimes, Mr. Hill was functioning under the combined effects of drugs, brain damage, impulsivity, dependency, and need for approval. When Clarence was using drugs, particularly cocaine, "he felt as if he could do anything." In fact his level of functioning and understanding was even more severely impaired when under the influence of alcohol or drugs. He felt as if he could do and talk better when, in fact the drugs further impaired his functioning. His brain dysfunction impaired reasoning, memory and judgment. He was impulsive and could not foresee consequences. The combination of deficits rendered him incapable of appropriate or sensible behavior.

The crime was not consistent with his previous behavior. Prior to his association with more aggressive friends, he was never described as violent, hostile, or aggressive. Clarence previously compensated for his deficits by withdrawing and playing with his toys, not in antisocial behavior. The drug and alcohol abuse and the leadership of friends like Jackson and Ladd apparently led him to exhibit a typical behavior. Studies

indicate that up to 50% of polydrug abusers exhibit neuropsychological impairment. Mr. Hill had a history of long term impairment in addition to the polydrug abuse. The combined effects of brain damage and drug abuse would severely impair Mr. Hill's ability to function. It would affect his ability to think clearly, process information, and control behavior, and control impulses and emotions.

MITIGATION EVIDENCE

Mr. Hill committed the offenses while under the influence of an extreme mental disturbance. Given Mr. Hill's level of functioning, the brain damage which disrupts normal processing and judgment, it is difficult to ascribe to this man the ability required for premeditation. His behavior was marked by impulsivity, lack of judgment, inability to foresee consequences, and confusion. He lacked, and presently lacks, the ability to analyze situations and draw the proper conclusions. The present testing was conducted four years after the crime, in a relatively safe environment with little interference. The crime was committed in a setting of turmoil, chaos, tension, danger, and while under the influence of cocaine, all of which would further limit this man's functioning.

The capacity of Mr. Hill to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. The previous evaluation did not include administration of a Neuropsychological test battery or additional testing and background information necessary to make the judgment of whether Mr. Hill had this capacity.

Clarence Hill lacked intellectual and emotional ability to organize and direct this robbery. He acted under the substantial domination of his codefendant, Clifford Jackson. Jackson engineered the car theft and the idea of the robbery. Clarence was a willing participant since he was dependent on Clifford, and wanted and needed his approval. The slow moving, slow thinking, slow responder, Clarence did not have the capacity to be in charge and direct the robbery. The uncharacteristic manic behavior was the

result of the cocaine ingestion, and the ever present organic impairment.

Finally, although Mr. Hill's conduct may have created a risk of death to many person persons, given his level of mental functioning, this was not committed knowingly. Mr. Hill was under the influence of cocaine, had limited ability to foresee consequences, or make adequate judgments. Under normal conditions, Mr. Hill would function at the level of a 10 year old boy, and at the time of the crime, Mr. Hill's functioning was even further impaired by his use of cocaine. Given Mr. Hill's substantial mental impairment, he would be incapable of formulating a heightened level of premeditation to support the aggravating circumstance that the crime was committed in a cold, calculated and premeditated manner.

The previous evaluation of Mr. Hill was inadequate in that there were sufficient indications which should have triggered testing of organic impairment. One intelligence test and one personality test was administered. The background information and affidavits utilized in the present evaluation were not available during the 1982 evaluation. Mr. Hill is capable of answering concrete questions in an appropriate manner. When he is not under the influence of drugs and in a situation that requires the ability to analyze and synthesize information he may appear adequate. The affidavits from family and neighbors clearly indicate that Clarence has always been different. His poor school records and general knowledge indicate that Clarence is not able to understand information or remember the information. The present testing clearly documents the brain dysfunction. Additional testing should have been conducted. It would also be expected that if additional background information regarding the environmental problems, birth injuries, head injuries, and resulting brain dysfunction had been known, his behavior would have been interpreted differently and significant statutory and non-statutory mitigating evidence would have been apparent.

(H. ____). Dr. Fleming's professionally thorough evaluation demonstrates that counsel's and the expert's failures deprived

Mr. Hill of substantial evidence relevant to guilt-innocence and penalty.

Dr. Fleming's findings are also supported by Dr. Yarbrough. Dr. Yarbrough also reviewed the background materials, Dr. Fleming's report and conducted a psychological evaluation of Mr. Hill. His report further confirms the inadequacy of the mental health evaluation case presented in Mr. Hill's case:

> This letter is sent as a follow-up to my evaluation of Clarence Hill, conducted on **12/27/89** at the Florida State Prison. I have reviewed numerous background materials including trial records in State v. Clarence Hill No. **82-4973-F;** Dr. James Larson's evaluation in **1982** prior to trial including test data; Dr. Larson's trial testimony; testimony from Octavia Hill; school records; police records from Florida and Alabama; jail records; prison records; Florida Supreme Court opinions; and numerous affidavits of family, friends, neighbors and others. I interviewed and tested Clarence Hill from **10:00** in the morning until lunchtime, with a break at noon. I then returned to the prison at 1:00, and concluded the interview at approximately **4:30** p.m. I did an extensive interview and three different types of testing while in contact with Clarence.
>
> The tests that were given to Clarence included the Wide Range Achievement Test - Revised form (WRAT-R), the Wechsler Adult Intelligence Scale - Revised form (WAIS-R), and the Rorschach Ink Blot Test. Each of the tests will be discussed in some detail. The intelligence testing done by me, is basically consistent with that done by Dr. Larson in **1982.** There are some small differences which I will explain. The WAIS-R yielded a Verbal IQ of **82,** a Performance IQ of **99,** and a Full Scale IQ of **87.** The Verbal IQ places Clarence in the lower 10% of the population in terms of his ability to use, and communicate verbal matter. This is a 6 point positive increase in this scale since he was tested in **1982,** with the primary significant difference occurring in terms of the Digit Span test which was a function of his

attention, and ability to concentrate increasing as a result of the change in the significant anxiety associated with being under arrest and awaiting trial. Although there is certainly significant anxiety associated with being on a death watch at Florida State Prison, this is a condition that Clarence has had a great deal of time to adjust to, and would not negatively influence his ability to attend to things that he heard. His knowledge of the world around him had increased somewhat from approximately the 2nd percentile to the 5th percentile. The remaining tests for the verbal IQ basically stayed within their prior range. Clarence had a Performance IQ of 99, which places him in the 50th percentile of all adults in the general population in the United States. These scores show that he is average in his ability to deal with eye/hand coordination tasks, and has good capacity for visual discrimination of things in a somewhat mechanical, or visuo-spatial manner of processing information and reacting to the environment. The most significant data about this is that there was a 3 point drop in his ability to interpret social situations and understand the consequences to these situations in a sequence over time, which took him from in the high average range to low average in terms of his ability to understand what the social outcomes of events are likely to be. One other factor was that Clarence showed scores in the 5th percentile with regard to his speed and accuracy of learning visual materials or symbols, and any time testing involved processing information that resembled typical reading or writing, Clarence's performance deteriorated at an alarming and very significant rate. This result is consistent with a finding of brain damage.

On the WRAT-R, Clarence obtained a Reading score which placed him in the .06 percentile; a Spelling score which placed him in the .4 percentile; and an Arithmetic score which placed him in the .9 percentile. These scores all show Clarence to be functioning effectively in a range below that of 1% of the entire adult population in his age group. The simple interpretation of these scores is that Clarence has a very severe dyslexia which covers almost all matter that would be presented to him in

school, reading, or other ways. Severe dyslexia is an indication of significant brain damage. This pattern evidently was not ever diagnosed, or treated while he was attending schools in Mobile, Alabama, or that surrounding area. Treatment for learning disability basically became available, although not on a widely distributed basis, in the late 1960's and early 1970's. Therefore, in all probability Clarence would have been too old to have benefited from diagnosis, and/or premeditation that might currently be available to individuals showing such severe dyslexia. His severity makes him a functional illiterate, and also has other secondary factors that are relevant to mitigation of his culpability for this offense.

The affidavits of numerous family members talk about Clarence being "slow, and different" when growing up. His tested level of intelligence (59 in 1969, 84 in 1982, and 87 in 1989) reflect a borderline range of intelligence. However, his borderline intelligence is compounded by his brain dysfunction. The severe dyslexia that Clarence manifests is typically accompanied by: very poor social development; general patterns of withdrawal; inability to develop age appropriate peer relationships; poor, or slow development with regard to heterosexual interaction; and very concrete thought processes. Such individuals are typically shown to have poor judgment, and to either function in an isolated fashion, or in a somewhat dependent fashion in terms of their interactions with peers. This type of severe brain dysfunction is a long-term condition, and individuals who suffer from it are usually dependent on either other adults, or their peer group, for direction and stimulation. These individuals are often limited in their ability to take care of themselves without being manipulated by others, and are often taken advantage of by others in financial interactions. The concreteness of their thought processes generally limits them in that they take at face value communications from other people, without ever developing an understanding of the generalities associated with communication from others, or the ability to develop generalities in terms of individuals learning how to deal with the world around

them. This results in an inability to analyze motivation or exercise independent judgment. In sum, ability to process information and to make appropriate judgments and decisions is severely limited and impaired.

In addition to the borderline intelligence and brain dysfunction, Clarence's visual "lazy eye" disturbance caused him to be tormented by his family, and other neighborhood and school children. However, Clarence did not develop an aggressive attitude in dealing with them, although he has sufficient physical size to have done so. According to the numerous affidavits gathered from family, friends, and others, he evidently had no aggressive history as a child or an adolescent. Part of this was likely due to the abusive upbringing he had from his mother, who was at home fulltime with the children (nine of her own, and six from other family members). From the history that has been gathered by the investigators, as well as their own observations, Mrs. Hill ruled with a very strong physical presence, and was seen to be significantly punitive in controlling the behavior of the numerous youngsters. She was the first and final response for punishment. This likely evolved as a result of the fact that Clarence's father evidently worked two or three jobs in order to try to support the children and his wife and was generally absent from the home. He was not called upon as a last line of defense, as occurs in many instances with the father being the "ultimate solution" when he came home. Mrs. Hill evidently provided any "ultimate solutions" for the children, and was very quick in her responses to situations. Reportedly, she whipped the children severely with limbs, electrical cords and an animal whip.

Additionally, Clarence was abused by the other children because he was different. It is my interpretation that Clarence learned from his mother basically not to talk back or to be a behavior problem. Clarence stated during the interview, "If they don't bother me, I don't bother them." The strict discipline was successful in keeping the other fourteen of the children out of trouble with the law. It is my opinion that this clear response to behavioral expectations,

had it been combined with underlying love and respect, would have kept Clarence from violations of the law, had it not been for his attraction to, and continued use of drugs and alcohol.

Clarence has a significant history of substance abuse. He developed very poor skills in social situations, and when he was in his adolescence became enamored of his ability to be accepted by other children when he found that if he drank or smoked marijuana other kids would let him hang around with them. Basically, his brain dysfunction and his pattern of repeated social promotions (school records reflect a long history of D's) prevented him from having positive life experiences. This led him to be susceptible to a pattern of artificial "feeling good" based on intoxicants when he was not able to learn to do many other things well enough to "feel good." He was able to do this from approximately fifteen or sixteen years of age, and continued to use intoxicants on a regular basis until his arrest for this offense. This seems to have been his general pattern in order to develop social acceptance and cope with his problems.

One other factor appears to be significant in understanding his personal history. The limited social skills, poor understanding of subtleties of communication, and paucity of understanding of other people's feelings that are typical of brain damaged persons isolated Clarence and led him to act like a much younger person. Lay persons characterize this as **"immaturity."** Consequent to this, Clarence retreated into his own world. He spent much time drawing and playing with toy cars. Further evidence of his dysfunctional immaturity, poor social perception and decision-making was shown by the fact that Clarence rode a bicycle up until his early 20's as the primary means of transportation, even riding to and from work on all days except when it was raining. If it had not been raining when he rode to work, then he would ride his bicycle home in the rain after work. He evidently rode his bicycle to and from the Colonel Dixie food establishment in Mobile, Alabama (a distance of around fifteen miles each way), where he was employed for approximately 5-6 years. That employment finally terminated in his

arrest when he was picked up at approximately 11:45 one evening with a box of food items from the Colonel Dixie.

This specific incident illustrates Clarence's level of social development and his ability to undertake independent decision making. Clarence had been a good and reliable employee at Colonel Dixie for a long time. However, he was arrested at 11:45 or 12:00 in the morning riding with a box of food on his handlebars and two gas filled balloons. The fact that a twenty plus year old man did not understand the "weirdness" of the way he looked under these circumstances or the "inappropriateness" of his behavior here illustrates that his decisions were very poorly thought through and in a concrete manner. Clarence's explanation of this event was that he had met a lady that he was trying to impress, and that she had suggested that he bring some food home to her and to her three children. Clarence had never thought about taking food before, but was doing this in order to please, or impress her, which indicates his dependent, easily led behavior. While riding after work toward this lady's house, he passed a new automatic teller operation which had balloons outside of it. Clarence thought that the children probably had never had balloons, so he stopped to take two balloons (although there were three children) to give to the children. The fact that he did not think what he was doing was inappropriate, and that it would be a blatant behavior that would call attention to himself shows the ultimate concreteness of his thinking processes, as well as the dependency that he had on other people for their approval. In addition to that, some of his siblings have very strong negative feelings about a period of time in which he was living outside the home and how he was "taken advantage of" by an older lady. This would be consistent with Clarence's propensity to do whatever someone asked, in order to get accepted by them.

One other significant factor is associated with Clarence's tending to be substantially dominated by someone else. It is my impression, based upon my evaluation, that Clarence would be very much an acquiescent individual, particularly when he is around anyone else who is demonstrating

strong beliefs or behavioral expectations. This characteristic is positive, when he is in appropriate hands under reasonable adult leadership. However, it is my professional opinion that when he is around **"bad company,"** Clarence would be very easily swayed. The most dramatic example of that is his having developed a habit of drinking and using marijuana, in spite of growing up in basically a **"tee-totaler"** household. Clarence remembers seeing his father drink a beer or two over holidays, but does not remember ever seeing his mother drink, or his father be intoxicated in any other circumstances. However, his need for approval and acceptance by peers was so strong that he would dramatically alter his own values in order to gain their acceptance.

Clarence gave a long-term history of alcohol and marijuana intoxication, generally on a daily basis. This is supported by his pattern of drug-related arrests or complaints with the police department, and by affidavits of family and friends. However, Clarence states that he had only on a few occasions used cocaine. He stated that he had used this approximately two to three times while in the company of Cliff Jackson, and the night before and the day of the robbery. The American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, 3rd Edition, states that the following characteristics may be associated with cocaine intoxication: psychomotor agitation; elation; grandiosity; loquacity; and hypervigilence. In addition to that, the following maladaptive behavioral effects are often present: fighting, impaired judgment, and interference with social or occupational functioning. In my opinion, as the former Director of the Drug Abuse Program of the Community Mental Health Center of Escambia County, Clarence not only has a history consistent with cocaine intoxication, but the description of the **"bungled"** robbery attempt also is consistent with impaired judgment, and poorly thought through outcomes that would be traditionally associated with people who would be under the influence of cocaine intoxication.

Factors which showed deficiency in judgment abound throughout the history of the incidents, whatever version you are listening

to. The grandiose and inept manner in which the auto robbery occurred in midday in downtown Mobile would begin the series of poor judgment, and mental errors. The data dovetails with the events of attempting a robbery in downtown Pensacola, in spite of Clarence stating that he had not ever been in that area and was not sure about how to get out. There was some forethought, in a very haphazard and grandiose fashion given to an attempted disguise with sun glasses, which evidently was planned by and purchased by Cliff Jackson. Neither of them even thought to have anything to take money out in if they were going to do a robbery. In addition to that, when they were leaving, money fell out and there was some attempt to try to pick it up. Jackson is the one who had the mental agility to get a trash bag out of a garbage can at the bank in order to place cash in it.

The aggressive behavior that I understand to have occurred through reading the transcripts would be very unusual, and inconsistent with Clarence's history. However, under the impetus of cocaine, Clarence's traditional pattern of staying out of the way of other people gave way to irritability and grandiosity. The cumulative effects of brain dysfunction, borderline intelligence and cocaine are evident in Clarence's motivation to go back to help his friend and how he did so. According to Clarence, when he was walking down the sidewalk, he saw the police with Cliff, and evidently decided instantly to go to the policemen without reflection. Clarence reported that he felt he could walk back there and get them to drop their guns. He remembered saying **"Halt,"** and then the officer wheeled and started to shoot.

It is my professional opinion that the combination of Clarence's difficulty with verbal communication, poor abstract thought, and probable chemical intoxication at the time of the event led to his inappropriate behavior, culminating in Officer Taylor's death.

The other test information that I am going to relay that I feel is somewhat significant is related to a test that I gave Clarence, the Rorschach Ink Blot Test.

Having discovered the severity of his dyslexia in the testing and interview situation, I undertook to give him some additional personality testing. Although Clarence was very forthright in his responses I wanted to corroborate my findings with information that could not be **"faked."** These tests also help in evaluating Clarence's potential for decision making and his ability to assess and integrate a variety of different sources of information. The Rorschach Ink Blot Test was chosen for this purpose and I administered a series of ten cards. Clarence gave three responses out of ten which indicated that he did not know what he was seeing. This lack of ability to synthesize or approximate shows a severe paucity of intellectual resources on Clarence's part, in spite of his interest in drawing and painting. Of the ten cards, Clarence had a very slow and methodical reaction to each card, with the exception of two, one of which was an Achromatic card and one of which was a Chromatic card. The two cards that he responded to quickly were both extremely popular responses given by a very high percentage of the population to the stimuli. In all other circumstances, both cards which are Achromatic (not evoking unusually strong emotional responses) and cards which are Chromatic (cards which do usually evoke strong emotional responses), Clarence showed a very slow and methodical response which was consistent with his communication during our interview, and during the testing. This test data dramatically indicates a person who is basically controlled, careful and generally cautious of his reactions to the environment around him. He is very unsure of himself and is not confident in reacting to many different stimuli in the world about him. This data supports the earlier contention that Clarence's behavior was affected by intoxication and he acted in a dependent and acquiescent manner with regard to his contact with Cliff Jackson, both earlier in their relationship, and at the time of the robbery.

Due to the cumulative effects of brain dysfunction, borderline intelligence, a history of substance abuse, and intoxication at the time of the offense, Clarence Hill suffered an extreme mental disturbance at the time of the offense. His life-long history

> of impaired judgment and inability to anticipate consequences would have substantially impaired his capacity to appreciate the criminality of his conduct and conform his conduct to the requirements of law. This lifetime condition would have been further impaired by cocaine intoxication at the time of the offense. There was insufficient testing and development of background data at the time of trial to reveal these substantial mental deficiencies. Clarence's multiple disabilities made it impossible for him to deal with his dysfunctional family, his rejection by his peers, his failure in school, and the exploitation by his friends. He resorted to substance abuse to gain recognition and acceptance. The combined effect of all these factors is to make Clarence Hill less culpable than a normal person who did not suffer from these mental deficiencies and troubled life.

(H. ____).

Dr. Larson admits that he missed clear indication of possible brain damage. He also admits that what he missed would have made a difference. Dr. Larson has been provided with the additional materials provided to Drs. Fleming and Yarbrough and with their test results and reports. Based upon this information, Dr. Larson will testify and would have testified at the original trial to substantial statutory and nonstatutory mitigation. Dr. Larson will testify to the presence of two statutory mitigating factors: that Mr. Hill was under extreme mental disturbance at the time of the offense and that his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Furthermore, Dr. Larson would also testify to the presence of additional nonstatutory mitigating factors to include that Mr. Hill was under the domination of Mr.

Jackson at the time of the offense.

Counsel did not make a tactical decision to keep this information from the jury. The State's contention to the contrary is a lame attempt to avoid the obvious. This evidence is entirely consistent with what Mr. Terrel tried to establish at resentencing. He explained:

> Dr. Larson did some psychological testing of Mr. Hill. At the time of the testing and subsequently, I failed to recognize the importance of the test results as it related to Mr. Hill's case. Specifically, the significant difference of 25 points between Mr. Hill's performance score and verbal score was a clear indication that Mr. Hill may have been brain damaged. This difference seemed to be an important distinction to me; however, I relied on the report of Dr. Larson which did not indicate that further testing was necessary. I should have asked Dr. Larson to do further testing given the fact that I am now informed that such a difference in points is a clear indication of brain damage. I had no tactical or strategic reason for failing to request additional neuropsychological testing.
>
> I have reviewed the neuropsychological evaluation report on Mr. Hill prepared by Pat Fleming, Ph.D. The information reflected in Dr. Fleming's report would have been valuable evidence of statutory and nonstatutory mitigation that I would have presented to the jury and judge. My failure to do so was due to my lack of understanding of the significance of the difference in scoring as it applies to brain damage and due to my failure to fully and effectively investigate issues corroborating Hill's dysfunction. The failure to present this evidence was not any trial tactic or strategy.

(H. ____). No reasonably competent counsel would tactically decide not to present such a compelling case of mitigation.

The facts above demonstrate that counsel's and the mental health expert's deficient performance in Mr. Hill's case was

prejudicial. The failure of any expert to adequately assess Mr. Hill's brain damage constituted professionally inadequate mental health assistance. An evidentiary hearing is necessary to resolve this claim. The claims presented here are identical to those found sufficient to warrant relief in State v. Sireci, 536 So. 2d 231 (Fla. 1988). Mr. Hill is equally deserving of relief. An evidentiary hearing is proper.

CLAIM IV

MR. HILL'S CAPITAL TRIAL AND SENTENCING PROCEEDINGS WERE RENDERED FUNDAMENTALLY UNFAIR AND UNRELIABLE, AND VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, DUE TO THE PROSECUTION'S DELIBERATE AND KNOWING PRESENTATION AND USE OF FALSE EVIDENCE AND ARGUMENTS AND ITS INTENTIONAL DECEPTION OF THE JURY, THE COURT, AND DEFENSE COUNSEL.

The prosecutors presented misleading evidence. They knowingly presented false "evidence", and then used that false "evidence" as a centerpiece of impassioned arguments for a capital conviction and sentence of death. The Court, the jury, and defense counsel were misled. False, misleading, inaccurate, and deceptive evidence and argument was presented and paraded before the jury, left uncorrected, and then blatantly used by the State in its prosecutors' arguments at guilt-innocence and sentencing. Mr. Hill's capital conviction and sentence of death resulted from this abrogation of rudimentary due process. Giglio v. United States, 450 U.S. 150 (1972). The process by which Mr. Hill was convicted and sentenced to death was a paradigm of the "corruption of the truth-seeking function of the trial process." United States v. Agurs, 427 U.S. 97, 103-04 and n.8 (1976).

At the 3.850 proceeding the assistant state attorney took great umbrage at Mr. Hill's properly pled, good faith ~~Giglio~~ claim, and sought to inject into these proceedings the wholly irrelevant issue of collateral counsel's professional ethics. Counsel for the State was well aware that any misgivings regarding collateral counsel's professional ethics were within the exclusive jurisdiction of the Florida Bar. Of course, counsel for the State was equally well aware that recourse to the appropriate forum would deprive him of his true goal of predisposing the tribunal against Mr. Hill with bogus allegations against his counsel, as the following illustrates:

> MR. MURRAY: Judge, there's some administrative matters. Initially pending before the Court is a pro hac vice motion for admission on the part of Mr. Dunn, and at this time the State is going to object to that on two grounds. Primarily, one, Mr. Nickerson is here, who is a member of the Florida Bar, I believe a member of the CCR office that is representing the defendant in this case. Most specifically besides the fact that Mr. Dunn is not admitted to the Florida Bar is the exception that beginning on page 16 with the language that Mr. Dunn used in the course of preparing the motion there will once we get to the merits of the motion be a motion to strike some of the language, but it appears on the face of it, in light of the record that's present in this case, that there's some clear violations of the code of professional responsibility. Based on that we strongly urge the Court not to grant the pro hac vice motion because, in fact, there is a Florida Bar member here prepared to go forward.

(H. ____).

Counsel for the State became increasingly indignant that Mr. Hill could even suggest misconduct had been engaged in on the part of the Office of the State Attorney in securing Mr. Hill's

conviction and sentence of death and moved to strike portions of Mr. Hill's Giglio claim.[4] As collateral counsel attempted to explain to the court:

> MR. DUNN: Yes, Your Honor. I guess we'll respond first to the motion to strike, Your Honor. Clearly the allegation within there is a violation of the principle set out in the Giglio case, and that is that the State did present misleading evidence to the jury. Based upon the evidence that we have at this time in our possession we have a good faith basis for making that allegation as to whether that is ever proved out in court.
>
> That's the reason that we're here, Your Honor. It's properly pled. It's before your court. It's a recognized area of the law.
>
> . . .
>
> We ask that Your Honor look at the pleading, listen to what is proffered here today and at some appropriate time make a ruling as to the claim, but we do not believe that that's a proper motion to strike, Your Honor.

(H. ____).

Notwithstanding the fact that the trial court took no evidence on this claim, the motion to strike was granted.

The State's theory of the case was that the bank robbery was the result of a well thought out plan orchestrated by Mr. Hill, and that once the plan went bad, Mr. Hill in a cold, calculated and premeditated manner murdered a police officer and wounded another in an attempt to assist his accomplice Mr. Jackson.

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[4] Understandably, counsel for the State neglected to point out that his office had already been cited by this Court on two separate occasions for prosecutorial misconduct in Mr. Hill's case. See Hill v. State, 477 So. 2d 553, 556 (Fla. 1985); see also Hill v. State, 515 So. 2d 176, 178 (Fla. 1987).

Crucial to that theory was the State's ability to prove that Mr. Hill was in complete control of his faculties and that he acted with premeditation at each and every step. Any evidence that Mr. Hill and Mr. Jackson were using drugs on the day of the crime would undermine the State's case.

The State obtained the services of Mr. Reid Leonard who provided them with the information they wanted: based upon his scientific testing he concluded there was no evidence of any illicit drugs in either Mr. Hill's or Mr. Jackson's blood. This evidence was scientifically unsound, inaccurate, and misleading and the State knew so. The State also knew that Mr. Leonard's proven incompetence in the laboratory had already resulted in the revocation of his state certifications to conduct certain blood testing. They used this evidence knowing that it was of no value: they misled the jury.

The procedures used by Mr. Leonard to test for the presence of drugs in Mr. Hill's blood were scientifically unsound and his ultimate findings were useless. Dr. William W. Manders, an eminently qualified forensic toxicologist has recently reviewed Mr. Leonard's findings and his testimony presented at Mr. Hill's trial and resentencing proceedings concerning the testing of Mr. Hill's blood. After a thorough review of those materials he concluded that:

> the method of ultraviolet spectrophotometry used by Dr. Leonard lacked sensitivity and specificity to detect drugs such as cocaine, LSD, THC and even phencyclidine (PCP) which is normally screened to a level of 25 ng/mL. And that the blood specimen which was taken from Clarence E. Hill, could have contained any or all of these drugs as well as others.

Dr. Manders indicates that Mr. Leonard's findings are "literally **meaningless."** He indicated that "ultraviolet spectrophotometry" has long been abandoned as a proper means of drug detection in blood or urine. He explains:

> In the mid 60's and early 70's, ultraviolet spectrophotometry was being replaced by gas chromatography, EMIT, radioimmunoassay and gas chromatography/mass spectrometry as analytical screening methods for drugs. Problematic with the ultraviolet procedure was the lack of sensitivity and specificity. It required a large amount of compound, usually in the microgram range, to produce a spectra which could easily be confused with the spectra of other compounds. Emit, radioimmunoassay, gas chromatography and gas chromatography/mass spectrometry in turn could analyze for compounds whose concentrations were in the nanogram (ng) range, thus giving these methods a thousand fold or greater degree of sensitivity over ultraviolet spectrophotometry. An article published in 1978 discussed the use of these techniques in the analysis of cocaine during the period of 1971 to 1976 [Finkle and McCloskey, J. For Sci. 23: 173-189 (1978)].

Finally, he even questions Mr. Leonard's representation that ultraviolet spectrophotometry will detect these drugs in blood. He indicates:

> It is my professional opinion that ultraviolet spectrophotometry cannot detect compounds such as THC or LSD where the blood levels are usually 10 ng/mL or less 30 minutes after exposure to the drug. As far as detection of cocaine, detection may be possible if an individual were given massive doses of this drug. Recreational doses would not be detectable.

Any competent expert would agree that Mr. Leonard's results are **"meaningless"** and unworthy of belief. Nevertheless the court and the jury were never provided with this information and they obviously accepted Mr. Leonard's results as the State presented

them: as worthy of belief.

The State knew that Mr. Leonard's procedures were unsound and that his results were inaccurate. In fact, they had state of the art, accurate means available to properly test Mr. Hill's blood for evidence of drugs and chose not to use it. They wanted a specific result: no evidence of drugs, and they knew Mr. Leonard would never find such evidence using this method.

According to Ms. Goodwin, the blood sample was taken from Mr. Hill at 2:45 p.m. on October 19, 1982, shortly after Mr. Hill was admitted to the hospital (T. 1133). The sample was stored in the lab at Baptist Hospital (T. 1132). The chain of custody document indicates that the sample remained there until October 21, 1982, when it was forwarded to the FDLE lab in Pensacola. At the FDLE lab, Mr. Hill's blood was tested by "gas chromatograph" but only for the presence of alcohol. The State had Mr. Hill's blood sample at their own lab with the proper means to test it for the presence of drugs and they did not do that. Instead, they forwarded the sample to Mr. Leonard, who used outdated and scientifically unsound procedures. The only explanation is that the State did not want any drugs found and Mr. Leonard provided them with that conclusion. They knowingly used Mr. Leonard's inaccurate results and presented them as the truth.

Further evidence of the State's ability to accurately and properly test Mr. Hill's blood for the presence of drugs is the test done on Officer Taylor's blood. As part of the autopsy, Officer Taylor's blood was screened by EMIT. As Dr. Manders indicated both gas chromatography and EMIT are analytically sound testing methods. Both methods were available to the State, but

neither were used to test Mr. Hill's blood for drugs. They chose instead to use a scientifically questionable procedure which would not reveal the presence of drugs.

The State deliberately used this evidence to foreclose any possibility of a verdict other than premeditated murder and to prevent Mr. Hill from establishing mitigation evidence based upon his use of cocaine at the time of the crime. When Mr. Hill testified at trial that he was under the influence of cocaine at the time of the robbery, the State presented Mr. Leonard and his false and misleading evidence.

Armed with this evidence, the State not only argued that Mr. Hill was not under the influence of cocaine, but **also** that Mr. Leonard's test results proved Mr. Hill was lying. The defense's entire case depended upon the testimony of Mr. Hill that he never intended to kill the officer -- that there was no premeditated murder. The State effectively used this false evidence to directly attack Mr. Hill's credibility.

In fact, the trial attorney went to great lengths in an attempt to respond to this argument:

> He also tells you that Clarence told you he was under the influence of cocaine and that came back negative in the blood test, and so, he is lying there. All you have to do is recall yesterday afternoon what Mr. Johnson asked Clarence when he put him on the stand. He asked Clarence where he got the gun and when he got the gun and Clarence said I don't remember. He said why don't you remember. He said because I was on something.
>
> Now, what time in the morning in Mobile was that? We don't know for sure. He never--and then Mr. Johnson, through his statements here just a moment ago, said they

kept on it. All the way to Pensacola. Now, if you remember that from anybody's testimony, you take that back there with you, because it didn't happen. There was never any such statement made except in Mr. Johnson's mind, which is kind of interesting.

Some times people hear things or think they hear things that don't really happen. That's apparently what happened to Mr. Johnson and that's apparently also what happened to Clarence. Maybe he went up there and said--and intended to say halt or stop or something like that. Maybe he said it and nobody heard it. Because no one here said he didn't say it except Mr. Johnson. All the witnesses said they didn't hear just like Officer Larry Bailly only heard one shot out of that whole mess.

Sometimes you don't hear things that happen under these situations and sometimes you don't say things or hear things that you think you hear.

To Mr. Johnson, that is evidence of premeditation. Because he was lying to you. Now, the cocaine. There is no testimony as to what effect cocaine will have on a person. The only thing that you have in front of you is the doctor's--the chemist's testimony about cocaine to the best of his knowledge, and in answer to Mr. Johnson's question, cocaine reacts as far as he knows like any other drug. It's going to be out of the blood system within one to two hours.

So, if he took it at 12:00 Noon when the car was taken from Mobile, you can assume that at 2:45 P. M. when the blood sample was taken, according to the chemist, the State's expert, and according to the answer to Mr. Johnson's question, it's not going to be there. And I assume that may be surprising to Mr. Johnson, but it's a fact. It's what his expert has testified to. But it doesn't make any difference if Mr. Johnson likes to say, because Clarence never told you he was under the influence of any drugs, he never tried to make that excuse. He answered it not in answer to any questions that I put to him, but in answer to Mr. Johnson's questions.

(T. 1233-35). Unfortunately, there was little that could be done

by that time to rebut the false and misleading evidence.

At Mr. Hill's resentencing, the State again presented this false evidence. This time they used it to rebut the defense attempt to present Mr. Hill's cocaine intoxication at the time of the offense as mitigating evidence. They emphasized it in their opening statement (R. 276). They presented Mr. Leonard to explain his findings (R. 644-51). And in closing argument, the State argued that Mr. Leonard's test results established that Mr. Hill was not under the influence of cocaine (R. 682).

As at trial, the evidence had its intended results. This is best established by the court's findings in support of the death penalty where the court found:

> He did testify that he had been sniffing cocaine and presented the testimony of his accomplice who indicated that they had had some cocaine, but there was expert testimony by Dr. Reid Leonard that as a result of the blood samples of the Defendant furnished by examination by way of chemical analysis showing only a residue of aspirin. The Court had the benefit of the Defendant's testimony to weigh with this testimony. The Court is of the opinion based upon the evidence that the Defendant has not sustained this mitigating circumstance.

(R. 840).

There can be no doubt that the prosecution's falsities had a substantial effect on the conviction and sentence. Rather than subjecting Mr. Hill's claim to the adversarial testing process of an evidentiary hearing, counsel for the State chose to engage in character assasination and additional subterfuge. The false evidence precluded the defense from presenting a voluntary intoxication defense, destroyed Mr. Hill's credibility and

foreclosed the jury and court from receiving important mitigation evidence. Under these circumstances, Mr. Hill's capital conviction and sentence of death violate the fifth, sixth, eighth and fourteenth amendments, and should be vacated.

CLAIM V

THE TRIAL COURT ERRED WHEN IT RESPONDED TO QUESTIONS FROM THE JURY AND REFUSED TO DISCLOSE TO MR. HILL AND HIS COUNSEL THE QUESTIONS ASKED, IN VIOLATION OF MR. HILL'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

During Mr. Hill's resentencing proceedings, and before deliberations commenced, the trial court received two questions from the jury. The record reflects the following colloquy between the court, the jury and Mr. Hill's counsel:

> THE COURT: Good morning, everyone. All right, I have two questions, and I don't think I can tell you. Those questions where we couldn't comment on directly. They are within the confines of the evidence and you weigh the evidence as you see it and take it by what you believe has been presented. That's all I can tell you. We can't tell you yes, this has been done and no, this hasn't been done.
>
> MR. TERRELL: Your Honor, may I see the questions?
>
> THE COURT: No, because I'm not commenting on them. Call you next witness, Mr. Allred.

(R. **374).** The questions were never disclosed to counsel and were not made part of the record.

Under Rule **3.410** Florida Rules of Criminal Procedure, once deliberations begin, any requests from the jury concerning instructions and evidence must be dealt with only after giving notice to the prosecuting attorney and to counsel for the

defendant. This Court has held that:

> Any communication with the jury outside the presence of the prosecutor, the defendant, and defendant's counsel is so fraught with potential prejudice that it cannot be considered harmless.

Ivory v. State, 351 So. 2d 26 (Fla. 1977). This Court further explained that:

> it is prejudicial error for a trial judge to respond to a request from the jury without the prosecuting attorney, the defendant, and defendant's counsel being present and having the opportunity to participate in the discussion of the action to be taken on the jury's request. This right to participate includes the right to place objections on record as well as the right to make full argument as to the reasons the jury's request should or should not be honored.

Id.

Communications between the court and jury prior to deliberations are governed by Rule 3.180, Florida Criminal Procedural Rules. Rule 3.180a(5) ensures the defendant's presence "at all proceedings before the court when the jury is present." When the court has a discussion with the jury in violation of Rule 3.180 the courts have held that it is reversible error. See Adkins v. Smith, 197 So. 2d 865, 867 (Fla. 4th DCA 1967); Loudermilk v. State, 186 So. 2d 16, 817 (Fla. 4th DCA 1966), Deans v. State, 180 So. 2d 178, 180 (Fla. 2d DCA 1965). As the court in Adkins explained:

> Although the better practice is to require counsel for the defendant and the state to be present while any conversation takes place between the jury and the court, a casual conversation or exchange of remarks is not reversible error unless it violates the provisions of F.S.A. section 914.01.

Adkins, supra, 197 So. 2d at 867. Any communication other than

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casual conversation or exchange of remarks unrelated to the proceedings is reversible error.

In Mr. Hill's case the jury communicated privately with the court through written questions. Although the Court obtained the communication in the physical presence of Mr. Hill and his counsel, that communication remained private and was never disclosed to the defense despite their requests to be allowed to see the questions. The court however responded to the questions and instructed the jury that the matters were "within the confines of the evidence" and that they should "weigh the evidence as they see it." Despite the disclaimer, the court did comment on the questions.

Although Mr. Hill and counsel were physically present, without knowledge of what the questions were they could no more intelligently determine if Mr. Hill's rights were being protected or not, than if they were actually absent. Mere presence alone is nothing without the defendant and counsel being given basic due process rights: notice of the subject matter and an opportunity to be heard on the matter. Mr. Hill's rights under Rule 3.180 were abrogated under these circumstances. Mr. Hill's counsel requested notice of what the questions were and that request was denied. The result being no better than if Mr. Hill and counsel were absent.

In the present case, the circumstances surrounding counsel's representation of Mr. Hill -- the court's refusal to disclose the questions asked by the jury -- "prevented [him] from assisting the accused during a critical stage of the proceedings." See

United States v. Cronic, 466 U.S. 648, 659 (1984). The court's action deprived Mr. Hill of his right to the effective assistance of counsel, and under Cronic, prejudice must be presumed based upon counsel's inability to give advice. See Stano v. Dugger, No. 88-3375, slip op. at 12 (11th Cir. Nov. 17, 1989). Mr. Hill is entitled to 3.850 relief.

CLAIM VI

THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS APPLIED TO MR. HILL'S CASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

On direct appeal in Mr. Hill's case, this Court invalidated the application of the "cold, calculated and premeditated" aggravating circumstance because "[t]he evidence does not rise to the level of heightened premeditation . . . which is necessary to support this aggravating circumstance." Hill v. State, 515 So. 2d 76, 79 (Fla. 1987). Thus, this aggravating circumstance was overbroadly applied by Mr. Hill's jury and judge. Under Mavnard v. Cartwrisht, 108 S. Ct 1853 (1988), the overbroad application of aggravating circumstances violates the eighth amendment. As the record in its totality reflects, the sentencing jury never applied the "heightened premeditation" limiting construction of the cold, calculated aggravating circumstance, as required by Mavnard v. Cartwrisht.

This Court has discussed this aggravating factor on numerous occasions. See Jent v. State, 408 So. 2d 1024, 1032 (Fla. 1982); McCray v. State, 416 So. 2d 804, 807 (Fla. 1982); Combs v. State, 403 So. 2d 418 (Fla. 1981). In Jent, supra, the court stated:

> the level of premeditation needed to convict in the penalty phase of a first degree murder

> trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, in the sentencing hearing the state will have to prove beyond a reasonable doubt the elements of the premeditation aggravating factor -- "cold, calculated...and without any pretense of moral or legal justification".

408 So. 2d at **1032**. The court in McCray stated:

> That aggravating circumstance [(5)(i)] ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive.

416 So. 2d at 807. Although this Court has attempted to require more in this aggravating circumstance than simply premeditation, the jury was not told that in Mr. Hill's case. In fact, the jury was told that the original jury at trial found Mr. Hill guilty of premeditated murder and that

> Consequently, you will not concern yourself with the question of guilt in this case.

(R. 262). Because of the lack of any limiting instruction and the instruction that "premeditated murder" was already found, Mr. Hill's jury was in effect instructed to find the "cold, calculated, and premeditated" aggravating factor.

In part because of the concerns discussed above, this Court has further defined "cold, calculated, and premeditated":

> We also find that the murder was not cold, calculated and premeditated, because the state has failed to prove beyond a reasonable doubt that Rogers' actions were accomplished in a **"calculated"** manner. In reaching this conclusion, we note that our obligation in interpreting statutory language such as that used in the capital sentencing statute, is to give ordinary words their plain and ordinary meaning. See Tatzel V. State, **356** So.2d 787, 789 (Fla.1978). Webster's Third International Dictionary at 315 (1981) defines the word **"calculate"** as "[t]o plan the nature of beforehand: think

> out ... to design, prepare or adapt by forethought or careful plan." There is an utter absence of any evidence that Rogers in this case had a careful plan or prearranged design to kill anyone during the robbery. While there is ample evidence to support simple premeditation, we must conclude that there is insufficient evidence to support the heightened premeditation described in the statute, which must bear the indicia of "calculation."

Roaers v. State, 511 So. 2d 526, 533 (Fla. 1987). This Court's subsequent decisions have plainly recognized that cold, calculated and premeditated requires proof beyond a reasonable doubt of a "careful plan or prearranged design." See Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988)("the cold, calculated and premeditated factor [] require[es] a careful plan or prearranged design."); Jackson v. State, 530 So. 2d 269, 273 (Fla. 1988)(application of aggravating circumstance "error under the principles we recently enunciated in Rogers.").

Because neither Mr. Hill's jury nor trial judge had the benefit of the narrowing definition set forth in Roaers, his sentence violates the eighth and fourteenth amendments. Moreover, the decision in Rosers preceded the direct appeal in Mr. Hill's case by several months. Mr. Hill is entitled to the benefit of the Rosers rule. The judge did not require any "heightened" premeditation as required by McCray, supra, and certainly he did not properly instruct the jury on this limiting construction. Moreover, Mr. Hill's jury was instructed that Mr. Hill was guilty of "premeditated murder" and told not to concern itself with such questions. Based upon these instructions, the reasonable juror would automatically presume that the "cold, calculated and premeditated" aggravating factor was present in

this case.

What occurred here is precisely what the eighth amendment was found to prohibit in Maynard v. Cartwrisht, 108 S. Ct. 1853 (1988). In fact, these proceedings are even more egregious than those upon which relief was mandated in Cartwrisht. The result here should be the same as in Cartwrisht:

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of opened discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 (1972).

108 S. Ct. at 1859 (emphasis added).

In Florida, a resentencing is required when aggravating circumstances are invalidated. See, e.g., Schafer v. State, 537 So. 2d 988 (Fla. 1989)(remanded for resentencing where three of five aggravating circumstances stricken and no mitigating circumstances identified); Nibert v. State, 508 So. 2d 1 (Fla. 1987)(remanded for resentencing where one of two aggravating circumstances stricken and no mitigating circumstances found); cf. Rembert v. State, 445 So. 2d 337 (Fla. 1984)(directing imposition of life sentence where one of two aggravating circumstances stricken and no mitigating circumstances found). The striking of this aggravating factor on direct appeal certainly requires resentencing under Florida law. Under eighth amendment law it is the sentencer who must make the "reasoned moral response." Penry v. Lynaugh, 109 S. Ct. 2934, (1989). The United States Supreme Court has granted certiorari in a case to

determine whether an appellate court has the power to usurp the sentencer's discretion and declare improper consideration of an aggravating circumstance harmless. ~~Clemons v. Mississippi~~, 45 Cr. L. 4082.

Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 630, (Fla. 1989). In fact, Mr. Hill's jury was so instructed. Florida law also establishes that limiting constructions of the aggravating circumstances are "elements" of the particular aggravating circumstance. "[T]he State must prove [the] element[s] beyond a reasonable doubt." ~~Banda v. State~~, 536 So. 2d 221, 224 (Fla. 1988). Unfortunately, Mr. Hill's jury received no instructions regarding the elements of the "cold, calculated and premeditated" aggravating circumstance submitted for the jury's consideration. Its discretion was not channeled and limited in conformity with Cartwright.

In Maynard v. Cartwright, the Court held that "the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." 108 S. Ct. at 1858. There must be a "principled way to distinguish [the] case, in which the death penalty was imposed, from the many cases in which it was not." Id. at 1859, quoting, Godfrey v. Georgia, 446 U.S. 420, 433 (1980). In Mr. Hill's case, the jury was not instructed as to the limiting constructions placed upon of the "cold, calculated and premeditated" aggravating circumstance. The failure to

instruct on the **"elements"** of this aggravating circumstance in this case in combination with the instruction that "premeditated murder" was previously established and not a concern of theirs, left the jury free to ignore those **"elements,"** and left them with the reasonable belief that the cold, calculated and premeditated aggravating circumstance must be found. The jury was given no limiting instruction which was found to be invalid in ~~Furman v. Georaia~~, **408** U.S. **238 (1972),** and ~~Maynard v. Cartwriaht~~.

This Court should now correct Mr. Hill's death sentence which violates the eighth amendment principle discussed in Maynard v. Cartwrisht, **108 S.** Ct. **1853, 1858 (1988):**

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically asserted that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georaia, **408** U.S. **238, 92 S.** Ct. **2726, 33** L.Ed.2d **(1972).**

The striking of this aggravating factor requires resentencing. Schafer, supra. Id. The **"harm"** before the jury is plain -- a jury's capital sentencing decision, after all, is not a mechanical counting of aggravators and involves a great deal more than that. The error denied Mr. Hill an individualized and reliable capital sentencing determination. Knight v. Dugger, **863** F.2d **705, 710** (11th Cir. **1989).**

Under Witt v. State, **387** So. 2d **922** (Fla.), cert. denied, **449 U.S. 1067 (1980),** Cartwrisht represents a fundamental change in law, that in the interests of fairness requires the decision to be given retroactive application. The errors committed here

cannot be found to be harmless beyond a reasonable doubt. There was mitigating evidence before the jury which could have caused a different balance to be struck had this aggravating circumstances not been found and weighed against the mitigation. Rule 3.850 relief is warranted under Hitchcock, Cartwright and the eighth amendment. A new jury sentencing proceeding must be ordered. Rule 3.850 relief is warranted.

CLAIM VII

THIS COURT'S FAILURE TO REMAND FOR RESENTENCING AFTER STRIKING AN AGGRAVATING CIRCUMSTANCE ON DIRECT APPEAL DENIED MR. HILL THE PROTECTIONS AFFORDED UNDER FLORIDA'S CAPITAL SENTENCING STATUTE, IN VIOLATION OF DUE PROCESS, EQUAL PROTECTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

A capital sentencing scheme is constitutional only to the extent that it is applied consistently to all capital defendants and eliminates any risk that death will be imposed in an arbitrary, capricious, or unreliable manner. See, e.g., Proffitt v. Florida, 428 U.S. 242 (1976). Mr. Hill was not afforded those protections, and thus was denied his due process, equal protection, and eighth and fourteenth amendment rights.

The trial court sentenced Mr. Hill to death on the basis of six aggravating circumstances (R. 835-42). The court's order imposing the death sentence concludes: "there has not been sufficient mitigating factors to outweigh aggravating circumstances" (R. 842). Clearly, the trial court believed that the six aggravating circumstances the court found were "sufficient" to justify a death sentence.

However, on direct appeal, this Court invalidated the cold,

calculated and premeditated aggravating circumstance because the evidence does not demonstrate a "heightened degree of premeditation, calculation or planning." Hill v. State, 515 So. 2d 176, 179 (Fla. 1987). This Court approved the trial court's other findings of aggravation and affirmed the death sentence. Id.

This Court's failure to reverse and remand for resentencing is in direct conflict with the court's own well-established standards. In Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977), this Court held that if improper aggravating circumstances are found, "then regardless of the existence of other unauthorized aggravating factors we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." Accordingly, reversal is required when mitigation may be present and an aggravating factor is struck, Elledae, supra, or even when mitigation is not found and an aggravating factor is struck. Alvin v. State, 14 F.L.W. 457 (Fla. Sept. 14, 1989); Schafer v. State, 537 So. 2d 988 (Fla. 1989); Nibert v. State, 508 So. 2d 1 (Fla. 1987).

In Alvin, supra, the trial court found no mitigating circumstances and two aggravating circumstances. After invalidating one aggravating circumstance, this Court remanded for resentencing because "we are not convinced that the judge would have imposed the same sentence had he known of the invalidity of one of the two aggravating circumstances." 14 F.L.W. at 458.

The same is true in Mr. Hill's case, and the result should

have been the same. In Mr. Hill's case, the trial court determined that six aggravating circumstances were "sufficient" to justify the sentence of death (R. **842**). Further, the trial court imposed death only after "weighing" the aggravating and mitigating circumstances and determining that mitigation did not "outweigh" aggravation (Id.). The court's order thus indicated that the court relied upon the six aggravating circumstances, weighed those factors against the mitigating circumstances, and found that mitigation did not outweigh aggravation. As in Alvin, supra, there is no way to know if the trial judge would have imposed death had he known of the invalidity of one of the five aggravating circumstances. As in Alvin, Schafer, Nibert, and Elledge, this Court should have remanded for resentencing so that the trial court could have reweighed aggravation and mitigation. This Court's failure to remand for resentencing deprived Mr. Hill of his rights to due process and equal protection by denying him the liberty interest created by Florida's capital sentencing statute. See Vitek v. Jones, **445** U.S. **480 (1980)**; Hicks v. Oklahoma, **447** U.S. **343 (1980)**.

This Court is not the sentencer under Florida law. Reweighing by the sentencer is what the law requires and what the court should have ordered. As the in banc Ninth Circuit has explained:

> Post hoc appellate rationalizations for death sentences cannot save improperly channeled determinations by a sentencing court. Not only are appellate courts institutionally ill-equipped to perform the sort of factual balancing called for at the aggravation-mitigation stage of the sentencing proceedings, but, more importantly, a

> reviewing court has no way to determine how a particular sentencing body would have exercised its discretion had it considered and applied appropriately limited statutory terms.

Adamson v. Ricketts, 865 F.2d 1011, 1036 (9th Cir. 1988)(in banc).[5]

In Florida, the trial court (jury and judge) is the only body authorized to weigh aggravating circumstances against mitigating circumstances. In Mr. Hill's case, this Court unconstitutionally took over that function, contrary to its own precedent, which requires a trial judge to engage in a meaningful weighing of aggravating and mitigating circumstances before imposing a death sentence. See, e.g., Nibert v. State, 508 So. 2d 1 (Fla. 1987); Muehleman v. State, 503 So. 2d 310 (Fla. 1987); Van Royal v. State, 497 So. 2d 625 (Fla. 1986).[6]

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[5]The United States Supreme Court has granted certiorari in Clemons v. Mississippi, 109 S. Ct. 3184 (1989), to consider the very questions at issue here: whether the eighth amendment permits an appellate court to save a sentence of death by reweighing aggravating and mitigating factors where the authority for capital sentencing under state law rests exclusively with the trial court sentencer.

[6]For example, the court sets aside death sentences where findings of fact are issued long after the death sentence was imposed because in such circumstances, the court cannot know that "the trial court's imposition of the death sentence was based on a 'reasoned judgment' after weighing the aggravating and mitigating circumstances." Van Royal, 497 So. 2d at 629-30 (Ehrlich, J., concurring). In Patterson v. State, 513 So. 2d 1257 (Fla. 1987), the court observed that Nibert had held that the judge's failure to write his own findings did not constitute reversible error "so long as the record reflects that the trial judge made the requisite findings at the sentencing hearing." Patterson, 513 So. 2d at 1262, quoting Nibert, 508 So. 2d at 4. Recently, this Court again emphasized that sentencing responsibility rests at the trial court level and that "the sentencing order should reflect that the determination as to

(footnote continued on following page)

Moreover, this Court also usurped the jury's role in Florida capital sentencing. The nature of Florida's capital sentencing process ascribes a role to the sentencing jury that is central and "fundamental," Riley v. Wainwright, 517 So. 2d 656, 657-58 (Fla. 1988); Mann v. Dugger, 844 F.2d 1446, 1452-54 (11th Cir. 1988)(in banc), representing the judgment of the community. Id. Thus, when error occurs before a Florida sentencing jury, resentencing before a new jury is required. Riley; Mann. Mr. Hill's jury was permitted to consider an aggravating circumstance which this Court later held was not properly considered. Thus, this Court should have remanded for resentencing before a new jury, rather than assuming (as it implicitly must have) that Mr. Hill's jury would still recommend death without the invalidated aggravating factors.

Under Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), a Florida capital jury is treated as a sentencer for eighth amendment purposes. Under Mavnard v. Cartwright, 108 S. Ct. 1853 (1988), a sentencing jury must be properly instructed regarding the aggravation it may consider. Hitchcock and Cartwright are new

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which aggravating and mitigating circumstances apply under the facts of a particular case is the result of 'a reasoned judgment' by the trial court." Rhodes v. State, 547 So. 2d 1201, ___ (Fla. 1989).

This Court's precedent thus clearly established that the trial court is the capital sentencer and that the trial court must reach a "reasoned judgment" based upon the trial court's weighing of aggravation and mitigation. In Mr. Hill's case, this Court undertook sentencing responsibility and thus denied Mr. Hill the protections afforded him under the Florida capital sentencing statute.

law establishing that this claim is properly presented in these proceedings and establishing that Mr. Hill is entitled to relief. This Court unconstitutionally usurped the sentencing jury's function.

This Court's failure to follow its own case law and remand for resentencing deprived Mr. Hill of his rights to due process and equal protection and violated the eighth and fourteenth amendments. Relief is proper.

CLAIM VIII

MR. HILL WAS DENIED HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BECAUSE THE JURY WAS NOT PROPERLY INSTRUCTED CONCERNING THE IMPROPER DOUBLING OF AGGRAVATING FACTORS.

This case involved unconstitutional doubling of aggravating circumstances (effecting an escape/hindering law enforcement). This issue involved **per se** reversible error, as this Court's precedents make irrefutably clear. See Provence v. State, **337** So. 2d **783, 786** (Fla. **1976**); Clark v. State, **379** So. 2d **97,** 104 (Fla. 1980); Welty v. State, **402** So. 2d **1139** (Fla. **1981**). Since mitigation was before the sentencing court, this error would have mandated reversal, **see** Elledge v. State, **346** So. 2d **998** (Fla. 1977), particularly because this Court already struck another aggravating circumstance (cold, calculated, and premeditated).

The United States Supreme Court recently held in a case declared to be retroactive on its face that a capital sentencer must make a "reasoned moral response to the defendant's background, character, and crime." Penry v. Lynaugh, **109 S.** Ct. ___, **45** Cr. L. **3188, 3195 (1989).** It is improper to create **"the** risk of an unguided emotional response." **45** Cr. L. at **3195.** A

capital defendant should not be executed where the process runs the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." 45 Cr. L. at 3195. There can be no question that Penry must be applied retroactively. The Court there concluded that, Jurek v. Texas, 428 U.S. 262 (1976), notwithstanding, the Texas death penalty scheme previously found constitutional created the "risk that the death [would] be imposed in spite of factors which [] call[ed] for a less severe penalty." 45 Cr. L. at 3195. Thus Mr. Penry's claim was cognizable in post-conviction proceedings. Similarly here the decision in Penry requires the examination of the procedure in Mr. Hill's case where excess and inappropriate aggravating circumstances invoked "an unguided emotional response."

This Court has consistently reversed the defendant's sentence of death in cases in which aggravating circumstances were "doubled". In Mr. Hill's case the jury was improperly instructed that they could consider the two aggravating circumstances of "effecting escape" and "hindering law enforcement." Mr. Hill's counsel objected to the court instructing the jury on these two aggravating factors because they involved unconstitutional doubling (R. 659). The court overruled the objection stating that they both would apply in this case (R. 659). Thus, the jury was instructed that they could consider both of these aggravating circumstances in determining the appropriate sentence (R. 705).

The jury was allowed to consider two aggravating circumstances which were supported by "the same essential

features" of Mr. Hill's crimes and which had been held to amount to improper doubling in a similar situation. ~~Kennedy v. State~~, 455 So. 2d 351, 354 (Fla. 1984). In fact, the trial court later acknowledged its error and found that:

> The Court is of the opinion that this circumstance (hindering law enforcement) should not be applied as an aggravating circumstance because it in many respects is a duplication of circumstance #4 (effecting escape).

(R. 838).

The trial court's analysis of these two aggravating factors within the context of the facts of Mr. Hill's case (R. 837-38), establish that "they should be treated as a single aggravating circumstance." Kennedy v. State, 455 So. 2d 351, 354 (Fla. 1984). The trial court erred in instructing the jury that they could consider the aggravating circumstances of "effecting escape" and "hindering law enforcement" as two separate aggravating circumstances.

This case, however, involved and involves the unconstitutionally classic types of doubling of aggravating circumstances. It involves fundamental error, and this Court should now correct the clear errors that were not corrected on direct appeal. Moreover, under Penry the presentation of these extra aggravating circumstances guaranteed an "unguided emotional response" by the sentencing judge who also did not consider nonstatutory mitigation, and thus violated the eighth amendment. There is in fact a likelihood in this case that the death sentence was "imposed in spite of factors which [] call[ed] for a less severe penalty." 45 Cr. L. at 3195. Relief is now proper.

In Florida, a resentencing is required when aggravating circumstances are invalidated. See, e.g., Schafer v. State, 537 So. 2d 988 (Fla. 1989)(remanded for resentencing where three of five aggravating circumstances stricken and no mitigating circumstances identified); Nibert v. State, 508 So. 2d 1 (Fla. 1987)(remanded for resentencing where one of two aggravating circumstances stricken and no mitigating circumstances found); cf. Rembert v. State, 445 So. 2d 337 (Fla. 1984)(directing imposition of life sentence where one of two aggravating circumstances stricken and no mitigating circumstances found). The striking of this aggravating factor on direct appeal certainly requires resentencing under Florida law. Under eighth amendment law it is the sentencer who must make the "reasoned moral response." Penry v. Lynaugh, 109 S. Ct. 2934, (1989). The United States Supreme Court has granted certiorari in a case to determine whether an appellate court has the power to usurp the sentencer's discretion and declare improper consideration of an aggravating circumstance harmless. Clemons v. Mississippi, 45 Cr. L. 4082.

Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 630, (Fla. 1989). In fact, Mr. Hill's jury was so instructed. Florida law also establishes that limiting constructions of the aggravating circumstances are **"elements"** of the particular aggravating circumstance. **"[T]he** State must prove [the] element[s] beyond a reasonable doubt." Banda v. State, 536 So. 2d 221, 224 (Fla. 1988). Unfortunately, Mr. Hill's jury received

no instructions indicating that they could not use the same essential facts to support two aggravating circumstances. See Kennedy v. State, 455 So. 2d 351, 354 (Fla. 1984). Its discretion was not channeled and limited in conformity with Cartwright.

Florida law requires the jury to weigh the aggravating circumstances against mitigating evidence. In fact, Mr. Hill's jury was so instructed. This Court has produced considerable case law regarding the import of instructional error to a jury regarding the mitigation it may consider and balance against the aggravating circumstances. In ~~Mikenas v. Dugger~~, the court ordered a new sentencing because the jury had not received an instruction explaining that mitigation was not limited to the statutory mitigating factors. The error was cognizable in post-conviction proceedings even though there had been no objection at trial, the issue had not been raised on direct appeal, and at a resentencing to the judge alone, the judge had known that mitigation was not limited to the statutory mitigating factors. It was cognizable because this Court determined that ~~Hitchcock~~ required the sentencing jury in Florida to receive accurate information which channeled and limited its sentencing discretion, but allowed the jury to give full consideration to the defendant's character and background. Because of the weight attached to the jury's sentencing recommendation in Florida, instructional error is not harmless unless the reviewing court can "conclude beyond a reasonable doubt that an override would have been authorized." Mikenas, 519 So. 2d at 601. In other words, there was sufficient mitigation in the record for the jury

to have a reasonable basis for recommending life and thus preclude a jury override.

Similar conclusions have been reached in other cases where the jury was erroneously instructed. Meeks v. Duaaer, ___ So. 2d ___, 14 F.L.W. 313, 314 (Fla. June 22, 1989)("Had the jury recommended a life sentence, the trial court may have been required to conform its sentencing decision to Tedder v. State, 322 So. 2d 908 (Fla. 1975), which requires that, if there is a reasonable basis for the recommendation, the trial court is bound by it."); Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989)("It is of no significance that the trial judge stated that he would have imposed the death penalty in any event. The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for the recommendation."); Floyd v. State, 497 So. 2d 1211, 1216 (Fla. 1986)("In view of the inadequate and confusing jury instructions, we believe Floyd was denied his right to an advisory opinion. We cannot sanction a practice which gives no guidance to the jury for considering circumstances which might mitigate against death."). In Mr. Hill's case the jury was improperly instructed that it could consider the aggravating circumstances of "effecting escape" and "hindering law enforcement" as two separate aggravating circumstances against which the evidence in mitigation was balanced. In Florida, the jury's pivotal role in the capital process requires its sentencing discretion to be channeled and limited. The failure to provide Mr. Hill's sentencing jury the proper "channeling and limiting" instructions violated the eighth

amendment principle discussed in ~~Maynard v. Cartwright~~.

In Mr. Hill's case, this Court also struck the aggravating circumstance of "cold, calculated and premeditated." In light of this, the error cannot be characterized as harmless. See Elledge v. State, 346 So. 2d 998 (Fla. 1977). The trial court found that these two aggravating factors are merged, and thus that the jury had been improperly instructed. Such an error requires resentencing. The "harm" before the jury is plain -- a jury's capital sentencing decision, after all, is not a mechanical counting of aggravators and involves a great deal more than that. The error denied Mr. Hill an individualized and reliable capital sentencing determination. Knight v. Dusser, 863 F.2d 705, 710 (11th Cir. 1989).

It is, after all, "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty," Lockett v. Ohio, 438 U.S. 586, 605 (1978), that "require[s] us to remove any legitimate basis for finding ambiguity concerning the factors actually considered." Eddings v. Oklahoma, 455 U.S. 104, 119 (1982) (O'Connor, J., concurring). ~~See also~~ Godfrey V. Georgia, 446 U.S. 420 (1980).

It is axiomatic that a death sentence, to be valid, must be soundly based on correct and applicable law. This surely cannot occur when the sentencing jury can inflate the number of aggravating circumstances and produce "an unguided emotional response." Penry, 45 Cr. L. at 3195. The result here is unreliable. The jury's decision was skewed by having duplicitous aggravating factors and another wholly inappropriate aggravating factor. Had the jury been properly instructed, the result here

could well have been different -- there was mitigation in this case. See Hall v. State, 541 So. 2d 1125 (Fla. 1989).

What occurred was fundamental error. The fundamental unfairness in this instance rendered Mr. Hill's capital sentencing proceeding unreliable. Rather than channeling sentencing discretion to avoid arbitrary and capricious results, and narrowing the class of persons eligible for death, Zant v. Stephens, 462 U.S. at 877, the duplication or "doubling" worked just the opposite result. Mr. Hill's sentence of death violates Penry and the eighth amendment. Mr. Hill is entitled to Rule 3.850 relief under the eighth and fourteenth amendments.

CLAIM IX

MR. HILL'S DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE HIS JURY WAS PREVENTED FROM GIVING APPROPRIATE CONSIDERATION TO; AND HIS TRIAL JUDGE REFUSED TO CONSIDER ALL EVIDENCE PROFFERED IN MITIGATION OF PUNISHMENT CONTRARY TO EDDINGS V. OKLAHOMA, MILLS V. MARYLAND, AND HITCHCOCK V. FLORIDA.

At the time of Mr. Hill's trial it was axiomatic that the eighth amendment required that a capital sentencer, "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978). No less clear was the fundamental tenant that "the sentencer may not refuse to consider or be precluded from considering any relevant mitigation." Eddinss, supra at 114. Recently in Mills v. Maryland, 108 S. Ct. 1860 (1988), the United States Supreme Court

in surveying the prime directive of ~~Lockett~~ and its progeny stressed the ability of the sentencer to consider all evidence of mitigation unimpeded.

> [I]t is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, Lockett v. Ohio, supra; ~~Hitchcock v. Duaaer~~, ___ U.S. ___ 107 S. Ct. 1821, 95 L.Ed. 2d (1987); by the sentencing court, ~~Eddings v.~~ Oklahoma, supra; or by evidentiary ruling, Skipper v. South Carolina, [476 U.S. 1 (1986)] . . . [w]whatever the cause, the conclusion would necessarily be the same: Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of Lockett, it is our duty to remand this case for resentencing."

Mills at 1866 quoting Eddings v. Oklahoma, 455 U.S. at 117 (O'Connor, J., concurring).

In Mr. Hill's case, the judge refused to follow ~~Eddinss~~, supra; Hitchcock, ~~supra~~; Mills, ~~supra~~; Penry v. Lynaugh, 109 S. Ct 2934 (1989), and his jury was precluded from fully considering substantial and unrebutted statutory and nonstatutory mitigation regarding Mr. Hill's drug intoxication, chronic drug abuse, below average intelligence, learning disability, substantial domination by his co-defendant, and his role as a good provider for his family.

Cliff Jackson, Mr. Hill's co-defendant, testified at the resentencing that the pair began to use drugs on the early morning of October 19, 1982 (R. 573), and that after the pair walked to Mobile, Jackson grew tired and decided to steal a car (R. 573). Jackson further testified that the pair continued to use cocaine throughout the morning and were doing lines of

cocaine in the stolen car en route to Pensacola (R. 573). Upon arriving in Pensacola it was Jackson who decided they should rob a bank (R. 574). Jackson then decided the pair needed a disguise and purchased for both Hill and himself a pair of sunglasses (R. 575). Jackson testified that the pair entered Freedom Savings, where he approached a teller and asked about opening an account. Jackson testified he was directed to another teller where he continued the pretextual dialogue about opening an account and then signaled to Mr. Hill that the robbery should commence (R. 576). At that point Jackson walked behind the barrier separating the tellers from the lobby and stood behind a teller using his finger to simulate the barrel of a gun (R. 576). Jackson then instructed Mr. Hill to "get those two women" who Jackson believed were attempting to activate the silent alarm (R. 577, 578). Mr. Hill complied with Jackson's instructions and placed the women behind the counter on the floor (R. 577, 591). Jackson then asked the tellers the location of the vault and when there was no reply threatened all the employees by saying, "If don't nobody know where the safe is then this woman here, she goes." (R. 577). When there was no immediate reply Jackson instructed Mr. Hill to grab a maintenance man who Jackson believed to be the bank manager. Again, Mr. Hill complied with Jackson's orders (R. 577).

When a teller told Jackson she could open the vault Mr. Hill accompanied her. A telephone rang during the course of the robbery and Jackson instructed the teller he was holding to "answer the phone and act normal" (R. 578). Jackson heard the caller state that the police were out front and told Mr. Hill to

come out of the safe (R. **578).** Jackson then grabbed a plastic trash bag and placed the money in it. Jackson and Mr. Hill then proceeded out the back door. When some of the money was dropped on the floor, Jackson stopped to pick it up. Mr. Hill, who did not see Jackson stop to retrieve the money, proceeded to exit through the back door (R. **579).** Jackson, upon seeing a police car at the back door, decided to exit via the front door where he was apprehended by two officers (R. **579).** Jackson was lying in a prone position when he heard someone yell **"halt"** followed by gunfire (R. **580).** Jackson then got up and saw one of the officers approaching him with his gun drawn. There was a struggle for the weapon which Jackson ultimately gained control of. Taking aim at the officer, Jackson fired the weapon only to discover that it was empty (R. **581).** On cross-examination Jackson testified that he told Mr. Hill which car to steal in Mobile (R. **585-86)** and that he was the leader of the robbery.

Clarence Hill testified at resentencing that since age 16, he had been employed and contributed to the financial support of his parents, siblings, and extended family members up to and including shortly before his arrest in the instant case (R. **604**, 607). Mr. Hill also testified that he had been **"snorting"** cocaine throughout the day of October **18, 1982,** into that night, and began using cocaine again on the morning of the 19th up until the time of the instant offense (R. 610). Mr. Hill testified the cocaine made him feel "like [he] could do just about anything" (R. 611).

Edna Hill, Mr. Hill's father, testified that his son

contributed portions of his salary towards household expenses to help support the family (R. 559). Octavia Hill, Mr. Hill's mother, testified on cross-examination that her son was incapable of making independent decisions and throughout his life, with one exception, had always sought to rely on the advise of others (R. 551-52). On direct examination Mrs. Hill testified that she was at a loss to explain her son's conduct but had heard in the neighborhood that he had been using "dope" (R. 551). Paul Wilson, a former classmate, and friend of Mr. Hill testified at trial that Mr. Hill used marijuana in his presence on prior occasions (R. 1367) and only a few days prior to the instant offense Mr. Wilson had seen both Mr. Hill and Jackson and that Mr. Hill "looked like he was . . . on something." (T. 1368).

The defense mental health expert, Dr. James Larson, testified that Mr. Hill's profile on the MMPI **foundindications of [Mr. Hill] being the type of individual who would readily use drugs, as the sort of person who could be impulsive. This sort of person would enjoy the experience of being high intoxicated or enjoy the experience of being high" (R. 512). Dr. Larson also testified that Mr. Hill had a verbal score on the WAIS-R intelligence test of 76 which places him in the "borderline range (R. 509). Dr. Larson also testified that a California test of mental maturity administered in school when Mr. Hill was twelve years old reflected a score of 67 "which falls in the retarded range" (R. 510). Dr. Larson pointed out, however, that this test did not measure non-verbal performance and could not be used as an accurate measure of Mr. Hill's I.Q. (R. 510). Dr. Larson

opined that Mr. Hill's full range I.Q. score based on the WAIS-R was 84, placing Mr. Hill in the 16th percentile of the population (R. 508). Dr. Larson also testified that he found "no major mental illness or psychosis . . . that is he is without serious mental disorder" (R. 511). Based on Mr. Hill's full range I.Q. score Dr. Larson determined that Mr. Hill was not retarded (R. 515).

On rebuttal, the State introduced the testimony of Officer Eddie Ragland who had arrested Mr. Hill in 1982. Officer Ragland testified that a search of the vehicle that Mr. Hill was driving disclosed a bag of marijuana under the front seat (R. 656). In addition, there were numerous other witnesses who would have substantiated Mr. Hill's chronic history of drug abuse and specifically his drug use on the day of the offense. See Claim V, supra. Moreover, we now know that the only evidence with which the State sought to rebut evidence of Mr. Hill's intoxication at the time of the offense was unreliable or false or both. See Claim III, supra.

Without question evidence of intoxication at the time of the offense under Florida law is a relevant nonstatutory mitigating circumstance which must be considered by the sentencer. Hararave v. Dugger, 832 F.2d 1528, 1534 (11th Cir. 1987); Foster v. Dugger, 518 So. 2d 901, 902 n.2 (Fla. 1987); Waterhouse v. Dugger, 522 So. 2d 341, 344 (Fla. 1988). In Mr. Hill's case the proffered evidence of voluntary intoxication was ignored by the court based on the erroneous evidentiary ruling that qualified Mr. Reid Leonard as an expert in chemistry. A qualification which was objected to by the defense and for which Mr. Leonard

was decidedly unfit to enjoy. This violated Eddings, supra at 876. Here the refusal was not based on the courts restrictive interpretation of admissible non-statutory mitigation present in Eddinss, but rather the court's erroneous evidentiary ruling which allowed incompetent evidence to be received and thereby allowed the court to ignore Mr. Hill's intoxication as a statutory mitigating factor pursuant to Fla. Stat. 921.141(6)(f). As Mills instructs, the actual impediment to consideration is irrelevant if the net result is the preclusion from the sentencer's consideration of all mitigation. Unmistakably the court in Mr. Hill's case was so precluded as evidenced by its sentencing order:

> 1. 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. There was testimony of a psychologist who conducted psychological examinations on the Defendant. That he gave IQ tests as to the psychological age. He had furnished to him the school records of the Defendant from the 9th to 12th grade and had the benefit of the consultations with Defendant himself. That the verbal IQ test showed the Defendant at 76 which was borderline normal. His performance was 101, 52 being the average; and the Defendant was well within the range of average. He was at 84 in another category which was low average. He had no mental illness or disorder. He would not be appropriate for involuntary hospitalization under the Baker Act. On cross-examination, he testified that the mental age was consistant with the chronological age. Along with this, there was the benefit of the Defendant's testimony at trial and the Court's observation was that his testimony did not appear to be unusual, slow or dim-witted. He testified in a manner that indicated he understood the nature of the questions and responded appropriately. He did testify that he had been sniffing cocaine and presented the testimony of his

> accomplice who indicated that they had had some cocaine, but there was expert testimony by Dr. Reid Leonard that as a result of the blood samples of the Defendant furnished by examination by way of chemical analysis showing only a residue of aspirin. The Court had the benefit of the Defendant's testimony to weigh with this testimony. The Court is of the opinion based upon the evidence that the Defendant has not sustained this mitigating circumstance.

(R. 839-40).

By accepting the incompetent evidence regarding Mr. Hill's "blood test" the court effectively nullified all proffered evidence of Mr. Hill's intoxication at the time of the offense and simply failed to consider Mr. Hill's well documented history of chronic drug abuse. Thereby erroneously refusing to consider any such evidence not only as a statutory mitigating factor but, as nonstatutory mitigation as well.

That the court's refusal to consider evidence of Mr. Hill's intoxication at the time of the offense, and history of drug abuse, in conjunction with his below average intelligence pursuant to subsection (6)(b) was erroneous is made patent by the case law interpreting this mitigating factor. The Florida Supreme Court in Perri v. State, 441 So. 2d 606 (Fla. 1983), noted the proper standard to be applied with respect to this statutory mitigating factor:

> The trial court denied defendant's request for a psychiatric evaluation prior to the sentence proceeding. The trial court found the defense of insanity had not been raised and there was no indication or evidence that the defendant was incompetent. The court also found that the prior psychiatric evaluation had determined that the defendant was competent.
>
> Section 921.141(6)(b), Florida Statutes

(1981), states that a felony committed while defendant was under the influence of extreme mental or emotional disturbance is a mitigating factor.

Section 921.141(6)(f) states that if 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, a mitigating factor arises.

We explained these mitigating factors in State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), as follows:

> Extreme mental or emotional disturbance is a second mitigating consideration, pursuant to Fla.Stat. Section 921.141(7)(b), F.S.A., which is easily interpreted as less than insanity but more than the emotions of an average man, however inflamed.
>
> * * *
>
> Mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance. Fla.Stat. Section 921.141(7)(f), F.S.A. Like subsection (b), this circumstance is provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state.
>
> * * *

Perri did not testify during the guilt proceeding and did not testify during the sentence proceeding. His only testimony was given to the judge for the purpose of stating that he had been in mental institutions. This should be enough to trigger an investigation as to whether the mental condition of the defendant was less than insanity but more than the emotions of an average man, whether he suffered from a mental disturbance which interfered with, but did not obviate, his knowledge of right and wrong. A defendant may be legally answerable for his actions and legally sane, and even

> though he may be capable of assisting his counsel at trial, he may still deserve some mitigation of sentence because of his mental state.

Id. at 608-9. See also Amazon v. State, 487 So. 2d 8, 13 (Fla. 1986)(inconclusive evidence that defendant had taken drugs the night of the offense and stronger evidence that the defendant had a history of drug abuse constitutes sufficient evidence that defendant could have acted under extreme mental or emotional distress).

Clearly, as reflected in the sentencing order, the trial court's erroneous evidentiary ruling led to the court's refusal to consider the proffered evidence in mitigation. Eddings, makes plain that the trial court may not "refuse to consider as a matter of law, any relevant mitigating evidence. Id. at 877. By making the erroneous evidentiary ruling with respect to the State's "expert" chemist the trial court effectively precluded its consideration of this evidence by depriving Mr. Hill of the individualized sentencing to which he is entitled. In doing so, the court committed fundamental eighth amendment error and resentencing relief is now warranted.

The trial court not only refused to consider statutory and non-statutory mitigation of Mr. Hill's intoxication but in addition refused to consider Jackson's substantial domination of the dim-witted, and intellectually impaired, Clarence Hill, as the following makes plain:

> MR. TERRELL: For the record, I'm requesting the one about domination of another.
>
> THE COURT: No, I'm not giving that. He wasn't dominated by anyone. In fact, if you

take the evidence from the side of the State, they completely refuted he was leading.

MR. ALLRED: I don't care if you give anything he asks, just to avoid the question.

THE COURT: I'm not going to give it, because he wasn't dominated.

MR. ALLRED: He's saying that he was and would suggest that, you see it's an alternative in that instruction. It says either under the domination of another or under extreme duress. This duress idea may flow from the cocaine thing, if we fail to give the instruction.

THE COURT: That's why you give them the other one.

MR. ALLRED: Under the doubling up thing, I guess.

THE COURT: Yeah, I'm giving that one because he said it. Whether they believe it or not, that's another matter, but he said, "I was high on coke. I didn't know what I was doing." So -- all right, you can give it, that's all. Let's see, we came up with No. 4, wasn't it?

MR. TERRELL: Yes, sir. For the record, I note my objection regarding No. 5.

(R. 662-3).

This ruling by the court is at once both confused and confusing. Ultimately this ruling demonstrates in the plainest terms possible the court's refusal to consider the proffered evidence in mitigation of Jackson's substantial domination, and Mr. Hill's dependence on the decision making of others. Rather then accepting the fact that Mr. Hill had a right to the mitigating instruction once "any evidence" has been introduced to support this mitigating factor, see, e.g., Garner v. State, 480 So. 2d 91, 92, 93 (Fla. 1985), the trial court apparently assumed that once the state introduces evidence in rebuttal as to the

existence of this mitigating factor the court may sua sponte issue a quasi directed verdict on that statutory mitigator. This stands in sharp contrast to the eighth amendment teachings of Lockett, supra. Eddings, supra; Mills, supra; Hitchcock, supra.

Mr. Hill's domination by his co-defendant Jackson was unmistakeably a proper statutory mitigating factor established by the legislature and improperly ignored by the trial court. As Eddings makes plain, "[while] a sentencer . . . may determine the weight to be given relevant mitigating evidence . . . [] they may not give it no weight by excluding such evidence from [its] consideration." Id. at 114-5. The court's flat refusal to consider the substantial proffered evidence regarding domination, let alone to instruct Mr. Hill's jury pursuant to subsection (6)(l) stands in sharp contrast to this basic eighth amendment requirement. If one juror cannot "blackball" from considering a mitigating factor, Mills, supra, it becomes difficult, if not impossible, to determine how a trial court may constitutionally preclude such consideration. The mere fact that trial counsel was able to argue the existence of substantial domination by Jackson cannot suffice to replace the sentencer's individualized consideration of this factor. Mere presentation alone is not sufficient. Downs V. Dugger, 514 So. 2d 1069 (Fla. 1987). Nor can the general Lockett catchall instruction suffice. Unlike the other six statutory mitigating factors which pertain exclusively to the defendant's conduct, history, and mental state, subsection (6)(e) like subsection (6)(c) pertains to the conduct of others, and completely external to the capital defendant.

Thus a rational juror could reasonably believe that an instruction which allowed for consideration of any other aspect regarding the defendant's character or record, and any other circumstance of the offense -- read in conjunction with the statutory mitigating factors pertaining exclusively to the defendant, actually precluded from their consideration the character or actions of a codefendant. Cf. Mills v. Maryland, 108 S. Ct. 1860, 1866 (1988). In this fashion, as in Penry, the trial court's failure to instruct on the statutory mitigating factor of substantial domination may well have deprived Clarence Hill's jury with a vehicle to give mitigating effect to Jackson's domination of Clarence Hill. Penry at 2449.

Similarly the court also failed to instruct Mr. Hill's jury that they could consider as a statutory mitigating factor that:

> The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

In Perri, supra. The Florida Supreme Court noted the proper standard to be applied with respect to this statutory mitigating factor:

> We explained [this] mitigating factors in State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), as follows:
>
> > Extreme mental or emotional disturbance is a second mitigating consideration, pursuant to Fla.State. Section 921.141(7)(b), F.S.A., which is easily interpreted as less than insanity but more than the emotions of an average man, however inflamed.

Perri at 608. See also Amazon v. State, 487 So. 2d 8, 13 (Fla. 1986)(inconclusive evidence that defendant had taken drugs the

night of the offense and stronger evidence that the defendant had a history of abuse constituted sufficient evidence that the defendant could have acted under extreme mental or emotional distress). Here as in Amazon, substantial testimony was introduced demonstrating not only intoxication on the day of the offense but also Clarence Hill's longstanding chronic drug abuse. In addition, evidence was also presented that Mr. Hill suffered from profound learning disabilities and intellectual impairments. The proffered evidence here rose to a level far above that in Amazon, yet the trial court once again refused to consider or instruct Mr. Hill's jury with respect to this statutory mitigating factor. Once again the sentencer was precluded from considering and the court refused to consider all statutory mitigation proffered by the defense. As Mills, makes plain the sentencer's ability to consider all evidence of mitigation must be unimpeded, the actual barrier to the consideration of the mitigating evidence is of no moment. Here, the trial judge boldly refused to consider, Eddings, supra, and Mr. Hill's jury was precluded from considering, Lockett, supra, Hitchcock, supra, this statutory mitigating factor. As a result, Mr. Hill's sentence of death is unreliable and rule 3.850 relief is appropriate. The unreliability of Mr. Hill's death sentence is beyond question. Not only was Mr. Hill's jury precluded from considering two statutory mitigating factors but in addition, weighed what little non-precluded mitigation remained against two invalid aggravating factors. See Hill v. State, 515 So. 2d 176 (Fla. 1987).

The court also failed to consider the non-statutory

mitigating factor that the defendant was a good provider notwithstanding uncontroverted evidence from Octavia Hill, Edna Hill, and Clarence Hill's own testimony that he consistently contributed portions of his salary towards the economic support of his family and extended family. Despite the presence of this mitigating circumstance the court found no non-statutory mitigation. In its sentencing order the court stated:

> Any other aspect of the Defendant's character or record and any other circumstances of the offense - several witnesses, James Wilson knew the Defendant for 19 years and was a school mate; Lucille Tilley knew the Defendant and his family for 19 years; Mrs. Petway knew the Defendant and his family for a number of years in Mobile since 1968; Grace Singleton, 79 years old, knew the Defendant when he was a little boy; Patsy McCaskill, his sister-in-law, knew him about six years; and the father and mother of the Defendant testified as to particulars of his character when he was a boy for honesty and peacefulness. On cross-examination, Tilley didn't know the Defendant had been arrested for robbery in Mobile as did Petway; Singleton was not aware of the robbery; McCaskill did know about the robbery. The Court is of the opinion that this evidence is insufficient to support this mitigating circumstance.

(R. 841-2).

The eighth and fourteenth amendments require that a state's capital sentencing scheme establish appropriate standards to channel the sentencing authority's discretion, thereby "eliminating total arbitrariness and capriciousness" in the imposition of the death penalty. Proffitt v. Florida, 428 U.S. 242 (1976). A reviewing court should determine whether there is support for the original sentencing court's finding that certain mitigating circumstances are not present. Magwood v. Smith, 792

F.2d 1438, 1449 (11th Cir. 1986). If that finding is clearly erroneous the defendant "is entitled to resentencing." Id. at 1450. The Florida Supreme Court has recognized that a capital defendant's contributions to family ,community or society reflects on character and provides evidence of positive character traits to be weighed in mitigation. Rosers v. State, 511 So. 2d 526, 535 (Fla. 1987) citing Lockett v. Ohio, 438 U.S. 536, 604-5 (1978). Here, as in Roaers, Mr. Hill established consistent economic support to his family, evidence that went completed uncontroverted by the State.

In Lamb v. State, 532 So. 2d 1051 (Fla. 1988), this Court remanded the case for resentencing where it was not clear that the trial court had considered the evidence presented in mitigation. In addition to information about a drug problem,

> Lamb also introduced nonstatutory mitigating evidence that he would adjust well to prison life; that his family and friends feel he is a good prospect for rehabilitation; that before the offense he was friendly, helpful, and good with children and animals;

Lamb, supra, at 1054. This Court quoted from its opinion in Rosers v. State, 511 So. 2d 526, 534 (Fla. 1987), saying:

> the trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of

> sufficient weight to counterbalance the aggravating factors.

Since the court was "not certain whether the trial court properly considered all mitigating evidence," id. at **1054,** the case was remanded for a new sentencing.

Here, the judge refused to recognize mitigating circumstances that were present. Under ~~Penry v. Lynaugh~~'s requirement that a capital sentencer fully consider and give effect to the mitigation, **109** S. Ct. **2934 91989),** as well as under Eddings, supra; Magwood, supra; and ~~Lamb~~, ~~supra~~, the sentencing court's refusal to consider this non-statutory mitigating circumstance which was established was error.

Mr. Hill's jury was also precluded from considering the mitigating evidence of his intellectual deficits and learning disabilities present since birth. Dr. Larson found that Mr. Hill suffered from a severe learning disability, and that he was of subnormal intelligence which affected him both mentally and emotionally.

Notwithstanding this evidence, a reasonable juror could have found that Mr. Hill's disabilities did not establish the only statutory mitigating circumstance instructed. Mr. Hill's jury was instructed, that mental or emotional disabilities could be considered as mitigating circumstances if the evidence demonstrated that:

> That 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. *706).*

Although Dr. Larson did not believe that Mr. Hill's

disorders "substantially impaired" his capacity for controlling his behavior or appreciating its wrongfulness at the time of the offense, a reasonable juror could have found the disorders were not so severe that they met the statutory criteria. Indeed Dr. Larson testified that Mr. Hill suffered from no major mental illness or psychosis. Nevertheless, a reasonable juror could still have found on the basis of the evidence that Mr. Hill did suffer from a learning disability and below average intelligence, that he suffered from this disorder much of his life, and that in conjunction with his cocaine intoxication, it plainly contributed to his thinking and behavior at the time of the crime. As previously noted the Florida law recognizes that a history of drug and alcohol addiction can be considered as a nonstatutory mitigating factor. Harsrave v. Dusser, 832 F.2d 1528, 1534 (11th Cir. 1987); Foster v. Dusser, 518 So. 2d 901, 902 n.2 (Fla. 1987); Waterhouse v. Dusser, 522 So. 2d 341, 344 (Fla. 1988).

In this overall context, a reasonable juror plainly could have believed that all of the evidence bearing upon Mr. Hill's mental and emotional condition of the time of the crime was to be considered only in relation to the one statutory mitigating circumstance which addressed this concern. Hararave v. Dugger, 832 F.2d 1528, 1534 (11th Cir. 1987); Messer v. Florida, 834 F.2d 890, 894-5 (11th Cir. 1987); Cf. Mills v. Maryland, 108 S. Ct. 1860, 1866 (1988).

The reasonableness of this interpretation of the instructions is supported by the trial courts findings in support of Mr. Hill's sentence of death. As demonstrated by his

findings, the trial judge considered the evidence of Mr. Hill mental and emotional disabilities only in relation to the one statutory mitigating circumstances which addressed this subject. Certainly a reasonable juror could likewise assume that consideration of Mr. Hill's mental and emotional state were exclusively limited to this enumerated statutory mental mitigating factor and nowhere else. In this respect, the preclusive instruction in Hill's case which reasonable jurors could have interpreted in a "all or nothing" fashion thereby foreclosing further consideration of the effects of Mr. Hill's learning disability and below average intelligence as nonstatutory mitigation operated in much the same fashion as the special circumstances in Penry v. Lynaugh, 109 S. Ct. 2934 (1989). In Penry the Court found that the use of the qualifer "deliberately" in Texas' functional equivalent of a mitigating factor without further definition was insufficient to allow the jury to give effect to Johnny Penry's mitigating evidence of mental retardation. The issues involved in several cases currently pending before the United States Supreme Court will have import for the issue presented here. See Blystone v. Pennsylvania, 109 S. Ct. 1567 (1989); Boyle v. California, 109 S. Ct. 2447 (1989); Saffle v. Parks, 109 S. Ct. 1930 (1989).

In Penry the Court found that a rational juror could have concluded that Penry's mental retardation did not preclude him from acting deliberately, yet also conclude that Penry's mental retardation made him less culpable than a normal adult. In striking the sentence of death the Court noted:

> In this case, in the absence of instructions

> informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to that evidence in rendering its sentencing decision. Our reasoning in Lockett and Eddings thus compels a remand for resentencing so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett, 438 U.S., at 605, 93 S.Ct., at 879 (concurring opinion). "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett, 438 U.S., at 605, 98 S.Ct., at 2965.

Here, reasonable jurors at Mr. Hill's trial, having found that his learning disability and below average intelligence was not **"substantial"** may still well have concluded that Mr. Hill's intellectual impairments reduced his moral culpability, but were left with no vehicle with which to give effect to that conclusion.

The trial court's findings thus establish not only that he failed to comply with Lockett, in his own sentencing deliberations by refusing to consider Mr. Hill's intoxication, intellectual impairments, domination by his co-defendant and status as a good provider, but also that a reasonable juror, despite knowing that she might consider nonstatutory mitigating circumstances could believe that the evidence of mental health and emotional disability was properly considered only in relation to the statutory mitigating circumstance. Ultimately the court's refusal to consider and the jury's reasonable mistake in failing to consider meant that neither fully considered the only evidence in Mr. Hill favor in deciding whether he should live or die.

In Penry, the Supreme Court held:

> [5,6] Underlying Lockett and Eddings is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." California v. Brow, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987)(concurring opinion). Moreover, Eddings makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence. Hitchcock v. Dusser, 481 U.S. 393, 107 S. Ct. 1821, 95 L.Ed.2d 347 (1987). Only then can we be sure that the sentencer has treated the defendant as a "uniquely individual human **being[g]**" and has made a reliable determination that death is the appropriate sentence. Woodson, 428 U.S., at 304, 305.

109 S. Ct. at 2947.

The jury was not allowed and the judge refused to comply with the dictates of Penry. These fundamental violations of eighth amendment jurisprudence demonstrate that Rule 3.850 relief is now appropriate.

CLAIM X

DURING THE COURSE OF MR. HILL'S TRIAL THE COURT IMPROPERLY ASSERTED THAT SYMPATHY AND MERCY TOWARDS MR. HILL WAS AN IMPROPER CONSIDERATION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The jury in Mr. Hill's trial was repeatedly admonished by the State Attorney, and instructed by the trial court, that

feelings of mercy or sympathy could play no part in their deliberations as to Mr. Hill's ultimate fate. During the penalty phase closing argument, the prosecutor made it plain that considerations of mercy and sympathy were to have no part in the proceedings:

> we spend so much time doing in voir dire in selecting you, was for . . . us to pick 12 of you from among the community who would best be able to impartially and objectively consider the facts and circumstances of this case, impartially and objectively without undue emphasize toward the emotional aspects that arise on both sides of the case; people that will make a decision not based upon feeling sorry for Steve Taylor and his family and will not make a decision based upon feeling sorry for the defendant or his family. But rather people that can coolly, coldly, and calculatedly, and objectively reach a decision in this case based upon the facts that have been proffered to you beyond a reasonable doubt,

(R. 664). The prosecutor went further:

> Now, I mentioned my oath, and I've mentioned the oaths of all the other people involved and yours as well. Now, in executing that oath, in living up to the requirements of that oath, <u>what I want you to do is keep in mind the perspective involved so far as your individual feelings about mercy</u>. No one likes the idea of taking another person's life, no one. And, therefore, when a person's life is at stake, you should not look at it as an individual responsibility that you hold. In taking an oath, contrary to it being a personal responsibility, you have simply sworn to consider all the circumstances and apply the law. It's a one-plus-one-step process. You don't have to personally involve yourself in that. All you have to do is be reasonable about the facts and circumstances that have been shown and then pursuant to your oath you are required to apply those to the law, and it's the law. We're a nation of laws, not men. that's why it's not your decision. It's the law's decision as to what happens and what should happen to Clarence Hill.

> Mr. Terrell mentioned something to you in opening statement about being true to yourselves. You have not taken an oath to be true to yourselves. It's assumed you'll be true to yourselves. But being true to yourself is not involved in the process of determining what the law says should happen to Clarence Hill. You should be true to your oath, and your oath is to follow the law. So in being true to yourselves, be true to your oath, be true and be sure than when you're making your individual vote in there, that you are following the law, being true to the law. Because it's the law that says what aggravating circumstances are and what mitigating circumstances are. And then whether one outweighs the other is your decision under the law, not outside the law. Not mercy for mercy's sake. Because that would go outside the scope of the law and exceed your oath.

(R. 668).

Trial counsel objected to that argument and the court sustained the objection but gave no cautionary instruction to correct the misstatement of the prosecutor. In fact, the court later placed its imprimatur on the State Attorney's no mercy or sympathy admonishment to the jury by expressly instructing them prior to their deliberations that such considerations were precluded by law and would result in a miscarriage of justice. Significantly, the following instruction was the only one provided by the court with respect to the role that mercy or sympathy could play in deliberations:

> This advisory recommendation must be decided only upon the evidence you have heard and the answers of the witnesses that are in the form of exhibits and evidence and these instructions. This recommendation must not be decided for or against anyone because you feel sorry for anyone or you're angry at anyone. Remember, the lawyers are not on trial. Your feelings about them should not influence your decision in this case.

> Feelings of prejudice, bias or sympathy are not legally reasonable doubts, and they should not be discussed by any of you in any way. Your recommendation must be based on your views of the evidence and on the law contained in these instructions.

(R. 710)(emphasis added). The jury was never informed that a different standard, one allowing for consideration of mercy or sympathy, was applicable at the penalty phase.

In Wilson v. Kemp, 777 F.2d 621, 624 (11th Cir. 1985), the court found that statements of prosecutors, which may mislead the jury into believing personal feelings of mercy must be cast aside, violate the federal constitution:

> The clear impact of the [prosecutor's statements] is that a sense of mercy should not dissuade one from punishing criminals to the maximum extent possible. This position on mercy is diametrically opposed to the Georgia death penalty statute, which directs that "the jury shall retire to determine whether any mitigating or aggravating circumstances . . . exist and whether to recommend mercy for the defendant." O.C.G.A. Section 17-10-2(c)(Michie 1982). Thus, as we held in Drake, the content of the [prosecutor's closing] is "fundamentally opposed to current death penalty jurisprudence." 762 F.2d at 1460. Indeed, the validity of mercy as a sentencing consideration is an implicit underpinning of many United States Supreme Court decisions in capital cases. See, e.g., Woodson v. North Carolina, 428 U.S. 280, 303, 96 S.Ct. 2978, 2990, 49 L.Ed.2d 944 (1976)(striking down North Carolina's mandatory death penalty statute for the reason, inter alia, that it failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death"); Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978)(striking down Ohio's death penalty statute, which allowed consideration only of certain mitigating circumstances, on the grounds that the sentencer may not "be precluded from considering as a mitisating

> factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death") (emphasis in original). The Supreme Court, in requiring individual consideration by capital juries and in requiring full play for mitigating circumstances, has demonstrated that mercy has its proper place in capital sentencing. The [prosecutor's closing] in strongly suggesting otherwise, misrepresents this important legal principle.

Wilson v. Kemp, 777 F.2d at 624. Requesting the sentencers to dispel any sympathy they may have had towards the defendant undermined the sentencers' ability to reliably weigh and evaluate mitigating evidence. The sentencers' role in the penalty phase is to evaluate the circumstances of the crime and the character of the offender before deciding whether death is an appropriate punishment. Eddings v. Oklahoma, 455 U.S. 104 **(1982)**; Lockett v. Ohio, 438 U.S. **586** (1978). An admonition to disregard the consideration of sympathy improperly suggests to the sentencer "that it must ignore the mitigating evidence about the [petitioner's] background and character," California v. Brown, 479 U.S. **538**, 107 **S.** Ct. 837, 842 (1987)(O'Connor, J., concurring). The sympathy arising from the mitigation, after all, is an aspect of the defendant's character that must be considered:

> The capital defendant's constitutional right to present and have the jury consider mitigating evidence during the capital phase of the trial is very broad. The Supreme Court has held that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," Lockett v. Ohio,

438 U.S. 586, 604 (1978) (emphasis in original). See also Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

The sentencer must give "individualized" consideration to the mitigating circumstances surrounding the defendant and the crime, Brown, 479 U.S. at 541; Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddinss v. Oklahoma, 455 U.S. 104, 111-12 (1982); Lockett, 438 U.S. at 605, and may not be precluded from considering "any relevant mitigating evidence." Eddinss, 455 U.S. at 114. See also Andrews v. Shulsen, 802 F.2d 1256, 1261 (10th Cir. 1986), cert. denied, ___ U.S. 107 S. Ct. 1964, 95 L. Ed. 2d 536 (1987).

Mitigating evidence about a defendant's background or character is not limited to evidence of guilt or innocence, nor does it necessarily go to the circumstances of the offense. Rather, it can include an individualized appeal for compassion, understanding, and mercy as the personality of the defendant is fleshed out and the jury is given an opportunity to understand, and to relate to, the defendant in normal human terms. A long line of Supreme court cases shows that a capital defendant has a constitutional right to make, and have the jury consider, just such an appeal.

In Gregg v. Georgia, 428 U.S. 153 (1976), the Court upheld the Georgia sentencing scheme which allowed jurors to consider mercy in deciding whether to impose the penalty of death. Id. at 203. The Court stated that "[n]othing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." Id. at 199.

In Woodson v. North Carolina, 428 U.S. 280, 304 (1976), the Court struck down mandatory death sentences as incompatible with the required individualized treatment of defendants. A plurality of the Court stated that mandatory death penalties treated defendants "not as uniquely individual human beings but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty." Id. at 304. The Court held that "the fundamental respect for humanity underlying the Eight Amendment . . . requires consideration of the

character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Id. The Court explained that mitigating evidence is allowed during the sentencing phase of capital trial in order to provide for the consideration of "compassionate or mitigating factors stemming from the diverse frailties of humankind." Id.

In Eddings v. Oklahoma, 455 U.S. 104 (1982), the Court reviewed a sentencing judge's refusal to consider evidence of a defendant's troubled family background and emotional problems. In reversing the imposition of the death penalty, the Court held that "[j]just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." Id. at 113-14 (emphasis in original). The Court stated that although the system of capital punishment should be "consistent and principled," it must also be "humane and sensible to the uniqueness of the individual." Id. at 110.

In Caldwell v. Mississippi, 472 U.S. 320 (1985), the Court held that an attempt to shift sentencing responsibility from the jury to an appellate court was unconstitutional, in part, because the appellate court is ill equipped to consider "the mercy plea [which] is made directly to the jury." Id. at 330-31. The Court explained that appellate courts are unable to "confront and examine the individuality of the defendant" because "[w]whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record." Id.

In Skipper v. South Carolina, 476 U.S. 1 (1986), the trial court had precluded the defendant from introducing evidence of his good behavior while in prison awaiting trial. The Court held that the petitioner had a constitutional right to introduce the evidence, even though the evidence did not relate to his culpability for the crime. Id. at 4-5. The Court found that excluding the evidence "impeded the sentencing jury's ability to carry out its task of considering

all relevant facets of the character and record of the individual offender." Id. at 8.

"Mercy," "humane" treatment, "compassion," and consideration of the unique "humanity" of the defendant, which have all be affirmed as relevant considerations in the penalty phase of a capital case, all inevitably involve sympathy or are sufficiently intertwined with sympathy that they cannot be parsed without significant risk of confusion in the mind of a reasonable juror. Webster's Third International Dictionary (Unabridged ed. 1966) describes "mercy" as "a compassion or forbearance shown to an offender," and "a kindly refraining from inflicting punishment or pain, often a refraining brought about by a genuinely felt compassion and sympathy." Id. at 1413 (emphasis added). The word "humane" similarly is defined as "marked by compassion, sympathy, or consideration for other human beings." Id. at 1100 (emphasis added). Webster's definition of "compassion" is a "deep feeling for and understanding of misery or suffering," and it specifically states that "sympathy" is a synonym of compassion. Id. at 462. Furthermore, it defines "compassionate" as "marked by . . . a ready inclination to pity, sympathy, or tenderness." Id (emphasis added).

Without placing an undue technical emphasis on definitions, it seems to us that sympathy is likely to be perceived by a reasonable juror as an essential or important ingredient of, if not a synonym for, "mercy," "humane" treatment, "compassion," and a full "individualized" consideration of the "humanity" of the defendant and his "character." . . . [I]f a juror is precluded from responding with sympathy to the defendant's mitigating evidence of his own unique humanness, then there is an unconstitutional danger that his counsel's plea for mercy and compassion will fall on deaf ears.

Here, the petitioner did offer mitigating evidence about his background and character. Petitioner's father testified that petitioner was a "happy-go-lucky guy" who was "friendly with everybody." The father also testified that, unlike other

> people in the neighborhood, petitioner avoided violence and fighting; that he (the father) was in the penitentiary during the petitioner's early childhood; that petitioner was the product of a broken home; and that petitioner only lived with him from about age **14** to **19**. Although the father admitted that petitioner once was involved in an altercation at school, he suggested that it was a result of the difficulties of attending a school with forced bussing. Record, vol. V, at **667-82**.
>
> Petitioner's counsel, in his closing argument, then relied on this testimony to argue that petitioner's youth, race, school experiences, and broken home were mitigating factors that the jury should consider in making its sentencing decision. In so doing, defense counsel appealed directly to the jury's sense of compassion, understanding, and sympathy, and asked the jury to show **"kindness"** to his client as a result of his background. Record, vol. V, at **708-723**.
> **. . .** [There is] an impermissible risk that the jury did not fully consider these mitigating factors in making its sentencing decision.
>
> **. . .**
>
> As we discussed above, sympathy may be an important ingredient in understanding and appreciating mitigating evidence of a defendant's background and character.

Parks v. Brown, **860 F.2d** at **1554-57**. On April **25, 1989,** the United States Supreme Court granted a writ of certiorari in order to review the decision in ~~Parks~~. **See** ~~Saffle v. Parks~~, ___ Cr.L. (cert. granted April **25, 1988**). A stay of execution in Mr. Hill's case would be more than appropriate pending the United States Supreme Court's establishing of standards for a determination of this claim.

The United States Supreme Court recently held in a case declared to be retroactive on its face that a capital sentencer jury must make a "reasoned moral response to the defendant's

background, character, and crime." ~~Penry v. Lynaugh~~, 109 S. Ct. 2934, 2947 (1989). It is improper to create "the risk of an unguided emotional response." 109 S. Ct. at 2951. A capital defendant should not be executed where the process runs the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." ~~Penry~~, 109 S. Ct. at 2952. There can be no question that ~~Penry~~ must be applied retroactively. The Court there concluded that, ~~Jurek v. Texas~~, 428 U.S. 262 (1976), notwithstanding, the Texas death penalty scheme previously found constitutional created the "risk that the death [would] be imposed in spite of factors which [] call[ed] for a less severe penalty." 109 S. Ct. at 2952. Thus Mr. Penry's claim was cognizable in post-conviction proceedings. John Penry sought, and was granted relief, in part on the identical claim now pressed by Mr. Hill. Penry alleged that under Texas' functional equivalent of aggravating factors his jury was precluded from considering a discretionary grant of mercy based on the existence of mitigating factors. Id., 109 S. Ct. at 2942. The Court found that, as applied to Penry, the failure to so instruct was not a legitimate attempt by Texas to avoid unbridled discretion, 109 S. Ct. 2951, but rather, an impermissible attempt to restrain the sentencer's discretion to decline to impose a death sentence. 109 S. Ct. 2951. In Mr. Hill's case, the sentencer was expressly told that Florida law precluded considerations of sympathy and mercy. The net result is the same: the unacceptable risk that the jury's recommendation of death was the product of an unguided emotional

response and therefore unreliable and inappropriate in Mr. Hill's case. This error undermined the reliability of the jury's sentencing verdict.

Given the State Attorney's admonition that Florida law precluded mercy and sympathy as mitigating factors upon which a sentence of less than death could be returned, reasonable jurors could have believed that true, given the court's subsequent instructions prior to penalty phase deliberations (R. 710), cf. Booth v. Maryland, 107 S. Ct. 2529 (1987); Penry v. Lynaugh, 109 S. Ct. 2934 (1989), simularly removing the sentencing recommendation from the realm of a reasoned and moral response. Counsel was prejudicially deficient in not objecting to the court's inappropriate and unconstitutional instruction.

In light of the prosecutor's argument and the court's subsequent instructions, Mr. Hill's jurors could well have reasonably believed that there was no vehicle for expressing the view that [Mr. Hill] did not deserve to be sentenced to death based upon mercy or sympathy. Id., 109 S. Ct. at 2950.

The error here undermined the reliability of the sentencing determination and prevented the jury from assessing mitigation. The prosecutor's argument and the court's instruction impeded a "reasoned moral response" which by definition includes sympathy. Penry v. Lynaugh, 109 S. Ct. 2934, 2949 (1989). For each of the reasons discussed above the Court should vacate Mr. Hill's unconstitutional sentence of death. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Hill's death sentence.

The retroactive opinion in Penry requires that this issue to

be addressed and fully assessed at this juncture. The eighth amendment cannot tolerate the imposition of a sentence of death where there exists a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Penry, 109 S. Ct. at 2952. Accordingly, Rule 3.850 relief should be accorded.

CLAIM XI

MR. HILL'S SENTENCE OF DEATH WAS BASED UPON AN UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTION AND THEREFORE ALSO UPON MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

In United States v. Tucker, 404 U.S. 443, 447-49 (1972), the Supreme Court held that a sentence in a noncapital case must be set aside as a violation of due process if the trial court relied even in part upon "misinformation of constitutional magnitude," such as prior uncounseled convictions that were unconstitutionally imposed. In Zant v. Stephens, 462 U.S. 879 (1983), the Supreme Court made clear that the rule of Tucker applies with equal force in a capital case. Id. at 887-88 and n.23. Accordingly, Stephens and Tucker require that a death sentence be set aside if the sentencing court relied on a prior unconstitutional conviction as an aggravating circumstance supporting the imposition of a death sentence. Accord Douglas V. Wainwright, 714 F. 2d 1532, 1551 n.30 (11th Cir. 1983). As articulated in Zant V. Stephens, this rule is absolute and does not depend upon the presence or absence of other aggravating or mitigating factors for its application. Reconsideration of the sentence is required. See Tucker, 404 U.S. at 448-449; Lipscomb

v. Clark, 468 F. 2d 132, 1323 (5th Cir. 1972).

The United States Supreme Court recently in ~~Johnson v.~~ Mississippi, 108 S. Ct. 1981, 1986-87 (1988), held:

> The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special "'need for reliability in the determination that death is the appropriate punishment'" in any capital case. See Gardner v. Florida, 430 U.S. 349, 363-364, 97 S. Ct. 1197, 1207-1208, 51 L.Ed.2d 393 (1977) (quoting Woodson v. North Carolina, 428 U.S. 280, 305, 96 S. Ct. 2978, 2991-92, 49 L.Ed.29 944 (1976)) (White, J., concurring in judgment). Although we have acknowledged that "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death,'" we have also made it clear that such decisions cannot be predicated on mere "caprice" or on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process." Zant v. Stephens, 462 U.S. 862, 884-885, 887, n.24, 103 S. Ct. 2733, 2747, 2748, no.24, 77 L.Ed.2d 235 (1983). The question in this case is whether allowing petitioner's death sentence to stand although based in part on a vacated conviction violates this principle.
>
> In its opinion the Mississippi Supreme Court drew no distinction between petitioner's 1963 conviction for assault and the underlying conduct that gave rise to that conviction. In Mississippi's sentencing hearing following petitioner's conviction for murder, however, the prosecutor did not introduce any evidence concerning the alleged assault itself; the only evidence relating to the assault consisted of a document establishing that petitioner had been convicted of that offense in 1963. Since that conviction has been reversed, unless and until petitioner should be retried, he must be presumed innocent of that charge. Indeed, even without such a presumption, the reversal of the conviction deprives the prosecutor's sole piece of documentary evidence of any relevance to Mississippi's sentencing decision.

> Contrary to the opinion expressed by the Mississippi Supreme Court, the fact that petitioner served time in prison pursuant to an invalid conviction does not make the conviction itself relevant to the sentencing decision. The possible relevance of the conduct which gave rise to the assault charge is of no significance here because the jury was not presented with any evidence describing that conduct-the document submitted to the jury proved only the facts of conviction and confinement, nothing more. That petitioner was imprisoned is not proof that he was guilty of the offense; indeed it would be perverse to treat the imposition of punishment pursuant to an invalid conviction as an aggravating circumstance.
>
> It is apparent that the New York conviction provided no legitimate support for the death sentence imposed on petitioner. It is equally apparent that the use of that conviction in the sentencing hearing was prejudicial. The prosecutor repeatedly purged the jury to give it weight in connection with its assigned task of balancing aggravating and mitigating circumstances "one against the other." **13** Record **2270;** App. **17;** see **13** Record **2282-2287;** App. **26-30.** Even without that express argument, there would be a possibility that the jury's belief that petitioner had been convicted of a prior felony would be **"decisive"** in the "choice between a life sentence and a death sentence." Gardner v. Florida, 430 U.S., at **359, 97** S.Ct., at **1205** (plurality opinion).

Here the judge and jury relied on Mr. Hill's prior robbery conviction to establish the "prior crime of violence" aggravating circumstance upon which his death sentence was based. The sentencing court found that aggravating circumstance.

This prior conviction was obtained in violation of the Constitution, and thus its use in imposing death violated the eighth and fourteenth amendments. Johnson. Time constraints prevent full development and presentation of this issue at this time. Johnson v. Mississippi, supra, is new case law cognizable

in a Rule 3.850 proceeding. See Jackson v. Dugger, 547 S. 2d 1197 (Fla. 1989). As a result, this claim is cognizable as being based on a change in law. Rule 3.850 relief is warranted.

CLAIM XII

MR. HILL'S JURY WAS IMPROPERLY INSTRUCTED RESULTING IN FUNDAMENTALLY UNFAIR CONVICTIONS AND SENTENCES IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS

Notwithstanding the fact that only one individual was killed, Mr. Hill's jury was instructed and returned verdicts of guilt on two counts of murder (R. 1267). The jury found Mr. Hill guilty of premeditated murder and felony murder robbery.

Under Florida law, Mr. Hill could only be convicted and sentenced to one count of murder. Muszynski v. State, 392 So. 2d 63, 64 (Fla. 5th DCA 1981).

As it is now impossible to determine which count of murder the jury actually convicted Mr. Hill on, all these murder convictions and their respective sentences must now be vacated and the case remanded for a new trial with a properly instructed jury. It is impossible to determine how the jury understood these instructions; the jury might have believed that the elements of one charge could satisfy the elements of a different charge. Strombers v. California, 283 U.S. 359 (1931). Muszynski, supra, holds that this error is fundamental and cognizable in Rule 3.850 proceedings.

The ambiguity in the double convictions of murder when there was only one victim became a central issue in the resentencing hearing. The resentencing proceeding was held on March 24-27, 1986, before Circuit Judge William S. Rowley and a jury. Prior

to the penalty trial, defense counsel filed a motion in limine seeking to prevent the newly impaneled jury from being informed of the original jury's finding of premeditation (R. **820**). The motion was renewed immediately after the jury was selected and just before they were sworn (R. **259-61**). The trial court ruled, over defense objection, that the prior jury's finding of premeditation would be disclosed to the new penalty jury (**R. 260-261**). Accordingly, the trial court began his preliminary instructions to the jury by stating that appellant "has been found guilty of first degree premeditated murder and felony murder" (R. **262**). The State's first witness, William Spence, a deputy clerk of the circuit court, referring to the verdict form from the original trial, testified over objection that the jury found appellant "[g]guilty of both first degree premeditated murder and a felony murder" (R. **289**). After presentation of the evidence, closing arguments, and jury instructions, the jury returned a recommendation that appellant be sentenced to death (R. **714, 834**).

The sentencing hearing was held on April 2, **1986**. Prior to the imposition of sentence, defense counsel once again argued, as grounds why sentence should not be imposed, that the jury should not have been informed of the prior jury's finding of premeditation (R. **844-47**). The trial court again overruled the objection **(R. 845-47)**. The court then, following the jury's recommendation, re-imposed the death penalty to make the resulting death sentence a denial of due process. See Darden v. Wainwright, supra, **91** L.Ed.2d at **157**. Appellant's death

sentence, imposed after such a proceeding, cannot constitutionally be carried out. See also Caldwell v. Mississippi, supra; Wilson v. Kemp, supra; Drake v. Kemp, supra.

By disclosing to the newly impaneled penalty jury the original jury's finding that the homicide was premeditated, the trial court in effect instructed the jury to disregard appellant's testimony (see R. 614-17) that he did not intend to kill Officer Taylor or anyone else -- that he intended only to disarm the officers and free Cliff Jackson -- and that he began firing when Officer Bailly wheeled around and fired at him. The original jury evidently did not believe appellant's testimony, and found the homicide to have been premeditated. But the original jury was so tainted by prejudicial pre-trial publicity and prosecutorial misconduct as to deprive appellant of his constitutional right to a fair and impartial jury in the proceeding in which that finding of premeditation was made. Consequently, the instruction to the new jury that appellant had already been found guilty of premeditated murder as well as felony murder, and that the [new] jury was not to concern itself with the question of guilt (R. 262), was tantamount to a transfusion of prejudice from the tainted original jury. The new jury should have been permitted to determine the question of premeditation, and to assess appellant's credibility, independently. The trial court's preliminary instruction to the jury, coupled with the testimony of court clerk William Spence which followed immediately thereafter (R. 289), deprived appellant of his constitutional right to have these critical issues of fact resolved by an impartial jury.

The guilt phase in this case clearly involved a substantial factual dispute as to whether or not the killing was premeditated. This, in turn, is a critically relevant issue with regard to penalty. If the penalty jury had believed appellant's testimony that he never intended to kill anyone, it would not have been required to recommend life, but it certainly would have been more favorably disposed toward a life recommendation for an unintentional killing than for an intentional one. By informing the jury, through an instruction and through testimony, that the finding of premeditation had already been made, and by further instructing them that they were not to concern themselves with that question, the trial court prevented this critical issue of fact and credibility from being resolved by an impartial and fairly selected jury, and resurrected the harmful effect of the prejudicial publicity and prosecutorial misconduct which destroyed the impartiality of the original jury.

Such fundamentally unfair proceedings contravene the most basic principles of double jeopardy and Rule 3.850 relief is now proper; a new trial must be ordered.

CLAIM XIII

MR. HILL'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. HILL TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HIMSELF EMPLOYED THIS IMPROPER STANDARD IN SENTENCING MR. HILL TO DEATH.

A capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death

> penalty could be imposed . . .
>
> [S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Hill's capital proceedings. To the contrary, the burden was shifted to Mr. Hill on the question of whether he should live or die. In Hamblen v. Duaser, 546 So. 2d 1039 (Fla. 1989), a capital post-conviction action, this Court addressed the question of whether the standard employed shifted to the defendant the burden on the question of whether he should live or die. The Hamblen opinion reflects that claims such as the instant should be addressed on a case-by-case basis in capital post-conviction actions. Mr. Hill herein urges that the Court assess this significant issue in his case and, for the reasons set forth below, that the Court grant him the relief to which he can show his entitlement.

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and Dixon, for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Caldwell v. Mississippi, 472 U.S. 320 (1985), Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and Maynard v. Cartwright, 108 S.

Ct. 1853 (1988). Mr. Hill's jury was unconstitutionally instructed, as the record makes abundantly clear (See R. 706). The court then employed this unconstitutional standard in imposing death (R. 842). This claim is now properly before this Court, and Rule 3.850 relief would be more than proper.

At the penalty phase of trial, judicial instructions informed Mr. Hill's jury that death was the appropriate sentence unless "mitigating circumstances exist that outweigh the aggravating circumstances" (R. 706). The trial judge then imposed death because "there has not been established sufficient mitigating factors to outweigh the aggravating factors" (R. 842). Such a standard, which shifts to the defendant the burden of proving that life is the appropriate sentence, violates the eighth and fourteenth amendments, as the Court of Appeals for the Ninth Circuit recently held in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc). This claim involves a **"perversion"** of the jury's deliberations concerning the ultimate question of whether Mr. Hill should live or die. See Hill v. Murray, 106 S. Ct. 2661, 2668 (1986). No bars apply under such circumstances. Id. A writ of certiorari has been granted to resolve the split of authority between Adamson and the Arizona Supreme Court. Walton v. Arizona, 46 Cr. L. 3014 (October 2, 1989).

The jury instructions and the standard relied upon by the judge here employed a presumption of death which shifted to Mr. Hill the burden of proving that life was the appropriate sentence. As a result, Mr. Hill's capital sentencing proceeding was rendered fundamentally unfair and unreliable.

In Adamson, 865 F.2d at 1041-44, the Ninth Circuit held that

because the Arizona death penalty statute "imposes a presumption of death on the defendant," the statute deprives a capital defendant of his eighth amendment rights to an individualized and reliable sentencing determination. What occurred in Adamson is precisely what occurred in Mr. Hill's case. See also Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). The instructions, and the standard upon which the sentencing court based its own determination, violated the eighth and fourteenth amendments. The burden of proof was shifted to Mr. Hill on the central sentencing issue of whether he should live or die. Moreover, the application of this unconstitutional standard at the sentencing phase violated Mr. Hill's rights to a fundamentally fair and reliable capital sentencing determination, i.e., one which is not infected by arbitrary, misleading and/or capricious factors. See Adamson, supra; Jackson, supra. The unconstitutional presumption inhibited the jury's ability to "fully" assess mitigation, in violation of Penry v. Lynaugh, 109 S. Ct. 2935 (1989), a decision which was declared, on its face, to apply retroactively to cases on collateral review.

The focus of a jury instruction claim is "what a reasonable juror could have understood the charge as meaning." Francis v. Franklin, 471 U.S. 307 (1985); see also Sandstrom v. Montana, 442 U.S. 510 (1979). Here, the jury was in essence told that death was presumed appropriate once aggravating circumstances were established, unless Mr. Hill proved that mitigating circumstances existed which outweighed the aggravating circumstances. A reasonable juror could have well understood that mitigating

circumstances were factors calling for a life sentence, that aggravating and mitigating circumstances had differing burdens of proof, and that life was a possible penalty, while at the same time understanding, based on the instructions, that Mr. Hill had the ultimate burden to prove that life was appropriate. This violates the eighth amendment.

This error cannot be deemed harmless. In Mills v. Maryland, **108 S. Ct. 1860 (1988),** the court concluded that, in the capital sentencing context, the Constitution requires resentencing unless a reviewing court can rule out the possibility that the jury's verdict rested on an improper ground. **Id. 108 S.** Ct. at **1866-67.** Under Hitchcock, Florida juries must be instructed in accord with the eighth amendment principles. Hitchcock constituted a change in law in this regard. The constitutionally mandated standard demonstrates that relief is warranted in Mr. Hill's case.

The United States Supreme Court recently granted a writ of certiorari in Blystone v. Pennsylvania, **109** S. Ct. **1567 (1989),** to review a very similar claim. The question presented in Blystone has obvious ramifications here. Under Pennsylvania law, the jury is instructed that where it finds an aggravating circumstance present and no mitigation is presented, it **"must"** impose death. However, if mitigation is found then the jury must decide whether the aggravating circumstances outweigh the mitigating. In Pennsylvania, the legislature chose to place upon a capital defendant a burden of production as to evidence of mitigation and a burden of persuasion as to whether mitigation exists. However, once evidence of a mitigating circumstance is found, then the State bears the burden of persuasion as to

whether the aggravating circumstances outweigh the mitigating such that a death sentence should be returned.

Under the instructions and standard employed in Mr. Hill's case, once one of the statutory aggravating circumstances was found, by definition sufficient aggravation existed to impose death. The jury was then directed to consider whether mitigation had been presented which outweished the aggravation. Thus, under the standard employed in Mr. Hill's case, the finding of an aggravating circumstance operated to impose upon the defendant the burden of production and the burden of persuasion of the existence of mitigation, d the burden of persuasion as to whether the mitigation outweighs the aggravation. Where as here, the prosecution contends that the jury finding of guilt establishes the "in the course of a felony" aggravating circumstance, a presumption of death automatically arises. Certainly, the standard employed here was more restrictive of the jury's ability to conduct an individualized sentencing than the Pennsylvania statute at issue in Blvstone. See also Bovde v. California, 109 S. Ct. 2447 (Cert. granted June 5, 1989).

The effects feared in Adamson and Mills are precisely the effects resulting from the burden-shifting instruction given in Mr. Hill's case. In being instructed that mitigating circumstances must outweigh aggravating circumstances before it could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances outweighed the aggravating circumstances. This jury was thus

constrained in its consideration of mitigating evidence, Hitchcock, 107 S. ct. 1821 (1987), and from evaluating the "totality of the circumstances," Dixon v. State, 283 So. 2d 1, 10 (Fla. 1973), in determining the appropriate penalty. The jury was not allowed to make a "reasoned moral response" to the issues at Mr. Hill's sentencing or to "fully" consider mitigation, Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989). There is a "substantial possibility" that this understanding of the jury instructions resulted in a death recommendation despite factors calling for life. Mills, supra. The death sentence in this case is in direct conflict with Adamson, Mills, and Penry, supra. This error "perverted" the jury's deliberations concerning the ultimate question of whether Mr. Hill should live or die. Hill v. Murray, 106 S. Ct. at 2668.

Under Hitchcock and its progeny, no bars apply, because Hitchcock, decided after Mr. Hill's trial, worked a change in law. Rule 3.850 relief is thereby appropriate, and Mr. Hill's sentence of death must be vacated.

CLAIM XIV

THE APPLICATION OF RULE 3.851 TO MR. HILL'S CASE WILL VIOLATE, AND THE PRESENT WARRANT HAS VIOLATED, HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW AND DENIED HIM HIS RIGHTS TO REASONABLE ACCESS TO THE COURTS.

The Governor of Florida signed a death warrant against Mr. Hill on December 9, 1989, and Mr. Hill's execution is presently scheduled for January 25, 1989. Under Rule 3.851 Mr. Hill's pleadings must therefore be filed by December 11, 1989. However, under the two-year limitation provision of Rule 3.850, Mr. Hill had until April 4, 1990, to file for post-conviction relief. The

signing of Mr. Hill's death warrant has therefore accelerated the time within which he must file for post-conviction relief by five (5) months.' Unlike all of the other more than 32,000 inmates sentenced by Florida courts who have two years from final judgment to bring such actions, Mr. Hill has arbitrarily been deprived of the time remaining in which he could timely file under Rule 3.850. This acceleration is unreasonable and furthers no legitimate state interest. To the contrary, it impedes Mr. Hill's right to properly investigate, research, prepare, and present a Rule 3.850 motion. As this Court has recognized, Rule 3.850 proceedings are governed by due process principles. See Holland v. State, 503 So. 2d 1250 (Fla. 1987). The timing of the litigation of Mr. Hill's post-conviction actions, however, has now been dictated by the Governor, a non-judicial officer and a party opponent, through the signing of a death warrant. Due process and equal protection do not countenance such a result.

The Governor's stated policy is to issue death warrants as soon and as frequently as possible to "keep the pressure on" capital defense attorneys. Rule 3.851, under these circumstances, indeed creates a pressure-cooker atmosphere. This Court, however, through the creation and implementation of Rule 3.851, could not have intended that the State receive a windfall benefit, or that the inmate suffer a significant detriment -- the

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'This period of time is extremely significant, given the need for full investigation before a Rule 3.850 motion is filed and given the pressing, difficult schedule with which Mr. Hill's counsel must deal.

arbitrary acceleration of the litigation of this action is a substantial detriment to Mr. Hill, as is the arbitrary deprivation of five months from the time allotted for the filing of a Rule 3.850 motion; both benefit the State at Mr. Hill's expense. No rule of criminal procedure could possibly be interpreted as an attempt by the Court to provide a strategic advantage to one of a controversy's litigants. (In this case, not only does Rule 3.851 provide the state's executive with such a strategic advantage, but it has allowed the executive [a party opponent] to specifically determine the timing of this action.) Indeed, the Court's rationale was that Rule 3.851 "[was] necessary to provide more meaningful and orderly access to the courts when death warrants are signed." In re Florida Rules of Criminal Procedure, Rule 3.851, 503 So. 2d 320, 321 (Fla. 1987)(emphasis added). The arbitrary and discriminatory acceleration of the filing requirements applicable to Mr. Hill's case, however, denies that very right to "orderly access to the courts," and disrupts precisely the order sought by the Florida Supreme Court. Cf. Davis v. Dugger, 829 F.2d 1513, 1521 (11th Cir. 1987)(Dismissal of habeas petition reversed and case remanded, because "[i]t was . . . the scheduling of petitioner's execution . . . [that] created the prejudice that respondent contends justified the district court's [dismissal] of the habeas petition . . . [P]prejudice must be due to the petitioner's delay and not to some other factor . . ."") (emphasis in original); see also id. at 1520 ("[I]t would be anomalous to hold that pursuit of collateral relief within the two-year statutory limitations period in Florida might nevertheless constitute

unreasonable delay . . .").

Rule 3.851 provides:

> Expiration of the thirty-day period procedurally bars any later petition unless it is alleged (1) that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence prior to the end of the thirty-day period, ...

This rule, to the extent that it grants to the Governor of Florida, a non-judicial officer, and a party opponent, the ability to curtail access to the courts by shortening the two-year period in which a Rule 3.850 motion may be filed is unconstitutional. Moreover, the facts supporting a post-conviction claim for relief cannot become known unless the case is adequately investigated. A case cannot be adequately investigated when counsels' duties are made impossible to fulfill, or where, as here, a death warrant is arbitrarily signed, and arbitrarily accelerates the relevant filing date.

The United States Supreme Court in a long line of cases beginning with Griffin v. Illinois, 351 U.S. 12 (1956), recognized the right of convicted inmates to unrestricted access to the courts in order to use established avenues for seeking post-conviction relief.

In Lane v. Brown, 372 U.S. 477 (1963), the United States Supreme Court addressed the Indiana post-conviction procedure which authorized an appeal to the Indiana Supreme Court from the denial of a writ of error coram nobis. The appeal, however, was dependent upon the filing with the Indiana Supreme Court of a trial transcript -- in fact this was a jurisdictional

requirement. An indigent petitioner could only get a transcript for purposes of meeting the jurisdictional requirement if the state public defender believed there was merit in the appeal and agreed to direct that the transcript be prepared and sent to the Supreme Court. The United States Supreme Court struck this procedure down saying: "The provision before us confers upon a state officer outside the judicial system power to take from an indigent all hope of any appeal at all." 372 U.S. at 485.

Three years later in Rinaldi v. Yeaser, 384 U.S. 305 (1966), the Court addressed the constitutionality of a New Jersey provision which authorized the withholding of prison pay from an unsuccessful indigent appellant in order to recoup the cost of the appeal. In striking the provision down the Court pronounced: "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."

The Court again discussed the Griffin progeny in Bounds v. Smith, 430 U.S. 817 (1977). There the question was an inmate's right to a law library or legal assistance. The Court's opinion observed: "It is now established beyond doubt that prisoners have a constitutional right of access to the courts." 430 U.S. at 821. Implicit in the Court's reasoning was the notion that Griffin and its progeny are founded upon the fundamental right to court access and thus that under either substantive due process or equal protection analyses distinctions between individuals and/or groups must withstand strict scrutiny.

The United States Supreme Court has thus made it very clear that where a state provides an inmate with a procedure for seeking post-conviction relief, there arises the fundamental right of access to the courts in order to take advantage of the established procedure. Distinctions that are made between those who would seek relief cannot impede open and free access: access must be equal. At issue here, in the application of Rule **3.851** to Mr. Hill's case, are two distinctions: first, the distinction between the capital defendant and the non-capital defendant; and second, the distinction between the capital defendant under warrant and the capital defendant not under warrant. For Rule **3.851** to be constitutionally applied to deprive Mr. Hill of any of his remaining time to seek Rule **3.850** relief the distinctions must be shown to be necessary to a compelling state interest. There exists no such interest here.

Obviously, the two-year limitation established by Rule **3.850** itself for seeking relief was created to give convictions finality. However, if that was the only consideration, the Court could have easily established a one month, or one week, as opposed to a two-year limitation. The Court could not but have had another competing concern in mind. This was the realization that time is essential to prepare a Rule **3.850** motion -- time to investigate, to research, and to prepare. The Legislature in creating CCR to assist death row inmates in the preparation and presentation of Rule **3.850** motions must also have recognized the time, energy, skills, and costs associated with pursuing a Rule **3.850** motion. Rule **3.850** contains no distinction between capital

and non-capital movants; the rule applies equally to all. However, the time that the death row inmate has to marshall his resources and prepare his Rule **3.850** motion can without warning be slashed to thirty days. A distinction can arbitrarily be made between one death row inmate and another death row inmate, and between capital and non-capital litigants. The distinction is made by the executive, a party opponent, when he signs a warrant before the two-year period to file a Rule **3.850** motion has run. When that occurs, whatever remains of the two-year period under Rule **3.850** is automatically converted to thirty days. See Rule **3.851.** Mr. Hill has been denied quite an important portion of that two-year period.

In addition, the Governor by signing unprecedented numbers of warrants over the past year has placed intolerable burdens upon CCR's resources. The signing of the warrants has reached the height of capriciousness. Mr. Hill was arbitrarily chosen by the Governor to be one (1) of the nineteen (19) warrant cases litigated by an overtaxed CCR since August **30,** 1989. Counsel for CCR are presently overwhelmed with seven (7) active death warrant cases (stays were obtained last week in two others) in addition to numerous non-warrant briefs, pleadings, oral arguments, and evidentiary hearings. The CCR's small staff of eleven attorneys must represent the vast majority of Florida's 310 (+) capital inmates whose actions are in the post-conviction stage of proceedings, pursuant to CCR's statutory mandate.

The distinction made by the Governor in the words of Rinaldi v. Yeager, supra, **384** U.S. **305,** is **"unreasoned",** and arises when the two-year limitation is applied only against the death row

inmate but not against the State. The two-year limit in Rule **3.850** represented a balancing which gave to the State a date certain and which created, in return, an obligation on the State to honor that date. The state's executive officer, however, is allowed to flout the rule by the arbitrary signing of a death warrant, and by arbitrarily chosing to sign unprecedented numbers of death warrants, thus whipsawing collateral counsel.

To the extent that Rule **3.851** is interpreted to permit the Governor to shorten the two-year period established by Rule **3.850**, it creates a distinction which, in the words of Lane v. Brown, "confers upon a state officer outside the judicial system [the] power to take from an indigent." In Lane the state officer involved was the public defender, not a party opponent. Even this, however, was not enough -- the Court struck down the statute. Certainly, the application of Rule **3.851** against Mr. **Hill** gives to the Governor the power to impede open and equal access to the courts; exactly what has been held time and again to be improper.

To be constitutional, Rule **3.851** must be construed as only applying to Rule **3.850** motions which are or may be filed beyond the two-year time limit. Its application to those cases in which the two years has not run infringes upon the very right of access to the courts which Rule **3.850's** two-year standard sought to protect.

Moreover, due process and equal protection cannot be squared with the fact that although Rule **3.850** provided Mr. Hill two (2) years within which to prepare and file a Rule **3.850** motion, the

executive is arbitrarily permitted to deny that state-created "liberty interest" through the signing of a death warrant. Cf. Hicks v. Oklahoma, 447 U.S. 343 (1980); Vitek v. Jones, 445 U.S. 480, 488-89 (1980). Rule 3.850's two-year limitation was created, in part, to assure the inmates' right to reasonable access to a post-conviction forum. The dictates of Evitts v. Lucev thus apply to Mr. Hill's case and make clear his entitlement to the relief sought herein:

> [W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the constitution -- and, in particular, in accord with the Due Process Clause.

469 U.S. 387, 401 (1985); see also Johnson v. Avery, 393 U.S. 483, 488 (1969); Smith v. Bennett, 305 U.S. 708, 713 (1961). The Governor's arbitrary action in this case has violated the very test of due process which the United States Supreme Court has made mandatory in such instances -- Mr. Hill is deprived of "a reasonable opportunity" to have his claims fairly presented to, and heard and determined by the state courts. See Michael v. Louisiana, 350 U.S. 91, 93 (1953); Reece v. Georgia, 350 U.S. 85 (1955). Finally, due process is violated because this case involves a classic example of "interference by [State] officials" -- the Governor -- which impedes Mr. Hill's rights to full and fair access to courts. Cf. Brown v. Allen, 344 U.S. 443, 486 (1953), quoted in Murray v. Carrier, 106 S. Ct. 2639, 2646 (1986).

As the en banc Eleventh Circuit Court of Appeals stated in Spencer v. Kemp, 781 F.2d 1458, 1470 (1986):

> [A] state procedural rule that is facially valid and has been consistently followed by the state courts will not preclude review of federal claims where its application in a particular case does not satisfy constitutional requirements of due process of law. Reece v. Georgia, 350 U.S. 85, 76 S.Ct. 167, 100 L.Ed. 77 (1955).

Here, the Governor's stated purpose is to "keep the pressure on" the capital defense attorneys. Mr. Hill has thus been denied the protections of Rule 3.850 through the arbitrary actions of the state's executive -- actions whose purposes (keeping the pressure on attorneys) have no relationship to any legitimate and constitutionally recognized state interest, but which have nevertheless impeded and restricted Mr. Hill's rights to due process, equal protection, and reasonable access to courts, and which have arbitrarily deprived him of the liberty interest created by Rule 3.850. All parties, not just the defendant, must be required to honor the two-year limit established by Rule 3.850.

As noted, Mr. Hill's Rule 3.850 motion was due on April 4, 1990, until his death warrant was signed. After the signing of a death warrant against Mr. Hill on November 9, 1989, which advanced this due date to December 11, 1989, Mr. Hill's counsel accelerated the steps necessary for the proper preparation of a post-conviction pleading. Cf. Spalding v. Dusser, 526 So. 2d 71 (Fla. 1988). Considering the crisis-posture CCR has been placed in by the Governor's action in signing nineteen (19) death warrants within ninety (90) days, it is clear that the interests served by Rules 3.850 and 3.851 will be rendered illusory unless the relief herein sought is provided. Although investigation is underway, and duly diligent review of the voluminous record has

begun, neither can possibly be professionally completed by December 11, 1989. At the very least, Mr. Hill should be given until April 4, 1990, the original, proper filing date, to further investigate and amend his 3.850 motion. Granting the requested relief will not prejudice the State respondent, in whose custody Mr. Hill will remain. See Davis v. Dugger, supra, 829 F.2d 1513. Granting the requested relief is further justified by the fact that the claims Mr. Hill asserts herein are significant and deserve adequate investigation and consideration.

CONCLUSION AND RELIEF REQUESTED

Based on the foregoing, counsel urges that the Court stay Mr. Hill's execution, and grant Mr. Hill the relief to which he has established his entitlement and/or remand this case for proper evidentiary resolution.

Respectfully submitted,

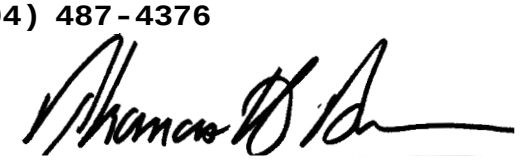
LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

THOMAS H. DUNN
Staff Attorney

JEROME H. NICKERSON
Assistant CCR
Florida Bar No. 0829609

JUDITH J. DOUGHERTY
Assistant CCR
Florida Bar No. 0187786

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

By: 
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Hand Delivery to Carolyn Snurkowski, Assistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, 111-29 North Magnolia Drive, Tallahassee, Florida 32301, this 24TH day of January, 1990.

Attorney