IN THE SUPREME COURT OF FLORIDA

AMOS LEE KING,

Appellant,

v.

Case No. 76,537

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS

PAGE NO.

PRELIMINARY STATEMENT

The instant case is an appeal from the denial by the Honorable Susan F. Schaeffer, Circuit Judge, of appellant's Rule 3.850 motion. The 3.850 relief was denied after the conduct of a full evidentiary hearing. The record in this post-conviction matter consists of twenty-nine (29) volumes and will be referred to by the symbol "3.850 R" followed by the appropriate page number.

STATEMENT OF THE FACTS

Your appellee strenuously disagrees with much of the content of appellant's "Statement of the Case and Facts" found at pages 1 - 4 in appellant's brief. Your appellee submits that appellant's statement is not merely a recitation of the proceedings below but is a slanted, self-serving compendium of inaccurate and misleading conclusions. Thus, your appellee respectfully submits the following statement of those facts which were developed in the evidentiary hearing below.

The first witness called by the defense was David Mack who worked as a paralegal and investigator for trial defense counsel, Baya Harrison for approximately 1-1/2 years (3.850 R 2613). Mr. Mack testified that minimum information was relayed by defense counsel Harrison and that no theme or strategy was ascertained by Mr. Mack. Mr. Mack also stated that there was no check list prepared by Mr. Harrison of things that needed to be accomplished (3.850 R 2631). Mr. Mack further testified that Mr. Harrison gave no instructions to procure records on behalf of appellant (3.850 R 2634). Throughout the course of Mr. Mack's involvement in this case, there was minimum dialogue with attorney Harrison (3.850 R 2637), and no specifics were allegedly given to Mr. Mack by Mr. Harrison concerning obtaining witnesses (3.850 R 2638). Mr. Mack testified that he was never asked by Mr. Harrison to ask the witnesses about alcohol use, child abuse, appellant's behavior as a child, adolescent, or adult, or drug use or abuse (3.850 R 2649 - 2650). On cross examination, Mr. Mack testified

that he was fired by Mr. Harrison in July, 1985, but that Mack might still have had minimum contact on the King case (3.850 R 2697), although Mack also testified that he was terminated entirely from the case after July, 1985 (3.850 R 2692 - 2693). Letters were subsequently written to Mack by Mr. Harrison detailing the reasons why Mack was terminated. A letter written October 11, 1985 indicated that Mack had failed to appear for numerous meetings in the past with the defense team and that Mack never followed through with investigations that he was supposed to conduct (3.850 R 2699 - 2700). On October 17, 1985, a follow-up letter was written advising that the previous letter was to stand because Mack could not be depended upon (3.850 R 2702 - 2703). Memorandums were sent to Mr. Mack by Mr. Harrison explaining that the trial court was in the process of entering an order dismissing Mack as the investigator in this case and that Mr. Mack had not conducted investigations as had been expected (3.850 R 2703 - 2705). Mack acknowledged at the evidentiary hearing that he did nothing as an investigator in this case except talk to the defendant and to his grandmother during his term as investigator from May until October 1985 (3.850 R 2709).

Roy Mathews, another investigator in this case, testified that he did preliminary work on this case in early October, 1985 and that he was appointed on October 11, 1985 as the investigator in this matter (3.850 R 2772). Mathews also testified that he was brought into the case because Mr. Harrison was dissatisfied with David Mack (3.850 R 2773). On direct examination, Mathews

testified that he could not ascertain any theme or theory of the defense from Mr. Harrison (3.850 R 2774 - 2775). However, this allegation was refuted on cross examination. Mathews testified that he was able to discern that one of the themes would be appellant's religious conversion while in prison and that appellant had good qualities (3.850 R 2854 - 2855). Mathews was also able to discern that one of the themes developed by Mr. Harris was the squalor of appellant's childhood (3.850 R 2856). Mr. Mathews further testified that during his interview with appellant, appellant denied committing the offenses (3.850 R 2886). Appellant never gave any indication that drugs or alcohol could be a mitigating factor where appellant maintained his innocence (R 3.850 R 2887 - 2888). Mr. Mathews recognized that there is an inconsistency between emphasizing intoxication as a mitigating factor in the victim's death where appellant was maintaining his innocence (3.850 R 2888). During his investigation Mr. Mathews contacted Ada King, a sister of the appellant. Ms. King told Mathews that although the children were beaten by King's parents, she never specifically recollected appellant getting hit over the head or losing consciousness as the result of a beating. She also related that she couldn't recall appellant ever being hospitalized for a head injury. Thus, there was no information available to Mathews indicating that appellant had suffered a brain injury (3.850 R 2889 - 2891). Mr. Mathews, who was present at the new penalty proceedings in 1985, recollected that testimony in that penalty phase indicated

that before appellant got involved with drugs he was respectful of adults, he was a nice kid, and he was no problem (3.850 R 2892). Mr. Mathews recognized, as an experienced investigator, that it would be a double-edged sword if Mr. Harrison had introduced appellant's Department of Corrections records because the state would then have been able to show that appellant was on death row, and Mr. Harrison was trying to keep that out (3.850 R 2894 - 2896). Mr. Mathews also recognized that introducing the details of appellant's drug involvement would be a double-edged sword because that would permit evidence of appellant's extensive criminal record (3.850 R 2896 - 2898). Additionally, if Mr. Harrison introduced Ada King's description of appellant's home life this would have been totally inconsistent with appellant's description as related to Dr. Mendelson, the mental health expert retained by the defense at the time of the resentencing proceeding (3.850 R 2899 - 2900).

The next witness presented at the evidentiary hearing was Dr. James Mendelson, a clinical psychologist who was retained by the defense at the time of the resentencing proceedings in 1985. He testified that in 1985 he received a large number of documents and materials from Mr. Harrison. Mr. Harrison provided legal papers and Department of Correction files which contained appellant's social and criminal history, a brief psychological screening report, six month progress reports and some disciplinary reports (3.850 R 2942). Dr. Mendelson did not see any indicia of brain damage so he didn't test for that infirmity

(3.850 R 2947, 2950). Dr. Mendelson had been contacted by Dr. Joyce Carbonell, the psychologist hired by CCR to examine appellant in 1988 for the post-conviction proceedings. Dr. Carbonell advised that she did see indicia of brain damage, namely head trauma, history of dizzy spells, fainting, frequent and severe headaches and blackouts. If Dr. Mendelson knew of this he would have questioned appellant further concerning his history and he would have proceeded with neuropsychological testing (3.850 R 2949 - 2950). Carbonell also provided additional information to Dr. Mendelson that appellant was intoxicated at the time of the offense (3.850 R 2950). If Dr. Mendelson had that additional information he would have questioned appellant more and would have considered that as a possibility of mitigating circumstances. If Dr. Mendelson found that appellant was intoxicated at the same time he had brain damage a question would have arisen concerning appellant's capacity to control his aggressive behavior and appellant might not have been able to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law (3.850 R 2951 - 2952).[1] Dr. Mendelson testified that after his discussions with Dr. Carbonell he questioned whether his

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[1] It should be noted that the information supplied by Dr. Carbonell was based on false premises. The evidence adduced at the evidentiary hearing refuted the contention that appellant had brain damage or that he was intoxicated at the time of the offense. This will be discussed in detail in the argument portion of this brief.

diagnosis of antisocial personality disorder was appropriate (3.850 R 2960). Upon questioning from the trial court, Dr. Mendelson stated that based on what he knows at the present time, he can not tell whether any statutory or nonstatutory mitigating factors exist in this case (3.850 R 2967). On cross examination, Dr. Mendelson testified that the voluminous DOT records enabled the doctor to get a flavor for appellant's background, appellant's extensive involvement with drugs, the use of alcohol within the family, the fact that appellant's father killed appellant's mother, the fact that appellant dropped out of school at an early age, and appellant's juvenile and adult criminal history (3.850 R 2969 - 2974). In Dr. Mendelson's interview with appellant, appellant denied committing the offense (3.850 R 2976). Appellant asserted that he acted in self-defense with respect to the stabbing of counselor McDonough. (3.850 R 2976). Appellant conveyed that he was not intoxicated although he did drink rum (3.850 R 2978). At the time of the offense, appellant was not angry or upset. During his interview of appellant, Dr. Mendelson observed that appellant was cooperative, involved, engaged, communicative, reciprocal, had no defects in social behavior, appellant's responses were appropriate, no disturbances were observed in appellant's cognitive area (no impairment of consciousness, thinking ability, calculation ability or intelligence) appellant did not exhibit visual or auditory hallucinations, memory function was intact, appellant was in good contact with reality, appellant was not delusional, appellant was

lucid, coherent, and relevant, and there was no disturbance in thought patterns. In other words, during Dr. Mendelson's extensive interview with appellant in 1985, nothing was observed to indicate brain damage (3.850 R 2981 - 2983).

Dr. Joyce Carbonell, a psychologist who was hired by collateral counsel in anticipation of the 3.850 litigation, testified that appellant, based upon psychological tests, suffers from brain damage (3.850 R 3106). Dr. Carbonell also opined that appellant's capacity to conform his conduct to the requirements of law was substantially impaired because of his brain damage, his emotional mental health problems, his exhibition of a reasonable amount of paranoia, and the evidence that at the time of the offense that appellant was drinking or using drugs (3.850 R 3507). Dr. Carbonell also concluded that appellant suffered from extreme mental or emotional disturbance based upon his brain damage, his definite paranoid tendencies, his chronic substance abuse, and the fact that he was raised in a brutal environment (3.850 R 3508). Dr. Carbonell specifically opined that appellant does not have antisocial personality disorder (3.850 R 3510). On cross examination, Dr. Carbonell acknowledged that there are many inconsistencies in appellant's record concerning his claim of dizziness (3.850 R 3571). Appellant denied in medical records any headaches or head injuries (3.850 R 3574 -3575, 3578 - 3579) or seizures or fainting (3.850 R 3579). Appellant made four trips to prison clinics over a fifteen year period for headaches and this does not signify that appellant had a history of severe

headaches (3.850 R 3582 - 3584). During the trial court's examination of Dr. Carbonell, it was observed that a jury would be very frightened of the type of person that appellant is because he has a history of criminal activity and that after getting out of prison appellant soon thereafter commits other crimes, (3.850 R 3638 - 3640).

Appellant's trial counsel, Baya Harrison, was the next witness at the evidentiary hearing. Mr. Harrison had represented appellant since 1981 in all levels of state and federal courts. Mr. Harrison testified that in 1985 he was not interested, as is CCR at the present time, in proving some alleged mental impairment or brain damage because he didn't believe that to be the case. Rather, Mr. Harrison wanted to show that as a young man appellant was a decent, caring young person who cared about his family and the people he worked for but who then went astray, and his parents let him go astray. Mr. Harrison was not interested in portraying appellant as some lunatic drug freak who would commit havoc at the drop of a hat, but that he did have a drug problem. Mr. Harrison observed that appellant's sister Ada King changed her story and that first she didn't indicate a serious drug problem because she thought that was what Mr. Harrison wanted to hear. Later she changed that. Mr. Harrison wanted to obtain testimony concerning appellant's environmental deprivation, but he did not want tons of stuff concerning how cruel and physically violent the parents were because appellant told Dr. Mendelson that wasn't necessarily the case (3.850 R

3200 - 3202). All these matters were communicated to investigator Roy Mathews. Mr. Harrison also discussed with Mathews the possible mental illness, the trauma to the head, and Mathews never suggested that he felt that that was something that existed in this case. Mr. Harrison also talked with people involved with CCR concerning this issue and it was never mentioned by them (3.850 R 3222 - 3223). Mr. Harrison further testified that he did not use Dr. Mendelson at trial because what little good it would do would be outweighed by Dr. Merin and that appellant instructed Mr. Harrison to take the position appellant didn't do it, not that it was done because of a mental illness (3.850 R 3251 - 3253; 3302). Unless some serious mental illness was present in this case, Mr. Harrison didn't want to try to convince the jury that a man who had been working out of the community, who had an average I.Q., who was functioning normally, and who was given the opportunity to quasi-return to society[2] all of the sudden could become this monster (3.850 R 3254 - 3255). Mr. Harrison was trying to show that appellant was intelligent and can give something back to society (appellant was learning Greek and he knew case law) and it would be inconsistent with this approach to show he was a deranged person (3.850 R 3256). Presenting an intoxication defense would have been a mixed-bag in that people at work-release centers are not supposed

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[2] At the time King murdered Mrs. Brady, King was in a work-release center in Tarpon Springs.

to consume alcohol or smoke marijuana, and the theory of defense was that appellant didn't do it, that he didn't have an opportunity to leave the work-release center before he was attacked by McDonough. An intoxication defense was simply not a good defense. Jurors would not believe you stick darning needles in the vagina of a sixty-seven year old woman because you are drunk (3.850 R 3263). On cross examination, Mr. Harrison testified that he had received an award from the American Civil Liberties Union and the St. Petersburg Times for his work in capital cases. Mr. Harrison was also the first recipient of the Florida Bar President's Pro Bono Service Award for the Second Judicial Circuit (3.850 R 3271). Mr. Harrison again testified that he never saw any indication of mental infirmity or brain damage. Indeed, he saw just the opposite. Appellant was asked by Mr. Harrison if he suffered from persistent dizziness, headaches or whether he suffered any head injuries. Appellant replied that these conditions did not exist (3.850 R 3274 - 3275). Upon questioning from the trial court, Mr. Harrison testified that even if he had evidence that appellant was taking drugs or was drinking (which he did not) he would not have wanted to put that on as mitigation in front of a jury based on the facts of this particular case (3.850 R 3281 - 3282). Indeed, Mr. Harrison explained fully in response to questioning by the court that he would not want to use the CCR proposed mitigation based on the facts of this case (3.850 R 3298 - 3307).

Various family members and friends of appellant were called to testify by appellant in the penalty phase. The purpose of their testimony was to corroborate and support the background information obtained by Dr. Carbonell which was used to support her diagnosis. Instead, these witnesses served to refute the underlying basis of Dr. Carbonell's testimony. For example, Betty King, a sister of appellant, never saw or heard anything concerning appellant using drugs. She never heard from other people in the family that appellant had a drug problem (3.850 R 3323, 3333). Dr. Carbonell had testified that as a basis for rejecting the antisocial personality disorder diagnosis appellant was in a continuous and monogamous relationship with his girlfriend, Ellen Brown. However, Betty King testified that appellant always had girlfriends, that he always had girls all the time (3.850 R 3325, 3329). Although a major underlying basis for Dr. Carbonell's opinions was the fact that appellant was a chronic drug and alcohol abuser, Betty King never saw appellant drink alcohol (3.850 R 3328). In rejecting the diagnosis of antisocial personality disorder, Dr. Carbonell focused on the fact that there was no history of appellant's truancy from school. Yet, Betty King testified that appellant sometimes stayed home from school in order to work (3.850 R 3332). Ada King, another sister of appellant, testified that she only saw him with drugs one time (3.850 R 3337), and that she never saw the father sharing alcohol with the boys in the family (3.850 R 3343). Robert Lee King, a brother of appellant, testified that

appellant girlfriends other that Ellen Brown (3.850 R 3376). Contrary to Dr. Carbonell's assertions that intoxicants may have contributed to appellant's behavior in brutally murdering Mrs. Brady, Steven Grant, Richard Green, Susan Bryant, and Leo Perry all testified that after ingesting drugs appellant was never violent (3.850 R 3425, 3451, 3465, 3489). Dr. Carbonell's conclusions that appellant did not have a truancy problem were refuted by Richard Green and Leo Perry who testified that appellant was either suspended from school several times or that he skipped school a few times (3.850 R 3455, 3497). Even though appellant's sister never saw or heard of appellant being involved with drugs, the evidence was clear that appellant, indeed, did have a history of drug use. In fact, the evidence was clear that appellant's "occupation" was shoplifting in order to support a drug habit and to make a living (3.850 R 3444, 3447 - 3448, 3450).

The final witness called at the evidentiary hearing was Dr. Sidney Merin. Dr. Merin had been retained by the state in 1985 to offer testimony in rebuttal to any testimony that would be offered by Dr. Mendelson. In 1988, CCR contacted Dr. Merin both through their office and through Dr. Carbonell. CCR's attempt to make Dr. Merin their expert was not permitted by Judge Schaeffer (3.850 R 1579 - 1603). Nevertheless, at the evidentiary hearing CCR called Dr. Merin as their witness and the trial court expressed her incredulity. Dr. Merin testified that based upon the tests he gave in 1989, appellant does <u>not</u> have brain damage

(3.850 R 3740, 3776, 3786) (Dr. Merin also gave appellant psychological tests in 1985, but inasmuch as brain damage was not indicated, no testing was done in this area). Dr. Merin reviewed all the materials that Dr. Carbonell had reviewed prior to his most recent examination of appellant. However, Dr. Merin testified that there was no indication that appellant was intoxicated at the time of the offense as evidenced by appellant's clear rendition of the evening's events and details. Appellant was extremely descriptive in his story and, even if much of that story was fabricated by appellant, the details recalled showed that memory was not affected by intoxicants (3.850 R 3777). Dr. Merin testified that it was clear that appellant has an antisocial personality (3.850 R 3777 - 3778, 3795). Dr. Merin opined that Dr. Mendelson conducted professionally adequate tests in 1985 and that those tests were professionally interpreted (3.850 R 3778 - 3779). Dr. Merin recalled telling defense counsel, Mr. Harrison in 1985 that appellant was probably one of the most dangerously antisocial individuals Dr. Merin had ever examined (3.850 R 3779). This opinion had not changed at the present time. Dr. Merin noted that there was no significant impairment of brain function which would negate or preclude the ability to understand what was occurring around appellant, to make judgments, to reason, to think logically, to anticipate and to maintain appellant's thinking within reasonable limits (3.850 R 3785). Dr. Merin concluded that appellant is clearly not mentally ill (3.850 R

3787). Appellant, in the opinion of Dr. Merin, was not under an extreme mental or emotional disturbance in 1977 at the time he committed the crimes (3.850 R 3788 - 3789), nor was appellant's capacity to conform his conduct to the requirements of the law substantially impaired (3.580 R 3794).

SUMMARY OF THE ARGUMENT

As to Issue I: Your appellee urges this Honorable Court to find that a "competent" mental health expert is one who is duly licensed and registered. "Competency" in the Ake v. Oklahoma context should not be equated with effective assistance of counsel. In any event, the evaluation and examination conducted by Dr. Mendelson in the instant case was more than adequate and appellant was not denied any constitutional rights by virtue of that examination. The only mental health expert who has offered an opinion that appellant is brain damaged is Dr. Carbonell, the expert retained by CCR in anticipation of the litigation in this cause. The underlying basis for Dr. Carbonell's opinions was shown to be unworthy and not deserving of serious consideration. Indeed, the testimony at the evidentiary hearing was clear that there was no indicia of brain damage in 1985 at the time of appellant's resentencing and, therefore, appellant's Sireci claim has no basis in fact.

As to Issue II: Defense counsel, Mr. Baya Harrison, afforded appellant reasonably effective assistance of counsel for the resentencing proceedings conducted in this case. Defense counsel conducted all necessary investigation and presented significant mitigation at the penalty phase. Mr. Harrison presented a well-conceived case with well-developed themes. The evidence adduced at the evidentiary hearing led the trial judge to correctly determine that even if the proposed CCR mitigation would have been presented to the jury, there is no reasonable probability that appellant would have received a life sentence.

As to Issue III - VII: As his last five issues on appeal, appellant presents claims which are not cognizable in collateral proceedings. These are claims which either were or should have been raised at trial and on appeal or in prior collateral proceedings. The summary denial of these claims was proper by the trial court, and this Honorable Court should affirm the trial court's decision.

ARGUMENT

ISSUE I

WHETHER APPELLANT WAS DEPRIVED AT THE TIME OF HIS RESENTENCING PROCEEDING OF A PROFESSIONALLY ADEQUATE MENTAL HEALTH EXAMINATION.

As his first claim on appeal, appellant raises a now familiar mental health issue which is pled in nearly every capital collateral 3.850 motion. Your appellee submits that King, like all other capital collateral defendant's misinterprets the requirements of Ake v. Oklahoma, 470 U.S. 68 (1985), and contends that he is entitled to a "competent" psychiatric evaluation where "competent" is equitable with the same standards used in determining if a defendant was accorded his Sixth Amendment right to effective assistance of counsel. Ake v. Oklahoma merely requires the state to provide psychiatric (or psychological) assistance where there is a demonstrated need therefore and the defendant cannot afford to hire his own experts. See Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987). Thus, where Dr. James Mendelson, a well known and respected mental health professional, examined King, there simply is no violation of Ake. In this regard, your appellee refers this Honorable Court to the decision in Clisby v. Jones, 907 F.2d 1047 (11th Cir. 1990), a decision which was rendered approximately one month after the trial court entered her order denying appellant's motion for post-conviction relief. Candidly, the opinion in Clisby was vacated where the Eleventh Circuit voted to rehear the

case en banc. 920 F.2d 720 (1990). However, although Clisby has no precedential value, the reasoning therein is adopted as to what a "competent" psychiatric evaluation means in the context of collateral litigation. Under the standards set forth in Clisby, there can be no doubt that Dr. Mendelson is a "competent" mental health expert which satisfies the dictates of Ake.

Your appellee submits that, as aforementioned, it is improper to equate a "competent" mental health professional with "effective counsel". There is a constitutional requirement that a defendant receive effective counsel and, therefore, the standards employed to determine effectiveness must be more stringent. Where, however, the Constitution only requires that the state provide a capital defendant with a "competent" mental health professional where the defendant cannot afford to hire one, that standard is met where, as in the instant case, a properly licensed mental health professional evaluates the defendant.

If this Honorable Court concurs with your appellee's theory that "competent" refers to a properly licensed and regulated professional, there is no need to examine this issue further. However, in the alternative, your appellee submits that appellant is entitled to no relief on this claim. The instant case can be contrasted with this Honorable Court's decision in State v. Sireci, 536 So.2d 231 (Fla. 1988), previous history State v. Sireci, 502 So.2d 1221 (Fla. 1987). In the trial court, appellant relied upon Sireci but this reliance was clearly

misplaced where Sireci is inapposite to the circumstances of the instant case. In the Sireci case cited in 502 So.2d, this Honorable Court affirmed the trial court's order granting the defendant's request for an evidentiary hearing. In so doing, this Court held:

> We must warn that a subsequent finding of organic brain damage does not necessarily warrant a new sentencing hearing. *James v. State*, 489 So.2d 737 (Fla. 1986). However, a new sentencing hearing is mandated in cases which entail psychiatric examinations so grossly insufficient that they ignore clear indications of either mental retardation or organic brain damage. *Mason v. State*, 489 So.2d 734 (Fla. 1986).

State v. Sireci, 502 So.2d at 1224. Upon remand for an evidentiary hearing in Sireci, and at the conclusion of that hearing, the trial court found that the two court appointed psychiatrists failed to diagnose organic brain syndrome caused by a car accident in which the defendant was left semiconscious for a two week period and which caused right-side facial paralysis. The trial court found that had the psychiatrist known about the facial paralysis they would have conducted additional testing to determine if the defendant suffered from an organic brain disorder. The trial court therefore found that circumstances existed at the time of the defendant's pretrial examination by the psychiatrists that required under reasonable medical standards at the time additional testing to determine the existence of organic brain damage. The failure to discover those circumstances resulted in the deprivation of due process by

virtue of the denial of an adequate psychiatric examination. Upon appeal to this Honorable Court, this Court acknowledged that there is evidence in the record which justified the state's argument that Sireci's original psychiatric examinations were adequate. This Court also noted that there was competent substantial evidence to support the trial court's findings and this Court did not wish to substitute it's judgment for that of the trial judge who personally heard the testimony. State v. Sireci, 536 So.2d at 233.

In the instant case, however, the evidence is far from clear as to whether the defendant suffers from organic brain damage. As is so often the case, CCR hired a psychologist, Dr. Joyce Carbonell, no stranger to this Court, and that doctor generated an opinion that was helpful to appellant. Relying extensively on the findings of Dr. Carbonell, even though two other mental health experts were involved in this case whose findings did not support those of Dr. Carbonell, appellant claims to have shown that the mental health examination undertaken in 1985 at the resentencing proceeding was somehow defective. To support her findings, Dr. Carbonell relied upon purported evidence supporting the possibility of brain damage but, as the evidence adduced at the evidentiary hearing clearly showed, the underlying basis for Dr. Carbonell's opinion is refuted.

In the Sireci case, the trial judge therein ordered a new sentencing hearing where the facts of that case supported the notion that evidence was available at the time the mental health

expert examined Sireci to indicate that testing might have been warranted to detect brain damage. The opposite is quite true in the instant case. Dr. Mendelson, the psychologist retained by the defense prior to the resentencing proceedings herein, testified that he saw no indicia of brain damage so there was no need to test therefore (3.850 R 2947, 2950). During his interview of appellant, Dr. Mendelson observed that appellant was cooperative, involved, engaged, communicative, reciprocal, had no defects in his social behavior, responses were appropriate, no disturbances were observed in appellant's cognitive area, appellant did not exhibit visual or auditory hallucinations, appellant's memory function was in tact, appellant was in good contact with reality, appellant was not delusional, appellant was lucid, coherent, and relevant, and there was no disturbance in thought patters. In other words, Dr. Mendelson observed that there was nothing to indicate possible brain damage (3.850 R 2981 - 2983). Nor did Dr. Merin, the expert witness retained by the state at the time of appellant's resentencing proceedings, observe anything to indicate that appellant might be brain damaged. Lo and behold, Dr. Carbonell is retained by CCR in anticipation of post-conviction litigation in this cause and she is the only expert who has examined appellant who concludes that appellant is brain damaged. Dr. Carbonell's opinion that appellant is brain damaged was based upon a history of head injury, her test results, and appellant's use of drugs at an early age (3.850 R 3106). The purported head injury finding was

allegedly supported by evidence of dizziness and headaches. Yet, on cross examination, Dr. Carbonell had to acknowledge the inconsistencies which existed in appellant's records concerning these matters. Specifically with respect to the claim of dizziness, Dr. Carbonell noted that there were inconsistencies in the record (3.850 R 3571). Appellant denied in his medical records any headaches or head injuries or that he had experienced seizures or fainting (3.850 R 3574 - 3575, 3578 - 3579). Indeed, the purported history of severe headaches was totally negated by the fact that appellant made only four trips to prison clinics over a fifteen year period for headaches (3.850 R 3582 - 3584).

One of the major factors relied upon by Dr. Carbonell in reaching her opinions was the purported fact that appellant was intoxicated at the time of the offense. Dr. Carbonell's findings that appellant's capacity to conform his conduct to the requirements of law was substantially impaired was based in considerable part on the notion that there was "considerable evidence" that at the time of the offense appellant was drinking or using drugs. This evidence consisted of two affidavits given by fellow inmates of appellant, one such affidavit being prepared during the course of the evidentiary hearing in this matter (3.850 R 3586). Also, Dr. Carbonell considered the fact that counselor McDonough, the victim of the stabbing attack by appellant resulting in a conviction for attempted murder, stated in a police report that at the time of the attack, appellant was sweating, was anxious, and appeared "high". Dr. Carbonell, as

well as collateral counsel, has apparently misinterpreted these remarks as an indication that appellant was intoxicated at the time of the offense. Rather, when viewed in context with all the other evidence concerning the stabbing of counselor McDonough it appears that appellant was "high" in the sense that he was agitated and excited. Indeed, in Mr. McDonough deposition of June 10, 1977, he indicated that appellant was not drunk and that McDonough did not smell alcohol on appellant (3.850 R 3595). Mr. McDonough's testimony under oath in deposition and at trial in both 1977 and 1985 clearly indicated that appellant was not intoxicated (3.850 R 3598). Mr. Robbins, the van driver who transported appellant to and from his work assignment, testified at trial in 1977 that he did not detect any odor of alcohol on appellant nor did appellant appear to be under the influence of alcohol (3.850 R 3599). Co-worker and co-inmate Fred Williams who rode with appellant in the van from appellant's work assignment back to the work-release center, testified in deposition and at trial that he didn't smell any odor of alcohol on appellant when he was picked up, there was no odor of alcohol in the vehicle, that he did not see appellant with alcohol, and that he did not detect anything out of the ordinary in appellant's behavior (3.850 R 3599 - 3600). Phillip Carroll, appellant's employer at his work-release assignment, testified in deposition and at trial that when appellant was at work the evening of the murder appellant had no smell of alcohol about him, he did not see appellant drinking, and appellant appeared

sober and rational the entire evening (3.850 R 3600). Indeed, as the trial court correctly noted during the cross examination of Dr. Carbonell, "certainly the record is replete with other things that would indicate that [appellant] wasn't [intoxicated]". (3.850 R 3596) Thus, the overwhelming evidence in this case concerning the issue of appellant's alleged intoxication reveals that appellant was not intoxicated. Therefore, a primary basis for Dr. Carbonell's opinion is without factual support.

In Dr. Carbonell's opinion, appellant's capacity to conform his conduct to the requirements of law was substantially impaired because of brain damage, emotional mental health problems, paranoia, and considerable evidence that at the time appellant was drinking or using drugs (3.850 R 3507). Dr. Carbonell also opined that appellant suffered from extreme mental or emotional disturbance based upon appellant's brain damage, paranoia, substance abuse, and the fact that appellant was raised in a brutal environment (3.850 R 3508). However, as discussed above, these findings do not withstand scrutiny based upon the evidence adduced at trial and at the evidentiary hearing. The overwhelming weight of the evidence indicates that appellant was not intoxicated. Dr. Carbonell is the only mental health professional who has concluded that appellant suffers from brain damage. Indeed, Dr. Merin testified that based upon all of the information available, including the information supplied by CCR and Dr. Carbonell, appellant is definitely not brain damaged (3.850 R 3740, 3776, 3786). Additionally, Dr. Mendelson, the

defense expert at the resentencing proceeding, testified that even with what he knows at present based upon Dr. Carbonell's findings, he can not tell whether any statutory or nonstatutory mitigating factors exist (3.850 R 2967). Therefore, even though appellant has created factual questions by relying upon evidence that is questionable, at best, to support the underlying basis of Dr. Carbonell's opinions, there is nothing to indicate that appellant received anything less than an adequate mental health examination in 1985. Indeed, Dr. Merin specifically testified that the tests given by Dr. Mendelson in 1985 were professionally proper and were professionally interpreted (3.850 R 3779). There is simply nothing in this record to indicate that appellant suffers from brain damage or that there were any indicia of brain damage in 1985. Based upon the facts of this case, appellant's comparison of this case with Sireci is not supported by the facts and his reliance upon Sireci is totally misplaced.

In his Claim I, appellant blends principles of ineffective assistance of counsel with his Sireci claim. Your appellee will respectfully defer discussion of matters pertaining to whether counsel was ineffective under Issue II of this brief. At this point it should be mentioned, however, that appellant's claim that the defense psychologist rendered an inadequate mental evaluation because defense counsel neglected to provide information is wholly without merit. The record indicates that Dr. Mendelson received a large number of documents and materials from defense counsel which contained appellant's entire social

and criminal history, psychological screening report, six months progress reports, and disciplinary reports (3.850 R 2942). All the mental health experts who examined appellant in this cause had knowledge of appellant's history of drug use and appellant's childhood history. Mr. Harrison, appellant's attorney at the resentencing proceeding, adequately provided materials so that appellant could be properly examined by Dr. Mendelson.

In his brief, appellant falsely concludes that all experts agreed that appellant suffered from mental deficiencies which affected his judgment and behavior at the time of the offense (appellant's brief at page 35). However, just the opposite is true. Only Dr. Carbonell found that mental mitigating factors were present in appellant's case. Dr. Mendelson testified that at present, even after being advised of all the circumstances surrounding Dr. Carbonell's findings, he can not tell whether any statutory or nonstatutory mitigating factors exist (3.850 R 2967). Dr. Merin specifically testified that at the time of the offense appellant was not under an extreme mental or emotional disturbance nor was appellant's capacity to conform his conduct to the requirements of the law substantially impaired (3.850 R 3788 - 3789, 3794). Thus, appellant's conclusions in his brief are simply false.

In his brief, appellant asserts that the trial court somehow applied an incorrect standard in determining that appellant was entitled to no relief on this claim. Appellant asserts that the trial judge merely found that because there were discrepancies in

the mental health evidence presented at the time of the evidentiary hearing that it was permissible to deprive the jury of all mental health evidence. In his claim, appellant relies upon cases dealing with Lockett and Hitchcock issues pertaining to preclusion of mitigating evidence. Such an analysis is totally flawed and has no bearing upon the trial court's decision in the instant case. We are not concerned sub judice with the failure of the trial court or jury to consider mitigating evidence based upon an inaccurate jury instruction. Rather, we are concerned with the adequacy of the mental health examination of appellant prior to his 1985 resentencing proceeding. In determining this issue, the trial court undertook a Strickland v. Washington analysis and determined the prejudice prong of that test. With respect to both the right to an adequate mental health examination and the right to effective assistance of counsel, the trial court determined that there is no reasonable probability that the results of the penalty phase would have been different even if the CCR proposed mitigation would have been propounded before a new jury (3.850 R 2550 - 2555). Appellant has cited to no case law which demonstrates that the trial court implied an improper standard in the instant case. In any event, it is clear from the facts developed at the evidentiary hearing that appellant could in no way prove his claim that he received inadequate mental health assistance in this case. Indeed, where the evidence adduced at the evidentiary hearing only supports the proposition that there was no indicia of brain damage,

appellant's claim predicated upon Ake v. Oklahoma and State v. Sireci must fail.

ISSUE II

WHETHER APPELLANT RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE RESENTENCING PROCEEDINGS IN THIS CASE.

As is evident by the trial court's order in this matter, appellant's attack upon Baya Harrison, the attorney who represented appellant through all stages of state and federal litigation in this cause, was unwarranted and defamatory (3.850 R 2555 - 2556). Appellant's claim that his resentencing counsel was "uncaring" was patently false and was refuted by all of the evidence presented below. As the trial court recognized, it is understandable to contest the effectiveness of one's counsel. However, your appellee concurs with the trial judge who took exception "with the further criticism laid on Mr. Harrison that he was 'uninterested', 'unconcerned', and 'indifferent' to Mr. King's fate." (3.850 R 2556) Such allegations which are totally devoid of even being considered should have no place in post-conviction pleadings.

Claims concerning the effectiveness of counsel must be viewed in light of the two-pronged test established by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Court held that the burden is upon the defendant to show that counsel's performance was deficient (i.e., counsel made errors so serious that he was not functioning as "counsel" within the meaning of the Sixth Amendment), and the defendant must also show that the deficient performance prejudiced the defense in so far as there is a high

probability that the outcome of the proceeding would have been different but for the actions of defense counsel. In applying the two-pronged test, a reviewing court must indulge in a strong presumption that counsel's representation was effective. Effective counsel does not mean errorless assistance, and an attorney's performance is to be judged on the totality of the circumstances in the entire record rather than on specific actions.

This Honorable Court in Blanco v. Wainwright, 507 So.2d 1377, 1381 (Fla. 1987), explained Strickland thusly:

> A claimant who asserts ineffective assistance of counsel faces a heavy burden. First, he must identify the specific omissions and show that counsel's performance falls outside the wide range of reasonable professional assistance. In evaluating this prong, courts are required to (a) make every effort to eliminate the distorting effects of hindsight by evaluating the performance from counsel's perspective at the time, and (b) indulge a strong presumption that counsel has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment with the burden on the claimant to show otherwise. Second, the claimant must show that there is a reasonable probability that the results of the proceedings would have been different but for the inadequate performance.

In the instant case, appellant has failed to carry this heavy burden.

Your appellee submits that when reviewing the allegations of ineffective assistance of counsel, the general presumption is that defense counsel is presumed to have performed competently and effectively within the meaning of the Sixth Amendment.

Strickland v. Washington, supra. Furthermore, the defense is required to prove prejudice. Strickland v. Washington, supra. Absent a denial of counsel or counsel who entirely failed to subject the state's case to adversarial tests, there must be a showing of specific deficiency and resulting prejudice. See United States v. Cronic, 466 U.S. 648 (1984). An examination of the testimony adduced in the evidentiary hearing before the trial court demonstrates that appellant's trial counsel acted as an advocate. Not only has appellant failed to show that trial counsel's conduct fell outside that wide range of reasonable professional assistance (and the trial court did not even need to rule on this prong of the test), but he has also failed to show that the results of the penalty phase would have been different.

Your appellee submits that, based on the evidence adduced at the evidentiary hearing, Mr. Harrison provided much more than effective assistance of counsel. Appellant contends that Mr. Harrison failed to investigate, develop or present mental health mitigating evidence or to challenge aggravating circumstances on the basis of such evidence. This contention is totally refuted by the evidence presented below. To support his contentions, appellant throughout his brief intersperses the verbatim text of affidavits submitted by persons prior to the evidentiary hearing some of whom did not even testify at the hearing. Your appellee submits that this Honorable Court should give the amount of weight due these affidavits, which is absolutely nothing. Those witnesses who were present at the evidentiary hearing were

thoroughly cross examined and it is clear that their pre-hearing affidavits hold no water. Appellant asserts that his trial counsel failed to investigate mental health mitigating issues. In support of this proposition he submits affidavits of two investigators who worked for Mr. Harrison. These investigators were totally discredited at the evidentiary hearing. In their direct testimony and, indeed, in their affidavits, these persons testified that they could discern no theme or theory upon which Mr. Harrison was proceeding. Of course, Mr. Harrison's testimony totally belies these contentions. In fact, at the hearing this contention was totally refuted where one of the investigators had to acknowledge that he was able to discern the defense strategy (3.850 R 2854 - 2856). Of course, Mr. Harrison retained Dr. Mendelson in an effort to compile mitigating evidence on behalf of appellant. The bottom line is the fact that Mr. Harrison, notwithstanding the present contentions of appellant's collateral counsel, amply investigated this case for a great period of time prior to the resentencing proceedings. Mr. Harrison testified in depth concerning the compilation of all investigation in his trial notebook and his conversations with various persons who were to be presented on behalf of appellant at the resentencing proceeding.

Appellant also contends that Mr. Harrison unreasonably failed to present evidence of the history of drug and alcohol abuse and appellant's alleged intoxication at the time of the offense. Even collateral counsel concedes in his brief that Mr.

Harrison did present some evidence that appellant had a drug problem (appellant's sister testified that she had seen appellant with a syringe hanging out of his arm, testimony which Mr. Harrison found very graphic for presentation to the jury). He complains, however, that more evidence was not presented concerning these matters. Rather than rely upon affidavits (including affidavits which are included within the brief of appellant of persons who did not even testify at the evidentiary hearing), your appellee will set forth the following portion of the record which conclusively demonstrates the strategic reasons why Mr. Harrison didn't want to introduce evidence of mitigation as now proposed by CCR:

> THE COURT: I've got to interject something here. I've got to ask this question because initially this decision is mine.
>
> Let's assume for the sake of argument, if you could have shown that he was really -- had had been taking drugs and drinking, would you have put that mitigation in front of a jury based on the facts of this particular case?
>
> THE WITNESS: No, Your Honor.
>
> THE COURT: That's what I assume. I just had to ask.
>
> In other words, then and/or at any time in the future, you would just as soon the jury not think that Mr. King had been out drinking and drugging before this episode?
>
> THE WITNESS: Your Honor, that's correct. I thought about this a lot. I used to spend evenings thinking about what the state was going to say in their closing argument. And I had met Ms. McKeown and I

know of her reputation. I knew she was very, very tough. And I could hear her saying, "Look, folks, the man was on parole once, and we gave him another chance. He commits robbery. He comes back. We give him another chance. And he's at a work release center. It's a semi-free situation. And all we ask is don't drink, don't do drugs and don't stick darning needles in the vaginas of 65-year-old women."

I could see it coming to me. That whole thing. Forgive me; I was drunk, to me that was just not the way to proceed.

THE COURT: And you still feel that way?

THE WITNESS: I still feel that way.

(3.850 R 3281 - 3282)

* * *

THE COURT: All right. Well, I have a couple questions, and so you all can sit here while I ask mine now. I'll give you a two-minute break.

Just a couple. I'm asking you this now as -- how many cases have you tried, Mr. Harrison, as a defense lawyer? Approximately.

THE WITNESS: Sixty, Your Honor, at least.

THE COURT: Okay. Have you had situations where you had a specific intent crime and were going to try to at least use intoxication as some type of a defense?

THE WITNESS: Yes, ma'am.

THE COURT: As a defense, is it very successful?

THE WITNESS: Not very successful.

THE COURT: Insanity. Have you ever had the occasion to have to try a not guilty by reason of insanity?

MR. HARRISON: Four or five times, yes, Your Honor.

THE COURT: Are those very successful?

THE WITNESS: No, ma'am not even when you've got a good one, to tell you the truth.

THE COURT: In particular, if I understood the doctor yesterday -- as I say, I've learned a lot over the years about psychiatrists and psychologists, but sometimes I don't understand, so I may be wrong in this.

My perception of what she said yesterday was that she was prepared to say based on her tests, her evaluation and all the data that she has now obtained, that what she perceives to be brain damage coupled with what she perceives as alcohol and drug use on the date of this offense causes what she perceives and what she calls impulse behavior.

What does impulse behavior mean to you? As a lawyer dealing with -- how does it pertain? If a doctor says, "I'm going to be able to get on the stand and testify that your client was brain damaged, he was on drugs, intoxicated and, therefore, his actions were what we can characterize as impulse behavior, what would that tell you as a lawyer?

THE WITNESS: That he committed the crime.

THE COURT: Based on impulse?

THE WITNESS: Exactly.

THE COURT: And if the testimony was further going to be that he was an addict, which I assume because there has been plenty of that testimony, what would that tell you as a lawyer? Without some sort of treatment or rehabilitation, could this impulse behavior repeat itself then?

THE WITNESS: It certainly could.

THE COURT: If you had the facts that you had to deal with in the King case and you had testimony that would present to the jury, combined with your answer earlier to my question that jurors hear 25 instead of life, they certainly know the person can get out after 25 years, and you knew the jury had heard about two robberies, one attempted murder and the facts of this case, would you have wanted to present him as a drug addict with an alcohol problem, brain damage, who acted on impulse to a jury?

THE WITNESS: No, ma'am.

THE COURT: Would you have ever considered putting that information before a jury if you had had it?

THE WITNESS: I would certainly not do that in this particular case.

THE COURT: Because of the unique facts of this case?

THE WITNESS: That's right. If you recall, Your Honor, this offense required a movement from point A to point B from 500 yards to Ms. Brady's residence, breaking into that residence, committing a host of offenses, leaving there, coming back to the work release facility, engaging in a very serious offense there. Not only that, but according to Mr. McDonough, after he was stabbed four or five times initially, Mr. King left, then came back and tied to cut his throat -- I said to one of the witnesses who tried to drag him off, "Listen, man, what did you see?" And the guy said, "Gee, I didn't see anything." To me, that's not -- that doesn't fit within the context of the impulse theory.

Again, too, though, Your Honor, this would be contrary to the position that we had taken based upon the client's representations that he didn't do it.

THE COURT: Would you in Pinellas County be frightened to try to argue that as some sort of mitigation before what you have perceived and have seen as a Pinellas County jury?

THE WITNESS: I would. I also -- I mean, there are lawyers out there that may have taken the Dr. Carbonell approach. I know Dr. Carbonell an I knew her at the time, and I would not have done that. I would not have used Dr. Carbonell. I've worked specifically with her, and I have my reasons I would not have used -- I don't think any other psychologist would testify --

MR. NOLAS: Oh, I object, Your Honor, and I'm going to cross-examine on this, if I may, Your Honor.

THE COURT: Well, you may when I'm done.

MR. NOLAS: Yes.

THE COURT: All right. The next thing I wanted to ask you about, you started to talk about your -- I think you called it a tactic -- or not a tactic. I don't know what you want to call it. But you indicated that there was a thought you might call your doctor; you might not. But after talking to Dr. Merin, I believe you indicated after his deposition, he told you something which caused you to fear that the state could call Dr. Merin if in fact you called your doctor.

THE WITNESS: Correct.

THE COURT: Would you continue and complete that, please.

THE WITNESS: Dr. Merin told me at the -- either the beginning or the conclusion of his deposition that Mr. King was one of the most dangerous sociopaths, dangerous individuals, he had ever examined.

I know Dr. Merin. I knew him at the time. He has one quality which Jim Mendelson does not have, and it may not be a good quality. He is glib. He is extremely glib.

He is very verbal. You can see it in his deposition. He just ran all over me in that deposition. You can't control the man. And Dr. Mendelson was no match for him. And Jim and I discussed that, and Jim was the first to knowledge that.

THE COURT: In Pinellas County at least, is it -- are there certain psychologists in this area based on the time that you practiced here who were known as good courtroom psychologists, in other words, persons who could really sway the jury?

THE WITNESS: Correct.

THE COURT: Versus those who perhaps were more -- you might rely on more, but they weren't so hot on the stand?

THE WITNESS: That's correct.

THE COURT: Okay. Based on your knowledge of what lawyers thought in the area, where was Dr. Merin classified as a courtroom testifyer?

THE WITNESS; In the former category. Not only that, you might recall that what I wanted to try to convey to the jury was what I think is true, and that is that Mr. King had progressed in prison. He was a better person. The Judeo-Christian ethic that had been woven into his personality by his ministers had helped him.

Dr. Merin was going to say that Mr. King was a sociopath and he would always be a sociopath, and he would be dangerous ten years down the line. I mean, he would absolutely have wrecked what we were trying to do in terms of presenting Mr. King in a favorable light.

I wanted to ignore that Brady homicide, get on to looking at what Mr. King had done since he had been incarcerated, using what I felt was fair credible testimony, and I still think it is.

THE COURT: And as far as lawyers or Dr. Merin's reputation among lawyers in Pinellas County, you said it was the former, meaning he was considered a good jury testifyer.

THE WITNESS: He is very, very tough.

THE COURT: Is he considered one of the best, one you want on your side so at least if he couldn't say anything, the other side couldn't get him?

THE WITNESS: That's right. And Dr. Merin also, according to my -- I talked to Joe Donahey, Pat Doherty, Mr. Jagger, Tony Rondolino, good lawyers down here, and Dr. Merin is not a state lackey. He has testified for defense counsel in many a case so, you know, I don't think I would be able to nail him to that issue. He was a very formidable person, and that's -- you know, that's why I was surprised when I read that affidavit know that 3.850 petition, quite surprised.

THE COURT: You read all of the matters attached to the petition?

THE WITNESS: Yes.

THE COURT: Putting all of the matters that have been developed since your --

THE WITNESS: Yes, ma'am.

THE COURT: -- representation of Mr. King, I take it?

THE WITNESS: Correct.

THE COURT: And there was certainly voluminous matters contained therein.

Are you still satisfied with the theory as you perceived it as being in Mr. King's best interests?

THE WITNESS: I feel that strategically that was -- the path we took was the best we could do. I think it was better than what's being offered here in retrospect. I do.

I think -- and I've said this before, an I don't think I'm articulating it well, but if you could have seen Reverend Robertson -- even Ms. McKeown in her closing statement complemented Reverend Robertson. She had to because he connected with the jury. He made eye contact. He was respected by that jury. He believed in Amos and he believes in him today, and Joe Ingle is the same way.

Ms. McKeown made points by alluding to the fact that Joe Ingle was against the death penalty and testified for another inmate. But she couldn't shake the fact that Joe Ingle is truly -- if I may say this -- a man of the cloth. He is a good decent man, and he believed in Amos and I think his goodness got through to that jury. It wasn't enough, obviously, but I would still do the same thing today if I had it to do over again.

THE COURT: I'm sure that when a lawyer looks back in retrospect and sees a twelve/zero recommendation, that it does go through -- and I'm sure it has gone through your mind, "Could I have done something? Could I have persuaded?" And after all you have seen and read, including what CCR has presented, I guess what you are telling me, you still think the theory that you had was the only possible theory that might work in Mr. King's case?

THE WITNESS: That's true. And I can tell you, not only was it a twelve to zero verdict, unfortunately, the jury was not out more than about a half hour. It was very upsetting. I felt worse about this than anything just about in my life because contrary to what Mr. Mack and these other people have inferred, which is very insulting to me, I cared about this man, and I think my actions proved that and I would never have done anything to hurt him in any way.

* * *

(3.850 R 3297 - 3307)

Indeed, the one overriding element in this entire case which collateral counsel cannot dispute is the fact that appellant adamantly maintained his innocence and defense counsel was obliged to proceed on this basis. It is axiomatic beyond the need for citation that evidence of intoxication or drug use is antithetical to the position that a defendant did not commit the crime. Failure to pursue an inconsistent line of defense is simply not ineffective assistance of counsel. In addition, as evidenced by Mr. Harrison's responses to the court's inquiries as outlined above, there were compelling reasons why the type of evidence now proposed by CCR should not have been presented to the jury in this particular case. Combined with the fact that appellant himself advised his own mental health expert, Dr. Mendelson, that he was not intoxicated at the time of the offense (3.850 R 2978) there certainly was no basis for the assertion of an intoxication presentation. Mr. Harrison testified at the evidentiary hearing that in the absence of serious mental illness which has not even been shown by the evidence presented by CCR in the evidentiary hearing below), Mr. Harrison didn't want to try to convince a jury that a man who had been working out of the community, who had an average I.Q., who was functioning normally, and who was given the opportunity to quasi-return to society (in a work-release center) all of the sudden could become a monster (3.850 R 3254 - 3255). Mr. Harrison also testified that presenting an intoxication defense would have been a mixed-bag in that people in work-release centers are not supposed to consume

alcohol or smoke marijuana. Combined with the theory of defense that appellant didn't do it, that he didn't have an opportunity to leave the work-release center before he was allegedly attacked by Mr. McDonough, intoxication was just not a good defense. Mr. Harrison testified that jurors would not believe that you stick darning needles in a 67-year-old woman because you are drunk (3.850 R 3263). Mr. Harrison testified as to his strategy before the sentencing jury. He was trying to show that appellant was intelligent and was able to give something back to society. Mr. Harrison opined that it would be totally inconsistent with this approach to show that appellant was a deranged person (3.850 R 3256). Appellant has utterly failed to show that Mr. Harrison was ineffective with respect to his treatment of these issues.

Appellant also contends that Mr. Harrison was ineffective by failing to properly impeach counselor McDonough. As set forth above under Claim I, there simply was no evidence of intoxication. Mr. McDonough never testified that he smelled alcohol on appellant or that appellant appeared to act in an intoxicated manner. Mr. McDonough's initial statement to the police that Mr. King was "nervous, sweating profusely and acting as if he was 'high'" does not reflect that Mr. McDonough ever believed that appellant was intoxicated. Rather, these characterizations depict one who is agitated and nervous, as one would be if he raped a 67-year-old woman, butchered a 67-year-old woman with a knife, stuck darning needles into the vagina of a 67-year-old woman and, indeed, murdered the 67-year-old woman.

It would not have been possible for Mr. Harrison to impeach Mr. McDonough because Mr. McDonough was always consistent in maintaining that appellant did not appear intoxicated during appellant's brutal attack upon Mr. McDonough.

Appellant also contends that Mr. Harrison conceded to the jury that death was the appropriate sentence in this case. No evidence of this sub-issue was adduced at the evidentiary hearing. In any event, it is clear that Mr. Harrison never conceded that death was the appropriate penalty in this case. Rather, the record of the resentencing proceedings reveals that he was a zealous advocate attempting to secure a life sentence in a case where the aggravating circumstances were significant, to say the least. Mr. Harrison's remarks only reflected the jury instructions that were to be given and reflected an accurate interpretation of Florida law. Mr. Harrison steadfastly maintained before the jury that appellant should receive a life sentence.

Lastly, appellant presents an oxymoronic argument concerning Mr. Harrison's failure to object to the purported notion that "the trial court improperly relied on evidence of King's behavior during trial to support the death sentence." (Appellant's brief at page 61, citing King v. Dugger, 555 So.2d 355, 359 - 360 (Fla. 1990)). Appellant acknowledges that trial counsel could not have been able to object to this matter, yet then states that trial counsel was prejudicially deficient in failing to object. Acknowledgment that defense counsel could not have objected renders an ineffective claim absurd.

In her order, the trial court correctly determined that appellant can in no way satisfy the prejudice prong of the Strickland test. The trial court correctly determined that there is no reasonable probability that the outcome of the proceeding would have been different even if the CCR propositions were advanced. Your appellee concurs with the trial court's ruling contained at 3.850 R 2550 - 2555 and submits that the trial court's order should be affirmed.

ISSUE III

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM THAT THE SENTENCING COURT ERRONEOUSLY REFUSED TO PERMIT EVIDENCE AND INSTRUCTIONS REGARDING THE CONSEQUENCES OF THE JURY'S VERDICT.

As his third point on appeal, appellant presents a claim which he knows is not cognizable in these proceedings. Appellant contends, as he did in the habeas petition previously presented to this Court, that the trial court erred by refusing to permit evidence, argument, and a special jury instruction concerning appellant's presumptive parole date. Defense counsel, Mr. Harrison, wanted to place before the jury evidence that appellant wouldn't necessarily be paroled after serving twenty-five years. In his habeas petition previously filed herein, this Honorable Court rejected this claim both on the merits and as a facet of an ineffective assistance of appellate counsel claim. King v. Dugger, 555 So.2d 355, 359 (Fla. 1990). Obviously, this claim is not one of ineffective assistance of trial counsel where Mr. Harrison attempted to introduce these matters to the jury many times. Therefore, this claim could have been raised on direct appeal and the failure to do so precludes collateral relief. See e.g., Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987). Appellant's attempt to have this Court consider an issue previously rejected must fail.

ISSUE IV

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM PREDICATED UPON BOOTH V. MARYLAND.

As his fourth claim, appellant presents the now-familiar issue predicated upon Booth v. Maryland, 482 U.S. 496 (1987). The specific complaint made by appellant was that at the resentencing trial testimony was adduced concerning the victim's background, personal characteristics, family history, and status in the community (appellant's brief at page 65). No objection was made below and on this basis the claim is procedurally barred. Grossman v. State, 525 So.2d 833 (Fla. 1988). Thus, summary denial of the Rule 3.850 claim was appropriate.

In any event, Booth has been overruled by Payne v. Tennessee, 501 U.S. ___, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) insofar as Booth held that evidence and argument relating to the victim is inadmissible at a capital sentencing hearing. Thus, collateral counsel's gratuitous assertion that defense counsel was ineffective for failure to litigate this issue must fail where the underlying issue has no merit. Indeed, it is ludicrous to suggest that the jury's unanimous recommendation of a death sentence is unreliable based upon a minute portion of the testimony concerning the status of the victim. Indeed, where the United States Supreme Court has now held that there is no Eighth Amendment violation in presenting argument and evidence concerning the victim, there was no error here.

ISSUE V

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM THAT THE SENTENCING JURY WAS INACCURATELY INSTRUCTED THAT THE ALTERNATIVE TO A PENALTY OF DEATH WAS LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE FOR TWENTY YEARS.

During the initial stages of voir dire in the sentencing proceedings, the trial court and the prosecutor mistakenly stated that the only two punishments allowable in appellant's case were a sentence of death or life imprisonment without parole for twenty years. Inasmuch as this is a claim which could have and should have been raised on direct appeal, the trial court correctly summarily denied this claim.

Nor can defense counsel be found to be ineffective for failing to object to these misstatements. As aforestated, the misstatements were made during the earliest portions of voir dire. The jury which heard the evidence and deliberated in this matter were correctly instructed on the law (Case NO. 68,631, R 1721, 1724). Therefore, the actual jury which heard this case was not mislead as to what the proper penalties were under Florida law.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT'S CLAIM THAT THE SENTENCING INSTRUCTIONS SHIFTED THE BURDEN TO THE DEFENDANT TO PROVE DEATH WAS NOT THE APPROPRIATE PENALTY.

In his next claim, appellant concedes that this Honorable Court has previously ruled adversely to his position on this

claim concerning the purported shifting of the burden to the defendant in capital sentencing jury instructions. This claim was not presented on direct appeal and is, therefore, procedurally barred from being raised collaterally. This Honorable Court has consistently rejected this claim on the basis of a procedural default, most recently in Johnston v. Dugger, 16 F.L.W. S459 (Fla. June 20, 1991). See also Atkins v. State, 541 So.2d 1165, 1166, n. 1(3).

ISSUE VII

WHETHER THE TRIAL COURT ERRED BY SUMMARILY DENYING APPELLANT'S CLAIM THAT THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE WAS APPLIED IMPROPERLY IN APPELLANT'S CASE.

As his final claim on appeal, appellant presents a claim which is raised in nearly every collateral proceeding. He contends that the heinous, atrocious or cruel aggravating circumstance was improperly applied in this case based upon the decision in Maynard v. Cartwright, 486 U.S. 356 (1988). This claim has been consistently rejected by this Honorable Court, either for reasons of procedural default or on the merits. See Johnston v. Dugger, supra at 16 F.L.W. S461, n. 2(1). This Honorable Court should affirm the summary denial of 3.850 relief on this claim.

CONCLUSION

Based on the foregoing reasons, arguments and authorities, the order of the trial court denying the 3.850 motion filed by appellant should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, and to Billy H. Nolas & Julie D. Naylor, Special Assistant CCR, P. O. Box 4905, Ocala, Florida 32678-4905, this 1st day of October, 1991.

Robert J. Krauss
OF COUNSEL FOR APPELLEE