IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,640

ALLEN LEE DAVIS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE FOURTH JUDICIAL
CIRCUIT COURT, IN AND FOR DUVAL
COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY AND INTRODUCTORY STATEMENT

The United States District Court for the Middle District of Florida (Black, J.) directed that Mr. Davis exhaust certain claims in the Florida state courts. Mr. Davis does so in this Rule 3.850 proceeding. Although the claims presented were previously considered and denied by this Court, Mr. Davis submits that changes in the law occurring since that time counsel reconsideration. In addition, the claims herein presented involve constitutional error that prejudiced fundamental rights, Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla. 1986), and reconsideration is therefore appropriate. Id.

To designate references to the record in the instant cause "R. ___" will be used. All other citations will be self-explanatory or will be otherwise explained.

REQUEST FOR ORAL ARGUMENT

Mr. Davis has been sentenced to death. The resolution of the issues involved in this action will 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 appropriate in this case, given the seriousness of the claims involved and the stakes at issue, and Mr. Davis accordingly requests that the Court permit oral argument.

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PROCEDURAL HISTORY

Appellant was indicted on May 27, 1982 (R. 55-56). After the State's presentation of a circumstantial case, the jury returned a general verdict of guilt (R. 1754-56, 1770). At the penalty phase, Mr. Davis' prior convictions were stipulated (R. 1777), and the State presented Mr. Davis' parole officer to show Mr. Davis was on parole (R. 1784-88). The jury returned a recommendation of death on February 4, 1983 (R. 1850).

At sentencing before the judge, the State brought to the Court's attention numerous letters from relatives of the victims demanding imposition of the death penalty, letters which the State had procured and submitted (R. 1857). In its findings, the trial court found six aggravating factors, and referred to statutory mitigating factors but declined to find any (R. 1869-75, 323-28). The Court imposed three sentences of death (R. 1876).

This Court affirmed the convictions and death sentences. Davis v. State, 461 So. 2d 67 (1984). Certiorari review was denied. Davis v. Florida, 105 S. Ct. 3540 (1985). Executive clemency was denied on August 20, 1986, and a death warrant issued. The Office of the Capital Collateral Representative then assumed Mr. Davis' representation, and on August 20, 1986, a Petition for a Writ of Habeas Corpus and an Application for Stay of Execution were filed in this Court.

While the habeas petition was pending, Mr. Davis filed a motion to vacate judgments and sentences in the circuit court pursuant to Fla. R. Crim. P. 3.850, along with a motion for stay of execution. On the same day the Rule 3.850 Motion to Vacate was filed, September 22, 1986, the circuit court denied all relief. An appeal was taken to this Court.

The Court affirmed the circuit court's denial of relief on September 23, 1986, Davis v. State, 496 So. 2d 142 (Fla. 1986). This Court denied habeas corpus relief. Davis v. Wainwright, 498 So. 2d 857 (Fla. 1986). Certiorari

review was denied by the United States Supreme Court. Davis v. Dugger, 484 U.S. 873 (1987).

Mr. Davis then petitioned the United States District Court for a writ of habeas corpus. The petition was denied by the district court on September 23, 1986. Davis v. Wainwright, 644 F. Supp. 269 (M.D. Fla. 1986), rev'd Davis v. Dugger, 829 F.2d 1513 (11th Cir. 1987). The Eleventh Circuit Court of Appeals reversed and remanded the petition to the district court. Davis v. Dugger, 829 F.2d 1513 (11th Cir. 1987). The district court then dismissed the petition without prejudice and directed Mr. Davis to present his Hitchcock v. Dugger, 481 U.S. 393 (1987), claims to the state courts.

A motion for post-conviction relief was then filed in the state circuit court pursuant to the United States District Court's directive, presenting claims predicated upon Hitchcock v. Dugger, upon changes in the law since the time of the filing of Mr. Davis' prior collateral action, and upon facts which counsel was unaware of, and could not have earlier been ascertained through the exercise of due diligence. The circuit court denied all relief on February 28, 1990. This appeal was then taken. The facts pertinent to Mr. Davis' claims for relief are discussed in the body of this brief as they relate to the individual claims presented.

SUMMARY OF ARGUMENT

I. Mr. Davis' sentence of death resulted from capital sentencing proceedings in which defense counsel and the sentencers believed nonstatutory mitigating circumstances were not to be considered in determining what sentence should be imposed. Counsel's misunderstanding of the law precluded investigation and presentation of a wealth of nonstatutory mitigation. Moreover, the sentencers including the judge failed to consider the nonstatutory mitigation appearing on the record. As a result, the penalty phase proceedings violated Hitchcock v. Dugger, 481 U.S. 393 (1987).

II. Mr. Davis was denied his right to the assistance of a confidential mental health expert in preparing his defense at both the guilt and penalty phases of his capital trial. As a result of counsel's failure and the mental health expert's failure, nonstatutory mental health mitigation was not presented to the sentencers in violation of Hitchcock v. Dugger, 481 U.S. 393.

III. Mr. Davis' fifth, sixth, eighth and fourteenth amendment rights were abrogated because he was forced to undergo criminal judicial proceedings although he was not legally competent, in violation of Pate v. Robinson, and the trial and sentencing process violated Faretta v. California, given the facts of this case.

IV. Mr. Davis' rights to reliable capital trial and sentencing proceedings were violated when the State urged that he be convicted and sentenced to death on the basis of victim impact and other impermissible factors, in violation of the eighth and fourteenth amendments.

V. Mr. Davis' sentencing jury was improperly instructed on the "especially heinous, atrocious, or cruel" aggravating circumstance, and the aggravator was improperly argued and imposed, in violation of the eighth and fourteenth amendments.

VI. The murder for which Mr. Davis was sentenced to death was not cold, calculated and premeditated as defined by Rogers v. State, and the application of this aggravating factor violated the eighth and fourteenth amendments because no limiting construction was provided to the jury or employed by the sentencing judge.

VII. Mr. Davis' sentence of death violates the fifth, sixth, eighth, and fourteenth amendments because the penalty phase jury instructions shifted the burden to Mr. Davis to prove that death was inappropriate and because the sentencing judge himself employed this improper standard in sentencing Mr. Davis to death.

VIII. Prosecutorial argument and inadequate jury instructions misled the jury regarding its ability to exercise mercy and sympathy and deprived Mr. Davis of a reliable and individualized capital sentencing determination, in violation of the eighth and fourteenth amendments.

IX. Mr. Davis' death sentence is predicated upon the finding of an automatic, non-discretion-channeling, statutory aggravating circumstance, in violation of the eighth and fourteenth amendments.

ARGUMENT

ARGUMENT I

MR. DAVIS' DEATH SENTENCES VIOLATE LOCKETT V. OHIO, EDDINGS V. OKLAHOMA AND HITCHCOCK V. DUGGER BECAUSE THE SENTENCING JUDGE LIMITED HIS CONSIDERATION OF MITIGATING FACTORS TO THOSE LISTED IN FLORIDA'S DEATH PENALTY STATUTE AND BECAUSE THE PARTICIPANTS OPERATED UNDER THIS SAME VIEW; AS A RESULT, MR. DAVIS' SENTENCES OF DEATH WERE OBTAINED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.[1]

The proceedings resulting in this sentence of death violate the constitutional mandates of Hitchcock v. Dugger, 481 U.S. 393 (1987). Mr. Davis' sentences of death resulted from the constitutionally improper restriction on the consideration of nonstatutory mitigating factors, and a constrained interpretation of the statute employed by the participants (e.g., defense counsel) in these capital proceedings. The sentencing court constrained itself from considering matters which mitigated against a sentence of death but which were not "enumerated" in the restrictive statutory list (see Fla. Stat. sec. 921.141 (1973)). This restrictive statutory construction caused the sentencer to ignore nonstatutory mitigation. Mr. Davis' resulting sentence of death was neither individualized nor reliable, and violates Hitchcock v. Dugger and its progeny. The [limiting] construction applied by Mr. Davis' sentencing court violated Hitchcock. Allen Lee Davis' sentences of death resulted from

[1]This claim was presented as Claim XIII in the Rule 3.850 motion filed in September 1986. It is represented now pursuant to the federal court's direction.

proceedings which were in every meaningful sense as unconstitutional as those in Hitchcock. Relief is appropriate.

The advisory jury here, like the one in Hitchcock, recommended death. After this recommendation, the trial judge imposed a death sentence. As reflected in his sentencing order, the sentencing judge in Mr. Davis' case "assumed . . . a prohibition [against nonstatutory mitigation]," and constrained his review of nonstatutory mitigation. Hitchcock, 481 U.S. at 397. See also Thomas v. State, 546 So. 2d 716 (Fla. 1989). In its sentencing order, the court discussed the statutory aggravating factors it deemed applicable. Then, the court looked at, reviewed, and considered, only statutory factors for mitigation.

The sentencing court, in limiting itself to consideration of only the mitigating circumstances listed in the statute, overlooked the nonstatutory mitigation contained in this record. Moreover, defense counsel's efforts were similarly constrained by the operation of state law and his perception of statutory constraints on consideration of mitigation. See Hall v. State, 541 So. 2d 1125 (Fla. 1989). To the extent counsel's belief was not reasonable, Appellant submits that counsel's view involved ineffective assistance of counsel which prejudiced Mr. Davis. As a result of counsel's view, a wealth of mental health and other nonstatutory mitigation never reached the jury and court charged with the task of determining Mr. Davis' fate.

The sentencer did not "consider," in any true and constitutional sense, the [nonstatutory] mitigating factors present in the case.

> The key aspect of the penalty trial is that the sentence be individualized, focusing on the characteristics of the individual. Gregg v. Georgia, 428 U.S. 153 (1976). Here the jurors were [not permitted to] mak[e] such an individualized determination.

Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986). Neither the court nor defense counsel fairly took note of mitigating factors concerning the character

of the offender and circumstances of the offense, Gregg v. Georgia, 428 U.S. 153 (1976), which mitigated against death but which were not in the statute. The sentencing judge foreclosed his own review. However, [nonstatutory] mitigation was available and should have been considered.

Because the court presiding at a capital sentencing proceeding is required to make specific findings in support of a death sentence, Fla. Stat. sec. 921.141 (3), we have a way of knowing what mitigating evidence was considered by the judge, as opposed to the jury. Through a review of the record and the trial judge's sentencing order, we do know what mitigating factors the judge considered in imposing sentences of death:

CONCLUSION OF THE COURT

> The Court finds that there are no statutory mitigating factors existing in this cause. . .

(Judgment and Sentence, R. 323). In arriving at this conclusion, the sentencing judge reviewed each of the eight mitigating circumstances contained in the statute, sec. 921.141 (6) (a)-(g), and articulated reasons for the non-application of each. Nonstatutory mitigation, however, was not considered. Indeed, nothing was said about such factors.

Fla. Stat. sec. 941.121 (3) requires the sentencing judge to make his findings of fact based "upon the records of the trial and the sentencing proceedings." A review of those records reveals that there was nonstatutory mitigating evidence which should have been considered. This mitigation was uncontested. Had the sentencing judge considered, in his own review of the record, evidence of mitigation other than that fitting precisely within the eight statutory categories to which he restricted his findings, the balance of life and death would have been significantly affected. However, not even a hint exists in the record that the Court took account of anything other than what tightly fit within the statute. The evidence was simply not considered by the

sentencing judge.

Important mitigating circumstances were contained in the record. Much more was available but not presented because of the restrictive view defense counsel imposed on himself. Evidence supporting mental mitigating circumstances existed; for example, the defendant's behavior after the crime supported such factors. Several of the officers who interrogated Mr. Davis immediately prior to his arrest reported that he gave responses suggestive of a multiple personality. It was additionally reported that Detective Kessinger's impression after questioning Mr. Davis was that he was "crazy." The defense attorneys' continuing difficulties in communicating with Mr. Davis regarding the events surrounding the incident, and Mr. Davis' own lack of memory, also evidence significant mental and/or emotional difficulties.

This Court has on previous occasions recognized that in appropriate cases an accused's cooperation with the authorities could be considered in mitigation. Washington v. State, 362 So. 2d 658, 667 (Fla. 1978). It would be hard to imagine a more appropriate case in that regard than the instant: from the time he initially came under suspicion until his ultimate conviction and sentence, Mr. Davis cooperated fully with the authorities. He never denied that he had been present at the victims' residence that evening -- had he not provided that information to Detective Kessinger, he might not have come under suspicion, and in fact might be a free man today. Mr. Davis consented to the search of his truck, volunteered to come to the station and take a polygraph, voluntarily submitted to a neutron activation test, and volunteered to the search of his apartment, going so far as to give the detectives his keys and directions as to how to get there. Short of pleading guilty to the offense, it would have been difficult for Mr. Davis to be any more cooperative with the investigating officers than he actually was. The fact that he did not plead guilty, however, does not foreclose consideration of his cooperativeness as a mitigating factor

-- the Court in Washington held that "the considerations that make up the decision of a defendant to plead guilty . . . are too ambiguous to assign significant weight to." Id. at 667.

This complete and total passive acquiescence on the part of Mr. Davis, particularly when contrasted with the seriousness of the offense, also suggests psychological problems rising to the level of mitigating factors. He never at any point acted as if he had anything to hide, and in fact so informed the investigating officers on several occasions. The statements elicited from Mr. Davis by the investigating officers at some points reflect almost exactly the questions posed. Faced with the serious situation in which he found himself, Mr. Davis' behavior in returning to the scene and all but throwing himself into the clutches of suspicion can hardly be deemed rational if he was indeed guilty of the crimes charged.

Mr. Davis' consistent protestations of lack of memory of the events also show significant psychiatric and psychological problems. If he was as rational as the State represented him to be before the jury, and was indeed guilty of the crime, surely he could and would have presented a better defense than lack of memory. Not only did he tell the detectives who interrogated and arrested him that he could not remember the events of the evening in question, but he also told his close friend, William Trent, to whom no exculpatory explanation was necessary, that he had either "blacked out" or "couldn't remember." Again, the seriousness of the crime, when contrasted with Mr. Davis' passive, almost childlike acquiescence, suggests either innocence or a genuine episode of memory loss, indicative of possible mental difficulties.

Nonstatutory mitigating factors were also expressly present from the testimony of defense witnesses at sentencing. The kind and generous character of the defendant, affirmed by the testimony of three witnesses, is clearly the type of mitigating evidence contemplated by Lockett. The State naturally argued

that the offense belied this assessment of his character, but this only reinforces, by the marked contrast, the suggestion of extreme mental disturbance. Mr. Davis' reputation for nonaggressiveness likewise is a valid consideration in mitigation, and similarly strengthens the presence of a damaged mind, when contrasted with the inexplicably uncharacteristic nature of the offense. The testimony to the effect that Mr. Davis loved, and was loved by, children is also a valid mitigating circumstance, and, in contrast to the offense, provides the most compelling evidence of all of significant psychological impairment.

It matters not whether proper mitigation is before the sentencer -- the issue is whether that evidence was meaningfully and properly considered. Hitchcock requires reversal of a death sentence where the sentencer does not provide meaningful consideration and does not give effect to the evidence in mitigation. Penry v. Lynaugh, 109 S. Ct. 2934 (1989).

The circuit court summarily denied this claim (R. 134). This claim was properly before the court on its merits, and the allegations required evidentiary resolution. It was thus error to deny this claim without an evidentiary hearing. The factors in mitigation which could and should have been presented and considered are further discussed in subsequent portions of this brief.

ARGUMENT II

BECAUSE THE MENTAL HEALTH EXPERT RETAINED TO EVALUATE HIM BEFORE TRIAL FAILED TO CONDUCT A FULL AND CONFIDENTIAL EVALUATION FOR AVAILABLE MENTAL HEALTH MITIGATION AS WELL AS COMPETENCY AND SANITY, AND BECAUSE DEFENSE COUNSEL FAILED TO RENDER EFFECTIVE ASSISTANCE, RESULTING IN A TRIAL AT WHICH MR. DAVIS WAS INCOMPETENT AND ENTITLED TO A COMPETENCY HEARING, IN THE FAILURE TO ESTABLISH AN AVAILABLE INSANITY DEFENSE, AND IN THE DEPRIVATION OF MR. DAVIS' RIGHTS TO A FAIR, INDIVIDUALIZED, AND RELIABLE CAPITAL SENTENCING DETERMINATION, AND, UNDER THE FACTS OF THIS CASE, RESULTING IN EVALUATIONS WHICH VIOLATED MR. DAVIS' RIGHTS TO CONFIDENTIALITY.[2]

Counsel did no or grossly inadequate investigation into his client's medical, social, and mental health background. This was due to the constrained view of mitigation counsel brought to his efforts. As a result, counsel possessed no relevant information to provide to any mental health expert. Mr. Davis was entitled to competent mental health assistance at his capital trial and sentencing proceedings. He was, after a fashion, provided experts, but their performances were professionally inadequate because they lacked the requisite information and date. Moreover, all of the participants at the trial believed nonstatutory mitigation was unavailable for consideration. As a result, the mental health experts did not pursue or consider nonstatutory mitigation present in the case. This violated the principles of Hitchcock v. Dugger, 481 U.S. 393 (1987). It is on this basis that this claim already considered by this Court in the prior 3.850 appeal (pre-Hitchcock) is represented at this juncture.

On May 19, 1982, the trial court entered an order to transport Mr. Davis for psychiatric examination (R. 6). The cost for the expert was to be paid by the then attorney, the public defender; the cost of transportation was taxed to the city (Id.). A week later, an order to transport Mr. Davis for "psychological examination" was entered with the same cost arrangement (R. 18).

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[2]This claim was presented in Claims I and II in the Rule 3.850 motion filed in September 1986. They are represented now pursuant to the federal court's direction.

No results of these interviews appeared in the record. The examinations were confidential.

On July 2, 1982, the public defender requested the court to provide funds to hire an expert to determine sanity/insanity (R. 181). The trial court was disinclined to grant the motion, arguing that an expert had seen Mr. Davis twice. Counsel told the court that the expert had not examined Mr. Davis for sanity and competency, but for other matters.

The public defender withdrew for largely unrelated reasons, and successor counsel had the expert who was previously contacted by the public defender prepare a report pursuant to Fla. R. Crim. P. 3.216(a). The expert was paid by the city (R. 513). Such a report goes "only to the attorney for the defendant and matters related to the expert shall be deemed to fall under the lawyer-client privilege." Id. The expert, Dr. Miller, had not been provided by either the public defender or Mr. Tassone [trial counsel] with any independent background information, did not seek or receive any himself, and had not evaluated Mr. Davis initially for either competency or sanity, much less mitigating circumstances. Consequently, no reliable opinion on these matters was forthcoming. Nevertheless, without conducting any testing or receiving or reviewing any information, Dr. Miller reported to counsel.

Counsel next requested a neurological examination for Mr. Davis (R. 262). The State had opposed any additional confidential psychiatric evaluations but agreed to an evaluation under Rule 3.713(c), which provides that the results go to "counsel for the parties." Rule 3.713 relates to presentence investigations, and, of course, one did not occur in this case -- the defense waived one. However, the court entered an order for a neurological examination because it would be "relevant for the sentencing phase" (R. 279). Mr. Davis was transported to the expert neurologist twice.

On January 14, 1983, the neurologist apparently sent a report directly to

the judge. The record does not reflect that copies were sent to counsel. The next pertinent reference in the record is when the judge refers to the "report" and his negation of statutory mitigation. No such report was in the record, and it was impossible for Mr. Davis to have anticipated, much less rebutted, such nonrecord material. This violated the eighth amendment. Gardner v. Florida, 430 U.S. 349 (1977).

Moreover, the procedure here violated the principles of Ake v. Oklahoma, 470 U.S. 68 (1985), as discussed by the Ninth Circuit in Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990). There the Ninth Circuit reversed a conviction and sentence of death in circumstances strikingly similar to those here:

> In the case before us, the indigent defendant Smith requested a court-appointed psychiatrist to help establish possible mitigating circumstances. The trial court agreed that psychiatric evaluation was appropriate. However, rather than appointing an expert to assist Smith in preparation for a resentencing hearing, the trial judge ordered an evaluation for the court, which would be reported directly to the court:
>
>> On June 10, 1983, the court granted the defendant's motion for psychiatric evaluation. The court appointed a psychiatrist, Dr. William Stratford, to examine the defendant and report to the court as to: (1) whether he could determine which of the versions given by the defendant was credible; and (2) what was the defendant's mental condition on August 4, 1982.
>
> State v. Smith, 217 Mont. 461, 705 P.2d 1087, 1090 (1985). The psychiatrist's contact with Smith was limited to the court-ordered examination. Smith's counsel never met with the psychiatrist to discuss the evaluation or to otherwise assess possible mitigating circumstances.
>
> In deciding to impose the death sentence, the Montana courts relied heavily on the psychiatric report to discount other testimony that Smith's behavior changed dramatically after he used LSD and alcohol.
>
> * * *
>
> The Montana courts held that evaluation by a "neutral" psychiatrist satisfied Smith's right to psychiatric assistance, even though the psychiatrist in no sense assisted in evaluation or preparation of the defense, and even though the defense was afforded no opportunity to rebut with its own psychiatric witness a highly damaging report prepared for the court. As Montana Justice Harrison stated, "The record demonstrates that Dr. Stratford was a neutral

psychiatrist who examined Smith as to his sanity at the time of the offenses. Dr. Stratford testified to the foregoing at the hearing and it was on that basis that this Court found no additional psychiatric evaluation was necessary." State v. Smith, 217 Mont. 453, 705 P.2d 1110, 1114 (1985).

But under Ake, evaluation by a "neutral" court psychiatrist does not satisfy due process. As then Circuit Judge Scalia stated in United States v. Byers, 740 F.2d 1104 (D.C.Cir.1984),

> Appellant and amici would have us believe that the mere availability of cross-examination of ... [psychiatric] experts is sufficient to provide the necessary balance in the criminal process. That would perhaps be so if psychiatry were as exact a science as physics, so that, assuming the ... psychiatrist precisely described the data ..., the error of his analysis could be demonstrated. It is, however, far from that. Ordinarily the only effective rebuttal of psychiatric opinion testimony is contradictory opinion testimony ...

740 F.2d at 1114.

Smith was entitled to his own competent psychiatric expert. See also U.S. v. Chavis, 486 F.2d 1290, 1292 (D.C.Cir.1973)("Two, three, or four psychiatrists for the Government and the court do not constitute adequate expert assistance for the defense"); United States v. Sloan, 776 F.2d 926, 929 (10th Cir.1985)(state's duty "cannot be satisfied with the appointment of an expert who ultimately testifies contrary to the defense on the issue of competence"); Marshall v. United States, 423 F.2d 1315, 1319 (10th Cir.1970)(expert who shares "a duty to the accused and a duty to the public interest" is burdened by "an inescapable conflict of interest").

* * *

We agree with the Third Circuit that a defendant's communication with her psychiatrist is protected up to the point of testimonial use of that communication. See also United States v. Nobles, 422 U.S. 225, 240 n. 15, 95 S.Ct. 2160, 2171 n.15, 45 L.Ed.2d 141 (1975)(order to disclose defense investigator's report "resulted from [defendant's] voluntary election to make testimonial use of [the] report"); United States v. Talley, 790 F.2d 1468, 1470-71 (9th Cir.1986)(recognizing "attorney-psychotherapist-client privilege" based in common law); United States Ex rel. Edney v. Smith, 425 F.Supp. 1038, 1054-55 (E.D.N.Y. 1976), (defendant waived protection against prosecution's use in rebuttal of one-time defense expert when defendant introduced testimony on mental state from different expert), aff'd, 556 F.2d 556 (2d Cir.), cert. denied, 431 U.S. 958, 97 S.Ct. 2683, 53 L.Ed.2d 276 (1977). Confidentiality must apply not only to psychiatric assistance at trial, but also to such assistance for sentencing in capital cases. In the case before us, even if Dr. Stratford had been acting as a defense psychiatrist, and had reached the same conclusion of no diminished capacity on the day of the crime, Smith's counsel was entitled to a confidential assessment of such an evaluation, and the strategic opportunity to pursue other, more favorable, arguments for

> mitigation. But Dr. Stratford's examination was restricted to a narrow field of inquiry prepared not for defense counsel, but for the court. As such, the process of psychiatric evaluation was inadequate.

914 F.2d at 1157-60.

The neurologist received no information outside of "self-report" from Mr. Davis, and his conclusions were flawed. As in Smith v. McCormick, the expert received no guidance from defense counsel as to the relevant areas of inquiry, and the expert in no way assisted defense counsel in preparing the defense. An expert recently provided with appropriate information and direction found:

> I have reviewed the CAT scan and other medical information provided to me with regard to Allen Lee Davis. The significant medical history includes seizures as an infant, severe head injuries as a teenager, severe left frontal headaches, hearing loss and repeated blackout spells. In addition, a psychological evaluation has suggested that Mr. Davis suffers from a seizure disorder (probably complex partial seizures). Moreover, the patient has been on Apresazide prescribed to him for chronic hypertension and this medicine could conceivably activate a seizure disorder. The patient also has a history of illicit use of amphetamine-like substances.
>
> Although the CT scan appears normal, in my opinion, it is inadequate as it was not done with contrast material and was performed on an older model machine. A CT scan performed both with and without contrast using a later model machine could conceivably provide objective evidence for focal brain damage.
>
> The patient has also had an EEG which was interpreted as normal. However, this was also performed improperly for the evaluation of complex partial seizures. It should be performed after being deprived of a night's sleep, with electrodes inserted into the nose.
>
> Objective evidence that Mr. Davis has brain damage and/or a seizure disorder could well be uncovered by medically appropriate testing and evaluative processes. This would be a crucial factor with regard to competency, sanity, formation of specific intent and mitigation.

(App. C., William Henry Olson, M.D.).[3]

Confidential mental health evaluations in criminal cases must be conducted to assist the defense in preparing the defense, or they do not satisfy due process. Dr. Miller's evaluation was not conducted with the benefit of proper

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[3]All references to the Appendix refer to the Appendix filed with Mr. Davis' initial Rule 3.850 motion that is part of the court file.

independent background information, guidance and direction from defense counsel, nor was it intended for the purpose for which it was ultimately used. The neurologist received no independent information, and performed insufficient tests. None of the needed psychological testing was conducted.

Proper evaluations must consider medical, psychiatric, and social history to arrive at a reliable diagnosis of mental health status (See Report of Dr. Krop, App. A, and Dr. Olson, App. C, to prior Rule 3.850 motion). See also American Psychiatric Association, "Report of the Task Force on the Role of Psychiatry in the Sentencing Process," Issues in Forensic Psychiatry 192, 200-02 (1984) [hereinafter cited "American Psychiatric Association]; Pollack, S., Psychiatric Consultation for the Court, 1 Bull. Am. Acad. Psych. & L. 267, 274 (1973) [hereinafter cited "Pollack"]; Kaplan, H. & Sadock, B., Comprehensive Textbook of Psychiatry/IV 487-88 (4th ed. 1985) [hereinafter cited "Kaplan and Sadock"]. Here, through ineffective assistance of counsel, failings on the experts' parts, and the court's directions, the evaluations were inadequate under Ake v. Oklahoma.

Related to this, the evaluations relied exclusively on an interview -- such a procedure invariably produces erroneous data concerning the patient because of the patient's inability to convey accurate information about his history, and, especially when mentally ill patients are included, because patients will generally mask rather than reveal symptoms. These difficulties can be avoided only by the collection of data independent of the patient (through, for example, review of records, psychological testing, laboratory testing, and interviews with those who know the patient). See, e.g., Kaplan and Sadock, 488, 550; American Psychiatric Association, 202; Arieti, S., American Handbook of Psychiatry 1158-60 (2d ed. 1974) [hereinafter cited "Arieti"]; Davidson, H., Forensic Psychiatry 38-39 (2d ed. 1965) [hereinafter cited "Davidson"]; Bonnie, R. and Slobogin, C., The Role of Mental Health Professionals in the Criminal

Process: The Case for Informal Speculation, 66 Va. L. Rev. 427, 508-10 (1980).

The evaluations of Mr. Davis failed almost entirely to focus upon the criteria relevant to the assessment of trial competency, see Report of Dr. Krop (App. A), failed to distinguish between data relevant to competency and data relevant to criminal responsibility and specific intent, and failed entirely to focus upon the criteria relevant to impaired responsibility (not rising to the level of insanity) and mitigation -- the experts and counsel obtained and reviewed virtually no relevant date concerning Mr. Davis and relevant to competency, insanity, and partially impaired criminal responsibility. See, e.g., American Psychiatric Association, 210; Pollack, 274. See also Winn v. United States, 270 F.2d 326 (D.C. Cir. 1959). Given the lack of consideration of data which could only be gathered outside the interview with Mr. Davis, the evaluations were grossly insufficient to permit the adequate assessment of the forensic issues in this case. See Report of Dr. Krop (App. A). See also Pollack, 275, 276; Davidson, 48; Halleck, S., Law in the Practice of Psychiatry 201 (1980).

In Mason v. State, 489 So. 2d 734 (Fla. 1986), this Court addressed a similar issue. Here, as in Mason, simple "interviews" which were "flawed as neglecting a history indicative of organic brain damage," Mason, were used. As in Mr. Davis's case:

> Commentators have pointed out the problems involved in basing psychiatric evaluations exclusively, or almost exclusively, on clinical interviews with the subject involved. One of the earlier interviewing psychiatrists noted in his report that Mason was "extremely hostile, guarded, indifferent and generally gave an extremely poor history in regard to dates, symptoms . . . etc." In light of the patient's inability to convey accurate information about his history, and a general tendency to mask rather than reveal symptoms, an interview should be complemented by a review of independent data. See Bonnie, R., and Slobogin, C., The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 Va. L. Rev. 427, 508-10 (1980).

Mr. Davis was denied his fifth, sixth, eighth, and fourteenth amendment rights. Mr. Davis was tried and sentenced to death in violation of his due process and equal protection rights. Ake v. Oklahoma, 470 U.S. 68 (1985). These inadequacies resulted in the abrogation of Mr. Davis' right to a competency hearing and to not undergo a criminal prosecution when he was mentally unfit to proceed. See Pate v. Robinson, 383 U.S. 375 (1965). The guilt-innocence phase was rendered fundamentally unreliable: available and provable insanity and diminished capacity defenses were ignored. Indeed, in this case, an insanity defense would have made quite a difference. At sentencing, the actual assistance of a defense mental health expert would have made a significant difference: substantial statutory and nonstatutory mitigation would have been established; aggravating factors would have been undermined. A professionally adequate evaluation would have assured a fair and reliable capital trial and sentencing determination. As it stands, the results of these proceedings cannot be relied upon.

Had counsel and the mental health expert been allowed to perform in a competent way, substantial mitigation, inter alia, would have been discovered. See also Appendix to previous Rule 3.850 motion. Moreover, had defense counsel not operated under the inhibitions he imposed upon himself (see Claim I), mitigating information such as that described below would have been presented to the sentencers.

A. BACKGROUND, RECORDS, AND INDEPENDENT INVESTIGATION

Allen Lee Davis grew up as an outcast, unwanted by his family and by his community, in an atmosphere of chaos, abandonment, neglect and abuse. From infancy to adulthood, Allen was rejected, ridiculed, and psychologically and physically abused. Poverty exacerbated the chaos and confusion of Allen's young life. Mired in mill town poverty, his family was economically and emotionally unprepared to care for themselves, much less for a growing child. His teenage

parents provided no stability, his mother entering two disastrous marriages and his father abusively rejecting Allen, refusing to acknowledge any responsibility or affection for his son.

Allen was repeatedly cast from one torturous situation into another, helpless to resist the forces surrounding him. After his father's rejection, Allen became the object of physical abuse and further psychological torture at the hands of his alcoholic stepfather, who never once laid a gentle hand upon Allen or offered any possibility of a meaningful relationship. Resigned as she was to living out her mistakes, Allen's mother provided no protection from this abuse. Any hope of stability from his mother's or stepfather's families was destroyed by grinding poverty in which people did what they could simply to survive, too overcome by the daily struggle to provide strength, meaning, or guidance to a child.

The community offered nothing to ameliorate young Allen's terror and confusion, instead further ostracizing him. In both his mother's home community of Millinocket, Maine, and his step-father's community of Medway, Maine, Allen suffered from the community's contempt for his family and their poverty, and from its ridicule of his unusual physical appearance. His mother's brothers' reputations brought scorn and rejection to all around them, including Allen, while the family's poverty brought isolation and mockery. Allen, always much larger than other children his age, found no refuge with his peers, who taunted and harassed him. This pattern continued throughout Allen's life. Any time hope for acceptance, a meaningful relationship or improved economic conditions seemed at hand, Allen was denied or rebuffed. Through it all, however, Allen remained a friendly, respectful, gentle and kind person, never permitting anger or frustration to get the better of him, and continuing to hope for love from his family and community.

Allen was born in Millinocket, Maine, on July 20, 1944, two months after

his mother, Jacqueline Pauline Davis ("Jackie"), married Donald Davis. Before marriage, Jackie and Donald had in common their last names, their poverty, and the fact that they were both little more than children themselves when they conceived Allen; Jackie was sixteen years old and Donald was fifteen. Allen's birth took place in the Millinocket town "hospital," which was only a house with some beds in it (App. D, Affidavit of Winona F. Michaud). From the hospital, Allen came to live at his maternal grandparents' home, where his grandmother cared for him because "Jackie just didn't want to be tied down with Bud at the time. She was still growing up herself." (App. D, Affidavit of Winona Michaud). Allen had health problems from infancy and the family had no money for proper medical care: "[W]hen [Allen] was a baby, he sometimes had convulsions. He could hardly breathe and would choke and shake all over. We couldn't afford a doctor so my mother would send me to find the midwife and she would come cool him down with water." (App. D, Affidavit of Juanita Sally Cesare).

Jackie and Donald married only to legitimize the birth of their child and never lived together as a family, instead living next door to each other in their parents' homes (App. D, Affidavits of Juanita Sally Cesare and Winona F. Michaud). While Jackie was anxious to make the marriage work, Donald, feeling trapped in a premature and unwelcome marriage, never intended for it to and treated his wife sadistically:

> I remember how cruel and abusive Donald was to Jackie. He treated her like a dog. Donald used to go out to places all the time and leave Jackie sitting at home. When he did take her anywhere, she had to walk behind him. If he stopped at the ice cream shop, she'd have to wait outside for him. . . He always had other girls chasing after him after he married Jackie and he encouraged it. Whenever Donald spoke to Jackie, he was very nasty, ordering her around and barking at her saying, 'You do this!' or 'Get me that!' He didn't care if Jackie had anything. . . [H]e was only ever concerned with himself.

(App. D, Affidavit of Anna May Mott). Donald's inhumane treatment of his young wife foreshadowed what his child would soon endure.

Donald's frustration at being trapped in his marriage to Jackie boiled over onto his infant son, Allen. Allen's father wanted nothing to do with him and did not want other people to know he had a child (App. D, Affidavit of Winona F. Michaud). Jackie often brought Allen to Donald's home to see his father, but Donald violently rejected Allen. If Allen cried or showed a desire for affection from his father, Donald became verbally and physically abusive, something young Allen was never able to understand:

> Buddy was always abused by Donald. . . . Donald hated having him around and he didn't hide his feelings, least of all from little Buddy. He used to pound Buddy when he cried. He would whack him and whack him and say, "That damn brat! All he does is cry!" Donald used to push Buddy away when Buddy was old enough to go to him and Donald would say, "Get away from me, you brat!" In later years . . . Buddy would ask me why his father used to say those things to him. . . . Buddy never understood it and he probably always felt like it was somehow his fault. Donald didn't care where he hit Buddy when he was crying. A lot of times he hit him hard enough to knock him down. . . . It all seemed out of hatred. I never saw him pick Buddy up to love him.

(App. D, Affidavit of Anna May Mott).

Donald's continuous rejection and abuse of his son were punctuated by extreme acts of cruelty. One Fourth of July when Allen was just learning to walk, he wandered into his father's back yard where Donald and his friends were celebrating. To show off for his friends, Donald threw firecrackers at his young son and when they exploded at Allen's feet, he ran, screaming and terrified, back into his maternal grandmother's yard. As a result of his father's outrageous act, Allen "had nightmares for many nights and would cry instantly at the sound of a bang. He was always nervous after that and, when he learned to talk, he stuttered." (App. D, Affidavit of Winona F. Michaud). Donald also took pleasure in taunting his son by pushing him toward the huge snapping turtle he kept in a tub and sneering, "'He's gonna get you!' I never understood how a man could be so cruel to his own child or why Jackie kept trying to make things work out with him." (App. D, Affidavit of Anna May Mott).

Allen's introduction to the world through his father told him that he was not wanted, that he was despised, and that there was nothing he could do to change that.

Jackie had two more sons by Donald before he joined the Navy and deserted his family. Donald had never contributed financially to raising his sons, (App. D, Affidavit of Juanita Cesare), and after he joined the Navy, "[h]e wasn't even sending money to Jackie until she got the Navy to send her the allotment she was entitled to." (App. D, Affidavit of Winona F. Michaud). When Donald came to Millinocket on leave, he never went to see Jackie and his children, only his mother (App. D, Affidavit of Anna May Mott). The allotment that Jackie got from the Navy was not enough for her, Allen, and the other boys to exist on. She took the boys out of her mother's house to try to make a home for them and for Donald to come back to, but he never did.

Allen and his brothers had lived with their mother in her mother's house with about a dozen other relatives all being supported by Allen's grandparents. The house was in a slum section of Millinocket known as "the pines."

> There were fifteen of us living in my parents' small house, including my parents, my grandfather, six of us kids, and Jackie's three boys. We were crowded from door to door. We didn't have much. . . . We had to cut our own wood to heat the house with the woodstove. In the winter, it was as cold inside as it was outside. We didn't have any indoor plumbing so we had to use the outhouse and we had to carry our water from a well.
>
> We were all poor people in our area of Millinocket. We lived in what was called "the pines," which meant you didn't have anything. We only survived because my mother and father worked so hard to provide the bare necessities for us. They did their best to take care of their children and their grandchildren and they always shared the little they had. There were basically two classes in Millinocket, the poor mill workers and the well-off mill management people. The mill was the only industry in Millinocket. It monopolized the whole town and it wasn't very good to the lower-paid workers.

(App. D, Affidavit of Winona F. Michaud).

In an attempt to make a home for her sons away from the crowd at her mother's, Jackie moved out of her mother's house with Allen and his brothers

while Donald was in the Navy. Unfortunately, her attempt only took them from poverty to destitution:

> The allotment wasn't enough for her and the boys to live on and, if it hadn't been for my mother giving them food, there would have been nothing for them to eat. The places Jackie could afford to rent were horrible. First she lived in a shack in Skunk Hollow, another really poor section of Millinocket. There wasn't enough room for her and the kids and it was always freezing there in the winter. There were rat holes in the floors. When I stayed there to watch the kids, I was scared to death at night. The kids were afraid, too. Then Jackie moved to a house on Medway Road that was a dive. She lived on the second floor and there were rats all over there like in the first house. The lady who lived downstairs had twin babies and one of them got her ear chewed off by a rat. I remember the woman running upstairs, hysterical, with the baby in her arms. . . You could see the rats in the yard. The city dump was right in back of the house. . . . I was afraid to even go out and take clothes off the line for Jackie when she asked me to.

(App. D, Affidavit of Anna May Mott).

Overcome by desperate poverty, Allen and his mother and brothers eventually were forced to move back to his grandparents' overcrowded house. Back in "the pines," Allen, who was six or seven by now, became subject to the stigma attached to the poverty and reputation of his family and to the taunting of other kids who targeted him as the town scapegoat. Allen was "a Davis from the slums" (App. D, Affidavit of Juanita Cesare), and the sharp class divisions in Millinocket made the community an impossible environment for a child with no emotional or psychological support:

> Millinocket was a very hard place to grow up in, especially if you were from "the pines." It's still that way. If a person is slow, the people in town needle him to death. Even the police pick on people, and once they get something on you here, you're the first person they go to when anything happens. The Davis family was constantly blamed for things other people did. We learned to avoid trouble and not to say anything back to people for fear of what they would try to do to us. I always felt inferior, and I do now, because I came from a poor family and the people in the town made everyone in the family feel like trash.

(App. D, Affidavit of Winona Michaud).

> If you lived in "the pines," you were picked on by the townspeople. We were brought up in the slums and anybody that took even a loaf of bread was sent to jail. Everyone thought the worst of people from that part of town.

(App. D, Affidavit of Juanita Cesare).

Added to the stigma of being a Davis, Allen was subject to cruel treatment from other children because of his size, his speech impediment, and his difficulties in school:

> All of his life, [Allen] was teased and ridiculed by other kids and people in town. It wasn't the normal kind of teasing you can get over and it never stopped. When [Allen] stuttered, kids would mock him and, because he was slow in school, they treated him like he was retarded. No one tried to overlook his problems or help him with them. [Allen] couldn't even walk down the street without other kids picking on him, tripping him, and hitting him. If he tried to stand up for himself, the kids' older brothers would come gang up on him.
>
> Buddy was never accepted by any of his peers and it made him starved for affection and approval. He was different because he was big for his age and because he stuttered and was slow in school, so he was treated like he had a disease. He never even had the chance to make any friends.

(App. D, Affidavit of Winona F. Michaud). Allen's peers continued the rejection he experienced from his father and they reinforced his perception of the world as hostile and unforgiving (App. D, Affidavit of Bruce Wayne Davis).

Starved as he was for affection and approval, Allen became "easily influenced because he wanted attention and he wanted people to like him and care about him" (App. D, Affidavit of Winona Michaud). Combined with his desire for affection, Allen developed a passivity from his inability to affect his environment: "He would leave things up to people if he thought they knew more about something than he did, especially if they showed any interest in him or he thought they were trying to help him in some way. He called my father 'dad' and did anything my father or mother asked him to do because he knew they were trying to help him and they cared about him." (Id.).

In addition to treating him as a social outcast, Allen's environment brought other damaging influences to bear on Allen's life. "The pines" was home to several child molesters, including one of Allen's uncles:

> Unfortunately, one of them was one of my brothers, [Allen's] uncle. He was sent to prison for child molesting and I'm afraid he could have

molested [Allen] at some time while [Allen] was living in the same house with him at my parents'. There was also a man who lived very near us who was deported back to Canada for molesting girls and boys in the neighborhood. . . . We didn't always know where [Allen] was or who he was with and it was all too easy for this man to molest him.

(App. D, Affidavit of Sally Juanita Cesare). Allen's isolation and rejection led him to spend a great deal of time by himself, making him an easy target for a child molester: "[Allen] was probably one of [the Canadian man's] victims because [Allen] was off in the neighborhood a lot without anyone with him." (App. D, Affidavit of Winona Michaud).

Allen's adjustment at school reflected the continuous upheaval of his home life, the effects of the early years of abuse from his father, and the rejection from community and peers. He failed the first three grades in school, repeating the first and third grades and failing again at both second attempts (App. E, School Records). Although such failure signaled the presence of special learning problems, he received no help or remediation. His IQ was measured as being within the retarded range during his school years (Id.).

When Allen was about nine years old, his mother married Leonard G. Caswell. Leonard was an alcoholic who treated Jackie even more sadistically than Allen's father had, and who perpetuated the cycle of poverty and abuse in Allen's life that was now so tragically familiar to him. Leonard brought his new family to live in Medway, Maine, about ten miles from Millinocket. Medway was known as "Shackville." It was the poverty pocket of the Millinocket area:

> Medway was a very poor town in those days. There was a lack of work and opportunity, and it was more or less the stepchild of Millinocket and East Millinocket. The mill, which was and still is the sole industry in this area, concentrated on helping those two towns develop while Medway became a forced slum area. If you couldn't afford to live in Millinocket or East Millinocket, you could come to Medway and put up anything you wanted to use for a house. . . [A]t the time when Jackie and her sons lived there, poverty was the rule and they were among the poorest in town.

(App. D, Affidavit of Wayne Davis).

The shack that Leonard put his family in was the aborted attempt to replace

the family's first house after it burned down around Jackie and the boys. It was a tarpaper shell with mill paper walls that had no running water or inside toilets. Allen and his brothers literally froze in the winter because the walls could not keep out the bitter Maine cold or keep in the transient warmth from the family's one small woodstove (App. D, Affidavits of Leonard Caswell, Winona F. Michaud, Bruce Wayne Davis, Juanita Sally Cesare, Anna May Mott).

> There was a small woodstove in one of the rooms and Jackie and Leonard would sleep in there in the winter while the boys slept in the area on the other side of the partition. There was no insulation whatsoever on the walls so the house was literally freezing in the winter. The area where the boys slept got so cold that a glass of water would freeze in there. . . .

(App. D, Affidavit of Juanita Sally Cesare).

Utterly defeated by poverty and a husband who offered only abuse, Allen's mother resigned herself and gave up trying to provide a decent home:

> The inside of the house was terribly filthy. The floors were bare boards which were always gritty with dirt. Jackie never had anything to really clean with and, in that place, cleaning it wouldn't have made much of a difference. The part of the house they used for a kitchen was filthy. They got their stove from the dump or maybe from someone who gave an old one to them. That's how they got any furniture they had.

(App. D, Affidavit of Juanita Cesare).

> Jackie didn't clean the place. She was just content to smoke cigarettes and drink coffee. That's all she wanted to do. She seemed to figure she wasn't going to get much more out of life anyway. . . .

(App. D, Affidavit of Desire Rhodes).

While Jackie and the boys went without, Leonard always made sure he was fed and clothed. He ate steak and lobster in front of them as they dined on macaroni and margarine. Often, there was no food for Allen and his brothers and when Jackie's mother and sisters finally discovered this, they began bringing food to the house. The mother and children "were always on the government free food program and we also had to take AFDC help. Mother had to lie and tell them father had left us to get the aid." (App. D, Affidavit of Cheryl Caswell

VanDine). All of Allen's clothes were hand-me-downs from relatives or donations from churches or people in the community (App. D, Affidavits of Winona F. Michaud, Juanita Sally Cesare, Bruce Wayne Davis, Anna May Mott).

> Leonard didn't care at all whether [Allen] and the other two boys had food or clothes. The kids would never have had a coat to wear in the winter if my family hadn't gotten them for them. Jackie rarely had more than two dollars in her pocket to last a week for her and the boys. Leonard didn't work much and, when he did, he wouldn't ever let Jackie know how much he made. He'd just spend it on himself.

(App. D, Affidavit of Anna May Mott).

Leonard "hated [Allen] and his brothers from day one. He never treated them good and when he married Jackie, he started abusing them." (App. D, Affidavit of Anna May Mott). The beatings that Allen took from his stepfather were the precursor to serious and insidious physical problems. Leonard never accepted the boys or tried to establish any type of father-son relationship with them. Instead, he openly despised them and used them as slaves to do the work he was too lazy to do himself. He beat them for any reason or no reason at all and grabbed whatever was handy to do the job.

> He stayed drunk all the time and found any excuse he could to beat us, especially me and [Allen]. He used anything he could find to beat us with--an ax handle, pieces of wood, or pitchfork handle. if anything at all upset him he would take it out on us kids. . . . When our stepfather beat us he didn't care where he hit us or how badly he injured us. He often drew blood from us during his tirades and numerous times he hit us in the head with things like an ax handle of pieces or wood or his fists.

(App. D, Affidavit of Bruce Wayne Davis).

> Leonard was an alcoholic from the time he met Jackie. He was drunk all the time and he beat the kids all the time. I always told him some day he would be sorry for it, that God would make him pay for it. He hit the boys for no reason. He would help them with a belt and he would whack them in the head and the ears with a stick of wood or a belt strap. The kids would fall down in pain, crying. . . Leonard made the boys do all the hard work and he didn't do any of it. . . I've seen the boys trudge into the woods with snow up to their armpits to cut wood while he sat in the truck with the heater on.

(App. D, Affidavit of Anna May Mott). Even Leonard's relatives, who lived in the same shack neighborhood, witnessed his cruelty to his stepsons and readily

admit that he never gave them a chance to have a decent father or a decent life. In spite of Allen's efforts to gain Leonard's acceptance, Leonard pushed him away through his bitterness and hate for his stepson (App. D, Affidavits of Guila Jacobs, Desire Rhodes, Judy Curtis).

> My father treated the boys much worse than he treated his own children, but [Allen] undoubtedly got the worst of it. Yet, [Allen] never talked bad about my father. . . He always kept his feelings to himself. He really tried to please my father and to get him to like him, but dad never would. You could see it break [Allen's] heart and crush his spirit.

(App. D, Affidavit of Cheryl Caswell VanDine).

Allen's life in Medway was filled with the same kind of harassment from other kids that he endured in Millinocket. He was always on the wrong side of the social fence and that, along with his largeness, his stutter, and his slowness in school made him attractive bait for his peers who were anxious to prove themselves by victimizing anyone who was different or appeared vulnerable, like Allen.

> Being from Medway was like asking for trouble. When we went to high school in East Millinocket, we were picked on unbelievably. Other kids wouldn't let us take part in anything and we always felt like we didn't fit in anywhere. [Allen] was especially singled out by other kids. They made fun of him because he was big and he stuttered. They called him fatso and other names and made nasty remarks about his family. Buddy didn't ever have any friends that I knew of. He sure never brought any to the house.

(App. D, Affidavit of Cheryl Caswell VanDine).

In the section of Medway where Allen lived were the brothers and sisters of Leonard Caswell and their families. Most of them looked down on Allen and his brothers because they did not belong anywhere. They were outcasts.

> Leonard's brothers and sisters always turned their noses up to the Davis boys because they were outsiders to the family. None of them cared for those boys. If something wrong happened in the neighborhood, they were the first ones suspected, whether there was any reason to blame them or not. . . . [Allen] took the rap for a lot of kids, including his brothers. He would never tell who had done something when he was accused of things he didn't do, which was a lot of the time.

(App. D, Affidavit of Desire Rhodes). By now, Allen had lost all hope of finding a place to belong. He had been isolated from his peers and his family long enough to decide that it was safer to keep to himself and go it alone, to deny the normal but overwhelming human need for acceptance and affection. He had tried too many times to reach out only to end up being physically and emotionally slapped down.

One of the Caswell families living in the section of Medway where Allen lived harbored a particularly notorious group of child molesters. Allen's emotional vulnerability and isolation left him open to sexual molestation, especially since he lived in close proximity with sexual molesters in his mother's family and his stepfather's family. Leonard's sister's husband and at least two of their sons were molesting every child in the neighborhood (App. D, Affidavits of Glenda VanDine and Cheryl Caswell VanDine). One of the sons was caught molesting a five year old boy (App. D, Affidavits of Maxine King and Desire Rhodes). Allen was a likely and easy victim for these molesters because he was a child desperately seeking attention and affection, a child who would easily mistake acts of molestation for acceptance. Allen's half-sister, Leonard's daughter, was a victim of her uncles' molesting.

> One of [my father's] sisters had a husband and two sons who molested every child in our neighborhood. They lived very near us in the small section where most of my father's brothers and sisters lived. They molested me until I was old enough to stop being scared of them and to put a stop to it. My uncle raped me two or three times. . . . Other children were victims of these molesters and I would be surprised if they didn't get to [Allen].

(App. D, Affidavit of Cheryl Caswell VanDine).

Coming from an environment in which child molestation was so prevalent, and rejected and ridiculed by his peers, Allen not surprisingly developed a similar problem later in his life. On April 22, 1966, he entered Spring Grove State Hospital, in Maryland, voluntarily committing himself for treatment of his abnormal attraction to young children. Allen knew "something was wrong with him

but he does not know how to help himself. He wants to better himself & is pleading for some help." (App. G, Spring Grove State Hospital records). The hospital records further report that Allan was "disgusted" with himself, but "he cannot help himself" (Id.). Allen had never forced himself upon a child and had never had intercourse with a child. He only touched a child if the child did not resist or complain: if "they don't say anything . . . he continues . . . and most of the time . . . the children seem willing" (Id.). Desperate for some human contact and affection, Allen had taken up the example set by his environment, all the while knowing he should not and knowing he needed help. Following his therapy at Spring Grove Hospital, Allen felt that he had "conquered his problems" (App. L, Bureau of Prisons, Inmate Records).

As Allen and his brothers grew older, they could not bear to live with their stepfather's torture anymore. During a particularly violent incident, the boys were forced to leave their mother and home:

> Once, when the boys had grown, Leonard was beating [Allen] and the other two boys jumped Leonard and started beating him up. He told them to get the hell out or he'd kill them all, so they ran. They ended up staying with other people in Medway for two or three weeks before me and my parents ever found out they weren't with Jackie. When we did find out, we went looking for them to bring them back to Millinocket and they stayed there with my parents. . . .

(App. D, Affidavit of Anna May Mott). Allen withdrew from high school to transfer to Millinocket after seeing a guidance counselor about the incident with his stepfather. The guidance report notes, "Leaving home to go with grandmother. Father--argument: F hit Allen on side of head twice with wood--will transfer to Stearns." (reference is to stepfather)(App. E, School Records). Allen enrolled in Stearns High School in 1960, now the product of a disintegrated family. He was forced away from his mother, whom he loved and protected. The note on his permanent record from school states: "Entered from Schenck High School 2-15-60. Student does not know where his father is or anything about him. . ." (App. E, School Records).

Circumstances in Millinocket were unchanged from Allen's earlier years there. He was still the target of ridicule and shame:

> Back in Millinocket, [Allen] was the main target for the kids in the neighborhood. They made fun of him because he was big for his age and they constantly picked on him, trying to start fights. Any time they saw [Allen] walking down the street, they started in on him. He never got a chance to make any friends.

(App. D, Affidavit of Juanita Cesare). The grandparents' home remained confused and overcrowded, and the family reputation continued to be a handicap.

In the years that Allen struggled daily to survive hunger and physical and emotional bombardment, he never returned hostility with hostility. Instead, he showed kindness and caring to the people he loved and isolated himself from the people who hurt him most. He became a loner who held his feelings inside, but was always ready to do what he could to help someone else. He especially looked after his mother, who he knew felt helpless to change her life or protect her children from the abusive men she was so fatally drawn to.

> When [Allen] was around me, he was kind, gentle, and protective. He was the same way with our mother. He would all the time help mom do the dishes and the floor. He didn't act like he thought it was demeaning for a guy to wash the floor. Mother often didn't have anything to eat because she would go without to make sure we had something to eat. That made [Allen] want to help her and take care of her. He knew she would never have the kind of life she wanted. When [Allen] was 14, mother was sick with the flu that Thanksgiving and dad was gone. Mother had taken the food stamps and bought the makings of a real Thanksgiving dinner, but she was too sick to prepare it. [Allen] got up real early in the morning and made turkey, potatoes, everything for us by noon. I've never seen anyone who tried so hard to get other people to love him.

(App. D, Affidavit of Cheryl Caswell VanDine). Allen also took it upon himself to watch out for his step-cousins in school. He would stop other kids from teasing them or pushing them around (App. D, Affidavits of Judy Curtis, Desire Rhodes).

> I liked [Allen] a lot. He would do anything in the world that I wanted him to do. I had a flat tire once that he had to keep pumping up for me. He was using just a hand pump and he kept at it and at it. [Allen] used to watch over my daughters and help them out if anyone was bothering them. He never sassed me and I never knew him to sass anyone or hurt anyone. He was always respectful. [Allen] stayed

> around my house a lot. I could see he was hungry for affection and love. I think [Allen] would have done almost anything to have people like him and think a lot of him.

(App. D, Affidavit of Guila Jacobs).

> [Allen] always had a heart of gold. He would give anyone the shirt off his back. He was just like his mother in that way. [Allen] used to hitchhike about 2 miles from high school during lunch to Medway when his mother was pregnant with one of Leonard's children just to make sure she was doing all right. Then he would hitchhike back to school. He was there one day during lunchtime when Jackie ended up having the baby in a neighbor's old car. Buddy carried her inside and ran to call me from a neighbor's house. He really loved his mother and watched over her.

(App. D, Affidavit of Anna May Mott).

In 1963, Allen's father, Donald, returned to take his sons to live with him and his new wife in Maryland. He came in response to a call from Allen's grandmother telling Donald that she was too old and sick to properly care for the boys anymore. Allen jumped at the chance to have the relationship with his father that he was deprived of for nineteen years, one that he never had, even when his father was close at hand in his younger years. But Allen faced the same obstacle with his father in Maryland that he did as a child in Millinocket. His father still resented him and treated him with aloofness and disdain.

> I hoped that [Allen] could have the kind of relationship with his father in Maryland that he never had before with him or Leonard. But I found out that that didn't happen. When [Allen] had a car accident in 1965, I went to Maryland with my mother to help care for Allen. I was there about two weeks, and the whole time, Donald treated [Allen] like he was a tremendous burden on him. . . Donald used to put [Allen] down every chance he got and say things like, "Nobody's ever going to like you. You're too fat and ugly for anyone to care for you. . . ." No matter what [Allen] did, nothing ever satisfied Donald. It was as if [Allen] was still that baby that Donald hated so much. His feelings about [Allen] hadn't changed at all, he just found a different way to abuse [Allen].

(App. D, Affidavit of Anna May Mott).

Allen's car accident, which occurred on April 21, 1965, put him in the hospital for a month and left him with serious injuries. His aunt observed him in a body cast with his head wrapped in bandages (App. D, Affidavit of Anna May

Mott). His head injury, occurring when he was thrown against the wrap-around windshield of his 1956 Buick Riviera, was quite severe. In the hospital the day after the accident, Allen's doctor noted, "Patient is presently stuporous . . . . cannot tell me anything except that he met [with] a car accident yesterday & can't remember anything in regard to the accident--most prob[ably] [post]concussion." (App. F, Medical Records of 1965 Automobile Accident). The doctor's impression on first examining Allen was that Allen had suffered a probable "syncope" and "cerebral concussion" (Id.). A nurse's note further indicated that Allen's left ear canal was impacted with "dark blood" (Id.), which is pathognomic of a temporal bone fracture. During his recovery, Allen experienced black outs and faded in and out of consciousness for a week. He blacked out during conversations with people, just closing his eyes while still sitting straight up (App. D, Affidavit of Bruce Wayne Davis).

Two of Allen's friends who were in the car with him died in the car accident. As a result, Allen was convicted of involuntary manslaughter and sentenced to three years at the Federal Correctional Institution in Petersburg, Virginia, beginning January 13, 1967. Allen's adjustment at federal prison was excellent and he received numerous complimentary reports on his behavior. He attended classes to train for taking the G.E.D. and worked conscientiously at any jobs or assignments that he was given (App. L, Bureau of Prisons, Inmate Records). Allen was transferred to the Federal Correctional Institution in Tallahassee, Florida, on March 18, 1968, after his father and stepmother moved to Jacksonville, Florida. He requested the move to be able to receive visits from them. His adjustment at the federal prison in Florida was also excellent and Allen was paroled from there on November 12, 1968 (Id.).

Medical records from the Federal Correctional Institution show that Allen was suffering chronic effects from the physical abuse of his youth and the head injury in the car accident. He repeatedly visited the prison clinic,

complaining of headaches, insomnia, and difficulties with his ears (App. M, Bureau of Prisons, Medical Records). He was medicated over long periods with phenobarbital, an anti-convulsant, and librium, which is used to relieve symptoms of anxiety (Id.). Further, a transfer report to the Federal Correctional Institute lists Allen's "major diagnosis" to be "Schizoid personality....325.1." (Id.).

Upon his parole, Allen lived in Jacksonville and worked over the next four or five years at various jobs, including doing construction work for his father. He also managed a Shell station at the beach in Jacksonville, working with his friend Bill Trent.

> [Allen] has always been easy to get along with. He'd do anything to help you out if you asked him to. He took a lot from people without saying or doing anything about it. When he managed a Shell station at the beach, a guy kicked him in the shin and [Allen] just let it slide. . . . [Allen] had the most patience of anyone I've ever known. He would sit all day at a shop waiting on truck parts without getting steamed up about it taking so long. [Allen] was also unusually honest. When he worked at a 7-11 store, I'd go by sometimes and take a coke from the cooler never thinking about paying for it. [Allen] would take the money out of his pocket for the coke and put it in the cash register, even though no one was around to know the difference.

(App. D, Affidavit of William J. Trent). Another part of Allen's character that Trent observed led Allen into another prison term when he was convicted of armed robbery with Trent as co-defendant.

> I was the person who made the decisions in my friendship with [Allen]. He would always leave things up to me to decide, even things like where to eat. He struck me as being a follower, especially when someone was in a superior or dominant position to him. He wouldn't question someone's advice if that person knew more about something than he did. He was very trusting and naive.

(Id.). A post sentence investigation report done on Allen after his conviction for the robbery indicated that at least two other people noticed the same trait in Allen.

> A. C. Soud, the subject's court-appointed defender stated that he seemed to be a forthright and honest person who may have been easily influenced by others. The subject gave no reason why he committed the offense and appeared to be remorseful. . . . Investigator W. H. Perry, of the Jacksonville Sheriff's office stated that the subject

> appeared to be easily led by others which may have been a factor in this case. He stated that the subject probably would not have gotten 15 years with the evidence they had, but he felt guilty and gave a full confession.

(App. J, Post Sentence Investigation). This tendency of Allen's to submit to the directions and wishes of others persisted from his early years as his way of gaining acceptance and affection (App. D, Affidavits of Judy Curtis, Desire Rhodes, Cheryl Caswell VanDine, Winona F. Michaud).

> [Allen] would go along with the crowd. He was a follower. He never caused trouble and he never bullied anyone, even as big as he was. He seemed like he just wanted to fit in somewhere, to find the kind of acceptance and affection he never got at home from his stepfather.

(App. D, Affidavit of Desire Rhodes).

Allen was sentenced to fifteen years in prison for his armed robbery conviction and a related offense. The post sentence investigation report leaves no doubt that Donald Davis remained indifferent and detached where his son Allen was concerned:

> It appears that the subject received little attention and affection from his parents. His grandmother reared most of the time and his father could not remember when he was born or if he was a happy child. He did not appear to be concerned or sorry about the subjects criminal activities and subsequent incarceration. He has not seen or spoken to him since before he was arrested. He did not go to the trial and has not corresponded with him in prison. He stated that he was shocked to hear about it and baffled as to why his son committed the crime but has not tried to contact his son for any explanation. During the interview with the subject's father, I felt as if we were discussing an acquaintance of the fathers and not his son. He seemed to be answering my questions because it was his duty and not out of any real concern for his son.

(App. J, Post Sentence Investigation).

In prison, Allen received consistently favorable progress reports which indicated that his work habits and behavior were well above average. He was described as having an excellent attitude and being very helpful. He had not given up trying to better himself, and earned his G.E.D. diploma on November 5, 1976. On April 27, 1979, Allen began pre-parole work release under the supervision of Jacksonville Community Correctional Center. He was employed by

Jenson of Jax and had above average performance on the job. He was placed on parole on September 25, 1979 (App. K, Florida DOC Records). Allen's parole officers noted in his record that his adjustment on parole was good and that he presented no problems. In a note entered on March 16, 1982, indicating employment verification, one of the parole officers stated that Allen's supervisor at Atlantic Drydock reported that Allen was a good, dependable employee (App. K, Florida DOC Records).

During the time that Allen was on parole, he began living with a woman, Mary Collins, in order to share expenses. In the same way that he treated his mother, half-sister, cousins, and aunts, Allen took a protective and caring role with Mary. He was kind to her and ready to help out if she had trouble paying her bills (App. D, Affidavit of William J. Trent).

After leaving prison for the robbery, Allen once more attempted to establish a relationship with his father. He was always available when his father needed him and ready to respond to any request his father might make of him. But Donald only tolerated Allen's presence and took advantage of his eagerness to please his father.

> [Allen] had a sad relationship with his dad, Donald Davis. I always felt like his dad only wanted him around to do work for him. He only called [Allen] to come over if he needed wood cut or needed some help fixing his boat. I never knew his dad to call him to come by for a social visit, to eat supper or to go out or anything. There was always a task involved everytime I can remember his dad calling. But [Allen] would drop everything when his dad wanted his help with something. His dad always came first. . . It seemed like [Allen] was always trying to please his father and to make him proud, but his father never appreciated all that [Allen] did for him. [Allen] really put his dad up on a pedestal. He would never talk bad about him even though I never knew of his dad to act like much of a father to him.

(App. D, Affidavit of William J. Trent).

Allen's brother, Bruce, and Bruce's wife and children visited Allen's father in Jacksonville quite often and occasionally for a week or two at a time. During those visits, Allen came over to his father's to see his brother. Both

Bruce and his wife, Angela, observed Allen's blackout spells, the same type of spells that Bruce had seen Allen experience after his car accident in Maryland.

> Even before the car accident [Allen] had complained of headaches and dizziness throughout the years. . . . That was not surprising because of all the times he'd been hit in the head by our stepfather. But after the accident something strange began happening with [Allen]. When he was home getting well in bed, he blacked out two or three times. He would be in the middle of a conversation with someone and would just close his eyes, still sitting straight up. You had to shake him pretty hard to bring him around. Even years later when I visited him and our dad in Jacksonville, Florida, the same thing was happening. He would black out sitting up at the dinner table or out in the yard during a conversation. . . . This was a common occurrence with him. He sometimes drifted in and out of these blackouts, always swearing later that he had not gone to sleep or lost consciousness. He never remembered it happening. Every time I visited him in Jacksonville these blackouts occurred. Sometimes my visits lasted two weeks and the blackouts would happen 10 to 15 times a day during my entire stay.

(App. D, Affidavit of Bruce Wayne Davis).

> [Allen] would fall asleep at the drop of a hat anywhere and any time of the day. He didn't act drowsy or tired, but one minute you'd be talking to him and the next minute he'd black out with no warning. . . . We were all concerned that, with the kind of work [Allen] did (welding), he would black out on the job and hurt himself. As far as I know, he didn't realize anything was happening when he blacked out. He only knew about it from us telling him that he did it. We suggested that he go to a doctor about it, but I don't think he ever did.

(App. D, Affidavit of Angela Davis).

Allen's problem with blacking out resulted in dangerous situations. In one instance, Allen was driving his friend Don Hollifield to Sanderson. Allen lost consciousness for a brief moment and ran off the road. It was not until Don hollered at him that he came back into awareness and pulled the truck back onto the road. At another time when Allen was driving with Don, Allen ran a car off the road. He was not saying anything and Don was confused about his behavior. Allen was agitated and acting totally out of character when he got out of the truck and went up to the driver of the car. Allen seemed angry and acted like he might hit the man, but he suddenly returned to the truck.

> He said he didn't mean to do that. There was no explanation as to why [Allen] acted like that. I never saw him do anything like it before

> or since. [Allen] was usually a real good driver, he didn't even tailgate people, much less run them off the road, and I know he wouldn't intentionally hurt anyone. That just wasn't [Allen] that ran that man off the road. It was like it was another person. I don't think [Allen] knew what was going on or what made him do that any more than I did.

(App. D, Affidavit of Don Hollifield).

On June 9, 1980, Allen was put on a high blood pressure medication, apresazide, which he was still taking in May of 1982. The medication was prescribed by Dr. Walter Jarrell, whose files on Allen contain no life history or reports of the extensive physical workup that would be necessary to safely prescribe a drug with such a host of warnings and contraindications. The Physician's Desk Reference cautions that among the adverse reactions to apresazide are "psychotic reactions characterized by depression, disorientation, or anxiety" (App. H, Medical records regarding hypertension).

In addition to blackout spells and high blood pressure, Allen's hearing was noticeably impaired. Those friends and family who had contact with him in recent years found his hearing problem obvious (App. D, Affidavits of Bruce Wayne Davis, Angela Davis, William J. Trent, Don Hollifield).

> [Allen] had real bad hearing. I've had to repeat myself to him plenty of times. . . I don't know if he was tested for his hearing, but I have a hearing problem, too and I've had a couple of tests that haven't picked up on it. [Allen] could have used a hearing aid, but he just learned to live with things like that and not complain if he couldn't hear something.

(App. D, Affidavit of William J. Trent).

On May 12, 1986, Allen was taken for questioning in relation to the deaths of Nancy, Kathy, and Kristy Weiler. He voluntarily agreed to the search of his truck and apartment, signed consent forms for both searches, voluntarily submitted to a polygraph, and cooperated totally with the police, being questioned for approximately six hours at the Police Memorial Building in downtown Jacksonville. Allen had no memory of any wrongdoing on his part. He had nothing to hide because he believed he was innocent of the crime about which

he was being questioned.

This life history contains compelling mitigation in and of itself. No reasonable strategy or tactics can be offered to explain the omission of this evidence at sentencing except that trial counsel believed that mitigation was limited to the statutory list. Further, the judge refused to appoint a confidential mental health expert to assist in the preparation and presentation of this mitigation. As a result, counsel did not develop or present this mitigation to a mental health expert who could have assisted in presenting and explaining its significance to the jury and the judge.

B. EXPERT TESTIMONY AND CONCLUSIONS

The mitigation becomes much more compelling, when placed in a proper context by mental health experts who utilized the independent background information and employed the needed testing, and who were specifically asked (unlike the experts at trial) to assess nonstatutory and other mental health mitigating factors. The items of information discussed herein were provided to two expert licensed clinical psychologists, who each evaluated Mr. Davis (See Report of Harry Krop. Ph.D.; Report of Pat Fleming, Ph.D.).

Dr. Fleming, whose report is reproduced, in part, below, conducted a psychological evaluation of Mr. Davis. She concluded that Mr. Davis would be "unable to provide adequate assistance to his counsel during trial" (Report of Dr. Fleming, p. 9). Dr. Fleming also concluded that Mr. Davis was suffering, at the time of the offense, from a "significant psychological disturbance" and that "he was unable to understand or appreciate the fact that he was destroying the victims" (Id., p. 8).

In addition, Dr. Fleming explained why Mr. Davis acted under the influence of an extreme emotional disturbance, as well as under extreme duress at the time of the offense, and why his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was

substantially impaired, due to his conditions. Dr. Fleming's report relates, in part:

SIGNIFICANT BACKGROUND INFORMATION

Family Background

Allen Davis is the oldest of three sons of Pauline and Donald Davis who married when 15 and 16 years as a result of pregnancy. These young parents did not live together following the marriage, and each stayed with their parents. The father completed eighth grade and the mother, her junior year of high school. Records indicate that the biological father did not like this son and kicked and hit him frequently, in addition to the consistent verbal abuse. The father reportedly threw fireworks at the boy's feet on one occasion. The father left the family to join the Navy and the mother married Leonard Caswell when Allen was nine years old.

Records indicate that the stepfather consistently abused the three brothers severely, beating them on the body and head, did not provide basic sustenance, and drank heavily. The boys frequently lived with their grandparents when the mistreatment and lack of care became intolerable.

The early years were marked by poverty and abuse. The natural mother was the closest to Allen, although she, too, beat him. Records indicate that as a child he tried to care for her and be her protector. The mother died of cancer in 1975.

Records indicate that Allen was a large boy who stuttered and was the focus of attacks of neighborhood gangs. He stated that he weighed 300 lbs. at age 13, was shy and a loner.

The entire family lived in poverty and sometimes filth and they were ostracized by the townspeople.

Educational and Intellectual Background

Allen's grades and achievement scores in school were consistently poor. He repeated several grades, was the largest boy in the class, and called Fatso, and was known to be retarded. He stuttered which increased the ridicule. He dropped out of high school in 1961. In ninth grade he read at fourth grade level. Intelligence tests were administered in seventh and ninth grade and he earned IQ scores of 68 and 71. He earned his GED while incarcerated.

Allen early learned to work hard and long hours to provide food and warmth for the family. During his adult years he was employed as a backhoe operator, carpenter's helper, and other blue collar jobs. At times, he worked two jobs. He was uniformly described by his employers as a good worker who got along well with fellow employees.

Psychological Background

In addition to the abuse, Allen was reported to have been sexually

molested a number of times by the relatives of his stepfather. He, in turn, was charged with fondling an 11 year old girl and was sentenced to the State Reformatory. He returned home when released and finished the tenth grade. The natural father took Allen and his brother, Richard, to live with him in Maryland in 1963. In Maryland, he self-admitted to Spring Grove State Hospital in Catonsville, Maryland to receive treatment for his sexual problems. Allen stated that he had gone voluntarily and admitted to molesting young children. He insisted that he had never had intercourse with children nor used force in these encounters. When admitted to Spring Grove he was placed on 50 grams of Mellaril. The psychiatric evaluation indicated a passive aggressive personality with feelings of inadequacy and impotence which resulted in avoidance of interpersonal relationships. Records indicate the Mr. Davis had one sexual relationship as an adult with Mary Collins. The relationship included some sexual relationships, but was primarily a platonic relationship. He is described by this woman as gentle, protective, and kind.

Legal History

Allen was sent to State Reformatory for Men in South Windham, Maine, for fondling.

April 21, 1965, Allen was involved in a vehicular accident while driving and sentenced to the federal prison in 1967 in Petersburg, Virginia. He states that he had taken a shot for weight control and had drunk several beers prior to the accident.

In 1973 Allen was arrested for armed robbery, attempted robbery, and use of a firearm, and sentenced to 15 years in prison. He was released after serving eight of the 15 years.

On May 12, 1982, Allen was arrested for the murder of Nancy Weiler and her two daughters, aged five and ten years, and was convicted of first degree murder on February 4, 1983. The judge sentenced him to death.

Allen's evaluation at both the reformatory and the prison were positive. On parole he was described as a model parolee.

Medical History

Medical information indicates that Allen has a hearing loss ranging from mild to moderate. He reports a 50% loss in the right ear and a 60% loss in the left ear. Allen reports he first noticed hearing loss at 13-14 years, and believes the loss increased due to the noise in construction work. He has had ringing in his ears since he was a small child and continues to awaken each day with the tinnitus.

He is presently taking medication (Vorporal) for high blood pressure. At the time of his arrest he was taking Apresazide, which has been known to cause psychotic reactions, according to medical literature.

Affidavits of family members indicate convulsions occurred in infancy followed by blackouts that resembled narcolepsy. He reports frequent short periods of time when he is unable to hear, or respond to conversations. He reports dizziness a "couple of times" in adulthood.

Allen denies significant alcohol problems although he admits that he drank beer. He denies any significant drug use. He reports being drunk only two times in his life - 17 years and 30 years. He noted that he had three-fifths of a quart of Canadian Club in his house for five years.

Headaches are reported "constantly," and have occurred since childhood.

An automobile accident at age 19 resulted in head injuries and various stages of loss of consciousness that extended for a week. He was hospitalized for a month. Following this accident, the headaches increased in frequency and severity. Memory loss, and narcolepsy were reported.

EVALUATION RESULTS

Evaluation Behavior

Mr. Davis was cooperative and motivated to perform well during the evaluation. He talked freely about his past. Physical appearance was remarkable due to his weight...350 lbs. Grooming was adequate. He sweated profusely during the evaluation. Motor activity was not unusual, although he moved slowly due to his size. Eye contact was adequate. Speech was normal with adequate rate, articulation, and grammar. He did drop some word endings and his speech was not clipped and clear. He did not hear some of directions and comments, and had to have information repeated frequently. Overall interaction was frank, open and appropriate. During the testing, Mr. Davis responded quickly, and at times, impulsively. The tests and interview were conducted in a reasonably quiet room in the Florida State Prison. The results are felt to be valid.

Neuropsychological Test Results

Previous IQ tests administered during school years yielded test scores of 68 and 71. It was reported that a WAIS-R administered September 19, 1986 by Dr. Harry Krop, Ph.D. noted an IQ of 84 placing him in the low average to borderline range of mental ability.

Mr. Davis's performance on the Halstead Neuropsychological Battery yields an overall picture of cerebral dysfunction on the seven tests that are most sensitive to brain dysfunction in general. An impairment index provides an overall level of functioning attained across the entire battery with an index score greater than 0.4, generally indicative of brain damage. Mr. Davis earned an impairment index of .71 indicating that his performance on five of the seven tests were in the abnormal range as for patients with known brain damage.

Mr. Davis was impaired on tests of psychomotor problem solving ability and sustained attention and concentration. He earned an impaired score on the Aphasia Screening Exam, making errors in word repetition, and spelling. He was in the severely impaired range on a test of logical analysis and new concept formation (Category Test). He was

impaired on two tests that required discrimination and attention (Speech-Sounds Perception Test and Seashore Rhythm Test). He had significant difficulty copying designs on the Screening for Aphasia, evidence of construction dyspraxia. He is unable to spell very simple words (square, cross, triangle) and on the Wide Range Achievement Test, earned a spelling grade equivalent of below third grade.

On the Wechsler Memory Scale he earned a Memory Quotient of 76, indicating a significant problem in memory. He was able to recall only seven of 22 memories and was unable to recall matched pairs of words presented orally three times. On all tests of information presented orally, he was in the moderate to severe range of impairment.

Visual field was full of gross confrontation and no evidence of finger dysgnosia or tendencies to suppress tactile, visual stimuli to either side of his body. He performed within normal limits with both hands on tests of pure motor speed (Finger Tapping Test, Grip Strength, Hand Dynamometer).

These results indicate the Mr. Davis has significant difficulty with memory, his verbal memory being weaker than for non- verbal material. The memory loss is likely a combination of the inability to adequately hear the information, process it, and then to store this information. He would have had great difficulty functioning well in school even with low average intelligence. This problem was clear in his school records which indicate below average grades and retentions. The sensory-perceptual or motor deficits would not significantly interfere with Mr. Davis' everyday functioning. He should be capable of performing manipulatory tasks that would be required of him.

Summary of Implications

The extended battery of the Halstead-Reitan Neuropsychological Test Battery indicates generalized cerebral dysfunction. Given Mr. Davis's history of blows to the head as a child, convulsions, head injuries sustained in the auto accident at age 19, and previous diagnoses of seizure disorder, these deficits indicated by the performance on the test battery are consistent. The history indicates damage of long standing.

Implications of Hearing Loss

Mr. Davis was unable to understand and/or process verbal presented information during the evaluation. In a relatively quiet room, and a one-to-one situation, he had to have information repeated during the interview and testing. Transcripts indicated that the judge had to admonish witnesses to speak louder since Mr. Davis was unable to hear the information. Previous psychological evaluations indicated the necessity to speak loudly and repeat questions to provide the necessary information. It is not known if Mr. Davis had the hearing aid he presently wears during the trial, but he now removes the aid when around noise.

The hearing tests administered 2-16-82 indicate a mild to moderate hearing loss. Research indicates that this type of loss results in

significant psychological problems since the individual is isolated socially due to the difficulty in communicating. Frequent misinterpretations are common, inappropriate responses are frequent. Totally deaf people have a community in which they can identify, but the hard of hearing are not a part of any group. Tinnitus (ringing in the ears) is an additional problem that Mr. Davis experiences that often causes psychological problems. Suspiciousness and anxiety are common to the hearing impaired. The audiogram measures loss of acuity. In addition, Mr. Davis's test results indicate a loss of ability to process information. This processing problem causes him to draw inappropriate conclusions and have difficulty interpreting information.

Implications of Psychomotor Seizure Activity

The psychological evaluation conducted by Harry Krop, Ph.D., September 19, 1986, indicates possible organic brain syndrome with psychomotor seizures. The organic brain syndrome was verified by the present administration of the neuropsychological test battery. The history of early convulsions, periods of amnesia, loss of consciousness, and Mr. Davis's report of periods of unawareness suggest that Mr. Davis may have experienced generalized non-convulsive seizures as a child, which would have resulted in brief episodes of loss of consciousness. It is beyond the scope of this examination to determine the nature of the seizure disorder.

The neurological examination conducted January 14, 1983, by Glenn Pohlman, M.D., indicates a normal EE and CT scan and neurological examination. The normal urological examination does not negate the cerebral dysfunction indicated on the neuropsychological test battery.

The reports of narcolepsy (recurrent attacks of sleep, loss of muscle tone, hallucinations, and sleep paralysis) needs to be further evaluated.

Implications of Psychological Functioning

Results of psychological evaluations, reports of relatives and friends, and self-report support severe abuse. Indications are that Mr. Davis adjusted by adopting a passive manner of relating to others. He tried to be helpful, avoided conflict, and was easily influenced by others. His history of sexual involvement with children would be typical of a history of nonacceptance by peers. His fear of punishment stemming from the sustained early abuse would cause more hysterical reactions to perceived threat than in the average man. Reports from incarceration indicates that Mr. Davis continues to be compliant and try to please. He does not cause problems and he noted in the interview that he tries to get along with everyone. He is proud of this trait.

Defendant's Account of the Incident

Mr. Davis noted that Mrs. Weiler lived next door to the family home. He was not friends with the family, but does not feel there were any problems. He was not angry with the mother, nor the children. He asserts that he had no sexual contact with her daughters, and had only

spoken to them in the back yard. He reports confusion regarding his ability to commit a crime of violence, particularly against the children. He remembers going to the house, and asking to use the telephone. He remembers that Mrs. Weiler was excited and shouting, but he does not know why. He remembers hitting her, but cannot recall events after that time. He willingly cooperated with the police in their investigation and cooperated with the sodium amytal test, because he knew that he had nothing to do with the crime. He continues to be confused regarding the events.

IMPLICATIONS OF EVALUATION INFORMATION

As noted previously, there are three factors that significantly impact Mr. Davis's functioning, and his behavior during the incident.

Hearing loss and processing problem. A hearing loss of the type and severity that Mr. Davis experiences impacts a number of areas in everyday living. Frequent misinterpretation of information is frequent. With the addition of background noise, competing sounds, large rooms with poor acoustics, distance from the speaker, the acuity measured in a sound proof room decreases. Emotional problems further increases the ability to understand and process the information. Hard of hearing people are known to have increased suspiciousness and anxiety, feel that others are talking about them, and have diminished self concept.

It is very possible that Mr. Davis would have entered the Weiler home for the purpose of using the phone or another benign purpose. If Mrs. Weiler had told him to leave or asked him a question that he misinterpreted, he could have drawn inappropriate conclusions. If she had become excited, the past history of abuse and retribution would have caused him to overreact. His impulsivity and documented brain damage would cause further interference. Mr. Davis does not interpret information nor draw appropriate conclusions. The present evaluation clearly documents his inability to look at facts and interpret them appropriately. He is unable to change a previous conclusion if new information is presented. In the case of circumstances surrounding the present charge, Mr. Davis would have reacted catastrophically due to this brain damage. His history suggests that emotional factors interact with his ability deficits to result in a poorer overall adjustment than would be predicted on the basis of his neuropsychological test results alone. Mr. Davis knows enough to conduct himself appropriately in routine everyday situations provided that emotional factors do not interfere. He does not understand subject matter that is abstract and he would have difficulty with the requirements of decision making under stress. He does not do well on situations that require close attention to fine details and he makes concentration related misinterpretations. This is in addition to his hearing loss.

Mental State at the Time of the Offense

The history and present level of functioning indicates that Mr. Davis was suffering from significant psychological disturbance at the time of the offense. Mr. Davis's behavior on the day of the crime is reasonably viewed as a catastrophic response to a situation which was

overwhelming to him. Several hypotheses are possible: One characteristic stress response for individuals with a history of abuse is to relive thoughts and fantasies of the past which are similar to the present situation, e.g. women yelling, angry people, threat of punishment. At this time the behavior is marked by feelings of detachment from the events and result in an altered state of consciousness. Given his history, Mr. Davis would try to protect himself from perceived harm. A second factor that influences Mr. Davis is his inability to control catastrophic reactions or judge appropriate behavior due to the brain damage.

Mr. Davis's sketchy memory and block of the actual crime is consistent with the multiple deficits. The absence of careful planning of the offense, the cooperation with police and lack of resistance at the time of the arrest lands credence to the explanation of psychological factors controlling the behavior at the time of the offense.

It is my professional opinion that the defendant's judgment was so impaired that he was unable to understand or appreciate the fact that he was destroying the victims.

Ability to Assist in Defense at Trial

Mr. Davis would be unable to provide adequate assistance to his counsel during the trial. The trial transcript notes his inability to hear the witnesses statements, and the judge's admonishments for those present to speak louder. He would not be able to hear nor process the necessary information. In a courtroom his hearing would be particularly impaired due to the high ceilings and distance from the speaker.

In addition, his functioning as measured by the present evaluation, supports his inability to problem solve and conceptualize. He lacks the ability to gather facts and draw conclusions, particularly if the information is abstract.

Given Mr. Davis's passive and conforming mode of adapting, he would be unlikely to question, demand, or insist. He is highly suggestible and would go along with suggestions of those he perceived to be in power, i.e. attorneys, judges.

AGGRAVATING AND MITIGATING FACTORS

At the time of the trial, the influence of the hearing loss and the brain damage was not known nor presented. If these factors had been presented, the conclusions regarding aggravating and mitigating factors would likely have been influenced.

Aggravating Factors

WHETHER THE CAPITAL FELONY WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION

Cold, calculated, and premeditated manner assumes the ability to plan in a rational manner. Mr. Davis's past history of abuse, fear of

punishment, and the brain damage prevents him from appropriately judging consequences. He would have known that it was wrong to harm another person, but would have reacted in a catastrophic manner to unusual circumstances such as Mrs. Weiler's excitable responses. Cold planning to harm other was not indicated in this man's history. A hysterical and catastrophic reaction would be consistent with Mr. Davis's history of emotional trauma combined with the brain damage and hearing loss.

Mitigating Circumstances

THE CAPITAL FELONIES WERE COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

Mr. Davis has a long history of emotional disturbance, hearing loss, abuse and brain damage. The significant factor was his inability to react appropriately under stress. He would have reacted in a manner similar to individuals with known brain damage... drawing inappropriate conclusions, being unable to process the information, and impulsively finding a way out.

Although a neurological examination was performed on the defendant, this type of evaluation does not identify deficits in functioning nor identify psychological problems.

WHETHER THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON

To Mr. Davis, the threat of punishment, the emotionality of another person, and the inability to process the information appropriately, would create extreme duress. An individual with normal capabilities would have been able to recognize that he could leave the house, he could reason with the woman, or take responsibility for his behavior in another manner. Mr. Davis is not able to react in this manner. These alternatives would not have been available to him, given his level and quality of functioning.

WHETHER THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED

Ten minutes prior to the incident, Mr. Davis would likely have been able to appreciate the criminality of his conduct and conform his conduct to the requirements of the law. He would have intellectually been able to understand that it is wrong to harm another. The impairment caused by brain damage and severe emotional problems does not allow Mr. Davis to use these faculties under conditions of extreme stress and danger. It is probable that the repeated head injuries suffered by this man as a child, plus the head injury sustained in the automobile accident, plus the psychological problems associated with extended abuse, results in reactions that were out of proportion to the facts.

ADDITIONAL MITIGATING FACTORS

Mr. Davis has a long history of an inability to form appropriate relationships. His early relationship with younger children are a good example of this deficiency. The affidavits from relatives are dramatic in the description of a life lacking in even basic food, clothing and shelter need fulfillment. He was mocked, ridiculed, and tormented by all of those surrounding him, both family and peers. He failed in school, was grossly overweight, and had a stuttering disorder. He adjusted his behavior to fill the expectations of others with minimal success.

Consistent with the history and the results of the evaluations, Mr. Davis is able to function well in a safe, controlled, structured environment. He does not cause problems, and while incarcerated, has never been violent.

I appreciate the opportunity to evaluate this complex, and unfortunate man. This case emphasizes the difficulty that brain damaged and emotionally disturbed individuals have in functioning in a complex society. Any one of his deficits would have possibly allowed him to maintain, the combination was overwhelming.

(Report of Dr. Pat Fleming).

Dr. Harry Krop, who also performed an evaluation, likewise concluded that several statutory and numerous nonstatutory mitigating factors were applicable in this case and that Mr. Davis was not competent at the time of trial. Dr. Krop concluded, in addition, that in his opinion Mr. Davis was insane at the time of the offense.

Mental Status at the Time of the Offense

Based on Mr. Davis' self-report, as well as the material provided to me, it is this examiner's opinion that there is a high likelihood that Mr. Davis is genuinely unable to recall the offense. It is furthermore my opinion that he was unable to appreciate the nature, quality and consequences of his actions at the time of the offenses, or conform his conduct to the requirements of the law.

This conclusion is based on his inability to recall significant details of the offense, his lack of motive for committing such an offense, the absence of denial of his involvement in the offense, his initial ready cooperation with the police, his history of non-assertive behavior, and his history of blackouts. Further, such an act of violence is absolutely uncharacteristic of his personality before and since the offense. There is a high likelihood that Mr. Davis' aggressive behavior was the product of a psychomotor seizure rather than a design or an intent to cause injury. He did not know what he was doing or its consequences.

Summary and Conclusion

This is a 42 year old single male who was evaluated on death row to determine his competency to stand trial, his sanity at the time of the offense, and possible mitigating factors that may have existed at that time. Based on the current evaluation and the information available to me, it is this examiner's opinion that Mr. Davis was insane at the time of the offense. It is highly probable that Mr. Davis was experiencing a psychomotor seizure at the time and could not understand the nature and quality of the violent act being committed or the difference between right and wrong with respect to the act. In such an episode, caused by an unpredictable psychomotor seizure, Mr. Davis would lack the ability to have fully formed a conscious purpose to commit the homicides for which he was tried and convicted.

As a result of the psychomotor seizure, it is impossible for Mr. Davis to have reliable memory of the details surrounding the offense. His initial willingness to assist investigators was based on his belief that he did not commit the offense. Once Mr. Davis was confronted by his family and investigators with his involvement, he experienced tremendous psychological turmoil over what his actions must have been. The internal turmoil between what he was told he did and what he could remember doing was overpowering.

In all likelihood, the state of psycho-emotional shock caused by the totally extra-character aggression he was led to believe he committed so debilitated him that he was not capable of acting in his own best interests during the ensuing legal proceedings. This debilitation was exacerbated by the pattern ingrained upon him by his life history of abuse and rejection from authority figures. Over his life, Mr. Davis had learned that he could not assert himself but must remain passive in the face of an authority figure, such as an attorney, and follow that figure's lead. His lifelong desire for acceptance taught him to seek ingratiation with authority figures by remaining passively compliant. The emotional shock engendered by his gradual realization of the possibility of guilt combined with his life's pattern of passivity effectively destroyed any internal motivation Mr. Davis might have had to help himself. He completely withdrew and relied upon others to chart his course and if they saw fit, punish him. Thus, in addition to being unable to disclose pertinent facts regarding the alleged offense because of the psychomotor seizure, Mr. Davis was certainly unable to relate to or assist his attorney in planning a defense, and lacked any motivation to help himself in the legal process.

In addition, several statutory mitigating circumstances no doubt contributed to his alleged actions at the time of the offense. Based on Mr. Davis' history and the reports available to me, it is likely that the inmate suffers from organic brain damage or shows the residuals of such a condition. In this regard, there is a high likelihood that the inmate was exhibiting a psychomotor seizure that could not be predicted when he allegedly killed the victims. Mr. Davis' ability to control his behavior at the time of the offense was seriously impaired; he lacked the capacity to conform his conduct to the requirements of law.

> In addition, several non-statutory mitigating factors were existent at the time of Mr. Davis' trial. His early and life-long abuse, first by his father and then his stepfather, destroyed any normal concepts of self-image. His feelings of inadequacy were exacerbated by rejection and ridicule by his peers, as well as his family. He was constantly mocked for his obesity, his speech impediment, his low intelligence, and his family's poor standing in the community.
>
> Mr. Davis' emotional development and self-imagery were so fundamentally retarded that he never developed the social skills needed to form positive relationships with his peers. For a period he sought acceptance through characteristically pre-adolescent sexual relationships, although stopping short of intercourse, with inappropriate partners of significantly younger age. He manifested feelings of deep guilt and shame regarding these sexual encounters, and as a result, his self esteem fell even lower. He voluntarily sought treatment for this perceived disorder. This behavior seems to reflect experiences in his own formative environment, one in which he was both deprived of normal forms of affection and quite possibly was molested by older relatives and neighbors.
>
> During periods of incarceration, Mr. Davis exhibited positive behavior, as indicated by institutional reports. His passive personality permitted him to function well in a controlled, stable environment.
>
> Throughout his life, he sought social isolation as a defense against humiliation and rejection. He developed a non-assertive, compliant, passive personality. The offense for which he was convicted was not by his own design or intent. It was in all probability the result of a pre-existing brain dysfunction over which he had no control.
>
> In conclusion, it is my opinion, based on interviewing and evaluating Mr. Davis and reviewing the previously listed materials, that Mr. Davis was insane at the time of the offense, incapable of conforming his conduct to the requirements of law, was incapable of assisting in his defense at trial, and meets at least two statutory mitigating criteria as well as other non-statutory factors.

(Report of Dr. Harry Krop).

All this information is of course unquestionably relevant to mitigation (<u>See</u> Argument I, <u>supra</u>). The evaluations demonstrate that it was an unreasonable omission of counsel <u>not</u> to have investigated Mr. Davis' background (<u>see</u> Argument I) and that the experts failed in their forensic capacity. Because of the participant's belief that nonstatutory mitigation was unavailable, a wealth of evidence was not pursued or considered. This left the sentencer without a complete picture of Mr. Davis necessary for "expressing its

'reasoned moral response' . . . in rendering its sentencing decision." Penry v. Lynaugh, 109 S. Ct. 2934, 2952 (1989).

The pretrial evaluations here at issue deprived Mr. Davis of his most essential rights -- i.e., they directly caused important, necessary, and truthful information to be withheld from the tribunal charged with deciding whether Mr. Davis was guilty of first-degree murder, and whether he should live or die. The errors discussed herein "precluded the development of true facts," and "serve[d] to pervert the jury's deliberations concerning the ultimate question[s]." Smith v. Murray, 106 S. Ct. 2661, 2668 (1986)(emphasis in original). No evidentiary hearing has been held on these claims. A full and fair evidentiary hearing is now proper, see, e.g., Mason v. State, 489 So. 2d at 735-37, for the files and records by no means show that Mr. Davis is "conclusively" entitled to "no relief" on this and its related claims. See Lemon v. State, 498 So. 2d 923 (Fla. 1986); O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984). Moreover, Hitchcock v. Dugger justifies representation of this issue in state court. The circuit court errored in failing to allow an evidentiary hearing.

ARGUMENT III

MR. DAVIS' FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE ABROGATED BECAUSE HE WAS FORCED TO UNDERGO CRIMINAL JUDICIAL PROCEEDINGS ALTHOUGH HE WAS NOT LEGALLY COMPETENT, IN VIOLATION OF PATE V. ROBINSON, AND THE TRIAL AND SENTENCING PROCESS VIOLATED FARETTA V. CALIFORNIA, GIVEN THE FACTS OF THIS CASE.[4]

Allen Lee Davis was not competent to undergo the 1983 criminal judicial proceedings which resulted in his capital conviction and sentence of death. A wealth of evidence was available then which would have revealed his lack of competency, but was not heard because of failings by defense counsel and the

[4]This claim was presented as Claim V in the Rule 3.850 motion filed in September 1986. It is represented now because this Court committed fundamental error in not ordering an evidentiary hearing. See Kennedy v. Wainwright, 483 So. 2d 424 (Fla. 1986).

experts.

The right to be tried only when competent is one of, if not the, most fundamental of rights. See Bishop v. United States, 350 U.S. 961 (1956); Pate v. Robinson, 383 U.S. 375 (1966); Drope v. Missouri, 420 U.S. 162 (1975). If there exists a reasonable probability that the defendant was incompetent at trial, the conviction and sentence cannot stand. The competency issue is non-waivable: "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." Pate, 383 U.S. at 384.

Testing and expert evaluations reveal that Mr. Davis was incompetent to stand trial and capital sentencing:

> Ability to Assist in Defense at Trial
>
> Mr. Davis would be unable to provide adequate assistance to his counsel during the trial. The trial transcript notes his inability to hear the witnesses statements, and the judge's admonishments for those present to speak louder. He would not be able to hear nor process the necessary information. In a courtroom his hearing would be particularly impaired due to the high ceilings and distance from the speaker.
>
> In addition, his functioning as measured by the present evaluation, supports his inability to problem solve and conceptualize. He lacks the ability to gather facts and draw conclusions, particularly if the information is abstract.
>
> Given Mr. Davis's passive and conforming mode of adapting, he would be unlikely to question, demand, or insist. He is highly suggestible and would go along with suggestions of those he perceived to be in power, i.e. attorneys, judges.

(Report of Dr. Fleming).

> As a result of the psychomotor seizure, it is impossible for Mr. Davis to have reliable memory of the details surrounding the offense. His initial willingness to assist investigators was based on his belief that he did not commit the offense. Once Mr. Davis was confronted by his family and investigators with his involvement, he experienced tremendous psychological turmoil over what his actions must have been. Internal turmoil between what he was told he did and what he could remember doing was overpowering.
>
> In all likelihood, the state of psycho-emotional shock caused by the totally extra-character aggression he was led to believe he committed so debilitated him that he was not capable of acting in his own best

> interests during the ensuing legal proceedings. This debilitation was exacerbated by the pattern ingrained upon him by his life history of abuse and rejection from authority figures. Over his life, Mr. Davis had learned that he could not assert himself but must remain passive in the face of an authority figure, such as an attorney, and follow that figure's lead. His lifelong desire for acceptance taught him to seek ingratiation with authority figures by remaining passively compliant. The emotional shock engendered by his gradual realization of the possibility of guilt combined with his life's pattern of passivity effectively destroyed any internal motivation Mr. Davis might have had to help himself. He completely withdrew and relied upon others to chart his course and if they saw fit, punish him. Thus, in addition to being unable to disclose pertinent facts regarding the alleged offense because of the psychomotor seizure, Mr. Davis was certainly unable to relate to or assist his attorney in planning a defense, and lacked any motivation to help himself in the legal process.

(Report of Dr. Krop).

Trial counsel repeatedly told the trial court that he had contacted or consulted Mr. Davis before making certain decisions, and then had Mr. Davis tell the court that that was true. The upshot seemed to be that if Mr. Davis said it was acceptable, it was reasonable attorney conduct, or, at least Mr. Davis could not later complain. Ultimately, decisions which are the exclusive function of counsel were entrusted to Mr. Davis by Mr. Tassone and the trial court. Cf. Foster v. Dugger, 823 F.2d 402, 407 n.16 (11th Cir. 1987); Chambers v. Armontrout, 907 F.2d 825, 831 (8th Cir. 1990)(in banc), cert. denied, 111 S. Ct. 369 (1990).

Mr. Tassone repeatedly took Mr. Davis up to the bench and had him tell the trial judge that he had decided complex legal issues, or at least was satisfied with what Mr. Tassone had done. For example, Mr. Tassone accepted the jury while he had a peremptory challenge left. This was attorney error, as it adversely affected the previously litigated venue change issue. The next day, Mr. Tassone marched Mr. Davis to the bench.

> MR. TASSONE: Mr. Davis, at this time let me state I think the record should reflect that the State through Mr. Austin and Mr. Kunz are present and that Mr. Davis is standing beside me and I would like to point out for the record that during the course of the jury selection, Mr. Davis and I had the opportunity to consult with each other and that Mr. Davis participated in the decisions that went to

peremptory challenges and Mr. Davis advised me yesterday that he was satisfied with the jury selection, even though there was one peremptory challenge left and that he was satisfied with the jury selection process.

Is that correct, sir?

MR. DAVIS: Yes, sir.

(R. 792). Mr. Tassone did not mention at the bench the legal effect of this "bench hearing": this Court rejected the venue argument based partially on this "concession" by Mr. Davis. Mr. Tassone noted that he had to speak with his client before making decisions about exhibits and stipulating to witnesses' qualifications (R. 924, 935), and said on the record he had received Mr. Davis' consent.

A host of decisions were "covered" after the fact, as mentally ill Allen Davis was made to acquiesce on lawyer decisions such as the calling of witnesses, cross-examining them, the best order of closing argument, and more:

MR. TASSONE: Your Honor, can we let the record reflect that we are still here at side bar out of the presence of the jury and that Mr. Davis is present with Mr. Kunz, the Assistant State Attorney and what I wanted to place into the record was the fact that any stipulation that was entered yesterday was done with the consent and approval of Mr. Davis, also, Your Honor, that any agreement as to the voluntariness of any lack of objection as to voluntariness of the search to either the truck or the apartment or Mr. Davis' presence at the Police Station was done with Mr. Davis' consent and that Mr. Davis and I fully discussed the matter and Mr. Davis advised me that to the best of his recollection, he did consent to appearing at the Police Station, to appearing or, excuse me, to consenting to the search of this truck and to consenting to the search of his apartment, is that correct, sir?

MR. DAVIS: Yes.

MR. TASSONE: Also, Your Honor, I wish to point out for the record that during the course of or subsequent to my appointment to this particular case, that Mr. Davis and I have discussed among other things calling of witnesses on Mr. Davis' behalf and Mr. Davis and I have discussed that for a period of at least sixty to ninety days and I have requested the names of witnesses and also discussed what items, if any, to present into evidence.

I have already obtained Mr. Davis' consent and his statement that he did not desire any witnesses be called in his behalf for the defense. I reviewed that decision with Mr. Davis. I advised him as to what possible witnesses could be called in his behalf and any

witnesses that could have been garnered in Mr. Davis' behalf would have been in Mr. Davis and my collective opinions and substantially in the nature of Mr. Davis has specifically and I think repeatedly made the decision that for tactical advantages, and I explained to him the way the closing arguments would occur, that he prefer that I have opening and closing arguments rather than the one middle argument and final argument.

Is that correct, sir?

MR. DAVIS: Yes.

MR. TASSONE: Also, Your Honor, I think the record if we can let the record reflect that after talking with Mr. Davis for several months in terms of the names of witnesses, he telephoned me on Saturday, I believe, which would have been the 29th of January, 1983, and advised me that he had spoken to a particular witness and that that witness had consented to testify in his behalf, not in the initial stage of this trial but in any possible sentencing phase.

Mr. Davis gave me the names of, I believe, four witnesses on Monday morning. . . .

(R. 1084-85).

MR. TASSONE: Your Honor, I want to let the record reflect in the presence of the State and Mr. Davis and the Court that prior to any cross examination of any witness, Mr. Davis and I have conferred fully about each and every one of the depositions taken in this case, the summary of them and discussed the potential of what those witnesses would say during the course of a trial if called by the State and I would like the record to reflect that Mr. Davis participated in the decisions with me in terms of whether to cross examine, to what extent and I have consulted with Mr. Davis over numerous occasions during the course of the trial to determine if I have not acceded to his wishes in terms of both at that time and whatever, and Mr. Davis...

. . . .

[I]t was his decision to have whatever chain of custody witnesses and Lethenia Meadows and Mary Carter identify the group as a whole and not on an individual basis.

(R. 1371, 1373).

MR. TASSONE: Also, Your Honor, I'd like the record to reflect that as I stated previously, Mr. Davis and I discussed at great length on numerous occasions the calling of witnesses to testify in Mr. Davis' behalf, specifically he would call or we spoke at length about the possibility of calling witnesses with fiber match expertise, serology, hypnosis and ballistics and Mr. Davis advised me that he felt that it was in his best interest not to call witnesses on his behalf to testify at this trial. Is that also correct, Mr. Davis?

MR. DAVIS: Yes.

THE COURT: Let the record indicate that that was an affirmative answer.

MR. TASSONE: Your Honor, to the best of my knowledge, information and belief, I have advised Mr. Davis as to what witnesses would be presented by the State, the nature of the direct examination by the State, the nature and extent of any cross examination that was possible on my behalf or on Mr. Davis' behalf and Mr. Davis has advised me that he is satisfied that I have remained within the bounds that he has directed to me in terms of the cross examination and that he is fully advised as to what the witnesses said during cross examination and was so advised prior to trial. Is that correct, Mr. Davis?

MR. DAVIS: Yes.

(R. 1627).

THE COURT: I think the record should reflect that Mr. Davis is present with his attorney, Mr. Tassone, and Mr. Kunz at side bar with the Court.

MR. TASSONE: Okay. On Monday, January 31st, 1983, Mr. Davis provided me the names of six witnesses who he would like for me to interview and talk to and that list is a part of at least my case file. I did so and asked Mr. Don Taylor who is an investigator to consult with those individuals since I was in trial. Mr. Taylor did so and reported back to me during the course of the trial on recesses as to what those witnesses would say.

Also, I discussed with Mr. Davis his position in taking the stand during this portion of the trial and all of this was discussed with Mr. Davis for several periods of time. Mr. Davis advised me that he did not wish to take the stand during this portion of the trial.

Also, I advised him as to what the witnesses whose names he gave me would possibly say. After advising Mr. Davis of what those witnesses would say, it was Mr. Davis' opinion and my opinion that three witnesses should be called out of the six names that he gave me and that is Bill and Linda Palmer and Katheryn Dixon who have been subpoenaed and are prepared to testify.

Again, Mr. Davis indicated that he did not want to testify during this portion of the trial and I would like the record to reflect that issue was discussed at great length with Mr. Davis as to whether he should testify during this phase.

Is that correct?

MR. DAVIS: That's right.

THE COURT: Well, likewise, Mr. Davis, the decision which was made on the witnesses to be called is as Mr. Tassone states it?

MR. DAVIS: Yes, sir.

THE COURT: Very well.

(In open court:)

THE COURT: Counsel, are we ready to proceed with the advisory hearing?

MR. AUSTIN: Yes, sir, we are.

MR. TASSONE: Yes, Your Honor. Prior to bringing the jury out, I would like the record to reflect that the State has provided me copies of judgment and sentences and copies of informations connected thereto. I was aware of the charges that the State is seeking to introduce evidence to present during the course of this proceeding and I would submit, Your Honor, that after consultation with my client, Mr. Davis has authorized me to stipulate to the introduction of the judgment and sentences and of the informations presented in connection therewith.

(R. 1776-77).

MR. TASSONE: Your Honor, again, I have made arrangements to the Court during the course of the trial and I think that the voluminous files in the Clerk's file, we would resubmit those arguments at this time without further arguing them before the Court.

(R. 1866).

Mr. Davis was, in effect, acting as his own attorney, or at least as co-counsel, without any of the waiver of counsel prerequisites having been fulfilled, and without his ever asking to proceed pro se. There had been no penetrating and comprehensive inquiry about the dangers and disadvantages of self-representation by the court or defense counsel. This procedure violated

the sixth, eighth and fourteenth amendments.[5]

Mr. Davis was deprived of the fundamental protections designed to assure a fair trial because he was forced to undergo proceedings when he was not legally competent. This error was exacerbated by the actions of defense counsel and the court. Defense counsel allowed his client to make legal decisions concerning defense strategy even though Mr. Davis was incapable of even understanding the legal proceedings of his trial. The trial court also erred by failing to conduct an inquiry into Mr. Davis' competency to stand trial. Pate v. Robinson, 383 U.S. 375 (1966). The trial court erred by allowing Mr. Davis to participate as defense counsel without conducting a Faretta inquiry into whether Mr. Davis was competent to proceed as counsel. Faretta v. California, 422 U.S. 806 (1975). Faretta requires a higher mental state than simple trial competency: neither issue was properly assessed in this case.

A criminal defendant is entitled to post-conviction relief if he can demonstrate that he was not legally competent at the time of his trial. See, e.g., Hill v. State, 473 So. 2d 1253 (Fla. 1985). Mr. Davis was not competent at the time of his trial. However, no competency determination was made. Indeed, defense counsel's request for a psychological evaluation was denied. Defense counsel's request for a psychological evaluation was based on the

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[5]In Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(in banc), cert. denied, 111 S. Ct. 369, the Eighth Circuit found a defendant's concurrence in counsel's decisions did not insulate those decisions from review. The Court stated:

> Chambers' statement did not give Hager reason to believe that pursuing certain investigations would be fruitless or harmful. It does not provide Hager with any information that either discredited Jones or Jones' testimony. Rather, the statement indicates only that a defendant with an eighth grade education, relying on information provided by Hager, agreed with Hager's decision not to call Jones. Whether or not Chambers agreed with the decision not to call Jones does not make that decision any more reasonable or the investigation fruitless or harmful.

907 F.2d at 831.

observation by a detective working for the State. The detective after observing Mr. Davis' bizarre behavior while incarcerated told defense counsel that he believed that Mr. Davis was insane. Defense counsel also conferred with members of the defendant's family and determined that Mr. Davis had a history of blackouts. The Court's decision to forego a competency inquiry and to deny counsel's request for a defense psychologist resulted in a proceeding where Mr. Davis was forced to proceed to trial when he was not legally competent.

As an indigent whose mental capacity is at issue at all stages of a capital case, Mr. Davis was entitled to a competently conducted psychiatric or psychological evaluation. Defense counsel failed to obtain a competency determination despite evidence readily available to counsel that would have established, at a minimum, the need for a professional competency evaluation and a hearing on the defendant's competency. Defense counsel failed to recognize obvious signs and symptoms of Mr. Davis' mental illness and emotional disturbance. Counsel failed to present the mental health experts with the information demonstrating Mr. Davis' lack of competency to stand trial. These records demonstrated that Mr. Davis, while awaiting trial, was behaving erratically. Counsel did not recognize the obvious, and failed to raise the issue of Mr. Davis' competency under Rule 3.211. Mr. Davis' mental and emotional disturbances and his lack of any real understanding of the criminal process were and are easy to document.

Mr. Davis was forced to proceed to trial and required to make critical life and death decisions although he lacked the mental capacity to make such choices. He was forced to trial when he did not understand the adversarial process nor fully understand the respective roles of the participants. He could not relate to his attorney because he did not understand what was happening. In addition, Mr. Davis' mental illness precluded him from possessing the capacity to relate the pertinent facts surrounding the alleged offense to his attorney. Mr. Davis

could not aid in his defense, nor aid counsel, nor testify rationally, nor realistically challenge prosecution witnesses, nor understand the proceedings transpiring before him.

Lay testimony, documentary evidence and background information existed and/or should have been developed which would have demonstrated that Mr. Davis should not have been forced to proceed to trial, should not have been convicted of first degree murder and should not have been sentenced to die. Mr. Davis should now be permitted to prove his claim, because forcing an incompetent to trial violates the most rudimentary of constitutional standards. This Court in Mason v. State, 489 So. 2d 734 (Fla. 1986), under very similar circumstances ordered that Mr. Mason be provided with the opportunity to raise this claim at a hearing. Mr. Davis should likewise be permitted a full, fair, and adequate opportunity to establish his claim at a hearing.

Mr. Davis' conviction and sentence of death stand in violation of the fifth, sixth, eighth, and fourteenth amendments, see, e.g., Pate v. Robinson, 383 U.S. 375 (1965); Hill v. State, 473 So. 2d 1253 (Fla. 1985); Mason, and his claim should now be heard. It was ineffective assistance of counsel to fail to discover Mr. Davis' incompetence and to bring it to the court's attention and to the attention of mental health experts; the indicia were there, counsel did not do his job. This failing prejudiced Mr. Davis. See Kimmelman v. Morrison, 477 U.S. 365 (1986). A fair competency hearing should now be conducted.

Moreover, the court and counsel's apparent views about Mr. Davis' desire to act as counsel and his actions to represent himself contrary to the advice of counsel warranted an inquiry into Mr. Davis' sixth amendment right of self-representation. Indeed, the entire process in this case, from pretrial proceedings through judge sentencing, violated Faretta v. California and its progeny. The right of a criminal defendant to represent himself was elucidated in Faretta v. California, 422 U.S. 806 (1975). Once a criminal defendant

asserts his right to self-representation the court has a duty to conduct an inquiry into the defendant's ability to represent himself. To adequately conduct this inquiry the court must ascertain whether the defendant has the knowledge and skill to conduct his own defense. The court must inquire whether the defendant can knowingly and intelligently waive his right to counsel.

The court's failure to conduct a Faretta inquiry deprived Mr. Davis of his sixth amendment right. The court also erred by allowing Mr. Davis to conduct a defense without inquiring whether Mr. Davis was capable of knowingly and intelligently waiving his sixth amendment right to counsel. This error caused Mr. Davis to be convicted and sentenced to death in violation of the sixth amendment. Both the court and counsel should have obtained the views of qualified mental health professionals in this regard.

The circuit court erred in denying this claim. An evidentiary hearing is proper, and thereafter, relief.

ARGUMENT IV

MR. DAVIS' RIGHTS TO RELIABLE CAPITAL TRIAL AND SENTENCING PROCEEDINGS WERE VIOLATED WHEN THE STATE URGED THAT HE BE CONVICTED AND SENTENCED TO DEATH ON THE BASIS OF VICTIM IMPACT AND OTHER IMPERMISSIBLE FACTORS, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.[6]

Mr. Davis argued in his initial motion to vacate judgment and sentence that his death sentence was based on impermissible victim impact information. He then reasserted this claim in accordance with the federal court's directive. The circuit court procedurally barred this issue "as a claim that, if preserved, could have been raised on appeal or in Mr. Davis' first Rule 3.850 petition." (ROA 134). As noted, this claim was raised in Mr. Davis' first Rule 3.850 petition. When prejudicial error results in the denial of fundamental constitutional rights, this Court will revisit a matter previously settled by

[6]This claim was presented as Claim III of the Rule 3.850 motion filed in September 1986. This claim is represented now in light of the federal court's directive.

the affirmance of a conviction or sentence. Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla. 1986). This is such a case.

The impermissible victim impact information in this case includes ten letters "concerning the sentencing of the defendant" which were improperly presented to the tribunal by the state attorney's office (See App. R), and which all contained supplications from family members praying that Judge Harding impose the death penalty on Petitioner because, chief among several reasons, of the pain and suffering the Petitioner's acts had caused them, the writers (See Letters, Appendix to prior Rule 3.850 motion). The letters also compared the defendant to the sweet, intelligent and worthwhile victims, expressed fear of ever feeling safe "at home" again, offered rebuttal to defense counsel's sentencing argument given to the jury, and expressed outrage (Id.). In addition, the State improperly argued that the sentencer should consider the suffering of the victims when deciding to impose the death sentence; the State also presented other improper arguments.

These letters and arguments were considered by Judge Harding in pronouncing sentence. Immediately prior to pronouncing sentence, Judge Harding made "a few observations":

> This criminal justice system is not at this point designed to effectively deal with the victims but, in any event, at no point during these proceedings could the Court restore the lives of the victims in this case but their [sic] are other victims, those who have been grievously hurt by the deaths of Nancy, Kristy, and Kathy Weiler and it is the prayer of this Court that those who have been so grievously hurt will be able to come to peace with themselves and with God, so that they will be able to continue to live a productive and positive life, the type of life that Nancy, Kathy, and Kristy Weiler would have wanted them to live.

(R. 1867-68)(emphasis added). The court also stressed, while pronouncing sentence, that the victims were "in the sanctity of their own home" (R. 1833). The penalty of death was imposed (R. 1875-76).

Even though defense counsel objected to the prosecutor's remarks, arguing that the state had improperly introduced the fear and suffering by the victims (R. 1847), cf. Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989), the court overruled the objection finding the prosecutor's comments proper (R. 1848). On the direct appeal of Mr. Davis' conviction and sentence this Court denied this claim on its merits. Davis v. State, 461 So. 2d 67, 70 (Fla. 1984). This occurred before the Court's decision in Jackson v. Dugger, and before the United States Supreme Court's decisions in Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 109 S. Ct. 2207 (1989). Mr. Davis asserted this claim in his prior motion for post-conviction relief. The circuit court summarily denied relief, and this Court affirmed the denial of relief. Davis v. State, 496 So. 2d 142 (Fla. 1986). Mr. Davis raised this claim in his habeas corpus petition which was also denied. Davis v. Wainwright, 498 So. 2d 857 (Fla. 1986). Now, post-Jackson, this claim should be properly entertained and relief should be granted.

A sentence of death cannot stand when it results from prosecutorial comments or judicial instructions which may mislead the jury into imposing such a sentence. Caldwell v. Mississippi, 472 U.S. 320 (1985). The prosecutors here nevertheless argued that the heinous, atrocious, or cruel aggravating circumstance was present not because of cruelty to the victim but because of cruelty to the victim's family. This improper interpretation of that aggravating circumstance was left uncorrected by the court. Errors such as this are precisely what was forbidden by Booth v. Maryland, 482 U.S. 496 (1987). See also South Carolina v. Gathers, 109 S. Ct. 2207 (1989).

Here, the sentencing judge considered and relied upon what the prosecutor had urged to the jury, the letters submitted from the victim's family, and what is forbidden under Booth and Gathers. The eighth amendment was violated here,

as it was in Booth and Gathers. This issue should be revisited; relief is appropriate.

ARGUMENT V

MR. DAVIS' SENTENCING JURY WAS IMPROPERLY INSTRUCTED ON THE "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCE, AND THE AGGRAVATOR WAS IMPROPERLY ARGUED AND IMPOSED, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.[7]

This Court has now explained:

> [T]he prosecutor argued that the fact that the victim's body was transported by dump truck from the hotel where she was killed to the dump where she was found supported the aggravating factor that the murder was heinous, atrocious, and cruel. We have stated that a defendant's actions after the death of the victim cannot be used to support this aggravating circumstance. Jackson v. State, 451 So.2d 458 (Fla. 1984); Herzog v. State, 439 So.2d 1372 (Fla. 1983). This statement was improper because it misled the jury.

Rhodes v. State, 547 So. 2d 1201, 1205-06 (Fla. 1989)(emphasis added). In Cochran v. State, 547 So. 2d 938 (Fla. 1989), the Court stated:

> Our cases make clear that where, as here, death results from a single gunshot and there are no additional acts of torture or harm, this aggravating circumstance does not apply.

Id. at 931.

A Florida capital jury must be correctly instructed at the penalty phase proceedings. Hitchcock v. Dugger, 481 U.S. 393 (1987). Mr. Davis' jury was not advised of these limitations on the "heinous, atrocious or cruel" aggravating factor. Indeed, the unconstitutional constructions rejected by this Court are precisely what was argued to the jury and what the judge employed in his own sentencing determination. As a result the instructions failed to limit the jury's discretion and violated Hitchcock v. Dugger, 481 U.S. 369 (1987), and Maynard v. Cartwright, 108 S. Ct. 1853 (1988). In addition, the judge employed the same erroneous standard when sentencing Mr. Davis to death.

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[7]This claim is presented now in light of the decision in Hitchcock v. Dugger, 481 U.S. 393 (1987), holding that a Florida sentencing jury must receive accurate instructions. This Court has previously held Hitchcock to be a change in law.

The jury instructions given in Cartwright were virtually identical to the instructions given to Mr. Davis' sentencing jury. The sentencing court here instructed the jury:

> Five, the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel.

(R. 1841). The Tenth Circuit's in banc opinion (unanimously overturning the death sentence) explained that the jury in Cartwright received virtually the same instructions:

> . . . the term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; "cruel" means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.

Cartwright v. Maynard, 822 F.2d 1477, 1488 (10th Cir. 1987)(in banc), affirmed, 108 S. Ct. 1853 (1988). In Cartwright, the United States Supreme Court unanimously held that such an instruction did not "adequately inform juries what they must find to impose the death penalty." 108 S. Ct. at 1858. The decision in Cartwright clearly conflicts with what was employed in sentencing Mr. Davis to death.

This Court has held that the "especially heinous, atrocious or cruel" statutory language is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). The Dixon construction has not been consistently applied, the jury in this case was never apprised of such a limiting construction, and the required limiting construction was never employed by the sentencing judge or state high court in Mr. Davis' case. This instructional error violated Hitchcock v. Dugger, 481 U.S. 393, 399 (1987)(Absent a showing that instructional error "had no effect on the jury," reversal required).

It is not significant whether the trial judge would have imposed the death penalty in any event. Instructional error is reversible where it may have affected the jury's sentencing verdict. Riley v. Wainwright, 517 So. 2d 656

(Fla. 1987). In Florida, the role of the sentencing jury is critical. In Mr. Davis' case, the sentencing vote was unrecorded. The jury may well have rendered a seven-five death recommendation. Under such circumstances one juror properly instructed could quite conceivably have concluded that the absence of the heinous, atrocious or cruel aggravating circumstance made death inappropriate and that the remaining aggravating factors were not sufficient to warrant a death sentence. See, e.g., Mills v. Maryland, 108 S. Ct. 1860 (1988). Such a change would have resulted in a binding life recommendation, and cannot be found to be harmless. The bottom line, however, is that this jury was unconstitutionally instructed, and that the State cannot prove harmlessness beyond a reasonable doubt. See Hitchcock. Both the judge and the jury applied precisely the construction condemned in Rhodes and Cartwright. In addition, the judge in actually sentencing Mr. Davis to death considered and relied upon the suffering of the victim's family after the homicide.

This Court normally remands for resentencing when aggravating circumstances are invalidated. See, e.g., Schafer v. State, 537 So. 2d 988 (Fla. 1989) (remanded for resentencing where three of five aggravating circumstances stricken and no mitigating circumstances identified); Nibert v. State, 508 So. 2d 1 (Fla. 1987)(remanded for resentencing where one of two aggravating circumstances stricken and no mitigating circumstances found); cf. Rembert v. State, 445 So. 2d 337 (Fla. 1984)(directing imposition of life sentence where one of two aggravating circumstances stricken and no mitigating circumstances found). The improprieties involved in this aggravating factor requires resentencing. Schafer.[8] The "harm" before the jury is plain -- a jury's

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[8]The remaining aggravating circumstances were of less significance here. For example, Mr. Davis was on parole at the time of the homicide but, as this Court recently explained, "the gravity of [that] aggravating factor is somewhat diminished by the fact [the defendant] did not break out of prison." Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989).

capital sentencing decision, after all, is not a mechanical counting of aggravators and involves a great deal more than that. The error denied Mr. Davis an individualized and reliable capital sentencing determination. Knight v. Dugger, 863 F.2d 705, 710 (11th Cir. 1989). The errors committed here can not be found to be harmless beyond a reasonable doubt. This is a claim of fundamental error. A new sentencing proceeding should be ordered.

ARGUMENT VI

THE MURDER FOR WHICH MR. DAVIS WAS SENTENCED TO DEATH WAS NOT COLD, CALCULATED AND PREMEDITATED AS DEFINED BY ROGERS V. STATE, AND THE APPLICATION OF THIS AGGRAVATING FACTOR VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE NO LIMITING CONSTRUCTION WAS PROVIDED TO THE JURY OR EMPLOYED BY THE SENTENCING JUDGE.[9]

In Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), this Court held that the "cold, calculated, and premeditated" aggravating factor requires proof beyond a reasonable doubt of "calculation," which consists of "a careful plan or prearranged design to kill." This Court has "defined the cold, calculated and premeditated factor as requiring a careful plan or prearranged design." Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988)(emphasis added).

A Florida capital jury must be correctly instructed at the penalty phase proceedings. Hitchcock v. Dugger, 481 U.S. 393 (1987). Nothing in the jury instructions, sentencing court's construction, or this Court's holding on direct appeal suggests the sort of "calculation," the "careful plan or prearranged design to kill," that is a necessary predicate for the "cold, calculated, and premeditated" aggravating factor. No evidence in this case even suggests a plan or design to kill sufficient to meet the heightened level of premeditation required by this aggravating factor. Further, no limiting instruction was given to the jury to guide their deliberations. See Hitchcock v. Dugger; Maynard v.

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[9]This claim is presented now in light of the decision in Hitchcock v. Dugger, holding a Florida sentencing jury must receive accurate instructions which comply with the eighth amendment. This Court has previously held Hitchcock was a change in law.

Cartwright, 108 S. Ct. 1853 (1988)(death sentence cannot stand where there is failure to apply limiting construction of broadly worded aggravating factor in order to channel and narrow sentencer's discretion); Zant v. Stephens, 462 U.S. 862, 877 (1983)(aggravating factor "must genuinely narrow the class of persons eligible for the death penalty"). The Court's holding on direct appeal fails to satisfy the standard that, under Rogers, is required before a death sentence can stand based on this aggravating circumstance.

The application of the "cold, calculated, and premeditated" aggravating factor by the sentencing court in Mr. Davis' case and the instructions provided to the jury, all fall far short of what the eighth amendment requires. No limiting construction was applied. See Maynard v. Cartwright. Moreover, there exist no facts in this case sufficient to support a proper finding -- required under Rogers -- of a "careful plan or prearranged design to kill." 511 So. 2d at 533. On the record of Mr. Davis' case, there was no possible basis on which to find, beyond a reasonable doubt, that Mr. Davis had a "careful plan or prearranged design to kill."

Given the fundamental purpose underlying the courts' decisions in Hitchcock v. Dugger, Maynard v. Cartwright and Rogers, it would be arbitrary and capricious -- and a violation of the standards of the eighth and fourteenth amendments -- to apply the narrowing construction of Rogers and Cartwright to some cases but not others. Without uniform application, the result is caprice: that a defendant would be executed on the basis of a construction of an aggravating factor that has been flatly rejected by the courts. Such a result cannot be squared with the well-recognized "requirement of reliability in the determination that death is the appropriate penalty in a particular case." Mills v. Maryland, 108 S. Ct. 1860, 1870 (1988).

The application of this aggravating factor to Mr. Davis' case violates Hitchcock, Cartwright, Rogers, and the sixth, eighth, and fourteenth amendments. Relief is appropriate.

ARGUMENT VII

MR. DAVIS' SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. DAVIS TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HIMSELF EMPLOYED THIS IMPROPER STANDARD IN SENTENCING MR. DAVIS TO DEATH.[10]

A capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Davis' capital proceedings. To the contrary, the burden was shifted to Mr. Davis on the question of whether he should live or die.

The jury instructions here employed a presumption of death which shifted to Mr. Davis the burden of proving that life was the appropriate sentence. This conflicts with the principles of Dixon. As a result, Mr. Davis' capital sentencing proceeding was rendered fundamentally unfair and unreliable. Mills v. Maryland, 108 S. Ct. 1860 (1988); Penry v. Lynaugh, 109 S. Ct. 2934 (1989). This error "perverted" the jury's deliberations concerning the ultimate question of whether Mr. Davis should live or die. Smith v. Murray, 106 S. Ct. at 2668. Mr. Davis therefore urges that the Court grant him the relief to which he can show his entitlement.

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[10]This claim is raised at this juncture because Hitchcock v. Dugger, 481 U.S. 393 (1987), constituted a change in law holding Florida capital jurors must receive correct instructions in a penalty phase proceeding.

ARGUMENT VIII

PROSECUTORIAL ARGUMENT AND INADEQUATE JURY INSTRUCTIONS MISLED THE JURY REGARDING ITS ABILITY TO EXERCISE MERCY AND SYMPATHY AND DEPRIVED MR. DAVIS OF A RELIABLE AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.[11]

In a capital sentencing proceeding, the United States Constitution requires that a sentencer not be precluded from "considering, as a mitigating factor, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978); see also Hitchcock v. Dugger, 481 U.S. 393 (1987). Because of the heightened "need for reliability in the determination that death is the appropriate punishment in a specific case," the eighth amendment requires "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." Woodson v. North Carolina, 428 U.S. 280, 303 (1976).

In Mr. Davis' case, prosecutorial argument informed the jurors that they could not consider mercy in making their sentencing determination. Additionally, the jury instructions did not adequately inform the jury that mercy or sympathy could be considered. This violated Hitchcock v. Dugger.

There exists a substantial possibility that the jury may have understood that it was precluded from considering sympathy or mercy. Cf. Mills v. Maryland, 108 S. Ct. 1860, 1867 (1988). This prevented Mr. Davis' jury from providing Mr. Davis the "particularized consideration" the eighth amendment requires. Undeniably, the presentation of evidence in mitigation of punishment involves the jury's human, merciful reaction to the defendant. See Peek v. Kemp, 784 F.2d 1479, 1490 and n.12 (11th Cir. 1986)(in banc)(the role of mitigation is to present "factors which point in the direction of mercy for the

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[11]This claim is presented in light of the federal court's directive and Hitchcock v. Dugger, 481 U.S. 393 (1987), holding that a Florida capital jury must receive accurate information in penalty phase proceedings.

defendant"); see also Tucker v. Zant, 724 F.2d 882, 891 (11th Cir.), vacated for reh'g in banc, 724 F.2d 898 (11th Cir. 1984), reinstated in relevant part sub nom. Tucker v. Kemp, 762 F.2d 1480, 1482 (11th Cir. 1985)(in banc). Allowing the jury to believe that "mercy" may not enter their deliberations negates any evidence presented in mitigation, for it forecloses the very reaction that evidence is intended to evoke, and therefore precludes the sentencer from considering relevant, admissible (even if nonstatutory) mitigating evidence, in violation of Hitchcock v. Dugger; Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, and the eighth and fourteenth amendments. Because Hitchcock is a change in law, this claim is cognizable now. Relief is appropriate.

ARGUMENT IX

MR. DAVIS' DEATH SENTENCE IS PREDICATED UPON THE FINDING OF AN AUTOMATIC, NON-DISCRETION-CHANNELING, STATUTORY AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.[12]

Mr. Davis was tried and convicted for three counts of first-degree murder. The State primarily relied on felony murder in seeking the convictions, and the jury returned a general verdict. The jury was instructed at the penalty phase regarding an automatic statutory aggravating circumstance and Mr. Davis thus entered the sentencing hearing already eligible for the death penalty, whereas other similarly (or worse) situated petitioners would not. Under these circumstances, Petitioner's conviction and sentence of death violated his sixth, eighth and fourteenth amendment rights.

The death penalty in this case was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the very felony murder finding that formed the basis for conviction. Automatic death penalties upon

[12]This claim is presented in light of the holding in Hitchcock v. Dugger that Florida capital juries must receive instructions in conformity with the eighth amendment.

conviction of first degree murder violate the eighth and fourteenth amendments, as the United States Supreme Court explained in Sumner v. Shuman, 107 S. Ct. 2716 (1987). As the sentencing order makes clear, felony murder was found as a statutory aggravating circumstance. The sentencer was entitled automatically to return a death sentence upon a finding of guilt of first degree (felony) murder. Every felony-murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Florida's statute, violates the eighth amendment: an automatic aggravating circumstance is created, one which does not "genuinely narrow the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. at 876, and one which therefore renders the sentencing process unconstitutionally unreliable. Id. In short, if Mr. Davis was convicted for felony murder, he then faced statutory aggravation for felony murder. This is too circular a system to meaningfully differentiate between who should live and who should die, and it violates the eighth and fourteenth amendments. See Lowenfield v. Phelps, 108 S. Ct. 546 (1988).

This error undermined the reliability of the jury's sentencing determination and prevented the jury from fully assessing the mitigation regarding Mr. Davis in this record. The Court should vacate Mr. Davis' unconstitutional sentence of death.

CONCLUSION

On the basis of the argument presented herein, and on the basis of what was submitted to the Rule 3.850 trial court, Appellant respectfully submits that he is entitled to an evidentiary hearing, and respectfully urges that this

Honorable Court set aside his unconstitutional capital conviction and sentence of death.

Respectfully submitted,

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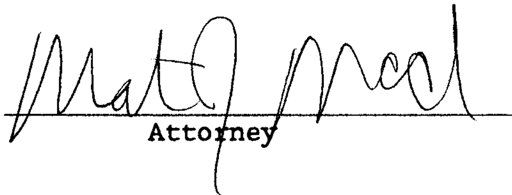
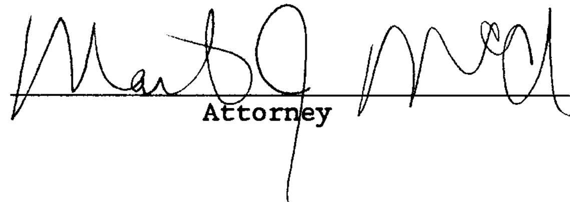


By: ____________________
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Mark Menser, Assistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, 111-29 North Magnolia Drive, Tallahassee, Florida 32301, this 19th day of February, 1991.



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Attorney