

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-1498

---

JACK DEMPSEY FERRELL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

---

ON APPEAL FROM THE NINTH CIRCUIT COURT  
OF THE JUDICIAL CIRCUIT,  
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

---

INITIAL BRIEF OF APPELLANT

---

DWIGHT M. WELLS  
Assistant CCC  
Florida Bar No. 0317136

CAROL C. RODRIGUEZ  
Assistant CCC  
Florida Bar No. 0931720  
CAPITAL COLLATERAL REGIONAL  
COUNSEL-MIDDLE  
3801 Corporex Park, Suite 210  
Tampa, Florida 33619  
(813) 740-3544

Attorney(s) for Appellant

**PRELIMINARY STATEMENT**

This is an initial brief in appeal of the circuit court's denial of Mr. Jack Ferrell's Motion for post conviction relief that was brought pursuant to Fla.R.Crim.P. 3.850.

The following symbols designate references to the record in this appeal followed by the appropriate page numbers:

"R." - record on direct appeal;

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

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

"T" - Trial

"RS" - Resentencing Hearing June 20, 1995

"EH 2" - Evidentiary Hearing of February 7, 2001

"EH 9" - Evidentiary Hearing of September 4, 2001

"R 1424" - Sentencing Order #1

"R 1430" - Sentencing Order #2

"R 1451" - Sentencing Order #3

All other references will be self-explanatory or otherwise explained.

**REQUEST FOR ORAL ARGUMENT**

Mr. Jack Ferrell has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a

similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims at issue and the stakes involved. Mr. Ferrell, through counsel, accordingly urges that the Court permit oral argument.

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT . . . . .	i
REQUEST FOR ORAL ARGUMENT . . . . .	i
TABLE OF CONTENTS . . . . .	iii
TABLE OF AUTHORITIES . . . . .	v
STATEMENT OF CASE AND FACTS . . . . .	1
I.    Course of Proceedings and Disposition in Court Below . . . . .	1
II.   Statement of the Facts . . . . .	3
a.  Facts Introduced At Trial . . . . .	3
b.  Facts Introduced at Sentencing . . . . .	11
SUMMARY OF ARGUMENT . . . . .	13
An Overview of the Life and Times of Jack Ferrell . . .	13
ARGUMENT I	
THE LOWER COURT’S RULING FOLLOWING THE POST-CONVICTION EVIDENTIARY HEARING WAS ERRONEOUS. . . . . .	18
A.    INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE . . . . .	18
1.  Trial counsel’s failure to adequately investigate and prepare important mitigation evidence . .	19
B.    FAILURE TO PRESENT MITIGATION . . . . .	21
1.  Lay Witnesses . . . . .	21
C.    EXPERT SOCIAL WORKER TESTIMONY . . . . .	34
ARGUMENT II	
THE COURT WAS CLEARLY ERRONEOUS IN DENYING MR. FERRELL	

RELIEF DUE TO HIS DEFENSE COUNSEL'S FAILURE TO SEEK  
ADDITIONAL EXPERT ASSISTANCE IN DETERMINING THE EXTENT OF  
BRAIN DAMAGE SUFFERED BY MR. FERRELL. . . . . 45

ARGUMENT III

Mr. Ferrell was denied his right to an individualized  
Sentencing and a Reasoned Weighing of Aggravating And  
Mitigating Factors in violation of his 8<sup>th</sup> and 14<sup>th</sup>  
Amendments to the United States Constitution and the  
Corresponding Provisions of the Florida Constitution. . 52

A. STATUTORY MITIGATORS WERE FOUND IN THE COURT'S  
ORIGINAL SENTENCING ORDER . . . . . 53

CONCLUSION AND RELIEF SOUGHT . . . . . 79

CERTIFICATE OF SERVICE . . . . . 80

CERTIFICATE OF COMPLIANCE . . . . . 81

**TABLE OF AUTHORITIES**

	<b><u>Page</u></b>
<u>Baxter</u> ,	
45 F.3d at 1513 . . . . .	30, 31
<u>Blake v. Kemp</u> ,	
758 F.2d 523 (11 <sup>th</sup> Cir.) . . . . .	21, 30
<u>Brown v. Wainwright</u> ,	
392 So. 2d 1327 . . . . .	77
<u>Campbell v. State</u> ,	
571 So. 2d 415 (Fla. 1990) . . . . .	54, 55, 57-60, 64, 65, 68, 69, 71, 72, 75, 78
<u>Cheshire v. State</u> ,	
568 So.2d 908 . . . . .	32
<u>Crook v. State</u> ,	
813 So. 2d 68 . . . . .	73
<u>Davis v. State</u> ,	
742 So.2d 233 (Fla. 1999) . . . . .	46, 49
<u>Duncan v. State</u> ,	
619 So. 2d 279 (Fla. 1993) . . . . .	58, 59, 64, 66, 72
<u>Evans v. Lewis</u> ,	
855 F.2d 631 (9 <sup>th</sup> Cir. 1988) . . . . .	21
<u>Ferrell v. State</u> ,	
390 So.2d at 391 . . . . .	27
<u>Ferrell v. State</u> ,	
520 U.S. 1123 (1997) . . . . .	1
<u>Ferrell v. State</u> ,	
635 So. 2d 367 (Fla. 1995) . . . . .	1
<u>Ferrell v. State</u> ,	
680 So. 2d 390 (Fla. 1996) . . . . .	1, 38, 44, 58, 71, 76
<u>Gregg v. Georgia</u> ,	

428 U.S. 153 (1976)	20
<u>Harris v. Dugger,</u> 874 F.2d 756 (11 <sup>th</sup> Cir. 1989)	20
<u>Heiney v. State,</u> 620 So.2d 171 (Fla. 1993)	26
<u>Hildwin v. Dugger,</u> 654 So.2d 107 (Fla. 1995)	18, 31
<u>Horton v. Zant,</u> 941 F.2d 1149 (11 <sup>th</sup> Cir. 1991)	31
<u>Hose v. Chicago Northwestern Transp. Co.,</u> 70 F.3d 968 (8 <sup>th</sup> Cir. 1995)	47
<u>Hoskins v. State,</u> 702 So.2d 202 (Fla. 1997)	50
<u>House v. Balkom,</u> 725 F.2d 608 (11 <sup>th</sup> Cir. 1984), cert. denied, 469 U.S. 870 (1984)	19
<u>Magill v. Dugger,</u> 824 F.2d 879 (11 <sup>th</sup> Cir. 1987)	19
<u>Nibert v. State,</u> 574, So. 2d. 1059 (Fla. 1990)	73
<u>Owen v. State,</u> 773 So.2d 510 (Fla. 2000)	44
<u>Penny v. Lynaugh,</u> 109 S.Ct. 2934 (1989)	20
<u>People v. Weinstein,</u> 156 Misc.2d 34, 591 N.Y.S.2d 715 (N.Y.Sup.Ct. 1992)	47
<u>Roberts v. Louisiana,</u> 428 U.S. 325 (1976)	20
<u>Robinson v. State,</u> 761 So 2d 269 (Fla. 1999)	45, 74

<u>Rogers v. State,</u> 783 So.2d 980 (Fla. 2001)	51
<u>Rose v. State,</u> 675 So.2d 567	31
<u>Santos v. State,</u> 629 So.2d 838 (Fla. 1994)	31
<u>Spencer v. State,</u> 645, So. 2d 377 (Fla. 1994)	73
<u>Stevens v. Kemp,</u> 846 F.2d 642 (11 <sup>th</sup> Cir. 1988)	21, 31
<u>Stevens v. State,</u> 552 So.2d at 1085	26
<u>Strickland v. Washington,</u> 466 U.S. 668 (1984)	18, 19, 45
<u>Tyler v. Kemp,</u> 755 F.2d 741 (11 <sup>th</sup> Cir. 1985)	21
<u>Weidner v. Wainwright,</u> 708 F.2d 614 (11 <sup>th</sup> Cir. 1983)	19
<u>Woodson v. North Carolina,</u> 428 U.S. 280 (1976)	20
 <u>Other Authorities</u>	
Fla. Stat. §921.141(6)	29
Fla. Stat. §921.141(6)(b)(2000)	52
Fla. Stat. §921.141(6)(f)(2000)	52
Eighth Amendment, U.S. Const.	16, 18
Fourteenth Amendment, U.S. Const.	16, 18
Sixth Amendment, U.S. Const.	16, 18

Dix, 1977. The Death Penalty, "Dangerousness," Psychiatric Testimony and Professional Ethics. Am.J.Crim.L. . . . . 41

Poders. 1980. The Psychiatrist's Role in Death Sentence Debated. 66 A.B.A.J. . . . . 42

**STATEMENT OF CASE AND FACTS**

**I. Course of Proceedings and Disposition in Court Below**

1. On May 11, 1992, Mr. Ferrell was indicted by an Orange County Grand Jury for first-degree murder (R. 175).<sup>1</sup>

2. Mr. Ferrell was tried by a jury and found guilty on February 4, 1993 (R. 530). The jury sentenced Mr. Ferrell to death on March 9, 1993, by a vote of 10-2 (R. 130). The trial court followed the jury recommendation and sentenced Mr. Ferrell to death on April 21, 1993 (R. 587-89).

3. On February 16, 1995, the Florida Supreme Court affirmed Mr. Ferrell's conviction, but remanded the case to the trial court because of the court's failure to adequately evaluate the aggravating and mitigating factors established at penalty phase. Ferrell v. State, 635 So. 2d 367 (Fla. 1995). On remand the trial court issued a new sentencing order, again sentencing Mr. Ferrell to death (R2. 72).<sup>2</sup> The Florida Supreme

---

1 R. refers to Record on Appeal of the 1993 conviction and sentence.

2 R2 refers to the Supplemental Record on Appeal of the 1995 re-sentencing.

Court affirmed this sentence on April 11, 1996. Ferrell v. State, 680 So. 2d 390 (Fla. 1996). On March 17, 1997, the United States Supreme Court denied Mr. Ferrell's's petition for writ of certiorari to the Florida Supreme Court. Ferrell v. State, 520 U.S. 1123 (1997).

4. On January 16, 1998, Mr. Ferrell filed an initial 3.850 Motion that was amended pursuant to Florida Rules of Criminal Procedure 3.850 and 3.851 on June 23, 2000.

5. Following a review of Defendant's Amended Motion, the file and record of the case, and State's response filed on July 24, 2000, the Court held a *Huff* hearing on August 14, 2000.

6. The Court granted Defendant an evidentiary hearing on Claim I, Section E; Claim II, Section B, subsections a. and b.; Claim II, Section C; Claim V; and Claim VI.

7. Circuit Court Judge Daniel P. Dawson was identified as a material witness in the Defendant's Evidentiary Hearing, recused himself and Circuit Court Judge Maura T. Smith was assigned to the case. Status hearings were scheduled on March 19, 2001 and April 13, 1001.

8. On February 7-8, 2001 the Court held an evidentiary hearing on those claims which a hearing had been granted , with the exception of Claim II, Section C, which addressed medical testing. The court left this issue open pending receipt of

evidence on this issue and pending a possible *Frye* hearing following any test(s) performed on Defendant.

9. On March 19, 2001, April 13, 2001, May 1, 2001, and July 6, 2001 the Court conducted status hearings.

10. On September 4, 2001, the Court held an Evidentiary Hearing on the issue of medical testing and determined that a *Frye* hearing was unnecessary.

11. On September 13, 2001, another status hearing was held and the Court provided all parties thirty days from the date of filing of the hearing transcript to file any additional memoranda for the Court's consideration.

12. On May 22, 2002, the court entered an Order Denying Defendant's Amended Motion to Vacate Judgement of Conviction and Sentence with Special Leave to Amend in its entirety.

13. On June 13, 2002 Mr. Ferrell filed his notice of appeal of the denial of his 3.850 motion.

This appeal follows:

**II. Statement of the Facts**

**a. Facts Introduced At Trial**

Jack Ferrell and Mary Esther Williams were involved in a romantic relationship and lived together in an apartment in

Orlando (T. 435).<sup>3</sup> The relationship was volatile, involving constant arguments between the two. In addition to the arguments, Mr. Ferrell and Ms. Williams were continuously under the influence of large amounts of alcohol (T. 424, 446, 449, 462-63, 591-92).

On the evening of Friday, April 17, 1992, Mr. Ferrell got off work, and began drinking, as he usually did at the end of the day. Ms. Williams was drinking with him as she often did (T. 593-95, 465). The next morning the couple awoke and began to drink again (T. 595-96). That morning, April 18, 1992, neighbors heard an argument in the couple's apartment, but were not concerned because this was a common occurrence (T. 435-36, 465).

Willie Cartwright, who lived in the same apartment building as Mr. Ferrell, testified that on that Saturday morning, she observed Mr. Ferrell go in and out of the apartment several times while she watched her television (T. 435). At about noon, Ms. Cartwright went outside and observed Mr. Ferrell drive up in his car, park it, and come across the courtyard (T.435). Mr. Ferrell had a plant or flower in his hand which Ms. Cartwright assumed he was taking to Ms. Williams to make up for the

---

3 T. refers to the trial transcript from the guilt phase proceedings in Mr. Ferrell's case.

argument she had heard earlier (T. 435-36). Ms. Cartwright had no conversation with Mr. Ferrell that morning. Ms. Cartwright stated that he had red eyes that morning, as if he had been drinking (T. 442). Mary Wallace, another neighbor, also saw Mr. Ferrell that morning and heard the argument between Mr. Ferrell and Ms. Williams (T. 456-57). Neither Ms. Wallace nor Ms. Cartwright heard any gunshots that morning (T. 443, 459). Ms. Cartwright testified that she first learned that Ms. Williams had been shot when Mr. Ferrell came downstairs and told her she had better call the police because he had just killed his "old lady" upstairs (T. 443).

Mr. Ferrell then went straight to his car and drove away (T. 444). Ms. Wallace went up to the couple's apartment and knocked on the doors and windows but got no response (T. 460). She told Ms. Cartwright to call 911. Ms. Cartwright did, and the ladies waited for the police to arrive (T. 460, 448).

Ms. Cartwright testified that approximately one week before Ms. Williams was shot, Mr. Ferrell allegedly told her that he had "killed one bitch and he would do it again," and that if he went back to prison he wouldn't be coming back this time (T. 446-47). An acquaintance of Mr. Ferrell's, Frank McCollum, testified that approximately ten days before Ms. Williams was shot, Mr. Ferrell came to him very drunk and very upset and told

him he was going to kill Ms. Williams and go back up north (T. 419).

McCollum alleged that, approximately one month before this incident, Mr. Ferrell had asked him if he knew where he could get a gun. When McCollum asked him why he needed a gun, Mr. Ferrell said he was going to kill Ms. Williams because they had had a fight and he was mad at her (T. 419-20). McCollum admitted that during these conversations Mr. Ferrell was very intoxicated and the threats were usually in response to a fight between Mr. Ferrell and Ms. Williams (T. 424).

The police arrived in response to a call of a reported shooting (T. 469). When the first officer entered the apartment building, he saw a body on the northern-most bedroom floor lying face up (T. 470). The officer identified himself and asked if the woman was okay, but got no response, although he detected shallow breathing (T. 470). The victim, identified as Mary Esther Williams, was admitted to the hospital with a gunshot wound and died ten days later (T. 529). When Ms. Williams was admitted into the hospital she had a blood alcohol level of .299 (T. 530).

An autopsy, performed on April 29, 1992, revealed two head injuries consistent with gunshot wounds (T. 529, 531). One was an entrance wound from a bullet on the right side of the head

approximately one inch in front of the right ear and on level with the mid portion of the right eye (T. 531). This wound penetrated the base of the skull and the bullet was recovered (T. 531). The second head injury was a gunshot wound to the left forehead at the hairline with the wound penetrating the scalp and exiting further back on the head, but not producing an injury to the skull itself (T. 531). There was an additional entrance gunshot wound to the middle joint of the left index finger (T. 532). Ms. William's cause of death was determined to be an injury to the brain associated with hemorrhaging, produced by the penetrating wound to the head as a result of a gunshot wound (T. 538).

Mr. Ferrell was arrested when he was pulled over in his car on April 8, 1993 (T. 513). When Mr. Ferrell was stopped, the police also seized a gun which was sitting on the right front seat (T. 516). There was also a slight smell of alcohol about Mr. Ferrell's person and he was extremely quiet and cooperative (T. 519-20). Detective Robert Mundy responded to the scene at Mr. Ferrell's apartment and took statements from Willie Cartwright and Mary Wallace, based upon which he issued a BOLO for Mr. Ferrell or his car (T. 556). Following Mr. Ferrell's arrest, Mundy met with him at the Orange County Jail and read him his Miranda rights (T. 557). Detective Mundy stated that

Mr. Ferrell understood all his rights and agreed to give a taped statement (T. 558). In the statement, Mr. Ferrell admitted that he and Ms. Williams had been drinking and got into an argument as Mr. Ferrell was taking his gun out of his pocket to put in his drawer, Ms. Williams pushed him, causing him to fall back and raise his hand up, which caused the gun to go off (T. 500). Mr. Ferrell was not sure, but he believed the gun may have fired twice (T. 500). Mr. Ferrell stated that he got scared and ran out the door, stopping to tell the neighbors downstairs to call an ambulance (T. 502). Mr. Ferrell then proceeded to get in his car and drive to Winter Park where he began drinking at a bar (T. 502). Mr. Ferrell stated that he did not intend to shoot Ms. Williams and was sorry that it happened (T. 503-505).

At trial, Mr. Ferrell testified that he and Ms. Williams had been living together for approximately sixteen or seventeen months. They had planned to be married in August 1992 (T. 591). He testified that he drank every day before and after work, drinking approximately one-half gallon of Fleischman's gin every night (T. 592). Ms. Williams would often drink with him (T. 592). Mr. Ferrell and Ms. Williams often fought with each other while they were drinking (T. 592).

Mr. Ferrell worked on Friday, April 17<sup>th</sup> and got off work at approximately 2:30 p.m. (T. 592). he cashed his check and

bought a pint of gin, which he shared with a friend (T. 592-93). He then bought another half gallon of gin and went home (T. 592). After running some errands together, Mr. Ferrell and Ms. Williams arrived home at approximately 5:00 p.m. and began drinking (T. 594). They did not argue that night, and Ms. Williams went to bed at approximately 11:00 p.m. (T. 595). Mr. Ferrell continued to drink straight gin until around 3:00 a.m., waking up around 6:00 a.m. to begin drinking again (T. 595-96). When Ms. Williams awoke she also started drinking (T. 596). At 9:30 a.m. Saturday morning, Mr. Ferrell went to a bar to get more liquor (T. 596). At approximately 11:00 a.m., Ms. Williams' mother and a friend came to the apartment, staying for approximately forty-five minutes and then leaving to go to Morrison's (T. 596). Mr. Ferrell and Ms. Williams discussed going to the laundromat, but Ms. Williams did not want to go. Mr. Ferrell wanted her to come along and keep him company, but he said it was okay if she did not go (T. 597). Mr. Ferrell loaded clothes into the trunk of his car and while doing so observed a gun in a box (T. 597). Mr. Ferrell put the gun in his pocket and was going to put it in a chest of drawers inside the apartment (T. 599). Mr. Ferrell walked into the bedroom and had the gun in his right hand pocket (T. 599). He had cigarettes, a lighter, and keys in the other pocket (T. 599).

Mr. Ferrell reached into his pocket to take his cigarettes and keys out (T. 602). Just as he pulled out his gun, he observed a hand coming at him, whereupon he flinched and stuck the gun up (T. 602). Mr. Ferrell then realized Ms. Williams was falling to the floor (T. 602). He tried to catch her, but she fell to the floor (T. 602). Mr. Ferrell panicked and left the apartment, stopping at the downstairs apartment to tell someone to call the police and an ambulance (T. 603). He thought about Ms. Williams' mother and tried to find her to tell her what had happened (T. 603). His attempt to find Ms. Williams' mother was unsuccessful (T. 603). Mr. Ferrell called the hospital to see how Ms. Williams was, but they would give him no information (T. 603). Devastated, Mr. Ferrell just went to a bar where he drank beer and whiskey (T. 603). Mr. Ferrell was on his way to give himself up to the police when he was stopped (T. 604).

Mr. Ferrell stated that he did not intend to kill Ms. Williams and denied ever telling Frank McCollum that he wanted to shoot Ms. Williams (T. 604, 612-14). Mr. Ferrell did admit that he told Willie Cartwright that he had "killed one bitch and would kill another", but that he was not referring to Ms. Williams (T. 617). Mr. Ferrell stated that when he made the statement to Ms. Cartwright about not returning from prison, he was referring to the fact that he had lost a kidney and would

probably die there before being released (T. 617).

Dr. James Upson, an expert in the field of neuropsychology and forensic psychology, examined Mr. Ferrell on three occasions (T. 662). Mr. Ferrell has a low IQ which places him in the bottom sixth or seventh percentile of the population in intelligence (T. 664). After administering a complete battery of psychological tests to Mr. Ferrell, Dr. Upson concluded that Mr. Ferrell suffers from brain damage, and in particular, frontal lobe impairment (T. 667-69). Dr. Upson testified that prolonged alcohol use leads to a deterioration of the frontal area of the brain (T. 682). Mr. Ferrell showed signs of this type of lobe damage (T. 683). Dr. Upson concluded that Mr. Ferrell's brain damage and his continued alcohol abuse caused behavioral changes (T. 684). Mr. Ferrell suffered mental problems at the time of the shooting, and Dr. Upson's opinion was that his ability to plan and conduct his behavior in a consistent fashion was diminished (T. 688). In describing the events of the shooting to Dr. Upson, Mr. Ferrell became tearful and felt very remorseful about what happened (T. 680-81).

When Mr. Ferrell drinks, his behavior is often marked by impulsivity (T. 688). While the testing cannot dispositively indicate that Mr. Ferrell's brain damage is a result of drinking, the information provided to Dr. Upson revealed no

other possible causes, such as head injury (T. 696). In making his diagnosis, Dr. Upson considered Mr. Ferrell's prior drinking habits, his prior work history, and prior observations by others about Mr. Ferrell's behavior (T. 725). Dr. Upson also considered the fact that Mr. Ferrell had spent seven and one-half years in prison for a murder he committed, during which time he was not drinking (T. 725). Dr. Upson concluded that Mr. Ferrell was capable of knowing right from wrong, although he was uncertain whether Mr. Ferrell was able to appreciate the criminality of his act (T. 734). Mr. Ferrell's actions following the murder were not indicative of premeditation (T. 735). Dr. Upson further stated that Mr. Ferrell loses cognitive control when he drinks and his impulses simply take over (T. 745). Dr. Upson did not believe that Mr. Ferrell planned to kill Ms. Williams, but rather that the shooting was the result of an impulsive response heated argument (T. 744).

**b. Facts Introduced at Sentencing**

The State presented several witnesses who testified to Mr. Ferrell's second-degree murder conviction in 1981 (R. 45-75). Mr. Ferrell shot Bertha Mae Lane in front of several witnesses (R. 56). He was apprehended a short time after the shooting and cooperated with the police (R. 58, 70), ultimately entering a plea to second-degree murder.

Dr. Upson reviewed Mr. Ferrell's prison records from his incarceration for the previous murder conviction (R. 80). Dr. Upson determined that Mr. Ferrell would function very well in a controlled setting such as a prison (R. 80). Mr. Ferrell was not involved in any incidents of violence while in prison (R. 80). Dr. Upson did not believe Mr. Ferrell would be a dangerous person so long as he is in a controlled setting (R. 81). Dr. Upson also believed that Mr. Ferrell was under the influence of an extreme mental or emotional disturbance at the time of the shooting (R. 82). Dr. Upson also found that Mr. Ferrell's ability to conform his conduct to the requirements of the law was substantially impaired at the time of the shooting (R. 83). Dr. Upson based these findings on the fact that Mr. Ferrell suffers from organic brain damage and the fact of his volatile and violent relationship with Ms. Williams (R. 82). According to Dr. Upson, Mr. Ferrell was impulsive and his judgment was critically impaired at the time of the shooting (R. 82.)

Two of Mr. Ferrell's co-workers testified that he was a good, dependable employee (R. 90, 96). Mr. Ferrell was a hard worker ( R. 91, 97). Frankie Moore testified knowing Mr. Ferrell for some years and that he has always worked (R. 101). Moore intimated that when Mr. Ferrell is not drinking, he is a nice person (R. 102).

## SUMMARY OF ARGUMENT

### **An Overview of the Life and Times of Jack Ferrell**

Jack Ferrell is the son of Katie Dawson (B.D. 9/11/24) who was age 14 and Dempsey Ferrell age 36 when he was born August 5, 1940 in Bailey, North Carolina. This was a farm community 33 miles east of Raleigh where the Black, mostly poor, inhabitants of all ages, worked in the fields of tobacco, cotton, peas and corn. There was rigid segregation, inequality in access to education, health, welfare, and other public resources. This was also a community with high levels of KLAN activities. Jack's mother, father, siblings, other relatives and neighbors were all dependent as day workers on the land for survival as their ancestors, former slaves, had been. Jack's mother was from a family of 13, most of whom also farmed all of their lives.

Life for this family was harsh. The family lived in non-insulated, sub-standard housing that was described as a "big, old, shack" with no electricity, only kerosene lanterns, no indoor plumbing, dependent on wood burning stoves for cooking and heating and a well for water. People slept five to six to a bed or on floor pallets. Food was not always plentiful and there was no health care.

The relationship was tumultuous with reports of physical

abuse of the mother, excessive uses of alcohol by the mother, the grandmother, and the father with little attention paid to Jack. Jack's stepfather, Tom Dawson, was also an alcoholic, also abusive to mother Katie and abusive to Jack. Jack would stay with other family members to avoid his stepfather. He and his stepfather had altercations when the stepfather was abusive toward the mother. Mr. Dawson died of alcohol related illness.

When Jack was older, as an early adolescent he went to live with his Uncle Robert and his wife, Georgia Long, even farther out in the country. Jack's parents and stepfather were not literate. They only attended school sporadically and stopped in the second and third grade. They all began farming at an early age in tobacco, cotton, peas and corn. While in Bailey, they attended school sporadically, "one day in and one day out" or "half day in, half day out" based on their need to make money and attend to the crops.

It is stated that Ms. Katie was often abusive to the children, especially Jack, when she was drinking. She would strike the children with the broom, pan or stick but would have no recollection of the abuse when she was sober. Jack also assumed the role of caregiver at an early age, dressing, feeding, entertaining and protecting his younger siblings. Mrs.

Gracie describes Jack as her "father figure."

Defendant sustained a head injury from a fall off a moving truck when he was 11 or 12 years old as confirmed by his half sister and mother. Shortly after his arrival at his uncle's home when he was 12 years old, he began a sexual relationship with his uncle's wife, Georgia Mae Long, who was some 18 years his senior. They would continue this relationship in that home for four years until Georgia reportedly took money from her husband's bank account and "ran away" with Jack. Their whereabouts were unknown to the family for at least a year when they were located in Orlando, Florida. They lived together off and on for a number of years arguing about his drinking and separating, reuniting and separating from time to time. This remains a very conflicting relationship for Mr. Ferrell. Ms. Georgia, according to DOC records, was alternately described as Jack's aunt, and his wife.

His mother, grandmother, father, and stepfather were not consistently present or available to him for care. He received little if any parental nurturing or emotional support. He experienced multiple traumas starting at a very early age.

Mr. Ferrell grew up in a household and community where violence was frequent. He and his siblings experienced the physical abuse of his mother. He witnessed other family members

engaged in physical violence. Several members of his family were killed or killed family members.

There are strong family patterns of alcohol abuse, medical problems, including diabetes (mother, grandmother, sister Gracie, son Danny) and cancer, educational and vocational deficits, domestic violence, extreme poverty. With only preliminary information about Mr. Ferrell it is evident that he had very limited opportunity for emotional, social and intellectual growth. There were many corrupting and toxic elements in his very early years, which sheds light on his adult behaviors. There were significant negative, traumatic experiences in his life. His early years were not safe, he experienced multiple abuses from many adults without any source of protection, consistent care, and nurturance or appropriate relationships. He has not received treatment for his alcoholism, early childhood trauma and abuse. He has had many casual relationships but has not had a sustaining relationship though he values the relationship with his sister and her family.

1. Mr. Ferrell proved at the Evidentiary Hearing that he received ineffective assistance of counsel at the penalty phase of his trial. Mr. Ferrell 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 mitigating evidence and failed to adequately challenge the state's case. The entire record presented in support of mitigation in the penalty phase of Mr. Ferrell's trial amounted to ten pages. 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. Upson, his expert and only mitigation witness, with sufficient background information. Moreover, he failed to investigate the availability of follow-up evaluations of his client based upon the information Dr. Upson 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 amounted to total abandonment of his client.

4. Trial court erred in initially preparing an appropriate Sentencing Order in this case that fully complied with the requirements of *Campbell v. State*. In re-writing the order pursuant to remand by this Court, the Defendant alleges and the trial court has found that he, the trial judge, was influenced

by arguments made by the prosecutor. The Defendant asserts that prosecutorial influence resulted in substantial changes being made to the Final Sentencing Order thus eliminating statutory mitigation found by the plain language reading of two prior sentencing orders prepared by the Court. Since this case involves a lone aggravator, there can be no question that the proportionality analysis is affected by the reclassification of mitigating evidence from statutory to non-statutory, to the prejudice of the defendant.

5. In re-sentencing the Defendant to death, the court failed to review the record, applicable case law for guidance and failed to find mitigating evidence that was properly before the court. This case involves a lone aggravator, therefore there can be no question that additional mitigation may have resulted in a different outcome.

#### **ARGUMENT I**

#### **THE LOWER COURT'S RULING FOLLOWING THE POST- CONVICTION EVIDENTIARY HEARING WAS ERRONEOUS.**

At the evidentiary hearing, Mr. Ferrell 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. Ferrell's rights as guaranteed under the Sixth, Eighth, and Fourteenth Amendments of

the United States Constitution were violated. Based upon the testimony presented, Mr. Ferrell was certainly entitled to relief.

To prevail on his claim, Mr. Ferrell 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, Ferrell 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. Ferrell 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. Ferrell fell below acceptable professional standards in several respects. Each of these failures, discussed below, severely prejudiced Mr. Ferrell. 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. Ferrell 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. Ferrell and would have, at a minimum, delivered the four necessary votes for a jury recommendation of life. The difference between Mr. Ferrell's character as presented at trial and the fully fleshed and humanized Jack Ferrell, 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 expert 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.

**B. FAILURE TO PRESENT MITIGATION**

**1. Lay Witnesses**

In this subsection Defendant claims that: (1) trial counsel presented only three lay witnesses in mitigation, two of whom were work related and one of those had not seen Defendant in over ten years; (2) that there were no family members presented; (3) that trial counsel only asked for five hundred dollars with which to conduct investigation; (4) that the investigator did limited work and never spoke with Defendant. Further, Defendant

maintains that had his trial attorney, Irwin, called family members to testify they could have told the Court of many non-statutory mitigators, such as that alcoholism was prevalent in Defendant's family, that his mother was pregnant at age fourteen, that his father was murdered when he was a child, and that he grew up in a family of sharecroppers in extreme poverty in North Carolina. Further, these witnesses could have testified to the fact that Defendant suffered head injuries as a child. The presence of head trauma is extremely significant to Mr. Ferrell's case.

Dr. Upson confirmed that tests administered suggested that Mr. Ferrell has frontal lobe impairment resulting in brain damage. In testifying during the trial and explaining Mr. Ferrell's limitations, Dr. Upson suggested that the frontal lobe brain damage "would suggest either alcohol, or some other event, and I probed for any accidents or anything developmentally that would account for this. I didn't find any, so I went on the assumption of probably his long term ingestion of alcohol was the responsible agent for the brain damage." (T-683).

In considering Mr. Ferrell's brain damage, a jury would no doubt have been far more compassionate if the origin had been attributed to an accident as opposed to voluntary abuse of alcohol. However, due to trial counsel's failure to properly

develop available mitigation, relatives that were witnesses to Mr. Ferrell's head trauma were never interviewed or asked to testify at his trial. In writing Sentencing Orders the court did not specifically address Jack's brain damage as an established mitigator. If counsel had provided full information to Dr. Upson, the expert it is quite likely that Dr. Upson could have definitely testified and Mr. Ferrell would have had additional mitigation available to weigh against the lone aggravator.

The defense attorney for Mr. Ferrell testified that he had hired an investigator who did interview the Defendant's mother, Katie Dawson. (EH1-180). Miss Dawson has stated that she was never contacted by anyone associated with defending her son and, in fact, did not even know that her son had gone to trial and been convicted until after the fact.

At the evidentiary hearing six witnesses testified on Defendant's behalf. They were: Mack Jones, Defendant's childhood friend; Katie Dawson, Defendant's mother; Grace Roundtree, Defendant's half-sister; Mary Boddie, Defendant's aunt; Susie Graham, Defendant's aunt; and Larry Roundtree, Defendant's brother-in-law. (EH1-187-206). All these witnesses testified that Defendant was a hard worker and had worked in agricultural labor from early childhood. A common statement was

that Jack (Defendant) worked hard, as did everyone else, because that was just the way it was in North Carolina among poor black people during the mid-twentieth century. They also testified about experiencing racial prejudice and poverty. Some of them had long since moved from North Carolina and most had not had contact with Defendant for many years.

Mack Jones' testimony agreed with the above statements and only added that he and Defendant had been childhood friends. Mr. Jones moved decades ago to Baltimore, Maryland, where he currently resides and where he has been successfully employed for many years. His testimony added nothing specific as to how Defendant's childhood impacted his behavior on the day of the crime.

Defendant's mother, Katie Dawson, reiterated that Defendant, like all of his relatives and friends, worked hard and was poor. She added that Defendant's father died when Defendant was three years old. She testified that she believed Defendant's father had been poisoned, but she was not positive. She did not offer any testimony as to how Defendant's father's death had impacted Defendant's life.

Defendant's half-sister, Grace Roundtree, testified that Defendant's mother drank, but she was not asked to elaborate on how that affected Defendant's life or whether Defendant's mother

was ever abusive when she drank. She also testified that even at a young age Defendant often worked to help support his family and to allow the other children to attend school. Ms. Roundtree also said that no one contacted her about testifying on behalf of Defendant in 1992 or 1993.

Defendant's aunt, Mary Boddie, testified that Defendant fell from a truck and hit his head when he was a child. Although she was not an eye witness to the accident, she said that she recalled Defendant being taken to the doctor. She was asked whether Defendant behaved differently after the accident and she replied that he did "sometimes." It was not clear from this witness' testimony whether she recalled Defendant's age at the time of the accident, nor whether his different behavior was simply the changing behavior of a growing child or was attributable to the accident. Ms. Boddie also testified that she thought that Defendant's father had been poisoned.

Another aunt, Susie Graham, testified that she had heard of Defendant's truck accident, but that she did not know much about it and did not know when it occurred.

Defendant's brother-in-law, Larry Roundtree, testified that he met Defendant in the summer of 1989 in Orlando. The essence of his testimony was that while in Orlando he and his wife stayed with Defendant who was very hospitable.

The court, in its order denying relief, found that the "trial attorney's decision not to call additional witnesses during the penalty phase was the result of reasonable professional judgment." (PC-R. 1869).

The court's determination that "counsel made a reasonable strategic decision not to call additional witnesses during the penalty phase" (PC-R. 1869) is clearly erroneous.

Mr. Ferrell'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 the was not prejudiced by the deficient performance of trial counsel. Id. at 173.

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.

Id. at 173.

In another case strikingly similar to the facts of Mr. Ferrell, this Court concluded,

[T]he 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 the result of a reasoned professional judgment. Trial counsel essentially abandoned the representation of his client during sentencing . . . At the very least, any evidence presented and any plausible arguments made t the trial court could have

been provided the trial court with a basis to follow the jury's recommendation of a life sentence . . . . [T]rial counsel's inaction in the penalty phase of the trial amounted to a substantial and serious deficiency measurably below the standard for competent counsel.

Stevens v. State, 552 So.2d at 1085.

In this case Mr. Ferrell's attorney presented 10 pages of mitigation evidence from the only expert retained by the defense attorney. This Court found the testimony of Dr. Upson in penalty phase to be brief and further characterized the testimony as merely an encapsulation of the testimony from the guilt phase. Ferrell v. State, 390 So.2d at 391. This amounted to a total abandonment of Mr. Ferrell by his attorney.

The trial court in denying relief to the Defendant stated that having carefully listened to each witness that did testimony at evidentiary hearing, this Court found no evidence that was not taken into account by sentencing judge, and no evidence to demonstrate that had Irwin presented the above witnesses at penalty phase of Defendant's trial, their testimony would have induced a reasonable doubt respecting guilt.

(PC-R. 1870).

First, the very wording of the above cite indicated the court's confusion over the issue. The issue presented by post conviction attorneys was mitigation in penalty phase and had nothing to do with the guilt phase of the trial.

Secondly and more importantly as to the issue of ineffectiveness of counsel at penalty phase was the court's failure to review the uncontroverted evidence submitted to the court which appears at (PC-R. 1788-1815). While this evidence was submitted in support of the post conviction attorneys continued attempt to present testimony on the issue of the value of an expert social worker, the evidence presented both general and specific insights into the life and times of Mr. Ferrell. In fact, the proffers of the three experts contained more information about Mr. Ferrell than was actually presented during his penalty phase.

This information would have been invaluable to the jury considering the eventual fate of Mr. Ferrell. An example of the available mitigation evidence which was neither investigated or presented on behalf of Mr. Ferrell is that:

The records indicate that Dr. Upson evaluated Mr. Ferrell on 9/23/92. Approximately three months later, 12/15/92, at deposition the doctor testified that he didn't have "notes or information of a life history by any means," "I really needed the prison records," that he was "unresolved" about Mr. Ferrell's relationship with the victim, and that as a doctor he needed to have a significant body of information so the "history (could) be explored and considered to understand who he (the defendant) was and what happened when this event took place," and that at that present time, significantly, "the perception that we're given may not be totally correct," "I

don't know." Dr. Upson opined on numerous indications of possible brain damage and specifically testified that he previously had requested numerous records which he had not received.

Dr. Upson's case file reveals that after the jury returned a verdict of guilty of first degree murder on 2/4/93 and it was clear that there would be a sentencing hearing, over the next approximate six weeks he spent a total of 48 minutes "preparing for sentencing hearing" which included two "phone consults with Atty. Irwin" before taking the stand on 3/9/93. No other communications occurred between counsel and defense expert prior to testimony. The records requested months previously were not forthcoming. The doctor's records note that he spent 30 minutes testifying at the sentencing hearing including direct, cross, and redirect. The doctor testified that Mr. Ferrell would do well and not be a danger in a controlled prison environment and that he might (emphasis added) have diabetes. The doctor also took a total of 21 lines of testimony to discuss the presence of two statutory mitigators.<sup>4</sup> Not a question was asked or response given regarding non statutory mitigators as the doctor had no data and did not have data to adequately discuss the only two statutory mitigators presented by counsel.

---

4 The "two" statutory mitigators discussed: 1) Felony committed while under the influence of extreme mental or emotional disturbance and 2) Capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, Fla. Stat. §921.141(6), are actually four distinct and separate mitigators as they are disjunctive and reflect four different constructs. Consequently, the doctor spent a total of 21 lines discussing four statutory mitigators; 5 1/4 lines per mitigating construct.

Seven years six months later, 9/4/01, Dr. Upson testified<sup>5</sup>

Notes: 1) The diabetic issue is critical and will be discussed later, but at the time of testimony, absent minimal and easily obtainable records, Dr. Upson could only posit "might" have diabetes. 2) The prior testing along with Dr. Upson's earlier testing at age 52, 9/23/92, scored as FSIQ 80 with 50% of the subtests in the mentally retarded range and the score itself equal to that of a child of approximately 14.3 years of age. Clearly, it would have been unrefutable that Mr. Ferrell would have reasonably qualified for the statutory mitigator, Age Of The Defendant At The Time Of The Crime, as well as several non statutory mitigators and gone a long way in explaining why the homicide occurred, had the records been obtained, reviewed, interpreted and their significance understood, which could have only been done by an expert.

Id. at 1803.

The information contained in the reports submitted by the post conviction attorney reveal a plethora of information which was readily available to defense counsel for Mr. Ferrell. Trial counsel essentially abandoned the representation of his client during the penalty phase. 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

---

5 Referenced,, p. 14, in Defendant's Written Closing Statement Regarding Evidentiary Hearings Conducted In February and September 4, 2001. (PC-R. 1802).

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.).

It is apparent from the record that the counsel for Mr. Ferrell never attempted to meaningfully investigate mitigation and hence violated the duty of counsel (PC-R. 1780) "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. Ferrell'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 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. Ferrell was definitely prejudiced by his counsel's failure to investigate and present both statutory mental health evidence and testimony as to nonstatutory mitigation.

Dr. Upson testified at trial that test results indicated that Mr. Ferrell was "clinically depressed and anxious." (T-678). Although this diagnosis constitutes recognized non-statutory mitigation, trial counsel failed to raise this issue in his sentencing memorandum to the court. (See: Memorandum of Law In Support of Life Sentence - R. 577).

Other potential mitigation available to the Defendant in this case is discussed at length in Cheshire v. State, 568 So.2d 908. The facts of Ferrell are that the victim was the common law wife of the Defendant. Additionally, the trial court permitted the State to present evidence about the prior murder case some years earlier where the victim was the common law wife of Mr. Ferrell. Given these facts it was incumbent upon the attorney representing Mr. Ferrell to fully investigate the circumstances of the relationships in both cases.

As this Court found:

First, based upon the state's case and the physical evidence, the murders at issue in this case reasonably could be characterized as the tragic result of a longstanding lovers' quarrel between Cheshire and his estranged wife. It is well established under Florida law that this type of situation constitutes valid mitigation. Fead v. State, 512 So.2d 176, 179 (Fla. 1987), receded from on other grounds, Pentecost v. State, 545 So.2d 861 (Fla. 1989); Irizarry v. State, 496 So.2d 822, 825 (Fla. 1986); Ross v. State, 474 So.2d 1170 (Fla. 1985); Blair v. State, 406 So.2d 1103 (Fla. 1981); Kampff v. State, 371 So.2d 1007 (Fla. 1979); Chambers v. State, 339 So.2d 204 (Fla. 1976).

Second, there was some evidence that Cheshire had been drinking at the time of the murder. Although the judge concluded that Cheshire was not sufficiently intoxicated, we nevertheless must acknowledge that a reasonable jury could have relied upon this evidence to conclude

that Cheshire was not in control of his full faculties. There is no evidence whatsoever that Cheshire began drinking as a way of developing the "courage" to commit the murders. Thus, this is valid mitigation. *Robinson v. State*, 487 So.2d 1040, 1043 (Fla. 1986); *Amazon v. State*, 487 So.2d 8 (Fla.), cert. denied, 479 U.S. 914, 107 S.Ct. 314, 93 L.Ed.2d 288 (1986). (Id. at 4)

[3] Thus, it necessarily follows that a reasonable juror could have relied upon this evidence to conclude that Cheshire lost control of himself because of intoxication, a perceived affront to his family status and the emotional distress that accompanies a \*912 failing marriage, and the fact that his spouse had left him for another person. Events that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitutes valid mitigation under the Constitution and must be considered by the sentencing court. See *Lockett v. Ohio*, 438 U.S. 568, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). (Id. at 4)

Neither Mr. Ferrell's depression or the characterization of the murder as a tragic result of a longstanding lovers' quarrel were argued as mitigation in behalf of Mr. Ferrell, although the record clearly supported both. Counsel was ineffective for not doing so. The result was one lone aggravator outweighing mitigation and resulting in prejudice to Mr. Ferrell via a death sentence.

**C. EXPERT SOCIAL WORKER TESTIMONY**

The trial court was clearly in error for denying the

defendant's post conviction attorneys the opportunity to present at the evidentiary hearing evidence relevant to the claim that the defense attorney should have called an expert social worker to evaluate and testify in the penalty phase of Mr. Ferrell's trial.

The procedural history of this case shows that following a Huff hearing held on August 14, 2000, the court ruled that several claims raised in the amended 3.850 motion filed on June 23, 2000, would be considered at an evidentiary hearing (PC-R. 1849).

One of those issues so designated was a claim that alleged that Mr. Irwin, Mr. Ferrell's defense attorney, should have employed a social work expert to assist him in preparing this case for trial. (R. 3.850).

The evidentiary hearing was scheduled for February 7 and 8, 2001. (PC-R. 1849). At the conclusion of the two days of testimony it became apparent that additional time would be needed to complete the hearing. The court discussed a hearing date with the attorneys representing Mr. Ferrell at that time. Also discussed at that time was the issue of the desire of the attorneys representing Mr. Ferrell to go forward and present evidence on the issue of the necessity to employ a social worker to assist the defense attorney in preparing and presenting

evidence during the penalty phase of Mr. Ferrell's trial. (PC-R. 1870).

During this discussion, the attorneys representing Mr. Ferrell announced that they were not prepared to go forward on the issue. (PC-R. 1871).

Pursuant to questioning from the court, the attorneys announced their intent to waive presenting testimony on the social worker issue. (PC-R. 1871).

In the summer of 2001, Mr. Ferrell's case was assigned to a different attorney. The attorney now representing the Defendant conducted a complete review of the status of the case. During this time a hearing date of September 4, 2001, was agreed upon as the date for the Defendant to continue presenting evidence on the remaining issues form the 3.850.

In his review of the case the importance of th social worker issue became apparent to the new attorney. It should be noted that the status of the case at this time was that testimony was ongoing as to several outstanding issues.

In the order denying relief to Mr. Ferrell the court made several statements that are not supported by the record. (PC-R. 1870-1872). The hearing held on September 4, 2001, was devoted to Claim II, Section C, mental testing. (PC-R. 1871).

The presentation of evidence on the above referred to issue

consumed an entire day on the court's docket. The court in its order noted the motion by the post conviction attorneys to present evidence on the social worker issue. (PC-R. 1871). The court then went on to state "although they had no evidence available for presentation at that time." (PC-R. 1871).

The attorneys for the Defendant explained to the court that the father of Marvin Dunn, the expert on the social worker issue had passed away and would not be available on September 4, 2001. (PC-R. 271). There is continuing discussion with the court reference the social worker issue with the attorneys for Mr. Ferrell stressing the importance of that issue in the post conviction process. (PC-R. 271-273).

It cannot be stressed too strongly that the current attorneys at no time waived the right of Mr. Ferrell of his right to present evidence on the social worker issue.

The statement by the court at the conclusion of the September 4, 2001, that "CCRC stated that it would like to file 'some sort of proffer from the social worker'" (PC-R. 1871) represents the frustration of post conviction attorneys with the court's denial of the right of Mr. Ferrell to present evidence on the social worker issue.

The court's order then refers to a telephonic hearing held on December 14, 2001. (PC-R. 1871). This status conference was

held pursuant to a motion that once again asked for two hours of hearing time to present evidence on the social worker issue. (PC-R. 459).

Another issue that was raised by the post conviction attorneys for Mr. Ferrell was the possibility that Mr. Ferrell is mentally retarded.

Mr. Wells: Yes, your honor. I realize that part of what Mr. Lerner is saying is true in terms of appealing it. Obviously, the lawyers that waived this were Harry Brody and Jeff Hazen. They preceded me representing Mr. Ferrell. I realize the court ruled upon their waiver that that issue was moot.

What I'm asking the court to do, in an abundance of caution, is either allow me to present evidence about the social work issue, that it is an issue that in the Huff order was considered for evidentiary hearing, or in the alternative, allow me to have some time on the court's docket to proffer the testimony that would have been presented at the hearing, so that in the event that Mr. Ferrell is denied relief by your honor, we would have maintained that issue for appeal.

It's a right that Mr. Ferrell has, and as I said in my motion, I'm the new lawyer on this and done considerable research on the issue and have experts prepared to testify to the court and, again, I would ask for at least, I think in terms of proffer, we would be talking no more than two hours time before the court, and for Mr. Ferrell I'm asking the court to consider that.

The second issue I would maintain is a new issue, the issue of Mr. Ferrell having

retardation. It was my understanding that at the end of the hearing, that that issue was left open. Again we are now in a position to present evidence about Mr. Ferrell's mental retardation, and we would ask for time to do that on the court's docket. (PC-R. 458-460).

Finally, the court denied the attorneys for Mr. Ferrell an opportunity to present further testimony. (PC-R. 462). It was the decision of the court to permit a proffer and not as a reading of the court's order would indicate that the Defendant's attorney made the request. The court did at the conclusion of the telephonic hearing the court did rule that it would allow the post conviction attorneys to make a proffer on the social worker claim. (PC-R. 1871).

In its order the court stated the following:

The Court, having carefully reviewed these documents and the comments of counsel submitted in the written closing argument, again finds no evidence that was not taken into account by the sentencing judge, and no evidence to demonstrate that had Irwin presented the above witnesses at the penalty phase of Defendant's trial, their testimony would have induced a reasonable doubt respecting guilt.

In responding to the court's order and requesting that this court remand this case back to the trial court for a new sentencing, it is important to note that the total amount of evidence presented by the defense counsel in the penalty phase amounted to fourteen pages. (PC-R. 52-77). The only expert

called by Mr. Irwin was Dr. Upson and, as this court noted in Ferrell v. State, 680 So.2d 390 (Fla. 1996) at 391, "his brief testimony in the penalty phase (ten pages of transcript) merely encapsulated his . . . detailed guilt phase testimony." Id. at 391.

Additionally, the trial court in its order refers to the testimony by the social worker expert being relevant and applicable to the penalty phase of the Defendant's trial. The court then goes on to conclude that their testimony would not have "induced a reasonable doubt as to guilt." (PC-R. 1872). The importance of the social worker testimony was never intended to have an impact on the guilt/innocence phase of Mr. Ferrell's trial. The testimony was significant in establishing mitigation in behalf of Mr. Ferrell where "The presence of substantial mitigation obviously could make a difference in this case." Anstead, J. dissenting opinion 680 So.2d (Fla. 1996) 392.

The record does not support the court's order conclusion that the proffered mitigation contains no evidence that was not taken into account by the sentencing judge.

The type and amount of information that could have been presented goes far beyond what was presented to the sentencing judge as follows:

Dr. Dunn, the social work expert who was not available for

the September 4, 2001, hearing due to the death of his father, submitted a proffer which appears at (PC-R. 1788-1789).

Some examples of the information found to be critical in penalty phase presentation to a judge and jury are:

1. Mr. Ferrell had a very traumatic childhood in which he was exposed to an extreme amount of violence in his family. He reports that his father was poisoned by a girlfriend. He was routinely beaten by this mother since this may have been the only manner of disciplining him that she knew. He grew up in a very rural environment under extremely poor conditions. His life may well have been different had he grown up under normal circumstances, a matter which a social worker may have noted. His upbringing certainly impacted his capacity, or the lack thereof, to make sound judgements and to resolve his feelings in a non-violence fashion.

2. Mr. Ferrell did not have the normal opportunity to bond with an adult figure in his early childhood and had no real home during his early years. He completed his education in public schools only to the eighth grade. His mother was only thirteen years old when he was born which suggests that Ferrell had little or no effective mothering as a child. His father was probably an alcoholic and was therefore not available to him as he grew up. People who are reared under such circumstances often have difficulty bonding in later life. It is also likely that Ferrell had no effective role model for developing normal relationships with women given the deficits of his own mother and father as parents. It is all but certain that this was a major factor in this man's development and which would have left him mental and emotionally crippled. (PC-R. 1788).

Marjorie B. Hammock, a social work practitioner, was retained by the defense. She provided in her proffer an overview of the work a social work expert would have undertaken in behalf of Mr. Ferrell. (PC-R. 1790-1792).

I would examine mental health/health care providers, school, social welfare agencies, military, criminal justice, employment, birth, death, and marriage records available on the defendant his family. I would conduct personal interviews with the defendant, family members, relatives, childhood and adult friends, neighbors, church members, significant others, service providers, work associates, former teachers, former employers and correctional staff who had contact with the defendant. I would examine newspaper files and contact persons who have knowledge of the community where/when the defendant was born, raised, and had his earliest experiences. I would confer with other experts and examine social research and theory to argument information about the defendant functioning throughout the life span. This effort would result in the development of a thorough and reliable biopsychosocial history of the defendant with information about the impact of the life history on the defendant's behavior at the time of the crime. (PC-R. 1790).

Finally a social evaluation would be prepared for testimony, providing a description of the findings regarding the social history and social functioning. An interpretation of the findings using a theoretical framework and an opinion regarding the relevance of the finding to the crime would be offered accompanied by appropriate visuals such as a family tree charts, photographs, and descriptions of the community of origin.

Mr. Bill Mosman, Psychologist and attorney specializing in death penalty cases, was retained by post conviction attorneys and his proffer appears at pages 1800-1815 of the post conviction record.

Dr. Mosman concluded that:

It is the obligation of the assisting expert to provide "an explanatory theme" for the criminal act in a manner in which the judge and jury can understand. It has been stated that an expert's failure to relate mitigation information to the offense by using an explanatory theme itself can be indicative of ineffectiveness.<sup>6</sup> Similarly, it has been noted that, "The jury and judge must be made to understand what caused a crime, particularly in homicides. It is the role of experts to provide that understanding so a rational approach to penalty can be taken."<sup>7</sup> Because of counsel's omission, there were no experts "to explain" Mr. Ferrell's conduct or rebut the State's assertions, nor was counsel aware of the information contained it or importance of the records, etc.

In addition to all written above, review the discussion of "Aunt Georgia Mae's" behavior vis a vis the molestation issues and the further warping and distortion which results in future intimate an close relationships. Also, add to the above discussion of the 1982 Beta IQ of 67 and Dr. Upson's 9/23/92

---

6 Dix, 1977. The Death Penalty, "Dangerousness," Psychiatric Testimony and Professional Ethics. Am.J.Crim.L.

7 Poders. 1980. The Psychiatrist's Role in Death Sentence Debated. 66 A.B.A.J. quoting Ohio State University law professor David Goldberger.

FSIQ of 80 with 50% of the subtests in the retarded range the 12/11/00 testing (deposition) of Dr. Dee wherein he obtained an FSIQ of 75 and my own 9/25/01 testing which resulted in a WAIS-III FSIQ of 73 and a Leiter IQ of 70.

It would be my opinion that had the services of a trained social worker been obtained to do what that profession is capable and licensed to do, at minimum, the following Statutory and Non Statutory Mitigators could have been more than reasonably presented to the jury:

STATUTORY:

- 1) Felony committed while under the influence of extreme mental or emotional disturbance. Both could have been presented.
- 2) Capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Both could have been presented.
- 3) Age of the defendant at the time of the crime. Deficits existed in multiple "age" areas.

NON STATUTORY:

- 1) Ability to be Rehabilitated
- 2) Abuse/Neglect
- 3) Any Emotional Disturbance
- 4) Crime Not Committed for Pecuniary Gain
- 5) Crime Not One of a Series of Crimes Occurring Closely in Time
- 6) Disadvantaged or Deprived Childhood
- 7) Emotional Impairment
- 8) Emotional Distress Even If Not Extreme
- 9) Family Life
- 10) Good Prison Record
- 11) History of Growing Up

- 12) Iatrogenesis from Systems
- 13) Medical Difficulties
- 14) Mental Impairment
- 15) Military Record
- 16) Previous Charitable or Humanitarian Deeds
- 17) Previous Contributions to Community or Society
- 18) Psychological Difficulties
- 19) Remorse
- 20) Utilization of Alcohol or Drugs

Of critical importance in the information contained in the proffer by Dr. Mosman was fact presented for the very first time. The information on the IQ scores as illustrated by Dr. Mosman clearly demonstrate that Mr. Ferrell may very well fall within the range as a mentally retarded person. (PC-R. 1802-1803).

The early test scores clearly demonstrate the need on the part of the defense counsel representing Mr. Ferrell to seek out additional psychological and psychiatric assistance in preparing this case for trial. His failure to do so significantly prejudiced his client.

The court in both denying the Defendant a hearing on the social work issue and denying his relief relies on Owen v. State, 773 So.2d 510, 515 (Fla. 2000). Owen has no application to the facts of Ferrell. In Owen, the Defendant opted to forego an evidentiary hearing on a fact based issue and this court therefore found the claim to be waived.

In the Ferrell case, the social work issue was definitely a fact based issue. While previous attorneys had indicated that they had no evidence to present on the issue, new attorneys later assigned to the case repeatedly moved the court to give the Defendant a hearing on the social work issue.

Issues relating to Mr. Ferrell's 3.850 claims were addressed in a bifurcated manner on February 7, 2001, and then on September 4, 2001. The record was open on September 4, 2001, and the court granting Mr. Ferrell opportunity to present social work evidence would not have prejudiced the state and would have merely required the trial court perhaps a half day of her docket.

To deny Mr. Ferrell the ability to present mitigation testimony substantially impaired the Defendant's presentation of a critical portion of his ineffectiveness of counsel claim. As well as establish a record where substantial mitigation does exist and would easily outweigh a lone aggravator.

For all the reasons stated above, this court should reverse the trial court and remand this case for a new sentencing hearing.

#### **ARGUMENT II**

**THE COURT WAS CLEARLY ERRONEOUS IN DENYING MR. FERRELL RELIEF DUE TO HIS DEFENSE COUNSEL'S FAILURE TO SEEK ADDITIONAL EXPERT ASSISTANCE IN DETERMINING THE EXTENT OF**

**BRAIN DAMAGE SUFFERED BY MR. FERRELL.**

The type of additional expert assistance should have included a request for a brain scan for Mr. Ferrell prior to his trial. Such a scan would have been invaluable to Dr. Upson and would have assisted the jury in better understanding the extent of brain damage suffered by the Defendant.

In its order denying relief, the Court found that Mr. Irwin's failure to order either a PET or a SPECT scan did not constitute a professionally unreasonable omission. The jury did hear Dr. Upson's testimony and was aware of Defendant's problems. (See Claim I, C). Moreover, the Court finds that the presentation of results from a scan would have only served to confirm Dr. Upson's opinion, but was not necessary to the formation of that opinion. See Robinson, 761 So.2d at 275-76. Hence, there is no reasonable probability that presentation of the results of a PET or SPECT scan would have resulted in a different outcome at trial. Strickland, 466 U.S. at 694. (PC-R. 1879).

The court's citing of Robinson v. State is without merit as the facts in Robinson are clearly distinguishable from the facts in Ferrell.

The facts of Robinson show that despite the Defendant's desire to waive penalty phase testimony, attorneys for Mr.

Robinson retained two experts to examine the Defendant. Id. at 271.

The date of Mr. Robinson's case was 1995, some three years after the trial of Mr. Ferrell. It is noted that Mr. Ferrell's case was the first death penalty where Mr. Irwin was the defense attorney. Id. at 275-76.

The trial court further cites Davis v. State, 742 So.2d 233, 237 (Fla. 1999). Again the facts of Davis are clearly distinguishable from the instant case. The focus of the argument in Davis is one of newly discovered evidence. Id. at 236-7. The argument in Ferrell is that the attorney representing Mr. Ferrell abrogated his responsibility to the Defendant by his failure in requesting a brain scan to support Dr. Upson's testimony that Mr. Ferrell was brain damaged. Counsel's failure to pursue the additional evidence for the penalty phase of Mr. Ferrell's trial requires this court to grant Mr. Ferrell relief in the form of a new sentencing hearing.

The trial attorney for Mr. Ferrell did not request permission from the trial court to have such scans performed in preparation for presenting evidence to the jury in support of Mr. Ferrell's claim of brain damage. Although expert Dr. Upson testified at trial in cross examination that various types of

technological scans were available. (T-694).

At the evidentiary hearing held on September 4, 2001, the defense called several witnesses to testify about the SPECT scan. (PC-R. 1874-1879). Defendant called Dr. Michael Foley, a diagnostic radiologist, Dr. Walter Afield, a neuropsychiatrist, and Dr. Henry Dee, a clinical neuropsychologist. The State called Dr. James Upson, a neuropsychologist. (PC-R. 1874).

In response to inquiry by the court, Dr. Foley testified that S.P.E.C.T. scans were available to be done since the mid 1980's and Brain S.P.E.C.T. scans were done in the mid 1980's. While Insurance companies did not fund P.E.T. scans until the mid 1990's, they had no problems in funding S.P.E.C.T. scans. (PC-R. 1770).

In *Davis*, 742 So.2d 233 (Fla. 1999), this court cites two cases which are equally on point as to the issue of the timing of the availability of the PET scan.

Moreover, PET scans appear in cases reported as early as 1992. *Hose v. Chicago Northwestern Transp. Co.*, 70 F.3d 968 (8<sup>th</sup> Cir. 1995); *People v. Weinstein*, 156 Misc.2d 34, 591 N.Y.S.2d 715 (N.Y.Sup.Ct. 1992).

The trial court concluded on page 33 of its order denying relief to Mr. Ferrell that:

Moreover, this claim is not asserted for the purpose of determining the usefulness of either a PET or a SPECT scan today. Instead, this is a claim of ineffective assistance of trial counsel for not having ordered a scan in 1992. Yet, there is no evidence that such scans were being used to demonstrate brain damage in capital cases in Florida in 1992. (PC-R. 1878).

While in the very narrow sense the court's reference to "capital cases" may be true, the law recognized the value of scans in demonstrating brain damage and such law could have been utilized by Mr. Irwin in requesting a brain scan for Mr. Ferrell.

Additionally, when the court writes that there was no request for a scan by post conviction attorneys in 2000 and 2001, this is inaccurate. Post conviction attorneys on several occasions requested that the court authorize the transportation of Mr. Ferrell to Brandon, Florida, so that a SPECT scan could be performed. On page 29 of 60 the court's order dated May 23, 2002, she specifically denied the request by Mr. Ferrell for a SPECT scan.<sup>8</sup> (PC-R. 1874).

Dr. Foley testified at the evidentiary hearing that:

---

<sup>8</sup> In the telephonic hearing held on December 14, 2001, post conviction attorneys once again moved the court to allow the transportation of Mr. Ferrell for the purpose of a SPECT scan. It is noted that the attorneys for Mr. Ferrell were assuming full financial responsibility for the costs associated with the SPECT scan.

if he (Mr. Ferrell) had brain damage in 1992 and then incarcerated so he had not been exposed to any other alcohol and you scan today, the images, if you had both sets from 1992 and today, it could have been discovered in 1992 would still be there today and they wouldn't be healed because the tissue was presumably dead in 1992 and it's still dead today and wouldn't have shown any significant improvement if you had both scans available for comparison. (PC-R. 1774).

In considering the Defendant's request, the court on pages 33 and 34 of the court's order dated May 23, 2002, the court asks post conviction attorney for case law supporting their contention that the scans were available to defense attorneys in 1992.

First of all the cites provided to this court from Davis v. State, 742 So.2d 233, clearly show that scan type evidence was being utilized in court cases in 1992.

Second, the testimony of Dr. Foley and Dr. Afield established the utilization of SPECT scans as early as the mid 1980's. (PC-R. 1774-1775).

Third, in those cases where present counsel was aware of the use of scan in capital cases, there was no record on appeal due to the fact that the scan (PET and SPECT) were actually performed pursuant to a request from defense attorneys. (PC-R. 1878-1879).

Fourth, the court's conclusion that "a SPECT scan would show

a black and white picture of Defendant's brain, which would reveal areas that are not receiving blood flow; however, the scan would not provide any additional information concerning Defendant's functional impairment," (PC-R. 1877) is purely speculative. If the court had granted post conviction attorneys request for a SPECT scan the true nature, extent, and progression of brain damage suffered by Mr. Ferrell due to his alcohol abuse and head trauma could have been more precisely determined and illustrated via demonstrative evidence.

Both Dr. Foley and Dr. Afield testified as to the necessity of a SPECT in determining the full extent of the damage to the brain.

Dr.'s Foley, Afield and the State's expert Dr. Upson testified that the S.P.E.C.T. technology was available since 1985, a fact that is uncontroverted. In 1992, Dr. Foley was receiving referrals from attorneys to conduct a S.P.E.C.T. scans and he testified that those specializing in this areas were fully aware of this testing tool and those that were not were at the risk of a malpractice claim. Dr. Upson is deemed a specialist in this area and therefore should be held to this standard of knowledge. Dr. Upson testified that he was aware of the S.P.E.C.T. scan technology in 1992, therefore, a recommendation for a S.P.E.C.T. scan should have been made and

the test performed in 1992. In his corroboration with Dr. Upson, Mr. Irwin as counsel for Mr. Ferrell should have ensured that a S.P.E.C.T. scan was done on Mr. Ferrell. (PC-R. 1781).

However, in handling his first death penalty case, Mr. Irwin lacked the expertise to recognize the need or realize the detriment to Mr. Ferrell. The State's expert, Dr. Upson, stated "If I were doing the case today, I would recommend a S.P.E.C.T. scan." T. Pg 151, L. 6-7 and went on to state "in a total evaluative sense - **I would consider it necessary.**" (Emphasis added). Pg. 151, 13-14. In Hoskins v. State, 702 So.2d 202 (Fla. 1997), the court ordered a new penalty phase proceeding where the trial court improperly denied the defendant's request for a PET scan, and the expert testified that the test would be necessary to complete his opinion because the test would render a more definite determination of brain damage. In the instant case, the State's own expert testified that the S.P.E.C.T. scan is necessary in a "total evaluative sense," Dr. Afield testified that in his professional opinion the scan was "necessary," Dr. Foley testified that the scan can "uncover new findings that were not previously appreciated" and also confirmed the test as being "necessary." In Rogers v. State, 783 So.2d 980 (Fla. 2001), 998, the trial court in determining whether funds would be provided for a PET scan found that a particularized need for

the test must be established, that is, that the test is necessary for experts to make a more definitive determination as to whether the defendant's brain is functioning properly **and to provide their opinions about the extent of the defendants brain damage.** (Emphasis added). The test is not solely for the purpose of showing brain function but also for the purpose of showing the extent of the brain damage involved. In order to provide an opinion regarding the full extent of Mr. Ferrell's impairment the experts in this case have testified that a S.P.E.C.T. scan is required. The jury was unable to view a S.P.E.C.T. scan that would have revealed visually the extent of impairment suffered by Mr. Ferrell as a result of his brain damage. There is no question that demonstrative evidence is an aid to juries in fully comprehending the facts and understanding the issues for judgment. Without having evidence clearly demonstrating the substantial degree of impairment that the experts have testified to, Mr. Ferrell was deprived of the opportunity to present powerful mitigating evidence in his behalf at trial or penalty phase proving prejudicial by the subsequent imposition of the death penalty in this case. Counsel failed to seek a SPECT scan not because he made a strategic decision but because he lacked the requisite experience in this his first death penalty case tried without

benefit of co-counsel. This case is analogous to Hoskins v. State as there is expert testimony in the record that the (S.P.E.C.T.) scan is necessary for a more definitive or precise expert opinion regarding Mr. Ferrell's mental condition to be offered.

### ARGUMENT III

**Mr. Ferrell was denied his right to an individualized Sentencing and a Reasoned Weighing of Aggravating And Mitigating Factors in violation of his 8<sup>th</sup> and 14<sup>th</sup> Amendments to the United States Constitution and the Corresponding Provisions of the Florida Constitution.**

The Original Sentencing order prepared by the trial court found along with non statutory mitigators, two statutory mitigators: (1) That the Defendant's ability to conform his conduct to the requirements of the law was **substantially** impaired; and (2) that Defendant was under the influence of an **extreme** emotional disturbance at the time of the crime. Section 921.141(6)(b) and (f), Fla.Stat(2000) (wording of statute subsections unamended since time of Defendant's sentencings) (emphasis added). While the existence of these conditions of impairment and disturbance can be found by the court to have been either statutory or non-statutory in terms of mitigation in order to be established as statutory mitigator they must be found to be **substantial** and **extreme**, respectively.

**A. STATUTORY MITIGATORS WERE FOUND IN THE COURT'S ORIGINAL SENTENCING ORDER**

The relevant portions of the court's original sentencing order follow:

The Defendant presented evident for the Court's and the jury's consideration of seven mitigating circumstances.

2. Defendant was under the influence of extreme mental or emotional disturbance at the time of the killing.
3. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired."

In proposing seven mitigating circumstances, the Defendant has included within this group statutory mitigating circumstances as well as non-statutory mitigating circumstances. In reviewing, considering and weighing these circumstances in mitigation, this Court is not differentiating between those mitigating circumstances proposed by our Florida legislature and the other mitigating circumstance. This Court give equal weight and consideration to each and every mitigating circumstance whether proposed by statute or not.

4.

[See: Original Sentencing Order, Exhibit #1, R- P. 1426]

In reviewing the Findings and Holdings of This Court, Judge Dawson did not follow the requirements outlined specifically in Campbell v. State, 571 So. 2d 415 (Fla. 1990):

When addressing mitigating circumstances in a first-degree murder case, sentencing

court must expressly evaluate in written order each mitigating circumstance proposed by defendant to determine whether it is supported by evidence and whether, in the case of non-statutory factors it is truly of a mitigating nature; court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by greater weight of the evidence; court next must weigh aggravating circumstances against mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance; although relative weight given each mitigating factor is within province of sentencing court, mitigating factor once found cannot be dismissed as having no weight; to be sustained, trial court's final decision in the weighing process must be supported by sufficient competent evidence in the record.

In discussing the evidence that had been presented by the Defendant in mitigation, at page 1427 of the Original Sentencing Order the court wrote:

Circumstances in mitigation that the Defendants ability to conform his conduct to the requirements of the law **was substantially impaired at the time of the crime, that he was under the influence of extreme mental or emotional disturbance at the time of the killing** .... are based on testimony from the guilt phase of the trial. (emphasis added)

Counsel in the instant case had never tried a death penalty case and presented relatively little mitigation evidence in behalf of the Defendant during the penalty phase of the trial.

In reviewing mitigating evidence, and specifically the guilt phase testimony, the trial court used statutory language to describe the impairment of the Defendant, Jack Ferrell.

As a result, trial counsel for the Defendant, Mr. Irwin, Esq., testified at the Post Conviction Evidentiary Hearing held on February 7, 2001, that it was his belief that the statutory mental health mitigators had been found to be proved by the court in the Original Sentencing Order dated April 21, 1993. EH2-p.87.

The first order that was prepared in this case was returned by the Supreme Court On February 16, 1995. In issue number four the Defendant asserted that the sentencing order failed to document the requisite findings of fact of mitigating and aggravating circumstances as required by section 921.141(3), Florida Statutes (Supp,. 1992) and therefore denied the Court an opportunity to meaningfully review and evaluate the lower court's sentence of death.

The Supreme Court agreed with the Defendant's assertions in Issue four and referred to the written findings as "inadequate findings under this Court's opinion in Campbell v. State, 571 So 2d 415, 419(Fla. 1990). In Issue Five the Defendant asserted that the trial court had improperly imposed a death sentence based on one aggravating circumstance in light of approximately

seven mitigating circumstances found. The Supreme Court declined to address the merits of Issue five pending receipt of a new sentencing order by the trial court.

Upon receipt of the Supreme Court's Order, the trial court found that an error had occurred between the time that the order had been signed and transmitted by the Clerk for review. Four pages were determined to have been missing, and therefore, a partial order had been submitted to the Supreme Court for review, in error. The Clerk was unable to locate the missing pages, however, the Judge located the complete document referred hereinafter as *Sentencing Order #1* stored in his computer. The record reveals that both Prosecutor and Defense counsel were summoned to chambers for an off record discussion regarding the missing pages. The Prosecutor subsequently called the Attorney General at the court's request and confirmed that the Attorney General also possessed only a partial order.

Upon further review, it was found that the entire contents of *Sentencing Order #1* had been read verbatim into the record by the trial judge (EH1- p. 46), therefore, it was a very simple process for the Court and counsel to review and both then stipulated that the order retrieved from Judge Dawson's computer matched the transcript of the Original Sentencing Hearing, April 21, 1993. (RS-p.6).

The Original Sentencing procedure in this case was very odd. At the re-sentencing the Prosecutor stated on the record that "at the original sentencing defense counsel and I [Prosecutor] were not given copies of the written order. Either during the pronouncement of the sentence or afterward..." (RS - p.5).

The record clearly reflects that the trial court was very confused regarding the requirements mandated by the Supreme Court for writing a Sentencing Order in a death penalty case. The judge asked trial counsel if only the additional pages of the original order should be filed or a second revised order. (RS-p.6). The State reviewed the opinion and she determined that the order did not comply with Campbell and requested that the court file the added pages as an exhibit but re-write the order to comply with Campbell. (RS-p.6). To support her position that the court should proceed in re-writing the order the Prosecutor stated that "from the State's position, [that]even the original order may not clearly comply with Campbell and may be defective in some areas, although a similar order was upheld by the Supreme Court with similar language, it was criticized by the Supreme Court as being not clear as it should have been, **if in fact, Campbell would have been decided prior to that order being entered.**" (Emphasis added). (RS-p.4).

The assertion by the Prosecutor was that a similar order written by the Court and affirmed by the Supreme Court on April 29, 1993 would not likely have been upheld had Campbell been decided at the time the Supreme Court reviewed the order. (RS-p. 4). The order that the Prosecutor was referring the court to consider was one that had been written by the judge in Duncan v. State, 619 So. 2d 279 (Fla. 1993) a case that she Prosecuted before the court and affirmed by the Supreme Court on April 29, 1993, three years following and citing Campbell v. State, 571 So. 2d 415, (Fla. 1990). Therefore, it is inconceivable that the trial court would have been unfamiliar with the requirements outlined in *Campbell* at the time of writing both Sentencing orders in Duncan and in Ferrell. Based upon erroneous information by the Prosecutor to the Court that Campbell and its' requirements imposed a new area of law applicable to orders rendered after Duncan, the court then felt obligated to re-write the original sentencing order.

Defense counsel was ill prepared to respond and characterized the situation as "a unique experience". Since this was Defense counsel's first death penalty case, it is understandable but ineffective representation to Jack Ferrell. (RS-p.6). Absent vehement objection, the Court proceeded to enter a third order that denied Mr. Ferrell statutory mitigators

and without such the one aggravator outweighed mitigation resulting in the imposition of a death penalty sentence. Counsel did manage to raise an objection to the re-sentencing process of June 20, 1995 citing no specific case law but generally stating the following:

My one concern, Judge, is that there is some recent case law that has come out that basically said whenever there's a re-sentencing the State and Defense are barred from trying to raise any new information or aggravators or mitigators and I think just to be on the safe side and protect whatever objections Mr. Ferrell may have for the record. That I should object at this time to anything additional being added, in case there is another issue for appeal. (RS-p.7).

It is also evident that the trial court was unfamiliar with the case law that had been promulgated to provide guidance in this endeavor. In describing Campbell the court stated that it "does not find Campbell as enlightening as the court would have like it to be." RS-p.9 Subsequently, the court states that the second part of Campbell requiring the court to relay the weight that was given to certain mitigators and aggravators is "unclear to this court as to whether that is to be awarded to each individual mitigator and aggravator and as they come through the order, with some type of terminology or scale or whether they are just to be indicated at the end of the order as to how much of the aggregate weight of the mitigators compared to the

aggregate weight of the aggravators." (RS.-p. 10).

At the Evidentiary Hearing held on February 7, 2001, Judge Dawson testified that he was unable to state if the original order would have been upheld due to intervening case law *Campbell* and the requirements imposed by it subsequent to the order he had written in the Duncan case. Apparently still confused regarding the effective date of Campbell. EH1- p. 21 In light of the foregoing, it is questionable as to whether or not the sentencing court even read the Memorandum of Law dated March 30, 1993 and filed in Support of a Life Sentence, by the Defendant that cited Campbell along with the requisite analysis required therein. R-p.577

At the Re-sentencing hearing the court stated on the record that it had reviewed the original sentencing order and the transcript of the original sentencing hearing. Noting also that while he had read the original order verbatim into the record and handed it to the clerk upon entry it had never made it from the clerk to the appellate level. RS - p. 10

The court read Supreme Court opinion remanding Mr. Ferrell's case and stated:

It appears that all they [Supreme Court] are requesting is for the court to supply them with an order that more clearly states my findings. And so at this time it is the court's intent to generate a new order that

does, in fact, more clearly state my findings as required by Campbell and enter that order on the record here today in front of Defense and the State and Mr. Ferrell. (hereinafter referred to as sentencing order #2) (RS- p.11).

Thereafter, the record is clear that the court prepared sentencing order #2 at the June 20, 1995 hearing for the purpose of responding to the Supreme Court's remand.

The court stated as follows:

...It's not extremely clear as to whether or not a new sentencing was, in fact, required or a new reading of the order was, in fact, required, but I will note for the record that a sentencing order has just been generated by the court after our last discussions on the record, that it has not been signed, that it's the Court's intent to read this order to the Defendant and to sign the order on the record in his presence at this time." (emphasis added) (RS. - p. 13).

However when asked in 2001, "why did you prepare another sentencing order during the hearing" the court replied, " I don't know". (EH2- p. 43). The judge went on to testify that he had no recollection of doing it. When transcript reviewed got three orders and he had no independent recollection of that order being generated or why. The judge then characterized sentencing order #2 as a draft to allow the parties to object or argue in reference to the sufficiency of it. That, however, is NOT what he stated on the record (as detailed above and as follows). (EH2- p. 43).

Sentencing Order #2 only became a draft following arguments made on the record by the Prosecutor in an effort to get the Court to reduce the Statutory Mitigation found to Non-Statutory Mitigation. This fact is clearly illustrated by the record of the Evidentiary Hearing held on February 7, 2001, wherein Judge Dawson agreed that in sentencing order #2 the court found mitigating factors present, and found **the two statutory mental health mitigators present.** (emphasis added) ( EH2-p. 43).

Post Conviction Counsel

Q- "Now, in this order [sentencing order #2] you state that the Court does find these mitigating factors present, but - - well, you find the two statutory mental health mitigators present. Is that right? Again."

Judge Dawson: "Yes".

Post Conviction Counsel

Q. - "By the way, you would have prepared this order: [sentencing order #2] neither the State - - the State didn't prepare any of these orders. Is that right?"

Judge Dawson: "Correct. All these, as far as I recall, were prepared by me personally". (EH1-p.44).

Although the Prosecutor stated that she was merely clarifying the Court's intent on the record, the record belies this assertion and indicates that she went much further and actually directed the Court in its' action to draft the third

sentencing order to the detriment of Mr. Ferrell.

Prepared to proceed and read sentencing order #2 into the record that by Judge Dawson's own admission granted two statutory mitigators, the Court then asked if either party had anything further and the following exchange occurred:

Prosecutor:

"Yes Your Honor. I did have a question. Along the intent of Campbell, is this court finding that the proposed mitigators to be proven by a preponderance of the evidence. Mitigators that were contested as being proven, that he was under the influence of extreme mental or emotional disturbance at the time of the killing and that he was - the other contested mitigator, that his ability to conform his conduct to the requirements of the law was substantially impaired?" (RS- p. 14.).

Court:

"Both of those issues are ones that the court has some difficulty in how to place in a written order its findings. The findings that there is, in fact, a - there is some degree and **I know that the term of mitigating factor number one is extreme-** (emphasis added) (RS.- p. 14).

The Prosecutor then proceeded to interrupt the court and began to explain to the court that this would make the mitigator statutory and instruct the court that there is a lesser degree that is non-statutory. Additionally, the Prosecutor further questioned the court as to whether the court "was really finding that" (the statutory mitigators) proven by a preponderance of

the evidence.

(RS- p.14).

Prosecutor:

"...the language needs to be clear whether you found that proven by a preponderance of the evidence or whether you found something lesser because that's something they need to rule upon, and that goes the same for the other mitigators where here the other one was" (RS - p. 15).

Court:

"The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law"-- (RS- p. 15).

Prosecutor:

"Whether it was substantially impaired, and I think that needs to be clear on whether those are being found proven on the preponderance of the evidence." (RS - p. 15).

It is incredulous that the Court wrote sentencing order #2 and was ready to read said order into the record BEFORE the lengthy dialogue with the Prosecutor occurred yet after statements made by the Prosecutor on the record referencing Campbell and Duncan the court stated:

The court is wrestling with exactly what *Campbell* requires this court to put in written form and to sign... (RS- p. 15).

When the Court asked for comment from either party regarding other portions of the order that they felt may not comply with Campbell prior to imposition of sentence. Defense counsel raised objections to any debate by either counsel and stated the following:

I'm a little confused as far as I understand the Florida Supreme Court Order, they were basically directing the court to issue another sentencing order and I don't see anywhere in the order that we're supposed to be debating the court's order at this - time. It seems to me that they were pretty clear in saying that the-" (RS- p. 15).

Before counsel could conclude his statement, however, the Prosecutor interrupted to state: "I'm not asking the court to change his rulings but since they send things back for rearticulation to comply with Campbell - **this is a new area of the law.** (Emphasis added). I think it's fair for us to comment on whether or not we think it complies with Campbell or whether it needs further definition". RS- p. 15 Clearly, the Prosecutor was engaged in argument before the court.

At the Re-Sentencing Hearing Defense Counsel raised objection to the lengthy dialogue discussing the order and its legal sufficiency that occurred between the Prosecutor and the trial court. RS-p.7 Counsel stated: "I would object at this time to anything additional being added in this case there is another

issue - - in case there is another issue for appeal." (RS-p.7).

Counsel testified at the post conviction hearing that he did not think that they should be there arguing anything to the court, period. EH2- P.102 Defense counsel further testified that he did

not perceive the Prosecutor as agreeing with his position that no substantive changes should be made by the court and disagreed with her characterization that she was merely asking the judge to be more specific in detailing his findings. He cited 20 pages in the record following his objection where the Prosecutor argued to the court what statutory mitigation was present in this case. (EH1-103). The Order was returned to the court for "a new sentencing order" and not for a re-sentencing of Mr. Ferrell. In effect, that is what occurred without Mr. Ferrell having the ability to add mitigation evidence in the record. As a result, Mr. Ferrell's case should be remanded for re-sentencing.

Campbell may have been a new case from Defense counsel's perspective in handling his first death penalty case but it should not have been a new area of the law for either Judge Dawson or the Prosecutor who had experience with other death penalty cases, occurring AFTER the Campbell decision- most

notably Duncan a death penalty case that she prosecuted before this very same trial judge.

A brief recess was called at 5:30 P.M. and the duration of the break is unknown. However, the record reveals that the proceeding concluded at 6:15 PM. (RS- P. 17). Judge Dawson returned to chambers and there wrote sentencing order #3 - the Final Sentencing Order, then returned on the record and completed sentencing of Mr. Ferrell to death all within forty five (45) minutes.

At the Evidentiary Hearing held in 2001, Judge Dawson testified that he had personally prepared the sentencing orders in this case and he agreed that two Statutory Mitigators were established in the Sentencing Order # 2 that:

(1) Defendant was under Extreme Mental or Emotional Disturbance at the time of the killing and (2) that he was substantially impaired and unable to conform his conduct to the requirements of the law in sentencing order #2.

Post Conviction Counsel

Q- "Now, in this order [sentencing order #2] you state that the Court does find these mitigating factors present, but - - well, you find the two statutory mental health mitigators present. Is that right? Again."

Judge Dawson: "Yes".

Post Conviction Counsel

Q. - "By the way, you would have prepared this order: [sentencing order #2] neither the State - - the State didn't prepare any of these orders. Is that right?

Judge Dawson: "Correct. All these, as far as I recall, were prepared by me personally". (EH2-p.44).

In both sentencing orders (Exhibits #1, and #2 at re-sentencing hearing) the court used the same language stating therein: "Circumstances in mitigation that the defendant's ability to conform his conduct to the requirements of the law was substantially impaired at the time of the crime, that he was under the influence of extreme mental or emotional disturbance at the time of the killing and that the defendant was under the influence of alcohol at the time of the killing, are based on testimony from the guilt phase of the trial."

Following remand the record is clear that the Judge entered the courtroom with Sentencing Order #2 in hand to be read into the record and to re-sentence the Defendant as he had been directed to so by the Florida Supreme Court. Following discussion with counsel both on and off the record, the question becomes:

1) What was the Judge's basis for re-writing Sentencing Order #2 ?

2) What was the Judge's basis for changing the language contained in both of his Sentencing Orders #1 and #2 finding

that the Statutory Mitigators, (1) that the Defendant was under Extreme Mental or Emotional Disturbance at the time of the killing and (2) that the Defendant was substantially impaired and unable to conform his conduct to the requirements of the law were present to Sentencing Order #3 wherein they were NOT found.

A review of the record provides some clarification:

Post Conviction Counsel

Q. - Did you review anything else in the record in 1995 [ at the re-sentencing hearing] , other than take note of the arguments that were held?

Judge Dawson: "... the only thing I reviewed in 1995 was the transcript from the original sentencing to confirm that the - - a complete order had been read into that record...so I don't even recall if I read anything other than the final pronouncement of that transcript. All I was searching for was I was confused when I only had the last page. So I went to the record to see if I had actually read only that page, and I found I had read the complete order. But other than that, no, I **did not review any other information that I recall or evidence.**" (Emphasis added) (EH2-p.48).

It is clear that the court returned to chambers and by Judge Dawson's own admission reviewed absolutely no documents or evidence from the file. Charged with the challenge of re-writing an order pursuant to remand by the Supreme Court on a case involving the most severe punishment imaginable - death,

Judge Dawson by his own admission reviewed no information or evidence.

To comply with Campbell and withstand scrutiny required that Judge Dawson's final order had to expressly state each mitigating circumstance proposed by the Defendant, include his review of each mitigator to see if it was supported by the evidence, include his determination as to whether non-statutory factors were truly mitigating, include his determination as to whether each mitigator was established by the greater weight of the evidence in the record, include his weighing of each aggravating circumstance against the mitigating and assurance that his final decisions be expressly evaluated in the order and supported by sufficient competent evidence in the record.

Cognizant of his responsibility Judge Dawson who had written a Death Penalty Sentencing Order in *Duncan* ( a post Campbell case) and had written already written two separate Death Penalty Sentencing Orders in Ferrell without the aid of counsel expressed confusion stating:

"The court is wrestling with exactly what Campbell requires this court to put in written form and to sign..." (RS- p. 15) before recessing briefly to chambers to write sentencing order #3.

It is not clear at all what the source of confusion could

have been. What is abundantly clear, however, is that the substantive change in order occurred immediately following arguments on the record by the Prosecutor, urging the Court to write an order finding that Mr. Ferrell was NOT under Extreme Mental or Emotional Disturbance at the time of the killing and was NOT substantially impaired.

In concluding that Mr. Ferrell was NOT under Extreme Mental or Emotional Disturbance at the time of the killing and was NOT substantially impaired, Judge Dawson stated in sentencing order #3 that this finding was "based upon testimony from the guilt phase of the trial." RS- p. 22 While a close reading of sentencing orders #1 and #2 reveals that the court found that Mr. Ferrell was under Extreme Mental or Emotional Disturbance at the time of the killing and was substantially impaired and similarly indicated this finding "based upon testimony from the guilt phase of the trial."

It could have been possible for Judge Dawson to reconcile the difference between the language in the first two orders finding the statutory mitigation present and the third order clearly stating that it was NOT found by reading the transcript of the guilt phase testimony and articulating the evidence supporting his final decision, it is however quite impossible for Judge Dawson to have reached these decisions modifying the

order without first having thoroughly read any portion of the record.

At the Evidentiary Hearing in 2001 he testified:

"[S]o I don't even recall if I read anything other than the final pronouncement of that transcript. All I was searching for was I was confused when I only had the last page. So I went to the record to see if I had actually read only that page, and I found I had read the complete order. But other than that, no, I **did not review any other information that I recall or evidence.**" (emphasis added) (EH2-p.48).

Clearly, Judge Dawson changed his order as a direct result of those arguments made by the Prosecutor over the objection of Defense counsel to the entire process undertaken by the court.

Sentencing Order #3 is actually still suspect when analyzed in light of requirements dictated in Campbell and even the Prosecutor expressed concerns regarding the final order actually complying with Campbell. Not only must the result of the weighing process be detailed in the written sentencing order but Campbell requires that the trial court's final decision in the weighing process be supported by sufficient competent evidence in the record. Review of the order shows that it still lacks information from the court relating to the factual testimony or factual evidence that the court actually considered and is a

final order devoid of the reasons why the court was finding or not finding the statutory mitigators. (EH2- p.162).

In Ferrell v. State, 680 So. 2d 390( Fla. 1996), the Supreme Court upheld the trial court decision at sentencing stage in rejecting proposed statutory mitigation after finding that they "were based on testimony from the guilt phase of the trial". In making this determination the Court assumed that the trial court had reviewed the record prior to rejecting the proposed statutory mitigation. Mr. Ferrell asserts that there is insufficient evidence to support the court's findings based upon the volume of defense testimony that Mr. Ferrell was substantially impaired at the time of the crime, and that he was under the influence of extreme mental or emotional disturbance at the time of the killing that remained essentially uncontroverted during the guilt and penalty phases of the trial.

As further support for an absence of sufficient competence evidence to support the court's findings, Mr. Ferrell would point to Judge Dawson's own words in response to questions posed at Evidentiary Hearing in 2001 regarding his analysis:

Post Conviction Counsel:

Q. What was the basis in the record for not finding extreme disturbance or, I mean, what was the basis in the record that you relied on for that?

Judge Dawson:

"I'm not sure I could answer that question right now. Sat through a long trial, long sentencing, evidence presented, both evidentiary as well as penalty phase in reference to a number of mitigators and aggravators. So I couldn't right now off the top of my head tell you exactly what it was that swayed me one way or the other to find or not find a mitigator having been proven or not proven." (EH1- p. 81).

Although he had an opportunity to thoroughly review the record prior to giving testimony at the Evidentiary Hearing in 2001, Judge Dawson was still unable to articulate the basis for his third order [sentencing order #3] and his finding that these [statutory] mitigators were not established. A trial court's findings concerning mitigation will not be disturbed if the findings are supported by "sufficient competent evidence in the record." Campbell, 571 So. 2d. At 420. In Duncan v. State, this court reviewed the record and found it to support the State's assertion that it was devoid of any circumstances to support the establishment of statutory mitigation. In the instant case, a review of the record will support the Defendant's contention that the record also lacks sufficient competent evidence to support the court's finding that statutory mitigation had not been established by the greater weight of the evidence.

"Whenever a reasonable quantum of competent uncontroverted

evidence of mitigation has been presented, the trial court must find that the mitigating circumstance has been proved." Crook v. State, 813 So. 2d 68 (citing Nibert v. State, 574, So. 2d. 1059, 1062 (Fla. 1990). The trial court may rejected proffered mitigation if the record provides competent substantial evidence to support the trial court's decision. Spencer v. State, 645, So. 2d 377, 385 (Fla. 1994).

Dr. Upson's testimony in both guilt and his brief testimony in the penalty phase was unrefuted. The State presented no evidence of its own to rebut the expert testimony establishing that Mr. Ferrell is at a low intellectual functioning level (T.-p. 664) and that he suffered from neuropsychological deficits and that the test data clearly indicated frontal lobe brain damage. (T.-p. 679). Not only did Dr. Upson testify about the brain damage but he established a causal link between the brain damage and the homicide. Pointing out that the decisions made by Mr. Ferrell on the day of the murder were impulsive in nature as opposed to non-impulsive or strategically carried out events. (T.-p. 680). Absent information regarding trauma, i.e. accident Dr. Upson opined that long term use of alcohol could have caused the brain damage based on the history obtained. (T.- p. 683). The conclusions reached by Dr. Upson were reached after performing a series of tests, clinical evaluations of Mr.

Ferrell and interviews with family. T. - p. 681. In assessing all mitigation available to Mr. Ferrell the trial court failed to address Mr. Ferrell's claim that he suffered from frontal lobe brain damage or that he was functioning at a low intelligence level. Neither of these factors are contained in any of the sentencing orders #1, #2 or #3) prepared by Judge Dawson. Even though defense counsel asked the court to review Dr. Upson's testimony related to Mr. Ferrell's brain damage. The existence of brain damage has been a significant factor that trial courts should consider in deciding whether a death sentence is appropriate in a particular case. Robinson v. State, 761 So 2d 269,277 (Fla. 1999).

If the trial court had properly considered the brain damage and low intellectual functioning level of the Defendant and the effect of these mental mitigators on the crime in question, the trial court may have found that the lone aggravator did not outweigh the various mitigators established by the record in this case.

When the first sentencing order was received counsel for Defendant testified at the Evidentiary Hearing that he felt that the statutory mental health mitigators had been found to be proved by the court. (EH2-p.87). In explaining his reaction after the court returned with sentencing order #3 ultimately

signed by the court, Attorney Irwin described his reaction as "alarmed". He asked for sentencing order #2 to be attached as part of the record, called appellate attorneys for the 5<sup>th</sup> DCA for guidance and testified that "they seemed alarmed as well". (EH2- p. 95).

In the process of litigating Mr. Ferrell's 3.850 Claims, newly discovered evidence regarding the process involving the sentencing of the Defendant, Jack Ferrell have become known through testimony at the Evidentiary Hearings held on February 7, 2001 and September 4, 2001. As follows:

1. There was no impediment to the court sending Sentencing Order #1 to the Supreme Court as the parties had stipulated to the court's version as a complete and accurate memorialization of the Original Sentencing Order.

2. The Judge decided to prepare an entirely new sentencing order #2 based in part upon a false belief based on statements made by the Prosecutor that intervening case law (Campbell v. State) required him to do so.

3. Following arguments made by the Prosecutor on the record, the Judge agreed to prepare yet another order - sentencing order #3 that substantially altered sentencing order #2, over objection of Defense trial counsel. (Changing the Statutory Mitigators to Non-Statutory and effectively ensuring

affirmance of a death sentence).

The reliability of the process used to sentence Mr. Ferrell to death is seriously suspect based upon the actions of the court.

In dissenting on a motion for rehearing based on the court's denial of Defendant's Challenge to the Court's rejection of statutory mitigation based upon the court's reliance only on guilt phase testimony Judge Anstead stated:

"This change of findings, without explanation of any kind, completely undermines confidence in the sentencing order under review". Noting that this case rests on a lone aggravator, he states that "the presence of substantial mitigation obviously could make a difference in this case." Ferrell v. State, 680 So. 2d (Fla. 1996), P. 390, *Dissenting Opinion on denial of Rehearing, October 3, 1996, P. 392*

In the penalty phase of the case Defense counsel presented the testimony of Dr. James Upson, a qualified expert in the field of neuropsychology. Dr. Upson also testified during the guilt phase portion of the trial. Dr. Upson's testimony was uncontroverted that Jack Ferrell was under the influence of extreme mental or emotional disturbance and that his capacity to conform his conduct to the requirements of the law was substantially impaired at the time of the crime. The trial

court abused its' discretion in changing the first two sentencing orders and ultimately writing sentencing order #3 that found these statutory mitigators had not been found. The court's sentencing order #3 does not contain paragraphs that relate either factual testimony or factual evidence that was considered by the court. Absent final "sufficient competent evidence in the record." to support the trial court's final decision in the weighing process as established in Brown v. Wainwright, 392 So. 2d 1327, even sentencing order #3 should not be upheld. Judge Dawson had an opportunity to supplement the record during the Evidentiary Hearing and provide the explanation required under *Campbell* to support his findings. Instead, he established that he prepared a re-sentencing order in 1995 some two years after the original sentencing, and reaffirmed the death penalty with only a cursory review of the case file.

In denying Mr. Ferrell's claim the trial court finds that the Supreme Court of Florida was aware of the proceedings at the post-remand sentencing hearing, as a part of the supplemental record, the transcript of those proceedings, and states that the sentence was affirmed. However, the challenge to the order involved a narrow issue involving the analysis of the court in rejecting the statutory mitigators based upon the court's

reliance only on guilt phase testimony without any consideration to penalty phase testimony that was in the record. The issues for the court's consideration and resolution regarding the sentencing order(s) are:

1. The failure of the trial court judge to properly draft any sentencing order in conformance with all of the requisites in Campbell.

2. The lack of substantial evidence to support the trial court's finding that the statutory mitigators specified herein were not found in the record.

3. The failure of the trial court to address mitigation established in the record and properly requested by Defense counsel in sentencing memorandum for review.

4. Sentencing Orders imposing death should be free from any ambiguous language. Regardless of the court's intent, the plain language used in sentencing orders #1 and #2 established statutory mitigation for Mr. Ferrell. Subsequent orders inserting a sentence to support a finding that the statutory mitigation "WAS NOT" found is a substantive change to the original order. A substantive change to a sentencing order, especially one imposing the death sentence, should not be entered without the opportunity for both parties to present evidence at a re-sentencing hearing.

5. Finding by the trial court below that the sentencing court was influenced by the State to change the way it expressed it's intent was found, however, the trial court stated that it is not improper as long as no new evidence is presented. The record shows that Prosecutor characterized Campbell as a new development and therefore is equivalent to arguing new evidence to the court. As such, the Prosecutors actions were improper.

Mr. Ferrell's case involves a lone aggravator and very careful analysis by the trial court of any mitigation established in the record is requisite before a sentencing of death can be sustained. Based upon all of the foregoing issues raised throughout this claim, Mr. Ferrell is entitled to a new sentencing hearing.

**CONCLUSION AND RELIEF SOUGHT**

For all the reasons stated above, the Defendant is entitled to have his sentence vacated and this case returned to the trial court for resentencing before a jury.

**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 \_\_\_\_\_, 2003.

---

Dwight M. Wells  
Florida Bar No. 0317136  
Assistant CCC

---

Carol C. Rodriguez  
Florida Bar No. 0931720  
Assistant CCC  
CAPITAL COLLATERAL REGIONAL  
COUNSEL-MIDDLE  
3801 Corporex Park Drive  
Suite 210  
Tampa, Florida 33619  
813-740-3544  
Attorney For Appellant

Copies furnished to:

The Honorable Maura T. Smith  
Circuit Court Judge  
425 North Orange Avenue  
Orlando, Florida 32801

415 Orange Avenue  
Orlando, Florida 34206

Douglas T. Squire  
Assistant Attorney General  
Office of the Attorney  
General  
444 Seabreeze Blvd., 5<sup>th</sup> floor  
Daytona Beach, Florida 32118

Jack Ferrell  
DOC# 083905; P2109S  
Union Correctional  
Institution  
Post Office Box 221  
Raiford, Florida 32083

Chris A. Lerner  
Assistant State Attorney  
Office of the State Attorney

**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.

---

Dwight M. Wells  
Florida Bar No. 0317136  
Assistant CCC

---

Carol C. Rodriguez  
Florida Bar No. 0931720  
Assistant CCC  
CAPITAL COLLATERAL REGIONAL  
COUNSEL-MIDDLE  
3801 Corporex Park Drive  
Suite 210  
Tampa, Florida 33619  
813-740-3544  
Attorney For Appellant