IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,142

ARTHUR DENNIS RUTHERFORD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR SANTA ROSA COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

References in this brief will be consistent with those made in appellant's Initial Brief, with the following additions:

"IB at _____." Appellant's Initial Brief.

"AB at _____." Appellee's Answer Brief.

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SUMMARY OF ARGUMENTS IN REPLY

Mr. Treacy, Mr. Rutherford's lead counsel during the penalty phase of his trial, assured the members of the sentencing jury that the defense intended to ". . . show you [Mr. Rutherford's] history from the time he was born in Santa Rosa County up until the present date." (R. 783). What followed amounts to less than sixty (60) transcript pages of primarily family member testimony about raising hogs, hunting and fishing, riding horses, growing vegetables, and vague character testimony (R. 133-189). The penalty phase presentation was the equivalent of what a pro se litigant would present. Mr. Rutherford's testimony concerning his Vietnam war experiences and their impact on his life was rejected as mitigation by the trial court based on lack of corroboration (2nd Supp. R. 5).

Even with no substantive mitigation to consider, the jury recommended death by the most narrow of margins --- seven (7) to five (5). Any harmlessness asserted by the government, either explicitly or by implication, must be summarily rejected considering the substantive mitigation detailed at the evidentiary hearing: (a) Mr. Rutherford suffers from Post Traumatic Stress Disorder, did so at the time of the capital offense, and the condition is directly related to his heavy combat service in the Vietnam war; (b) Mr. Rutherford was alcohol dependent during the relevant time period; and (c) Mr. Rutherford suffered under extreme stressors from the time he returned to the United States after the war until the time of the capital

offense, including having an extremely destructive relationship with his wife/ex-wife; having sole custody and responsibility for supporting and raising four children after his former wife abandoned the family; agreeing to accept his former wife back after an affair with another man and agreeing to raise and support a child borne of that affair; having symptoms of and anxiety concerning exposure to Agent Orange; being concerned about his children's serious physical ailments and fearing they were also related to Agent Orange; laboring under the affects of being raised in a highly dysfunctional family, characterized by alcoholism and physical abuse; and suffering from poor self concept due to low average intelligence and poor school performance (PC-R1. 184-193).

Further, the evidence presented below establishes that had trial counsel truly shown the jury who Mr. Rutherford was from his birth in Santa Rosa County until the time of sentencing, the statutory mitigating factor of extreme emotional disturbance would have been accepted by the jury (PC-R1. 194) and a wealth of non-statutory mitigation would have compelled the jury to recommend life over death (PC-R1. 195). This evidence would have reduced the gravity of the aggravating factors and helped orient the jurors away from the improper, prejudicial and inflammatory evidence presented by the prosecutor of the victim's alleged fear of appellant, which was introduced without any contemporaneous and specific objection by defense counsel. The government is wrong when it asserts that proper objections were made to this

testimony, as this Court has ruled and the government itself has conceded in the past.

The government seeks, as did the lower court, to defend the deficient performance and resulting prejudice to Mr. Rutherford caused by trial counsel's utter failure to perform an adequate and independent mitigation investigation, failure to understand mental health mitigation, and failure to discover and present nonstatutory mitigators by arguing that such competent and effective representation simply wasn't provided to capital defendants in Walton County, Florida in 1986. Further, it is argued that competency evaluations are really the same as mental health mitigation evaluations and investigations prepared precisely and solely for the penalty phase of a capital murder trial. This Court should not be misled by these arguments.

ARGUMENT I

THE FAILURE TO OBJECT CLAIM

During the penalty phase of appellant's trial, the prosecutor's opening argument consisted of the following:

> During the course of this trial people could not testify as to concern (sic) things because of Rules of Evidence. One of those Rules of Evidence is what is known as hearsay.
>
> So you could not hear from Stella Salamon because anything that Stella Salamon said to anybody during her life was hearsay. But today, today we're not bound by the hearsay rule. And this week was A.D. Rutherford's week in court but today you can hear from Stella Salamon, through her words to her friends.

(R. 782)(emphasis supplied)

Defense counsel interposed no objection to this opening by the prosecutor and further failed to make contemporaneous objections to the testimony of Lois LaVaugh (R. 804-813) and Beverly Elkins (R. 819-831) regarding the victim's hearsay statements to them regarding her suspicions and fears of appellant. Further, defense counsel himself elicited similar testimony from Richard Le Vaugh (sic) during cross-examination (R. 818-819). During the hearing below, trial counsel admitted there was no strategic reason for failing to object to this testimony and that the introduction of the testimony was improper (R. 90-01). These deficient acts by counsel allowed the prosecution to make the victim's hearsay expressions of fear of appellant the feature of the penalty phase. Further, this testimony was not introduced to rebut any theory of mitigation

asserted by the defense, but was rather a calculated move by the prosecutor to introduce prejudicial and inflammatory hearsay evidence into the critical penalty phase of the trial. Compare, Wuornos v. State, 644 So. 2d 1012, 1017-1018 (Fla. 1994)(Once defendant advances a theory of mitigation, State has a right to rebut through any means allowed by rules of evidence; when defense opens the door to hearsay testimony in penalty, State has a right to fair rebuttal through hearsay evidence), with, Dragovich v. State, 492 So. 2d 350, 354-355 (Fla. 1986)(The State may not do indirectly what it may not do directly; may not introduce improper evidence to support aggravators under guise of rebutting mitigators; hearsay evidence must be excluded if no opportunity for fair rebuttal).

Rules of evidence are relaxed during the penalty phase of a capital trial, but this Court has stated that "they emphatically are not to be completely ignored". Johnson v. State, 660 So. 2d 637, 645 (Fla. 1995). The government's bare assertion that the testimony "could have been admissible to rebut Rutherford's guilt-phase testimony" (AB. 12) is not supported by the provisions of Sec. 921.141(1), Fla.Stat., since appellant had no "fair opportunity to rebut" the hearsay statements of a deceased, unavailable declarant. Dragovich. Further, Bertolotti v. State, 565 So. 2d 1345 (Fla. 1990) does not support the government's position, as that case dealt solely with the admissibility of evidence of specific characteristics of the victim. Lucas v. State, 568 So. 2d 18 (Fla. 1990) is also unhelpful to the

government in that the issue there related to prior crimes and threats, some of which were invited by the defense, and has no applicability to hearsay statements of fear attributed to a decedent where no crime and no threat had ever been made.

The government makes no attempt to argue this evidence was, in fact, relevant to any aggravating circumstance. Rather, the argument now appears to be that the evidence was relevant to rebut appellant's trial attorney's theories of mitigation, even though these theories were not known to the government at trial and only came to light during the 3.850 evidentiary hearing (AB. 12-13). This is clear manipulation of the record in an attempt to create relevancy in the absence of any appearing from the trial record.

Alternatively, the government asserts that the error was harmless since other evidence supported the aggravators of HAC and CCP (AB. 13). This reasoning is faulty. First, it is impossible "to gauge the effect" of counsel's omissions and the impact of the improper testimony upon both the co-sentencing jury and court. This undermines confidence in the outcome of the sentencing proceeding. State v. Michael, 530 So. 2d 929, 930 (Fla. 1988). The government felt the testimony was so vital to obtaining a recommendation of death that it argued it in opening and closing statements and introduced it in the first place. The sentencing court specifically relied upon the testimony in finding CCP as an aggravator (2nd Supp. R. 4-5).

The government wisely avoids any attempt to rebut appellant's argument that Vela v. Estelle, 708 F.2d 954, 961-966 (5th Cir. 1983), and related cases cited at appellant's initial brief at page 18, require relief in these circumstances. As argued in the initial brief, Mr. Rutherford was "thrice prejudiced" in this case: defense counsel allowed prejudicial and irrelevant evidence to be presented during the penalty phase; defense counsel allowed the jury to treat the evidence as relevant and material to the sentencing decision by failing to object and move for a curative instruction; and defense counsel's failure to object waived the issue for direct appeal purposes (as this Court concluded on direct appeal) (IB. 19). Under these circumstances, harmless error has no applicability.

Appellee also avoids confronting the reality of the cumulative error analysis required to fairly evaluate trial counsel's deficient performance and resulting prejudice to appellant as necessitated by this Court's opinions in Gunsby v. State, 670 So. 2d 920 (Fla. 1996); Cherry v. State, 659 So. 2d 1069 (Fla. 1995); and Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995). It is the combination of what the sentencing jury knew, but should not have, and what it did not know, but should have, which makes Mr. Rutherford's case such a compelling one for relief. A full cumulative analysis will appear at the conclusion of Issue III herein.

ARGUMENT II

THE FAILURE TO PRESENT MENTAL HEALTH MITIGATION CLAIM

The government's attempt to defend trial counsel's utter failure to plough the fertile field of appellant's war experiences in the context of mental health mitigation may only be characterized as feeble. First, the argument is that trial lawyers just didn't do this in 1986. The government seems to think that if Mr. Treacy wasn't told to do it in a seminar then there can be no deficient performance. Second, the argument goes that presenting evidence of hog farming and the like amounts to "humanizing" Mr. Rutherford, and is a substitute for substantive mitigation evidence, and, therefore, a reasonable trial strategy.

These timid assertions ignore the truth of this case. Mr. Treacy was a veteran himself, was aware that appellant had symptoms of Post Traumatic Stress Disorder, and had documentary evidence in the form of rudimentary competency exams and a Veteran's Administration application for treatment signed by appellant. What Mr. Treacy apparently did not know (and this reflects on both his competency as a capital trial attorney and his effectiveness in this case) was that a competency examination and a mental health evaluation and investigation for purposes of mitigation are two entirely different examinations and they have entirely different purposes in the capital trial. This fact cannot be contested.

Mr. Treacy testified as follows during the evidentiary hearing:

> Q. In your opinion is a competency evaluation the same type of evaluation, the competency evaluation the same type of evaluation that you would have performed to present in the penalty phase of a capital trial?
>
> A. Basically, yes.

(R. 82).

When asked a different way, the response was the same:

> Q. Is it fair then to say, Mr. Traecy (sic) that the issue before a psychologist when doing a competency evaluation is different from the issue before him when he is asked to testify at the time of sentencing?
>
> A. A lot of them are exactly the same, a lot of them.

(R. 84).

Following this question, Mr. Treacy stated that he thought "generally you can say yes" to the question whether competency issues and mitigation issues are the same (R. 84). Initially, trial counsel couldn't recall if the competency evaluations in this case mentioned statutory or non-statutory mitigating factors (R. 84), but after refreshing his memory over lunch, had to concede that the competency reports did <u>not</u> mention statutory mitigating circumstances at all (R. 88).

This testimony must be contrasted with both this Court's own opinions in this regard and the expert testimony presented on Mr. Rutherford's behalf during the evidentiary hearing.

James P. Larson, whose expertise in the area of forensic psychology was stipulated to by the government (R. 176), explained the proper and differing roles of competency and mitigation evaluations:

> Q. And what is it, what is the difference for example between an evaluation for focusing on finding mitigating factors and a competency evaluation for example?
>
> A. They are different issues.
>
> In a competency evaluation you are focussed entirely on whether or not a person can assist in the preparation of the defense and whether or not he has an understanding of the charges against him and the possible range of penalties. And the law sets forth some other conditions and basically all of this is a part of a standard called the Dusky Standard (phonetic) as I recall.
>
> In a competency evaluation the question is: Is this person competent to proceed? And competency, of course, is a constitutional guarantee.
>
> In an evaluation for mitigation in a first degree murder case the legal issues are different. There are at least two statutory mitigators under the law as I understand it. And additionally the court and the trier of fact can look at any, almost any factor that they want to consider in the balance of justice.
>
> Q. Would the other factors be considered non-statutory mitigation as you understand it?
>
> A. That's a phrase that is commonly used. Non-statutory mitigation.

(R. 181-182).

*****

> Q. During the course of your study of background materials did you have a chance to review the records of Dr. Medzarian and Dr. Phillips?
>
> A. I did.

Q. And what did those records reflect?

A. Those reports are what we call competency evaluations. And they basically address competency issues.

Competency is defined by state statute and their evaluations consisted of talking to him in a mental status examine (sic). And Dr. Medzarian gave him actually a personality measure, but it was an invalid test result and did not figure into her thinking on it.

And typically we did not give a test in competency evaluations in the formal psychometric sense. And sometimes we do if an I Q is an issue, mental retardation. But these were fairly standard competency evaluations that were limited in scope, were not diagnostic evaluations to diagnose whether or not he suffered from disorder A, disorder B, or disorder C. But they were to determine whether or not he was sufficiently, mentally intact and competent to proceed at that time.

Q. Would you consider either of these reports sufficient to constitute an evaluation in regard to the mitigating circumstances?

A. I wouldn't. And the issue is entirely different. When I do competency evaluations -- and the way that I was trained to do them in the State of Florida you focus basically on the competency issue and whether or not a person is competent to proceed in a number of things such as probation, and in trial and entering a plea, and so forth.

But mitigation -- first of all there are two mental health mitigators so one needs to address those issues.

And of course one does not do that in a competency evaluation and it is inappropriate. So those evaluations did not address either of the two statutory mental health mitigators nor did they address the so called non-statutory mitigation except perhaps some of it inadvertently. But those issues were not addressed.

And the other way that the evaluation for mitigation is different is the reliance upon third party mitigation. And oftentimes in a competency evaluation you do not have very much third party information available.

In fact usually you don't need it. And usually you make observations about if the person understands the charges against him, and the range of penalties, if they seem to understand the role of the state attorney and the role of the public defender and the role of the jury. They have an idea of the difference between guilty and innocent. And they can reason at a rudimentary level. And competency is a minimal standard actually then one determines if they are competent or incompetent based on the evaluation.

(R. 196-198)(emphasis supplied).

*****

Q. And had you been retained in 1985 or '86 would your conclusion be the same?

A. If I had been asked to do an evaluation for mitigation either by the state or the defense my conclusion would be the same.

If I was asked to do a competency evaluation or address the insanity issue then I would not have addressed mitigation.

(R. 202)(emphasis supplied).

The above opinions regarding the differences between competency evaluations and mitigation evaluations must also be placed in context with the substantive opinions offered by Dr. Larson. Whereas, the sentencing court found no mental health statutory mitigation and no non-statutory mitigation whatsoever (R. 948), Dr. Larson testified that had an appropriate mental health mitigation evaluation and investigation been conducted in 1986, that it would have supported the statutory mitigating factor of extreme emotional distress (PC-R1. 194) and the non-

statutory mitigators of alcoholism or alcohol dependence, immense and extreme stressors due to appellant's domestic predicament, Agent Orange fears, and dysfunctional and abusive family of origin (PC-R1. 192-193). These findings by a jury would surely have altered the sentencing recommendation, as well as altering the sentencing court's weighing process. Rather than three aggravators being balanced against an individual statutory mitigator (no significant prior criminal history) with no non-statutory mitigation; two statutory mitigating circumstances (no significant prior criminal history and extreme emotional disturbance) and numerous non-statutory mitigators would have been weighed and would have compelled a life sentence.

The unfortunate truth here is that Mr. Treacy was on notice of the potential mitigation in appellant's life and history, but he did not know what to do with the information due to ignorance of the purpose of mental health mitigation evaluations. Post Traumatic Stress Disorder was not new (PC-R1. 201-202)(Dr. Larson testified that PTSD appeared as a diagnostic entity in 1979-1980 in DSM-III; that in 1986 it was a recognized disorder; and that expert testimony, including himself, was readily available in 1986). Alcoholism is as old as the Bible in Western civilization. The incredible stress caused by adultery and domestic discord has been known since the inception of the family. Dysfunctional families of origin and the fallout therefrom has been discussed since the 70's at least. Agent Orange surfaced shortly after the end of the Vietnamese war.

This information was available to trial counsel, but without a true mental health evaluation conducted for mitigation purposes, it was invisible. That is the error: what was vital for purposes of reaching a fair and reasoned sentencing determination in Mr. Rutherford's case was kept invisible through trial counsel's ignorance and deficient performance.

That Post Traumatic Stress Disorder resulting from combat service in Vietnam constituted mitigation in 1986 cannot reasonably be contested. In Masterson v. State, 516 So. 2d 256 (Fla. 1987), the offense date was June 27, 1982, and the trial was conducted well in advance of 1986. Masterson was convicted of killing Joseph Parisi (characterized as a drug dealer) and his girlfriend, Patricia Savino. Both individuals were shot with pillows over them for muffling purposes. At the penalty phase of Masterson's trial, experts testified that he suffered from "delayed post-traumatic stress disorder brought on by his military service in Viet Nam," was alcohol dependent, and a drug abuser. Masterson, 516 So. 2d at 257. The evidence supporting the PTSD diagnosis included nightmares, suspicious behavior, and an increase in alcohol and drug consumption. Further, evidence was presented that despite his problems, Masterson was still a good father, provided for his two sons, for his younger sister, and for his niece. Masterson, Id. The jury recommended a life sentence on the first degree murder conviction, which the trial judge overrode, finding four aggravating circumstances (CCP, in the course of an armed burglary, to avoid arrest, and conviction

for prior violent felony) and no mitigating factors. Masterson, 516 So. 2d at 258. This Court placed great weight upon the combat experiences, PTSD, alcohol and drug use, and positive character mitigation in striking the override and remanding for imposition of a life sentence.

Masterson, while an override case, is instructive for the present analysis in several important respects. First, it rebuts the notion asserted by the trial attorney, trial court, and now the government on appeal that PTSD was not a known or commonly asserted tool of mitigation in 1986. Masterson pre-dates Mr. Rutherford's offense and trials. Second, it supports the prejudice analysis advanced by appellant. If Mr. Masterson could obtain a life recommendation after killing two people, making statements that the girlfriend had to be killed in order to avoid identification and arrest, and having a violent felony past (as contrasted with appellant who had no significant history for criminal behavior), then this evidence would have quite clearly assisted appellant in obtaining that one missing vote for a life recommendation. Third, it rebuts the notion that portraying Mr. Rutherford both as a victim of the war, with resulting emotional problems and alcohol dependency, and as a good father, provider, and generally nice fellow, would have been inconsistent. Mr. Masterson's attorney apparently knew this evidence was not contradictory, was powerful, and it, in fact, resulted in a life recommendation. Chief Justice Kogan's concurring opinion in Johnson v. State, 612 So. 2d 575, 577-581 (Fla. 1993) also

demonstrates in dramatic fashion the compelling nature of combat/PTSD evidence. Mr. Rutherford was provided ineffective assistance of counsel during the penalty phase of his trial and the jury never knew of this compelling evidence.

This Court rejected appellant's claim on direct appeal that his military service compelled a finding in mitigation. Rutherford v. State, 545 So. 2d 853, 856, 856 n. 3 (Fla. 1989). This Court specifically noted that Mr. Rutherford "did not make a claim of posttraumatic stress disorder." Id. at n. 3. It is asserted that counsel's failure to do so made all the difference both to the sentencing jury and to this Court on direct appeal. Proportionality concerns are impacted when the truth regarding Mr. Rutherford's combat experiences, resulting PTSD and alcoholism are known. Further, these truths are not manufactured since direct appeal. The record demonstrates that appellant was in alcohol counselling prior to this offense and had sought treatment for both Agent Orange and PTSD symptoms through the Veteran's Administration prior to this offense.

The government's assertion that the instant claim must fail because appellant "did not demonstrate that every counsel, to be effective at the time of his trial, would have presented the testimony of mental health experts" (AB. 24) is without merit and a misstatement of the law. The reasonableness of trial counsel's challenged conduct must be judged based upon the facts of the particular case and viewed at the time of the conduct. Strickland v. Washington, 466 U.S. 668, 690 (1984). Counsel's

role in a penalty proceeding "is comparable to counsel's role at trial -- to ensure that the adversarial testing process works to produce a just result under the standards governing decision." Strickland, 466 U.S. at 687. "Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688. Further, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. The Supreme Court left it to state and lower federal courts to apply the Strickland standard to individual and varying factual situations. A substantial body of law has evolved regarding mental health experts in the context of ineffective assistance of counsel claims.

It is established that trial counsel has a duty to ensure that his or her client receives adequate mental health assistance. Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984). This is especially true where a client's mental state is at issue during a penalty proceeding in a capital case. United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979); Blake; Mauldin. Defense counsel has very significant duties during sentencing and "[t]hat a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command." Strickland, 466 U.S. at 685. 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 the 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 Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

In Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988), the court was confronted with issues similar to the present case. Trial counsel was on notice of vague prior mental problems by the defendant, but chose to cease any investigation in that regard following a competency evaluation finding the defendant competent to proceed. Stephens, 846 F.2d at 653. Further, although not due to counsel's efforts, some evidence of the defendant's mental problems and bizarre behavior was presented in the penalty phase through the defendant's mother. Id. The court found that the lawyer's reliance on the competency report was acceptable for the guilt phase of the trial, but

> ...when a capital sentencing proceeding is contemplated by counsel aware of the facts of which appellant's trial counsel was aware, professionally reasonable representation requires more of an investigation into the possibility of introducing evidence of the defendant's mental history and mental capacity in the sentencing phase than was conducted by trial counsel in this case. Although trial counsel was aware well in advance of trial that appellant had spent time in a mental hospital shortly before the shooting, and that for some reason a psychiatric evaluation had already been ordered, he completely

> ignored the possible ramifications of those facts as regards the sentencing proceeding. This omission denied appellant reasonably competent representation at the penalty phase. (footnote omitted)

Stephens, 846 F.2d at 653 (emphasis supplied).

Similarly, in the instant case trial counsel was aware well in advance of trial that appellant had sought V.A. benefits and engaged in alcohol counselling. The documents established a basis to investigate further. The competency reports themselves put counsel on notice of possible PTSD and war-related maladies which constituted fertile mitigation. As in Stephens, trial counsel "completely ignored the possible ramifications of those facts as regards the sentencing proceeding." Due to counsel's ignorance of the difference between a competency evaluation and a mitigation evaluation, he could not appreciate the value of what was within his grasp.

This Court has addressed the danger of relying, as the competency examiners here apparently did, on the defendant's own report and history in making critical mental health determinations:

> Commentators have pointed out the problems involved in basing psychiatric evaluations exclusively, or almost exclusively, on clinical interviews with the subject involved. One of the earlier interviewing psychiatrists noted in his report that Mason was "extremely hostile, guarded, indifferent and generally gave a poor history in regard to dates, symptoms...etc." In light of the patient's inability to convey accurate information about his history, and a general tendency to mask rather than reveal symptoms, an interview

> should be complemented by a review of independent data. (cite omitted)

Mason v. State, 489 So. 2d 734, 737 (Fla. 1986).

In the instant case, the trial attorney relied upon competency evaluations conducted in just such a fashion and treated them as if they were all-encompassing mental health evaluations for mitigation. As Dr. Larson testified, appellant, being a victim of combat-induced PTSD, was predisposed to distrust and it would have required persistence and the development of rapport and trust over time before appellant could have aided his defense or cooperated in a true mental health evaluation and investigation into mitigation (PC-R1. 230-232). The trial attorney here, when confronted with a difficult case and a less than ideal client, ceased his investigation and abdicated his role as an advocate for his client. As Dr. Larson further testified, it is possible to reach valid mental health assessments even with no cooperation from a patient (PC-R1. 205). That requires an investigation and collateral sources of information. No investigation was done here.

In State v. Michael, 530 So. 2d 929 (Fla. 1988), this Court affirmed the lower court's grant of postconviction relief under similar factual circumstances. Defense counsel had failed to obtain expert opinions on statutory mental health mitigating factors despite knowledge of the defendant's disturbed condition. Although the lower court reasoned there was no deficient performance for not pursuing an insanity defense and, thus, no guilt phase ineffectiveness, the lack of adequate mental health

evaluations coupled with an inability to gauge the effect of the omission undermined confidence in the outcome of the penalty proceeding. Michael, 530 So. 2d at 930. Such is this case here.

Further, the finding of the heinous, atrocious, or cruel aggravating factor does not preclude a life sentence in Mr. Rutherford's case. Morgan v. State, 639 So. 2d 6 (Fla. 1994). In Morgan, the offense was described as a "brutal" murder of a 66 year old victim and the HAC aggravator, along with another aggravating factor, applied. Nevertheless, in part based upon substantial mental health mitigation and evidence of substance abuse, this Court imposed a life sentence on appeal.

Mr. Rutherford's combat-induced PTSD and war experiences provided defense counsel with fertile ground for mitigation. Inexplicably, despite his later protestations that "[a]ny evidence that was mitigating [he] would have been delighted to present to the jury," (PC-R1. 93), trial counsel failed to properly investigate and present mental health mitigation on behalf of Mr. Rutherford. That would have required a competent and complete mental health evaluation conducted for the purpose of developing mitigation. Sadly, trial counsel was ignorant of how such an examination differed from a bare bones competency evaluation.

A cumulative analysis of the deficiencies in counsel's performance strengthens appellant's claim of error and mandates postconviction relief. Gunsby; Cherry; Harvey, supra.

ARGUMENT III

THE FAILURE TO PRESENT STATUTORY AND NON-STATUTORY MITIGATION CLAIM

Appellant relies upon and reasserts the extensive factual statement supporting mitigation (IB. 51-60) and citation of authorities contained in his initial brief. To the extent that the government relies upon appellant's alleged lack of cooperation as justification for the paltry mitigation presented at trial, it should be noted that Dr. Larson opined that it would require persistence and development of rapport and trust for appellant to assist counsel at trial. See Argument on Claim II. Of course, this is something that counsel, being a layperson in the field of psychology or psychiatry, would doubtless only have learned had he recognized the vital need for a mental health evaluation and investigation for mitigation purposes. Thus, the primary purpose for replying to the government's argument in this regard.

While appellee, as is its custom, attempts to examine and minimize appellant's compelling claim of ineffective assistance of penalty phase counsel by dissecting each individual claim, such an analysis is both simplistic and contrary to law. The individual claims coexist, impact one another, and must be viewed in totality for their "cumulative effect" upon appellant's trial. Appellee would distract this Court from the true issue of whether Mr. Rutherford was afforded "a person who happens to be a lawyer" or was afforded a lawyer "who plays the role necessary to ensure that the trial is fair." Strickland, 466 U.S. at 685. The

government seeks to do this by arguing there really were objections, the evidence "could have been admissible", and perhaps a harmlessness rationale regarding the failure to object claim. The failure to provide adequate mental health evaluations and experts for mitigation claim is met with a half-hearted assertion that the lawyer tried to "humanize" appellant and that effective counsel wasn't provided to capital defendants in Walton County, Florida in 1986. Inexplicably, presenting the truth and the whole truth about appellant at sentencing is perceived as being in conflict with the "good old country boy" presentation. Regarding the instant claim of failure to investigate and present mitigation generally, appellee resorts to appellant didn't assist, it's harmless, and it's no error for the lawyer to do worse than he could have done. When the government's claim by claim "analysis" is considered as a totality and in the context of the entire penalty phase of the trial below, it is revealed as no analysis at all and certainly not one which considers the "cumulative effect" of penalty phase counsel's errors.

This Court has repeatedly directed counsel away from such piecemeal analysis of claims in capital cases. Although an individual penalty phase claim of ineffectiveness might appear to fail under the Strickland test, "the cumulative effect of such claims, if proven, might bear on the ultimate determination of the effectiveness of . . . counsel." Harvey v. Dugger, 656 So. 2d 1253, 1257 (Fla. 1995)(remanding for evidentiary hearing on postconviction ineffectiveness claims).

In Cherry v. State, 659 So. 2d 1069 (Fla. 1995), this Court, finding the situation similar to Harvey v. Dugger, remanded for an evidentiary hearing on various claims of ineffective assistance of penalty phase counsel and specifically cited to the "cumulative effect" holding of Harvey v. Dugger.

And perhaps, most importantly, in Gunsby v. State, 670 So. 2d 920 (Fla. 1996), this Court specifically relied upon a "cumulative effect" analysis in granting Gunsby a new trial after evidentiary hearing upon Gunsby's postconviction claims, based partially upon newly discovered evidence, partially upon the government's withholding exculpatory evidence, and partially upon a finding of ineffectiveness of counsel.

As asserted at the outset of this reply, penalty phase counsel's deficient performance resulted in the jury and this Court being misled about who Arthur Dennis Rutherford is, what life experiences led him to appear before a jury with the power to recommend that his life be spared or extinguished, and what mitigating factors impacted that decision. As stated in Strickland by the United State Supreme Court:

> When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer --- including an appellate court, to the extent it independently reweighs the evidence --- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Strickland v. Washington, 466 U.S. 668, 695 (1984)(emphasis supplied).

It is asserted that just as this Court did not know who A.D. Rutherford was at the time of his direct appeal, neither did his sentencing jury. This Court was presented with several aggravating circumstances, found in part by the trial court on the basis of improper hearsay evidence admitted without proper objection, and but one statutory mitigating circumstance (no significant prior criminal history). No non-statutory mitigation was found (this Court allowed the trial court to completely reject appellant's military service as mitigating) and no PTSD was presented for consideration (as this Court noted in the same footnote rejecting military service as being necessarily mitigating). No alcohol dependence was presented. No domestic stress or divorce or raising of a child not your own was presented. No Agent Orange concerns and fears were presented. No alcoholism or physical abuse in family of origin was presented. No evidence of low average intelligence and low self-esteem was presented. Appellant asserts that a proper analysis of the "cumulative effect" of penalty phase counsel's errors and their impact upon the ultimate sentencing decision compels a finding of ineffectiveness of counsel because "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

Mr. Rutherford is, at a minimum, entitled to a resentencing.

REMAINING ISSUES ON APPEAL

Mr. Rutherford relies upon the arguments asserted and the citation to authorities as contained in his Initial Brief and asserts that the government has not overcome his demonstration of error below.

CONCLUSION

Based upon the arguments contained in Appellant's Initial Brief and the arguments in reply contained herein, Appellant urges this Court to reverse the trial court's order denying him postconviction relief and grant him a new trial and/or sentencing proceeding, as this Court deems just, legal and fair.

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by first class mail, postage prepaid, to all counsel of record on April 28, 1998.

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