IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-1105

LOWER TRIBUNAL CASE NO. 93-159-CF-A-MH

RICHARD HENYARD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR LAKE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This is the appeal of the circuit court's denial of Richard Henyard's motion for postconviction relief which was brought pursuant to Florida Rule of Criminal Procedure 3.850.

Citations shall be as follows: The record on appeal concerning the original trial court proceedings shall be referred to as "R ___" followed by the appropriate page numbers. The postconviction record on appeal will be referred to as "PC-R ____" followed by the appropriate page numbers. The evidentiary hearing transcripts will be referred to as "EH ____" followed by the appropriate page numbers. All other references will be self-explanatory or otherwise explained.

This appeal is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Henyard was deprived of his right to a

fair and reliable trial and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives. Furthermore, as to the denial of Mr. Henyard's motion for postconviction relief, there has been an abuse of discretion and a lack of competent evidence to support certain of the trial judge's conclusions.

REQUEST FOR ORAL ARGUMENT

Because of the seriousness of the claims at issue and the stakes involved, Richard Henyard, a death-sentenced inmate on Death Row at Union Correctional Institution, urges this Court to permit oral argument on the issues raised in his appeal.

STATEMENT OF CASE

Trial

On February 16, 1993, Mr. Henyard was charged by indictment with two counts of first degree murder, three counts of armed kidnaping, one count of sexual battery with the use of a firearm, one count of attempted first degree murder, and one count of robbery with a firearm. On June 1, 1994, the jury found Mr. Henyard guilty of all counts as charged. On June 3, 1994, after the penalty phase, the jury recommended by 12 to 0 votes

that the court impose the death penalty on each count of first degree murder.

On August 19, 1994, the court followed the jury's recommendations, concluded that the mitigating circumstances did not offset the aggravating circumstances and imposed two death sentences on Mr. Henyard. The court found in aggravation: (1) that Mr. Henyard had been convicted of a prior violent felony; (2) that the murders were committed in the course of a kidnapping; (3) the murders were committed for pecuniary gain; and (4) the murders were especially heinous, atrocious or cruel. In mitigation the court found three statutory mitigators: (1) Mr. Henyard's age of eighteen at the time of the crime (according it little weight); (2) Mr. Henyard was acting under an extreme emotional disturbance (accorded very little weight); and (3) that his capacity to conform to the requirements of law was impaired (accorded very little weight). The court also found six nonstatutory mitigators: (1) Mr. Henyard functioned at the emotional level of a thirteen year old and was of low intelligence (little weight); (2) Mr. Henyard had an impoverished upbringing (little weight); (3) he was born into a dysfunctional family (little weight); (4) he could adjust to prison life (little weight); (5) he could have received eight consecutive life sentences with a minimum mandatory fifty years

(little weight); and (6) his codefendant could not receive the death penalty as a matter of law due to age (some weight).

Direct Appeal

On December 19, 1996, this Court agreed with Mr. Henyard that his prior juvenile adjudication as a violent felony was improperly considered by the trial court but the Court found the error to be harmless beyond a reasonable doubt due to the six other contemporaneous violent felony convictions. In so ruling, the Court affirmed Mr. Henyard's convictions and the imposition of the sentences of death. Henyard v. State, 689 So.2d 239 (Fla. 1996). On October 6, 1997, the United States Supreme Court denied Mr. Henyard's petition for *certiorari* review. Henyard v. Florida, 522 U.S. 846, 118 S.Ct 130, 139 L.Ed.2d 80 (1997).

State Postconviction Proceedings

On August 5, 1998, Mr. Henyard filed his first Fla.R.Crim.P. 3.850 motion. On May 11, 1999, Mr. Henyard filed an amended Rule 3.850 motion which presented nine claims for relief. On June 22, 1999, a *Huff* hearing was held pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993). By its order dated June 28, 1999, the court denied an evidentiary hearing on Claims II-IX and the several sub-claims contained in Claim I, Paragraphs 1, 2, 9, 12, 16, 18, 19, 20, 25, and 26. The court made a preliminary ruling denying without prejudice an evidentiary

hearing on the sub-claims contained in Claim I, Paragraphs 22-24. The court granted an evidentiary hearing on the ineffective assistance of counsel matters raised as sub-claims in Claim I, Paragraphs 3, 4, 5, 6, 7, 8, 10, 11, 13, 14, 15, 17 and 21. These sub-claims alleged (1) the failure of trial counsel to adequately investigate and present mitigating evidence; and (2) the failure of trial counsel to adequately prepare their mental health expert.

On October 14, 1999, the court held an evidentiary hearing on these claims. On April 11, 2002, the court issued its order on the amended Rule 3.850 motion. As it did with the *Huff* order, the court treated each enumerated paragraph in Claim I as a separate and distinct sub-claim of ineffectiveness of trial counsel. It denied relief as to all the claims in the amended motion. By reason of the notice filed on May 1, 2002, this appeal is properly before this Court.

STATEMENT OF FACTS

A. TRIAL

The facts adduced at the trial were summarized by this Court in the ruling on Mr. Henyard's direct appeal:

> The record reflects that one evening in January, 1993, eighteen-year-old Richard Henyard stayed at the home of a family friend, Luther Reed. While Reed was making dinner, Henyard went into his bedroom and took a gun that belonged to Reed. Later that month, on

Friday, January 29, Dikeysha Johnson, a long-time acquaintance of Henyard, saw him in Eustis, Florida. While they were talking, Henyard lifted his shirt and displayed the butt of a gun in the front of his pants. Shenise Hayes also saw Henyard the same evening. Henyard told her he was going to a night club in Orlando and to see his father in South Florida. He showed Shenise a small black gun and said that, in order to make his trip, he would steal a car, kill the owner, and put the victim in the trunk.

William Pew also saw Henyard with a gun during the last week in January and Henyard tried to persuade Pew to participate in a robbery with him. Later that day, Pew saw Henyard with Alfonza Smalls, a fourteen-year-old friend of Henyard's. Henyard again displayed the gun, telling Pew that he needed a car and that he intended to commit a robbery at either the hospital or the Winn Dixie.

Around 10:00 p.m. on January 30, Lynette Tschida went to the Winn Dixie store in Eustis. She saw Henyard and a younger man sitting on a bench near the entrance of the store. When she left, Henyard and his companion got up from the bench; one of them walked ahead of her and the other behind her. As she approached her car, the one ahead of her went to the end of the bumper, turned around, and stood. Ms. Tschida quickly got into the car and locked the doors. As she drove away, she saw Henyard and the younger man walking back towards the store.

At the same time, the eventual survivor and victims in this case, Ms. Lewis and her daughters, Jasmine age 3, and Jamilya, age 7, drove to the Winn Dixie store. Ms. Lewis noticed a few people sitting on a bench near the doors as she and her daughters entered the store. When Ms. Lewis left the store, she went to her car and put her daughters in the front passenger seat. As she walked behind the car to the driver's side, Ms. Lewis noticed Alfonza Smalls coming towards her. As Smalls approached, he pulled up his shirt and revealed a gun in his waistband. Smalls ordered Ms. Lewis and her daughters into the back seat of the car, and then called to Henyard. Henyard drove the Lewis car out of town as Smalls gave him directions.

The Lewis girls were crying and upset, and Smalls repeatedly demanded that Ms. Lewis "shut the girls up." As they continued to drive out of town, Ms. Lewis beseeched Jesus for help, to which Henyard replied, "this ain't Jesus, this is Satan." Later, Henyard stopped the car at a deserted location and ordered Ms. Lewis out of the car. Henyard raped Ms. Lewis on the trunk of the car while her daughters remained in the back seat. Ms. Lewis attempted to reach for the gun that was lying nearby on the trunk. Smalls grabbed the gun from her and shouted, "you're not going to get the gun, bitch." Smalls also raped Ms. Lewis on the trunk of the car. Henyard then ordered her to sit on the ground near the edge of the road. When she hesitated, Henyard pushed her to the ground and shot her in the leg. Henyard shot her at close range three more times, wounding her in the neck, mouth, and the middle of the forehead between her eyes. Henyard and Smalls rolled Ms. Lewis's unconscious body off to the side of the road, and got back into the car. The last thing that Ms. Lewis remembers before losing consciousness is a gun aimed at her face. Miraculously, Ms. Lewis survived and, upon regaining consciousness a few hours later, made her way to a nearby house for help. The occupants called the police and Ms. Lewis, who was covered in blood, collapsed on the front porch and waited for the officers to arrive.

As Henyard and Smalls drove the Lewis girls away from the scene where their mother had been shot and abandoned, Jasmine and Jamilya continued to cry and plead: "I want my Mommy," "Mommy," "Mommy." Shortly thereafter, Henyard stopped the car on the side of the road, got out, and lifted Jasmine out of the back seat while Jamilya got out on her own. The Lewis girls were then taken into a grassy area along the roadside where they were each killed by a single bullet fired into the head. Henyard and Smalls threw the bodies of Jasmine and Jamilya Lewis over a nearby fence into some underbrush.

Later that evening, Bryant Smith, a friend of Smalls, was at his home when Smalls , Henyard, and another individual appeared in a blue car. Henyard bragged about the rape, showed the gun to Smith, and said he

had to “burn the bitch” because she tried to go for his gun. Shortly before midnight, Henyard also stopped at the Smalls’ house. While he was there, Colinda Smalls, Alfonza’s sister, noticed blood on his hands. When she asked Henyard about the blood, he explained that he had cut himself with a knife. The following morning, Sunday, January 31, Henyard has his “auntie,” Linda Miller drive him to the Smalls’ home because he wanted to talk with Alfonza Smalls. Colinda Smalls saw Henyard shaking his finger at Smalls while they spoke, but she did not overhear their conversation.

That same Sunday, Henyard went to the Eustis Police Department and asked to talk to the police about the Lewis case. He indicated that he was present at the scene and knew what happened. Initially, Henyard told a story implicating Alfonza Smalls and another individual, Emmanuel Yon. However, after one of the officers noticed bloodstains on his socks, Henyard eventually admitted that he helped abduct Ms. Lewis and her children, raped and shot her, and was present when the children were killed. Henyard continuously denied, however, that he shot the Lewis girls. After being implicated by Henyard, Smalls was also taken into custody. The gun used to shoot Ms. Lewis, Jasmine and Jamilya was discovered during a subsequent search of Smalls’ bedroom.

The autopsies of Jasmine and Jamilya Lewis showed that they both dies of gunshot wounds to the head and were shot at very close range. Powder stippling around Jasmine’s left eye, the sight of her mortal wound, indicated that her eye was open when she was shot. One of the blood spots discovered on Henyard’s socks matched the blood of Jasmine Lewis. “High speed” or “high velocity” blood splatters found on Henyard’s jacket matched the blood of Jamilya Lewis and showed that Henyard was less than four feet from her when she was killed. Smalls’ trousers had “splashed” or “dropped blood” on them consistent with dragging a body. DNA evidence was also presented at trial indicating that Henyard had raped Ms. Lewis.

Henyard v. State, 689 So.2d 239, 242-43 (Fla. 1996)(footnotes omitted); *cert. denied*, Henyard v.

Florida, 522 U.S. 846, 118 S.Ct 130, 139 L.Ed.2d 80 (1997).

At the penalty phase of the trial, witnesses testified for the State and defense and presented the following information. Ms. Lewis first testified for the State about the drive out of town and that she began praying by calling out Jesus' name (R2090) with the driver responding about being Satan (R2091). Thereafter, a petition for delinquency charging Mr. Henyard with the commission of the offense of robbery with a weapon when he was fourteen was admitted into evidence over objection. (R2100). Jeffrey Pfister, an attorney who represented Mr. Henyard on the 1989 charge testified that the facts of the juvenile charge revealed that Mr. Henyard was a lookout at the store where the offense occurred, that Henyard was not armed and was the least culpable of the three charged with the offense. (R2210-15).

LeRoy Parker, an expert for the State, testified as to the blood stain patterns and evidence regarding the clothing worn by Henyard and Smalls. (R2166-99). Michael Graves, an attorney, was recognized as an expert in regard to sentencing guidelines. (R2226). Graves had calculated what Mr. Henyard's guideline sentence would be based on and determined that he would receive a life sentence which would be treated as a true life sentence (never to be released) by the Department of Corrections. (R2226-33). Graves also testified that Smalls, the codefendant,

would not receive the death sentence due to his age. (R2234).

Mr. Henyard was born on June 26, 1974 (R2408). His mother and father were not married and his father left the home two weeks after he was born. (R2256). His mother was often ill and drank constantly during her pregnancy with Mr. Henyard. (R2409-10).

Mr. Henyard's father tried to see his son off and on as his work permitted. (R2257). He lost contact with his son around 1980. (R2258).

His mother began abusing alcohol and illegal drugs when Mr. Henyard two years old and often used the drugs in his presence. (R2411; 2284). Henyard suffered from a skin problem during his early years. (R2411). His mother eventually could not deal with her son so he often stayed with his godmother, Jackie Turner. (R2412). Turner said she took care of Henyard from the age of ten months until he was three years old at which time he returned to the care of his mother. When with his mother, he would often run away and go to Turner's house. Nkoya Nichole Wiley, who was Turner's daughter and Henyard's god sister, indicated that Turner also reared a niece of Henyard and that most of Henyard's childhood friends were of a younger age. (R2241-44)

At age eleven, Turner contacted Henyard's father who came

and took Henyard to Pahokee. (R2285). When picking his son up, the father said his son looked "dirty, [and] nasty." For the most part, Henyard stayed with his father and his father's girlfriend, Edith Ewing, until he was age fifteen and one-half and, afterwards, for another year-long period. (R2264-68).

Mr. Henyard's father often worked seventy to ninety hours a week as a truck driver, had so little time for his son that he never took his son fishing or to church, scouting, or a ball game, and even missed school registration. (R2252; 2264-66). A Pahokee middle school teacher, Edna MacClendon, further testified that Henyard was never a discipline problem and had a tendency to hyperventilate at school for which she took him to a clinic more than once. (R2252).

Dr. Jethro Toomer, a licensed psychologist, interviewed Mr. Henyard twice in jail for a period of several hours. (R2302-05). Dr. Toomer also spoke with Henyard's mother and godmother. (R2305). Dr. Toomer administered a battery of psychological and intelligence tests and determined that Henyard's IQ was 85, a below average range for intellectual functioning. (R2310). The testing also showed that Henyard had problems in visual motor coordination and perception. (R2318).

Dr. Toomer further interpreted the testing results as indicating that Henyard had a good amount of insecurity and

impulsivity resulting in acting without foresight and without contemplation of the consequences. (R2318). The testing showed a mild learning disability, a high score for chemical-drug abuse and for thought disturbance. (R2319-21).

Additionally, Dr. Toomer said that Henyard had extremely low self-esteem by reason of a test score of nearly 100 percent and that he scored a 78 percent on a test for anti-social tendencies. (R2322). The testing also showed the equivalent functioning as a thirteen year old. In view of the testing and interviews, Dr. Toomer's opinion was that Henyard suffered from the lack of nurturing, that he manifested personality, emotional and psychological deficiencies, and that he was unable to project the consequences of his behavior. Consequently, Dr. Toomer opined that Henyard was unable to appreciate the criminality of his conduct on the night of the offenses and that he suffered an emotional disturbance and impairment, though not extreme. (R2349-51). Dr. Toomer concluded with an opinion that Henyard did not know whether his actions were right or wrong because he was not functioning at a level where such was relevant. (R2357).

B. EVIDENTIARY HEARING

The court conducted an evidentiary hearing on October 14, 1999. Appearing and testifying for the defense was Rosa Lee

Adams (EH.967); Jacqueline Turner (EH.993); Angelette Wiley (EH.1035); Dr. Russell Bauers (EH.1059 where his surname is spelled Bowers); Katherine Ann McCoy (EH.1096); and Trena Lenon (EH.1105). The State called and secured testimony from Richard Henyard, Sr. (EH.1128); Edith Ewing (EH.1134); T. Michael Johnson (EH.1139); Mark Nacke (EH.1197);James Tyrone Williams (EH.1225); and Dan Pincus (EH.1233).

SUMMARY OF ARGUMENT

During the penalty phase of the trial, counsel for Mr. Henyard failed to investigate and present all available mitigating factors. Specifically, Mr. Henyard's trial counsel did not fully investigate the following non-statutory mitigating factors: (1) Mr. Henyard's lack of stable parental contact and supervision; (2) Mr. Henyard's physical abuse at the hands of his father's common law wife; (3) Mr. Henyard's pattern of seeking out younger children as companions due to his lower IQ and "mental" age and to avoid harassment from children his own age; (4) Mr. Henyard's childhood sexual abuse; (5) Mr. Henyard's chronic use of alcohol; and (6) Mr. Henyard's mental state as characterized by his suicidal ideations. Mr. Henyard is prejudiced because, but for trial counsel's deficiencies, the

record would include the details that could or would have shown that the result of the proceeding would have been different.

ARGUMENT

THE EVIDENTIARY COURT ERRED IN NOT GRANTING RELIEF BECAUSE TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE RESULTING IN AN INADEQUATE ADVERSARIAL PROCESS.

The United States Supreme Court requires that a defendant show two elements in establishing a claim of ineffective assistance of trial counsel:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."
>
> Strickland v. Washington, 466 U.S. 668, 104

S.Ct. 2052, 80 L.Ed.2d 674, (1984), at 687.

Furthermore, establishment of prejudice is controlled by the following requirement:

> "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."
>
> Strickland, 466 U.S. at 694.

As presented in the Rule 3.850 Motion, after the guilt phase of a capital trial, defense counsel must discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The United States Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may never have made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976)(plurality opinion). (PC-R. 470).

Mr. Henyard claimed that during the penalty phase of the trial, counsel failed to investigate and present all available mitigating factors. In his Rule 3.850 motion, Mr. Henyard presented three aspects of this claim: (i) counsel’s failure to investigate; (ii) counsel’s failure to adequately prepare mental

health experts; and (iii) counsel's failure to deliver an effective closing argument regarding mitigation. The court did not receive testimony on the third aspect at the evidentiary hearing.

The first aspect of Mr. Henyard's claim alleged that trial counsel failed to fully investigate all available mitigating evidence at the time of his trial. Specifically, Mr. Henyard claimed that trial counsel did not fully investigate the following non-statutory mitigating factors: (1) Mr. Henyard's lack of stable parental contact and supervision; (2) Mr. Henyard's physical abuse at the hands of his father's common law wife; (3) Mr. Henyard's pattern of seeking out younger children as companions due to his lower IQ and "mental" age and to avoid harassment from children his own age; (4) Mr. Henyard's childhood sexual abuse; (5) Mr. Henyard's chronic use of alcohol; and (6) Mr. Henyard's mental state as characterized by his suicidal ideations. Mr. Henyard presented evidence on these factors through testimony from friends, family members and a former teacher. Additionally, Mr. Henyard presented testimony from trial counsel as to counsel's knowledge and investigation of these factors.

First, Mr. Henyard presented four witnesses which were never heard from during the penalty phase of the trial. The evidence

presented established that Mr. Henyard did indeed suffer a neglectful childhood. The testimony of these witnesses paints a picture of a childhood characterized by an alcoholic teenage mother who abandoned her child to be raised by strangers and an emotionally and geographically distant father who was out of touch with the realities of his child's day to day existence. While trial counsel presented some evidence regarding Mr. Henyard's deprived childhood, these additional witnesses, most of whom lived on the same street where Mr. Henyard spent his early childhood, were never interviewed and not presented at the time of Mr. Henyard's penalty phase. The evidentiary court should have been struck by the fact that the witnesses presented by trial counsel to portray Mr. Henyard's childhood were the very instruments of the abuse and neglect suffered by Mr. Henyard. Thus, the court should have found that trial counsel did not adequately investigate and present the non-statutory mitigator of Mr. Henyard's deprived childhood.

Mr. Henyard also presented testimony at the evidentiary hearing which established that the common law wife of Mr. Henyard's father, Ms. Edith Ewing, did indeed use corporal punishment on Mr. Henyard while he resided with her. (EH 176). The testimony revealed that, on several occasions when Mr. Henyard was approximately 14-15 years old, Ms. Ewing struck Mr.

Henyard with a leather belt across his legs. (EH 179). Additionally, the testimony established that Mr. Henyard did not physically retaliate for this punishment. (EH 179-180).

Mr. Henyard's trial counsel testified that Ms. Ewing was not presented by the defense at the penalty phase to avoid revealing Mr. Henyard's actions which prompted the punishments to the jury. (EH 192). However, this witness did testify for the state in the penalty phase. (R. 2441-2445). By allowing the penalty phase jury to be left with the impression that this was a loving relationship, the court should have found that trial counsel failed to adequately present the true nature of the strained relationship between Mr. Henyard and Ms. Ewing and the resulting physical abuse suffered by Mr. Henyard.

Mr. Henyard also presented testimony from Jacqueline Turner and Angelette Wiley at the evidentiary hearing. According to testimony during the original trial, Mr. Henyard spent a majority of his childhood residing with Ms. Turner. Ms. Wiley is Ms. Turner's daughter and, therefore, spent a portion of her childhood residing with Mr. Henyard. Both Ms. Turner and Ms. Wiley testified about Mr. Henyard's desire to stay back in school with younger children. (EH 55, 80). Specifically, both witnesses recounted an incident when Mr. Henyard became extremely distressed at the thought of being enrolled at the

high school. (Id.)

Additionally, Ms. Wiley testified about physical harassment of Mr. Henyard by neighborhood children. (EH 81).

Ms. Wiley was never called to testify at Mr. Henyard's penalty phase hearing. (EH 81). The only testimony related to this factor at the penalty phase came from Ms. Turner, who stated that Mr. Henyard was ridiculed by other children. (R. 2286). Clearly the testimony of Ms. Wiley about physical harassment and actual injuries to Mr. Henyard is not simply cumulative evidence. (EH 81). Therefore, the evidentiary court should have found that trial counsel failed to adequately present the mitigating factor regarding Mr. Henyard's pattern of seeking out younger children as companions due to his lower IQ and "mental" age and to avoid harassment from children his own age.

Another factor raised by Mr. Henyard at the evidentiary hearing is one of childhood sexual abuse. Trial counsel presented no testimony regarding childhood sexual abuse at Mr. Henyard's penalty phase hearing. (R. 2079 - 2423). However, Ms. Turner, Ms. Wiley, and another witness, Trena Lenon, testified that, prior to the penalty phase hearing, Mr. Henyard divulged his sexual abuse to them. (EH 58,63,79-80, 150-152). Additionally, Ms. Wiley's testimony established that Mr. Henyard

made these statements regarding the sexual abuse when he was approximately seven years old. (EH 80). All of the witnesses testified that Mr. Henyard identified his abuser as a neighbor, Bruce Kyle. (EH 58,63,79-80, 150-152). At the evidentiary hearing, trial counsel testified that the case file included notes indicating that Mr. Henyard informed trial counsel, prior to the penalty phase hearing, that he hadbeen sexually molested as a child by someone named Bruce Kyle. (EH 222). Trial counsel could offer no explanation as to the lack of any evidence of an investigation to follow up these comments from Mr. Henyard. (EH 234, 258). Additionally, trial counsel agreed that evidence of childhood sexual abuse would be a valid mitigating factor that should be investigated and presented to the jury. (EH 259). Furthermore, no evidence was presented at the evidentiary hearing that could have convinced the court that the failure to present this mitigating factor was a strategic decision by trial counsel. Therefore, the evidentiary court should have found that trial counsel failed to investigate and present the important mitigating factor of Mr. Henyard's childhood sexual abuse to the sentencing jury.

Another factor presented by Mr. Henyard regarded his chronic use of alcohol. While the record is quite clear that Mr. Henyard's mother had an extensive history of drug and alcohol

abuse, the additional evidence presented at the evidentiary hearing pertained to Mr. Henyard's own use of alcohol. (EH 110). Testimony from Dr. Russell Bauers established that Mr. Henyard started using alcohol in the company of his mother, around the age of eight. (Id.)(It should be noted that the witness' surname is mistakenly reported as "Bowers" in evidentiary hearing transcript). Again, there is nothing in the record to indicate that this information was ever investigated or presented to the sentencing jury by trial counsel. Therefore, the court should have found that trial counsel failed to investigate and present as a mitigating factor Mr. Henyard's chronic use of alcohol.

Finally, Mr. Henyard claimed that trial counsel failed to investigate and present evidence regarding his mental state as characterized by his suicidal ideations which manifested prior to his trial. The medical department supervisor from the Lake County Jail, Dan Pincus, testified during the evidentiary hearing about Mr. Henyard's suicide attempt while in jail awaiting trial. (EH 276). Mr. Pincus himself observed the ligature mark left on Mr. Henyard's neck after Mr. Henyard tied the nylon cord from his laundry bag around his neck.. (EH 277). Furthermore, Mr. Pincus testified that not only did he relate this incident to Mr. Henyard's trial counsel, but he also informed the state of the incident and the witness' belief that

Mr. Henyard may make another attempt at suicide. (EH 280). Clearly Mr. Henyard's trial counsel had knowledge of this suicide attempt. (EH 224). Yet the testimony at the evidentiary hearing established that Mr. Henyard's trial counsel chose to rely not on the informed opinion of a psychological or psychiatric expert as to the "legitimacy" of Mr. Henyard's suicide attempt and the possible mitigating effects of this mental state, but instead relied on their own opinions and those of an investigator and a nurse. (EH 224-225, 270, 279).

No evidence was presented at Mr. Henyard's penalty phase regarding his mental state after his arrest; therefore, the jurors were not allowed to weigh the circumstances and make their own factual determination as to the legitimacy of Mr. Henyard's suicide attempt. (R. 2079 - 2423). Additionally, trial counsel offered no explanation for failing to investigate the matter. Significantly, trial counsel Mark Nacke testified that he was never even made aware of this suicide attempt after he joined the defense. (EH 264-265). Thus, the court should have found that trial counsel failed to investigate and present the important mitigating factor of Mr. Henyard's mental state as characterized by his suicidal ideations.

Next, Mr. Henyard claimed that trial counsel failed to adequately prepare the mental health expert that testified at

the penalty phase hearing. Dr. Jethro W. Toomer testified during the penalty phase of Mr. Henyard's trial. ® 2297-2404)(mistakenly spelled as 'Dr. Tumer' in the transcript). The trial record supported this claim on several critical points. First, Dr. Toomer testified that he never spoke with Mr. Henyard's father. (R. 2386). Additionally, Dr. Toomer testified that he never spoke with Ms. Ewing, a statement which was confirmed by Ms. Ewing in her own testimony. (R. 2386, 2444). Dr. Toomer never spoke with Ms. Turner's husband, with whom Mr. Henyard resided during much of his childhood. (R. 2385). Dr. Toomer never reviewed any medical records. (R. 2392). Trial counsel testified that extensive preparations were undertaken with the two mental health experts consulted by the defense. (EH 202). The testimony at the evidentiary hearing established that all three defense attorneys Johnson, Stone and Nacke, participated in a teleconference with the mental health experts. (EH 199-202). Yet, as noted above, Mr. Nacke testified that he was never informed about Mr. Henyard's suicide attempt at the Lake County Jail. (EH 264-265).

The court should, therefore, have concluded that Mr. Henyard's suicide attempt was yet another aspect of Mr. Henyard's life that Dr. Toomer did not consider when forming and presenting his opinion of Mr. Henyard's mental health.

Additionally, there is no evidence that trial counsel informed Dr. Toomer about Mr. Henyard's childhood sexual abuse. Finally, it should be noted that the state relied upon these same facts regarding Dr. Toomer's evaluative techniques to implore the sentencing jury not to put any weight in the opinion of Dr. Toomer. (R. 2478). That the state argued to the evidentiary court that Dr. Toomer's preparation and findings were more than adequate to rely upon in a determination affecting a man's life strikes more than a note of disingenuousness. Consequently, the evidentiary court should have found that there was ample evidence that trial counsel failed to provide all relevant evidence to the defense mental health expert and therefore did not adequately prepare the expert.

Thus, this Court should find that Mr. Henyard satisfied the first prong of the Strickland test on all the above enumerated grounds. Therefore, this Court must now determine if Mr. Henyard was prejudiced by these failures to the point of undermining confidence in the outcome of the penalty proceeding. This state reserves the death penalty for only the most aggravated and least mitigated murders. Kramer v. State, 619 So.2d 274, 278 (Fla. 1993). Thus, it is vital that sentencing be undertaken with adequate presentation of all relevant factors as to both aggravation and mitigation. While this process is

not a strict numerical balancing, clearly any additional factors on either side of the equation could result in a changed penalty phase outcome.

The test to be applied in this case is whether it is reasonably probable that this additional mitigation, if it had been heard and considered by the jury and original trial judge would have led to the imposition of a life sentence. Rutherford v. State, 727 So.2d at 266. The Court should find that in the instant case, there is a reasonable probability that this additional mitigation, considered in conjunction with the various mitigating factors originally found by the trial court, would result in the imposition of a life sentence. Additional support for this conclusion is in the proportionality reviews of Cooper v. State, 739 So.2d 82 (Fla. 1999), Urbin v. State, 714 So.2d 411 (Fla. 1998), and Livingston v. State, 565 So.2d 1288 (Fla. 1988).

The recent case of Ragsdale v. State, 798 So.2d 713 (Fla. 2001), also provides significant guidance in determining the issue of whether defense counsel were ineffective at the penalty phase of this case in their investigation and presentation of mitigation evidence.

First, Ragsdale points out that the penalty phase of a capital trial must be subject to meaningful adversarial testing

to be reliable. (Ragsdale at 716). Secondly, there is a strict duty on defense counsel to conduct a reasonable investigation of the defendant's background. (Ragsdale at 716). The court noted, thirdly and significantly, that Ragsdale's trial had no testimony from mental health experts to explain how the defendant's background factors may have contributed to the defendant's psychological and mental health status at the time of the crime. (Ragsdale at 717).

The fourth criteria from Ragsdale in the postconviction analysis is that the court also must consider the reasons why counsel did not investigate or present available evidence and whether counsel made a reasonable tactical [or strategic] decision to forego further investigation of mental health mitigation. (Ragsdale at 718-19).

Lastly, the postconviction court must measure the evidence that was available against the evidence presented at the penalty phase; if there is a reasonable probability of a different result, the defendant has proved his ineffective assistance of counsel claim and should be granted relief. (Ragsdale at 720).

The Ragsdale criteria, of course, has a historical foundation in Ake v. Oklahoma, 470 U.S. 68 (1985) where the United States Supreme Court discussed a defendant's right to be provided with "a competent psychiatrist ...[to] conduct an

appropriate examination and *[to] assist in [the] evaluation, preparation and presentation of the defense*." Ake at 82. (emphasis added). That assistance is required because "[w]hen jurors make this determination about issues that inevitably are complex and foreign, the testimony of psychiatrists can be crucial and 'a virtual necessity if an insanity plea is to have any chance of success.' (citation omitted). By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them." Ake at 81. Mr. Henyard argues, of course, that an identical value is given by psychologists to a sentencing court and jury in the penalty phase of a capital trial.

These cases, like the instant case, presented substantial mitigation including youth, deprived childhood and diminished intellectual functioning. This Court did not find these cases to be among “the least mitigated murders” for which the death penalty is reserved. Cooper, supra at 86.

CONCLUSION AND RELIEF SOUGHT

Consequently, Mr. Henyard’s sentences of death in this case

should be vacated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of the Appellant has been furnished by U.S. Mail, first class postage prepaid, to Stephen D. Ake, Assistant Attorney General, Office of the Attorney General, 2002 N. Lois Avenue, Suite 700, Tampa, florida 33607 and Richard Henyard, DOC#225727, P1220S; Union Correctional Institution, 7819 NW 228th Street, Raiford, Florida 32026 on this _____ day of December, 2002.

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CERTIFICATE OF COMPLIANCE

We hereby certify that the foregoing Initial Brief of Appellant was generated in Courier New 12-point font pursuant to Fla.R.App.P. 9.210.

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