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

REPLY BRIEF OF APPELLANT

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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.

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REPLY TO STATEMENT OF THE FACTS

Appellant stands by every fact cited in the initial brief as accurate and fully supported by the record. However, Appellant does not agree with the version of the facts presented in the Appellee's Brief and provides additional facts to aid the Court in understanding the record.

Defense counsel initially employed David Mack to investigate Mr. King's case. The State does not contest that Mr. Mack did not do his job and was dismissed from the case (Appellee's Brief at pp. 2-3).

Thirty days before the resentencing, Mr. Mathews was retained as an investigator (PC 2811). Due to shortness of time, other obligations, and miscommunication Mr. Mathews admitted he did not do an adequate investigation (PC 2779, 2809, 2813).[1] Specifically, he did not gather or review any records (PC 2780-81). He did not provide any data to a mental health expert (PC 2785-86). He did not investigate a history of substance abuse although there was an indication of a drug problem (PC 2828). He did not investigate intoxication at the time of the offense (PC 2831).[2] The State does not contest these facts in its brief (Appellee's Brief, pp. 3-5). Mr. Mathews testified that he was so upset at the lack of preparation that he walked out of the courtroom several times during the resentencing hearing and had an "intense conversation" with counsel (PC 2816).

The State does not contest the fact that Dr. Mendelson, the mental health expert retained for the resentencing, was only provided with partial "DOT (sic) records" (Appellee's Brief, p. 7). The State is wrong in alleging that these materials included "appellant's entire social and criminal history" (Appellee's Brief at 27). The State's Brief is misleading in stating that Dr. Mendelson "can <u>not</u> tell whether any statutory or nonstatutory mitigating

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[1]However, Mr. Mathews testified that he did report red flags such as child abuse and substance abuse to defense counsel (PC 2783-84).

[2]Mr. Mathews' testimony prompted the trial judge to inquire "Is there an issue in this thing on inadequate investigation?" (PC 2815).

factors exist in this case" (Appellee's Brief, p. 7). In fact, Dr. Mendelson testified that:

> I can try. I'm not an attorney. My understanding of the statute is that a mitigating factor of this sort would be the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law being substantially impaired, and it would be my opinion that if he were intoxicated and brain damaged it could very well be that he was not able to do that.

(PC 2951-52). It is also misleading to state that during Dr. Mendelson's interview, "nothing was observed to indicate brain damage" (Appellee's Brief, p. 8). In fact, Dr. Mendelson testified that he had evidence of a history of significant drug abuse (PC 2970, 2998) and that had he been aware of indicia such as blackouts, fainting, headaches and dizziness, he would have done screening tests for brain damage (PC 2945, 2949). He also testified that because the paranoia scale on the MMPI was elevated both on the test he gave and on Dr. Carbonell's test, he believes that paranoid personality may be a correct diagnosis (PC 2955-60). Finally, he stated that Mr. King reported drinking rum and smoking marijuana on the night of the offense (PC 2977). In retrospect, the doctor regretted not asking Mr. King how much he had to drink and not interviewing other individuals. "I did not do those things and so I can't say how much certainty I have about the conclusions I reached in 1985" (PC 3007).

Defense counsel retained Dr. Mendelson and transported him from Tallahassee to Tampa for the purpose of testifying at Mr. King's resentencing proceeding (PC 2785). It was only on the second day of the resentencing that counsel became aware of the devastating effect of the lack of adequate investigation, evaluation and preparation on the mental health testimony (PC 3303). It was due to this lack of adequate preparation, investigation and evaluation that no mental health testimony was presented.[3]

The State's insinuation that there was no testimony at the 3.850 hearing which would document a history of drug abuse is simply untrue (Appellee's

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[3]Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989). No tactical motive can be ascribed to an attorney who failed to properly investigate and prepare.

Brief, p. 12). Stephen Grant testified that he sold heroin to Amos King on a regular basis when Mr. King was 17 years old (PC 3419); Richard Green testified that he and Amos King were injecting speedballs, heroin and coke together, when Mr. King was 16 years old (PC 3442); Susan Bryant testified she also injected speedballs with Amos King (PC 3460); and Leo Perry stated he started getting drunk with him when Mr. King was 14 years old and also used heroin and cocaine with Amos King (PC 3488-89). All of these witnesses testified that Mr. King did drugs away from home which explains why his sisters were not aware of the effects of his drug problem. Given the extensive personal testimony presented at the 3.850 hearing in addition to a record of drug related crimes and references to drug problems in his prison files, the evidence of Mr. King's severe drug problem was overwhelming.

The State's brief is misleading as to the evidence of truancy. Betty King testified that Mr. King only stayed home from school once and that was to complete a repair job (PC 3329). Richard Green testified on cross that he could not say whether Amos King skipped school a lot (PC 3455) and Leo Perry testified he skipped school a few times (PC 3497). The State argues there is no evidence to support Dr. Carbonell's observation of Mr. King's long term relationship with Ellen Brown (Appellee's Brief, p. 12). However, there were numerous witnesses who testified to precisely that issue. Robert King testified that Amos was with Ellen for five years (PC 3371); Richard Green testified that he had a good relationship with Ellen (PC 1343); Susan Bryant testified to his good relationship with Ellen (PC 3461); and finally, Ellen Brown Smith testified to her stable, long term relationship with Mr. King (PC 3468-84). It is at best irresponsible to state that "these witnesses served to refute the underlying basis of Dr. Carbonell's testimony" (Appellee's Brief, p. 12).

Dr. Merin was retained as a State expert to re-evaluate Mr. King at the time of the 3.850 hearing. He confirmed that Mr. King had right brain dysfunction (PC 3755); that Mr. King suffered from a personality disorder as a result of his abusive upbringing (PC 3723-26); that Mr. King suffered from a

history of severe substance abuse which had "burned out some dendrites" (PC 3705, 3789); and at the time of the offense Mr. King suffered from poor judgment and impulsivity and would not have reflected on his act (PC 3772, 3802, 3803).

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 State's reply brief, is most notable for the novel suggestion that this Court set aside long standing precedent in state and federal law and find that any mental health expert who is licensed has provided competent assistance as a matter of law. The only authority cited for this proposition is an opinion which has been subsequently withdrawn by the Eleventh Circuit. Clisby v. Jones, 907 F.2d 1047 (11th Cir. 1990). Unaccountably, the State completely disregards a subsequent opinion by the Eleventh Circuit, cited in the appellant's brief, finding that licensure alone cannot satisfy due process concerns for the provision of competent mental health assistance. Cowley v. Stricklin, 926 F.2d 640 (11th Cir. 1991). In Cowley the Court observed:

> 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.

929 F.2d at 644.

This Court has consistently held that licensure alone is insufficient to satisfy due process concerns that indigents be afforded the requisite assistance of a mental health expert. (Mason, Sireci). This Court has further held that when critical mental health evidence, sufficient to undermine confidence in the outcome, *fails to reach the judge or jury due to a* failure of a mental health expert, relief is warranted.

The State's next premise is that the law of Sireci and Mason doesn't apply to Mr. King's case because the evidence of brain damage is "far from clear." (Appellee's Brief, p. 21).

Appellant's expert testified at length in great detail regarding the results of her testing and concluded that Mr. King suffered from brain damage in the moderate to severe range:

> The impairment index goes from zero to one, okay, so he is at the upper range of moderately impaired. Severely impaired starts from .8 to 1.0, he is at .7.

(PC 3033). Dr. Carbonell's professional opinions regarding brain damage were based on detailed objective test results and this underlying basis for her opinion was never "refuted" as alleged by counsel for the State (State's Brief at 21). Further, the State's own expert agreed that Mr. King has right brain dysfunction and never criticized or questioned Dr. Carbonell's testing.[4]

In discussing the possible causes of the brain damage revealed by her testing, Dr. Carbonell discussed severe alcohol and drug abuse from an early age including sniffing gas, a significant head injury when a chain hoist broke hitting Mr. King on the top of the head with a heavy steel hook, family reports of frequent complaints of headaches and dizziness by Mr. King following this head injury, and reports of loss of consciousness with accompanying tremors (PC 3067, 3077-78, 3081). All of this evidence was obtained from witnesses who testified at the 3.850 hearing subject to cross examination by the State. Dr. Carbonell also referred to prison reports showing a history of frequent or severe headaches, blackouts, and dizziness (PC 3045).[5]

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[4]Counsel for the appellant would state at the outset that the unprofessional accusations and slurs on the character of the appellant's counsel and witnesses are regrettable and deplorable. They have no basis in fact and are obviously introduced into the argument in an attempt to distract the Court's attention from the merits of the issues being presented.

[5]Contrary to the State's allegations, it is insignificant that Mr. King reported his headaches, dizziness and blackouts in some prison check lists but not others. It is incredible to state that " . . . the underlying basis for Dr. Carbonell's opinion is refuted." Dr. Carbonell testified that she personally interviewed witnesses as well as reviewed the sworn affidavits

(continued...)

Dr. Carbonell gave her opinion that Mr. King was intoxicated at the time of the offense. She relied upon Mr. King's self report as corroborated by notarized statements taken from eyewitnesses the same day the offense occurred. Mr. King told her that he had been drinking throughout the evening at the restaurant where he worked as part of a St. Patrick's Day celebration and that he also used marijuana.[6] Contemporaneous, notarized statements taken by the Inspector General described Mr. King's intoxication. Lyn Robbins the van driver described Mr. King as "intoxicated" and stated "I knew that from the time I picked him up from work" (PC 4581). Mr. Robert Hawkins stated to the Inspector General the day of the offense that "the smell of alcohol was strong on his person." He reiterated this testimony later in a deposition and at the original trial where he stated:

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

(PC 2952) (emphasis added). She also relied upon the affidavit of Morris Hires who stated he was smoking marijuana with Amos King at the work release center just before the offense (PC 3120, 3392). Mr. Hires testified at the 3.850 hearing that Mr. King was already high on marijuana and/or alcohol when he got back from work, that he and Mr. Hires smoked more marijuana together, and that Mr. King said he intended to do more drugs after Mr. Hires left which he interpreted to mean cocaine (PC 3412). Although Dr. Carbonell testified she had also reviewed later statements that Mr. King was not intoxicated, she found the contemporaneous statements taken by the Inspector General and the sworn statement of a witness who had actually watched Mr. King smoking marijuana just before the offense to be more reliable. Further, she stated

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[5](...continued)
which documented dizziness, loss of consciousness and frequent headaches. Although the State had ample opportunity to cross examine these witnesses, at no time did they retract the information provided to Dr. Carbonell (Appellee's Brief, p. 21).

[6]Mr. King also told to Dr. Mendelson and Dr. Merin that he was drinking and using marijuana.

that Mr. King's normal behavior, which was that of a model inmate, would have been inconsistent with the crimes of which he was convicted (PC 3103).

Finally, the State argues that because Mr. King's sisters were not aware of the extent of his drug use that this undermines Dr. Carbonell's opinion.[7] In fact she relied upon statements which were repeated under oath, subject to cross examination, at the 3.850 hearing. Stephen Grant testified that he sold heroin to Amos King on a regular basis when Mr. King was 17 years old (PC 3419); Richard Green testified that he and Amos King were injecting speedballs, heroin and coke together, when Mr. King was 16 years old (PC 3442); Susan Bryant testified she also injected speedballs with Amos King (PC 3460); and Leo Perry stated he started getting drunk with him when Mr. King was 14 years old and also used heroin and cocaine with Amos King (PC 3488-89). Given the extensive personal testimony presented at the 3.850 hearing in addition to a record of drug related crimes and references to drug problems in his prison files, it is ludicrous to say that Dr. Carbonell had no basis for her opinion that Mr. King had a severe drug problem. Even Dr. Merin, the State's expert, found a history of severe drug and alcohol abuse since the age of 12 or 13 (PC 3715).

The State argues that Dr. Carbonell is the "only expert" who concludes that Mr. King is brain damaged. Since Dr. Mendelson never tested for brain damage and is not a neuropsychologist, he testified he could not state an opinion (PC 2950). However, he testified that he would have done a screening test for brain damage had he been aware of Mr. King's history of previous head injury, headaches, dizziness, and loss of consciousness (PC 2945-50, 2997). Further, due to the lack of records, he is not sure that antisocial is a correct diagnosis and believes Mr. King "may very well" not have been able to

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[7]All of the lay witnesses testified that Mr. King did drugs away from home and tried to keep it from his sisters.

appreciate the criminality of his conduct or to conform his conduct to the requirements of law (PC 2951-52, 2960).[8]

The only other expert was Dr. Merin, the State's expert. Dr. Merin conceded that he was aware of indicia in 1985 which are relevant to an inquiry into brain damage (PC 3706). Dr. Merin conceded that his tests showed brain "deficiency or inefficiency, not necessarily brain damage" which he chose to characterize as a "right hemisphere type of learning disability" (PC 3755). As Dr. Merin testified, Mr. King "burned out some dendrites" (PC 3789). At no time did Dr. Merin state that Amos King's brain was functioning normally as the State's brief implies. Further, Dr. Merin conceded that in administering his testing, he arbitrarily chose to use the tests which would give more normal results (PC 3679-3686). At no time did Dr. Merin question Dr. Carbonell's test results or the integrity of her findings.

Dr. Mendelson testified that because he relied solely upon self report and an incomplete prison file, he was unaware of head trauma, dizzy spells, fainting, severe headaches and blackout. He testified that had he known of these factors he would have done testing to screen for brain damage (PC 2945). Dr. Mendelson conceded he was not a neuropsychologist and was not qualified to do brain damage testing. Either he or counsel should have sought experts who were competent in this area. Dr. Merin testified that at the time of trial he was aware of significant indicia of brain damage such as early and severe

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[8]Dr. Mendelson did not have the "entire social history" as represented by the State (State's Brief at 26-27). The only background material provided to him was a partial DOC file. He had no records of the offense, no school records, no data from family or friends, no juvenile records and no records of head injury, fainting, dizziness, blackouts or intoxication at the time of the offense (PC. 2960, 2963, 2998). Defense counsel candidly admitted that there was "a lot of stuff" in the DOC medical records that he did not provide to Dr. Mendelson (PC. 3266). By contrast Dr. Carbonell reviewed judicial opinions, Mr. King's statements to the clemency board, the clemency proceedings, Dr. Mendelson's records, Dr. Merin's file, Dr. Merin's deposition and notes, Pinellas County Sheriff's Office reports, the jail records, school records, records on Mr. King, Sr., the State Attorney's file, the investigative file from the original trial, the medical examiner's report, the resentencing testimony, appendix to the 3.850 motion, the DOC file, FSP inmate file, FSP medical file, affidavits and police reports. In addition she interviewed Mr. King's sister, Ada King; his grandmother, Emily Bentley; two other sisters, Betty and Sheila; his former girlfriend whose name is now Ellen Smith; Joseph Campbell; Carlton McDuffy; and Floristina Dorsey.

substance abuse which should have triggered brain damage testing (PC 3715). Dr. Mendelson was also aware of the early and severe drug and alcohol abuse (PC 2998).

Due to the mental health experts' failure to do their job, the defense was deprived of significant evidence of brain damage, intoxication, the effects of a long history of substance abuse, and the personality disorders resulting from an incredibly abusive home. It is unreasonable to now ask counsel to speculate about what he might have done if he had had the assistance of a competent mental health professional. In referring to his impressions of Dr. Merin and Dr. Mendelson, whose original evaluations were conceded to be inadequate, defense counsel explained:

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

(PC 3303). Because Dr. Mendelson did not do his job, Amos King was deprived of the assistance of a competent mental health expert. The State was able to overwhelm the inexperienced, poorly prepared, incompetent defense expert.[9]

The State's brief attempts to obscure the real issues with half truths and innuendo directed against appellant's counsel and witnesses. The State has not contravened the key issue that no mental health evidence was presented to the judge or jury, when compelling evidence of statutory and nonstatutory mitigation was available. All the experts agree that there is compelling nonstatutory evidence of a severe and early substance abuse, severe child abuse, extreme poverty, brain dysfunction and mental disorders. The experts all agree that Mr. King's personality disorders resulted from the extremely abusive upbringing. The defense expert at trial, as well as every expert

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[9]To the extent that counsel was asked to speculate in hindsight that he might not have wanted to present competent expert testimony as to the compelling statutory and nonstatutory mitigation which could have been presented, there is no reasonable strategy not to present such evidence when this decision was the result of a failure to investigate and to provide competent mental health assistance. See e.g., Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991). Purported tactical decision not to present significant evidence in mitigation deemed unreasonable.

involved, acknowledged the need for brain damage testing under the circumstances of this case and Dr. Mendelson opined that he "may very well" have found statutory as well as nonstatutory mitigation if he had had the brain test results as well as the evidence of intoxication at the time of the offense (PC 2951-52). The State's expert acknowledged right brain dysfunction which he characterized as brain "deficiency" instead of brain "damage" and testified that Mr. King suffered from poor judgment and impulsivity at the time of the offense and would not have reflected on his acts (PC 3755, 3772, 3802, 3803). The expert retained for postconviction, conducted detailed, objective tests and characterized the brain dysfunction as brain damage which is on the borderline between moderate and severe (PC 3033). Based on the longstanding mental disorders of severe substance abuse, paranoid personality disorder and brain damage, she found that the statutory mitigating factor of extreme mental disorder is present.[10] Based on the circumstances of the offense she found that Mr. King's capacity to conform his conduct to the requirements of law was substantially impaired (PC 3507-08). Dr. Mendelson, the defense expert retained at trial, testified that given the background information and the brain damage test results, he has doubts about his diagnosis and that Mr. King "may very well" not have been able to appreciate the criminality of his conduct or to conform his conduct to the requirements of law (PC 2952-53, 2960).

At Mr. King's resentencing there was no mental health evidence presented. There was no evidence of the severe and constant beatings administered to Amos King with fan belts, jumper cables, belts, branches and whatever came to hand. There was no evidence of brain deficiency or the severe and early substance abuse. There was no evidence of the personality disorders which resulted from the nightmare of starvation, violence and neglect. There was no evidence that Mr. King was intoxicated at the time of the offense. None of this evidence reached the jury because the defense

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[10]This opinion would be the same whether Mr. King suffered from the personality disorder of paranoia or another personality disorder (PC. 3509).

expert did not do his job. He did not seek the assistance of a qualified neuropsychologist. He did not seek the appropriate background information nor was it provided to him. Had he done so he could have testified to statutory and nonstatutory mitigation. Due to his failure the defense was overwhelmed, especially given counsel's inadequate preparation. All of this evidence would have provided a basis for a jury finding of statutory and nonstatutory mitigation yet none of it reached the judge or jury. Prejudice is manifest and relief is warranted.

ARGUMENT II

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

The State's emphasis on the Appellant's "heavy burden" of proof in this case is not correct. In Strickland, the Court indicated that the standard of prejudice in an ineffectiveness of counsel claim is lower than that required for a new evidence claim:

> On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case.

466 U.S.668, 693 (1984). The lower standard of proof adopted for ineffectiveness of counsel claims is lower than a preponderance of the evidence and only a reasonable probability sufficient to undermine confidence in the outcome must be shown.[11]

In applying the Strickland standard to effectiveness of counsel cases, the courts have uniformly ruled that no hindsight reasonable strategy decision can be made not to present evidence if in fact the evidence is unknown at the time of trial due to a lack of investigation. State v. Lara, 581 So. 2d 1288 (Fla. 1991); Stevens v. State, 552 So. 2d 1082 (Fla. 1989); Bassett v. State, 541 So. 2d 596 (Fla. 1989); Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991); Porter v. Wainwright, 805

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[11]The State's reliance on the "heavy burden" standard adopted by this Court in Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1987) is misplaced and this Court is encouraged to adopt the reasonable probability standard articulated by the Eleventh Circuit in Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991).

F.2d 930 (11th Cir. 1989); Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989); Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989); Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990) en banc; Kubat v. Thierat, 867 F.2d 351 (7th Cir. 1989); Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991); Kenley v. Armontrout, 931 F.2d 1298 (8th Cir. 1991); Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991).

In Mr. King's case, defense counsel failed to investigate his client's records and background or to provide the information which he did have to the mental health expert. As a result of this failure to investigate, counsel was unaware of the history of head injury, fainting, dizziness and headaches which would have led to an inquiry regarding brain dysfunction. Since counsel was unaware of brain dysfunction, which in combination with personality disorders, a history of severe substance abuse and/or intoxication, would have resulted in testimony as to both statutory and nonstatutory mitigation; he could not make a strategy decision not to use it. Just as counsel made no effort to find witnesses to support the claim made in opening argument that Mr. King suffered from alcohol, cocaine and heroin addiction, there could be no subsequent strategy reason to fail to present such evidence. The State's response that there were no available witnesses is simply not true.[12]

At the time of trial, counsel retained a mental health expert and provided him with a list of the statutory mitigating factors. Counsel testified that he would have wanted to present significant mental health testimony (PC 3242-43). Defense counsel transported a mental health expert to the resentencing for purposes of presenting his testimony to the jury. It is clear that counsel did want to present mental health evidence. The primary reason he did not adequately present this evidence was that without needed information, his inexperienced expert was left unprepared.

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[12]In regard to the State's strange allegation that the prehearing affidavits "hold no water" (Appellee's Brief at 33), this is a strawman as virtually every witness also testified at the evidentiary hearing including Betty King, Ada King, Robert King, Morris Hires, Steven Grant, Richard Green, Susan Bryant, Ellen Smith, Leo Perry, David Mack, and Roy Mathews. None of their statements were challenged in any significant respect.

In assessing an ineffectiveness of counsel claim, "[A] reviewing court should not second guess the strategic decision of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer." Harris v. Reed, 894 F.2d 871, 878 (7th Cir. 1990). Nor should trial counsel be allowed to shield his failure to investigate simply by raising a claim of "trial strategy and tactics." Crisp v. Duckworth, 743 F.2d 580, 584 (7th Cir. 1984). In its answer brief, the State has quoted pages verbatim from a most unusual colloquy between the Court and defense counsel. In this colloquy, the Court through a series of leading questions invites defense counsel to speculate in hindsight as to various possible "strategy" reasons for failing to present the statutory and nonstatutory mitigation which was available but which the judge and jury never heard. Many of these reasons are obviously not from counsel's perspective at the time of trial.

In hindsight, counsel, with considerable aid from the court and counsel for the State, speculated as to a plethora of "reasons" why he might not have wanted to present statutory and nonstatutory mitigation. Specifically he said he did not present mental health testimony because it would have implied that Amos King "committed the crime" (PC 3299); because intoxication and insanity are "not very successful" in Clearwater (PC 3298); because the jury knew Mr. King would be eligible for parole in 25 years (PC 3300); because he wouldn't take the "Dr. Carbonell" approach (PC 3301); because Mr. King claimed innocence; because Mr. King told Dr. Mendelson that had was not intoxicated (even though he acknowledged drinking rum and smoking marijuana);[13] that counsel did not want the jury to think that Mr. King "could become a monster"; that he was worried that Mr. King had violated a work center rule against drinking or smoking marijuana; and that he didn't think being drunk was a good defense.

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[13] See Ross v. State, 474 So. 2d 1170 (Fla. 1985). Death sentence improper due in part to defendant's history of drinking problems notwithstanding defendant's testimony that he was "cold sober" the night of the crime.

At the postconviction hearing, trial counsel testified that he would have wanted to use mental health testimony for Mr. King (PC 3242-43). The simple truth is that at the time of trial defense counsel wanted to present mental health mitigation for his client and had every intention of doing so on November 4th, when the penalty phase began. He brought Dr. Mendelson from Tallahassee to Clearwater for that purpose. It was not until November 5th that counsel realized how unprepared he and his expert were, when he deposed Dr. Merin. Defense counsel realized that his expert, Dr. Mendelson, was inexperienced and unprepared although preparation should have been done long ago. Counsel did not come to this conclusion until after the sentencing proceeding was already under way. This was no considered judgment made with the assistance of an adequate mental health professional after a full investigation. Counsel's "decisions," given his lack of preparation, cannot be deemed "reasonable." See Horton; Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991) (Ineffective assistance of counsel exists where evidence of mitigation is readily available and counsel inexplicably fails to present and argue this evidence.); Stephens v. Kemp, 846 F.2d 642, 652 (11th Cir. 1988) (Although defense counsel obtained a negative opinion from a mental health expert and presented the mother's testimony regarding bizarre behavior, the failure to investigate, present and argue to the jury at sentencing any evidence of appellant's mental history and condition constituted error.)

In her order denying postconviction relief, the trial court judge recognized the importance of the evidence which was never presented and characterizes it as "impressive": The new testimony/evidence includes the following:

> 1) The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> 2) The capital felony was committed while the Defendant was under extreme mental or emotional disturbance.
>
> 3) The Defendant suffers from brain damage.

> 4) The Defendant was under the influence of drugs and alcohol at the time he committed this offense.
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> 5) More evidence than previously submitted to the jurors that the Defendant was an alcoholic and drug addict.
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> At first blush these statutory & non-statutory mitigating factors may seem impressive.

(PC 2551-52). The trial court is incorrect in her assessment that counsel had no obligation to present the impressive statutory and nonstatutory evidence simply because the State could have introduced sme evidence in rebuttal. Harris v. Dugger, 874 F.2d 756, 764 (7th Cir. 1990)(Good character evidence should not have been omitted "merely because its use would have permitted the state to add some prior unlawful acts to the proof already in the case".); Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991)(Attorneys' strategy to omit mitigating evidence because the jury would draw the implication that it was a "horrible case" was unreasonable.); Blake v. Kemp, 758 F.2d 523 (11th Cir.) cert. denied, 474 U.S. 995 (1985)(the fact that the State could have presented contrary evidence does not relieve defense counsel of the duty to present mitigating evidence.) To the extent that the State attempts to excuse counsel's failure to investigate by Mr. King's statements or actions they are in error. Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(Whether or not a defendant argues with a decision does not make the failure to investigate any more harmless.); Thomas v. Wainwright, 767 F.2d 738 (11th Cir. 1985)(Even a defendant's complete noncooperation does not free his lawyer to abdicate his professional responsibility.)

In his preparation for the resentencing, defense counsel's first line of defense was an innocence claim which was not permitted by the court:

> So you know Mr. Mathews was interested in that issue, and we worked very, very hard on that issue.

(PC 3190). His next line of defense was his mental health expert which was cut off by the State when defense counsel deposed Dr. Merin on the second day of the sentencing. Without the innocence evidence or mental health evidence, the defense was crippled. As the State so eagerly pointed out in closing,

there were not even any witnesses to support the history of drug abuse alleged by defense counsel in his opening statement. Without the available evidence of statutory and nonstatutory evidence, counsel was reduced to an admission that the State had proved death was the appropriate sentence due to his failure to conduct a reasonable investigation.

CONCLUSION

The trial court enumerates two statutory and three nonstatutory mitigating factors which were never presented to the jury, characterizes this evidence as "impressive", and yet denies relief. One of the five aggravating factors presented to the sentencing judge and jury was struck by this Court on direct appeal. As to the factor of prior violent conviction, Mr. King presented evidence which would reduce the weight to be accorded to this factor when he presented evidence of intoxication and mental disability at the time of those offenses. The evidence that Mr. King was placed on work release in an establishment which gave him access to alcohol when he had a long history of being a severe alcoholic would have reduced the weight to be accorded to the under sentence of imprisonment aggravating factor.

Finally, the evidence of his reduced capacity to appreciate the criminality or to conform his conduct to the requirements of law and his extreme mental or emotional disturbance would have led a jury to reduce the weight to be accorded to the finding of the heinous, atrocious and cruel aggravating factor. The trial counsel argued age as a mitigating factor. The evidence of Mr. King's mental disabilities would have been relevant to the jury's consideration of this mitigating factor. The balancing of aggravating and mitigating evidence is not a counting process. Given the substantial evidence which was established in mitigation and the collateral effect of that evidence on the weight to be accorded to the aggravating factors, the Appellant has undermined confidence in the sentence.

Based upon the foregoing and upon the discussion presented in Mr. King's previous brief, this Court should grant a new trial and sentencing.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on December 6, 1991.

Respectfully submitted,

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