

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-2025

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LOUIS B. GASKIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

---

ON APPEAL FROM THE SEVENTH CIRCUIT COURT  
OF THE JUDICIAL CIRCUIT,  
IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA

---

INITIAL BRIEF OF APPELLANT

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**PRELIMINARY STATEMENT**

Appellant appeals the circuit court's denial of his motion for post-conviction relief prosecuted pursuant to Rule 3.850, Florida Rules of Criminal Procedure. The proceedings in his case will be cited to as follows:

"R." - record on direct appeal;

"R2." - record on direct appeal from remand;

"PC-R." - record of post-conviction proceedings.

When the direct appeal opinions of this Court are referred to after the initial cite in the procedural history, they will be referenced as Gaskin.

**REQUEST FOR ORAL ARGUMENT**

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

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STATEMENT OF CASE AND FACTS

I. Course of Proceedings and Disposition in Court Below

Mr. Gaskin was charged by indictment, dated March 27, 1990, with two counts of First Degree Murder in the death of Robert Sturmfels (premeditated and felony murder), two counts of First Degree Murder in the death of Georgette Sturmfels (premeditated and felony murder), one count of Armed Robbery of the Sturmfels, one count of Burglary of the Sturmfels' home, two counts of Attempted First Degree Murder of Joseph and Mary Rector, one count of Armed Robbery of the Rectors, and one count of Burglary of the Rector's home. He pled not guilty.

One June 15, 1990, the jury found Mr. Gaskin guilty of two counts of First Degree Murder, one count of Attempted First Degree Murder with a Firearm, two counts of Armed Robbery with a Firearm, and two counts of Burglary of a Dwelling with a Firearm. (R. 1285-1294). On June 18, 1990, the jury recommended, by a vote of eight to four, that the court impose the death penalty on each count of First Degree Murder. (R. 1301-1302). On June 19, 1990, the court followed the jury's recommendations and imposed two death sentences on the Appellant. (R. 1311-1319). Mr. Gaskin was also sentenced to two terms of 30 years incarceration on the Armed Robbery with a Firearm counts and three terms of life imprisonment on the

remaining counts, all to run consecutively. (R. 1303-1310).

On December 5, 1991, the Florida Supreme Court affirmed these convictions, reversed the two felony murder convictions that were duplicative of the premeditated murder convictions, and remanded for proceedings consistent with its decision. See generally Gaskin, 591 So.2d 917 (Fla. 1991). On June 29, 1992, the United States Supreme Court granted certiorari review, vacated the death sentences, and remanded the case to the Florida Supreme Court for reconsideration in light of Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). See Gaskin v. Florida, 505 U.S. 1216, 112 S.Ct. 3022, 120 L.Ed.2d 894 (1992). On September 4, 1992, the Supreme Court denied rehearing. Gaskin v. Florida, 505 U.S. 1244, 113 S.Ct. 22, 120 L.Ed.2d 948 (1992).

On March 18, 1993, the Florida Supreme Court affirmed Mr. Gaskin's convictions and sentences and found that the vagueness challenge to the heinous, atrocious or cruel jury instruction (*Espinosa* error) was not properly preserved for appellate review. Gaskin v. State, 615 So.2d 679 (Fla. 1993). On October 12, 1993, the United States Supreme Court denied certiorari review. Gaskin v. Florida, 510 U.S. 925, 114 S.Ct. 328, 126 L.Ed.2d 274 (1993).

On March 23, 1995, the Appellant filed his first 3.850

motion. On October 12, 1995, the Appellant filed his amended 3.850 motion. On November 7, 1996, a *Huff* hearing was held pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993). On January 17, 1997, the lower court summarily denied Mr. Gaskin's amended 3.850 motion. (PC-R. 1288-1305). On February 4, 1997, Mr. Gaskin filed a motion for rehearing. (PC-R. 1377-1446). On February 10, 1997, the lower court denied rehearing. (PC-R. 1447).

On March 12, 1997, the Appellant filed his notice of appeal. (PC-R. 1448). On July 1, 1999, the Florida Supreme Court affirmed in part, and remanded in part to the lower court to hold an evidentiary hearing on the Appellant's ineffective assistance of counsel claims: (1) counsel failed to investigate and present important mitigating evidence, Claims III and V of his amended 3.850 motion; (2) counsel failed to provide Dr. Harry Krop, the mental health expert, with sufficient background information to properly assess his mental condition, Claims V and XVIII of his amended 3.850 motion; (3) counsel failed to specifically address aggravating and mitigating factors in his closing argument to the jury, Claim III of his amended 3.850 motion; and (4) there is an alleged conflict of interest arising from counsel's status as a deputy sheriff, Claim V of his amended 3.850 motion. Gaskin v. State, 737 So.2d 509, 513-14 &

517 (Fla. 1999).

On April 13 and 14, 2000, the lower court held an evidentiary hearing on these remanded claims. Thereafter, on August 23, 2000, the lower court denied Mr. Gaskin's 3.850 motion in its entirety (PC-R 1500-15). Mr. Gaskin filed his notice of appeal of the denial of his 3.850 motion on September 20, 2000 (PC-R 1569-1570). This appeal follows.

## **II. Statement of Facts**

### **a. Facts Introduced at Sentencing**

At the penalty phase of Mr. Gaskin's trial, defense counsel failed to present the testimony of a mental health expert. Rather, the defense's presentation was limited to the testimony of two lay witnesses. (R. 970-981). Further, defense counsel failed to specifically address aggravating and mitigating factors in closing argument to the jury. (R. 993-998).

The jury recommended by a vote of eight to four that the court sentence Mr. Gaskin to death for counts one and two of the indictment. (R.1301-1302). The lower court subsequently sentenced Mr. Gaskin to death on counts one and two. (R.1303-1310).

### **b. Facts Introduced at Evidentiary Hearing**

To prove that his trial counsel had been ineffective at his capital trial, Mr. Gaskin presented the testimony of his trial

attorney, Mr. Cass; two experts, Dr. Krop and Dr. Toomer; and several lay witnesses.

Dr. Krop was hired by the defense to test Mr. Gaskin for competence to stand trial. Dr. Krop was also asked to evaluate Mr. Gaskin for issues related to mitigation.

In his testimony at the post-conviction hearing, Dr. Krop testified that he found Mr. Gaskin competent to proceed at trial and he also testified that he could not rule out that sanity was an issue at the time of the event because he did not have enough materials to review. (PC-R. 26). Dr. Krop went on to testify that Mr. Gaskin was a very disturbed individual and he felt that he did not have enough data to address the sanity issue or even mitigation. (PC-R.26).

In his testimony, Dr. Krop further stated that he wrote a letter to Mr. Cass requesting additional information and/or requesting the names of individuals that Dr. Krop might interview to verify or more fully develop both the sanity issue and the mitigation issue. (PC-R. 26).

Dr. Krop stated that "Certainly the one thing that was very noteworthy from my initial evaluation of Mr. Gaskin was one, from his MMPI he had a profile which suggested possible schizophrenia, and secondly from his own several disclosures, he described extremely sexually deviant propensities and sexually

deviant behavior patterns starting at a very early age." (PC-R. 28). Dr. Krop stated that "I could not rule out that he was psychotic at that time, meaning at the time of the offense." (PC-R. 29).

Q: You mentioned some of the things you typically do rely on is school records for background.

A: Yes.

Q: Did Mr. Cass ever provide those to you?

A: No.

(PC-R.29).

In explaining the results from the MMPI, Dr. Krop testified that, first of all, he felt that Mr. Gaskin was giving him a fairly accurate presentation of himself. (PC-R. 29). And the scales that were elevated were the 8-9 scales which basically is a pretty pathological profile. (PC-R. 30). Dr. Krop further testified that he asked Mr. Cass for more materials about Mr. Gaskin at the deposition held on June 4, 1990, (PC-R. 34), including school records, but that he did not receive any information until the post-conviction lawyers representing Mr. Gaskin provided to him some time in late 1999 or early in 2000. (PC-R. 33). Additionally, Dr. Krop testified that he did not have the report by Dr. Rotstein. (PC-R. 37). That report,

which was 27 pages long, was given to him by post-conviction lawyers prior to the evidentiary hearing held in April, 2000. (PC-R. 37). From his review of Dr. Rotstein's report, Dr. Krop recalled that Dr. Rotstein had found Mr. Gaskin to be a seriously disturbed individual with sexually deviant propensities and a schizoid type personality features. (PC-R. 37). Dr. Krop found that "Mr. Gaskin was having more and more difficulty controlling those impulses to the point where obviously he was acting out both violently and sexually deviantly and he was struggling in his head." (PC-R. 39). Dr. Krop testified that he communicated at least twice with Mr. Cass in writing and had concluded that Mr. Gaskin was a seriously disturbed individual. (PC-R. 40). "I indicated that it was my opinion that when I was deposed by Mr. Nelson, I think the nature of the acts themselves sort of speak for themselves as far as how disturbed Mr. Gaskin was." (PC-R. 40).

As a true indicator of the level of ineffectiveness and the failure of Mr. Cass to investigate mitigation evidence, Dr. Krop testified that in his deposition on June 4, 1990, some two weeks before the trial of Mr. Gaskin was to begin, Dr. Krop stated that "I didn't have enough information yet to be able to give an opinion to that degree." (PC-R. 41).

A review by Dr. Krop of Dr. Rotstein's report would have

"supported mine that is his diagnosis and increase my confidence level. I would say, that my diagnosis was correct." (PC-R. 41). Dr. Krop would have testified that he felt that he (Gaskin) had a very severe personality disorder which I consider a very serious emotional disturbance. (PC-R. 42).

He related in the evidentiary hearing that from his memory, Mr. Cass and he spoke for a total of about one half hour before the trial of Mr. Gaskin. (PC-R. 42).

Dr. Krop testified that he suggested to Mr. Cass, "I believe I mentioned that in the deposition that it might be helpful to have a neuropsychological evaluation done of Mr. Gaskin because one of the things I did learn from the family members is that there was a head injury, I believe he fell off a bike. There may have been another one." (PC-R. 45-46).

Based upon information given to Dr. Krop by post-conviction counsel, he did conclude that Mr. Gaskin suffered from a learning disability. (PC-R. 47). He found that Mr. Gaskin had problems concentrating and paying attention and maintaining his interest and stated "I believe to this day, he still has some problems in that area." (PC-R. 47).

Dr. Krop went on to say "I would say that there was some parenting skills that were lacking in the people that were raising him, but, again, I don't have enough information in

terms of his dynamics underlying some of his later bizarre behaviors to suggest that it's a result of any kind of dysfunctional family." (PC-R. 50).

Dr. Krop testified that "the two populations I've probably had the most experience with of a specific type of problem are, number one, first degree murder violent cases, and then sexual offenders." (PC-R. 52).

Dr. Krop stated "What you have in Mr. Gaskin is a combination of the two. His sexual deviancy, particularly at the age that he started engaging in sexually deviant behavior compared to thousands of sex offenders that I've worked with, it's very, very severe." (PC-R. 52).

In response to a question posed about Mr. Gaskin's personality, Dr. Krop testified that

A person doesn't choose behaviors that end up being maladaptive or getting you caught or getting you punished. This is not to say that the behavior doesn't lend itself to some reinforcement at the time it's happening, but I think most of us, if we had to choose, would choose pretty normal behavior that gets reinforced by pretty much mainstream society rather than the criminal element. So he didn't choose it, but he certainly was responsible or else I would have said that he was basically insane.

(PC-R. 53).

Dr. Krop told Mr. Cass that he could testify to several things. One was that he could say that Mr. Gaskin was one of

the more seriously disturbed individuals he'd ever encountered. (PC-R. 54). "I told him that I could provide a diagnosis to a reasonable degree of psychological certainty of a mixed personality disorder." (PC-R. 54).

The witness called following Dr. Krop was Libby Willis. (PC-R. 127). Ms. Willis identified herself as Mr. Gaskin's eighth grade teacher. (PC-R. 129). Ms. Willis described Mr. Gaskin as quiet, but not a great student. (PC-R. 127).

She also stated that the Appellant "tried real hard." (PC-R. 129). She testified that "I had at that time a lower group, and his effort was there, so . . . but he was not real high functioning." (PC-R. 129). "He was not a behavior problem." (PC-R. 129).

When asked "Did Louis Gaskin's trial attorneys contact you in 1990 for his trial?" She replied "No." (PC-R. 130).

The next witness called at the evidentiary hearing was Dr. Toomer. (PC-R. 141). Dr. Toomer told the court that the post-conviction lawyers for Mr. Gaskin gave him information about Mr. Gaskin before he did his evaluation. (PC-R. 144).

This information included the school records, information provided by the family members and also reports and/or depositions of Dr. Krop and Dr. Rotstein. (PC-R. 144). Dr. Toomer did a clinical evaluation much like Dr. Krop had done

back in 1990 which included a clinical interview, psychological history, and several inventories, the bender gestalt design, the MMPI, and the Carlson Psychological Survey. (PC-R. 144). Dr. Toomer, using all of the data supplied to him, testified that his diagnosis suggested a schizophrenia paranoid type illness for Mr. Gaskin. (PC-R. 145). He went on to say that the totality of the data suggest numerous possible diagnoses. (PC-R. 145). He further concluded that Mr. Gaskin suffered from a borderline personality disorder, as well as some features of a schizotypal personality disorder. (PC-R. 146).

Dr. Toomer also found the presence of indicators of some neurological impairment or what he called neurocognitive disorder. (PC-R. 146).

Dr. Toomer described what he characterized as three basic components of a complete psychological evaluation. (PC-R. 147). They would include the clinical interview, which is a face-to-face interview including the process of testing and evaluation (PC-R. 147); the examination of past records, school records and other data relative to the person's functioning (PC-R. 147); and lastly the information to be derived from individuals who have personal knowledge of the particular individual in question during his/her developmental years. (PC-R. 147).

Dr. Toomer was able to conclude that based upon a pervasive

and long-term pattern of instability in terms of mood, effect and behavior, Mr. Gaskin had been impacted adversely in terms of his ability to function adequately in terms of thought and behavior. (PC-R. 148).

These environmental issues created, in the evaluation done by Dr. Toomer, impairment impacts which had an effect on all aspects of Mr. Gaskin's functioning. (PC-R. 148). What Dr. Toomer found in Mr. Gaskin is a person who was moving along, what he described, as a continuum of psychopathology. (PC-R. 149). Dr. Toomer found that Mr. Gaskin suffered from mental maladies ranging from schizotypal personality disorder all the way to schizophrenia. (PC-R. 149). These again are somewhat consistent with the findings of Dr. Krop and Dr. Rotstein, back in 1990. (PC-R. 37-38).

Dr. Toomer further opined that appearance is hardly an adequate way of making a determination in terms of functioning. (PC-R. 151). A person can at times appear very normal but that does not mean that that same person cannot have very severe mental health problems. (PC-R. 151). That was and is the situation with Louis Gaskin. (PC-R. 151). Dr. Toomer found that Mr. Gaskin was "An individual whose overall development and behavior represents deficits and impulse control diffidence in tolerance for anxiety, a lack of supplementary capacity and an

inability to control impulse delayed gratification." (PC-R. 152/153). Dr. Toomer found that Mr. Gaskin fit into the statutory mental health mitigator that he was substantially impaired. (PC-R. 153). Dr. Toomer found this particular diagnosis or definition of a mental health mitigator was not only applicable at the time of the offense but had been applicable to Mr. Gaskin for a good part of his life. (PC-R. 154).

A review of Mr. Gaskin's school records show that as early as 1977 Mr. Gaskin was defined as an underachiever. (PC-R. 155). Mr. Gaskin was designated as a SLD. Additionally, even in SLD classes, Dr. Toomer found that Mr. Gaskin daydreamed, had poor attention span and the visual and auditory processing deficits remained. (PC-R. 155). Dr. Toomer testified at the evidentiary hearing that school records were particularly important as supportive data that goes on in the evaluation process. (PC-R. 156).

Dr. Toomer again stated that "There has to be a pattern of predictability, saneness, security and safety during the early years. If that's not there, we can almost guarantee that we're going to have a dysfunctional individual." (PC-R. 157).

An individual such as Mr. Gaskin because of the lack of predictability that they have experienced because of the turmoil they are incapable of handling because of it

occurring at such a young age, what they tend to do is develop a different aura or personality in order to cope with or address the trauma that they have experienced and the significant and heightened emotionality that they are unable to deal with, the feelings that are engendered by that particular situation.

(PC-R. 158).

In completing his testimony, Dr. Toomer testified that had he been contacted in 1990 and, most importantly, supplied with the additional corroborative information that he was supplied with prior to the evidentiary hearing in 1999/2000, he could have and would have evaluated Mr. Gaskin and presented the data that he presented in the hearing to the jury. (PC-R. 160).

Dr. Hafner was called and he identified himself as the head of the exceptional education program in Flagler County. (PC-R. 236). Dr. Hafner testified about the different types of special education available in Flagler County and the fact that Mr. Gaskin was placed in the exceptional children's program. (PC-R. 237). Dr. Hafner explained that the criteria for getting into the exceptional children's program was that a person have an IQ of over 70 and that there be a discrepancy between his IQ and his achievement scores of 15 points or more. (PC-R. 237).

Dr. Hafner told the court that he had reviewed Louis Gaskin's school records and was able to determine that in the

third grade Mr. Gaskin was placed in a specific learning disabilities program. (PC-R. 238). A continued review of Mr. Gaskin's school records showed that he was in this program until he left school. (PC-R. 239). Dr. Hafner explained the term administrative placement, which meant that Mr. Gaskin was passed along and at some point actually got where it appears that he was in high school before he quit school altogether. (PC-R. 239). Administrative placement was a discretionary decision made by the principal of the school because of persons growing bigger physically and being much older than the other children, it was sometimes decided, as it was in Mr. Gaskin's situation, to pass him along. (PC-R. 239). Dr. Hafner also stated that "He consistently had very, very poor scores in reading and language arts. There were even comments about that since kindergarten." (PC-R. 240). Mr. Gaskin was retained or held back in the third grade and in the fifth grade. (PC-R. 240). Mr. Hafner was not contacted by trial attorneys, and he would have testified had he been contacted. (PC-R. 241).

Andrew Williams was called by post-conviction counsel. He identified himself as the brother of Louis Gaskin and first met Louis when Mr. Williams was 13 years old. (PC-R. 252). Mr. Williams had a common experience with Louis Gaskin in that they both lived with Mr. Gaskin's great grandparents for a period of

time. (PC-R. 253). Mr. Williams described Louis' efforts to assist his great grandparents in terms of giving them money to help them pay bills. (PC-R. 253). The question was also asked of Mr. Williams about whether or not the great grandparents assisted Mr. Williams or Louis in their schoolwork and the answer was "No, I don't think so." (PC-R. 253). Mr. Williams proceeded to explain that his great grandparents could not read and further explained that Louis never lived with his mother although at that time Mr. Gaskin knew who his mother was and that he had a brother and sister. (PC-R. 253). Mr. Williams was never contacted by the trial attorney in this case in 1990 and therefore, again, his testimony was not available to the trial attorney to present to the jury. (PC-R. 254).

The next witness called was Janet Smith, who did testify at the penalty phase in 1990. Ms. Smith described her relationship with Mr. Gaskin as first cousins. (PC-R. 256). She further testified that she moved in with the great grandparents also when she was about 11 years old. (PC-R. 256). She described the discipline in the house as being very, very strict and also confirmed earlier testimony that the great grandparents could not read. (PC-R. 256).

Ms. Smith went to the same school that Louis went to and described the treatment of Louis by his fellow students. (PC-R.

257). That description included that they abused him as well as made fun of him because according to Ms. Smith "we were kind of on the poor side and we didn't get new clothes like everybody else and that even in his teen years, he was sucking his thumb." (PC-R. 258). She also described behavior which was related to Mr. Gaskin getting mad about something and that he "would go off by himself and even sometimes rock, you know just sit somewhere and constantly rock." (PC-R. 258). Ms. Smith described an incident where Mr. Gaskin fell off his bicycle and hit his head and had a hole up there, as she characterized it. (PC-R. 259).

Ms. Smith testified about the relationship between Mr. Gaskin and his mother. Ms. Smith was asked:

Q: How did she treat Louis?

A: Not like he was her child.

(PC-R. 259).

Ms. Smith was then asked to give an example.

Well, like, I could go to her and ask her, you know, Auntie, can I have five dollars? And she'll say, Well, I don't have it, baby. Or she'll give it to me.

But if he asked her, excuse me, but she would say, I don't have no mother fucking money.

(PC-R. 260).

The next witness called in the post-conviction hearing was Edward Stark. (PC-R. 272). He identified himself as someone

who had met Mr. Gaskin when he was four or five years old and had known Mr. Gaskin off and on for many, many years. He described a situation where "We were pretty small in stature and you know we got bullied around a lot because we were smaller than the other guys." (PC-R. 272). Mr. Stark also confirmed information that Louis' mother was using both crack cocaine and marijuana. (PC-R. 275). Mr. Stark also witnessed Mr. Gaskin fall off his bike several times and was aware that Mr. Gaskin had received stitches in his head. (PC-R. 275-276).

The next witness called at the evidentiary hearing was Pamela Williams who is the sister of Louis Gaskin. (PC-R. 285). She testified that she first met Louis when he was 13 or 14 and was unaware until that meeting that she even had a brother named Louis Gaskin. (PC-R. 285). She described in some detail what living with the great grandmother was like and to use her words "She was like a mean witch." (PC-R. 286). Ms. Williams went on to describe living with the great grandmother in the following way, "She kept you hostage like a prison to me. That's how I feel." (PC-R. 286). Ms. Williams described the house that Louis was brought up in as not being a clean house and a house full of what she described as junk, junk that would be picked up periodically by the grandmother and brought home and put in the house. (PC-R. 288). She also confirmed that the grandparents

could not read and therefore could not help Louis in any way with his school work. (PC-R. 290).

Ms. Williams stated that Mr. Gaskin had few, if any, friends and he often hid from people where he lived with his great grandparents. (PC-R. 291). Ms. Williams corroborated the treatment given Louis by his mother. Mr. Gaskin was abandoned by his mother as an infant. (PC-R. 292). Ms. Williams confirmed that her mother, the mother of Louis Gaskin, used both marijuana and crack cocaine in her presence. (PC-R. 292). The trial attorney for Mr. Gaskin in 1990 had no contact with the sister and brother of Mr. Gaskin nor did he have any contact with the mother of Mr. Gaskin. (PC-R. 301).

The next witness to testify was Elsie Chappel. Ms. Chappel identified herself as a school teacher who had Mr. Gaskin in her class in the fourth grade. (PC-R. 320). Ms. Chappel described Louis as being withdrawn and a person who, according to her quote, "Would fall through the cracks in any classroom." (PC-R. 320). She further testified that it was about this time that Louis Gaskin was enrolled in the SLD program for person with specific learning disabilities. (PC-R. 321). Ms. Chappel told the court that she would have been available to testify in 1990 but was never contacted by attorney Cass in regards to doing that. (PC-R. 322). Under cross-examination, the State

brought up questions about Mr. Gaskin's absenteeism and was told that he, in fact, was not missing that much school. (PC-R. 322). Then the State inquired of Ms. Chappel about his IQ but she did not know his IQ. Under cross examination, Ms. Chappel testified that she felt that Mr. Gaskin was deficient in his reading ability to do the word problems associated with math. (PC-R. 233).

The next witness was Kenneth Gordon who identified himself as the fifth grade Social Studies teacher for Mr. Gaskin. (PC-R. 325). As with other teachers, Mr. Gaskin was described as a loner, a child that hid in the classroom. (PC-R. 326). Mr. Gordon also had information from a fellow teacher by the name of Annie Gaskin, no relation to Mr. Louis Gaskin, that Mr. Gordon related to the court. (PC-R. 328). Mr. Gordon testified that Ms. Gaskin told him about some of the beatings that Louis was subjected to by his great grandmother. (PC-R. 329).

The focus of the cross-examination by the State was on the knowledge by Mr. Gordon of any illegal activities that Mr. Gaskin might have been involved with at the school. (PC-R. 329). Mr. Gordon was not really aware of those activities and again, would ask to keep in mind that we are talking at this point that Louis was in the fifth grade. (PC-R. 330).

Mr. Cass, Mr. Gaskin's trial attorney, testified that the

office where he worked as an Assistant Public Defender had tried, during the period of time that Mr. Gaskin went to trial, to use a two man team on capital cases but they had too many cases to really cover them properly. (PC-R. 338). Mr. Cass stated that at the time he was representing Mr. Gaskin, he had between 14 and 16 capital cases that he was working on. (PC-R. 339). He stated that he had no investigator assigned to this particular case or to capital cases at all. (PC-R. 339). The office during this time also had no mitigation specialist or person specifically assigned to assist trial attorneys in preparing their cases for penalty phase in the event that a client was, in fact, convicted of first degree murder. (PC-R. 340).

Mr. Cass stated that he felt he had a weak case on guilt/innocence. (PC-R. 341). He also stated that he hired two persons to assist him in the mental health area, but made a decision not to use either one of them. (PC-R. 342).

With respect to Mr. Gaskin's allegation that trial counsel was ineffective during the penalty phase of his trial, Mr. Cass made specific reference to Dr. Krop but maintained that he was not of sufficient help and did not call him. (PC-R. 342).

During most of the direct examination of Mr. Cass, it was quite apparent that he had not reviewed material in preparation

for his testimony. He gave many answers of "I don't know, I think so, or I don't think so." (PC-R. 343-346, 365-366). One of the questions asked was "Do you remember Dr. Krop asking for school records and medical records and depositions?" (PC-R. 343). The answer by Mr. Cass was "I think so." Mr. Cass testified that he didn't think he got any school records for Dr. Krop, despite two written requests for them. (PC-R. 344).

Mr. Cass could not recall the date of receiving Mr. Gaskin's case. (PC-R. 345). He testified that he thought he received the case in 1988 when in fact the date of the offense was December 20, 1989. (PC-R. 345). The trial attorney did not remember having any discussions with Dr. Krop and was unaware of the information that Mr. Gaskin was a seriously disturbed individual. (PC-R. 346). The trial attorney was unaware that Mr. Gaskin had a problem with sexual deviancy. (PC-R. 347).

At the conclusion of the guilt phase wherein Mr. Gaskin had been found guilty of two counts of first degree murder and just before beginning the penalty phase, Mr. Cass requested time from the court to discuss certain matters with Mr. Gaskin. (R. 967). This conversation took place in the holding cell at the courthouse and Mr. Cass chose to have a court reporter present during this discussion. (PC-R. 367). During the evidentiary hearing, Mr. Cass was asked about this procedure. Mr. Cass had

no explanation as to why he felt it was necessary to have a court reporter present when he was informing Mr. Gaskin of what he would characterize later on as a strategy decision on his part. (PC-R. 354). During his evidentiary hearing testimony, Mr. Cass had no memory at all of Dr. Rotstein and, in fact, at one point asked the inquiring attorney "Did I employ Rotstein?" (PC-R. 352). Mr. Cass also had no explanation as to why he did not call Dr. Rotstein as a witness, given the fact that Dr. Rotstein had found at least one statutory mental health mitigator present in Mr. Gaskin. (PC-R. 365).

Mr. Cass then discussed more fully the circumstances of using a court reporter to record what would appear to be a privileged conversation with his client:

Q: Did you have some concerns about protecting your professional reputation down the line, as to why you would call a court reporter in?

A: I think that's probably the most logical answer for it but it's not something I would normally do.

(PC-R. 354).

An additional question asked of Mr. Cass about the mental health experts was the following:

Q: Do you think that's a legal decision as to whether or not you should call that mental health expert for mitigation?

A: Are you asking me, sir, whether or not

I think it's proper to put the question to him and the decision to him?

Q: Right. Do you think that should be a decision a lawyer makes?

A: If you're asking me right now, I think it is yes, it should be a decision for the attorney. As for advising the client, if he says no, then probably my attitude would have been to move to withdraw because I don't think the average client is prepared to make that decision competently.

(PC-R. 358).

Mr. Cass was asked if he took Dr. Rotstein's deposition. His reply was "I don't think so." (PC-R. 365). He was later asked "Did you provide Dr. Rotstein's reports to Dr. Krop?" Mr. Cass' response was "I don't think so." (PC-R. 365). Mr. Cass was asked if he tried to consult with other public defender offices to find other mental health experts who might have been able to evaluate Mr. Gaskin and come up with statutory mental health mitigators as Dr. Rotstein did. His response was "No sir I didn't." (PC-R. 367).

Mr. Cass then stated that there was not a great deal of contact between the various offices and it probably didn't occur to him. (PC-R. 366). Yet later on in this same series of questions, he admitted that he had gone to life over death seminars which are sponsored by the Florida Public Defender's Association and in fact had met other attorneys from other

circuits who were doing capital litigation. (PC-R. 366).

In response to the following question:

Q: Instead of using Dr. Davis, who you knew never found anyone sane or competent, why not try to find one of these other doctors who often testified and made these findings and also could testify to statutory mental health mitigation.

A: There was pressure on the employment of experts for the use of the defense and probably because of the war we were having on that, particularly on forensic psychology, I probably just laid down and let it roll over me.

(PC-R. 369).

Addressing the issue of strategy directly at this point, the post-conviction counsel asked Mr. Cass the following question:

Q: Let me go back. When we were talking about the conversation with the court reporter present, when you were talking to Louis, you advised of one of the things that you didn't want to get into was prior crimes yet when you called .

A: I'm sorry, I don't understand.

Q: You advised him that one of the reasons you didn't want to call Dr. Rotstein was because you didn't want his prior crimes to come out. You didn't think that would come out, yet it did come out with a witness, through the witness Janet Morris.

A: Who was it?

Q: Janet Morris. They were able to bring out the prior burglaries. Did you

advise Louis that they could have potentially brought that out through the lay witnesses?

A: I don't think so. I mean, I don't think I did advise him of that.

(PC-R. 381).

#### SUMMARY OF ARGUMENT

1. Mr. Gaskin proved at the Evidentiary Hearing that he received ineffective assistance of counsel at the penalty phase of his trial. Mr. Gaskin was denied the effective assistance of counsel at penalty phase in violation of the Sixth, Eighth and Fourteenth Amendments of the United States Constitution. Trial counsel failed to adequately investigate and prepare additional mitigating evidence and failed to adequately challenge the state's case. Counsel failed to adequately object to the Eighth Amendment error. Counsel's performance was deficient and as a result the death penalty is unreliable.

2. Trial counsel was ineffective when he failed to provide Dr. Krop, his expert, with sufficient background information. Moreover, he failed to investigate the availability of follow-up evaluations of his client based upon the information Dr. Krop did provide to him.

3. Trial counsel's performance was deficient in his failure to test the state's case in closing argument. Trial

counsel's closing argument failed to address the mitigators and aggravators that were presented during the penalty phase. This failure was in effect an abandonment of his client.

#### ARGUMENT I

#### THE LOWER COURT'S RULING FOLLOWING THE Post-conviction EVIDENTIARY HEARING WAS ERRONEOUS.

At the evidentiary hearing, Mr. Gaskin presented evidence substantiating his claims regarding ineffective assistance of counsel at the penalty phases of his trial. Due to the ineffectiveness of his counsel, Mr. Gaskin's rights as guaranteed under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution were violated. Based on the testimony present, Mr. Gaskin was certainly entitled to relief.

To prevail on his claim, Mr. Gaskin must demonstrate that counsel's performance was deficient and that counsel's deficient performance affected the outcome of the sentencing proceeding. Hildwin v. Dugger, 654 So.2d 107, 109 (Fla. 1995) (citing Strickland, 466 U.S. at 694, 104 S.Ct. at 2068).

Stated otherwise, Gaskin must demonstrate that but for counsel's errors he would have probably received a life sentence.

#### A. Ineffective assistance of counsel at the penalty phase.

##### 1. Trial counsel's failure to adequately investigate and

**prepare important mitigation evidence.**

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland requires a defendant to plead and demonstrate both unreasonable attorney performance and prejudice to prevail on an ineffective assistance of counsel claim. Id. Mr. Gaskin has fulfilled each requirement.

"One of the primary duties defense counsel owes to his client is the duty to prepare himself adequately prior to trial." Magill v. Dugger, 824 F.2d 879, 886 (11<sup>th</sup> Cir. 1987); "Pretrial preparation, principally because it provides a basis upon which most of the defense case must rest, is, perhaps, the most critical stage of a lawyer's preparation." House v. Balkom, 725 F.2d 608, 618 (11<sup>th</sup> Cir. 1984), cert. denied, 469 U.S. 870 (1984); Weidner v. Wainwright, 708 F.2d 614, 616 (11<sup>th</sup> Cir. 1983). As stated in Strickland, an attorney has a duty to undertake reasonable investigation or "to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691.

Trial counsel's representation of Mr. Gaskin fell below acceptable professional standards in several respects. Each of

these failures, discussed below, severely prejudiced Mr. Gaskin. To prove prejudice, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings. Id. Had counsel performed effectively, there is a reasonable probability that the outcome would have been different -- that is, that Mr. Gaskin would have received a life sentence.

Defense counsel must also 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 Penny v. Lynaugh, 109 S.Ct. 2934 (1989); Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976). The state and federal courts have expressly and repeatedly held that

trial counsel in a capital sentencing proceeding has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration, object to inadmissible evidence or improper jury instructions and make an adequate closing argument. Harris v. Dugger, 874 F.2d 756 (11<sup>th</sup> Cir. 1989); Evans v. Lewis, 855 F.2d 631 (9<sup>th</sup> Cir. 1988); Stevens v. Kemp, 846 F.2d 642 (11<sup>th</sup> Cir. 1988); Tyler v. Kemp, 755 F.2d 741, 745 (11<sup>th</sup> Cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11<sup>th</sup> Cir. 1985). Trial counsel here did not meet these rudimentary constitutional standards.

Proper investigation and preparation would have resulted in evidence establishing an overwhelming case for life on behalf of Mr. Gaskin and would have, at a minimum, delivered the two necessary votes for a jury recommendation of life. The difference between Mr. Gaskin's character presented at trial and the fully fleshed and humanized Louis Gaskin, a man with a life story whose mental health problems would have come to light had counsel properly prepared, is startling. Had counsel properly prepared, the judge and jury could have known the real person. Had counsel provided the mental health experts who testified at penalty phase with this critical information and with the overwhelming evidence of his longstanding problems in school, mental health problems, and environmental problems, they

too could have testified about the real person.

The central issue of this particular claim is that the trial counsel, during the penalty phase of Mr. Gaskin's trial, presented limited and next to no competent evidence in mitigation. In fact, the only evidence presented by the defense during the penalty phase of the trial consisted of brief testimony of two witnesses: his cousin and his aunt. The culmination of their testimony was that the defendant was well liked by everyone growing up, he worked hard at a lumber mill where he was employed and seemed to enjoy his job, and that there was nothing about the defendant's past or background that would have caused him to act violently or to commit murder.

In the order denying the Appellant relief, the court found that "counsel did procure two mental health experts to evaluate the Defendant for competency and mitigation." (PC-R. 1506). The trial court ignores the fact that counsel did not elicit testimony of the mental health experts during the trial of Mr. Gaskin.

Mr. Cass testified in the direct questioning by post-conviction counsel that he did not even recall employing Dr. Rotstein and, of course, we know now from testimony that Dr. Rotstein was in fact employed by the State of Florida after Mr. Cass had employed Dr. Davis. (PC-R. 365).

During cross-examination, the State tries to downplay the earlier testimony of Mr. Cass that he was extremely busy during this period of time.

Q: When you say you had a number of capital cases going at the time of this case, you didn't mean that they were all death penalty cases. You had cases other than death cases, didn't you?

A: No sir. I was doing death cases exclusively. I terminated my ordinary felony docket in '83.

(PC-R. 394).

Q: Isn't it a problem for you, because anybody who knew about Mr. Gaskin's life is going to be able to testify about all the warts in that life too, all the negative things he had done?

A: Absolutely.

Q: If you call a teacher, for instance Mr. Cass, and you think you probably talked to some of them, do you think you would have wanted to call a teacher to say, you know, he wasn't very bright in school but by the way he also would steal stuff all the time? Now with that I mean would you consider the negatives and positive before deciding whether not to call a person as a mitigation witness?

(PC-R. 395-396). This line of questioning ignores that Mr. Cass, by his own testimony, had not had any contact with any of these people and secondly, did not have an investigator to interview these folks and therefore was not in a position to

make an informed strategical decision about whether or not to put these people on. (PC-R. 339). Moreover, there is significant mitigation evidence that can be presented to a jury that does not, in fact, open the door to all of Mr. Gaskin's prior bad acts. As an example, the fact that Mr. Gaskin had no father or did not know who his father was, the fact that his mother abandoned him and yet came back into his life and then abandoned him again, repeated abandonments, something that an expert could have looked at, the fact that the mother used drugs, the fact that Mr. Gaskin had a learning disability, the fact that he failed in the third and fifth grades and was administratively promoted, the fact that he was a loner, that he had few friends, that he was teased in school. (PC-R. 236-241) (256-261). Again, there was plethora of potential mitigation evidence that could have and should have been investigated by Mr. Cass. This certainly was not done and therefore this case falls far below what is the accepted standard under Hildwin and Strickland.

At the evidentiary hearing held in April, 2000, the post-conviction counsel called a number of witnesses, each of whom were available to testify at the time of trial and who could have significantly enhanced the paltry mitigation evidence presented at trial.

For example, a witness, Dr. Hafner, was called and he identified himself as the head of the exceptional education program in Flagler County. (PC-R. 236). Dr. Hafner testified about the different types of special education available in Flagler County and the fact that Mr. Gaskin was placed in the exceptional children's program. (PC-R. 237). Dr. Hafner explained that the criteria for getting into the exceptional children's program was that a person have an IQ of over 70 and that there be a discrepancy between his IQ and his achievement scores of 15 points or more. (PC-R. 237).

Dr. Hafner told the court that he had reviewed Louis Gaskin's school records, again something that was never made available to the psychological experts in this case by trial counsel and was able to determine that in the third grade Mr. Gaskin was placed in a specific learning disabilities program. (PC-R. 238). A continued review of Mr. Gaskin's school records showed that he was in this program until he left school. Dr. Hafner also explained the term administrative placement as it would appear without further investigation which of course was not done by trial counsel, that Mr. Gaskin was in fact passed along and at some point actually got where it appears that he was in high school before he quit school altogether. Administrative placement was a discretionary decision made by

the principal of the school because of persons growing bigger physically and being much older than the other children, it was sometimes decided, as it was in Mr. Gaskin's situation, to pass him along. Dr. Hafner also stated that "He consistently had very, very poor scores in reading and language arts." (PC-R. 240). Mr. Gaskin was retained or held back in the third grade and in the fifth grade. At the end of his testimony, the attorneys for the post-conviction work representing Mr. Gaskin asked Mr. Hafner if he, one, was contacted by trial attorneys and two, if they would have contacted him would he have testified as he did in 2000. The answer to the first question was no, he was not contacted by trial attorneys and the answer to the second question was sure, he could have testified. (PC-R. 241).

In the order denying Mr. Gaskin relief, the court stated that "As to nonstatutory, non-mental health mitigating facts, the defendant presented testimony of friends, family members and former teachers or administrators. This court find that such production of evidence would have opened the door to damaging cross examination regarding the defendant's past violent and criminal conduct." (PC-R. 1505).

The type of testimony as given by Dr. Hafner, when fully developed by competent counsel, could have presented a powerful

picture to the jury as to the nature and extent of the problems faced by Mr. Gaskin.

The court's determination that "counsel made a reasonable strategic decision not to present this nonstatutory, non-mental health mitigation" (PC-R. 1505) is clearly erroneous. "A strategic decision, however, implies a knowledgeable choice." Autzy v. State, 536 So.2d 1014, 197 (Fla. 1988).

Mr. Gaskin's case is very similar to the facts in Heiney v. State, 620 So.2d 171 (Fla. 1993). In the Heiney case, the circuit court determined that he was not prejudiced by the deficient performance of trial counsel. Id. at 173. In reversing the circuit court, this Court applied its reasoning in Stevens v. State, 552 So.2d 1083, that "Trial counsel's inaction in the penalty phase of the trial amounted to a substantial and serious deficiency."

The circuit court in Gaskin found that "In cases where counsel did conduct a reasonable investigation of mental health mitigation prior to trial and then made a strategic decision not to present this information, the Florida Supreme Court has affirmed the trial court's finding that counsel's performance was not deficient." (PC-R. 1507).

However, in Gaskin as in Heiney v. State, 620 So.2d 171, 173 (Fla. 1993), this Court found that "Heiney's lawyer in this case

did not make decisions regarding mitigation for tactical reasons. Heiney's lawyer did not even know that mitigating evidence existed. This is so because counsel did not attempt to develop a case in mitigation." Heiney v. State, 620 So.2d 171 (Fla. 1993).

The trial court is in error when it concluded "This Court finds that counsel was not deficient because counsel did conduct a reasonable investigation of mental health mitigation prior to trial and made a reasonable, strategic decision not to present this information to the jury and not to present Dr. Krop's finding to the judge." (PC-R. 1507).

Dr. Krop testified that when his deposition was taken on June 4, some two weeks before the start of the trial, that he did not have any additional information from the trial attorney, Mr. Cass, about the existence of additional mitigation witnesses and/or testimony. (PC-R. 27). Continuing on with Dr. Krop's testimony, he felt that from the MMPI that Mr. Gaskin had a profile which suggested possible schizophrenia and secondly, from his own several disclosures, he described extremely sexually deviant propensities and sexually deviant behavior pattern starting at a very early age. (PC-R. 28). This case had a veritable panoply of potential mental health and non-mental health mitigators available to it had only the trial

attorney persisted in (1) requesting a lengthy continuance of this trial and (2) obtaining other potential experts to investigate the iceberg, the tip of which Dr. Krop had discovered in his evaluation. Dr. Krop described Mr. Gaskin as being "very self-disclosing, providing a lot of information, both about the crimes as well as his background, to which Dr. Krop suggested that he was pretty open and forthright, in the sense that he was not giving me a whole lot of positive information about himself." Dr. Krop further found "that he could not rule out the fact that Mr. Gaskin was psychotic at the time of these events." (PC-R. 29). Dr. Krop, at the evidentiary hearing, was asked directly:

Q: You mentioned some things, some of the things you typically do rely on the school records for background.

A: Yes.

Q: Did Mr. Cass ever provide those to you?

A: No.

(PC-R. 29).

In its order the trial court discussed Dr. Krop's diagnosis of Mr. Gaskin. "Dr. Krop diagnosed the Appellant as having a mixed personality disorder with schizoid and antisocial features (terminology in 1990) or personality disorder not otherwise specified, with schizoid, schizotypal, and antisocial features

(modern terminology); he did not find any statutory mitigators."  
(PC-R. 1507).

Dr. Krop's testimony is literally filled with indicators which, if investigated by trial counsel at the time of Mr. Gaskin's original trial, could have in all likelihood and would have produced significant mitigation evidence of a psychological nature. Moreover, the existence of early sexual deviancy, on the part of Mr. Gaskin, certainly indicated that there was a great chance in fact that Mr. Gaskin had been the victim of sexual abuse himself. Again quoting from the testimony of Dr. Krop, "he maintained that on the MMPI the scales that were elevated were the 8-9 scales, which basically is a pretty pathological profile." He then continues, 'So simply based on the MMPI, I could not rule out that he was psychotic or schizophrenic.' (PC-R. 29).

"So his presentation was pretty non-psychotic but some of the things he said about his thinking, his personality, his varied personalities, things he hears inside his head and the MMPI, I felt that I could not rule out that he was schizophrenic at that time."  
(PC-R. 30).

What the trial counsel did in this case in preparing for mitigation was a minimal look at by a single doctor, Dr. Krop, into Mr. Gaskin's background. Mr. Cass, the trial attorney, chose for instance to hire Dr. Davis and acknowledged in so hiring Dr. Davis that he was hiring somebody who was known to be a State expert. Mr. Cass would have this Court believe that

this was a strategy decision in order to deprive the State of using Dr. Davis as a witness against Mr. Gaskin.

In its order the trial court found that "In the instant case, counsel did procure two mental health experts to evaluate the Defendant for competency and mitigation, Dr. Robert Davis and Dr. Harry Krop, who were aware of most of these background facts propounded by the Defendant." (PC-R. 1507).

This conclusion reached by the trial court is not supported by the testimony produced at the evidentiary hearing. Mr. Cass testified at the hearing that he knew that Dr. Davis was known to be a State witness and he hired Dr. Davis not to develop mitigation, but to deprive the State of the services of Dr. Davis as a witness. (PC-R. 361). This decision clearly deprived Mr. Gaskin of an expert who could or would assist Mr. Cass in the penalty phase of the trial.

Dr. Krop found that Mr. Gaskin was involving himself in an escalating pattern in social and violent type behaviors to the point where he was clearly aware that they are also escalating, yet at the same time, he was having more and more difficulty controlling these impulses to the fact where obviously he was acting out both violently and sexually deviantly and he was struggling in his head. (PC-R. 38-39). If one looks at the fact pattern of the crime for which Mr. Gaskin was convicted and

sentenced to death, it is very much a part of this escalating pattern of violent activity that he involved himself in the shootings of both of the victims who passed away and later on the shootings or attempting shootings of victims down the street from the home where he first committed the homicides in this case. (R. 1313-1317). Dr. Krop testified that he sent a letter to Mr. Cass wherein he said "that he felt that Mr. Gaskin was as seriously a disturbed individual, I indicted it was my opinion when I was deposed by Dr. Nelson, I think the nature of the acts themselves speaks for themselves as far as how disturbed Mr. Gaskin was." (PC-R. 45). The question in the context of this brief then becomes what did Mr. Cass, the trial attorney, do with the information that was passed onto him by Dr. Krop? The answer is he did nothing. Mr. Cass was given a variable treasure trove of potential mental health and non-mental health mitigators with all of which were never investigated at all by Mr. Cass. In fact, Mr. Cass was given some of the this information in a deposition taken on June 4 of the year of this trial and this case then proceeded to trial on June 25 of that same year, less than three weeks after Mr. Cass had been given the information. Mr. Cass never moved for a continuance of this case, nor did he attempt again to hire any additional experts or personnel that could have helped him to develop an effective

mitigation presentation which was critical in this case, given the horrendous nature of the crimes for which Mr. Gaskin was being tried. Dr. Krop testified at the evidentiary hearing as he had in his earlier deposition that "I didn't have enough information yet to be able to give an opinion to that degree." (PC-R. 40-41). The degree he is talking about is whether or not to a reasonable degree of psychological certainty, what his diagnoses actually were as to the mental health problems affecting Mr. Gaskin.

Dr. Krop testified that following his second meeting with Mr. Gaskin wherein he felt that Mr. Gaskin had a very severe personality disorder which he considered a very serious emotional disturbance, that the total time Mr. Cass spent with Dr. Krop was about one half hour. Dr. Krop described in that brief meeting with Mr. Cass the characteristics of what Dr. Krop was describing as a severe personality disorder. He described or came up with a diagnosis of paraphilia which is basically a person with severe sexual disorder. In Mr. Gaskin's case, it was Mr. Gaskin who described for him paraphilia, he described for him sex with animals, he described exposing himself, obscene phone calls, cross dressing and forced sex. (PC-R. \_\_\_\_). Again, all of these indicators should have tipped off Mr. Cass that further and extensive investigation was necessary in this

case to develop an effective presentation to a jury at the penalty phase. It is interesting to note that the court, in denying relief, finds that Mr. Cass made a strategy decision based upon the potential exposure of the prior history as well as other bad acts by Mr. Gaskin. However, a trial attorney cannot hide behind strategic decisions when the level of his ineffectiveness is such that he basically prepares no mitigation at all. Stevens v. State, 552 So.2d 1082 (Fla. 1989).

"During the sentencing phase, the defense lawyer did not conduct nor arrange for an investigation into the defendant's background. Had he done so, substantial mitigation would have been discovered. Also the lawyer did not present mitigating evidence nor did he make any arguments on the defendant's behalf to the trial judge." Id. at 1085. In Mr. Gaskin's case, we have a very analogous situation to that cited in Stevens v. State. The defense lawyer in Gaskin presented little or no mitigation evidence based upon his failure to conduct an investigation into Mr. Gaskin's background. He also made little or no closing argument to the jury regarding the weighing of aggravators and mitigators. As the court held in Stevens, "The failure to investigate the defendant's background, the failure to present mitigating evidence during the penalty phase, and the failure to argue on the defendant's behalf was not the result of

reasoned, professional judgment. The trial counsel essentially abandoned the representation of his client during sentencing." Id. at 1087. In the Stevens case, the jury had recommended a life sentence and what the court found was that "At the very least, any evidence presented and any possible arguments made to the trial court, could have provided the trial court with a basis to follow the jury's recommendation of a life sentence. Trial counsel's inaction in the penalty phase of the trial amounted to a substantial and serious deficiency measurably below the standard for competent counsel." Id. at 1087.

In Stevens v. State, 552 So.2d 1082 (Fla. 1989), this Court found that "The record shows that substantial mitigation evidence would have been discovered had trial counsel conducted or arranged for a reasonable investigation into Stevens' background." Id. at 1085. The testimony in Mr. Gaskin's case, at the evidentiary hearing, shows that, again, there was substantial potential mitigation evidence available to trial counsel had trial counsel conducted a reasonable investigation into Mr. Gaskin's background.

At the evidentiary hearing, Dr. Hafner testified that Mr. Gaskin was placed in the exceptional children's program at an early age. (PC-R. 237). A complete review of the Appellant's school records showed that Mr. Gaskin remained in the special

program until he left school. (PC-R. 238).

The trial court inexplicably stated in its order denying relief to Mr. Gaskin, that the mental health experts retained by Mr. Cass "were aware of most of these background facts propounded by the Defendant." (PC-R. 1506).

This conclusion is contrary to the evidence present at the evidentiary hearing. Dr. Krop testified that he received next to no background facts from trial counsel. (PC-R. 42, 50). Mr. Cass, in testimony, stated that he had no knowledge of the background facts testified to at the hearing. (PC-R. 347, 354).

It is well settled that evidence of family background and personal history may be considered in mitigation. Brown v. State, 526 So.2d 903, 908 (Fla.). See also Hollsworth v. State, 522 So.2d 354 (childhood trauma is a mitigating factor). The court further noted "that employment history and positive character traits are also relevant factors to be considered in mitigation since these factors may show potential for rehabilitation and productivity within the prison system."

Andrew Williams was called by post-conviction counsel. He identified himself as the brother of Louis Gaskin and first met Louis when Mr. Williams was 13 years old. (PC-R. 252). Mr. Williams had a common experience with Louis Gaskin in that they both lived with the great grandparents for a period of time.

Mr. Williams described Louis' efforts to assist his great grandparents in terms of giving them money to help them pay bills. The question was also asked of Mr. Williams about whether or not the great grandparents assisted Mr. Williams or Louis in their schoolwork and the answer was "No, I don't think so." (PC-R. 253). Then he further explained that his great grandparents could not read and that Louis never lived with his mother although at that time Mr. Gaskin knew who his mother was and that he had a brother and sister. Mr. Williams was never contacted by the trial attorney in this case in 1990 and therefore, his testimony was not available to the trial attorney to present to the jury.

In the absence of any mitigating evidence, the jury in Gaskin considered the nature of the offense and the evidence before it and voted eight to four for a death recommendation. Had trial counsel made the argument based upon mitigation, or discovered any of the mitigation evidence and presented it to the jury, he then could have argued these grounds to the jury as support for a life recommendation based upon the principals enunciated in Tedder. Tedder v. State, 322 So.2d 908, 910 (Fla. 1975).

Another witness who testified at the evidentiary hearing was Janet Smith, who did testify at the penalty phase in 1990. Ms.

Smith described her relationship with Mr. Gaskin as first cousins. (PC-R. 256). She further testified that she moved in with the great grandparents also when she was about 11 years old. She described the discipline in the house as being very, very strict and also confirmed earlier testimony that the great grandparents could not read. (PC-R. 257).

Ms. Smith went to the same school that Louis went to and described the treatment of Louis by his fellow students. That description included that they abused him as well as made fun of him because according to Ms. Smith "we were kind of on the poor side and we didn't get new clothes like everybody else and that even in his teen years, he was sucking his thumb." (PC-R. 257).

She also described behavior which was related to Mr. Gaskin getting mad about something and that he "would go off by himself and even sometimes rock, you know just sit somewhere and constantly rock."  
(PC-R. 258).

Ms. Smith described an incident where Mr. Gaskin fell off his bicycle and hit his head and had a hole up there. This was the same head injury that Dr. Krop discovered in his evaluation of Mr. Gaskin and had recommended to Mr. Cass that a full neuropsychological work-up be done on Mr. Gaskin. (PC-R. 46). Of course, that work-up was never done because Mr. Cass did not

follow through nor investigate the applicability or the appropriateness of such an investigation. She also testified and described the relationship or lack of relationship between Louis and his mother. (PC-R. 258). There is no other way to characterize this description but a total abandonment and rejection by the mother of Mr. Gaskin. Abandonment can be a factor in a psychological make-up of a child that was exhibiting behavioral problems beginning in kindergarten. Ms. Smith testified in the evidentiary hearing in response to the following question

Q: How did she treat Louis?

A: Not like he was her child.

(PC-R. 259).

In the Rose case, the Florida Supreme Court held "Rose must demonstrate that but for the counsel's errors he would have probably received a life sentence." Rose v. State, 675 So.2d 567 (Fla. 1996). Hildwin v. Dugger, 654 So.2d 107, 109 (Fla.). Such a demonstration is made if "Counsel's errors deprived the defendant of a reliable penalty phase proceeding." Id. at 110. The failure to investigate and present available mitigating evidence is a relevant concern along with reasons for not doing so. Id. at 109-10.

Another witness called in the post-conviction hearing was

an Edward Starke. He identified himself as someone who had met Mr. Gaskin when he was four or five years old and had known Mr. Gaskin off and on for many, many years. Much of the information that he supplied with his testimony was corroboration of earlier evidence and testimony given by other witnesses, none of whom were talked to prior to the trial in 1990. For instance, he described a situation where "We were pretty small in stature and you know we got bullied around a lot because we were smaller than the other guys." (PC-R. 272). Mr. Starke also confirmed information that Louis' mother was using both crack cocaine and marijuana and of course we have no indication of the time frame of that use in relationship to Louis' birth and his being reared by his great grandparents again, because there was no investigation of the mother of Louis Gaskin in or about the time of the trial. Mr. Starke also witnessed Mr. Gaskin fall off his bike several times and was aware that Mr. Gaskin had received stitches in his head. (PC-R. 275-276).

"An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background for possible mitigating evidence." Quarter v. Singletary, 14 F.3d 554, 557 (11<sup>th</sup> Cir. 1994). The failure to do so "may render counsel's assistance ineffective." Bolender, 16 F.3d 1547, 1557 (11<sup>th</sup> Cir. 1994). In Rose the record reflects

that counsel made practically no investigation of mitigation and presented little evidence of mitigation in the sentencing proceeding, despite the existence of substantial evidence of mitigating circumstances that would have been uncovered if counsel had made a reasonable investigation. In Gaskin, the record reflects that counsel made practically no investigation of mitigation and presented little or no evidence of mitigation in the sentencing proceeding despite the existence of substantial evidence of mitigating circumstances that would have been uncovered if counsel had made a reasonable investigation.

Pamela Williams, Louis Gaskin's sister, also testified at the evidentiary hearing. She testified that she first met Louis when he was 13 or 14 and was unaware until that meeting that she even had a brother named Louis Gaskin. She described in some detail what living with the great grandmother was like and to use her words "She was like a mean witch." (PC-R. 286). Ms. Williams went on to describe living with the great grandmother in the following way, "She kept you hostage like a prison to me. That's how I feel." (PC-R. 286). Ms. Williams described the house that Louis was brought up in as being not a clean house and a house full of what she described as junk, junk that would be picked up periodically by the grandmother and brought home and put in the house. She also confirmed that the grandparents

could not read and therefore could not help Louis in any way with his school friends. The question was asked of Ms. Williams whether or not Mr. Gaskin had many friends and the answer to that was no. She also was asked whether or not Mr. Gaskin hid and the answer to that was yes. (PC-R. 291). Ms. Williams corroborated the treatment given Louis by his mother and that treatment basically again can be described or characterized best as total abandonment of Louis even though she was having some contact with Louis. Ms. Williams confirmed that her mother, the mother of Louis Gaskin, used both marijuana and crack cocaine in her presence. The trial attorney for Mr. Gaskin in 1990 had no contact with the sister and brother of Mr. Gaskin nor did he have any contact with the mother of Mr. Gaskin.

Another witness called by post-conviction attorneys representing Mr. Gaskin was Elsie Chappel. Ms. Chappel identified herself as a school teacher who had Mr. Gaskin in her class as a fourth grade teacher. (PC-R. 320). Ms. Chappel described Louis as being withdrawn and a person who, according to her quote, "Would fall through the cracks in any classroom." (PC-R. 320). She further testified that it was about this time that Louis Gaskin was enrolled in the SLD program for person with specific learning disabilities. Ms. Chappel told the court that she would have been available to testify in 1990 but was

never contacted by attorney Cass in regards to doing that. (PC-R. 322).

The next witness was Kenneth Gordon who identified himself as the fifth grade Social Studies teacher for Mr. Gaskin. (PC-R. 325). As with other teachers, Mr. Gaskin was described as a loner, a child that hid in the classroom. (PC-R. 326). Mr. Gordon also had information from a fellow teacher by the name of Annie Gaskin, no relation to Mr. Louis Gaskin, that Mr. Gordon related to the court. Mr. Gordon testified that Ms. Gaskin told him about some of the beatings that Louis was subjected to by his great grandmother. (PC-R. 328-329).

At the post-conviction proceeding, Gaskin introduced a large amount of mitigation evidence, which included the testimony of relatives and friends of the family, who described Gaskin's poor childhood and through testimony of expert witnesses, who described Gaskin's mental and emotional deficiencies. (PC-R. 22-333). In Phillips v. State, 608 So.2d 778 (Fla. 1992), this Court held that the testimony of Phillips' mother, brother and sister that Phillips grew up in poverty, and that his parents were migrant workers who often left the children unsupervised, that Phillips' father physically abused him and physically abused Phillips' mother in front of the children, and that Phillips' was a withdrawn, quiet child with no friends, was

relevant and admissible evidence in mitigation in the penalty phase of a trial. Id. at 783.

The trial court in its order found that "It was counsel's strategy not to present this mitigation to the jury." According to Mr. Cass, his strategic decision was in part based upon the concern that by putting on mitigation, it would open the door to damaging cross examination regarding Mr. Gaskin's past violent and criminal conduct. (PC-R. 393).

The court's finding that "A defendant is not prejudiced by the failure to introduce this type of nonstatutory mitigation when it would have opened the door to testimony of the defendant's violent past," (PC-R.1505) is clearly erroneous. In Mr. Phillips' case, the experts concluded that Phillips falls under the statutory mitigating circumstances of extreme emotional disturbance and an inability to conform his conduct to the requirements of the law. Id. at 783.

Post-conviction attorneys called as a witness Dr. Jethro Toomer, a clinical and forensic psychologist. (PC-R. 141). Dr. Toomer was given the material that Mr. Cass failed to give to Dr. Krop. (PC-R. 144). This material included school records, a life history and the names of relatives and friends to be interviewed as supporting material to the psychological evaluation. (PC-R. 144).

"An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background for possible mitigating evidence." Quarter v. Singletary, 14 F.3d 554, 557 (11<sup>th</sup> Cir. 1994). The failure to do so "may render counsel's assistance ineffective." Bolender, 16 F.3d 1557.

In the Rose case, the Florida Supreme Court held "Rose must demonstrate that but for the counsel's errors he would have probably received a life sentence." Rose v. State, 675 So.2d 567 (Fla. 1996). Hildwin v. Dugger, 654 So.2d 107, 109 (Fla.). Such a demonstration is made if "Counsel's errors deprived the defendant of a reliable penalty phase proceeding." Id. at 110. The failure to investigate and present available mitigating evidence is a relevant concern along with reasons for not doing so. Id. at 109-10.

In Rose the record reflects that counsel made practically no investigation of mitigation and presented little evidence of mitigation in the sentencing proceeding, despite the existence of substantial evidence of mitigating circumstances that would have been uncovered if counsel had made a reasonable investigation. In Gaskin, the record reflects that counsel made practically no investigation of mitigation and presented little or no evidence of mitigation in the sentencing proceeding

despite the existence of substantial evidence of mitigating circumstances that would have been uncovered if counsel had made a reasonable investigation. (PC-R. 338-385). In Rose as in Mr. Gaskin's case, the defense called Dr. Jethro Toomer, a clinical and forensic psychologist. In Rose, Dr. Toomer testified that Rose suffered from organic brain damage, had a longstanding personality disorder, was a chronic alcoholic and that Rose meets the statutory criteria for the mitigator of being under the influence of extreme emotional or mental disturbance at the time of the offense, Rose, 675 So.2d 567, see Section 921.141 (6)(b) Fla. Stat. 1993; moreover, Toomer found that Rose's ability to appreciate the criminality of his conduct or conform his conduct to the requirements of law was impaired at the time of the offense. See Id. Section 921.141 (6)(f). Dr. Toomer's opinion was based on the psychosocial evaluation of Rose in which he administered a battery of psychological tests and reviewed Rose's school, hospital, medical and prison records. Id. at 571. In Gaskin, Dr. Toomer presented very similar testimony to that which is outlined in the Rose case.

The court's finding "that counsel conducted a reasonable investigation into mental mitigation evidence which is not rendered incompetent merely because the Defendant has now secured the testimony of a more favorable mental health expert."

(PC-R. 1508) (TC-0-9). Mr. Cass conducted no investigation into mental health mitigation beyond hiring Dr. Krop and Dr. Davis. (PC-R. 322-385).

In the case of Mr. Gaskin, it is clear that the failure to investigate Mr. Gaskin's background, especially given the indicators by Dr. Krop that Mr. Gaskin was seriously mentally ill, the failure to present mitigating evidence during the penalty phase and the failure to argue on Mr. Gaskin's behalf was not the result of a reasoned, professional judgment. Trial counsel essentially abandoned the representation of his client during sentencings. The Federal court in Blake went on to say, "It should be beyond cavil that an attorney who fails altogether to make any preparation for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness." Blake v. Kemp, 758 F.2d 523, 533 (11<sup>th</sup> Cir.).

Dr. Toomer also found that Mr. Gaskin was under extreme emotional disturbance and had an inability to conform his conduct to the requirements of the law. Experts in the Phillips' case opined that Phillips did not have the capacity to form the requisite intent to fall under the aggravating factors of cold, calculated and premeditated or heinous, atrocious or

cruel. Both of these aggravators were presented to the jury in Mr. Gaskin's case with no argument to the contrary which was in effect abandoning the representation of Mr. Gaskin by his trial counsel. As the court found in Phillips, 608 So.2d at 783, the jury vote in this case was seven to five in favor of a death recommendation. The swaying of the vote of only one juror would have made a critical difference here. Id. at 783. In Mr. Gaskin's case, the vote for a death recommendation was eight to four. We are talking about the swaying of two jurors in terms of a possible life recommendation for Mr. Gaskin.

It is apparent from the record that the counsel for Mr. Gaskin never attempted to meaningfully investigate mitigation and hence violated the duty of counsel (PC-R. 322-385) "to conduct a reasonable investigation, including an investigation of the defendant's background for possible mitigating evidence." Baxter, 45 F.3d at 1513. In Mr. Gaskin's situation, trial counsel attempts to take refuge behind the strategic decision theory as to why he failed to present mitigation evidence to the jury in the case. "Case law rejects the notion that a strategic decision can be reasonable when the attorney has failed to investigate his options and make reasonable choice between them." Horton v. Zant, 941 F.2d 1149, 1462 (11<sup>th</sup> Cir. 1991). In a review of the record in Mr. Gaskin's case, it is clear that

trial counsel failed to investigate his options even though he was given ample information by Dr. Krop to look further for both psychological testimony, which could have been presented at the trial, as well as non-statutory mitigation information that would have been presented at the trial. (PC-R. \_\_\_\_). In evaluating the harmfulness of resentencing counsel's performance, we have consistently recognized that severe mental disturbance is a mitigating factor of the most weighty order, Hildwin, 654 So.2d 110, and Santos v. State, 629 So.2d 838, 840 (Fla. 1994), and the failure to present it in the penalty phase may constitute prejudicial ineffectiveness. Hildwin, 654 So.2d at 110; Rose v. State, 675 So.2d 567, 573.

In citing Baxter, the court in Rose stated that "Psychiatric mitigating evidence has the potential to totally change the evidentiary picture." We have held petitioners to be prejudiced in other cases where defense counsel was deficient in failing to investigate and present psychiatric mitigating evidence. See Stevens v. Kemp, 849 F.2d 642, 653 (11<sup>th</sup> Cir.). The Court in conclusion in Rose held that "in light of the substantial mitigating evidence identified at the hearing below as compared to the sparseness of the evidence actually presented, we find that counsel's errors deprive Rose of a reliable penalty phase proceeding. We further conclude that Rose was prejudiced by the

ineffective assistance of counsel at the penalty phase for failing to investigate and present available mitigating evidence." Rose v. State, 675 So.2d at 574. See Hildwin, 654 So.2d 110.

Mr. Gaskin was definitely prejudiced by his counsel's failure to investigate and present both statutory mental health evidence and testimony as to nonstatutory mitigation.

**B. Failure to provide experts with sufficient background information.**

Although Mr. Gaskin was evaluated by several mental health experts pre trial, they had no background information on Mr. Gaskin, and no information on Mr. Gaskin's mental state on the night of the homicides. Additionally, failure to provide Dr. Krop with the material that he requested (PC-R. \_\_\_) precluded counsel for Mr. Gaskin from presenting any mental health mitigation to the jury. As a result, they were unable to develop a true picture of Mr. Gaskin for the jury. Mr. Gaskin lost the full impact of compelling statutory and nonstatutory mitigating evidence.

The mental health experts, because of insufficient background information, were unable to explain Mr. Gaskin's mental illness and brain damage in the context of his life history and background. Reasonable investigation would have

resulted in the mental health experts being able to present a total picture of Mr. Gaskin's life history, his mental health problems and his significant environmental problems. (PC-R. 32-310). This total picture would have presented significant statutory and nonstatutory mitigation evidence in a consistent and rational manner and would have precluded a sentence of death. In this case, the failure of the trial attorney to supply the mental health experts with sufficient background information precluded the trial attorney from calling any mental health experts in the sentencing phase of Mr. Gaskin's trial.

Dr. Hafner told the court that he had reviewed Louis Gaskin's school records and was able to determine that in the third grade Mr. Gaskin was placed in a specific learning disabilities program. (PC-R. 238).

Mr. Cass testified at the evidentiary hearing that "he did provide Dr. Krop with the requested additional information." (PC-R. 408-409).

The court then found "that the Defendant failed to establish any actual prejudice from counsel failing to provide Dr. Krop with the school records." (TC-0-12).

The court is too narrow in its holding as to this issue. While school records are important as background information for

the psychologist, there also was a plethora of other information available from friends and family which should have been provided to the mental health experts. (PC-R. 240-286).

A criminal defendant is entitled to expert psychiatric assistance when the state makes his/ her mental state relevant to the proceeding. Ake v. Oklahoma, 105 S.Ct. 1087 (1985). "What is required is an adequate psychiatric evaluation of the defendant's state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11<sup>th</sup> Cir. 1985). "There exists a particularity critical relationship between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1298, 1279 (5<sup>th</sup> Cir. 1979).

In addition to the evidence outlined above, Rose presented substantial lay testimony regarding mitigation at the post-conviction hearing which had not been investigated or was not presented by counsel during the penalty phase proceeding. Rose v. State, 675 So.2d at 571. Again, like the testimony in Rose, testimony was presented at the post-conviction hearing of people that would have been and could have been available to testify to the jury about mitigation type evidence on behalf of Mr. Gaskin.

Witnesses called at the post-conviction hearing included:  
Andrew Williams, brother of Mr. Gaskin - Mr. Gaskin brought

up by his great grandparents who could not read or write; abandoned by his mother. (PC-R. 252-253).

Janet Smith, first cousin of Mr. Gaskin - Mr. Gaskin brought up by his great grandparents - very strict discipline picked on by fellow students at school sucking his thumb until his teen years. Mr. Gaskin fell off his bike and suffered a serious head injury. Abandoned by his mother. (PC-R. 258-259).

Pamela Williams, sister of Mr. Gaskin - lived with great grandparents with Mr. Gaskin - described living conditions like being a hostage, like a prison to me. (PC-R. 286). Abandoned by his mother. Mother used marijuana and crack cocaine. (PC-R. 299-300).

Ms. Elsie Chappel - Fifth grade teacher of Mr. Gaskin - described Louis as withdrawn; "Would fall through the cracks in any classroom." (PC-R. 320). Mr. Gaskin in the SLD program for persons with specific learning disabilities.

Mr. Gordon - Fifth grade social studies teacher of Mr. Gaskin - described Mr. Gaskin as a loner who hid in the classroom. Related information about beating that Mr. Gaskin was subjected to by his great grandmother. (PC-R. 326-327).

These witnesses were never interviewed by trial counsel and therefore the information they provided was never shared with Dr. Krop. Additionally, their testimony was never presented to

the jury trying Mr. Gaskin.

**C. Trial counsel's failure to argue in this closing argument the weighing process that the jury should apply to mitigating and aggravating circumstances.**

The entire closing argument in the penalty phase presented to the jury by Mr. Cass was less than six pages of typed transcript which represents approximately a three minute closing argument. (R. 993-998).

The closing argument by Mr. Cass reflects a total abandonment of his client. Mr. Cass presented no evidence in mitigation and therefore was limited in his closing argument.

At the evidentiary hearing, Mr. Cass was asked:

Q: Why didn't you specifically address the statutory aggravators and mitigators in your closing argument?

A: I'm sure I don't know. To pick out the thousand and one things I was going to address in that closing argument, I couldn't narrow it down that far to tell you why I didn't go into mitigators and aggravators and I didn't apparently. Is that correct? (PC-R. 371).

The trial court in its order states that "Counsel also addressed two mitigators: the Defendant's age and anything found in the character of the Defendant." (PC-R. 1511).

However, the court heard testimony at the evidentiary hearing that Mr. Cass did not request a jury instruction on the

statutory mitigator of age.

Questions about mitigators were asked, specifically

Q: Why didn't you ask for the jury instruction on the statutory mitigator of age?

A: I don't know. I thought perhaps being an adult, I don't recall any case law saying being entitled to it as an adult for one of the mitigators of youth.

(PC-R. 371).

This answer shows a complete lack of the law of mitigators in that actually age can be asked for regardless of one's age or regardless of one's status as a juvenile or an adult.

In fact, the closing argument's total review of mitigators is contained in two sentences. (R. 994).

Counsel then characterizes his client, Mr. Gaskin, as a sociopath. (R. 994). In his limited and ineffective closing argument, counsel presents information to the jury that was kept from the jury when Mr. Cass presented no mental health experts. This information was extremely prejudicial to Mr. Gaskin.

Mr. Cass further mischaracterized the life of Mr. Gaskin as "pretty normal" (R. 995) when testimony at the evidentiary hearing showed that Mr. Gaskin did not have a normal life. (PC-R. 220-238).

Trial counsel's knowledge of his client was so limited that he was precluded from presenting an effective closing argument.

Mr. Cass characterized his client as "an intelligent young man."  
(R. 995).

Mr. Gaskin was not an intelligent young man. Dr. Krop described the Appellant as "A very disturbed individual." (PC-R. 26). School personnel testified that Mr. Gaskin was identified as a person with specific learning disabilities by the time he was in the third grade. (PC-R. 238).

Mr. Cass was asked the following questions during the evidentiary hearing:

Q: Were you aware that Louis was in special learning disability classes in school?

A: I don't remember that.

(PC-R. 372).

Q: Why did you not utilize this to show his unusual behavior about hiding under the bed and he had to be pulled out and he was foaming in the mouth since you had Virginia Brown testify at penalty phase, why didn't you utilize that for mitigation?

A: I probably didn't see or, this is a supposition, I don't remember my mental condition at the time or by condition I mean as far as recollection is concerned that it wasn't particularly significant. In the speech of the lady, there are times she used words. Talking about foaming at the mouth doesn't necessarily mean foaming at the mouth.

Q: Did you discuss it with her?

A: No.

Q: Did you discuss that with any mental health experts?

A: No sir.

(PC-R. 378).

The trial court's order found that "In light of counsel's reasonable strategy to keep out the Defendant's past violent and criminal conduct, sexual deviancy, and lack of remorse by not presenting extensive mitigation evidence - - - counsel's performance during closing argument was not deficient." (PC-R. 1512).

This finding by the court is not supported by the facts and testimony presented at the evidentiary hearing. Mr. Cass had no knowledge of the extensive mitigation available to him because of his failure to investigate the life of Mr. Gaskin.

This failure to investigate rendered Mr. Cass ineffective from the opening statement to the closing argument of the trial.

The United States Supreme Court has held that

[8] Florida employs a three-stage sentencing procedure. First, the jury weighs statutorily specified aggravating circumstances against any mitigating circumstances, and renders an "advisory

sentence" of either life imprisonment or death. Fla. Stat. §921.141(2)(Supp. 1992). Second, the trial court weighs the aggravating and mitigating circumstances, and enters a sentence of life imprisonment or death; \*526 if the latter, its findings must be set forth in writing. §921.141(3). The jury's advisory sentence is entitled to "great weight" in the trial court's determination, *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975), but the court has an independent obligation to determine the appropriate punishment, *Ross v. State*, 386 So.2d 1191, 1197 (Fla. 1980). Third, the Florida Supreme Court automatically reviews all cases in which the defendant is sentenced to death. §921.141(4).

Lambrix v. Singletary, 520 U.S. 518, 526.

Citing Espinosa, the Supreme Court further opined that

We determined that the Florida capital jury is, in an important respect, a cosentencer with the judge. As we explained: "Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances."

505 U.S., at 1082, 112 S.Ct., at 2928.

Closing argument is a critical stage in a trial and more so in the penalty phase of a capital trial. Failure of Mr. Cass to argue to the jury aggravators and mitigators rendered his representation ineffective.

#### CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, the lower court improperly denied Mr. Gaskin Rule 3.850 relief. This Court should order that his sentence be vacated and remand the case for a new sentencing, new evidentiary hearing, or for such relief as the Court deems proper.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this \_\_\_\_\_ day of \_\_\_\_\_, 2001.

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that a true copy of the foregoing Initial Brief, was generated in Courier New, 12 point font, pursuant to Fla. R. App. P. 9.210.

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