IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,045

NEWTON C. SLAWSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Slawson's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court summarily denied Mr. Slawson's claims without holding a proper hearing of any kind.

The following symbols will be used to designate references to the record in this instant cause:

"R." -- record on direct appeal to this Court;

"PC-R." -- record on 3.850 appeal to this Court;

"App." -- indicates that record omissions still exist.

REQUEST FOR ORAL ARGUMENT

Mr. Slawson has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Slawson, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE

On April 26, 1989, the Hillsborough County grand jury returned an indictment charging Mr. Slawson with four counts of first degree murder and one count of killing an unborn child by injuring the mother (R. 1977-79).

Mr. Slawson's trial was held in March of 1990. A jury returned a verdict of guilty on each of the five counts (R. 2136-38). The jury recommended death for each of the four counts of first degree murder (R. 2144-47).

The trial court sentenced Mr. Slawson to four death sentences (R. 175-1770). The trial court entered written findings (R. 2157-2163).

The Florida Supreme Court affirmed Mr. Slawson's convictions and sentences on direct appeal. Slawson v. State, 619 So. 2d 255 (Fla. 1993). The United States Supreme Court denied certiorari on February 28, 1994. Slawson v. State, 114 S. Ct. 2765 (1994).

On September 14, 1995 Mr Slawson's attorney, without Mr. Slawson's verification, filed a Motion to Vacate Judgements of Conviction and sentences with special request for leave to amend. On October 31, 1996, counsel, without Mr. Slawson's verification, filed an amended motion to vacate judgments of convictions and sentences with special request for leave to amend. (PC-R. 27,184). On January, 14 1997, the circuit court denied Mr. Slawson's motion to vacate without granting a proper Huff hearing. (PC-R. 55).

As a result on February 12, 1997, Mr. Slawson filed notice of appeal to this Court.

SUMMARY OF ARGUMENT

The lower court erred in summarily denying Mr. Slawson's motion. Because the files and records did not conclusively demonstrate that Mr. Slawson was not entitled to relief, the lower court should have ordered an evidentiary hearing or in the alternative should have held post-conviction proceedings in abeyance until the Carter v. Florida, 22 Fla. L. Weekly S706, case was decided. The lower court further erred in failing to attach any portions of the record establishing that Mr. Slawson was not entitled to relief. Reversal and remand for an evidentiary hearing is proper.

Furthermore, counsel is unable to fully and properly argue the arguments argued below because of Mr. Slawson's unique situation. See Argument I. Mr. Slawson's mental illness interferes with his ability to consult with counsel and understand the proceedings in which he is enmeshed to such an extent that he will not leave his cell for legal visits. Until Mr. Slawson is competent, counsel will not be capable of fully investigating and arguing on his post-conviction claims. The circuit court must consider the issue of competency during the post-conviction proceeding prior to conducting any evidentiary hearings.

ARGUMENT I

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. SLAWSON'S MOTION.

The lower court summarily denied Mr.Slawson's 3.850 motion. A Rule 3.850 litigant is entitled to an evidentiary hearing unless "the motion and the files and 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, 1224 (Fla. 1986); Mason v. State, 489 So. 2d 734, 735-37 (Fla. 1986).

Where, as here, a Rule 3.850 litigant presents claims demonstrating a need for a competency hearing, Carter v. Florida an evidentiary or a competency hearing is warranted, as this Court has explained:

> We now accept Justice Overton's concurring view in Jackson that a trial court must hold a competency hearing in a postconviction proceeding only after a defendant shows there are specific factual matters at issue that require the defendant to competently consult with counsel.

This Court has also explained in Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989):

> Since the court neither held an evidentiary hearing nor attached any portion of the record to the order of denial, our review is limited to determining whether the motion on its face conclusively shows that Squires is entitled to no relief. Fla.R.Crim.P. 3.850.

Moreover, a trial court has only two options when presented with a Rule 3.850 motion: "either grant appellant an evidentiary hearing, or alternatively attach to any order denying relief

adequate portions of the record affirmatively demonstrating that appellant is not entitled to relief on the claims asserted." Witherspoon v. State, 590 So. 2d 1138 (4th DCA 1992). However, in the present case the lower court did not follow the procedures stated in Witherspoon.

On December 20, 1996 a Huff hearing was set. Counsel for Mr. Slawson explained to the court that Mr. Slawson had not come out of his cell for legal visits and was thus unavailable to help counsel during the post-conviction proceedings. Counsel explained to the court that Mr. Slawson, was incompetent, in that he is paranoid, delusional, and that as a result of his mental illness he has refused to consult with his attorneys (PC-R. 54).

As a result of Mr. Slawson's incompetence counsel requested an evidentiary hearing on the competency issue or in the alternative hold the hearing until this court decided Carter v. State. (PC-R. 51) Counsel explained to the court that:

Mr. Slawson lacks the ability to consult with counsel and understand the proceedings against him. The hearing on this claim would impact Mr. Slawson's claim for ineffective assistance of counsel during the guilt/innocence phase. (PC-R. 38)

Counsel informed the court that Mr. Slawson had refused to leave his cell, from March 15, 1995, for legal visits, medical visits or psychiatric evaluations. As a result, Mr. Slawson did not sign the verification for the original (filed on 9-15-95) or the amended motion to vacate judgment of convictions and sentences (filed on 11-1-96).

Furthermore, during the hearing held on December 12, 1996, counsel informed the court of the pending Carter case and requested the proceedings be held in abeyance until this Court had decided Carter.. However, the court denied Mr. Slawson's Motion to Vacate and did not attach any record references to its final order. In denying the order the court stated that:

Well, relying upon the Amended Motion to Vacate Judgements of Convictions and Sentences and the State's answer as to each of those claims, I will find that on the claims of those, claims, I

will find that on the claims as alleged the defendant is not entitled to an evidentiary hearing for those reasons set forth in the State's response and will as to the first issue. I understand the first claim. I guess, you can appeal that decision and see what the Supreme Court says. (PC-R. 55).

ARGUMENT II

MR. SLAWSON LACKS THE ABILITY TO CONSULT WITH COUNSEL AND UNDERSTAND THE PROCEEDINGS AGAINST HIM IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The United States Constitution prohibits states from depriving an individual of life, liberty or property without due process of law. U.S. Const. amend. XIV, § 1. Mr. Slawson is entitled to due process of law in his post conviction proceedings. Easter v. Endell, 37 F.3d 1343 (8th Cir. 1994); Huff v. State, 622 So.2d 982 (1993); Holland v. State, 503 So.2d 1250 (Fla. 1987). The proceedings in which an individual convicted of a capital crime is involved amount to an "undue process regardless whether or not any person, state actor or not, could or should have diagnosed the defendant's incompetency. This absence of due process blossoms into a constitutional violation if it occurred during a proceeding in which the state deprived a person of life, liberty, or property." James v. Singletary, 957 F.2d 1562, 1573 (11th Cir. 1992). The Florida postconviction process is designed to protect individuals convicted of a capital crime from the deprivation of life in violation of the United States and/or Florida Constitutions.

Fl.R.Cr.Pr. 3.850(a), 3.851(a). Forcing a death row inmate to go forward with proceedings when he lacks "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him," Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 789 (1960); Scott v. State, 420 So.2d 595 (1982) poses an unacceptable risk that he will be deprived of life in violation of the due process clause of the Fourteenth Amendment.

In Florida, the postconviction process begins when an individual who has been sentenced to death files a Motion for Postconviction Relief under oath. Fl.R.Cr.Pr. 3.850(c), 3.851(a). This oath requires Mr. Slawson to read his motion for postconviction relief and evaluate the factual basis of each claim for accuracy and veracity. Gorham v. State, 494 So.2d 211 (Fla. 1986); Scott v. State, 464 So.2d 1171 (Fla. 1985). Mr. Slawson must consult with counsel to gain personal knowledge of facts of which he lacks first-hand knowledge, but which counsel discovered through investigation and included in the motion. Gorham, 494 So.2d at 212. Mr. Slawson is unable to meet either requirement entailed in verifying his motion because he is not competent.

Mr. Slawson is incapable of assisting counsel to formulate claims to include in his Motion for Postconviction Relief. See Spalding v. Dugger, 526 So.2d 71 (Fla. 1988). (A defendant in

capital postconviction proceedings is entitled to the effective assistance of counsel.) In his motion, Mr. Slawson alleges deprivations of substantial rights which require detailed allegations of facts of which only Mr. Slawson is aware. See, Harrell v. State, 458 So.2d 901 (Fla.App. 2 Dist. 1984). Such claims likewise will involve Mr. Slawson calling witnesses and cross-examining them. Harrell, 458 So.2d 901; See, Barr v. State, 548 So.2d 819 (Fla.App. 2 Dist. 1989). To conduct his case in accordance with these requirements, Mr. Slawson must understand the nature and consequences of the proceedings. Without such an understanding, he cannot assist counsel.

Mr. Slawson has a long history of mental health complications culminating in his current incompetence. His mother fell on her stomach about a month before his birth. During birth, Mr. Slawson suffered oxygen deprivation. Head injuries have plagued him since infancy. He has had at least four severe head injuries prior to reaching age 10. Since age 10, Mr. Slawson has suffered at least three severe head injuries. He also has a history of drug and alcohol abuse.

Mr. Slawson refuses to leave his cell for legal visits, medical evaluations and psychological evaluations. Postconviction counsel retained a mental health expert, and he has reviewed Mr. Slawson's psychiatric history, background material, and conversed with postconviction counsel concerning Mr. Slawson's written interactions and refusals to leave his

cell. This expert diagnosed Mr. Slawson as paranoid schizophrenic, and determined that he is unable to consult with his lawyer with a reasonable degree of rational understanding and lacks a rational and factual understanding of his postconviction proceedings. Within a reasonable degree of medical certainty, this expert can say that Mr. Slawson has become so paranoid and delusional that he is incapable of trusting his attorneys, family members or anyone else who may be considered a natural ally.

Mr. Slawson has information necessary for counsel to effectively represent him. The mental health expert describes Mr. Slawson as having a psychological profile of an individual who experienced severe physical, sexual and mental abuse as a child. A strong possibility exists that family member(s), or close friend of the family, or members, was responsible for this abuse. Counsel must confer with Mr. Slawson to determine whether he experienced any abuse, and who may have been the perpetrator or perpetrators. Postconviction counsel suspects a bizzarly hostile yet dependent relationship exists between Mr. Slawson and his mother, and perhaps with other family members.

Other information with which Mr. Slawson could provide postconviction counsel relates to his head injuries. His medical history reveals regular episodes of dizziness and headaches. Mr. Slawson also has a history of seizures. Only Mr. Slawson can describe the circumstances surrounding his dizzy spells, and how he reacts to them. Only Mr. Slawson can describe for counsel the

specific nature and location of his headaches. Finally, only Mr. Slawson can describe how his seizures feel and affect him. This information is essential for the development of Mr. Slawson's claims in postconviction because such details are relevant to specific mental health diagnoses and behavioral disorders that may be present in addition to his diagnosis of paranoid schizophrenia.

Mr. Slawson is the only individual who can describe his relationship with trial counsel. Serious questions about the adequacy of trial counsel's representation pervade Mr. Slawson's case in postconviction, and no one but Mr. Slawson can elucidate trial counsel's handling of his case. Postconviction counsel has attempted to visit Mr. Slawson on a number of occasions to explore these matters with him. Mr. Slawson has refused all visits from his attorneys except one visit relating to the issue of Union Correctional Institution's revocation of a front cuff pass.

Initially, postconviction counsel believed Mr. Slawson refused visits from his attorneys because he had physical problems. However, his continued refusal together with information available in the record on appeal prompted counsel to retain a mental health expert. This expert determined that Mr. Slawson is likely suffering from extreme paranoid delusions, and that this prevents him from establishing a trusting relationship with his attorneys. His delusions also are the likely cause of

his vicious letters to his mother and refusal to leave his cell for family visits.

Without speaking to Mr. Slawson, postconviction counsel is unable to argue a comprehensive factual basis for his claims, or to proceed with the investigation of Mr. Slawson's case. The mental health expert is confident within a reasonable degree of medical certainty that there is no other explanation for his conduct the night of the homicides other than a severe mental disease rendering him insane. The nature of Mr. Slawson's mental disease will also lead to the development of substantial mitigation.

A. STANDARD FOR PRE-TRIAL COMPETENCY.

The United States Supreme Court has long held that "a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial." Drope v. Mississippi, 420 U.S. 162, 171 (1975). See also Cooper v. Oklahoma, 116 S. Ct. 1373, 1381 (1996) (discussing the "dire" consequences of an erroneous determination of competence). Florida has adopted the oft-cited standard found in the Supreme Court decision of Dusky v. United States, 362 U.S. 402 (1960) (per curiam), namely, that a defendant may not be tried unless he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . [and] a rational as well as factual

understanding of the proceedings against him." Id. See Fla. R. Crim. P. 3.211 (a)(1) (1996).

In addition to incorporating the Dusky standard, Fla. R. Crim. P. 3.221 offers various considerations to be appraised when evaluating a defendant's competency to be tried. These considerations include a defendant's capacity to appreciate the charges or allegations against him as well as the range and nature of possible penalties, to understand the adversary nature of the legal process, to disclose to counsel facts pertinent to the proceedings at issue, manifest appropriate courtroom behavior, and testify relevantly. Fla. R. Crim. P. 3.211 (2)(A)(i-vi).

While some of these considerations are applicable to post-conviction proceedings, some are not, and, as explained further below, the nature of postconviction proceedings necessitates that additional considerations be weighed in evaluating Mr. Slawson's competency at this time.

B. STANDARD FOR POSTCONVICTION COMPETENCY.

Because Mr. Slawson has the right to be competent during his postconviction proceedings, he must have the "capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." Drope, 420 U.S. at 171, as well as have a "rational, as well as a factual, understanding of the pending proceedings." Dusky, 362 U.S. at 402. What exactly these concepts mean in relation to

postconviction proceedings is a matter of first impression in this State.

The Supreme Court of Wisconsin has recently provided some guidance in this area. In State v. Debra A.E., 188 Wis.2d 111, 523 N.W.2d 727 (1994), the Court addressed the very issue presented herein -- the standard of competency in postconviction proceedings. The Court first noted that "[c]ompetency is a contextualized concept; the meaning of competency in the context of legal proceedings changes according to the purpose for which the competency determination is made." Id. at 6. The Court went on to adopt the Dusky standard to postconviction competency. Because a defendant seeking postconviction relief is required to make numerous decisions and undertake various tasks, including "assist[ing] counsel in raising new issues and developing a factual foundation for appellate review," Id., the Supreme Court of Wisconsin held that "a defendant is incompetent to pursue postconviction relief . . . when he or she is unable to assist counsel or make decisions committed by law to the defendant with a reasonable degree of rational understanding." Id. at 7.

A constitutionally adequate competency standard must comport with the legal requirements of Dusky itself. This issue was addressed by the Tenth Circuit Court of Appeals in Lafferty v. Cook, 949 F. 2d 1546 (10th Cir. 1991), a case particularly relevant to Mr. Slawson's situation as it also involved an individual suffering from schizophrenia. In Lafferty, the Court

was faced with the situation where one of the prosecution's competency experts testified to his belief that the existence of a hallucination-induced delusional system was irrelevant to the issue of competency, and that, even if the defendant suffered from a mental illness that actively prevented him from rationally understanding the proceedings, he was nonetheless competent. Lafferty, 949 F.2d at 1554. The Court held that this view indicated that the expert "embraced the view that factual understanding alone is sufficient, a view . . . that is totally contrary to the circumstances of Dusky itself and that has been rejected by the cases applying the Dusky test." Id. The Tenth Circuit noted that it could not "accept as consistent with Dusky and its progeny a finding of competency made under the view that a defendant who is unable to accurately perceive reality due to a paranoid delusional system need only act consistently with his paranoid delusion to be considered competent to stand trial." Id. at 1554-55. For example, just because a defendant "can" consult with his attorney or assist in his defense is not the end of the inquiry, for such a conclusion fails to take into consideration the fact that a mental illness such as schizophrenia interferes with the defendant's thought process, thereby precluding a voluntary or intelligent "decision":

> To say on this record as a matter of law, as the dissent apparently wishes to, that [the defendant] could have consulted with his lawyer if he had chosen to do so is either to disregard the substantial evidence that [the defendant's] mental disease rendered him unable to make that choice, or to conclude that

Dusky does not require decisions based on reality. The first alternative is precluded by the record, and the second is precluded by the law.

Id. at 1556 n.11 (10th Cir. 1992). All of these considerations must be taken into account when assessing a defendant's capacity not only to have a factual understanding, but also, and most importantly, a rational understanding of the postconviction process.

In order to arrive at a workable "standard" for competency in the context of a capital postconviction proceeding, it is necessary to take into consideration the role of the defendant in these proceedings. First and most obvious, a defendant must be able to effectively communicate with his counsel "with a reasonable degree of rational understanding." Fla. R. Crim. P. 3.211 (a)(1). "A defendant's right to the effective assistance of counsel is impaired when he cannot cooperate in an active manner with his lawyer. . . The defendant must be able to provide needed information to his lawyer, and to participate in the making of decisions on his own behalf." Riggins v. Nevada, 112 S.Ct. 1810, 1820 (1992) (Kennedy, J., concurring in judgment).[1]

The defendant's input and active participation is essential for a productive attorney-client relationship during the pendency

[1]That the proceedings are postconviction proceedings rather than trial proceedings is a distinction without a difference, as Mr. Carter has the right to effective representation during his postconviction proceedings. *Spalding v. Dugger*, 526 So. 2d 71 (Fla. 1988); *Spaziano v. State*, 660 So. 2d 1363 (Fla. 1995).

of postconviction proceedings. The input of the defendant is essential in order to properly investigate the case. In the postconviction setting, collateral counsel was not present at the trial, nor privy to any decision-making sessions regarding trial strategy, if such occurred. The client's recollection of the trial, the relationship with trial counsel, and any discussions that took place about trial strategies is critical to providing effective assistance in a postconviction proceeding. If there were witnesses available at trial that would have provided helpful testimony and the client wanted that testimony presented at trial, collateral counsel must be able to obtain that information from the client in order to conduct the necessary investigation. If a defendant does not have the capacity to remember the trial, or any witnesses who testified at the trial, or other essential aspects of the trial or the investigation, or provide any information about potential avenues of investigation, then the defendant cannot be said to have the capacity to "consult with counsel with a reasonable degree of rational understanding."

In connection with the requisite capacity to consult with counsel, a defendant must possess the capacity "to understand the nature and object of the proceedings against him." Drope, 420 U.S. at 171. Strategies and decisions that are made for postconviction proceedings are different than those for trial, and those concerns are multiplied when federal habeas litigation

is taken into account. In order to assist in the presentation of claims and arrive at various litigation strategies, a defendant must have the capacity, both factual and rational, to at least understand the fundamental nature of the postconviction process in both state and federal court beyond simply knowing he wants a new trial. Not only must a defendant understand the "adversary nature of the legal process," see Fla. R. Crim. P. 3.211 (a)(2)(A)(iii), he must also possess the requisite capacity to "rationally" understand the nature and object of the postconviction process. And certainly, a necessary component of understanding the nature and object of postconviction proceedings is the mental capacity to understand not only that these proceedings could result in the defendant's execution by electrocution, but also the reasons for that execution. See Ford v. Wainwright; Fla. R. Crim. P. 3.811 (1996).

An individual seeking postconviction relief in a capital case must also have the capacity to be present at and participate in an evidentiary hearing, listen to the testimony, and consult with counsel with a reasonable degree of rational and factual understanding about the testimony being presented. A defendant does not lose his right to due process when seeking postconviction relief, and fundamental constitutional rights to which a defendant is entitled at trial also attach at a postconviction evidentiary hearing. See, e.g., Teffeteller v. Dugger, 21 Fla. L. Weekly S107 (Fla. 1996). For example, Mr.

Slawson has the constitutional right to confront witnesses against him at an evidentiary hearing. Teffeteller, 21 Fla. L. Weekly at S107.

A defendant must also be able to manifest appropriate courtroom behavior during a hearing, similar to the pre-trial standard. A client's input during an evidentiary hearing is essential, as many of the matters about which testimony is elicited concerns alleged events between the client and trial counsel and other witnesses, including alleged decisions and strategies made after consultation with the defendant. If the defendant lacks the capacity to participate at a hearing, or is hallucinating during the hearing, for example, or engaging in some other activity in response to internal stimuli consistent with his mental illness, the defendant cannot be competent to proceed.

Given that Mr. Slawson has the right to be competent during these proceedings, he is also entitled to the assistance of competent mental health assistance. State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987); Mason v. State, 489 So. 2d 734 (Fla. 1986). The expert also has the responsibility to obtain and properly evaluate and consider the client's mental health background. Mason, 489 So. 2d at 736-37. The United States Supreme Court has recognized the pivotal role that the mental health expert plays in criminal cases:

[W]hen the State has made the defendant's mental condition

relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they might believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity, and tell the jury why their observations are relevant.

Ake v. Oklahoma, 470 U.S. 68 (1985). Thus, no adequate competency determination can be made in the absence of effective mental health experts armed with information about the defendant's background, family history, and other relevant information necessary to the rendering of a professionally competent opinion.

Mr. Slawson has neither the ability to consult with counsel nor to understand the proceedings against him. His postconviction proceedings therefore are being conducted in violation of the Fourteenth Amendment to the United States Constitution and the corresponding provisions of the Florida Constitution. Mr. Slawson's case in postconviction cannot proceed until he has regained his competence.

ARGUMENT III

MR. SLAWSON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT/INNOCENCE PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE

UNITED STATES CONSTITUTION WHEN COUNSEL FAILED TO OBJECT TO IMPROPER AND INVALID EXPERT TESTIMONY AND FAILED TO ADEQUATELY LITIGATE OTHER GUILT PHASE ISSUES.

The sole issue in the guilt phase of Mr. Slawson's case was "specific intent." The only issue before the jury was whether Mr. Slawson's intoxication at the time of the offense negated his ability to form specific intent.

The State knew it would have a difficult time proving specific intent in this case. It also knew Mr. Slawson suffered from a history of mental illness, and was probably intoxicated at the time of the offense.

Further, the State was aware of the defense strategy of calling two prominent mental health experts to testify that Mr. Slawson's intoxication at the time of the offense negated his ability to form the requisite intent for first degree murder.

In desperation, the State hired Dr. Stanton Samenow to testify that the insanity and impairment defenses are not valid. On direct examination, Dr. Samenow testified that, based on a long-term study he had conducted, it is virtually impossible to reconstruct the mental state of a defendant at the time of crime, and that ultimately, an impairment "defense is essentially a charade" (R. 1224).

Dr. Samenow testified that he could not formulate an opinion regarding whether Mr. Slawson had the ability to form specific intent at the time of the homicides because, "I don't think it is

possible to go back and reconstruct" the defendant's state of mind (R. 1211). He went on to say,

> I would maintain it is impossible to say what went on in Mr. Slawson's mind at that time.
>
> And so, I think, again, the exercise of trying to reconstruct what his mental state is or was at that time, it just can't be done with any validity or reliability.

(R. 1211).

Dr. Samenow testified that, for the individuals in his study, "the insanity defense had been a charade by which they calculatingly were able to get into a hospital rather than go to prison." (R. 1203). He could not form an opinion regarding Mr. Slawson's state of mind at the time of the homicides based on the materials he reviewed because be believe it is impossible to "validly" or "reliably" "ascertain the mental state at the time of the crime, trying to reconstruct days, weeks or months later." (R. 1208). Dr. Samenow went on to give a clear opinion concerning the validity of impairment defenses:

> I would say the insanity defense and the, um, impairment defense is essentially a charade.

(R. 1224).

This testimony destroyed Mr. Slawson's defense that he was unable to form specific intent at the time of the offense. Dr. Samenow told the jury to disregard the law and any defense attempt to prove Mr. Slawson lacked the requisite intent for first degree murder because such defenses are "charades."

Despite the fact that Dr. Samenow's testimony was highly

improper and contrary to the law of Florida, defense counsel made no effort to have Dr. Samenow's testimony stricken from the record and have the jury instructed to disregard it.

Defense counsel was ineffective for failing to object to Dr. Samenow's testimony rendering an opinion on the validity of insanity and impairment defenses, which are matters of law.

Dr. Samenow's testimony was wholly unrelated to "assist(ing) the trier of fact in understanding the evidence or in determining a fact in issue," and could not "be applied to the evidence at trial."

The admissibility of Dr. Samenow's testimony was first raised on direct appeal. Although the Florida Supreme Court maintained that Dr. Samenow's testimony was improper, it held that trial counsel failed to preserve the issue:

> We do not approve of the admission of expert testimony that a legally recognized defense is "a charade." Such is not a proper subject on which to elicit an expert's opinion. However, the issue has not been preserved and we cannot agree that Slawson was deprived of a defense. Cf. Carter v. State, 469 So. 2d 194 (Fla. 2d DCA 1985) (fundamental error to give inherently misleading self-defense instruction that is an incorrect statement of law and that has the effect of negating defense). Slawson was given an opportunity to rebut Dr. Samenow's testimony and a proper instruction was given on the defense of intoxication.

Slawson v. State, 619 So. 2d 255, 259 (1993). This issue is raised here because claims of ineffective assistance of counsel are not cognizable on direct appeal.

During its closing argument, the State relied heavily on Dr. Samenow's testimony by urging the jury to reject the intoxication

defense as "sheer nonsense" and "an insult to [the jury's] intelligence:

> In view of this, the "I didn't do it" defense just won't work. It won't work. It won't hold water, and Newton Slawson knows that.
>
> What other option did he have? Well, he might come in here and try to plead insanity, but that wouldn't work either. He had been examined numerous times by Dr. Merin and Dr. Maher. Both of them said he wasn't insane at the time these acts were committed.
>
> What option is left? He is not insane. He can't say he didn't do it. Well, you have heard it this past week, cocaine intoxication.
>
> In essence, he is claiming that although he slaughtered this entire family, he shouldn't be held accountable because he was in a cocaine-crazed state of mind and couldn't have formed the necessary intent to kill.
>
> State another way, he would have you believe, he would like for you to believe, he hopes you will believe, that these killings were not premeditated.
>
> Based on the testimony you heard from the witness stand, based on all the evidence that you have seen, I suggest to you that his cocaine intoxication is nothing but sheer nonsense. It's an insult to your intelligence.
>
> MR. DONERLY: Your Honor, may we approach the bench?
>
> THE COURT: No. Sit down.
>
> Go ahead. I'll overrule the objection.

(R. 1395-96).

Defense counsel objected to the State argument that an intoxication defense was "nonsense" because such an argument was contrary to the law for the State of Florida:

> MR. DONERLY: May I now state the terms for the objection, Your Honor?
>
> The objection, Your Honor, was on the grounds that the --

roughly the third half and especially the part immediately before the objection that Mr. James' argument was not an argument about the evidence, but rather an argument in derogation of the intoxication defense, essentially saying even if established, who cares, because it's the intoxication defense, it's nonsense, and, um, that an argument has been accepted at the appellate level with reference to the insanity defense -- I didn't bring the case with me, obviously, because I didn't anticipate the argument. The name was Ruso v. State, I believe it was, a 3rd District Court of Appeals case.

THE COURT: Well, it was a witness that said that the defense in this case was nonsense. The State presented a witness that testified under oath, though, an expert, plus, I think Mr. James was arguing that -- that the evidence and the weight of the evidence indicated that it was nonsense in this case.

I don't think that --

MR. SKYE: That was my recollection, Judge.

THE COURT: So, I mean, that's why I anticipated your objection and that's why I didn't want to go ahead and interrupt the argument at that time.

MR. DONERLY: Well, I take it the Court is going to overrule the objection?

THE COURT: Overrule the objection.

(R. 1405-06) (emphasis added).

Of course, the witness who stated the defense was nonsense (invalid) was Dr. Samenow, who testified that impairment defenses in general are charades (R. 1224). As noted above, this testimony has been condemned by the Florida Supreme Court on direct appeal. Slawson v. State, 619 So. 2d 255, 259 (1993). Thus, the State argument urging the jury to reject the intoxication defense as "sheer nonsense" was contrary to law and highly improper.

Trial counsel knew prior to trial what would constitute the

substance of Dr. Samenow's testimony. In fact, trial counsel took Dr. Samenow's deposition prior to trial. Thus, trial counsel should have objected to Dr. Samenow testifying to the validity of an impairment defense.

At deposition, Dr. Samenow testified:

> (T)he attempt to reconstruct what was in somebody's mind, what his mental state was a day ago, a week ago, a month ago, a year ago really is an exercise in futility. And I would say essentially that there is no way to know.
>
> * * *
>
> The whole attempt to talk about a mental state at the time of the crime is really an exercise pretty much like reading tea leaves or the Ouija board.

(Deposition of Dr. Stanton Samenow at 6).

When asked by defense counsel whether he believed the insanity defense was a "sham," Dr. Samenow replied, "Yes." (Deposition of Dr. Stanton Samenow at 9). In his deposition, Dr. Samenow described the study upon which he based his conclusion that insanity, a legally valid defense, was a "charade." (Deposition of Dr. Stanton Samenow at 11).

With regard to the defense of lack of intent to commit a crime, Dr. Samenow had the same opinion:

> "I think to go back and to try to reconstruct a mental state at the time of the crime has many, many problems inherent in it. And I think as I indicated earlier that really, I don't think it can be done."

(Deposition of Dr. Stanton Samenow at 12).

The insanity defense is a legal standard, and its validity is determined by the same bodies and in the same manner as any other legal standard. Courts through case law and the legislature through statutes determine the validity of legal

standards. As the Florida Supreme Court has made clear,

> Under McNaughton the only issues are: 1) the individual's ability at the time of the incident to distinguish right from wrong; and 2) his ability to understand the wrongness of the act committed.

Gurganus v. State, 451 So. 2d 817, 820 (Fla. 1994).

Underlying the insanity defense is the most fundamental principle of criminal law: for an individual to be deemed criminally culpable for his acts, the legally specified *mens rea* must exist at the same time the legally prohibited act is performed. Whether these circumstances exist simultaneously is a question for the finder of fact, most often the jury. In other words, a jury, as the fact finder, is required by law to do exactly what Dr. Samenow said is impossible: "attempt to reconstruct what was in somebody's mind, what his mental state was a day ago, a week ago, a month ago, a year ago". Because, as an expert in the field of psychology, Dr. Samenow could only have testified to opinions that would have assisted the jury in determining whether Mr. Slawson in fact formed the intent necessary to commit first degree murder, his testimony was beyond the scope permitted under the Florida Evidence Code. His testimony in no way assisted the jury in evaluating the evidence, or determining a fact in evidence; therefore, it was irrelevant.

Furthermore, the conclusions at which Dr. Samenow arrived at were contradictory, and therefore unreliable. Although he testified at deposition that mental state at the time of the

crime could not be reconstructed, he went on to say that he believed all the subjects of his study were sane at the time of the crime. When asked about psychosis and criminal behavior, Dr. Samenow said, "I haven't found anybody yet who was psychotic at the time of the crime." (Deposition of Dr. Stanton Samenow at 9). He explained that based on his study, he has "not found a case where the person was mentally ill at the time of the crime." (Deposition of Dr. Stanton Samenow at 11). These conclusions directly contradict his initial statement that state of mind at the time of a crime could not be reconstructed. Counsel at trial was ineffective in failing to object to Dr. Samenow's testimony.

Additionally, Dr. Samenow's opinion was unreliable because the standard under which the individuals he evaluated in his study were acquitted was different from that utilized in Florida. The standard for legal insanity applied to those individuals was the Durham Rule, under which a person is not criminally culpable if it is determined beyond a reasonable doubt that he suffers from a mental disease or defective mental condition at the time of the prohibited act such that the accused is not criminally responsible. This standard differs significantly from the McNaughton Rule. Durham v. United States, 214 F.2d 861 (1974).

Because counsel knew the substance of Dr. Samenow's testimony prior to trial and the doctor had never examined Mr. Slawson, counsel should have objected to its admission. Mr. Slawson was prejudiced in the sense that if trial counsel had

objected to the substance of the doctor's testimony, there is a reasonable probability that the outcome would have been different. In the absence of his irrelevant, confusing testimony, there is a reasonable probability that the jury would have voted for a lesser degree of murder.

Dr. Samenow went on to give additional dubious and confusing testimony to the jury. He testified that he has never found anyone who committed a crime while in a psychotic state (R. 1219), and described psychosis as the following:

> Psychosis is when a person loses contact with reality. That can be a brief episode or when a person can have a chronic psychotic condition. And what that really has to do with is where a person causes, in fact, reasoning suffers. He is not oriented as to person, place and time.
>
> He may be delusional. He may be hallucinating. He is not purposeful and deliberate in what he does and, indeed, there are such people. And, indeed, even on the grounds of St. Elizabeth's there are such people. But not in our criminal population.
>
> * * *
>
> I am saying two things.
>
> One is that we had a small number of people in our study who had episodes of psychosis, but when psychotic they were not involved in criminal behavior.
>
> Indeed, the content of their psychosis was anti-crime. So I am simply saying to you that among the people that I have dealt with there was not a psychosis at the time of the criminal behavior.

(R. 1220).

Further, defense counsel inquired whether Dr. Samenow had ever found anyone to have engaged in criminal activity with impaired mental faculties. The response from Dr. Samenow was:

[n]ot where they didn't know what they were doing in terms of the crime. What I mean by that is, yes, a person can have some pretty odd features about them. One can have a mental disorder and be a criminal too, like one could have cancer and emphysema.

(R. 1220).

Dr. Samenow then clarified his statement:

Oh, I am not saying that they were mentally impaired.

I am saying that a person can have some very strange things about his personality and can have problems in his life, but that doesn't mean that the mental illness caused him to commit the crime.

(R. 1221).

Dr. Samenow's testimony that mental illness does not cause one to commit a crime was irrelevant and confusing to the jury. Neither the insanity defense nor the involuntary intoxication defense involve a causal relationship between a mental state and a criminal offense. Rather, these defenses describe a certain state of mind which negates the "premeditated design" level of intent required for the commission of murder in the first degree. Fla. Stat. §782.04(1)(a)(1).

Furthermore, this testimony contradicts his conclusion that state of mind at a particular moment cannot be reconstructed.

Dr. Samenow's testimony was irrelevant, confusing and beyond the scope of his expertise as a psychologist. He rendered opinions concerning the validity of legal defenses. Furthermore, he misunderstood the nature of the defenses upon which he rendered his opinion.

Despite trial counsel's knowledge of the substance of Dr. Samenow's testimony prior to trial, he failed to object to its admission. Such blatant error cannot be ascribed to a reasonable strategic decision; thus, counsel's performance was deficient.

Further, if defense counsel had investigated Dr. Samenow's research, he would have known that the study upon which Dr. Samenow relied to render his opinions was unreliable and irrelevant. Experts in the field of psychology would not reasonably rely upon this study for any purpose. Of this study, Geoffrey P. Alpert of the University of Texas at Dallas writes,

> Unfortunately, the reader will find no causal connection between the authors' methods and data and their conclusions! It is the objective of this book to define and identify the criminal personality in terms of thought patterns and emotions as well as actions. Unfortunately, this effort is doomed to failure because of the authors' subjective rather than operational definitions and their false premises regarding the viability of American Society.

Geoffrey P. Alpert, 1 Criminal Justice Review 137 (1976) (reviewing Samuel Yochelson and Stanton Samenow, The Criminal Personality, Volume I: A Profile for Change (1975)).

Under the Sixth and Fourteenth Amendments to the United States Constitution, Mr. Slawson had a right to the effective assistance of counsel at his capital trial. Strickland v. Washington, 466 U.S. 668 (1984). The right to effective assistance of trial counsel is the right to counsel who will "bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 668. The

absence of "a reliable adversarial testing process" at trial renders the outcome unreliable in the sense that "the trial cannot be relied on as having produced a just result." 466 U.S. at 686.

Counsel's highest duty is the duty to investigate and prepare. Where counsel unreasonably fails to investigate and prepare, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. See, e.g., Kimmelman v. Morrison, 477 U.S. 365, 384-88 (1986) (failure to request discovery based on mistaken belief state obliged to hand over evidence); Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991)(failure to conduct pretrial investigation was deficient performance); Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(en banc) (failure to interview potential self-defense witness was ineffective assistance); Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989)(failure to have obtained transcript witness's testimony at co-defendant's trial was ineffective assistance); Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986) (failure to interview potential alibi witnesses).

"In a capital case the attorney's duty to investigate all possible lines of defense is strictly observed." Coleman v. Brown, 802 F.2d 1227 (11th Cir. 1986). Mr. Slawson's court-appointed counsel failed in this duty. Counsel operated through neglect. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, Harrison v. Jones, 880 F.2d

1279 (11th Cir. 1989), or on the failure to properly investigate and prepare. See Kimmelman v. Morrison, Chambers v. Armontrout, Nixon v. Newsome. Mr. Slawson's capital conviction and sentence of death are the resulting prejudice. But for counsel's errors, there is a reasonable probability of a different outcome.

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. Washington 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, 626 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. Washington; Kimmelman v. Morrison.

The Eighth Amendment to the Federal Constitution recognizes the need for increased scrutiny in the review of capital verdicts and sentences. Beck v. Alabama, 477 U.S. 625 (1980). The United States Supreme Court noted, in the context of ineffective assistance of counsel, that the correct focus is on the

fundamental fairness of the proceeding:

> A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the 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.

Strickland v. Washington, 466 U.S. 668, 696 (1984) (emphasis added).

A. OTHER GUILT PHASE ERRORS BY TRIAL COUNSEL

In this case, counsel failed to investigate and prepare for guilt phase proceedings. He failed to familiarize himself with the law; he failed to object to errors. Counsel's ignorance of the law constitutes deficient performance that prejudiced Mr. Slawson. Mr. Slawson was deprived of a reliable and meaningful penalty phase proceeding before the sentencing jury, which is "a co-sentencer." Johnson v. Singletary, 612 So. 2d at 576.

Mr. Slawson's convictions and sentences are the prejudice resulting from trial counsel's deficient performance. There is a reasonable probability that upon counsel's objection, the trial court would have excluded the testimony, and the jury would have been clear that involuntary intoxication is a legally valid defense, and returned a verdict for second degree murder. Mr. slawson's convictions and sentences are unreliable.

Mr. Slawson did not receive the fundamentally fair trial to

which he was entitled under the Eighth and Fourteenth amendments to the Federal Constitution. See Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991); Blanco v. Singletary. The sheer number and types of errors involved in his trial, when considered as a whole, resulted in the unreliable conviction and sentence he received.

Mr. Slawson's trial was tainted because trial counsel was ineffective. Counsel's performance was unreasonable and prejudicial. Rule 3.850 relief is appropriate and Mr. Slawson requests an evidentiary hearing on this issue. Mr. Slawson is entitled, at the very minimum, to a hearing on the issues raised.

ARGUMENT IV

MR. SLAWSON'S COUNSEL IS PROHIBITED FROM INTERVIEWING JURORS TO DETERMINE WHETHER JUROR MISCONDUCT CREATES CAUSE FOR RELIEF. MR. SLAWSON'S RIGHTS UNDER THE FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS ARE VIOLATED.

Florida Rule of Professional Conduct 4-3.5(d)(4) provides that a lawyer shall not initiate communications or cause another to initiate communication with any juror regarding the trial in which that juror participated. This prohibition restricts Mr. Slawson's ability to allege and litigate constitutional claims that would show that his conviction and sentence of death is in violation of the United States Constitution.

Florida has created a rule that denies due process to defendants such as Mr. Slawson. "A trial by jury is fundamental

to the American scheme of justice and is an essential element of due process." Scruggs v. Williams, 903 F.2d 1430, 1434-35 (11th Cir. 1990)(citing Duncan v. Louisiana, 391 U.S. 145 (1968)). Implicit in the right to a jury trial is the right to an impartial and competent jury. Tanner v. United States, 483 U.S. 107, 126 (1987). However, a defendant who tries to prove members of his jury were incompetent to serve has a difficult task. It has been a "near-universal and firmly established common-law rule in the United States" that juror testimony is incompetent to impeach a jury verdict. Tanner, 483 U.S. at 117.

An important exception to the general rule of incompetence allows juror testimony in situations in which an "extraneous influence" was alleged to have affected the jury. Tanner, 483 U.S. at 117 (citing Mattox v. United States, 146 U.S. 140, 149 (1892)). The competency of a juror's testimony hinges on whether it may be characterized as extraneous information or evidence of outside influence. Shillcutt v. Gagnon, 827 F.2d 1155, 1157 (7th Cir. 1987).

Such extraneous information that may be testified to by jurors includes evidence that jurors heard and read prejudicial information not in evidence, Mattox v. United States, 146 U.S. 140 (1892); that the jury was influenced by a bailiff's comments about the defendant, Parker v. Gladden, 385 U.S. 363, 365 (1966); or that a juror had been offered a bribe, Remmer v. United States, 347 U.S. 227, 228-30 (1954).

In order for a defendant to win relief, the extraneous information that infects the jury deliberations must amount to a deprivation of due process. Jeffries v. Blodgett, 5 F.3d 1180, 1190 (9th Cir. 1993); Harley v. Lockhart, 990 F.2d 1070, 1073 (8th Cir. 1993); Shillcutt v. Gagnon, 827 F.2d 1155, 1159 (7th Cir. 1987). Furthermore, prejudice that pervaded the jury room, yet is not attributable to extrinsic influences, may nonetheless be so egregious that "there is a substantial probability that the [juror's comment] made a difference in the outcome of the trial," thus allowing the admission of juror testimony to prove the abuse. Shillcutt, 827 F.2d at 1159.

Because error can occur in the jury room that amounts to a denial of due process, defendants must be given the opportunity to discover that error. Florida, however, bars defendants from their best source of information of what took place in the jury room -- the jurors themselves. Patrick Jeffries never would have known of the impermissible extrinsic evidence considered by his jury, and never would have been granted habeas relief, if Washington had a rule similar to Florida's prohibiting contact with jurors. See Jeffries v. Blodgett, 5 F.3d at 1189. Mr. Slawson cannot allege what, if any, impermissible extrinsic factors other than those previously cited, Tanner; Jeffries; or intrinsic prejudices, Shillcutt; may have affected his jury's deliberations because Florida has erected a bar to his discovery of such due process violations. Florida's rule prohibiting contact with jurors is therefore, in itself, a denial of due process.

The Florida Supreme Court recently has recognized that overt acts of misconduct by members of the jury violate a defendant's right to a fair and impartial jury and equal protection of the law, as guaranteed by the United States and Florida Constitutions. Powell v. Allstate Insurance Co., 652 So. 2d 354 (Fla. 1995). It is imperative that postconviction counsel be permitted to interview jurors to discover if overt acts of misconduct impinging upon the defendant's constitutional rights took place in the jury room.

The Florida rule likewise impinges upon Mr. Slawson's right to free association and free speech. This rule is a prior restraint. Mr. Slawson's counsel seeks to interview jurors in order to prepare his postconviction pleadings. Any legitimate interest the State has in preventing interference with the administration of justice ends when the trial ends, at least with regard to jurors. Wood v. Georgia, 370 U.S. 375 (1978). There is no "clear and present danger" that talking to Mr. Slawson's jurors years after his trial would interfere with the administration of justice. Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978). The Florida rule is overbroad. Whatever interests it seeks to protect are outweighed by the rule's chilling effect on speech.

The Florida rule unconstitutionally limits freedom of association. Litigation is a mode of expression and association protected by the First Amendment. NAACP v. Button, 371 U.S. 415 (1963). In order to enforce the rule, the State must show that the governmental interest being furthered is compelling, and that that interest cannot be achieved by means less restrictive to freedom of association. NAACP v. Alabama, 357 U.S. 449 (1958). The State can make neither showing here. Florida's rule constitutes an impermissible restriction on freedom of association.

The prohibition violates equal protection in that a defendant who is not in custody can freely approach jurors to determine if juror misconduct occurred when an incarcerated defendant is precluded from doing so. In addition, death-sentenced inmates in other states are not precluded from communicating with jurors to determine if cause exists to prove juror misconduct and have been granted relief after proving such error existed. See, e.g., Jeffries v. Blodgett, 5 F.3d 1180 (9th Cir. 1993). Florida's rule thus denies Florida inmates equal protection.

Florida's rule prohibiting Mr. Slawson's counsel from contacting his jurors violates Mr. Slawson's First, Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

Mr. Slawson requests reasonable time to amend this petition after this unconstitutional prohibition has been lifted.

ARGUMENT V

MR. SLAWSON IS INNOCENT OF FIRST DEGREE MURDER AND WAS DENIED ADVERSARIAL TESTING.

Counsel is unable to fully argue this claim without consulting with Mr. Slawson. See Argument I. Mr. Slawson's mental illness interferes with his ability to consult with counsel and understand the proceedings in which he is enmeshed to such an extent that he will not leave his cell for legal visits. Until Mr. Slawson is competent, counsel will not be capable of fully investigating and arguing this claim.

ARGUMENT VI

MR. SLAWSON WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE MENTAL HEALTH EXPERT WHO EVALUATED MR. SLAWSON DID NOT RENDER ADEQUATE MENTAL HEALTH ASSISTANCE AS REQUIRED BY AKE V. OKLAHOMA.

Mr. Slawson was denied his rights under the Federal Constitution to a professional, competent, and appropriate mental health evaluation for use in the aid of his defense. Counsel failed to obtain such an evaluation. Counsel failed to provide the background material to the mental health experts retained which were necessary for an adequate and appropriate evaluation.

A criminal defendant is constitutionally entitled to competent and appropriate expert psychiatric assistance. Ake v. Oklahoma, 470 U.S. 68 (1985); Morgan v. State, 639 So. 2d 6 (Fla. 1994). What is required is a "psychiatric opinion developed in such a manner and at such a time as to allow counsel a reasonable opportunity to use the psychiatrist's analysis in the preparation and conduct of the defense." Blake v. Kemp, 758 F.2d 523, 533 (11th Cir. 1985)(emphasis added). Mr. Slawson was denied his constitutionally guaranteed right to the competent and appropriate assistance of expert psychiatric assistance.

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). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background, see O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984), and to assure that the client is not denied a professional and professionally conducted mental health evaluation. See Fessel; Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991); Mason v. State, 489 So. 2d 734 (Fla. 1986); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984). Mr. Slawson was denied the effective assistance of counsel because counsel failed to conduct a proper investigation into Mr. Slawson's mental health background.

The mental health expert must also protect the client's rights, and the expert violates these rights when he or she fails to provide competent and appropriate assistance. State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987); Mason v. State. The expert also has the responsibility to obtain and properly evaluate and consider the client's mental health background. Mason, 489 So. 2d at 736-37. Here, the expert appointed by the court violated Mr. Slawson's rights to provide competent and appropriate assistance.

Generally accepted mental health principles require that an accurate medical and social history be obtained because it is often only from the details in the history that organic disease or major mental illness may be differentiated from a personality disorder. R. Strub & F. Black, Organic Brain Syndrome, 42 (1981). This historical data must be obtained not only from the patient, but also from sources independent of the patient. Patients are frequently unreliable sources of their own history, particularly when they have suffered from head injury, drug addiction, and/or alcoholism. Additionally, a patient's knowledge may be distorted by information obtained from family and their own organic or mental disturbance. A patient's self-report is thus insufficient. Mason.

Mr. Slawson is entitled to new guilt-innocence and penalty phase proceedings because his psychiatric examination was "so grossly insufficient" that it ignored indications of schizophrenia. Sireci.

Florida law made Mr. Slawson's mental condition relevant to guilt/innocence and sentencing in many ways: (a) insanity; (b) specific intent to commit first degree murder; (c) statutory mitigating factors; (d) statutory aggravating factors; and (e) myriad nonstatutory mitigating factors. Mr. Slawson was entitled to professionally competent mental health assistance on these issues.

Trial counsel and defense experts were ineffective. Trial counsel should have prepared defense experts to challenge Dr. Samenow's qualifications as an expert. Defense experts should have refuted Dr. Samenow's specious testimony. It is clear that Dr. Samenow's testimony denied Mr. Slawson Sixth Amendment right to a fair trial.

In Mr. Slawson's case, counsel failed to provide his client with "a competent psychiatrist . . . [to] conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Ake, 105 S. Ct. at 1096 (1985); Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990); Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991); De Freece v. State, 848 S.W. 2d 150 (Texas Cr. App. 1993).

Both the expert and trial counsel have a duty to perform an adequate background investigation. The failure to conduct such investigation violates due process because neither the judge nor the jury has facts necessary to make a reasoned finding. In this case, sources of information necessary for an expert to render a professionally competent evaluation were not investigated. Information that would have assisted in preparing Mr. Slawson's defense and in presenting evidence of mitigating circumstances existed at the time of trial.

Mr. Slawson has a long history of mental health complications. His mother fell on her stomach about a month before his birth. During birth, Mr. Slawson suffered oxygen deprivation. Head injuries have plagued him since infancy. He has had at least four severe head injuries prior to reaching age 10. Since age 10, Mr. Slawson has suffered at least three severe head injuries. He also has a history of drug and alcohol abuse.

Postconviction counsel retained a mental health expert, and he has reviewed Mr. Slawson's psychiatric history and background material. This expert diagnosed Mr. Slawson as paranoid schizophrenic, and can say, within a reasonable degree of medical certainty, that Mr. Slawson was insane at the time of the crime. The expert who testified on Mr. Slawson's behalf at trial stated that he lacked sufficient information to say whether Mr. Slawson met the criteria for legal insanity at the time of the offenses. (R. 1670).

Mr. Slawson's postconviction mental health expert can also say, within a reasonable degree of medical certainty, that Mr. Slawson's capacity to appreciate the criminality of his conduct was substantially impaired. The expert who testified on Mr. Slawson's behalf at trial stated that he lacked sufficient information to formulate an opinion concerning this statutory mitigating circumstance (R. 1591).

The mental health expert retained in postconviction describes Mr. Slawson as having a psychological profile of an individual who experienced severe physical, sexual and mental abuse as a child. A strong possibility exists that a close family member, or members, was responsible for this abuse. Postconviction counsel suspects a long-standing bizzarly hostile yet dependent relationship exists between Mr. Slawson and his mother, and perhaps with other family members. The details of these circumstances were not presented in Mr. Slawson's penalty phase, but constitute weighty non-statutory mitigation.

Mr. Slawson's medical history reveals high blood pressure, regular episodes of dizziness and headaches. Mr. Slawson also has a history of seizures. At neither his trial nor his penalty phase was there any discussion of circumstances surrounding Mr. Slawson's dizzy spells, or how he reacts to them. No expert examined the specific nature and location of his headaches or whether they are related to seizure activity. This information was essential for the development of Mr. Slawson's defense at trial and mitigation at the penalty phase because such details are relevant to specific mental health diagnoses and behavioral disorders that may have been present in addition to his other diagnoses. The postconviction mental health expert is confident within a reasonable degree of medical certainty that there is no other explanation for his conduct the night of the homicides other than a severe mental disease rendering him insane. The nature of Mr. Slawson's mental disease will also lead to the development of substantial evidence of mitigation.

The expert at the trial level failed to fully investigate and conduct competent mental health testing. Consequently, Mr. Slawson's judge and jury were unable to "make a sensible and educated determination about the mental condition of the defendant at the time of the offense." Ake, 105 S. Ct. at 1095.

Compelling mitigation was never presented to the judge and jury charged with the responsibility of deciding whether Mr. Slawson would live or die. Important, necessary, and truthful information was withheld from the jury, and this deprivation violated Mr. Slawson's constitutional rights. See Penry v. Lynaugh, 109 S. Ct. 2934 (1989); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

Defense experts never adequately defined guilt phase insanity or the penalty phase statutory mitigating factors. Defense experts never explained the difference in the standards to the jury. Trial counsel was ineffective for not bringing this testimony before the jury.

Mr. Slawson did not receive a fair trial because he did not receive appropriate assistance by the mental health expert. The court's failure to ensure that he received appropriate assistance resulted in a violation of Mr. Slawson's due process rights and right to a fair trial.

Currently, Mr. Slawson's mental state has rendered him incompetent and contributed to counsel's inability to consult with Mr. Slawson and to prepare his Rule 3.850 motion. At present, Mr. Slawson is unable to verify his Rule 3.850 motion. Due to paranoid and prosecutorial delusions most likely caused by schizophrenia, Mr. Slawson refuses to come out of his cell for legal visits. See Introduction.

Adequately prepared mental health experts are now prepared to bring forward compelling testimony which challenges Dr. Samenow's irrelevant and highly prejudicial testimony and provide relevant and probative testimony.

The prejudice to Mr. Slawson resulting from the expert's inappropriate evaluation is clear. Confidence in the outcome is undermined because the result of the proceedings in Mr. Slawson's case is unreliable. An evidentiary hearing must be conducted, and Rule 3.850 relief is proper.

ARGUMENT VII

MR. SLAWSON WAS DEPRIVED OF HIS RIGHT TO RELIABLE ADVERSARIAL TESTING AND DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.

Counsel's highest duty is the duty to investigate and prepare. Where, as here, counsel unreasonably fails to investigate and prepare, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. See, e.g., Kimmelman v. Morrison, 477 U.S. 365, 384-88 (1986) (failure to request discovery based on mistaken belief state obliged to hand over evidence); Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991)(failure to conduct pretrial investigation was deficient performance); Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(en banc) (failure to interview potential self-defense witness was ineffective assistance); Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989)(failure to have obtained transcript witness's testimony at co-defendant's trial was ineffective assistance); Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986) (failure to interview potential alibi witnesses).

"In a capital case the attorney's duty to investigate all possible lines of defense is strictly observed." Coleman v. Brown, 802 F.2d 1227 (11th Cir. 1986). Mr. Slawson's court-appointed counsel failed in this duty. Counsel operated through neglect. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989), or on the failure to properly investigate and prepare. See Kimmelman v. Morrison, Chambers v. Armontrout, Nixon v. Newsome. Mr. Slawson's capital conviction and sentence of death are the resulting prejudice. But for counsel's errors, there is a reasonable probability of a different outcome.

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. Washington 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, 626 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. Washington; Kimmelman v. Morrison.

The Eighth Amendment recognizes the need for increased scrutiny in the review of capital verdicts and sentences. Beck v. Alabama, 477 U.S. 625 (1980). The United States Supreme Court noted, in the context of ineffective assistance of counsel, that the correct focus is on the fundamental fairness of the proceeding:

A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the 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.

Strickland v. Washington, 466 U.S. 668, 696 (1984) (emphasis added). The evidence presented in this claim demonstrates that the result of Mr. Slawson's trial is unreliable.

A. DEFENSE COUNSEL'S FAILURE TO OBJECT TO DR. SAMENOW'S ERRONEOUS TESTIMONY DIMINISHED THE WEIGH THE JURY GAVE TO CERTAIN STATUTORY MITIGATION.

Without objection by trial counsel, Dr. Samenow testified that, based on a long-term study he had conducted, it is virtually impossible to reconstruct the mental state of a defendant at the time of crime and ultimately an impairment "defense is essentially a charade" (R. 1224).

Dr. Samenow testified that he could not formulate an opinion regarding whether Mr. Slawson had the ability to form specific intent at the time of the homicides because, "I don't think it is possible to go back and reconstruct" the defendant's state of mind (R. 1211). He went on to say,

> I would maintain it is impossible to say what went on in Mr. Slawson's mind at that time.
>
> And so, I think, again, the exercise of trying to reconstruct what his mental state is or was at that time, it just can't be done with any validity or reliability.

(R. 1211).

Dr. Samenow testified that for the individuals in his study, "the insanity defense had been a charade by which they calculatingly were able to get into a hospital rather than go to prison." (R. 1203). He could not form an opinion regarding Mr. Slawson's state of mind at the time of the homicides based on the materials he reviewed because be believes it is impossible to "validly" or "reliably" "ascertain the mental state at the time of the crime, trying to reconstruct days, weeks or months later."

(R. 1208). Dr. Samenow went on to give a clear opinion concerning the validity of impairment defenses:

> I would say the insanity defense and the, um, impairment defense is essentially a charade.

(R. 1224).

This testimony destroyed Mr. Slawson's case for mitigation that his capacity to conform his conduct to the requirements of law was substantially impaired. Dr. Samenow told the jury to disregard the law and any defense attempt to establish that Mr. Slawson's capacity to conform his conduct to the requirements of the law was substantially impaired.

Despite the fact that Mr. Samenow's testimony was highly improper and contrary to the law of Florida, defense counsel made no effort to have Dr. Samenow's testimony stricken from the record and have the jury instructed to disregard his testimony.

Defense counsel was ineffective for failing to object to Dr. Samenow's testimony rendering an opinion on the validity of Mr. Slawson's mitigation theory of impairment, which is a matter of law.

The trial court found two statutory mitigating circumstances were applicable in Mr. Slawson's case. The Court found (1) that Mr. Slawson's capacity to conform his conduct to the requirements of law was substantially impaired and (2) that the offense was committed while Mr. Slawson was under the influence of extreme mental or emotional disturbance (R. 2160).

However, the jury might never have found these mitigating factors, or might have given less weight to these mitigating factors because the jury was told by Dr. Samenow that impairment are a shame (R. 1224). Further, the State improperly urged the jury to disregard such a defense because it was nonsense (R. 1395-96).

B. DEFENSE COUNSEL FAILED TO PRESENT READILY AVAILABLE EVIDENCE OF MITIGATION TO THE JURY OR TO PROVIDE ADEQUATE BACKGROUND INFORMATION TO MENTAL HEALTH EXPERTS.

In Mr. Slawson's case, counsel failed to provide his client with "a competent psychiatrist . . . [to] conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Ake, 105 S. Ct. at 1096 (1985); Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990); Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991); De Freece v. State, 848 S.W. 2d 150 (Texas Cr. App. 1993).

Both the expert and trial counsel have a duty to perform an adequate background investigation. The failure to conduct such investigation violates due process because neither the judge nor the jury has facts necessary to make a reasoned finding. In this case, sources of information necessary for an expert to render a professionally competent evaluation were not investigated. Information that would have assisted in preparing Mr. Slawson's defense and in presenting evidence of mitigating circumstances existed at the time of trial.

The mental health expert retained in postconviction

describes Mr. Slawson as having a psychological profile of an individual who experienced severe physical, sexual and mental abuse as a child. A strong possibility exists that a close family member, or members, was responsible for this abuse. Postconviction counsel suspects a long-standing bizzarly hostile yet dependent relationship exists between Mr. Slawson and his mother, and perhaps with other family members. The details of these circumstances were not presented in Mr. Slawson's penalty phase, but constitute weighty non-statutory mitigation.

Mr. Slawson has a long history of mental health complications. His mother fell on her stomach about a month before his birth. During birth, Mr. Slawson suffered oxygen deprivation. Head injuries have plagued him since infancy. He has had at least four severe head injuries prior to reaching age 10. Since age 10, Mr. Slawson has suffered at least three severe head injuries. He also has a history of drug and alcohol abuse.

Postconviction counsel retained a mental health expert, and he has reviewed Mr. Slawson's psychiatric history and background material. This expert diagnosed Mr. Slawson as paranoid schizophrenic, and can say, within a reasonable degree of medical certainty, that Mr. Slawson was insane at the time of the crime. The expert who testified on Mr. Slawson's behalf at trial stated that he lacked sufficient information to say whether Mr. Slawson met the criteria for legal insanity at the time of the offenses. (R. 1670).

Mr. Slawson's postconviction mental health expert can also say, within a reasonable degree of medical certainty, that Mr. Slawson's capacity to appreciate the criminality of his conduct was substantially impaired. The expert who testified on Mr. Slawson's behalf at trial stated that he lacked sufficient information to formulate an opinion concerning this statutory mitigating circumstance (R. 1591).

The mental health expert retained in postconviction describes Mr. Slawson as having a psychological profile of an individual who experienced severe physical, sexual and mental abuse as a child. A strong possibility exists that a close family member, or members, was responsible for this abuse. Postconviction counsel suspects a long-standing bizzarly hostile yet dependent relationship exists between Mr. Slawson and his mother, and perhaps with other family members. The details of these circumstances were not presented in Mr. Slawson's penalty phase, but constitute weighty non-statutory mitigation.

Mr. Slawson's medical history reveals high blood pressure, regular episodes of dizziness and headaches. Mr. Slawson also has a history of seizures. At neither his trial nor his penalty phase was there any discussion of circumstances surrounding Mr. Slawson's dizzy spells, or how he reacts to them. No expert examined the specific nature and location of his headaches or whether they are related to seizure activity. This information was essential for the development of Mr. Slawson's defense at

trial and mitigation at the penalty phase because such details are relevant to specific mental health diagnoses and behavioral disorders that may have been present in addition to his other diagnoses. The postconviction mental health expert is confident within a reasonable degree of medical certainty that there is no other explanation for his conduct the night of the homicides other than a severe mental disease rendering him insane. The nature of Mr. Slawson's mental disease will also lead to the development of substantial evidence of mitigation.

C. OTHER PENALTY PHASE ERRORS BY TRIAL COUNSEL

Counsel failed to investigate and prepare for the penalty phase proceedings. He was ignorant of the law and he failed to object to erroneous jury instructions as set forth in this motion to vacate.

Counsel's ignorance of the law was deficient performance which prejudiced Mr. Slawson. Mr. Slawson was deprived of a reliable and meaningful penalty phase proceeding before the sentencing jury, "a co-sentencer." Johnson v. Singletary, 612 So. 2d at 576.

D. CONCLUSION

Under Strickland, ineffectiveness of counsel occurs when trial counsel's conduct so undermines the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Where adversarial testing does not occur, confidence is undermined in the outcome, and relief is

appropriate. Given a full and fair evidentiary hearing, Mr. Slawson can show the result of his trial was unreliable because of counsel's deficient performance. Mr. Slawson is entitled, at a minimum, to a full and fair evidentiary hearing on these claims.

This Court can also take into consideration that counsel's errors were cumulative. Mr. Slawson did not receive the fundamentally fair trial to which he was entitled under the eighth and fourteenth amendments. See Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991); Blanco v. Singletary, 941 F.2d 1477 (11th Cir. 1991). The sheer number and types of errors involved in his trial, when considered as a whole, resulted in the unreliable conviction and sentence that he received.

The entire trial was tainted because of trial counsel's ineffectiveness. Counsel's performance was unreasonable and was prejudicial. Rule 3.850 relief is appropriate. Mr. Slawson is entitled at the very minimum to a hearing on the issues raised.

ARGUMENT VIII

MR. SLAWSON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE VOIR DIRE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY ACTIONS OF THE PROSECUTION AND THE TRIAL COURT.

Counsel is unable to fully plead this claim without consulting with Mr. Slawson. See Argument I. Mr. Slawson's mental illness interferes with his ability to consult with

counsel and understand the proceedings in which he is enmeshed to such an extent that he will not leave his cell for legal visits. Until Mr. Slawson is competent, counsel will not be capable of fully investigating and pleading this claim. Also public records materials are still outstanding.

ARGUMENT IX

THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY ON THE STANDARD BY WHICH THEY MUST JUDGE EXPERT TESTIMONY. THE JURY MADE DECISIONS OF LAW THAT SHOULD HAVE BEEN WITHIN THE PROVINCE OF THE COURT. AS A RESULT, THE JURY'S GUILT VERDICT AND RECOMMENDATION THAT MR. SLAWSON BE SENTENCE OF DEATH ARE CONSTITUTIONALLY UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

This claim is evidenced by the following:

All other allegations and factual matters contained elsewhere in this motion are fully incorporated herein by specific reference.

Counsel is unable to fully plead this claim without consulting with Mr. Slawson. See Argument I. Mr. Slawson's mental illness interferes with his ability to consult with counsel and understand the proceedings in which he is enmeshed to such an extent that he will not leave his cell for legal visits. Until Mr. Slawson is competent, counsel will not be capable of fully investigating and pleading this claim. Also public records materials are still outstanding.

At the outset, Mr. Slawson, through counsel, represents that this claim is incomplete due to the fact that some state agencies

have not provided the documents requested by Mr. Slawson pursuant to Chapter 119, Florida Statutes. See Argument I. Therefore, Mr. Slawson requests leave to amend and/or supplement this claim once Chapter 119 has been fully complied with by the state agencies.

The trial court instructed the jury on expert witnesses as follows:

> Expert witnesses are like other witnesses, with one exception -- the law permits an expert witness to give his opinion.
>
> However, an expert's opinion is only reliable when given on a subject about which you believe him to be an expert.
>
> Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

(R. 1488) (emphasis added). Defense counsel did not object to this instruction.

The Court's instruction was an erroneous statement of law. The decision of whether a particular witness is qualified as an expert to present opinion testimony on the subject at issue is to be made by the trial judge alone. Ramirez v. State, 651 So. 2d 1164 (Fla. 1995) (citing Johnson v. State, 393 So. 2d 1069, 1072 (Fla. 1980), cert. denied, 454 U.S. 882 (1981)). The Court's instruction here permitted the jury to decide whether an expert was truly expert in the field in which the Court had already qualified him. In addition to judging his credibility, the jury was permitted to judge his expertise. That determination belongs solely to the judge.

The United States Constitution, through the Sixth Amendment right to compulsory process and confrontation, and through the Fourteenth Amendment right to due process, guarantees criminal defendants "a meaningful opportunity to present a complete defense." Crane v. Kentucky, 476 U.S. 683, 690 (1986)(citing California v. Trombetta, 467 U.S. 479, 485 (1984)). See also Ake v. Oklahoma, 470 U.S. 68, 76 (1985). In recognition of the unique difficulties indigent defendants face in mounting a defense, most states and the federal government require that indigent defendants are provided with legal counsel and the assistance of experts. See Ake, 470 U.S. at 79-80. By providing funds for experts, states and the federal government have acknowledged the indispensableness of experts in presenting a defense. See Ake; McFarland v. Scott, 114 S. Ct. 2568, 2571-72 (1994).

By permitting the jury to accept or reject an expert's qualification in a field, a question of law reserved exclusively for the Court, the instruction at issue here allowed the jury to reject the experts' opinions without legal basis for doing so. See Strickland v. Francis, 738 F.2d 1542, 1552 (11th Cir. 1984). In so instructing the jury, the Court violated Mr. Slawson's fundamental right to present a defense, guaranteed by the Sixth and Fourteenth Amendments.

Defense counsel failed to object to this erroneous instruction, and failed to offer an alternative instruction that

correctly defined the limits of the jury's discretion regarding expert witnesses. Counsel had no tactical or strategic reason for permitting the jury to be misinstructed. As a result, the outcome of the jury's deliberations is fundamentally unreliable. The prejudice to Mr. Slawson is manifest. Relief is proper.

Mr. Slawson requests an evidentiary hearing on this issue, as the records and files do not conclusively demonstrate that he is entitled to no relief.

ARGUMENT X

MR. SLAWSON WAS DENIED HIS RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION WHEN THE JUDGE AND PROSECUTOR IMPERMISSIBLY SUGGESTED TO THE JURY THAT THE LAW REQUIRED A RECOMMENDATION OF DEATH.

This claim is evidenced by the following:

All other allegations and factual matters contained elsewhere in this motion are fully incorporated herein by specific reference.

Counsel is unable to fully plead this claim without consulting with Mr. Slawson. See Argument I. Mr. Slawson's mental illness interferes with his ability to consult with counsel and understand the proceedings in which he is enmeshed to such an extent that he will not leave his cell for legal visits. Until Mr. Slawson is competent, counsel will not be capable of fully investigating and pleading this claim. Also public records

materials are still outstanding.

During voir dire, the prosecutor repeatedly asked prospective jurors if they could follow the law, vote for a sentence of death, and base their verdict and sentencing recommendation on the evidence (R. 138, 139, 144, 145, 149, 411). The trial court, prosecutor and defense counsel emphasized jurors' duty to follow the law (R. 88, 94, 259, 260, 261, 262, 263, 282, 399, 1490, 1497, 1711). The prosecutor asked the panel whether anyone had any feelings about what the law is or should be that would interfere with their ability to follow the instructions the trial court would give (R. 412).

During the guilt/innocence phase of Mr. Slawson's trial, the jury was correctly instructed that it would be improper to consider mercy or sympathy for the defendant during their deliberations (R. 1491). Defense counsel argued in his penalty phase closing that Mr. Slawson was deserving of mercy, but the jury was never instructed that mercy is one of the proper considerations upon which a recommendation of life may be based. (R. 1708, 1709). To the extent defense counsel failed to request a jury instruction on mercy, counsel's performance was prejudicially ineffective.

Contrary to the impression given the jury, the law never requires that a death sentence be imposed. What the law requires is for the jury to consider the evidence introduced in the guilt and penalty phases of trial, and recommend an appropriate

sentence. Of mercy as a consideration in the penalty phase of a capital trial, the Florida Supreme Court has said:

> Certain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment. Such an exercise of mercy on behalf of the defendant in one case does not prevent the imposition of death by capital punishment in the other case.

Alvord v. State, 322 So. 2d 533, 540. In other words, mercy, for whatever reason a jury chooses to factor it into their decision, may play a part in arriving at an appropriate sentence. See, Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985).

The cumulative effect of the voir dire questions, the guilt/innocence phase instructions, and the penalty phase omission was to impress upon the jurors that they must strictly apply the facts to the law as the judge presented the law to them. In the absence of an instruction to the contrary, a juror has no reason to believe the guilt/innocence mercy instruction would be inapplicable in the penalty phase. Indeed, they were instructed that although the State must prove aggravating factors beyond a reasonable doubt, the defense burden was only to "reasonably convince" jurors of each mitigating circumstance (R. 1713-1714). This was a change from the guilt/innocence phase, in which the defense had no burden of proof. Another change in the rules of deliberation about which the jury was instructed was the unanimity of the verdict in the guilt/innocence phase to the necessity of only a 6-6 vote to be a recommendation of a life sentence (R. 1493, 1714-1715). These instructions violate the Eighth Amendment. Mills v. Maryland, 486 U.S. 367 (1988); Franklin v. Lynaugh, 487 U.S. 164 (1988). Failure to inform the jury of the change in the consideration of mercy improperly left them with the impression that mercy could not be considered in determining an appropriate sentence.

ARGUMENT XI

MR. SLAWSON'S SENTENCING JURY WAS IMPROPERLY INSTRUCTED ON THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING FACTOR, WHICH DID NOT APPLY AS A MATTER OF LAW, AND THE HARMLESS ERROR ANALYSIS WAS NOT MEANINGFUL IN VIOLATION OF ESPINOSA V. FLORIDA, 112 S.CT. 2926 (1992), STRINGER V. BLACK, 112 S.CT. 1130 (1992), CLEMONS V. MISSISSIPPI, 110 S.CT 1441 (1990), MAYNARD V. CARTWRIGHT, 486 U.S. 356 (1988) AND THE EIGHTH AND FOURTEENTH AMENDMENT.

Regarding the heinous, atrocious, or cruel aggravating circumstance, Mr. Slawson's sentencing jury was given the following instruction:

"2. An Aggravating Circumstance that you may consider only as to the murder of Peggy Wood, if you find it established by the evidence, is that the crime was especially heinous, atrocious, or cruel.

(R. 1712).

Defense counsel objected to this instruction during the charge conference:

ARGUMENT XII

MR. SLAWSON'S EIGHTH AMENDMENT RIGHTS WERE VIOLATED BY THE SENTENCING COURT'S REFUSAL TO FIND AND WEIGH THE MITIGATING CIRCUMSTANCES SET OUT IN THE RECORD.

The proceedings resulting in Mr. Slawson's sentence of death violated the constitutional mandate of Eddings v. Oklahoma, 455 U.S. 104 (1982). Sentencing judges are required to specifically address nonstatutory mitigation presented and/or argued by the defense. Campbell v. State, 571 So. 2d 415 (Fla. 1990). The failure to give meaningful consideration and effect to the evidence in mitigation requires reversal of a death sentence. Penry v. Lynaugh, 109 S. Ct. 2934 (1989).

In Mr. Slawson's case, both statutory and nonstatutory mitigating circumstances are set forth in the record. The trial

court acknowledged that Mr. Slawson's mother abused him as a child, and that he is a friendly person who is capable of acts of kindness (R. 2161). In addition to the nonstatutory mitigation mentioned by the trial court, Mr. Slawson also presented evidence that: 1) he was abused by his step-father (R. 1562); 2) that he served in the Army and received an honorable discharge (R. 1678); 3) that he served in the Navy and received an honorable discharge (R. 1678); 4) that he defended his mother against his step-father's brutal attacks ((R. 1562); 5) that he was helpful to people (R. 1566, 1570-71, 1574-75); 6) that he was hard working (R. 1566); 7) that he had no disciplinary reports while in the Hillsborough County Jail (R. 1678); 8) that he was good with children. Each of these are mitigation under Florida law. Buckrem v. State, 355 So. 2d 111 (1977); Francis v. State, 473 So. 2d 672 (1985); Pardo v. State, 563 So. 2d 77 (1990); Lamb v. State, 532 So. 2d 1051 (1988); Cooper v. Dugger, 526 So.2d 900 (Fla. 1988). He was remorseful; his behavior in court was exemplary. There was evidence that Mr. Slawson was brain damaged, suffered from mental illness, had a history of drug abuse (R. 1630, 1644-1646, 822).

"When a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990). See Maxwell v. State, 603 So.2d 490 (Fla. 1992).

The Florida Supreme Court has recognized that trial courts "continue to experience difficulty in uniformly addressing mitigating circumstances." Campbell, 571 So. 2d 415, 419 (Fla. 1990). Moreover, the failure to set forth specific findings concerning all aggravating and mitigating circumstances could prevent the appellate court from adequately carrying out its responsibility of providing the constitutionally required meaningful appellate review, including proportionality review. Campbell, 571 So. 2d 419-20; State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). Indeed, lack of uniformity in the application of aggravating and mitigating circumstances invariably results in the arbitrary and capricious imposition of the death penalty. Furman v. Georgia, 408 U.S. 238 (1972); see Grossman v. State, 525 So. 2d 833, 850 (Fla. 1988) (Shaw, J., concurring).

In Campbell, the requirements for sentencing courts respect to findings regarding mitigating circumstances was set forth:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. . . The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably

established by the greater weight of the evidence . . . . The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in the weighing process must be supported by "sufficient competent evidence in the record." Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981).

Campbell, 571 So. 2d at 419-20 (footnotes and citations omitted)(emphasis added); see also Ferrell v. State, 20 Fla. L. Weekly S74 (Fla. Feb. 16, 1995), Larkins v. State, No. 78, 866 (Fla. May 11, 1995).

In Eddings, Justice O'Connor wrote separately explaining why she concurred in the reversal:

In the present case, of course, the relevant Oklahoma statute permits the defendant to present evidence of any mitigating circumstance. See Okla. State., Tit. 21, Section 701.10 (1980). Nonetheless, in sentencing the petitioner (which occurred about one month before Lockett was decided), the judge remarked that he could not "in following the law. . . consider the fact of this young man's violent background." App. 189. Although one can reasonably argue that these extemporaneous remarks are of no legal significance, I believe that the reasoning of the plurality opinion in Lockett compels a remand 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." 438 U.S., at 605, 98 S. Ct., at 2965.

Eddings, 455 U.S. at 119-20. Justice O'Connor's opinion makes clear that the sentencer is entitled to determine the weight due a particular mitigating circumstance; however, the sentencer may not refuse to consider that circumstance as a mitigating factor. See Parker v. Dugger, 489 U.S. 308 (1991). Here the trial court improperly rejected nonstatutory mitigation. This was Eighth Amendment error.

To the extent that counsel failed to litigate this issue at trial or on direct appeal, Mr. Slawson was denied effective assistance of counsel. Mr. Slawson is entitled to an evidentiary hearing and to relief.

ARGUMENT XIII

MR. SLAWSON WAS DENIED DUE PROCESS BECAUSE HE WAS NOT COMPETENT TO PROCEED AND THE TRIAL COURT FAILED TO CONDUCT A COMPETENCY HEARING TO RESOLVE THE ISSUE OF COMPETENCY, CONTRARY TO THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Due process requires that a defendant be competent at the time of his trial. Bishop v. United States, 350 U.S. 961, 76 S.Ct. 440 (1956). A claim of incompetence to stand trial can be proven by the subsequent presentation of collateral evidence as to actual competence. Nathaniel v. Estelle, 493 F.2d 794, 796-97 (5th Cir. 1974). Mr. Slawson was incompetent to proceed at the time of trial because he lacked "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him," Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 789 (1960); Scott v. State, 420 So.2d 595 (1982).

Due process is denied by the court's failure to conduct a reliable and adequate competency proceeding. Pate v. Robinson, 383 U.S. 375 (1966). In Mr. Slawson's case, no hearing on the question of Mr. Slawson's competence was held. Counsel failed to file a motion for competency evaluations, despite Mr. Slawson's extensive mental health history, bizarre behavior, and the explanation Mr. Slawson gave for the nature of the homicides with which he was charged. The trial court, although empowered to do so by Fl. R. Cr. P. 3.210(b), failed to order a competency hearing based on facts available to it.

Counsel is unable to fully plead this claim without consulting with Mr. Slawson. See Argument I. Mr. Slawson's mental illness interferes with his ability to consult with counsel and understand the proceedings in which he is enmeshed to such an extent that he will not leave his cell for legal visits.

Until Mr. Slawson is competent, counsel will not be capable of fully investigating and pleading this claim. Also public records materials are still outstanding.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing and the record, Mr. Slawson respectfully urges this Court to reverse and remand to the lower court, ordering a determination of competency and any required evidentiary hearing, and grant such other relief as the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on February 12, 1998.

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