IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,537

AMOS LEE KING,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE SIXTH JUDICIAL
CIRCUIT COURT, IN AND FOR PINELLAS COUNTY,
FLORIDA

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PRELIMINARY STATEMENT

This case involves the appeal of a circuit court's denial of Rule 3.850 relief in a capital post-conviction proceeding after an evidentiary hearing. Mr. King's case presents significant and compelling issues warranting the granting of Rule 3.850 relief.

The evidence presented at the hearing tracked the affidavits, reports, and other evidence presented with Mr. King's Rule 3.850 motion. The documentary evidence is herein cited as "App" by its appendix entry number. The post-conviction record is cited as "PC" and the sentencing record as "R." All other citations are self-explanatory or are otherwise explained.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action will determine whether Mr. King lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case, given the seriousness of the claims involved and the stakes at issue, and Mr. King, through counsel, respectfully requests that the Court permit oral argument.

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STATEMENT OF THE CASE AND FACTS

Mr. King was charged by indictment in Pinellas County, Florida, with first degree murder, sexual battery, burglary and arson on April 7, 1977.

After entering not guilty pleas to all counts of the indictment, Mr. King was convicted by a jury on all counts and sentenced to death on the first degree murder conviction on July 8, 1977. The trial court sentenced him to death on that same date.

The Florida Supreme Court's opinion on direct appeal is reported as King v. State, 390 So. 2d 315 (Fla. 1980). Mr. King's sentence of death was found to have resulted from an unconstitutional proceeding and was vacated by the Eleventh Circuit Court of Appeals. King v. Strickland, 748 F.2d 162 (11th Cir. 1984), previous history, King v. Strickland, 714 F.2d 1481 (11th Cir. 1983); King v. State, 407 So. 2d 904 (Fla. 1981). A death sentence was imposed at the resentencing proceeding. A majority of the Florida Supreme Court affirmed over dissenting opinions. King v. State, 514 So. 2d 354 (Fla. 1987). A subsequent petition for habeas corpus relief was denied by the Florida Supreme Court, also over dissenting opinions. King v. Dugger, 555 So. 2d 355 (Fla. 1990). Mr. King filed a motion for Fla. R. Crim. P. 3.850 relief. The trial court conducted an evidentiary hearing but thereafter denied relief. This appeal follows.

At approximately 4:05 a.m. police responded to a fire alarm and discovered the body of Natalie Brady inside her residence. She died of multiple injuries including a blow to the neck and stab wounds. The medical examiner attributed Mrs. Brady's death to multiple causes and established the time of death as 3:00 a.m. Arson investigators concluded that the fire was intentionally set at approximately 3:00 to 3:30 a.m. King v. State, 390 So. 2d 315 (Fla. 1980).

Amos King fell under suspicion because he had been found outside on the grounds of a nearby correctional facility and had assaulted a guard at approximately the same time as the murder.

At Mr. King's resentencing hearing, counsellor McDonnaugh testified that he checked Mr. King into the correctional facility at 2:35 or 2:40 a.m. after returning from a work release assignment. He then found him outside about an hour later with blood on his clothing (R. 1374-75; 1401). The State conjectured that Mr. King was able to leave the facility, travel to the Brady residence, burglarize the residence, commit murder and rape and set fire to the house all in the short space of time after he checked into the correctional facility. Mr. King denied that he had blood on his clothing until after the fight with McDonough and maintained his innocence. All of the evidence was circumstantial.

At the resentencing, the defense was raised that Mr. King was raised in an alcoholic family and had a history of drug addicition (R. 1249-50). The State presented testimony by Counsellor McDonnaugh that Mr. King did not appear to be under the influence of drugs or alcohol at the time of the offense although he admitted he had no expertise in making that judgment (R. 1413-15). No evidence was presented as to intoxication at the time of the offense.

At the postconviction hearing, Mr. King presented critical evidence regarding statutory and nonstatutory evidence that the judge and jury never heard. In regard to Mr. King's intoxication at the time of the offense, the only evidence heard by the judge and jury was that counselor McDonough testified that Mr. King was not intoxicated (R. 1413-1414). The jury never knew that Mr. McDonough gave a notarized statement to the Inspector General immediately after the offense that Mr. King was acting strangely when he saw him, "nervous, sweating profusely and acting as if he was 'high,'" and that "he [McDonough] realized he had trouble when he saw King's condition." (PC 203). Mr. King explained to the mental health expert that he was on work release to a restaurant where a St. Patrick's Day party was staged and he consumed a large quantity of alcohol. (PC 2228). The jury never heard the testimony of an inmate who smoked marijuana with Mr. King after his return to the work center and who believed that Mr. King was going to use cocaine to get

even higher (PC 2085-2108). Further, the jury never heard from three additional witnesses who observed Mr. King immediately before and after the offense and described him as intoxicated with a strong odor of alcohol (PC 4578-81). There was overwhelming evidence of severe intoxication at the time of the offense which the jury never heard.

At the postconviction hearing all of the experts agreed that Mr. King's judgment at the time of the offense was affected by his mental deficiencies. Specifically, they agreed that there was a history of severe substance abuse from an early age; a family history of extreme violence, neglect and physical abuse; mental disorder; and brain dysfunction. Despite the wealth of available mitigating evidence, both statutory and nonstatutory, no mental health evidence was presented to the judge and jury.

None of the relevant evidence regarding Mr. King's mental deficiencies and substance abuse was presented to the judge and jury because the relevant investigation was not done. Defense counsel testified that he relied on investigator Mathews to conduct the investigation. (PC 3175-76; 3228). Mr. Mathews testified that he did not conduct the investigation because he was waiting for direction from counsel. (PC 2784). Regardless of who was at fault, meaningful investigation was not undertaken. In addition, defense counsel stated that he focused his defense on developing evidence of Mr. King's innocence, which was not admitted into evidence:

> A This case has a difference. It has a difference than any of the other cases. The problem that I had with the state was, and with respect to Judge Federico, he told me I couldn't present any evidence of innocence, but he let Ms. McKeown present evidence of guilt.
>
> For example, they would not stop in their efforts wherever they could to slide in -- and I say this respectfully and they did a good job -- but to slide in as much to tie Mr. King to that murder. For example, the location of the knife. That was really in dispute, and I mean, I raised Cain if you read the record about that. And to me that's the difference in the King case. <u>And I respectfully disagree with the Florida Supreme Court because they can't tell me I can't present evidence of innocence and then let the state jam evidence of guilt down the throat of the jury who didn't know what in the world was going on in 1985 about a case that had happene [sic] in 1977. So you know, Mr. Mathews was interested in that issue, and we worked very, very hard on that issue</u>.

(PC 3189-90)(emphasis added).

At the postconviction hearing substantial evidence was presented regarding intoxication at the time of the offense; serious mental deficiencies; and the failure to provide competent mental health expertise. None of this evidence was presented to the judge and jury.

SUMMARY OF ARGUMENT

1. Mr. King was denied his rights to professionally adequate mental health assistance and to proper evaluation of mental health mitigating evidence due to inadequacies in the experts' evaluations and ineffective assistance of counsel, in contravention of the sixth, eighth, and fourteenth amendments. Due to confusion between the attorney and the investigator, the statutory and nonstatutory evidence in Mr. King's case was never investigated. The experts were never supplied with any documentary evidence other than a partial Department of Corrections file on Mr. King. All of the experts agreed that Mr. King's judgment at the time of the offense was affected by his mental deficiencies. Specifically, they agreed that there was a history of severe substance abuse from an early age; a family history of extreme violence, neglect and physical abuse; mental disorder; and brain dysfunction. Despite the wealth of available mitigating evidence, both statutory and nonstatutory, no mental health evidence was presented to the judge and jury. Because he totally failed to test for brain dysfunction, Dr. Merin's conclusions were unreliable as was the case in Sireci. There can be no reliable adversarial testing when the jury heard no mental health evidence whatsoever. Numerous indicators of brain dysfunction were present yet no testing was performed. Mr. King's rights to professional adequate mental health assistance were violated. The circuit court made no findings as to the professional adequacy of the evaluations by the experts at the time of sentencing.

2. Mr. King's trial counsel failed to provide effective assistance when he failed to investigate statutory and nonstatutory mitigation, failed to provide the experts with any background material other than a partial Department of Corrections file, failed to present any mental health evidence, failed to present any evidence to explain why Mr. King's history of substance abuse was mitigating although he told the jury that Mr. King was a heroin addict, and focused his defense on an incorrect interpretation of the law. Defense counsel testified that he relied on investigator Mathews to conduct the investigation. Mr. Mathews testified that he did not conduct the

investigation because he was waiting for direction from counsel. Regardless of who was at fault, meaningful investigation was not undertaken. In addition, defense counsel stated that he focused his defense on developing evidence of Mr. King's innocence, which was not admitted into evidence. The result was that judge and jury were deprived of virtually all of the available statutory and nonstatutory mitigating evidence.

3. Mr. King's rights to an individualized and reliable capital sentencing determination were denied by the sentencing court's refusal to allow accurate evidence and to provide instructions regarding the consequences of their verdict, in contravention of the sixth, eighth and fourteenth amendments.

4. Mr. King was denied his rights to an individualized and fundamentally fair and reliable capital sentencing determination as a result of the presentation of constitutionally impermissible victim impact information, contrary to the eighth and fourteenth amendments.

5. Mr. King's sentencing jury was inaccurately instructed that the alternative to a penalty of death was life imprisonment without possibility of parole for twenty years, contrary to state law and in violation of the sixth, eighth, and fourteenth amendments.

6. The trial court's unconstitutional shifting of the burden of proof in its instructions at sentencing, and its application of this same improper standard in imposing sentence, deprived Mr. King of his rights to due process and equal protection of law, as well as his rights under the eighth and fourteenth amendments.

7. The heinous, atrocious or cruel aggravating circumstance was applied to Mr. King's case in violation of the eighth and fourteenth amendments.

ARGUMENT I

MR. KING WAS DENIED HIS RIGHTS TO PROFESSIONALLY ADEQUATE MENTAL HEALTH ASSISTANCE, AND TO PROPER EVALUATIONS OF MENTAL HEALTH MITIGATING EVIDENCE, BECAUSE OF INADEQUACIES IN THE PRETRIAL EXPERTS' EVALUATIONS AND BECAUSE OF INEFFECTIVE ASSISTANCE OF COUNSEL, IN CONTRAVENTION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The rights to professionally adequate mental health assistance and effective assistance of counsel are closely intertwined. If the mental health professional's judgment professionally inadequate, defense counsel, who necessarily must rely on such opinions, becomes strapped by those inadequacies. See Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985); see also, Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988). Sometimes, however, the mental health evaluation is inadequate because counsel fails to convey important and necessary information to the mental health expert and fails to direct and guide the expert's evaluation as to what is legally relevant to the proceedings. Where an expert's opinions are professionally inadequate or invalid, the accused's fourteenth amendment right to professionally adequate mental health assistance is violated. This Court has held that relief under such circumstances is warranted. See Mason v. State, 489 So. 2d 734, 735-37 (Fla. 1986); State v. Sireci, 502 So. 2d 1221, 1223-24 (Fla. 1987); State v. Sireci, 536 So. 2d 231 (Fla. 1988). The results of trial level proceedings founded upon inaccurate or inadequate professional evaluations -- whatever the reason for the inadequacy -- cannot be relied upon and the results of the proceedings are rendered unreliable. Mason; Sireci.

In Mason, mental health professionals conducted pretrial evaluations and determined that the defendant was competent. Id., 489 So. 2d at 735-36. However, significant background information reflecting the defendant's history of impairments was not considered by the experts. Id. at 736. This Court remanded for an evidentiary hearing on the questions of whether the results of the initial evaluations were professionally valid.

In State v. Sireci, 502 So. 2d at 1222-24, a similar analysis was applied to issues involved in the evaluation of mental health mitigating evidence. After this Court's affirmance of the grant of an evidentiary hearing, relief was granted because the invalidation of the original experts' evaluations violated Mr. Sireci's

rights by depriving him of mental health mitigating evidence. Sireci, 536 So. 2d 231. This analysis, founded upon Ake v. Oklahoma, 470 U.S. 68 (1985), and the sixth, eighth, and fourteenth amendments, fully applies to Mr. King's case and demonstrates that relief is appropriate. Here, as in Sireci, substantial statutory and non-statutory mental health mitigating evidence was never heard by the jury charged with deciding whether Amos King should live or die because of the failings of the mental health experts involved at the time of the original proceedings. Mr. King was denied an individualized and reliable capital sentencing determination, and relief is appropriate. The circuit court did not make findings on these issues.

A. No mental health evidence was presented at the time of resentencing despite the fact that substantial mitigation was available.

At the time of trial, defense counsel retained Dr. James Mendelson to advise the defense, and the State retained Dr. Sidney Merin. Prior to filing the 3.850 motion in 1989, collateral counsel retained Dr. Joyce Carbonell. All of these experts testified regarding their findings at the evidentiary hearing. All of the experts agreed that Mr. King suffers from mental deficiencies which affected his judgment and behavior at the time of the offense, however, the jury never heard any testimony from a mental health expert regarding his deficiencies.

No brain function testing was conducted for Mr. King at the time of his resentencing. Although Dr. Merin knew Mr. King had a severe history of child abuse and drug abuse from an early age and had suffered a severe head injury as a child, he did no testing for brain damage (PC 3693, 3725, 3729). He, like the experts in Sireci, failed to consider this critical and significant issue. In addition to these indicators, Dr. Merin never sought out and never was provided with readily available records, which would have established that Mr. King had difficulty functioning in school and had reported fainting, dizziness and headaches to the prison authorities (App. 3 Dr. Merin report). Further, Dr. Merin confirms that had these reports been provided, he would have conducted brain function testing (App. 3).

The errors here, however, also were precipitated by the actions or inactions of Mr. King's counsel on resentencing. Counsel's former investigators now explain:

My name is David Mack and in 1985 I had five years of experience as a capital case investigator. I have been responsible for the investigation of at least 30 capital cases.

On May 25, 1985 I was appointed by Order of the court to investigate mitigating factors for State of Florida vs. Amos Lee King, Jr. Baya Harrison was the attorney that represented Mr. King. Prior to and during this appointment I had worked as a paralegal in Mr. Harrison's office.

Throughout my investigation I was disenheartened [sic] by Mr. Harrison's attitude towards the case. He never gave me any directions for my investigation, his demeanor was cavalier, and he was absolutely unconcerned about Mr. King's case. He would tell me that he did not have the time.

I spent three months as Baya Harrison's investigator on Amos King's case. Although I asked Mr. Harrison time and again to tell me what he wanted me to do and what witnesses he wanted me to contact, Mr. Harrison would consistently decline to discuss the substantive issues with me, telling me that he did not have the time. No investigation was conducted on the case: I received no direction from Mr. Harrison and therefore had no clue as to what tasks he wanted me to undertake. The totality of my efforts involved my seeing Mr. King at the Florida State Prison and asking him to list the names and addresses of his relatives, which he did, and an interview with one family member. These two tasks were accomplished on my own initiative and upon my insistence to Mr. Harrison that something had to be done on the case. After I obtained the information, Mr. Harrison indicated that he would not have time to discuss it with me.

I believe that Mr. Harrison served Mr. King an injustice in his handling of his case. In sum, Mr. Harrison was unconcerned and uninterested in Mr. King's case. I was in fact appalled by his lack of concern. As indicated above, the case was uninvestigated during the time of my involvement, because of Mr. Harrison's lack of concern.

(Affidavit of David Mack, App. 5). Mr. Mack testified at the evidentiary hearing in accord with what he related in his affidavit (See PC 2602-2766).

My name is Roy Matthews and I am a licensed private investigator. Most of my work involves capital criminal defense, and I have investigated and assisted in the preparation of numerous capital trials and sentencing proceedings throughout the State of Florida.

I was retained by Baya Harrison of Tallahassee, Florida to investigate and assist in the preparation for the capital penalty phase proceedings in State of Florida v. Amos Lee King in 1985. I was appointed by court order effective October 11, 1985, although I had actually commenced working on the case in late September or very early October.

When I commenced work on Mr. King's case, virtually nothing had been done by way of investigating and developing mitigating evidence to present at the resentencing proceeding. Mr. Harrison told me that he was unhappy with his previous investigator, who had worked on the case with him for some time, and that little had been done on Mr. King's case during that time. The case was, in fact, essentially uninvestigated when I became involved. As my work on the case continued, however, I realized that Mr. Harrison had no organized plan for the preparation and investigation of mitigating evidence.

Although I had had at that time significant experience in the investigation of capital sentencing proceedings, I always depended on the attorney for direction and specific instructions. In all of my previous experiences, the attorney would have a general idea of what mitigation was present, and would, with my cooperation, develop a general "theme" for the presentation of his case. I would then, consistent with that theme, and with the instruction of the attorney, investigate that mitigating evidence which the attorney felt important to the presentation of the sentencing proceeding. In most cases I had been involved with, both I and the attorney had also worked closely with a mental health expert, who would use the information I had developed in my investigation, and records I would obtain regarding the client, in his or her evaluation of the defendant.

My experience in the King case, however, was unlike any other experience I have had in any case in which I have been involved. I received no instruction or guidance from Mr. Harrison with regard to my investigation, what he felt was important, or what he was planning to present at the resentencing proceeding. I of course attempted to elicit such information from Mr. Harrison, but found it impossible due to the fact that Mr. Harrison simply did not know what was important or what he wanted to present. I could not engage him in an in-depth discussion of the case. I found this very unusual and disturbing.

Mr. Harrison provided me with limited facts of the offense and Mr. King's background. I do not recall seeing any discovery or police reports. Generally I would routinely review such records in a case prior to beginning my investigation. I had known before I was retained that Mr. Harrison had been involved in the case for some time, and I had expected much of the preliminary work to have been already done. I thought it particularly odd that Mr. Harrison was unaware and unable to relate exactly what had been done and what remained to be done. Almost nothing had been done. Due to the limited time we had to prepare the case, direction from Mr. Harrison was essential to an adequate and effective investigation. I did not receive that direction largely because Mr. Harrison did not have a clear idea of what evidence he was trying to develop.

I was left virtually on my own in the investigation of Mr. King's case. Because of the short time available for the investigation, I did not have time to personally review all the materials in the case. I relied upon Mr. Harrison to provide me with relevant information and direction regarding potential mitigation evidence. The more I got into the investigation, the more I realized he had no overall strategy or direction of the investigation or the defense. He did not investigate all avenues as is customarily done in an investigation of a capital case. I have since learned that there were numerous "red flags" in the records which would have aided my investigation and triggered inquiry into particular issues such as brain damage, child abuse, substance abuse, etc., which Mr. Harrison never discussed with me. I nevertheless was sufficiently familiar with the procedures and practices involved in capital sentencing to do what I could in terms of investigation of mitigating information, and tried to do so. I investigated Mr. King's background as thoroughly as possible under the circumstances, talking at length to various friends and family members, and attempted to relate to Mr. Harrison the information I had uncovered. Mr. Harrison, however, never seemed to understand any of this, and was generally disorganized.

In virtually all of the previous capital cases I had investigated, both I and the attorney worked closely with mental health professionals in the course of investigating and developing mitigating evidence. I knew from experience that an important part of my job as an investigator

was to provide the results of my investigation to the mental health professional to use in evaluating the defendant, and to provide the experts with records and other background information about the client. Customarily, I would coordinate interviews between the mental health experts and pertinent witnesses. I was aware that Mr. Harrison had retained the services of Dr. Mendelson as a mental health professional in the King case and suggested that Dr. Mendelson talk to the witnesses I had discovered. This did not happen. I was also aware that another expert, Dr. Merin, had been appointed by the court to evaluate Mr. King. Mr. Harrison never requested that I provide background information and records regarding Mr. King to the experts -- in my experience, a routine practice in capital cases. Mr. Harrison did not appreciate the interrelation between the mental health experts' evaluations, and the need for records and background information. As a result of Mr. Harrison's apparent lack of understanding, none of the types of background information normally provided to experts in the capital cases in which I have been involved was provided to the experts in this case. (For example, school records and other documents, and witness accounts.) I was never asked to make available the accounts of the witnesses I had contacted and to my knowledge the experts were not provided with the accounts of witnesses familiar with the offense and Mr. King's behavior at the time of the offense. The information I obtained from witness interviews was not in Mr. Harrison's possession so he could not have made it available to the mental health experts without my knowledge.

To my knowledge, Mr. Harrison did not discuss the merits of the case with Dr. Merin until after the sentencing proceeding commenced. Dr. Merin was deposed on the second day of the sentencing hearing. I had the opportunity to speak with the other expert, Dr. Mendelson, at the time of the hearing and learned from our brief conversation that the expert was unprepared to testify because he was unfamiliar with the background facts of the case. Neither expert was aware of what Mr. King's case involved as far as family history and other background information, and neither was made aware of Mr. King's records. Since Mr. Harrison never asked, I never obtained the types of documentary evidence and records I would normally obtain in capital cases, and consequently such records were not supplied to the experts. The experts had only Mr. King's self report and their test results. I have been told that Dr. Merin had partial D.O.C. records. Had Mr. Harrison only asked, both experts would have had the full records, which I was more than willing to obtain.

I knew from my own experience that background information could be important mitigating evidence, and looked for such information during the course of my investigation. After I found significant evidence of a longstanding history of both drug and alcohol abuse on the part of Mr. King, I of course informed Mr. Harrison. Several of the witnesses I had talked to were familiar with Mr. King's history, and knew firsthand of his addiction to heroin. Several knew of his reputation in the community as a heroin addict. Several were familiar with his early-arising abuse of alcohol-- in fact, one of the witnesses I spoke to informed me that Mr. King's father had made illegal whiskey, or "moonshine," while Amos was growing up, and had in fact encouraged his son to drink it as early as the age of twelve. When I provided this information to Mr. Harrison, I anticipated Mr. Harrison would decide which issues I should investigate and pursue further. Strangely, when I tried to discuss these issues with him after I uncovered the information, Mr. Harrison did not seem to appreciate the significance and was very confused. None of this information was followed up on. Many witnesses were available, and should have at least been contacted, who would have testified to Mr. King's serious drug and alcohol abuse. Mr. Harrison put those who were contacted on the stand without any

proper investigation or consideration of what information they could provide. I also understood that Mr. King may very well have been intoxicated at the time of the offense, but Mr. Harrison gave me no direction on investigation of this issue and did not inform me that such information existed. Mr. Harrison never adequately met any of the witnesses nor prepared the testimony of the witnesses. I was so concerned that I finally wrote out some questions for the witnesses during the sentencing hearing. When I tried to tell him earlier what the witnesses would say, he never took notes or recorded the information.

I did not know until the hearing that Mr. Harrison thought that the information relating to alcohol and drug abuse was of primary importance. He informed the jury during his opening statement that Mr. King had started abusing drugs at an early age and had become a heroin addict by the time he was a young teenager. Mr. Harrison presented only the "tip of the iceberg" of the evidence supporting his argument at the sentencing proceeding. Since he did not adequately prepare the witness testimony, he did not know what evidence existed to support his argument. Several of the witnesses who actually testified at the sentencing hearing were aware of this information, and prepared to testify in that regard, but Mr. Harrison simply failed to properly elicit it. Witnesses who were called were put on the stand unprepared -- Mr. Harrison did not take the time to talk to them prior to their testimony. Since he did not take the time to properly discuss the witnesses with me, he knew almost nothing about their accounts until they were put on the stand. Mr. Harrison was absolutely unprepared, and I was very concerned and frustrated about this at the time. Substantial evidence regarding Mr. King's drug and alcohol abuse, and regarding other mitigating evidence in the case, was never developed or presented. As stated, numerous other witnesses were available, but I was never instructed to contact them.

Mr. Harrison was so unprepared to examine many of the witnesses that I felt compelled to write out questions for him to ask them as the proceeding was actually going on. I had never before felt obliged to do this for an attorney, but I was genuinely concerned that Mr. Harrison was not adequately prepared. It appeared that Mr. Harrison was so intimidated that he was not thinking clearly. Many of the questions I gave him concerned exactly what I had earlier told him about the particular witness, but he didn't take notes and didn't appear to know what to get from the witnesses, particularly from Ada King and Ida James. The evidence I had uncovered regarding Mr. King's history and background, and his alcohol and drug abuse, was not effectively developed before the jury.

I am of course not an attorney. I do, however, have extensive experience in the investigation, development, and presentation of mitigating evidence at capital sentencing proceedings. I have never been involved in a case this poorly prepared and presented. Mr. Harrison did not take any steps to prepare and meaningfully present the evidence which I had developed. Mr. Harrison never indicated any strategic or tactical reasons for not properly organizing and investigating the case. I didn't see how he could be making strategic choices until after he had investigated the various possible avenues of inquiry. I was so upset and concerned at the sentencing hearing that I actually had to leave the courtroom on several occasions.

(Affidavit of Roy Matthews, App. 4). Mr. Matthews also testified at the evidentiary hearing and discussed the facts related in his affidavit (PC 2770, 2847-2938).

At the hearing, defense counsel testified that he relied on Mr. Mathewes. Mr. Mathews said he relied on counsel and thus he did not pursue evidence since he was not instructed to. The situation here is akin to the situation in Harris v. Dugger. These matters are discussed in Argument II, infra.

As the evidence herein discussed shows, "critical matters of mitigation were neglected" at the point when the jury was to decide whether to sentence [Mr. King] to death." Jones v. Thigpen, 788 F.2d 1101, 1103 (5th Cir. 1986). The experts -- Dr. Merin and Dr. Mendelson -- were provided with very little. But the experts themselves had the responsibility of undertaking professionally appropriate evaluations. In failing to do so, Mr. King's rights to a reliable sentencing determination were violated, Sireci, and his right to effective counsel was also undermined by the experts' failings. Blake. Mr. King was never afforded an adequate mental health evaluation, because neither Dr. Merin nor Dr. Mendelson conducted brain function testing despite the presence of known indicators of brain dysfunction and failed to obtain records which could have provided further indicators.

Dr. Joyce Carbonell has since conducted a full battery of brain damage testing, including evaluating and administering tests to Mr. King on three different occasions. It was her professional opinion to a reasonable certainty that Mr. King does in fact suffer from organicity which affected his behavior at the time of the offense. She also found that he exhibited severe mental illness on tests conducted at various times during incarceration. Dr. Carbonell relied on notarized statements made by eyewitnesses to the Inspector General at the time of the offense that Mr. King had a strong odor of alcohol and appeared high, and a great deal of other supporting evidence in finding that Mr. King was intoxicated at the time of the offense. She testified that this finding was corroborated by the aberrant behavior of Mr. King when he attacked the prison guard, contrary to his prior history as a good inmate.

Upon the provision of relevant background data to a competent mental health expert, statutory and non-statutory mitigating evidence would have been available in this case in abundance. Mr. King was entitled to professionally adequate mental

health assistance. Ake v. Oklahoma; Blake v. Kemp; State v. Sireci. He was also entitled to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). The issue involved in this case is whether the denial of the right to effective counsel and to expert assistance undermines this Court's confidence in the reliability of the result of this capital sentencing proceeding. It should.

At the time of Mr. King's resentencing, Dr. Mendelson and Dr. Merin found Mr. King to be an antisocial personality. That finding should never have been made -- it did not apply to Mr. King. The experts reviewed almost none of the readily available background information regarding Mr. King and thus did not know who he was. The experts did not conduct necessary testing, did not consider relevant background information and did not assess significant issues relating to Mr. King's demonstrable mental illness -- Amos King is organically brain damaged.

Mr. King's due process rights to professionally adequate evaluations of his mental status at the time of the offense and to discovery of extant mitigating circumstances were violated. Sireci. The experts who evaluated Mr. King for the resentencing explained at the time the 3.850 motion was filed that their opinions were subject to reevaluation due to the lack of testing and background information:

> At your request I have reviewed my evaluation of the above-captioned inmate (August 8, 1985) and some additional information provided by Dr. Joyce Carbonell (November 26, 1988). From her report several critically important pieces of information have come to light. On the night of the stabbing of Officer McDonough, Amos King was quite intoxicated. This was far in excess of the portrait he painted for me 3 years ago when his level of alcohol consumption was diminished. Of perhaps greater importance is the fact that Dr. Carbonell also found evidence of diffuse brain damage which would have substantially interfered in his judgment impulse control, and reality contact on the night in question. I was not directed to inquire into the possibility of organic impairment, but had I had the benefit of these two essential pieces of information (i.e., intoxication and brain damage) I would have reached substantially stronger and more forceful conclusions in my own report. Essentially, I very much agree with Dr. Carbonell that these factors constitute mitigating factors and deserve further evaluation and consideration.
>
> Another piece of data that was not made available to me or Dr. Merin were facts regarding Mr. King's background and behavior which are not consistent with a diagnosis of an Antisocial Personality Disorder. Both of us reached the independent conclusion that he should be classified as such; her data and the other additional information, including Mr. King's full incarceration record, school records, and other records, has the effect of causing me to now reconsider that diagnosis.
>
> Finally, her description of his interview remarks regarding his attorney as a collaborator with the prosecutor, who jointly with the judge conspired against him, clearly suggests a paranoid disorder. These

> paranoid delusions did not show up in my own interview because they are encapsulated and were not triggered by any of my inquiries. I felt at the time that his high score on Scale 6 of the MMPI (that measures paranoia) was perhaps artificially inflated by the fact that he was on death row. Given this new information, I am now much more inclined to believe that he has strong pockets of paranoia which could either be the product of, or separate from, his problems with drugs and brain damage.
>
> Taken as a whole it is now my opinion that there are cogent reasons to favorably consider the question of mitigating factors, including the issues of drugs and alcohol intoxication, brain damage, and a paranoid disorder. The new data brought out by Dr. Carbonell's report strongly moves me to that persuasion.

(App. 2, Dr. James M. Mendelson). Dr. Mendelson's report was introduced at the evidentiary hearing, and he also testified (PC 2938-2999). His testimony was that he did not know whether Mr. King was brain damaged, since he was not asked to evaluate the issue originally, and that he had no opinions on statutory and non-statutory mental health mitigating factors, again because he never assessed such factors initially. Dr. Merin likewise stated at the time that the 3.850 was filed that his initial opinions were hampered by lack of background information:

> This letter is intended to summarize some of my recent thoughts regarding Amos Lee King. I conducted an evaluation of Mr. King in 1985. As we discussed on the telephone, I have recently learned that numerous materials (including records and accounts of witnesses) regarding Mr. King were available at the time of my 1985 evaluation, but that these materials were never provided to me. For example, I have recently learned that only an edited version of Mr. King's Department of Corrections records were provided to me. I was also never provided with his school records, Sheriff's records, and other important materials. Accounts of witnesses reflecting Mr. King's possible intoxication at the time of the offense, and corroborating the accounts he provided regarding his intoxication at the time were not provided, and I was never given prior testing results, such as those reflected in his Department of Corrections records.
>
> Such materials are very relevant to a full and adequate mental health evaluation in a case such as this -- where the question is one of mitigation covering an individual's functioning throughout his life as well as at the time of the offense.
>
> Additionally, I was never asked to and did not consider the question of brain damage. I have recently had the opportunity to talk with Dr. Carbonell about her evaluation. Her examination results from her testing performed on November 23, 1988, were suggestive of impairment of brain function.
>
> Based on her scores and the information now available, I believe it would be appropriate for me to conduct further neuropsychological testing. The history reflected in the records provided is often found in individuals who eventually develop a diffuse encephalopathy. As stated, the history was never provided to me. Had it been, or had I been asked, I would have independently examined for brain damage.

> These issues are significant because individuals with brain damage may suffer from difficulty with impulse control, emotional lability, and paranoia, among other factors, and in addition their susceptibility to substances such as alcohol is much greater, all relevant to the question of mitigating circumstances. Of course, authorities recognize that a finding of antisocial personality disorder should be carefully assessed in cases involving brain damaged patients. Thus, the possibility of brain damage is an issue which should have been fully assessed at the time of the original evaluation. Moreover, the collateral data now available in Mr. King's complete record indicates that mental illness and other factors are issues in this case that should have been and must now be assessed and considered. These issues bear on the underlying dynamics contributing to behavior often defined as antisocial.
>
> As stated, I was never provided with records indicating that Mr. King had consumed alcohol at the time of the offense. This pertinent information was not available for assessment at the time of my original evaluation. Generally, intoxication impairs judgment and control, affects one's emotions and thought processes, and affects one's behavior. In a case such as this, an assessment of such factors would be even more important because alcohol consumption combined with an organic brain syndrome (for example, a diffuse encephalopathy) would very likely affect behavior.
>
> These matters are all relevant to mitigation, statutory and nonstatutory. However, as discussed herein, they were not assessed at the time of my original evaluation. All of Mr. King's records were not provided to me. Apparently, Dr. Mendelson worked under similar constraints.
>
> I was never asked these critical questions, nor asked about relevant mitigating circumstances at the time of my original evaluation. These matters should have been assessed in 1985, and certainly should now be assessed. I understand that Dr. Carbonell is now conducting a neuropsychological evaluation and that the full record has been provided to her. I understand that you would like for me to also evaluate Mr. King in light of this information. As stated, I believe these matters should have been assessed in 1985 and need to be assessed now relative to the important questions regarding mitigating circumstances involved in this case, and I would therefore be willing to undertake this task.

(App. 3, Dr. Sidney Merin) (emphasis added). Dr. Merin's report was also introduced at the evidentiary hearing and he also testified.[1]

B. <u>Dr. Merin's brain damage testing was incomplete and unreliable</u>.

Dr. Merin concurred with Dr. Carbonell that Mr. King suffers from brain dysfunction but disagreed as to the degree of this disability. By the time of the hearing, however, he had been retained by the State. As even a cursory review of his testimony demonstrates (<u>see</u> PC 2370-2456, 2509-2529), this doctor had become about as biased in favor of the State as any expert can get. This alone should raise questions. But what was learned at the hearing about the gross

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[1] The records referred to in Dr. Merin's report were provided by the State. They were incomplete.

unprofessionalism in Dr. Merin's original and post-conviction evaluations can only be characterized as startling. The trial court however did not make findings on this issue. This Court should remand the case for such findings.

On the stand, Dr. Merin admitted that he erroneously calculated a number of tests, tests upon which he relied, and tests which were the basis of his opinions. As he acknowledged, his improper evaluation of the tests left him looking like "a fool." To be sure, Dr. Merin did some quick side-stepping to try to buttress his opinions. This too proved unsuccessful -- given his admissions that he had unprofessionally scored the tests, the basis for expert opinions were sorely lacking.[2] Dr. Merin further acknowledged that he had not been provided with relevant records originally and that his testing was incomplete. A psychologist who invalidly scores his tests, whose opinions are founded on those deficiencies, who has not requested or reviewed important records, and who is demonstrably biased does not render professionally appropriate assistance.

In 1985 there were numerous indicia which should have triggered an evaluation of brain damage. Even the State's expert, Dr. Merin, conceded that he was aware of early substance abuse, abusive home life, head injury and poor performance in school -- all of which should have triggered an inquiry into brain damage (PC 3692-93, 3705-06, 3715, 3725, 3789). All the evidence is in agreement that no evaluation or testing was done, however, to discover brain deficiency. On the stand Dr. Merin conceded as much. And when, for the postconviction hearing, he did some testing at the State's request he acknowledged on the stand that he erred in this testing and the way it was calculated.

The State retained Dr. Sidney Merin as a state expert. Dr. Merin's account on brain damage was flawed. However, it is notable that Dr. Merin's account also provided an impressive amount of mitigating evidence he could have presented to the judge and jury. In 1985, the State's expert could have testified to the following facts:

Mr. King has a Beta IQ of 86 (PC 3673).

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[2] Dr. Merin's admission came about because he was informed about the testimony of Dr. Carbonell regarding the errors in his testing scores. When he took the stand he then admitted "the obvious."

The Beta IQ of 86 and Dr. Merin's subsequent testing indicate that Mr. King has a deficiency in the functioning of the right side of his brain (PC 3715-17, 3755).

At the time of the offense, Mr. King suffered from poor judgment and impulsivity (PC 3772, 3802). Mr. King would have been overly sensitive and likely to misinterpret or distort things that were said to him (PC 3780). Mr. King would not have reflected on his act at the time of the offense (PC 3803).

He had a difficult childhood due to poverty and violence in the home including shooting and cutting, which eventually resulted in Mr. King's father killing his mother. Both parents drank and Mr. King was severely abused, often for no reason. (PC 3693, 3725).

Mr. King failed eighth grade and left school shortly thereafter (PC 3694).

Mr. King's IQ was significantly depressed by his home environment (PC 3699-700).

Mr. King's family suffered from severe poverty (PC 3693, 3725).

Mr. King got along well with people, was never a bully, but rather had always been nice to people, was somewhat of a private person, and had more acquaintances than friends (PC 3705).

Mr. King held numerous jobs as auto mechanic, fruit picker, masonry and yard work (PC 3705).

Mr. King suffered from severe drug and alcohol abuse starting from an early age including marijuana, barbiturates, heroin, and cocaine and that drug abuse is relevant to an assessment of brain damage (PC 3705, 3706, 3715).

Antisocial behavior can be caused by brain damage, behavioral problems due to child abuse, and developmental problems (PC 3723).

In Mr. King's case his "horrendous" background was a cause of his antisocial personality. This is unfortunate but not surprising given the extreme degree of violence and neglect during his childhood (PC 3723-26).

Dr. Merin considered head injury and severe drug abuse in assessing Mr. King. The type of stuff Mr. King was using "probably burnt out some dendrites". This type of damage can become rejuvenated after a period of time in a drug-free environment (PC 3789).

Mr. King had no known prior history of inflicting personal injury on another person (PC 3813).

Dr. Merin was in agreement with virtually all of the mitigating evidence which Dr. Carbonell testified to and which the jury never heard. He disagreed, however, as to the degree of brain dysfunction and as to whether Mr. King's mental state constitutes statutory or nonstatutory mitigation. For example, Dr. Merin conceded that Mr. King has "right hemisphere problems" with his brain:

Q You indicated in your report, in fact I think on a couple of occasions, that there is some suggestion of some right hemisphere problems in Mr. King's case?

A That's correct.

(PC 3716).

Q You indicated earlier that there were some indications of right hemisphere problems in Mr. King's case?

A That is correct.

Q Did you ever give any specific test to assess the extent of those problems?

A Of which?

Q Of those right hemisphere problems, something to specifically test that?

A The revised Beta examination gives us some information in that regard. The visual memory function of the Wechsler Memory Scale Revised give us some information with regard to that. The Rey-Osterreich Complex Figure Examination is directly related to that. The Bender-Gestalt Visual Motor test with memory is also directly related to it. Of course the nature of his drawings is generally or can be concluded in some respects to be a right hemisphere function, those examinations.

Q And based on those you noticed that there was some problems in right hemisphere function?

A Yes, a deficiency or an inefficiency, not necessarily brain damage.

Q Not necessarily brain damage, but it could be?

A Well, that's a lot of guesswork. This is what I would refer to -- I had a clinic for learning disabled individuals, this is what we would refer to as right hemisphere type of learning disability as opposed to dyslexia.

(PC 3754-55). Dr. Merin conceded that there could be brain damage; however, he disputed the degree of the brain deficiency. To that extent the reliability of Dr. Merin's findings are at issue and are discussed in more detail.

In regard to the testing which he performed on Mr. King in 1989, Dr. Merin conceded that his results were in error and that he had overscored Mr. King's IQ by <u>22 points</u>:

Q Now, during the course of the 1989 evaluation did you report a Beta IQ score in your report?

A Yes.

Q Can you tell us what that score is, please?

A I think it was 86. Yes, Beta score of 86.

Q And do you recall reporting a W.A.I.S.R. IQ score in your report?

A Yes.

Q Can you tell us what that score was, please?

A The score is 104. I reported it as 126, but that's an error.

(PC 3673-74)(emphasis added).

Q Now, why did you recompute -- I just heard this for the first time. When did you do this by the way, this recomputation?

A Today.

Q And can you tell us how it came about that you did it?

A Yes. I received a telephone call as I was going over all this material from Mr. Crow who informed me that there was a report by Dr. Carbonell apparently that there was an error in my computation, which absolutely floored me. I went back, I had my testing assistant come over to my home where I was doing my studying and bring the manual with me [sic], we reviewed it and indeed that was the error; that is, we took it off the performance scale rather than the verbal scale.

(PC 3684) (emphasis added).

Q Now, if you had not received a telephone call today is it fair to say that you would not have rescored the W.A.I.S.R.?

A That's correct.

Q You would have relied on the 126?

A That is correct.

Q You would have relied on the 126?

A That is correct. I would have looked awfully silly.

(PC 3717) (emphasis added).

Not only did Dr. Merin improperly score his tests, he admitted that he had given only the verbal part of the WAIS-R intelligence test and had not given the performance part (PC 3679). This was very significant because a brain damaged individual would be expected to do more poorly on the performance section. Since Dr. Merin never administered a complete test for IQ in either 1985 or 1989, he was unable to give an opinion as to Mr. King's full-scale IQ (PC 3702). Dr. Merin also conceded that he had made an error in scoring the Peabody Picture Vocabulary Test and had had to recompute it from the 37 percentile to the 87 percentile (PC 3733). Furthermore, although Dr. Merin rescored Mr. King's IQ to 104 (PC 3699), he stated

that he based his "recalculation" on the three highest scores out of six subtests given to Mr. King:

> Q And taking all six of those categories you have the raw score of 67?
>
> A Correct.
>
> Q Nevertheless, you took the three highest, information, vocabulary and comprehension, and you recalculated?
>
> A That is correct.

(PC 3686). As he agreed at the hearing, had he considerecd the other three -- the thre lowest -- the results would have been dramatically different.[3] Again, Dr. Merin conceded that the information and vocabulary scores which he selected were the least likely to be affected by brain damage (PC 3704-05). He also testified that Mr. King did more poorly on the digit symbol test, the test that is most sensitive to brain dysfunction:

> Q And what kind of things did digit symbol test?
>
> A It involves under time pressure the ability of the individual to learn symbol relationships in much the same way as you would learn letters or those little hieroglyphics we call letters and words.
>
> Q Is that something that is more sensitive to the possibility of organicity as something like say vocabulary?
>
> A It can be. It's also very sensitive to learning disorder.

(PC 3700). Dr. Merin admitted that due to what he characterized as time constraints, he was unable to complete all his testing (PC 3701). He also conceded that he gave his tests subsequent to Dr. Carbonell and that there was a potential "learning effect" which could have artificially elevated the later scores (PC 3703). Further, Dr. Merin testified that on the Trails A and Trails B tests, it took Mr. King 25 seconds and 36 seconds to complete a test that a normal person can do in 12-13 seconds (PC 3723). Dr. Merin also testified that Mr. King had 47 errors on the categories test; a range of approximately 50 errors is in the brain damage range (PC 3729-30). He described Mr. King's draw-a-person test as immature, bland and

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[3]Dr. Merin could provide no explanation for why he chose the three highest scores and refused to consider the three lowest. Obviously, when the three highest are arbitrarily selected, the results will be skewed up as Dr. Merin admitted.

primitive (PC 3750). He admitted that he did not administer the Cantor-Bender test which is designed specifically to screen for right-side brain damage although he himself had noted such damage (PC 3753).

At no time did Dr. Merin question Dr. Carbonell's test results or the integrity of her findings. He merely stated that his own findings differed although he himself admitted that they were based on incomplete, improperly scored test results. Further, his ultimate conclusion was that there was in fact right brain-dysfunction although he characterized it as a "learning disability." This characterization was flawed. The learning disability was due to Mr. King's brain damage but, as he acknowledged, Dr. Merin neither completed the testing nor scored it properly.

Moreover, the ultimate effect of Dr. Merin's testimony on a jury even on the basis of his flawed testing would have been that he agreed that there was brain dysfunction, and that it was only a question of degree. The jury would have known that Dr. Merin's testing was incomplete, that he calculated Mr. King's IQ based on the three highest scores of six subtests, and that his original calculations on two different tests were in error. And Dr. Merin did not consider the issue of brain damage at all at the time of his original evaluation.

As to Dr. Merin's findings that Mr. King suffered from an antisocial personality disorder, the trial court is in error in finding that this diagnosis would not have been mitigating <u>in this case</u>. An antisocial diagnosis is only detrimental to mitigation when it stems from the inherent nature of a defendant. <u>That is not the case with Mr. King</u>. Dr. Merin testified that Mr. King's antisocial behavior was the direct result of the terrible abuse, neglect, and poverty of his childhood:

> Q Now, you indicated a contributing factor in Mr. King's case in his childhood history; is that --
>
> A Yes.
>
> Q Relate to us what that history is as you understood it in 1985.
>
> A To save time, pretty much what I said before, he has a terrible relationship with his father, he had very poor relationship with his father, observing his mother beating father, guns, knives, cutting, alcoholism, all of those that are contributory. Until the

individual is nine, ten, eleven years of age then that child begins to make decisions and it is at that point that we begin to develop concepts of a conduct disorder which eventuates in an antisocial personality disorder.

Q The poor relationship with his parents when he was a child, that came from the parents, did it not?

A That is correct.

Q Okay. And that was imposed on Mr. King, was it not?

A He was exposed to it, not necessarily imposed upon him.

Q Is there a history of neglect and abuse in this case?

A I would expect there most certainly was. I think it would be consistent with that.

Q And you indicated that there is a history of mistreatment?

A Yes.

Q Is there a history of poverty?

A Very much so.

Q Is it surprising based -- assuming that Mr. King -- let me just phrase it this way, assuming hypothetically that Mr. King suffers from an antisocial personality disorder, is it something surprising based on his history, would that surprise you?

A Not surprising. It's unfortunate rather than really surprising.

(PC 3724-26) (emphasis added). In fact, Dr. Merin stated that had Mr. King had a normal childhood, even his IQ would have been much higher (PC 3700).

Not only did Dr. Merin say Mr. King's antisocial actions were not his fault, but there is serious question about the reliability of Dr. Merin's diagnosis of an antisocial personality disorder. Dr. Merin admitted that he had absolutely no evidence of the criteria required by DSM III for a diagnosis of antisocial personality disorder either in 1985 or 1989 (PC 3707-14). The finding itself was made without meeting the requisite criteria. This is not reliable. Dr. Merin also conceded that behavior such as truancy can be due to causes other than antisocial personality such as brain damage, child abuse, drug abuse or a personality disorder, such as paranoia (PC 3722-23). Dr. Merin conceded that Mr. King did not have the antisocial personality profile of "4/9" on his MMPI (PC 3811) and that on the MMPI his paranoia scale was elevated (PC 3798).

The trial court opined that all of this mitigating evidence should have not been presented because Dr. Merin would have given the following opinion regarding future dangerousness:

> THE COURT: Let me ask this one last question while I have the page here that I was looking for. Doctor, Mr. Harrison indicated that one of the reasons he elected not to call his expert -- I guess one of the reasons is because you were prepared to testify for the State. One of the things he was afraid they would be able to elicit was the fact that you had said that Mr. King was a very dangerous man I believe is what his quote was.
>
> THE WITNESS: Yes, ma'am.
>
> THE COURT: Is that -- is he accurate in his memory that you said something along those lines?
>
> THE WITNESS: Yes, ma'am.
>
> THE COURT: And would you have been prepared to testify to that if -- as to that if called by the State and if it were otherwise relevant and allowed?
>
> THE WITNESS: Yes, with the qualification that dangerousness is difficult to predict, but there are some -- some ways of increasing the probabilities of that prediction.
>
> THE COURT: And you feel the same way today or in the future based upon the evaluations that you have made as of today?
>
> THE COURT: Yes, ma'am.
>
> THE COURT: Okay.

(PC 3807-08)(emphasis added). Not only did Dr. Merin qualify his opinion with the observation that "dangerousness is difficult to predict" but he stated that he was not aware of a single instance in which Amos King had ever hurt someone at any time either before or since the offense (PC 3812, 3809-10). The jury would have known that none of the disciplinary reports in prison involved a single instance of harm to another person. Moreover, future dangerousness is not an aggravating circumstance. It is not relevant to a capital proceeding unless the defense presents as mitigation evidence that the defendant will not be a danger in the future. Obviously, the circuit judge's decision is premised on an error of law.

The trial judge is correct in her assessment that "At first blush these statutory and nonstatutory mitigating factors may seem impressive" (PC 2552). She was correct that they constitute "roses" which the jury never heard. However, what the trial court attempted to characterize as "thorns" are really only a few wilted

leaves. The Court's first so-called thorn is that all the doctors "disagree." In fact all of the doctors agree there is brain dysfunction, that there is a personality disorder and that there is a history of severe substance abuse. They agree that Mr. King had a horrendous childhood of poverty, violence and neglect. They agree that he was beaten and suffered head injury. They agree that his behavior was impulsive and that he had poor judgment. They agree that his upbringing caused his mental disorders. The characterization of the degree of brain dysfunction is merely a wilted leaf and not a thorn. Certainly, it cannot justify presenting no evidence as to Mr. King's mental disabilities and their effect on his behavior at the time of the offense.

All of the expert witnesses agreed that many indicators of brain damage were present in 1985. However, the testing was never done. This is the gravamen of Mr. King's Sireci claim. Given Mr. King's history of early and severe substance abuse, the violent child abuse, the poor performance in school and the severe head injury, it fell below the standards of adequate professional mental health assistance to do no testing. Again, whether the mental disorder caused by his upbringing is paranoia or a personality disorder is a wilted leaf and not a thorn. Dr. Merin testified that Mr. King's disorder was caused by the horrendous violence and neglect which he suffered as a child. Amos King was not to blame for it.

The court believed that Mr. King's substantial and severe history of drug and alcohol addiction should not have been raised because of speculation that the jury may have learned that he committed minor crimes to support his habit. Defense counsel informed the jury that Mr. King was a heroin addict. Surely, citizens in this day and age realize that poor persons suffering from severe drug addiction support their habit with petty crimes. The jury was already aware of a substantial criminal history. The jury knew Mr. King was an addict, defense counsel told them so, but they were never told why that was a mitigating circumstance. Again, only a wilted leaf.

Finally, the trial court opined that Dr. Merin's testimony would have been "devastating" to the defense. Mr. King has demonstrated repeatedly that Dr. Merin's testimony would have been very mitigating and in large measure corroborative of Dr.

Carbonell's testimony regarding Mr. King's mental deficiencies and their effects on his behavior. And, in any event, Dr. Merin's account was in many instances flawed, as he admitted. The circuit court should have considered this issue, see Sireci, before speculating on the effect Dr. Merin's views may have had.

Of the two original experts, Dr. Mendelson never formulated opinions, because he was not asked, and Dr. Merin, as he all but admitted, could not formulate any valid opinions because of the grossly unprofessional procedures he employed. This case is thus strikingly like Sireci: although mental health evidence (the mitigation arising from Mr. King's impaired mental health) should have been heard by the jurors, none was heard because of the deficiencies of the examiners.

Mr. King was brain damaged, mentally ill, and his brain was fried by a history of drug and alcohol abuse. As Dr. Merin put it, Mr. King "burned out some dendrites." Mr. King's level of functioning at the time of the offense was impaired by his mental deficits and his consumption of alcohol. Evidence of statutory mitigation (extreme emotional disturbance; impaired capacity to conform conduct to requirements of law) and non-statutory mitigation was abundant in this case and should have been heard. A professionally adequate evaluation was never provided to Mr. King -- the experts failed to conduct their craft properly. Dr. Merin's results were tentative, incomplete and unprofessional. They could not form an adequate basis for the finding that no mental health evidence should have been presented to the jury.

C. Substantial statutory and nonstatutory mitigation existed which was never presented to the jury and adequate adversarial testing never occurred due to the inadequate and unreliable evaluations at the time of sentencing.

A wealth of mental health mitigation was available in this case. Even minimal, efforts on counsel's and the experts' parts would have made a difference. Had Mr. King been properly evaluated, the jurors would have heard an overwhelming case for life.

Mr. King was evaluated, post-conviction, by Dr. Joyce Carbonell. Dr. Carbonell considered background information and conducted proper testing. Her credentials are impeccable. Her report (admitted at the hearing) was as follows:

As you requested I have prepared a report summarizing my findings with regard to Amos King, Jr. You have asked that I examine Mr. King to determine what, if any, mental health related evidence in mitigation of sentence was available for presentation at the time of his 1985 capital sentencing. Since your request I have spent approximately 4 1/2 to 5 hours with Mr. King on November 23, 1988. I interviewed Mr. King and various psychological tests were administered. Because of Mr. King's history and information contained in collateral sources, I evaluated him in terms of personality functioning, brain damage, achievement levels and intellectual levels. The following tests were administered: the Wechsler Adult Intelligence Scale - Revised (WAIS-R), the Wide Range Achievement Test - Revised, Level 2 (WRATR-2), the Canter Background Interference Procedure for the Bender-Gestalt (Canter-Bender), the Minnesota Multiphasic Personality Inventory (MMPI), the Tactual Performance Test (TPT) and the Finger Oscillation Test. Additionally, I reviewed substantial materials concerning Mr. King's background and history and spoke with several members of his family. These materials are listed at the end of the report.

The report that follows is based on the testing, my interview of Mr. King and an examination of extensive records available regarding Mr. King. The report is also based on my training and experience in psychological assessment and general experience as a clinical psychologist. I have conducted numerous assessments involving the use of psychological tests and teach graduate level courses in the administration, scoring and interpretation of personality tests. I have been consulted on competency evaluations, insanity evaluations, mental health issues in forensic cases, Baker Act proceedings, and have served as an expert witness in civil and criminal proceedings. I have served as a consultant for the Office of Disability Determination in the State of Florida and am currently a consultant for the Georgia Department of Human Resources at a state hospital in Thomasville, Georgia. I am a tenured associate professor of clinical psychology at Florida State University. Additionally, I am licensed as a psychologist in the states of Florida and Georgia and am certified as an instructor by the Florida Commission on Criminal Justice Standards and Training.

Interview and Background Information

Mr. King is a 34 year old black male who reports having been incarcerated since July 1977. He was born in Tallahassee, Florida on August 16, 1954. He reports that the family moved shortly after he was born and continued to move frequently until approximately 1960. The moves were apparently related to his father's employment. Mr. King is the second oldest of nine children. He attempts to portray his parents in a positive light but when pressed admits that drinking and fighting were routine behaviors in the household. Other family members have reported over the years that there was little parental guidance, that both parents were alcoholics and that the children, Amos included, were beaten with "sticks and ropes and plow lines." (testimony of Ira Dean James). Other reports indicate that the children would "run out screaming, hollering would somebody come stop their parents from fighting." (testimony of Mayme Moreland). Other children in the family also report chronic fighting, lack of sufficient food and lack of supervision (testimony of Ada Lee King). Violence in the family was so severe that it resulted in Mrs. King's death in 1971. Mr. King (Amos's father) shot Mrs. King. Mr. King was subsequently stabbed to death by his landlady in 1985.

In spite of an exceptionally disturbed family, Mr. King performed at an average level. His school records indicate that Amos was interested in school subjects (reading and arithmetic). They also

state that Amos "enjoys working with others in his group." Later (1966-67) it is reported that he "Can work and think independently" but that he was "Influenced by the actions of his peers."

Mr. King reports that he began the use of drugs and alcohol at approximately 12 or 13 years of age. This is corroborated by his sister Ada King, who testified at his sentencing. In addition, I had a telephone conversation with her (November 26, 1988) in which she confirmed this. She reported that Amos was "hanging out" with the wrong kind of boys and was influenced by them. This is consistent with school reports indicating that he was easily influenced by the actions of his peers.

Other people also corroborate his drug use. An affidavit from Ronald Joseph Massey indicates that he and Mr. King began the use of beer, marijuana and any pills they could get when Mr. King was 12-13 years old. Eventually they graduated to heroin use to which Amos became addicted. Others report that although they did not see Amos use drugs, that it was "common knowledge" that Amos used drugs (affidavit of Stephen J. Grant). Other information in the Department of Corrections' files indicate that his drug problem continued. Mr. King's father indicated (in a post-sentence investigation interview in 1972) that he had seen his son with "needles and other paraphenalia" and felt that his son had been using drugs. Amos's common law wife, Ellen Brown King also noted in 1972 that Mr. King used drugs and was "going along with what others want him to do." A Florida Division of Corrections Psychological Screening Report Interview Sheet also notes that drugs are a special difficulty for Mr. King. Psychological testing in 1975 and 1972 indicates an MMPI (Minnesota Multiphasic Personality Inventory) profile that is frequently found "among adolescents who are using drugs" (Graham, 1987).

Perhaps as a result of his lack of supervision in the home and his drug use, Mr. King became involved in a number of juvenile offenses. Some prison records, in fact, list drugs as a "causative factor" in his criminal behavior. In spite of his offenses Mr. King's incarceration records indicate that he was a "model" inmate. He was described as having a "favorable attitude" (September 18, 1975). He was described as putting forth "above normal effort" on his job (October 17, 1975). He was not seen as "a disciplinary problem of his own volition" (December 8, 1972). He was also described as "making an honest effort to improve himself" (April 23, 1973). He was at this time given 6 days extra gain time based on his "overall institutional adjustment, good attitude and good work performance." His attitude was described as "good" (March 31, 1973, September 30, 1973) and he was also described as "polite and friendly."

At other times the prison evaluators explained that his attitude was "exceptionally good," and that he was a "hard working inmate" who was recommended for extra gain time because he kept his work area in "outstanding condition for several months" (undated Inmate Performance Report). He was also described on October 10, 1973 as having an "exceptionally good attitude" and as being an "excellent student" in "academic school" and as having "excellent dorm and work reports." Other reports (October 1, 1973) also indicate an excellent attitude. His Florida Division of Corrections Reclassification and Progress Report (May 16, 1974) indicates that he puts forth "above normal effort" and that his attitude towards supervisors and other inmates was "very good." On November 14, 1974, a progress report indicates that he gets "disturbed and excited at times . . .", but also notes that progress on his job is above average. He completed a GED while in prison on December 20, 1973. He was given extra gain time as a

result of his "excellent overall institutional adjustment." He was granted numerous furloughs while at a work release center. Another Reclassification and Progress Report dated on June 8, 1976, states that "his attitude towards his work is very attentive and he displays a desire to do his best." Mr. King is described as "eager to accept more responsibility" and as "cooperative and friendly" towards his supervisor. The prison authorities also described Mr. King as "needing little supervision" and as being a "positive influence and trustworthy." On August 26, 1976, the evaluators noted that he was an "asset towards the entire operation of the gym" and recommended him for gain time. On May 9, 1976, he was described as constantly displaying a "positive approach to problems," and also that "he has displayed model inmate characteristics of this department." In October of 1976, he was reduced to minimum custody because of the "number of good work, Quarters and School Reports . . ." In November of 1976, his work and attitude was still described as "very good." In addition, on November 16, 1976, his work report stated: "Inmate King, Amos has done an exceptional job for the Rec. Dept. when ever a job is asked of him you can be sure it will be done right." His review on December 23, 1976, indicates that he is "functioning very well" and has been receiving "outstanding Work, School and Quarters reports." The one obvious exception to his record is the offense involving Officer McDonough. This offense, however, seems to be related to Mr. King's intoxication, and is clearly aberrant from his past behavior.

Even at the time of the stabbing incident, Mr. King was described by his work supervisor as having a "good attitude" and that he "appeared to get along with other employees." (Pinellas County Sheriff's Department Supplementary Report, March 18, 1977). The investigative file of Roy Matthews indicates that he interviewed the manager of the restaurant where Mr. King worked at the time. His notes reflect that Mr. King "was one the the best employees he has had" and that, as noted in the Sheriff's Department report, he "got along good with other employees and did what he was told to do." In addition, "he was trusted with the keys to the dry storage room and the cleaning room." The assistant manager of Mr. King's place of employment also testified at Mr. King's original trial that Mr. King was a good worker, one of his best.

Three people who were present on the evening of the incident described Mr. King as under the influence of drugs or alcohol. Mr. McDonough himself, immediately after the incident, described Mr. King as "nervous, sweating profusely and was acting as if he was high." (Pinellas County Sheriff's Department report, March 18, 1977). Mr. Robbins, who was the van driver on the night of the incident, noted that Mr. King was intoxicated: "He (King) was intoxicated. I knew that from the time I picked him up from work." An inmate, Mr. Hawkins, who interceded in the altercation between Mr. King and Mr. McDonough, described Mr. King, stating that "the smell of alcohol was strong on his person." (D.O.C. records).

After his assignment to Florida State Prison in 1977, Mr. King had no disciplinary reports until 1980. It was then noted that "Inmate King has always displayed a positive attitude, good behavior and had no disciplinary action since his assignment to this facility." In 1981 he is noted to have a "satisfactory quarters report." His progress review on August 24, 1983 once again indicates "satisfactory" adjustment and a "minor disciplinary report." In August, 1984, his adjustment is still described as "satisfactory" and no disciplinary violations are noted. In August, 1985, once again Mr. King had a clear disciplinary record and "satisfactory adjustment." In August, 1986, a progress report once again indicates a clear disciplinary record. The July, 1987, Progress

Report also indicates a clear disciplinary report. A January 29, 1988 Progress Report indicates only one disciplinary report. Mr. King's most recent disciplinary report (July 1, 1988) once again indicates a clear disciplinary record. Throughout his incarceration time, he has, with one exception (the stabbing involving Officer McDonough) had no violent incidents and virtually no disciplinary reports.

Mr. King's report of his behavior is consistent with the official records.

When questioned about his health and specifically about head injuries, Mr. King reports that he had fainting spells, early on, dizzy spells and was "feeble" until he was 7 or 8 years old. He reports that he was told he had vitamin deficiencies, and was given a fruit punch to drink to remedy this deficiency. In addition, he remembers being struck on the head about age 9 or 10 and also reports other incidents where he was hit in the head and became "wobbly". On a prison questionnaire filled out in approximately 1975, Mr. King reported that he had "frequent or severe headaches," "blackouts", and worries about his health. A history of dizziness and fainting spells is indicated again on a 1984 medical history.

Mr. King indicates that he had a lasting relationship with a girlfriend he had known since age 15. He reports that they lived together for a number of years. Prison records provide documentation of this ongoing relationship and Mr. King and Ms. Brown-King also report that they lived together for a number of years.

When questioned about his current incarceration, Mr. King denies any involvement in the murder. His description of the events surrounding the stabbing of officer McDonough are consistent with his earlier versions. He relates these events, though, in a rambling, tangential fashion and frequently had to be redirected to the main question that was asked. Mr. King seems to have some paranoid ideation concerning his original trial. He reports that the public defender appointed to him was known for trying to get people to take pleas even when there was no evidence against them. When questioned as to why a public defender would do this, Mr. King replied that Mr. Cole was being "paid off" by the prosecutor and judges. Mr. King also reported that he filed many motions on his own, but that they had been removed from the court files and copies were removed from his cell in 1981. He stated that Mr. Cole was a "front for the prosecution." He also noted that Mr. Cole refused to sit near him at the trial in order not to listen to what Mr. King had to say. As with most paranoid ideation, there is some event that triggers the belief. It is my understanding that Mr. King's former defense attorneys did indeed raise a complaint with the court regarding Mr. King's hygiene. Mr. King believed that this was a ploy so that they could avoid sitting near him. As I understand it, the defense attorneys' performance was found to be lacking, although certainly not for the reasons Mr. King described. This finding seems to have cemented Mr. King's beliefs. It is interesting to note that Mr. King believes that Mr. Cole was adverse to him because Mr. King had filed "papers" for another inmate in the jail in 1975, causing the inmate to be released. According to Mr. King, Mr. Cole wanted the inmate to go to prison in spite of the fact that there was no evidence, because Mr. Cole worked for the prosecution. Mr. King believes that Mr. Cole generally tried to get people to plead guilty when there was no evidence. He also believes that his trial transcript was edited by the judge, the trial attorney and the prosecutor and thus does not reflect certain events at his trial. There were other instances of paranoid ideation not mentioned above.

Test Results

Because some of the tests administered to Mr. King were also administered at earlier times, they will be compared and contrasted when possible. Mr. King was cooperative throughout the testing as he was throughout the entire evaluation.

On the Wechsler Adult Intelligence Scale, Mr. King received a Full Scale I.Q. of 97, a Verbal I.Q. of 100 and a Performance I.Q. of 95. He scored extremely well on a vocabulary subtest. Given his lack of schooling and socio-economic status, his scores on the test, particularly his verbal scores, are unusual. A higher performance than verbal I.Q. would be expected in a case such as this, but that is not the circumstance in Mr. King's case. An earlier administration (1985) of the verbal portion of the WAIS-R resulted in a Verbal I.Q. of 108 which is consistent with the present results. The performance section of the WAIS was not administered in 1985, so comparison is not possible. Mr. King's current I.Q. score is not incongruent with I.Q. scores reported in prison records. On a test of achievement (WRAT-R2), he received standard scores of 101, 117 and 86 on reading, recognition, spelling and arithmetic, respectively. These are not surprising given his performance on the I.Q. test. He has, obviously, in spite of his lack of formal education, made some attempt to educate himself. He has done best in those areas, such as spelling, that are amenable to rote memorization. While working on the arithmetic portion of the WRATR-2, Mr. King commented that he had a math book in his cell and would begin studying it.

His scores on the MMPI are similar to those reported in 1985. The primary elevations (although higher on the more recent MMPI) are the same. People with similar profiles are usually suspicious of others and the likelihood of paranoid features should be examined (Greene, 1980). They are sensitive to real or imagined criticisms and often have a history of drug addiction or alcohol abuse (Groth-Marnat, 1984). People with similar profiles have significant levels of social maladjustment. People with such profiles are often diagnosed as suffering from "schizophrenia-paranoid type" or "passive-aggressive personality disorder." Profiles such as these are typical of people difficult to interact with. They are usually able to control the acting out of their hostility but do exhibit violent outbursts on occasion. Their ". . . sensitivity to criticism and suspiciousness can lead to unpredictable and irrational violent outbursts." (Greene, 1980). In addition, Mr. King had a high score on an MMPI scale designed to measure drug and alcohol abuse. This is congruent with his history of substance abuse.

On the TPT, a test for brain damage, Mr. King falls within the brain damaged range. His scores on a finger oscillation are also poor, further suggesting brain damage. On a test given in 1985, the Categories Test, Mr. King made 45 errors. This indicates a deficit, as his performance I.Q. suggests he should perform at a higher level. Mr. King's performance on the Canter Bender is within normal limits, but contains design overlap which is considered to be a sign of brain damage. Overall, Mr. King's test results are strongly suggestive of diffuse brain damage. This is consistent with his history of drug and alcohol abuse and may also be related to his reports of closed head injury, and his earlier reports of dizziness, headaches and fainting spells.

The test results are congruent with Mr. King's behavior and history. The paranoid ideation noted on the MMPI is consistent with his behavior during the interview and is consistent with his history. His history of alcohol abuse is also supported by the test data.

In summary, Mr. King appears to have a history of alcohol/drug abuse which may have contributed to his apparent brain damage. His high level of suspiciousness and difficulty coping in society may have its etiology in this diffuse brain damage. Given this brain damage, he would be more susceptible to the effects of alcohol and thus much more likely to act out violently while drinking. In spite of these problems and his impoverished background, Mr. King has attempted to better himself and is achieving at a level at or beyond what is expected in some areas. He has done remarkably well in the structured setting of institutionalization.

Mitigating Circumstances

As you requested, I examined Mr. King with regard to possible mitigating circumstances in the mental health area. My understanding is that mitigating factors involve such matters as an extreme mental or emotional disturbance at the time of the offense and whether the defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. It is also my understanding that the court will consider any aspect or factor regarding the defendant or the offense which may serve to mitigate the sentence or to demonstrate to the judge and jury that a sentence of life imprisonment would be more appropriate.

Mr. King has an extreme emotional disturbance. He has a long history of alcohol and drug abuse, shows signs of brain damage on psychological testing and has an MMPI profile consistent with his paranoid ideation. It is unclear whether his paranoid ideation is a result of his brain damage or independent of it, but the resulting behavior is the same.

Given his brain damage, the effects of alcohol would be magnified, leading to loosened behavioral controls. Mr. King's ability to conform his conduct to the requirements of law would have been substantially impaired by his brain damage, mental illness and use of alcohol around the time of the offense.

While the information presented in this report relates to the two statutory mitigating factors discussed above, it also speaks to mitigation not specifically defined by statute. The information provided relates to Mr. King's background as well as to the offense.

There are additional non-statutory mitigating factors that are and were worthy of consideration. Mr. King has mental health problems. Virtually all of the objective testing given to Mr. King over the years indicates mental disturbance of some sort.

Mr. King had no semblance of a normal upbringing. He lived with alcoholic parents who beat each other and the children, including Amos. He received little, if any, guidance and began to abuse drugs and alcohol at age 12 or 13, when familial supervision deteriorated even more. In spite of his background, Mr. King's primary school records indicate that he was a child who was interested in his school work. He was described as being able to work and think independently. Although he did not go beyond the eighth grade, Mr. King eventually earned a G.E.D. and has continued to learn new materials on his own.

In addition, Mr. King was an alcohol and drug abuser. There is evidence, independent of his own recollection, that he was under the influence of alcohol at the time of the offense. As mentioned earlier, the victim of the stabbing, the van driver who returned Mr. King from his job that night and an inmate present at the stabbing all reported

shortly after Mr. King's arrest that he was "high", "intoxicated" and smelled of alcohol (respectively). His history, in fact, indicates heroin abuse and alcohol abuse along with other drugs. In addition, Mr. King reports that he was drinking that evening while working at the restaurant.

In summary, Mr. King was raised in a brutal environment that eventually resulted in the death of his mother at his father's hands. He suffers from various significant mental health deficiencies and impairments, each of which alone is problematic, but combined have more than an additive effect. His alcohol problems are also familial in nature as both his parents and paternal grandparents were "drunkards" (telephone interview with Emily Bentley).

The brain damage discussed above also is a matter which mitigates: brain damage may well affect an individual's emotional lability, behavior, and tolerance for alcohol.

It should also be noted that Mr. King has overall performed in an exemplary fashion while incarcerated. Descriptions of his prison behavior are documented above and demonstrate a good adjustment to prison life.

The issue remains as to why the evaluations conducted in 1985 by Drs. Mendelson and Merin did not adequately assess Mr. King's problems. The constraints described below provide an obvious answer. I have reviewed the materials of both experts and have spoken with Dr. Merin. Unfortunately, Dr. Mendelson was out of town and thus I was unable to speak with him.

One of the primary problems seems to be that the psychologists were provided with little of the available materials regarding Mr. King necessary to a full and proper assessment of his background, history, and mental state. Such materials are especially significant to the wide-ranging assessment involved in questions concerning mitigating circumstances.

Both of the psychologists diagnosed Mr. King as suffering from an antisocial personality disorder, a diagnosis dependent on adequate background information. Neither of the psychologists had school records, for example, nor did they seem to have complete versions of the Department of Corrections (DOC) or Florida State Prison medical records. Had they had such records they could have noted that through grade 6, Mr. King performed at an average level, consistent with an average I.Q. In addition materials in the DOC files indicate that Mr. King had a long lasting relationship with one woman (who indicates that she is his common-law-wife) who reports that he supported her and accepted family responsibilities. Interviews with Mr. King's father before his death corroborate this relationship (DOC records).

Throughout his life, and during his incarceration, there is little to indicate that Mr. King was violent or aggressive. He has no history of assaulting others save the instant offenses. His incarceration records are similarly free of interpersonal violence. In spite of his chronic problems with drug and alcohol abuse, he has no arrests for D.U.I. or other traffic violations. In addition, Mr. King shows signs of brain damage, which would obviate a diagnosis of antisocial personality disorder. As Kaplan and Sadock (1985) have pointed out antisocial behavior "is often characteristic of persons whose functioning is on the border of several other kinds of disorders, including psychosis, organic brain syndromes, and retardation." Mr. King's D.O.C. files report a history of fainting spells and dizziness,

which should have been investigated. Had either psychologist been aware of these records, or had they been asked to investigate the possibility of brain damage, they would have discovered signs and symptoms of brain damage. Such information contraindicates a diagnosis of antisocial personality disorder as does his history. Even prison records and available prison MMPI's generally do not report that he is antisocial. The examiners, however, did not consider brain damage or Mr. King's records. As indicated, these records were never provided to the examiners.

During our conversation, Dr. Merin agreed that Mr. King should have been examined for brain damage. In fact, Dr. Merin, because he was not provided with certain relevant pages of the D.O.C. records or the Sheriff's reports was unaware that there were statements indicating that Mr. King was "intoxicated" or "high" at the time of the offense. As Dr. Merin and I agree, such alcohol consumption combined with an organic brain syndrome (such as diffuse encephalopathy) would clearly have an effect on behavior. In addition, intoxication itself would have become an issue, regardless of the brain damage. Combined, though, they are clearly significant.

Records are always important in an evaluation such as this, but when the question is one of whether the patient suffers from an antisocial personality disorder, records are all the more important. As Kaplan and Sadock (1985) have pointed out "organic defects of the central nervous system mimic facets of personality disorder." Thus it is also noted that "objective records must be obtained" and "alcoholism must always be considered in a differential diagnosis." In this case, the prior psychologists were provided with inadequate records, were denied independent corroboration of Mr. King's alcohol use on the evening of the offense, and were never queried with regard to brain damage. In addition, Dr. Merin was not asked to evaluate mitigating circumstances, and thus provided no opinion on this issue. Given the fact that brain damage was not assessed and that the examiners were never provided with critically important background information, the issue of mitigation at Mr. King's resentencing was never adequately evaluated.

In summary, it is my opinion that substantial mitigation was available in Mr. King's case. These issues, for the reasons indicated, could not be and thus were not adequately assessed or properly evaluated at the time of his resentencing. As you know I have worked under difficult time constraints because of Mr. King's execution date. I believe additional evaluation would shed even more light on these issues. My conversation with Dr. Merin indicates that he, too, would find such additional information helpful.

(App. 1). Dr. Carbonell also testified at the evidentiary hearing, discussed her analysis of the testing of Dr. Merin and Dr. Mendelson, and answered the inquiries of the State and the Court (See PC 3506-3660, 3011 et seq.). The results of Dr. Carbonell's evaluation were further confirmed by the affidavits and testimony of witnesses who knew Mr. King throughout his life (see, infra, affidavits; see also PC Vols. 21 and 22 [testimony]) and they were in large part confirmed by Dr. Merin. A proper evaluation, and an adequate assessment of records, would have made a difference.

At the time of trial, defense counsel retained Dr. James Mendelson to advise the defense and the State retained Dr. Sidney Merin. Prior to filing the 3.850 motion in 1989, collateral counsel retained Dr. Joyce Carbonell. All of these experts testified regarding their findings at the evidentiary hearing. All of the experts agreed that Mr. King suffers from mental deficiencies which affected his judgment and behavior at the time of the offense; however, the jury never heard any testimony from a mental health expert regarding his deficiencies.

Specifically, all of the experts agreed that there is evidence that Mr. King suffered a serious head injury as a child, that he suffered from severe drug and alcohol abuse from an early age, that he suffered from a personality disorder which causes poor judgment and impulsivity, that this disorder was the direct result of the severe abuse that he suffered as a child, and that he suffered from some degree of brain dysfunction. Had the State's expert, Dr. Merin, testified at the penalty phase he would have told the jury that Mr. King had a Beta IQ of 86 (PC 3673). The Beta IQ of 86 and of Dr. Merin's subsequent testing indicate deficiency in functioning in the right side of his brain (PC 3715-17, 3755). At the time of the offense, Mr. King suffered from poor judgment and impulsivity (PC 3772, 3802). Mr. King would have been overly sensitive and likely to misinterpret or distort things that were said to him (PC 3780). He would not have reflected on his act (PC 3803). Dr. Merin would have described a difficult childhood due to poverty and violence in the home, including shooting and cutting, which eventually resulted in Mr. King's father killing his mother. Both parents drank and Mr. King was severely abused, often for no reason. (PC 3693, 3725). Mr. King failed eighth grade and left school shortly thereafter and Mr. King's IQ was significantly depressed by his home environment (PC 3694, 3699-700). Mr. King's family suffered from severe poverty (PC 3693, 3725). Mr. King got along well with people, was never a bully, had always been nice to people, was somewhat of a private person and had more acquaintances than friends (PC 3705). Mr. King held numerous jobs as auto mechanic, fruit picker, mason and yard worker (PC 3705). Mr. King suffered from severe drug and alcohol abuse starting from an early age, including marijuana, barbituates, heroin and cocaine. That drug abuse is relevant to an assessment of brain damage (PC 3705,

3706, 3715). Antisocial behavior can be caused by brain damage, behavioral problems due to child abuse, and developmental problems (PC 3723). In Mr. King's case his "horrendous" background was a contributing factor to his antisocial personality. This is unfortunate, but not surprising, given the extreme degree of violence and neglect Mr. King endured while growing up (PC 3723-26).

Dr. Merin considered head injury and severe drug abuse in assessing Mr. King. The type of stuff Mr. King was using "probably burnt out some some dendrites". This type of damage can be diminished after a period of time in a drug-free environment (PC 3789). Mr. King no known prior history of inflicting personal injury on another person (PC 3813), and future dangerousness would have been difficult to predict (PC 3808). The only points of disagreement between Dr. Merin and Dr. Carbonell were the extent of Mr. King's brain damage and whether his disabilities were "extreme" or "severe" in relation to the statutory mitigating factors. Obviously, the experts agreed as to the presence of substantial non-statutory mitigation.

The trial court made no findings concerning the deficiencies in the evaluations of Drs. Merin and Mendelson. It evaluated only the claim of ineffective assistance of counsel. The independent mental health claim in this case is compelling. Mr. King accordingly respectfully urges that this Court remand this action for proper findings on, and an initial resolution of, this issue by the trial court.

D. The law requires that a judge and jury be presented with the wealth of mitigating evidence that was never heard and that a reliable adversarial testing occur.

Contrary to what the sentencing court was led to believe, mental health mitigating evidence was available, and available in abundance. This evidence would have established mitigation and rebutted aggravation. It should have been heard at sentencing, and would have been, but for the deficiencies of the experts discussed herein -- deficiencies strikingly like the ones involved in Sireci.

Mr. King was entitled, as a matter of due process, to court-funded evaluations that were professionally reliable and valid. See, e.g., Mason v. State, 489 So. 2d 734 (Fla. 1986); Ake; Sireci. He was denied that right. As the Circuit Court

explained in granting relief in Sireci, a finding which was relied upon by this Court:

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

(State v. Sireci, Order Granting Defendant's Motion for Post-Conviction Relief, No. CR76-532, Ninth Judicial Circuit). As in Sireci, Mr. King herein has presented "substantial evidence" that his mental illnesses, substance abuse and organic impairment existed at the time of the offense at issue, and that these significant deficits were not properly assessed by the mental health professionals who conducted the original examinations. Post-conviction relief was granted in Sireci. It is equally warranted in Mr. King's case.[4]

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[4] This Court's holdings in Mason and Sireci are supported by independent analysis of this question in light of federal due process principles. As the United States Supreme Court has explained, interests that are protected by the due process clause may arise from two sources -- the due process clause itself or state law. Hewitt v. Helms, 459 U.S. 460, 466-67 (1983); Meachum v. Fano, 427 U.S. 215, 223-27 (1976). Both of these sources recognize and require protection of the defendant's interest in having a valid evaluation of his or her mental status.

The due process clause itself requires protection of this interest as a matter of fundamental fairness to the defendant and in order to assure reliability in the truth-determining process. Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 1094-97 (1985). As the Court explained in Ake, the provision of competent psychiatric/psychological expertise to a defendant assures the defendant "a fair opportunity to present his defense," id. at 1093, and also "enable[s] the jury to make its most accurate determination of the truth on the issue before them." Id. at 1096.

Independent of the requirements of the due process clause itself, Florida has created a state law entitlement to the valid evaluation of mental status that is protected by the due process clause. In Florida, a criminal defendant is entitled to an evaluation of his or her mental status upon request unless the trial judge is "clearly convinced that an examination is unnecessary. . ." Jones v. State, 362 So. 2d at 1336. Florida law, therefore, mandates evaluation of mental status upon the existence of specified factual predicates. When such an interest is created by state law, it is protected by the due process clause. See Hewitt v. Helms, 459 U.S. at 472 ("use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the state has created a protected liberty interest"); Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 10 (1979) (due process is required when there is a "set of facts which, if shown, mandate a decision favorable to the individual"). Since the function of the Due Process Clause in

The absence of mental health mitigating evidence at the sentencing proceedings is attributable to the failure of the 1985 examiners to have the necessary materials and to conduct proper testing. As the Ake Court held, the due process clause protects indigent defendants against invalid evaluations. Accordingly, the due process clause requires that appointed mental health experts render "that level of care, skill, and treatment which is recognized by a reasonably prudent similar health care provider as being acceptable under similar conditions and circumstances." Fla. Stat. sec. 768.45(1) (1983). In the context of diagnosis, exercise of the proper "level of care, skill and treatment" requires adherence to the procedures that are deemed necessary to render an accurate diagnosis. "[N]ot only must the medical practitioner employ the proper skill and prudence when diagnosing the ailment of a patient but he or she must also employ methods that are recognized as necessary and customary by similar health care providers as being acceptable under similar conditions and circumstances." 36 Fla. Jur. 2d Medical Malpractice sec. 9, at 147 (1962). See also Olschefsky v. Fischer, 123 So. 2d 751 (Fla. 3d DCA 1960).

On the basis of generally-agreed upon principles, the standard of care for a professionally adequate mental health evaluation includes the need for a careful assessment of organic factors contributing to or causing aberrant behavior. Kaplan and Sadock, Comprehensive Textbook of Psychiatry (4th Ed.), p. 543. An accurate medical and social history must be obtained, and must be obtained from sources independent of the patient. Because "[i]t is often only from the details in the history that organic disease may be accurately differentiated from functional disorders or from atypical lifelong patterns of behavior," R. Strub and F. Black, Organic Brain Syndromes, 42 (1981), the medical and social history has often been called "the single most valuable element to help the clinician reach an accurate

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this context is "to insure that the state-created right is not arbitrarily abrogated," Wolff v. McDonnell, 418 U.S. 539, 557 (1974), it protects a Florida defendant against professionally inadequate and invalid evaluations of his or her mental status. Because such evaluations would be the functional equivalent of no evaluation at all, the State must be required to provide professionally competent and valid evaluations in order to effectuate the right it has created. Accordingly, Mr. King was entitled to professionally valid and adequate evaluations with respect to mitigating circumstances.

diagnosis." H. Kaplan and B. Sadock, Comprehensive Textbook of Psychiatry 837 (4th ed. 1985). See also MacDonald, T., Psychiatry and the Criminal 102, 103, 110 (emphasizing the singular importance of a "painstaking clinical history" in order to differentiate an underlying seizure disorder from an antisocial personality disorder). It is well recognized that the patient is often an unreliable data source for his own medical and social history. "The past personal history is somewhat distorted by the patient's memory of events and by knowledge that the patient obtained from family members." Kaplan and Sadock at 488. Mentally ill and/or brain damaged patients are in fact the poorest of poor historians. Id. Because of this phenomenon,

> [I]t is impossible to base a reliable constructive or predictive opinion solely on an interview with the subject. The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information on the defendant, relevant medical and psychiatric history, and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant.

Bonnie and Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 Va. L. Rev. 427 (1980)(emphasis added), quoted in Mason, supra. Accord Kaplan and Sadock at 550; American Psychiatric Association, "Report of the Task Force on the Role of Psychiatry in the Sentencing Process," Issues in Forensic Psychiatry 202 (1984); Pollack, Psychiatric Consultation for the Court, 1 Bull. Am. Acad. Psych. & L. 267, 274 (1974); H. Davidson, Forensic Psychiatry 38-39 (2d ed. 1965); MacDonald at 98. Here, Drs. Mendelson and Merin were provided with and obtained little relevant independent information regarding Mr. King's history and background.

Appropriate diagnostic studies must be undertaken in light of the history and a proper assessment of records regarding the patient. In forensic cases involving questions regarding aberrant or antisocial behavior, neuropsychological testing is critical to determine the presence or absence or organic damage. See Kaplan and Sadock at 547-48; Pollack at 273. In fact, among the available diagnostic instruments for detecting organic disorders, neuropsychological test batteries have proven to be the most valid and reliable diagnostic instruments available. See

Filskov and Goldstein, Diagnostic Validity of the Halstead-Reitan Neuropsychological Battery, 42 J. of Consulting and Clinical Psych. 382 (1974); Schreiber, Goldman, Kleinman, Goldfader, and Snow, The Relationship Between Independent Neuropsychological and Neurological Detection and Localization of Cerebral Impairment, 162 J. of Nervous and Mental Disease 360 (1976). Here, such testing was not conducted originally -- as Drs. Merin and Mendelson acknowledged.

A history of the patient, assessed from collateral sources independent of the patient, is especially relevant for a diagnosis of organic brain impairments, for an assessment of the effects of such impairments on the patient's behavior, and for an assessment of the effects of the intake of drugs and alcohol on the level of functioning of individuals with such impairments. As the discussion presented herein makes clear, the standard was not met in Mr. King's case.

E. The trial court applied an improper standard to the assessment of prejudice.

The trial court obviously applied the standard that it was permissible to deprive the judge and jury of all mental health evidence on the grounds that there may be some discrepancies among experts. This is clearly contrary to the law.

Courts have long recognized that psychiatry is not an exact science and that experts do differ in their opinions. As a Circuit Judge, Justice Scalia wrote:

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

United States v. Byers, 740 F.2d 1104, 1114 (D.C. Cir. 1984).

In Ake v. Oklahoma, the Court specifically rejected the idea that psychiatric opinion is a scientific process which produces a unanimous result. Recently, the Ninth Circuit Court of Appeals addressed this issue:

> [2] Consistent with the adversarial nature of the fact-finding process and the quasi-scientific nature of psychiatric opinion, the Ake court explicitly rejected the notion that psychiatrists can be expected to reach a unanimous diagnosis of the current mental condition of a defendant and unanimous prognosis as to future expected conduct or that there is such a thing as "neutral" psychiatric testimony:

Psychiatry is not . . . an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness. Perhaps because there is often no single, accurate psychiatric conclusion on legal insanity in a given case, juries remain the primary factfinders on this issue, and they must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party.

470 U.S. at 81, 105 S.Ct. at 1095.

Smith v. McCormick, 914 F.2d 1153, 1157 (9th Cir. 1990). The requirement of professional adequate assistance by a mental health expert as defined in Ake and Smith v. McCormick has recently been applied by the Eleventh Circuit. Although, mental health experts testified their performance was inadequate:

> The district court found that Dr. Habeeb was a "qualified," "independent psychiatrist." This may have been the case, but Dr. Habeeb did not provide the constitutionally requisite assistance to Cowley's defense. *Ake* holds that psychiatric assistance must be made available for the *defense*. This assistance may include conducting "a professional examination on issued relevant to the defense," presenting testimony, and assisting "in preparing the cross-examination of a State's psychiatric witnesses."
>
> * * *
>
> Dr. Poythress, Cowley's mental health expert during the federal habeas proceedings, stated:
>
> > [Habeeb's] evaluation was inadequate in terms of depth and scope, and the testimony [contained] conclus[o]ry as opposed to descriptive or formulative kinds of information about Mr. Cowley.
>
> * * *
>
> In short, Dr. Habeeb provided little if any assistance to the defense. As the Ninth Circuit has recently noted, "The right to psychiatric assistance does not mean the right to place the report of a 'neutral' psychiatrist before the court; rather it means the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate . . . ."[8]
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> ---
>
> [8] *Smith v. McCormick*, 914 F.2d 1153, 1157 (9th Cir.1990)

Cowley v. Stricklin, 929 F.2d 640, 644 (11th Cir. 1991)(emphasis in original). The trial judge wrongly that differing psychiatric opinions negate prejudice when there is a failure to present any mental health evidence to the judge and jury. This is particularly so when the experts agree mitigation exists and disagree only as to the degree of brain dysfunction, whether the disorder is a paranoia or a personality disorder (although agreeing that each is caused by Mr. King's horrendous childhood),

and whether or not the brain dysfunction, severe drug and alcohol abuse and personality disorder rise to the level of "extreme" and "substantial" disabilities required for statutory mitigation.

This Court has recently reaffirmed that the jury is the final fact finder as to whether mental disability rises to the level of statutory mitigation:

> Once a reasonable quantum of evidence is presented showing impaired capacity, it is for the jury to decide whether it shows "substantial" impairment . . . . To allow an expert to decide what constitutes "substantial" is to invade the province of the jury.

Stewart v. State, 558 So. 2d 416, 420 (Fla. 1990).

The trial court also found that prejudice was negated based on speculation that evidence of petty crimes might have come out. In Blake v. Kemp, 758 F.2d 738 (11th Cir. 1985) the State argued that had the defense in fact presented mitigation witnesses, that damaging evidence regarding Blake's former arrest record would have come out. The court rejected this argument even though the Court believed that the unfavorable evidence "very well would have persuaded a jury to impose the death sentence in any event." 758 F.2d at 534.

In Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989) the Eleventh Circuit again rejected the State's argument that prejudice was not proven where the State would have been able to elicit information regarding additional crimes:

> It does appear that injecting Harris' character as an issue during sentencing was fraught with danger. Although the prosecutor told the jury that Harris committed murder while on parole, the introduction of evidence about Harris' character would have allowed the state to further explore the appellant's other felony convictions as well as his dishonorable discharge form the Army. Nevertheless, on this record, we cannot conclude that effective counsel would have made a strategic decision to forego testimony about Harris' good character merely because its use would have permitted the state to add some prior unlawful acts to the proof already in the case.

874 F.2d at 764.

Because no adequate mental health evaluation was performed, the judge and jury never knew of Mr. King's severe drug and alcohol abuse from an early age which included the abuse of marijuana, amphetamines, quaaludes, cocaine, "speedballs" and heroin. The trial court was in error in finding that there is no prejudice in failing to present this evidence simply because it may have revealed some additional petty crimes. Harris v. Dugger.

The trial court also erred in finding no prejudice because there were several aggravating factors. The Eleventh Circuit has rejected the State's argument that there is no prejudice when the aggravating circumstances are overwhelming:

> Certainly he would have been unconstitutionally prejudiced if the court had not permitted him to put on mitigating evidence at the penalty phase, no matter how overwhelming the State's showing of aggravating circumstances.

Blake v. Kemp, 758 F.2d 523, 534 (11th Cir. 1985).

In Knight v. Dugger, 863 F.2d 705 (11th Cir. 1988) the Court further discussed this issue:

> The State argues that the *Lockett* error was harmless in this case because so many aggravating factors were found (four) that no amount of non-statutory mitigating evidence could change the result in this case. No authority has been furnished for this proposition and it seems doubtful that any exists. The State's theory, in practice, would do away with the requirment of an individualized sentencing determination inc ases where there are many aggravating circumstances. It is this requirment, of course, that is at the heart of *Lockett* and its progeny. *See Lockett v. Ohio*, 438 &.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978)("in capital cases the fundamental respect for humanity underlying the Eighth Amendcment requires consideration of the character ancd record of the individual offender and the circumstances of the particular offense . . .," quoting *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976)).

863 F.2d at 710. The trial court's conclusion that the number of aggravating factors justifies a finding of no prejudice is in error.

Relief is warranted on the basis of this claim. The trial court's finding of no prejudice is in error. Because of the dearth of trial court findings on the Sireci issue, however, Mr. King respectfully urges that this case be remanded for proper initial findings on this issue by the trial court.

ARGUMENT II

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

Defense counsel must discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion). In Gregg and its companion cases, the Court emphasized the importance of focusing the jury's attention on "the

particularized characteristics of the individual defendant." Id. at 206. See also Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

Thus, the Florida state courts and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration, present proper objections, and preserve available claims for relief. See State v. Michael, 530 So. 2d 929 (Fla. 1988); Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), adhered to on remand, 739 F.2d 531 (1984); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982); Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986). Trial counsel here did not meet these standards. As was explained in Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985):

> In Lockett v. Ohio, the Court held that a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the jury receiving accurate information regarding the defendant. Without that information, a jury cannot make the life/death decision in a rational and individualized manner.

Id. at 743 (citations omitted). Moreover, even if counsel provides effective assistance in some areas, the defendant is entitled to relief if counsel renders ineffective assistance in his or her performance in other portions of the proceedings. Washington v. Watkins, 655 F.2d 1346, 1355, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981). See also Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Even a single error by counsel may be sufficient to warrant relief. Nelson v. Estelle 642 F.2d 903, 906 (5th cir. 1981) (counsel may be held to be ineffective due to single error where the basis of the error is of constitutional dimension); Nero v. Blackburn, 597 F.2d at 994 ("sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard").

As demonstrated in the following sections, each of Mr. King's counsel's errors are sufficient, standing alone, to warrant Rule 3.850 relief for each undermines confidence in the fundamental fairness of the proceedings.

A. **Trial Counsel Unreasonably Failed to Investigate, Develop, or Present Substantial Available Mental Health Mitigating Evidence, and to Challenge Aggravating Circumstances on the Basis of Such Evidence**

As discussed in Argument I, supra, substantial mental health mitigating evidence was available in Mr. King's case, but never reached the judge and jurors charged with deciding whether Amos King should live or die. Counsel's investigation of mental health issues was not reasonable. Among the omissions were counsel's failures to investigate mental health issues properly, to ask appropriate questions of the experts, and to provide the experts with significant and available information regarding Mr. King. As a result of counsel's omissions, a wealth of substantial mental health evidence was not heard -- evidence which would have established statutory and non-statutory mitigating circumstances, and which would have undermined aggravating circumstances.

At the evidentiary hearing, trial counsel stated that he relied upon his investigators to develop mitigating evidence regarding Mr. King's background. The first investigator retained for this purpose was David Mack. Mr. Mack testified that in fact he failed to do the investigation and cited a lack of guidance from the attorney. Trial counsel blamed Mr. Mack for the failure. Trial counsel subsequently retained Roy Mathews as an investigator. Trial counsel testified that both he and Mr. Mathews believed that David Mack had not investigated Mr. King's case:

> A Mr. Mathews came up to Tallahassee. He was working for attorney Ed Stafford on the Peak case. I met with Charlotte Holman.[sic] She had put me in touch with Mr. Mathews, and it was Mr. Mathews who made some of these calls to see that Mr. Mack had not done what he said he had done. it wasn't just me. It was Mr. Mathews.
>
> Q So he at that time was telling you that he had concerns with what Mr. Mack was doing?
>
> A Yes. This is in the summer of '85, and it was Mr. Mathews who was very, very, vociferous about this.

(PC 3164).

Trial counsel testified that he had confidence in Mr. Mathews and turned the investigation of nonstatutory mitigation over to him:

> . . . That's what I asked Mr. Mathews to do was to help with that kind of third portion of the effort, which was to get these nonstatutory

mitigating witnesses interviewed, talked to, nailed down, and here for trial.

(PC 3175-76). Counsel stated that he only met with Mr. Mathews on three occasions, including the initial visit when he asked Mr. Mathews to work on the case (PC 3176, 3230). Trial counsel stated that he directed Mr. Mathews to gather evidence that Mr. King "was born a decent human being." (PC 3201).

Once the resentencing hearing began, trial counsel testified that Mr. Mathews became very alarmed and very upset that he (Mr. Mathews) had not properly investigated the case:

> . . . But when he started seeing the egregiousness of the case, that's when he started getting upset. Until then, I just don't think he had quite realized the problems we had.

(PC 3228)(emphasis added).

Mr. Mathews executed an affidavit and testified at the hearing. He stated that he had failed to properly investigate because he relied on trial counsel to direct his investigation and the direction was not forthcoming:

> Q At the time of these conversations, were you aware that the resentencing was quickly approaching?
>
> A Yes.
>
> Q Was that a concern of yours?
>
> A Yes. I had other obligations at the time and so, you know, I really counted on Baya to be specific with me and tell me exactly what needed to be done.
>
> Q And did you express to Mr. Harrison your concerns with the time frame in which you had to work on this case?
>
> A Yes.
>
> Q And what, if any, feedback or guidance or direction did Mr. Harrison give you?
>
> A None.

(PC 2784). Mr. Mathews also testified that he did not provide background information to the mental health expert:

> Q Was there a mental health expert involved in this case?
>
> A Yes, a Dr. Mendelson.
>
> Q And did you in any way discuss Mr. King's case with Dr. Mendelson?

A As best I can recall, I met Dr. Mendelson in the witness room as the hearing was under way. That was the only discussion that I had with him.

Q You had no discussions prior to the hearing itself?

A Not that I remember, no.

Q In your normal course of investigating a capital case, is it routine for you to work with a mental health expert with the attorney?

A Yes.

Q Can you explain for the Court what steps you would take or what you would do to try to assist the mental health expert?

A Well, generally as the investigator, I have, you know, direct contact with a lot of the witnesses that would have the social history and background and won't want to talk with the mental health expert about that and make sure he understands what that history consists of and put me in touch with whatever witnesses that he feels he needs to talk to to have firsthand knowledge to do interviews with, as well as a presentation of whatever documents that may have been generated for the investigation.

Q And in this case, of your personal knowledge, did you provide any information concerning what these witnesses had told you to Dr. Mendelson?

A No.

(PC 2784-85). This is consistent with trial counsel's testimony.

Although considerable mud slinging went on at the evidentiary hearing regarding who was at fault, the bottom line is that the investigation was never done. Critical background information was never provided to Dr. Mendelson or Dr. Merin and never presented to the jury. In her order, the trial judge praised Mr. Harrison for his dedication to his client. However, that does not alter the fact that the proper investigation was simply never done and that as a direct result <u>no</u> mental health mitigation was presented and little of the other wealth of mitigating information which was available. Mr. Harrison relied on Mr. Mathews. Mr. Mathews did not do his job because he was waiting for direction from Mr. Harrison. The result here is the same as the result in <u>Harris v. Dugger</u>, each person relied on the other due to a failure in communication.

Neither expert was given adequate background materials to reach a reliable conclusion regarding Mr. King's mental status. Trial counsel testified that he never obtained and/or provided the experts with any of Mr. King's juvenile records, school records, materials from original defense attorney file, trial transcript, police reports, inspector general reports showing that Mr. King was high and smelled strongly of alcohol at the time of the offense, or statements from persons who were familiar with Mr. King's background (PC 3240-42). In fact the only documentation provided to the experts by trial counsel was a partial D.O.C. file (PC 3266). The investigator did not get the inforamtion so counsel did not have it.

The investigation was never done. The information was never provided to the experts. Each member of the defense team thought the other was handling that aspect. It was not until the resentencing started that the deficiencies became painfully apparent.[5]

Had mental health mitigation been available, counsel would have wanted to present this type of evidence to the judge and jury:

> If he had found -- sure. If he had found something that was really strong, I would have certainly used it appropriately. It would have to be something significant on that.

---

[5]Ironically, Judge Schaeffer expressed her opinion during the hearing that if an attorney had evidence of fainting they would be on notice to request brain function testing:

> THE COURT: I would disagree with you, counsel. I'll overrule your objection simply because I think that as an experienced criminal defense lawyer, I think you have enough opportunity to be involved with mental health experts that you certainly can recognize certain symptoms of what might cause you to ask a doctor to look into whether or not you have a brain disorder.
>
> MR. NOLAS: Not to argue with Your Honor, but I don't think I can. I don't think a lay witness --
>
> THE COURT: Well, I can. <u>If I had evidence that a man was fainting, all of the things that a doctor would talk about, I'd probably ask for a test along those lines</u>.

(PC 3273)(emphasis added). In fact, trial counsel did have Mr. King's D.O.C. records which indicated that he reported headaches, dizziness and <u>fainting</u>.

(PC 3242-43). Further, it is apparent that trial counsel made decisions based on the erroneous assumption that Mr. King had an IQ as high as 120 when in fact Mr. King's IQ was dramatically lower and his Beta IQ was 86 (PC 3255).

Trial counsel wasted considerable time and effort pursuing a nonexistent defense. He explained that the main aspect of his defense was that Mr. King did not commit the offense (PC 3263). He expressed considerable frustration that while the State was allowed to offer extensive proof of the crime, he was not allowed to respond:

> A This case has a difference. It has a difference than any of the other cases. The problem that I had with the state was, and with respect to Judge Federico, he told me I couldn't present any evidence of innocence, but he let Ms. McKeown present evidence of guilt.
>
> For example, they would not stop in their efforts whenever they could to slide in -- and I say this respectfully and they did a good job -- but to slide in as much to tie Mr. King to that murder. For example, the location of the knife. That was really in dispute, and I mean, I raised Cain if you read the record about that. And to me that's the difference in the King case. And I respectfully disagree with the Florida Supreme Court because they can't tell me I can't present evidence of innocence and then let the state jam evidence of guilt down the throat of the jury who didn't know what in the world was going on in 1985 about a case that had happene [sic] in 1977. <u>So you know, Mr. Mathews was interested in that issue, and we worked very, very hard on that issue</u>.

(PC 3189-90)(emphasis added). To the extent that trial counsel's failure to prepare the admissible evidence available for Mr. King was due to his misapprehension of the law, a new sentencing is required. <u>Harrison v. Jones</u>, 880 F.2d 1279 (11th Cir. 1989).

B. <u>Trial Counsel Unreasonably Failed to Present Available Evidence of Mr. King's History of Drug and Alcohol Abuse and His Intoxication at the Time of the Offense</u>

Trial counsel told Mr. King's sentencing jury in his opening argument that Mr. King was a heroin addict (PC 3261; R. 1251). Defense counsel argued to the jury during closing that they should find Mr. King's history of drug abuse as a mitigating circumstance. However, no evidence was presented to the jury to explain <u>why</u> drug abuse should be mitigating.

The State, of course, easily exploited the scarcity of the evidence presented by trial counsel regarding drug abuse:

> What else did he [defense counsel] tell you he was going to show you during his opening statement, that King had serious drug problems,

> rattled off those. Have you heard any evidence King had a serious drug problem other than his sister who was 12 years old at the time or younger seeing him with a needle one time. And her testimony was she thought he was involved with drugs.
>
> You did hear from a good friend of his, no idea he was involved heavily with drugs, didn't know he was involved with drugs. He [defense counsel] was trying to overstate Mr. King's problems.

(R. 1687-88 [State's closing argument])(emphasis added).

The State was correct in that defense counsel did tell the jury he was going to prove that Mr. King had a serious drug problem, and did fall far short of his promise. The State was entirely incorrect, however, in its allegation that defense counsel was attempting to "overstate" Mr. King's problems. Defense counsel, in fact understated the magnitude of Mr. King's drug and alcohol problems. Mr. King in fact had an extensive and longstanding involvement in substance abuse and drug addiction, and there was ample, compelling proof available. Defense counsel, however, failed to develop and present this proof, and thus failed to fulfill his own promise to the jury. By telling the jury that Mr. King was a heroin addict and then failing to develop any evidence as to why that could mitigate the sentence, counsel actually made things worse. This was prejudicially ineffective assistance.

A rich and compelling body of evidence was available at the time of the resentencing demonstrating Mr. King's longstanding and ongoing abuse of, and addiction to, a variety of drugs, including alcohol and heroin. Department of Corrections records compiled during Mr. King's previous incarcerations were rife with references to Mr. King's early and continuing problems with drugs and alcohol, and the resultant effects of those substances on his behavior. All of these records were available to, and a few were actually in the possession of defense counsel (see, e.g., R. 1593) at the time of the resentencing proceeding. None of them, however, nor any of the information contained therein, were employed by defense counsel to fulfill his promise to the jury.

There was ample evidence available to defense counsel. Numerous friends and acquaintances of Mr. King could and would have testified to Mr. King's early and ongoing involvement in drugs and alcohol, his heroin addiction, and his reputation in the community as a substance abuser. These witnesses provided affidavits and testified at the evidentiary hearing as they would have at sentencing (See, e.g., PC

Vols. 21 and 22 [containing the testimony of various witnesses on this issue].) For example:

> My name is Ronald Joseph Massey. I am 34 years old and I have known Amos Lee King, Jr. since I was about eleven years old. We grew up together in Largo, Florida.
>
> Amos and I have always been good friends. We went to elementary school together and played together after school. We were such close friends that Amos spent many nights over at my house. He would sleep over so that we could spend more time together.
>
> When we were in our early teens, Amos and I would try different types of drugs. We started drinking beer when we were 12 and 13 years old. We also tried pot and any pills that we were able to get. We would do these types of things as often as we were able to obtain any drugs or had the money to buy some.
>
> Up until the early 70's, heroin was unknown in Pinellas County. A friend of ours from up North brought some down with him when he came to stay in Largo one summer. Amos and I both tried it for the first time. We then met people from St. Petersburg and Tampa who knew how to get heroin. Amos and I both ended up getting hooked on it. This lasted for at least two years. I was busted in 1974 and went to prison for two years. I lost contact with Amos after I went to prison.

(Affidavit of Ronald Massey, App. 6).

> I have known Amos Lee King since 1969, the year we first met. Amos wanted to date me, but I was only 13 years old and not allowed to date.
>
> Over the years, we would see each other around town and speak, or sometimes we would stop and talk for a few minutes. I got to know him and we became friends.
>
> When I knew Amos, he used drugs, drank beer and alcohol. I have seen him drunk and I heard he also used pot. I know he injected narcotics because I saw him do it.
>
> I was at the Largo Greenleave night club one night in 1975. Amos invited me to ride with him. We got into a car and drove with several of his friends to a nearby house. They went inside the house and Amos told me to stay in the car. So much time passed, I began to get worried. I walked up to the house and looked in. I saw syringes, a spoon with a bent handle and dried blood all over everything. I looked over at Amos as his friend injected him what what I believe was heroin. I was so frightened, I ran away.

(Affidavit of Florasteen Yeldon Dorsey, App. 6).

> I am Leo Edward Perry. I am 37 years old and I have spent most of my life in Largo.
>
> I have known Amos Lee King as long as I can remember. We grew up in the same neighborhood and hung around together when we were teenagers. Amos was a quiet person, fun to be around and easy to get along with.
>
> Amos started drinking beer and liquor when he was 13 or 14 years old. We went out drinking in Largo at the Green Leaf and the Moon Stop night clubs sometimes during the week, but always on the weekend.

Amos turned to hard drugs, when he was around 17 years old. I know he used heroin, coke and did speedballing, developing a 2-300 a day habit.

When Amos got high, he was very moody. Before Amos started using drugs, he was somewhat suspicious, but under the influence of drugs, he moved from place to place and did not want to be closed in. He would say that he did not want to be around a lot of people.

(Affidavit of Leo Edward Perry, App. 6).

My name is Joseph Melvin Campbell. I live in Dunedin, but I grew up in Largo, where I knew Amos Lee King.

I am six years older than Amos. I know him and his family from when we all lived in the same neighborhood. I use to see Amos around the neighborhood all the time.

I know that Amos started drinking beer at a young age. When he was in his mid teens, he would get drunk every weekend. He would stagger, and become more talkative. Usually, Amos would drink at home. The whole family is alcoholic and they would all sit outside in their father's junk yard and drink.

I began to hear about Amos shooting drugs when he was around 18 years old. People would talk about his shooting heroin and cocaine and that he had a pretty bad habit.

(Affidavit of Joseph M. Campbell, App. 6).

My name is Leola Richardson. I have lived in Largo since 1967, when I moved here from Clearwater after my father's death. I met Amos King in 1970, when I started dating Robert King, Amos' brother.

Amos was always very nice and was the type of person who would do anything to help anybody, especially his friends and family members. I recall many occasions when Amos would give a neighbor without a car a ride to the grocery store. Amos gave nice gifts to my daughter, who he said resembled his mother.

If Amos' mother had lived, his life would have been different. His brother, Bob, no longer cared attitude about life after his mother died and told me nothing mattered to him anymore. Amos probably felt the same way to and allowed drugs to overtake his life.

Drugs made Amos a thief, not a murderer. He stole to support his drug habit, but never hurt anyone during any of the robberies he committed.

Bob told me that Amos was a drug addict and that he was using heroin and cocaine. I am not sure when he first used drugs, but I know it was before 1972, the year that Bob also became a drug addict. Everyone knew Amos had devoted his life to using drugs and finding ways to get more drugs. Amos' problems began and ended with drugs.

When Amos went to trial, I was still working at the county courthouse. I went to the trial amost everyday on my lunch hour. Amos would wave to me and say hello everytime he saw me.

(Affidavit of Leola Richardson, App. 6).

My name is Stephen J. Grant. I am 33 years old. I live at 13050 Washington Drive.

I have known Amos King since we were children. We attended the same elementary school and lived in the same neighborhood.

Although I moved to St. Petersburg in the early 60's, my relationship with Amos did not end. I would see Amos when I would come back to Largo to visit. When he was old enough to have a car, he would drive to St. Petersburg and we talked and caught up with what was going on with each other.

When we were in our teens, around 15 years old, heroin was popular in our community. I heard that Amos was using heroin. I never saw him use the drug, but it was common knowledge, among his friends and people on the street, that Amos had a drug habit.

(Affidavit of Stephen Grant, App. 6).

All of these witnesses were readily available to trial counsel. Some of them, and others whose testimony was presented below (see PC Vols. 21 and 22), were known to defense counsel's investigator, but were never contacted or interviewed by defense counsel apparently because of the misunderstanding between counsel and the investigator. (See Affidavit of Roy Matthews, App. 4).

There was yet more compelling evidence relating to substance abuse available to trial counsel. Three witnesses who had seen Mr. King either immediately before or immediately after the time of the offense had stated shortly thereafter in notarized statements given to the Inspector General that Mr. King at those times was "high", "intoxicated", and/or reeked of alcohol. Lynn Robbins, who had picked up Mr. King from work in the early morning hours of March 18, 1977, told investigators later that day that "(King) was intoxicated. I knew that from the time I picked him up from work." (PC 4580-81). Similarly, Robert Hawkins, another fellow inmate, who had attempted to break up the fight between Mr. King and Officer McDonough, told investigators later that same day that "the smell of alcohol was strong on his [Mr. King's] person." (PC 4578-79). Mr. Hawkins had in fact testified to that effect on two prior occasions, at both deposition and at Mr. King's prior trial:

> I smelled alcohol very strongly on him [King] when I grabbed him, and his eyes looked very strange. I caught a glimpse of his eyes when I grabbed hold of him, when he turned his head. His eyes really looked weird. It's something I won't forget, the way he looked. I can't describe it to you, though, you know.

(Deposition of Robert Hawkins, App. 10). Similarly,

Q Mr. Hawkins, you got pretty close to Mr. King when you put your arms on his shoulder, is that correct?

A Yes, sir.

Q Did you smell any alcohol on his breath?

A Yes, sir, I did.

Q Was it very strong or what?

A It was strong enough that I could smell it, yes, sir.

Q You smelled alcohol on his breath when you got close to him?

A Yes, sir.

(Testimony of Robert Hawkins at 1977 trial, ROA 1473). Officer McDonough also initially told investigators that Mr. King was acting strangely when he saw him, "nervous, sweating profusely and acting as if he was 'high,'" and that "he [McDonough] realized he had trouble when he saw King's condition." (PC 203). This evidence was also introduced at the evidentiary hearing.

Mr. King told the mental health expert that he had become intoxicated to the point that he "couldn't make heads or tails of anything":

Q All right. Do you recall if you asked him what he had to drink?

A I did and I can't remember. "It was March 17th. It was St. Patrick's Day." People had been offering him drinks all night. "I couldn't make heads or tails of anything. I had been drinking. It really wasn't my intention to drink, but I drank anyway, smoked a joint. Even when we were working people we worked for were offering us drinks."

MR. NOLAS: And for the record, your Honor, the doctor Is [sic] reading from her notes.

THE COURT: All right.

MS. McKEOWN: I assume so.

(PC 2228). This evidence was never presented to the judge and jury.

All of this evidence would have been compellingly mitigating, and perfectly consistent with defense counsel's initial promise to the jury. All of it was available to defense counsel. Officer McDonough in fact testified, as a state's witness, at the resentencing proceeding and testified in a way directly contradictory to his initial statement (See R. 1414; cf. App. 7; see also Section C, infra.) Trial counsel thus could not only have brought out

this critical mitigating evidence through his cross-examination of McDonough, but could also have severely impeached his testimony in the process. Counsel did not do this, however.

All of the evidence discussed herein would have established classically recognized mitigating factors. See, e.g., Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985)(death sentence improper due in part to defendant's history of "drinking problems" and alcoholism, notwithstanding defendant's testimony that he was "cold sober" on night of crime); Waterhouse v. Dugger, 522 So. 2d 341 (Fla. 1988)("Waterhouse proffered evidence that he suffered from alcoholism and was under the influence of alcohol [on] the night of the murder. . . . The jurors should have been allowed to consider these factors in mitigation"); Fead v. State, 512 So. 2d 176, 178 (Fla. 1987)(Florida Supreme Court has "held improper an override where, among other mitigating factors, there was some 'inconclusive evidence that [defendant] had taken drugs on the night of the murder,' along with 'stronger' evidence of a drug abuse problem"); Barbera v. State, 505 So. 2d 413, 414 (Fla. 1987)(intoxication and drug dependence may mitigate sentence); Amazon v. State, 487 So. 2d 8, 13 (Fla. 1987) ("history of drug abuse" one factor rendering jury override improper); Roman v. State, 475 So. 2d 1228, 1235 (Fla. 1985), (alcoholism and organic brain syndrome); Huddleston v. State, 475 So. 2d 204, 206 (Fla. 1985)(history of drug abuse among factors rendering jury override improper); Hargrave v. Dugger, 832 F.2d 1528, 1534 (11th Cir. 1987)(in banc)(vacating death sentence because nonstatutory mitigating evidence, including evidence of a "history of drug abuse," was excluded from consideration by sentencer); Foster v. State, 518 So. 2d 901, 902 n.2 (Fla. 1988)("some" evidence of alcohol use). Not only would this evidence have been independently mitigating, but it also would have resulted in substantial mental health-related mitigating circumstances had it been developed, and the provided to the mental health experts or had such experts sought it out and used it. The mitigating evidence, however, did not reach the jury and judge.

No "tactic" or "strategy" can be attributed to the omissions discussed

herein. The omissions wee based on the same problem that arose in Harris v. Dugger. And as previously discussed, counsel promised the jury during his opening statement that he would show that Mr. King was a heroin addict with a long history of drug addiction and substance abuse, which affected his behavior throughout his life, but the evidence was never heard by the jury. All of the evidence discussed herein would have been entirely consistent with what counsel told the jury in his opening argument, and would have in fact compellingly supported that argument. The promise, however, was never fulfilled.

The trial court nevertheless denied relief by relying on a purported strategic decision of counsel in failing to investigate or present evidence of drug and alcohol abuse. But investigation was not undertaken to discover such as the initial notarized statements regarding Mr. King's intoxication. This evidence as well as the overwhelming corroboration of relations and friends regarding his severe drug and alcohol abuse, were never provided to a mental health expert. The jury never knew of this critical evidence of intoxication at the time of the offense. Of course no strategy decision can be made without a prior investigation. State v. Cara, No. 73, 888 (Fla. May 9, 1991); State v. Michael, 530 So. 2d 929 (Fla. 1988); Stevens v. State, 552 So. 2d 1082 (Fla. 1989); Bassett v. State, 541 So. 2d 396 (1989); Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991). These facts were readily available. But for the confusion between trial counsel and his investigators, it would have been discovered. Not only was there a lack of adequate investigation, but there was no strategy to keep drug use away from the jury.[6] Indeed, the clearest evidence of counsel's intent was what he stated his intent to be to Mr. King's sentencing judge and jury:

> The one statutory mitigating circumstance that I think you will find and the evidence will be presented is to the effect that the age of the Defendant at the time of the crime was such that he was only 23 years of age. More importantly as far as the mitigating evidence is

[6] If there was, counsel's promise to the jury would make no sense, and would by itself be evidence of ineffective assistance.

> concerned will be that what is called non-statutory mitigating evidence, evidence that goes to the circumstances surrounding the life of Amos Lee King, what he was like before this incident occurred and what he has been like since.
>
> And I would like to go into that in a little more detail at this time.

(R. 1248) (emphasis added).

Trial counsel went on to attempt to argue alcohol and drug addiction:

> The evidence will show these older boys introduced Amos to drugs; first to alcohol, then to marijuana to cocaine and to the very addictive heroin.
>
> And thus, at the age of 16, Amos King, the evidence will show, was a committed heroin addict with no parental concern as to where he lived or what he did.
>
> Obviously the evidence will show that he, Amos, could not avoid the law very long. The evidence will show Amos was arrested as a teenager and sent to a series of juvenile detention facilities here in Pinellas County and also up around Leon County where I am from.
>
> The evidence will show once released from this reform school that Amos, because of this recurring drug problem, because he had no parental supervision whatsoever, Amos would drift right back into a life of crime.
>
> . . . .
>
> The evidence will show that he gained a very sincere interest in Christianity. The evidence will show he began interacting with certain ministers who would come to Florida State Prison or who would correspond with Amos at Florida State Prison and Amos began to, as he rid himself of this awful restraint of heroin, he began to rid himself of his emotional problems that came with it.

(R. 1250-52) (emphasis added). There can be no doubt that counsel considered alcohol and drug addiction as an important aspect of the mitigation which he hoped to present on behalf of Mr. King. Yet no testimony was presented from a mental health expert, and none of the other significant evidence on these issues was heard by the jury. Only one lay witness was called, who said she saw a needle in his arm on one occasion. The critical effects of substance abuse on Mr. King's life were never addressed. The miscommunication and the failure to investigate had a disasterous effect on the outcome Mr. King's resulting sentence of death should be vacated.

C. <u>Trial Counsel Unreasonably Failed to Correct the False Testimony of a Critical State Witness and/or Impeach That Witness's Testimony With Available Evidence</u>.

As discussed in the preceding section, correctional Officer James McDonough told detectives shortly after the assault that Mr. King appeared "high" when he first encountered him immediately prior to the altercation. According to McDonough's initial statement, Mr. King was "nervous, sweating profusely and acting as if he was 'high'," and "he realized he had trouble when he saw King's condition." (<u>See</u> App. 7; <u>see also</u> Section B, <u>supra</u>.). McDonough's initial statement was confirmed by the statements and testimony of other witnesses who had seen Mr. King during the same time period. (<u>See</u> Apps. 8, 9, 10; <u>see also</u> Section B, <u>supra</u>.).

Mr. McDonough's testimony at the resentencing proceeding, however, was radically different than his initial statement:

> Q If you would, sir, for the record once again state your name, please?
>
> A James D. McDonnaugh [sic].
>
> Q Mr. McDonnaugh [sic], there were one or two questions I omitted to ask you when you were previously on the stand.
>
> When Mr. King returned to the correctional facility after work, you indicated you checked him in around 2:40 in the morning. Did he appear to have been under the influence of alcohol or drugs at that time?
>
> A No , he did not. I would have detained him and questioned him.
>
> Q So you didn't smell anything on his breath?
>
> A Could not smell any alcohol and <u>he did not appear to be under the influence of any narcotics</u>.
>
> Q Anything out of the ordinary about his demeanor or appearance at that time when he checked in from work?
>
> A No, he appeared to be someone who had just finished eight or ten hours of work.
>
> Q Okay. I would like to call your attention now to when you observed him outside the facility, when you brought him back in the facility, when the attack then took place upon yourself. During that time frame, you were in close proximity to Mr. King, is that correct?
>
> A Yes, sir.
>
> Q Did you at that time detect an odor of alcohol about his person or did he appear to be under the influence of any substance?

A No, I could not smell the odor of alcohol. I did not detect it at all nor did he appear to be under the influence of any drug.

MS. MCKEOWN: Okay. I have no other questions, Your Honor.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. HARRISON:

Q Sir, do you have any expertise in telling whether or not somebody is on some type of drug other than alcohol?

A No, sir.

MR. HARRISON: Okay. Thank you.

REDIRECT EXAMINATION

MS. MCKEOWN:

Q Did his demeanor denote an individual who was under the influence of any type of substance?

MR. HARRISON: Your Honor, I object. The witness testified that he doesn't have any expertise as a foundation upon which to make that kind of determination.

THE COURT: Well, as a layman he is entitled to express an opinion. The weight to be given to that is for the jury. I'll overrule the objection.

You may answer the question.

THE WITNESS: From my experience he did not appear to be a subject that was intoxicated or had been drinking.

Q (By Ms. McKeown): Okay. And, Mr. McDonnaugh, you have observed in your law enforcement background that you gave us, people who have been drinking and people who have been under the influence of substances?

A Yes, that is correct.

Q He did not exhibit any of those signs?

A He did not exhibit of those symptoms.

(R. 1413-16)(emphasis added).

Defense counsel should have been aware of McDonough's initial statement. Similarly, counsel should have been aware of the accounts of witnesses such as Robert Hawkins (see supra) included in notarized statements made immediately after the offense which directly contradicted what McDonough said on the stand. Detective Pendakos, who had in fact taken and reported McDonough's initial statement, had earlier testified and made passing reference to McDonough's initial

statement. (See R. 1285). Defense counsel nevertheless allowed McDonough to testify in a manner directly contradictory to his original statement.

If McDonough's initial statement was a true account of the events, his trial testimony was false. Whatever the reasons for the obvious discrepancy between McDonough's initial statement and his ultimate trial testimony, it was defense counsel's duty to bring it to the jury's attention. Not only would counsel have substantially impeached McDonough's credibility, he also could have elicited compelling mitigating evidence by effectively employing McDonough's prior statement. (See Section B, supra.). His failure to do so was ineffective assistance.

Trial counsel have been found ineffective for failing to impeach critical State's witnesses with available evidence. See, e.g., Smith v. Wainwright, 799 F.2d 1442, 1444 (11th Cir. 1986). This is such a case: trial counsel's failure to correct the testimony of McDonough and/or to impeach his testimony with his prior inconsistent statement severely prejudiced his client.

D. Trial Counsel Unreasonably Conceded to the Jury That Death Was the Appropriate Sentence in Mr. King's Case

As discussed in later portions of this motion, Mr. King's jury was informed by the Court (see R. 1218, 1720, 1721), the State (see R. 1151, 1187, 1668-69, 1695), and defense counsel (see R. 1698) that death was the appropriate sentence once the State proved one or more aggravating circumstances, and unless and until the defendant proved the existence of mitigating circumstances, and that those mitigating circumstances outweighed the aggravating circumstances proved by the State. The obvious due process violation engendered by such burden-shifting is plain. The gravamen of the instant claim involves trial counsel's patently unreasonable adoption of this unconstitutional construction and his incredibly damaging concession that under that construction, death was the appropriate sentence.

The prosecution's statement of the burden of proof, reproduced below, represents the views of all the parties, and the view imparted to the jury by the court, state, and defense:

> As I have said, any one of those [aggravating] factors can justify death in this case. Once a factor -- there are sufficient factors, one or more, to justify the imposition of death, then that is the appropriate

> recommendation unless the Defendant can overcome that. That is why I say there is a burden of proof placed upon the Defense in this case. That is to reasonably convince you, number one, that there are mitigating circumstances in this case . . . . Then their burden is higher than that. Not only because they convince you that that mitigating circumstance exists but those mitigating circumstances outweigh, outweigh the aggravating circumstances that exist in this case. That is his burden.

(R. 1668-68)(emphasis added). The defense agreed, and told the jury essentially the same thing:

> [y]ou must first decide whether sufficient aggravating circumstances exist to justify the death penalty for Amos King.
>
> Then you must decide that being the case whether sufficient mitigating circumstances would exist which outweigh those aggravating circumstances? If the mitigating circumstances outweigh the aggravating circumstances, you should recommend a life sentence. If not, then, of course, you should recommend death.

(R. 1698)(emphasis added). The court, of course, instructed the jury in the same manner. (*See* R. 1218, 1720, 1721.).

After thus assuming the burden of proving that the mitigating circumstances outweighed the aggravating circumstances, a burden which the constitution specifically prohibits from being placed on the criminal defendant, and after agreeing that death was appropriate when the State proved the existence of *any* aggravating factors, defense counsel then, incredibly, conceded that the State had proved four aggravating circumstances. (*See* R. 1700.). The effect was to effectively inform the jury that the State had established that death was the appropriate sentence, that the defense could not carry their burden of proving otherwise, and that the jury should thus sentence his client to death. The unreasonableness of such a damaging concession, and the resulting prejudice are obvious. Relief is proper.

E. Failure to Object to Improper Evidence

In denying habeas corpus relief, this Court held that "[b]ecause trial counsel did not object," Mr. King could not be heard on his claim that "the trial court improperly relied on evidence of *King's behavior during* trial to support the death sentence." *King v. Dugger*, 555 So. 2d 355, 359-60 (Fla. 1990). Mr. King's petition explained that the purported "evidence" relied upon by the trial court was patently unreliable and that defense counsel had no opportunity to object because he did not

have any idea that the trial judge would rely on such evidence until the judge filed his sentencing order. Mr. King explained that an attorney cannot object contemporaneously to a sentencing order that is filed with the court's clerk's office. This Court disagreed. Given the fundamental importance of the claim and this Court's previous ruling, Mr. King respectfully submits that trial defense counsel was prejudicially deficient in failing to object.

Conclusion

The various omissions and deficiencies identified herein, and the resulting prejudice to Mr. King, were sufficient to establish Mr. King's entitlement to Rule 3.850 relief.

ARGUMENT III

MR. KING'S RIGHTS TO AN INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION WERE DENIED BY THE SENTENCING COURT'S REFUSAL TO ALLOW ACCURATE EVIDENCE AND TO PROVIDE INSTRUCTIONS REGARDING THE CONSEQUENCES OF THEIR VERDICT, IN CONTRAVENTION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. King acknowledges that this Court has previously denied relief on this claim in this case. See King, 555 So. 2d 355. He respectfully submits, however, that this is a claim of fundamental error which rendered the proceedings' results unreliable and accordingly respectfully requests that the Court reconsider.

The eighth and fourteenth amendments require that a sentencer in a capital case not be precluded from considering those circumstances that a capital defendant proffers as a basis for a sentence less than death. Lockett v. Ohio, 438 U.S. 586 (1978). Excessively vague sentencing standards were condemned in Furman v. Georgia, 408 U.S. 238 (1972), and it is well recognized that in order to pass constitutional muster, a death penalty scheme must "genuinely narrow the class of persons eligible for the death penalty" and must reasonably justify the imposition of a more severe sentence on the particular defendant "compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862 (1983).

To that end, defense counsel for Mr. King attempted to present information to the jury that the 25-year minimum mandatory term on a life sentence meant exactly that: that the defendant would indeed serve at least 25 years before even being eligible for parole. During voir dire, when defense counsel first tried to provide

the jurors with this <u>accurate</u> information, he was instructed by the court that he could not ask questions to the effect that 25 years meant at least 25 years minimum mandatory service before parole (R. 1124).

The subject next arose when the defense attorney informed the judge that he had listed Mr. Harry Dodd, the Executive Director of the Florida Parole and Probation Commission, as a witness. Counsel wanted to know whether he would be allowed to call Mr. Dodd (R. 1403-04). Counsel then proffered Mr. Dodd's anticipated testimony concerning Mr. King's future eligibility for parole (R. 1405). The court's ruling at that time was that defense counsel could call any witnesses he wanted, but that the anticipated testimony regarding parole would be "irrelevant" (R. 1407).

Defense counsel later called Mr. Dodd and again proffered his testimony. The testimony was that Mr. Dodd was the "top administrative person for the Parole Commission of Florida" (R. 693). Having reviewed the Department of Corrections Inmate File on Amos Lee King, he could state that under Commission rules, Mr. King would not be eligible for consideration for parole until after 24 and a half years had expired (R. 1533-39) and that after that, Mr. King's salient factor score would be very high on the scale (R. 1543) which would put Mr. King at a range where it would be unlikely that he would be paroled at all at any early time (R. 1544). The salient factor range would have to be met before Mr. King would be eligible for parole (R. 1545). Mr. Dodd explained that his testimony was accurate under the present status of the law and procedure (R. 1549). The court found this all very "enlightening," but ruled that he would not allow the testimony to go to the jury (R. 1550).

At the instruction conference, defense counsel requested that one of the jury instructions be modified to include the word "consideration," so as to read "without possibility of parole consideration for 25 years." The Court again refused (R. 1652-53). Defense counsel indicated that he wanted to argue to the jury that life sentence without possibility of parole for 25 years does not mean to suggest that Mr. King <u>would</u> be paroled after 25 years (R. 1655-56). The Court's response was to say that if counsel did so argue, the court would let the State argue that the law could change and he could be out sooner than in 25 years (R. 1656).

In a similar case, the United States Supreme Court has held that it was proper for such information (accurate information regarding the result of the jury's sentencing verdict) to be presented to the jury. In California v. Ramos, 463 U.S. 992 (1983), a capital case, the Supreme Court reversed the California court for disallowing a jury instruction that stated that the Governor "is empowered to grant a reprieve, pardon, or commutation of a sentence following conviction of a crime. Id. at 995-96. In so holding, that Court found that the matter at issue was relevant to the question of capital sentencing, and that it did not run afoul of relevant constitutional safeguards.

> The Briggs instruction gives the jury accurate information of which both the defendant and his counsel are aware, and it does not preclude the defendant from offering any evidence or argument regarding the Governor's power to commute a life sentence.

Id. at 1004.

Likewise, defense counsel should not have been precluded from offering accurate information concerning parole, through the testimony of Mr. Dodd, which the State could have tried to rebut. Similarly, counsel should not have been precluded from presenting his argument. The requested instruction was constitutionally appropriate and the parole argument was central to counsel's defense. It was a violation of the eighth amendment not to allow the jury to hear this accurate information: the result was that counsel's defense was undermined unfairly and an unreliable sentencing proceeding resulted. This Court should reconsider.

ARGUMENT IV

MR. KING WAS DENIED HIS RIGHTS TO AN INDIVIDUALIZED AND FUNDAMENTALLY FAIR AND RELIABLE CAPITAL SENTENCING DETERMINATION AS A RESULT OF THE PRESENTATION OF CONSTITUTIONALLY IMPERMISSIBLE VICTIM IMPACT INFORMATION, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS.

During the proceedings resulting in Mr. King's sentence of death, the State elicited and argued evidence relating to victim's background and her status in the community in an effort to demonstrate victim impact. The evidence, and State arguments based thereon, were obviously introduced and used for one purpose -- to urge the jury to vote for death because of who the victim was, her place in the community, and her "worth" as compared to that of the defendant. This was fundamentally unfair, and violated Mr. King's rights to a reliable and

individualized capital sentencing determination. The State's arguments for death involved an obvious attempt to impermissibly aggravate the homicide and justify the death sentence on the basis of impermissible victim impact information.

During opening argument, the prosecution "testified" with regard to the victim's background, personal characteristics, family history, and status in the community:

> The victim in this case is Natalie Brady who was 67 years old at the time. She lived alone in a house in Tarpon Springs on Brady Road. She was a long time member of the community. The road was named after her family.

(R. 1235).

The State elicited similar testimony from its witnesses during its case in chief:

> Q Now, who is Mrs. Brady, Natalie Brady?
>
> A Mrs. Brady, she goes by Tillie Brady as everybody has known her in Tarpon. She is a resident of that house, owner of that house, she and her family lived in the Anclote area of Tarpon Springs for fifty, sixty, seventy years. In fact, Brady Road was named after her family.
>
> Q The house she lived there on Brady Road, did she reside there with anyone?
>
> A No, she did not.
>
> Q Lived there alone?
>
> A That is correct.
>
> Q How old was Mrs. Brady?
>
> A Mrs. Brady, at the time of her death, was 67 years old.
>
> Q Can you give us a physical description of her? What was her height and weight, if you know.
>
> A Mrs. Brady was about five foot two inches, she was large, about 180 pounds. And late sixties, sixty-seven years old.

(R. 1262 [testimony of Manual Pendakos]).

The State then, in its final argument, used this testimony to urge the death penalty on the basis of the "worth" of the victim, and her personal characteristics, as compared to those of the defendant:

> 67-year old Natalie Brady was at home alone in her home, helpless, defenseless, vulnerable when she was confronted by King, 23-years old, six foot one and about 190 pounds. A young, tall muscular male.

(R. 1666). Such "comparable worth" arguments, in and of themselves, have been classically condemned. Moore v. Kemp, 809 F.2d 702 (11th Cir. 1987)(in banc); Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983).

In short, the presentation of evidence or argument concerning "the personal characteristics of the victim" before the capital sentencing judge and jury violates the eighth amendment because such factors "create[] a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." Booth v. Maryland, 482 U.S. 496, 503 (1987). Similarly, it is constitutionally impermissible to rest a sentence of death on evidence or argument purpose of which is to compare the "worth" of the defendant to that of the victim. Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983); see also Moore v. Kemp, 809 F.2d 702, 747-50 (11th Cir. 1987)(in banc)(Johnson, J., concurring in part and dissenting in part). "Worth of victim" and "comparable worth" evidence and arguments have nothing to do with 1) the character of the offender, and/or 2) the circumstances of the offense. Cf. Zant v. Stephens, 462 U.S. 862, 879 (1983). They deny the defendant an individualized sentencing determination, and render any resulting sentence arbitrary, capricious, and unreliable. Moreover, without any tatical or strategical reason , counsel in Mr. King's case failed to register an objection to the admission of this evidence. This was deficient performance, which prejudiced Mr. King by permitting the introduction of highly prejudicial evidence. In short, the eighth amendment forbids the State from asking a jury to return a sentence of death because of who the victim was. But this is precisely what Mr. King's capital sentencing jury was called on to do. This case, thus, involves fundamental eighth and fourteenth amendment error and, as in Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989), relief is appropriate. Defense counsel's failure to litigate these issues constitutes ineffective assistance, which prejudiced Mr. King.

ARGUMENT V

MR. KING'S SENTENCING JURY WAS INACCURATELY INSTRUCTED THAT THE ALTERNATIVE TO A PENALTY OF DEATH WAS LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE FOR TWENTY YEARS, CONTRARY TO STATE LAW AND IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The entire venire from which Mr. King's jury was selected was instructed as follows:

> Ladies and gentlemen, this is the case of State of Florida versus Amos Lee King, Jr. The Defendant has previously been found guilty of murder in the first degree. Consequently, the jury which is selected will not concern itself with the question of his guilt.
>
> The punishment for the crime of murder in the first degree is either death or life imprisonment without the possibility of parole for 20 years. The final decision as to what punishment shall be imposed rests solely with the Court. However, the law requires that a jury be impaneled to recommend to the Court what punishment should be imposed upon the Defendant. This is the sole purpose of this proceeding.

(R. 848)(emphasis added).

This incorrect instruction was later echoed by the prosecutor during voir dire

> Let me kind of move around with a little pit stop with the questionarres for a couple of minutes telling you something the judge already told you; basically that the only sentence in this case can be, one, life with a mandatory twenty years in prison, or death.

(R. 894)(emphasis added). Similarly,

> You may have sympathy for the Defendant who has to face the consequences of life with a mandatory twenty years in prison or death as a result of that crime; that may evoke sympathy. But we ask you to put those feelings aside.

(R. 886-87)(emphasis added).

The undeniably erroneous instructions discussed herein placed "artificial alternatives" before the jury, see California v. Ramos, 463 U.S. 992, 1007 (1983), and served to mislead and misinform the jury. Caldwell v. Mississippi, 472 U.S. 320 (1985). Such misinformation violated the eighth amendment, as it enhanced the risk that death was imposed despite the presence of factors calling for life imprisonment. See Lockett v. Ohio, 438 U.S. 586, 605 (1978); Beck v. Alabama, 447 U.S. 633, 637 (1980).

Erroneously informing the jury as to the alternatives to a sentence of death "interjected wrongful considerations into the fact finding process, diverting the jury's attention from the central issue" of whether life or death was the appropriate punishment. Beck v. Alabama, 447 U.S. at 642. The erroneous instruction may have encouraged Mr. King's jury to reach a death verdict for an impermissible reason: its incorrect belief that the only alternative to a death sentence was life imprisonment with only a twenty year mandatory minimum. The erroneous instruction thus "introduce[d] a level of uncertainty and unreliability" into the sentencing process that "cannot be tolerated in a capital case." Id., 447

U.S. at 643. This error was made even more egregious by the trial court's refusal to allow the jury to consider accurate information regarding what a life sentence would actually entail. See Beck.

The United States Supreme Court has explained that the question involved in cases such as this is "what a reasonable juror could have understood the charge as meaning." Mills v. Maryland, 108 S. Ct. 1860, 1866 (1988), quoting Francis v. Franklin, 471 U.S. 307, 316 (1985). In Mills, the Court found reversible eighth amendment error where the sentencing jury could have read the instructions in an erroneous and improper fashion. Here, a reasonable jury could have interpreted the instruction at issue here, one of the first instructions it heard from the court, to mean exactly what it said, i.e., that under Florida law a defendant convicted of first degree murder could be free in twenty years. Under Mills, the question is whether the erroneous instruction could have affected the verdict. Id., 108 S. Ct. at 1867. It could have. Defense counsel should have litigated this issue, and in failing to do so, rendered prejudicially deficient assistance. Mr. King is thus entitled to relief.

ARGUMENT VI

THE TRIAL COURT'S UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF IN ITS INSTRUCTIONS AT SENTENCING, AND ITS APPLICATION OF THIS SAME IMPROPER STANDARD IN IMPOSING SENTENCE, DEPRIVED MR. KING OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

The jury in this case was instructed that death was the proper sentence once aggravation was proved, unless and until the defense presented enough in mitigation to overcome the aggravation. This standard was provided to the jury in the sentencing instructions and then apparently employed by the sentenced judge, see Ziegler v. Dugger, 524 So. 2d 419, 420 (Fla. 1988)("Unless there is something in the record to suggest to the contrary, it may be presumed that the judge's perception of the law coincided with the manner in which the jury was instructed"). This standard shifted the burden to Mr. King to prove that death was not appropriate, and more importantly, restricted full consideration of mitigating evidence, in violation of the sixth, eighth and fourteenth amendments.

A presumption of death, such as that employed here, was never intended to be presentated to a Florida jury at the sentencing phase of a capital trial. See Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1988). The instructions shifted to the defendant the burden of proving that life was the appropriate sentence, and violated the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), the eighth and fourteenth amendments, Lockett v. Ohio, 438 U.S. 586 (1978), and Mills v. Maryland, 108 S. Ct. 1860 (1988). The burden of proof was shifted to Mr. King on the central sentencing issue of whether he should live or die, and the instructions inhibited consideration of mitigation and rendered the death sentence unconstitutional under Mills.

The focus of a jury instruction claim is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Boyde v. California, 58 U.S.L.W. 4301, 4304 (U.S. March 5, 1990). Here there is more than a reasonable likelihood that based on the instructions, the jury believed that Mr. King had the ultimate burden to prove that life was appropriate. Thus, proper consideration of mitigation was inhibited, for only the mitigation that outweighed the aggravation could be given full consideration and "effect." Mr. King's resulting death sentence is fundamentally unreliable. Defense counsel should have litigated this issue, and in failing to do so rendered prejudicially deficient assistance. Petitioner acknowledges that this Court has previously ruled adversely to his position on this claim. He respectfully submits, however, that because of the fundamental nature of the error at issue, and the intervening decisions in cases such as Mills, the ends of justice counsel that the claim be heard on its merits and that relief be granted.

ARGUMENT VII

THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE WAS APPLIED TO MR. KING'S CASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The manner in which the jury and judge were allowed to consider "heinous, atrocious or cruel" provided for no genuine narrowing of the class of people eligible for the death penalty, because the terms were not defined in any fashion, and a reasonable juror could believe any murder to be heinous, atrocious, or cruel

under the instructions. See Mills v. Maryland, 108 U.S. 1860 (1988). These terms require definition in order for the statutory aggravating factor genuinely to narrow, and its undefined application here violated the eighth and fourteenth amendments. Godfrey v. Georgia, 466 U.S. 420 (1980). Jurors must be given adequate guidance as to what constitutes "especially heinous, atrocious, or cruel." Maynard v. Cartwright, 108 U.S. 1853 (1988). No such evidence was provided here. Accordingly, Mr. King's death sentence was obtained in violation of the eighth and fourteenth amendments, and must be vacated.

In Mr. King's case, the Court offered no explanation or definition of "heinous, atrocious, or cruel" but simply instructed that one of the aggravating circumstances which the jury could consider was:

> 6) The crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious or cruel.

(R. 1721).

This bald instruction was given in spite of the fact that prior to trial defense counsel filed a detailed motion urging that this aggravating factor be found unconstitutional because it is vague, overbroad and arbitrary and capricious (R. 172-178). This motion was renewed at the resentencing proceeding (R. 1719).

Even though this Court had consistently held that in order to show "heinous, atrocious, or cruel" something more than the norm must be shown, see Cooper v. State, 336 So. 2d 1133 (Fla. 1976); Odom v. State, 403 So. 2d 936 (Fla. 1981); Parker v. State, 458 So. 2d 750 (Fla. 1984), the trial court found that heinous, atrocious and cruel was properly found in Mr. King's case.

However, the court did not have the benefit of Maynard v. Cartwright, decided by the United States Supreme Court in June of 1988. Cartwright did not exist at the time of Mr. King's trial, sentencing or direct appeal and it substantially alters the standard pursuant to which Mr. King's claim must be determined. As did Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), Cartwright represents a substantial change in the law that requires Mr. King's claim to be determined on the merits pursuant to Rule 3.850.

Moreover, the new precedent involves the most fundamental of constitutional errors -- proceedings which violate the standards enunciated in Cartwright render

any ensuing sentence arbitrary and capricious. Id. For this reason also Mr. King's eighth amendment claim is properly before the Court. What Mr. King has presented involves errors of fundamental magnitude no less than those found cognizable in post-conviction proceedings in Reynolds v. State, 429 So. 2d 1331, 1333 (Fla. App. 1983)(sentencing error); Palmes v. Wainwright, 460 So. 2d 362, 265 (Fla. 1984)(suppression of evidence); Nova v. State, 439 So. 2d 255, 261 (Fla. App. 1983)(right to jury trial); O'Neal v. State, 308 So. 2d 569, 570 (Fla. 2d DCA 1975)(right to notice); French v. State, 161 So. 2d 879, 881 (Fla. 1st DCA 1964)(denial of continuance); Flowers v. State, 351 So. 2d 3878, 390 (Fla. 1st DCA 1977)(sentencing error); Cole v. State, 181 So. 2d 698 (Fla. 3d DCA 1966)(right to presence of defendant at taking of testimony). Moreover, because human life is at stake, fundamental error is more closely considered and more likely to be present where the death sentence has been imposed. See, e.g., Wells v. State, 98 So. 2d 795, 801 (Fla. 1957)(overlook technical niceties where death penalty imposed); Burnette v. State, 157 So. 2d 65, 67 (Fla. 1963)(error found fundamental "in view of the imposition of the supreme penalty").

Mr. King was denied the most essential eighth amendment requirement -- his death sentence was constitutionally unreliable. Here, the eighth amendment violations directly resulted in a capital proceeding at which an error of constitutional dimension directly affected the sentencer's consideration "concerning the ultimate question whether in fact [Amos Lee King should have been sentenced to die]." Smith v. Murray, 106 S. Ct. 2661, 2668 (1986)(emphasis in original). Given such circumstances, the Supreme Court has explained that no procedural bar can be properly applied. Id. Beyond all else that Mr. King discusses herein, the ends of justice require that the merits of the claim now be heard, and that relief be granted. In Proffitt v. Florida, 428 U.S. 242 (1976), the United States Supreme Court approved the Florida Supreme Court's construction of the "heinous, atrocious or cruel" aggravating circumstance, holding:

> [The Florida Supreme Court] has recognized that while it is arguable "that all killings are atrocious, . . . [s]till, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." Tedder v. State, 322 So. 2d, at 910. As a consequence, the court has indicated that the eighth statutory provision is directed only at "the

> conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So. 2d, at 9. See also Alford v. State, 307 So. 2d 433, 445 (1975); Halliwell v. State, [323 So. 2d 557], at 561 [Fla. 1975]. We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases.

Proffitt, 428 U.S. at 255-56 (footnote omitted).

The construction approved in Proffitt was not utilized at any stage of the proceedings in Mr. King's case. The jury was simply instructed that one of the aggravating circumstances was "the crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious, or cruel" (R. 1721). The explanatory or limiting language approved by Proffitt does not appear anywhere in the record. Nevertheless, on direct appeal, this Court affirmed. The sentencing judge also failed to apply any limiting construction, as did the Florida Supreme Court on direct appeal.

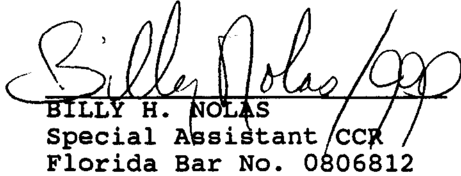
The deletion of the Proffitt limitations renders the application of the aggravating circumstance in this case subject to the same attack found meritorious in Cartwright. The Supreme Court's eighth amendment analysis fully applies to Mr. King's case; the identical factual circumstances upon which relief was mandated in Cartwright are present here, and the result here should be the same as in Cartwright.

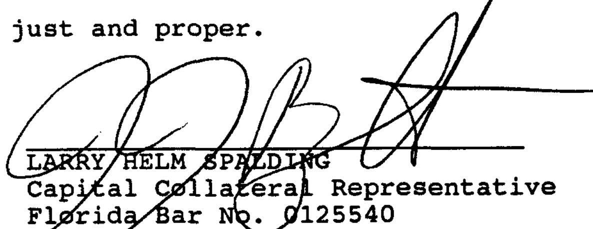
In Mr. King's case, as in Cartwright, what was relied upon by the jury, trial court, and Florida Supreme Court did not guide or channel sentencing discretion. Likewise, here, no "limiting construction" was ever applied to the "heinous, atrocious or cruel" aggravating circumstance. Counsel failed to request or proffer adequate instructions defining heinous, atrocious and cruel. This failure was ineffective assistance. Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Finally, this Court did not cure the unlimited discretion exercised by the jury and trial court by its recitation of facts. As in Cartwright, Mr. King is entitled to post-conviction relief.

At the evidentiary hearing substantial evidence was presented by both the defense and State mental health experts that Mr. King's judgment was impaired at the time of the offense and that he suffered from mental disability. However, the court did not grant a hearing on this claim.

CONCLUSION AND RELIEF REQUESTED

On the basis of the argument presented herein, and on the basis of what was submitted to the Rule 3.850 trial court, Appellant respectfully urges this Honorable Court to set aside his unconstitutional conviction and death sentence and grant all other relief which the Court deems just and proper.





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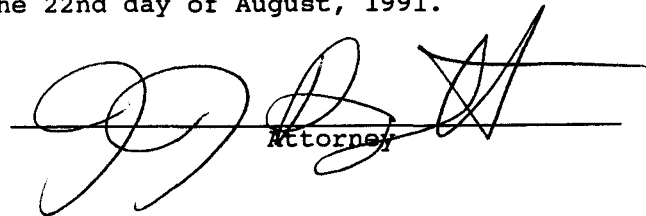
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Robert Krauss, Assistant Attorney General, Westwood Building, Seventh Floor, 2002 North Lois Avenue, Tampa, Florida 33607 this the 22nd day of August, 1991.



Attorney