IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,756

TOMMY SANDS GROOVER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE FOURTH JUDICIAL
CIRCUIT COURT, IN AND FOR DUVAL
COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Groover's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. This court ordered evidentiary resolution of questions concerning trial counsels' failure to question Mr. Groover's competency in the face of evidence showing the state had administered large doses of Mellaril to this brain damaged, mentally retarded defendant.

Citations in this brief shall be as follows: The record on appeal concerning the original court proceedings shall be referred to as "R. ___" followed by the appropriate page number, and the original trial transcript from that proceeding shall be referred to as "RT. ___." The record on appeal from the summary denial of the Rule 3.850 motion shall be referred to as "M. ___." The record on appeal after remand for the evidentiary hearing shall be referred to as "H. ___," and "H.T. ___" shall designate the transcript of the Rule 3.850 evidentiary proceedings before the trial court. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Mr. Groover 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 involved and the stakes at issue, and Mr. Groover through counsel accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE

A. INTRODUCTION

This case came to this Court on appeal of the summary denial of Mr. Groover's Rule 3.850 motion. After reviewing the record this Court remanded for an evidentiary hearing to determine trial counsels' ineffectiveness for "failing to inquire into his [Mr. Groover's] competency to stand trial and for failing to order a psychiatric evaluation of appellant." Groover v. State, 489 So. 2d 15 (Fla. 1986). An evidentiary hearing was conducted. The lower court denied relief, but committed a number of errors in making that denial and erred in its ultimate disposition of Mr. Groover's claims. The record amply demonstrates Mr. Groover's entitlement to relief, and this action is now before this Court.

Prior to the submission of this brief, Mr. Groover, through counsel, requested that this Honorable Court hold this appeal in abeyance in order to afford him the opportunity to pursue before the lower court a motion for post-conviction relief which included, inter alia, claims predicated on Hitchcock v. Dugger and Booth v. Maryland. See Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987)(Hitchcock opinion represents a significant change in law making claims predicated upon Hitchcock cognizable in Florida collateral actions); Jackson v. Dugger, 14 FLW ___ (Fla. 1989)(same, with regard to Booth v. Maryland). Neither Booth nor Hitchcock were available to Mr. Groover at the time of his initial Rule 3.850 action. At the time that this brief is being drafted, this Court has not yet ruled on Mr. Groover's motion. Mr. Groover on this date files his initial brief, pursuant to

the Court's briefing schedule, but continues to urge that these appellate proceedings be held in abeyance pending the disposition of his Rule 3.850 motion. Absent the granting of the relief sought in the motion to hold these appellate proceedings in abeyance, the Rule 3.850 action is subject to dismissal pursuant to this Court's decision in State v. Meneses, 392 So. 2d 905 (Fla. 1981). The Hitchcock and Booth claims, inter alia, which Mr. Groover has now presented to the trial court are far from frivolous, and the motion to hold in abeyance should therefore be granted.

Counsel for Mr. Groover note at the outset that no claim previously urged before this Court is abandoned or waived, notwithstanding the Court's limited remand. See Groover v. State, 489 So. 2d (Fla. 1986). However, counsel will not reiterate those claims herein.

B. STATEMENT OF THE FACTS

On May 17, 1982, Mr. Groover agreed to a negotiated plea under which he would plead guilty to one count of first degree murder, in exchange for a life sentence. On the same day, and as part of the plea agreement, Mr. Groover gave the State a sworn statement which was incriminating not only to the two indicted murders, but also to a third murder. As part of the agreement, Mr. Groover agreed to cooperate with the State in all aspects of the prosecution of Robert and Elaine Parker, his co-defendants. Of particular significance was the provision of the agreement which indicated that the statement given on May 17th could be used against Mr. Groover if he later refused to cooperate.

The next day, Mr. Groover appeared in court and entered a plea of guilty in accordance with the plea agreement. Over the next several months, Mr. Groover dealt with the prosecutors and the police exclusively and on his own without the benefit of his counsel. During this period, numerous incriminating statements were elicted from Mr. Groover, without counsel, during an extensive deposition at which he was apparently represented by an assistant state attorney. Having perfected the State's case against himself and his codefendants, Mr. Groover then withdrew his plea. Mr. Groover is mentally retarded, brain damaged, and mentally ill.

On August 12, 1982, his counsel, Mr. Nichols, withdrew from the case and the court appointed Mr. Shore. On August 20, 1982, Mr. Groover officially withdrew his plea. His position worsened. He was indicted for a third murder, based largely upon his sworn statements. Mr. Groover's case proceeded to trial at which the defense was that he had been present but had not taken an active part and could do nothing to stop the murders because of his fear of Robert Parker, the codefendant. His defense was based solely upon his testimony. At sentencing, Mr. Shore presented Mr. Groover and his mother who both gave a short statement to the jury. Ironically, Mr. Groover was sentenced to death by the jury for the third murder only, the one on which he was not originally indicted -- Mr. Groover "waived" himself into the electric chair.

All of this happened to Mr. Groover without anyone considering that they were dealing with a brain damaged, mentally retarded, mentally ill, illiterate drug addict. All of this happened to Mr. Groover while he was improperly drugged by the

State with large dosages of an anti-psychotic drug. Neither of his attorneys knew this. The judge did not know this. The jury did not know this.

The facts relevant to the claims for relief are discussed in the body of this brief, as they relate to the individual claims presented.

C. PROCEDURAL HISTORY

Mr. Groover was indicted on two counts of first degree murder on February 25, 1982 (R. 2). Mr. Groover entered a plea of guilty to one count of murder, pursuant to a negotiated agreement, made several official statements at the request of the prosecution and was called as a witness at a deposition by the co-defendants' attorneys, at which he again made statements. Thereafter, Mr. Groover's attorney withdrew the guilty plea. Subsequently, on August 26, 1983, Mr. Groover was reindicted, this time on three counts of murder (R. 33). The new indictment (3 counts) was based on the statements elicited from Mr. Groover after the guilty plea.

Mr. Groover was convicted by a jury of three counts of first degree murder on January 8, 1983 (RT. 1614). After a penalty phase, the jury recommended death only on Count III (Dalton), (R. 252-4). However the trial court overrode the jury as to Count I (Padgett) and imposed the death penalty on Counts I and III, and life imprisonment on Count II on February 18, 1983 (R. 268-70).

The convictions and sentences were appealed to this Court and affirmed. Groover v. State, 458 So. 2d 226 (Fla. 1984). Certiorari review was thereafter denied. Groover v. Florida, 105 U.S. 1877 (1985).

On May 7, 1986 the Governor of Florida denied clemency and signed a death warrant. Mr. Groover filed a Motion to Vacate Judgment and Sentence, a request for an evidentiary hearing, and a Motion for Stay of Execution on June 1, 1986, which were summarily denied by the circuit court on that same day. Mr. Groover appealed the denial of the Rule 3.850 motion, the request for evidentiary hearing and the request for a stay of execution.

On appeal, this Court remanded the case to circuit court for evidentiary resolution of two issues contained in the Rule 3.850 motion and affirmed the summary denial of the remaining issues. Groover v. State, 489 So. 2d 15 (Fla. 1986). On remand, the circuit court held an evidentiary hearing on two issues: whether defense counsel were ineffective for failing to 1) inquire into Mr. Groover's competency and 2) request a psychiatric evaluation of Mr. Groover. The evidentiary hearing was held on July 17-19, 1986, after seven days notice to counsel for Mr. Groover.

Two years later, on August 20, 1988 the circuit court entered an Order Denying Motion to Vacate. The order was a verbatim regurgitation of the State's post-hearing memorandum, except for very selective transcript quotes which the lower court included in its order. No transcript was ever provided to defense counsel, and it was only after the record on appeal was received that counsel (who were not involved in the evidentiary hearing) noticed that many of the quotations were simply wrong and misleading -- for example, many of the quotations stop in the midst of the witnesses' statements (and sometimes sentences) and completely exclude anything that was said supporting Mr. Groover's position. On September 7, 1988 Mr. Groover filed a

Motion for Rehearing, pointed out some of the obvious problems then apparent in the order, and requested a transcript. Rehearing was denied on January 26, 1988. No transcript was provided to counsel by the trial court. Notice of appeal was timely filed. Mr. Groover's claims are now before this Court.

ARGUMENT

CLAIM I

TOMMY GROOVER'S ORGANIC BRAIN DAMAGE AND MENTAL RETARDATION, COMBINED WITH THE IMPROPER MEDICATING OF MR. GROOVER BY THE STATE DURING ALL CRITICAL TRIAL-LEVEL PROCEEDINGS, RENDERED HIM INCOMPETENT TO STAND TRIAL AND CAPITAL SENTENCING, AND COUNSEL WERE INEFFECTIVE FOR FAILING TO CONDUCT A REASONABLE INVESTIGATION INTO THESE ISSUES IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This Court in its opinion of June 3, 1986, Groover v. State, 489 So. 2d 15 (Fla. 1986), remanded the motion to vacate in order to have evidence presented on the questions of Mr. Groover's competency to stand trial due to his various mental health deficits and the State's continuous administration to him of heavy doses of antipsychotic medication (e.g., Mellaril) and his former counsel's failure to pursue the matters. An evidentiary hearing was held and, as will be shown herein, the trial court erred in its conclusion that Mr. Groover was not entitled to receive the relief sought (H 210).[1]

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[1]It should also be noted here that the "Discussion of the Law and Conclusions" (H. 201-210) in the lower court's 101 page order was lifted verbatim from the state's post-hearing memorandum (H. 104-110). The lower court made every finding that the State asked for, and ignored the voluminous evidence

(footnote continued on following page)

With regard to Mr. Groover's competency claim the lower court found:

> 6. The defendant exhibited no behavior whatsoever in the pretrial or trial phases of this case that would indicate that he was mentally deficient or under the influence of any drug to the extent his normal faculties were impaired.

(H. 211). In saying this, the lower court completely ignored not only clear, ample record evidence to the contrary but all of the expert and lay testimony presented by Mr. Groover at the evidentiary hearing. The testimony at the evidentiary hearing included the account of several experts in the mental health area that discussed Mr. Groover's mental impairments and how those impairments would be exacerbated by Mellaril, the drug which the State gave Mr. Groover, without notice to counsel, during each critical stage of the initial proceedings.

Dr. James Merikangas, a neuro-psychiatrist many times qualified as a forensic expert, testified that Mellaril, the trade name of Thioridazine, is an anti-psychotic drug that is used in the treatment of psychosis and that in small doses it is a major tranquilizer (H.T. 124). Psychosis is defined as "a general term for any major mental disorder of organic and/or emotional origin characterized by derangement of the personality and loss of contact with reality, often with delusion,

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(footnote continued from previous page)

presented at the hearing in support of Mr. Groover's claims. It is therefore difficult to see how that court's ruling could have provided Mr. Groover with the well reasoned review which Rule 3.850 requires: the lower court simply regurgitated the State's words.

hallucinations, or illusions." Dorland's Illustrated Medical Dictionary (26th Edition). Dr. Merikangas reviewed the records kept by the jail of Mr. Groover's incarceration and found that Mr. Groover had been given doses of up to 500 milligrams a day during his incarceration (H.T. 124). (See also record references at M. 379,384,385,392,399,401,402,403,404). Mellaril is prescribed for the "management of manifestations of psychotic disorders." Physician's Desk Reference (PDR) (1985 ed.), p. 1804.

In addition, Mr. Groover was also being given Sinequan, a drug recommended for treatment of

> 1. Psychoneurotic patients with depression and/or anxiety. 2. Depression and/or anxiety associated with alcoholism (not to be taken concomitantly with alcohol). 3. Depression and/or anxiety associated with organic disease (the possibility of drug interaction should be considered if the patient is receiving other drugs concomitantly). 4. Psychotic depressive disorders with associated anxiety including involutional depression and manic-depressive disorders.

PDR, p. 1740. Recommended dosages of Sinequan for patients with "illness of mild to moderate severity" is 75 milligrams per day. PDR, p. 1740. Mr. Groover was often receiving as much as one hundred and fifty (150) milligrams (mg) per day (M. 373,375, 376, 380, 403).

Mr. Groover also received Robaxin while incarcerated. Robaxin is to be used "as an adjunct to rest, physical therapy, and other measures for the relief of discomforts associated with acute, painful musculoskeletal conditions." PDR, p. 1662. A usual dosage for adults is three 500 mg tablets per day. PDR, p. 1662. Mr. Groover was receiving six 500 mg. tablets per day at

the same time he received the Mellaril and the Sinequan (M. 370, 371, 373, 375,382, 389,399, 417). The effects of these drugs on a normal person would be serious enough. The effects of the combination of these misprescribed drugs on a mentally ill and brain damaged person are simply devastating. But there was more. Mr. Groover was also given Vistaril during this same time period (H.T. 666, M. 374,) which is a drug for the treatment of anxiety associated with psychoneurosis, PDR, p. 1613. These drugs should not be given in conjunction with each other, for they virtually destroy a person's ability to act or think rationally. Mr. Groover was literally doped up during the time he took a guilty plea, made statements incriminating himself, withdrew the guilty plea, stood trial, and received a death sentence. Defense counsel did nothing about this -- the first attorney (Nichols) did not know about it (he never showed up when his client gave statements or at his client's deposition), the second (Shore) learned about it when he read the deposition transcript, but then did nothing about it.

On July, 8, 1982, the day preceding his deposition, which the State attended but defense counsel did not, Mr. Groover was administered the following drugs: 25 mg. of Sinequan (M. 381), 3000 mg. of Robaxin (M. 382), and 3 tsps. or 300 mgs. of Mellaril (R. 384). During the deposition, Mr. Groover was given Mellaril (H.T. 574, M. 498) at least once. These drugs continued to be prescribed and administered to Mr. Groover up to and through trial (M. 419-437; H.T. 630).

Even according to the State's witnesses, Mellaril is a powerful drug appropriate only for treatment of psychotic

behavior. Dr. Ernest Carl Miller stated at the Rule 3.850 hearing: "I think that with a mentally retarded individual one must be as with older people and younger people more judicious in the administration of this powerful drug" since it could produce "paradoxical responses" or responses which are the opposite of what is anticipated (H.T. 625-26). Dr. Antoine Innocent, a psychiatrist testifying for the State, testified that when he saw Tommy Groover in June of 82, Mr. Groover was "not psychotic" (H.T. 660). On the basis of that fifteen (15) minute interview, and without the benefit of any testing or physical examination, Dr. Innocent prescribed Mellaril for this mentally retarded and brain damaged individual. Why Dr. Innocent would prescribe a serious anti-psychotic drug to an individual who he belived not to be psychotic is a question which Dr. Innocent could not answer.[2]

This powerful anti-psychotic drug was prescribed and administered in varying dosages and in combination with various other anti-psychotic drugs, as well as "muscle relaxant" drugs and a host of other medications including cold remedies, laxatives, pain relievers, etc. (M. 370-437). All this was in a period of time from at least June of 1982 through trial in January of 1983, virtually through every critical stage of the criminal proceedings against Mr. Groover.

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[2]Dr. Innocent testified that Mr. Groover told him he was serving a 25-year prison term for <u>second degree murder</u> (H.T. 660; 673). Such indications of Mr. Groover's inability to understand the charges against him, among others, were ignored by defense counsel, the prosecutor (who dealt exclusively with Mr. Groover for some time), and the doctor (who saw Mr. Groover for fifteen minutes).

In the lower court's summary of the witness testimony, the testimony of all defense witnesses was summarized almost exclusively by portions of cross-examination. The court, after admitting many of these witnesses as experts in their respective fields, then proceeded to ignore the substance of the opinions each expressed.

Mr. William White, qualified as an expert in preparing and conducting capital sentencings, testified that reasonably competent counsel would be concerned upon learning that the client was being prescribed a psychotropic drug such as Mellaril while incarcerated (H.T. 55). According to Mr. White, jail authorities often medicate people simply to control them rather than to treat a mental illness (H.T. 55). The fact of the medication, however, should be a trigger to reasonably competent counsel that further investigation is necessary. This is especially so since the attorney is not a mental health expert and cannot determine a diagnosis or whether there is a legitimate need for psychotropic medications. The attorney should consult with a mental health expert to provide these answers (H.T. 66). Defense counsel here never did.

The other attorney expert called by the defense was Richard H. Burr, an attorney with seven years experience focusing almost exclusively on capital litigation.[3] Mr. Burr detailed the steps

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[3]Mr. Burr is also an expert consultant for Florida's Department of Health and Rehabilitative Services with regard to mental health issues, and serves on an advisory committee on the development of standards for psychological and psychiatric forensic examinations in criminal cases.

reasonably competent counsel would take in determining whether mental health issues are present in a capital case. First, counsel would look to the circumstances of the crime and see if there is evidence of, for example: drug use or excessive violence that might indicate rage attacks or some other mental disturbance, and in co-defendant cases, he should look to see if there is dominance by one defendant. This was not done here. He would next observe the client in an interview and look for signs of slow speech, distorted thoughts, memory lapses, illogical progression of thoughts, etc., would then look to see how others perceive the client, would look at the client's history, through records from schools, military, hospitals, and any other source that may be available, would interview family and friends, and would consider any bizarre actions taken by the client. Each of these areas may provide indicators that mental health issues should be further investigated and an expert evaluation sought by reasonably competent counsel (H.T. 258-264). In each of these areas, Mr. Groover showed clear signs of a very diminished level of mental health functioning. Defense counsel took no action.

Mr. Burr interviewed Mr. Groover and reviewed the following: Mr. Groover's May 17 statement, the transcript of the guilty plea (May 18), Mr. Groover's deposition (July 9), the hearing for substitution of counsel, the hearing for the withdrawal of the plea, the suppression hearing, and various other portions of the trial transcript (H.T. 263).[4] Based on his expertise in the

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[4]The lower court's ruling that the various experts presented by Mr. Groover did not know the record is absolutely rebutted by the Rule 3.850 record itself and by the testimony of the experts at the Rule 3.850 hearing.

field, his review of the materials and his interview with Mr. Groover, it was Mr. Burr's opinion that trial counsel had made serious omissions in that virtually none of the "red flag" areas for determining mental health issues had been explored or investigated in this case (H.T. 264). Mr. Burr then discussed the many specific facts in this case which showed these "red flags" and showed where the omissions occurred (H.T. 264-281). Mr. Burr concluded that under the recognized standards of performance for capital defense attorneys, it was unreasonable attorney conduct for Mr. Groover's counsel not to undertake any investigation of the mental health issues in this case, and not to follow up on the many "red flags" showing that such issues had to be investigated (H.T. 281). Included in his discussion was counsel's failure to follow-up on the "red flag" of the heavy dosages of Mellaril prescribed for Mr. Groover. This was clearly an area needing further investigation and expert mental health assistance (H.T. 275). The kind of "flags" to which Mr. Burr and Mr. White referred would have led to an investigation that revealed the kind of overwhelming evidence presented at the evidentiary hearing and summarized below regarding Mr. Groover's mental health deficiencies.

The standard for relief regarding issues such as this is today well-settled: reasonable standards for defense attorney performance require that counsel <u>investigate</u> the client's competency or lack thereof. <u>See</u> <u>Futch v. Dugger</u>, 874 F.2d 1483, 1487 (11th Cir. 1989). Counsel's performance is deficient under recognized standards if counsel fails "to make reasonable investigation into" the client's competency or fails "to make a

reasonable decision that such investigation was unnecessary." Id. at 1487 (emphasis added). Counsel here neither made a reasonable investigation into the competency of Mr. Groover (a mentally ill, mentally retarded, brain damaged, and drugged defendant), nor made a "reasonable" decision not to investigate the issue -- the "red flags" were plain in this case:

> In order to demonstrate prejudice from counsel's failure to investigate his competency, petitioner has to show that there exists "at least a reasonable probability that a psychological evaluation would have revealed that he was incompetent to stand trial."

Futch, supra, 874 F.2d at 1487 (citations omitted). Here, Mr. Groover made the requisite showing: at the Rule 3.850 hearing he presented substantial evidence that had a proper mental health evaluation been conducted at the time of the original proceedings, there exists "at least a reasonable probability," Futch, supra, 874 F.2d at 1487, that such an evaluation would have revealed that Mr. Groover was in fact not competent. The lower court ignored this, the appropriate legal standard, for evaluating a post-conviction petitioner's competency claim. The signs were there in this case, and a reasonable investigation would have revealed evidence demonstrating Mr. Groover's lack of competency. No such investigation, however, was conducted.

Dr. Francis S. Smith, an audiologist and speech language patholgist, tested Mr. Groover's hearing and speech and found that Mr. Groover suffers a hearing loss of mild to moderate in both ears with a high frequency loss in both ears that is of a more severe type (H.T. 83-84). These deficits made it difficult for Mr. Groover to hear certain sounds and, certainly in a

courtroom trial setting, with activity which generally makes concentration difficult, Mr. Groover's ability to hear would have been seriously impaired (H.T. 84-85). This was evident throughout the proceedings as Mr. Groover frequently had to have questions repeated to him. Dr. Smith also found that Mr. Groover's language level is approximately that of a nine year old (H.T. 87). Based on her testing, interview of Mr. Groover, review of records, and many years of experience, Dr. Smith concluded that Mr. Groover suffers from

> generalized damage to the brain. Whether you wish to call that retardation or brain damage. I do not feel--the reason I am getting a little technical I do not feel for example there is damage simply to the auditory nerve, whether there is damage simply to the areas of the brain involved in formation of language or formation of speech sounds. People with damage in those areas I would tend to call aphasic, so in answer to your question I would feel that there is generalized brain damage that probably would be classified as retardation.

(H.T. 91).

The evaluations and testing conducted by of Dr. James Merikangas and Dr. Harry Krop substantiated the findings of Dr. Smith. Dr. Merikangas examined Mr. Groover, and reviewed voluminous record materials, including Mr. Groover's school records, affidavits from individuals who knew Mr. Groover, the results of the testing administered by Dr. Krop, and the evaluations conducted by Drs. Benjamin Greenberg and Samuel Greenberg. He performed a physical exam, a neurological exam, and a mental status exam. He explained that the testing showed a "number of abnormalities that you see in people who are brain damaged" (H.T. 113). Dr. Merikangas explained that "there is

brain damage which is both diffuse and involving the left hemisphere of the brain" (H.T. 115). When explaining that Dr. Krop's testing showed Mr. Groover to be mildly to moderately retarded, Dr. Merikangas testified:

> In his case it appears that the brain damage and the mental retardation are the result of the same physical injury to the brain so I would say that the retardation is a way to describe the intellectual deficit that accompanies his brain damage. This is also somewhat intertwined with the years of solvent and drug abuse which is in the history. It's clear that there was mental retardation prior to any of this drug abuse.

(H.T. 116). Dr. Merikangas discussed the probability that Mr. Groover had suffered further brain damaged as a result of his years of abuse of organic solvents (H.T. 117-121). When discussing the potential further complications of the drugs provided to Mr. Groover by the State (e.g., Mellaril), Dr. Merikangas first indicated that his review of the record did not show any psychiatric evaluation that would indicate why Mellaril had been prescribed. Mellaril is an anti-psychotic drug used to treat psychosis. The jail doctors, however, did not believe that Mr. Groover was psychotic at the time, as reflected in the jail medical log (H.T. 124-125). A usual dosage for someone of Mr. Groover's size "who is actively psychotic" is 200 to 300 mgs. per day. That dosage might be increased depending on how "wildly psychotic" the patient was (H.T. 126). Mr. Groover's dosages began at 300 mgs. per day and were then increased.[5] Based on Mr.

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[5]If Mr. Groover was not "actively psychotic" during the "fifteen minutes" that the jail doctor saw him, why were such substantial dosages of drugs given to him?

Groover's brain damage, his verbal I.Q. of 64 and overall I.Q. of 60 (well within the range for mental retardation), his use of Toluene and other organic solvents, and the dosages of Mellaril and other drugs given to Mr. Groover during the original proceedings, Dr. Merikangas concluded: "It's my opinion based upon all these factors and my own examination plus my experience with mentally retarded people that he would be incompetent" (H.T. 128). Dr. Merikangas made it clear that Mr. Groover's personality and his mental retardation were factors that led to his incompetence but when coupled with the circumstances of bargaining for his life while being "sedated" with anti-psychotic medication (e.g., Mellaril), obvious indicia of incompetency at the time of trial and the other trial-level proceedings against Mr. Groover existed (H.T. 144).

Dr. Harry Krop is a clinical psychologist. He evaluated and tested Mr. Groover. Dr. Krop was called as a witness at the evidentiary hearing. In addition to reviewing numerous records and other materials (H.T. 166-17), Dr. Krop conducted the following tests: Bender-Gestault, auditory memory examination, Wechsler Memory Test, finger tapping, Wechsler Adult Intelligence Scale Revised (WAIS-R), and the Aphasia screening examination. He also conducted a client interview. Dr. Krop noted that after talking with Mr. Groover for but a few moments, it was easily discernible that he was mentally retarded. The testing confirmed this fact (H.T. 168). Mr. Groover's IQ as shown by the WAIS-R was 64 for verbal and 60 overall, putting him in the "lowest range" of mental retardation or in the lowest one-and-one-half percent (1 1/2%) of the population (H.T. 168). Dr. Krop's

findings were consistent with those of Drs. Smith and Merikangas in that the brain damage is generalized and diffuse (H.T. 175). When asked about the additional effects of Mellaril on Mr. Groover, Dr. Krop explained that it is unusual "for a person who is not psychotic to be put on such high doses of Mellaril which has to cause some type of impairment of functioning, . . ." (H.T. 189).

Dr. Samuel Greenberg, an eminently qualified psychologist, also reviewed volumes of background material on Mr. Groover (H.T. 221-222) and performed various psychological examinations. Dr. Greenberg also conducted a mental status exam and personal interview. Dr. Greenberg found that Mr. Groover is mentally retarded and suffers from organic brain damage (H.T. 228). He was unequivocal in his position that Mr. Groover was significantly impaired with regard to his competency to stand trial as well as his competency simply to function in the world. Dr. Greenberg explained: "If he were a patient or a client of the Veteran's Administration we would appoint a guardian" (H.T. 231), and discussed Mr. Groover's lack of competency in 1982 and the indicia of incompetency in this case. Dr. Greenberg also explained that Mr. Groover's mental deficiencies were complicated by the administration of 400 - 500 milligrams of Mellaril per day: "That's a big dose. That's a dose usually reserved for an active psychoses, somebody who is totally out of control" (H.T. 232). It was clear to Dr. Greenberg that Mr. Groover did not meet the statutory criteria for competency as defined by Florida law (H.T. 232).

Each of these experts reviewed extensive background materials, conducted a battery of tests, and spent substantial time interviewing Mr. Groover to arrive at their opinions. The experts, presenting views from various fields of expertise, and the records and lay testimony submitted at the hearing, all explained that Mr. Groover, inter alia, is mentally retarded, brain damaged, and suffers a hearing loss. Each of the experts expressed the opinion that even those factors alone made it questionable that Mr. Groover could fully comprehend the nature of the proceedings against him and meet the other criteria of competency as set forth in Rule 3.211. When these factors were put in the context of the other indicia of incompetency in this case, and particularly when put in the context of the large doses of anti-psychotic medication that had been administered to this brain-damaged, mentally retarded, hard of hearing client, his incompetency during the proceedings against him was plain.

While the lower court made much of the fact that these witnesses did not review certain portions of the trial record, the fact is, as Dr. Merikangas made clear, that when an expert conducts a competency evaluation, he or she usually does not have trial materials to use. In any event, the experts here had innumerable trial materials. Competency determinations in criminal cases are routinely made and, unfortunately, usually made with far less time, study, testing, and expertise than the evaluations conducted by these experts. Defense counsel here, however, requested no evaluation of their impaired client's competency. The lower court ignored all of the evidence demonstrating that because of Mr. Groover's mental deficits and

the high dosages of Mellaril and other drugs given to him, he was not competent to proceed in 1982. The lower court's view flies in the face of the overwhelming evidence presented at the evidentiary hearing.

The State, and the lower court (which accepted the State's position verbatim), relied primarily on the account of non-expert witnesses, inexperienced in the effects of Mellaril on brain damaged individuals, who stated that on the basis of a handful of encounters with Mr. Groover during his incarceration, he "seemed fine." Of course, a great deal of lay testimony was also before the lower court demonstrating that Mr. Groover had never been well and was not functioning right during the trial proceedings. The only state witnesses remotely qualified to discuss the effects of Mellaril on a brain damaged individual were Dr. Ernest Carl Miller and Dr. Antoine Innocent. Dr. Innocent, the prescribing doctor, by his own admission saw Mr. Groover for the sparse total of 15 minutes prior to prescribing the initial dosage of 300 milligrams of Mellaril per day (H.T. 671). Dr. Innocent was not board certified and from the text of the hearing, it seems that his ability to communicate in English is extremely limited (H.T. 654-688). This language barrier could only serve to further confuse a mentally retarded individual who has limited comprehension, at best. Dr. Innocent performed no tests and reviewed no previous history of Mr. Groover (H.T. 672-3). His testimony was quite bizarre: he said he saw no evidence of psychosis and yet he himself prescribed a very heavy dose of an anti-psychotic drug, a drug which professionals agree cannot and must not be prescribed to individuals who are not psychotic.

Dr. Miller, the only other State expert, undertook no testing of Mr. Groover. Worse yet, he never evaluated or even saw Mr. Groover (H.T. 616).[6] Dr. Miller's sole source of information on Mr. Groover was the jail medical file from Clay and Duval Counties (M. 370-437), listing the medication dosages and the jail personnel's comments. Based on that information alone, Dr. Miller expressed his opinion that the doses given to Mr. Groover would "not necessarily" have caused Mr. Groover to become incompetent (H.T. 618). Of course, Dr. Miller also made it clear that treating a mentally retarded or brain damaged individual with such a powerful drug must be done with great care (H.T. 625-626). For the lower court to have completely disregarded expert opinions based on properly conducted evaluations in favor of lay opinions that "he looked okay to me" is a result that is patently absurd. Dr. Miller testified that the Mellaril would not <u>necessarily</u> make one incompetent. This is a far cry from a finding that Tommy Groover was competent, even while on Mellaril. Contrary to the lower court's ruling that "his claims are contrary to the great weight of the evidence" (H. 210), the overwhelming evidence before the lower court clearly supports Mr. Groover's claim of incompetence at the critical stages of the trial-level proceedings against him.

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[6]Findings rendered by a trial court which ignores the substantial, overwhelmingly evidence presented by a capital post-conviction petitioner and instead relies <u>solely</u> on those bits and pieces selected by the State are, of course, entitled to no deference. The evidence in the record amply supports Mr. Groover's claims. The lower court erred in ignoring it.

A. THE RIGHT TO BE TRIED ONLY WHEN COMPETENT

"A person accused of a crime who is mentally incompetent to stand trial shall not be proceeded against while he is incompetent." Fla. R. Crim. P. 3.210. It is simply unfair to try someone when that person has no ability to meaningfully participate in the proceedings which will subject him to a loss of liberty or, as here, life. This fundamental unfairness is prohibited by the fifth, sixth, eighth and fourteenth amendments to the United States Constitution, and by parallel state constitutional provisions.

The constitutional test for incompetency was articulated in Dusky v. United States, 362 U.S. 402 (1960), and is well known to, and oft quoted by, this Court:

> [T]he "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him."

Id. See also Drope v. Mississippi, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966); Bishop v. United States, 350 U.S. 961 (1956). See also ABA Mental Health Standards, Part IV, Competence to Stand Trial, 7-4.1. The Dusky standard has been forcefully applied by this Honorable Court, and this Court's opinions reflect an especially vigilant concern for protecting the rights of incompetents. See Jones v. State, 478 So. 2d 346 (Fla. 1985); Hill v. State, 473 So. 2d 1253 (Fla. 1985); Gibson v. State, 474 So. 2d 1183 (Fla. 1985); Christopher v. State, 416 So. 2d 450 (Fla. 1982); Lane v. State, 388 So. 2d 1022 (Fla. 1980). Mason v. State, 486 So. 2d 734 (Fla. 1986).

State procedures which fail to provide adequate resolution of competency issues violate the due process clause of the fourteenth amendment. Pate v. Robinson, 383 U.S. 375 (1966). Accordingly, whether the procedural failure is found on direct appeal, W.S.L. v. State, 470 So. 2d 828, 830-31 (Fla.2d DCA 1985); Gibson v. State, supra, or in post-conviction proceedings, Hill; Mason, supra, the remedy is to "vacate the conviction and sentence and remand with directions that the State may proceed to re-prosecute the defendant after it has been determined that he is competent to stand trial." Hill, 473 So. 2d at 1260. Mr. Groover was never afforded the requisite competency hearing at the time of trial. His counsel wholly failed to investigate the issue, notwithstanding the many red flags that should have notified counsel to investigate and to seek at least one proper mental health evaluation. Mr. Groover has shown that if such an evaluation had been requested, there exists "at least a reasonable probability" that a "psychological evaluation would have revealed that he was incompetent to stand trial." Futch, 874 F.2d at 1487. See also Hill v. State, supra. He has more than met his burden. The lower court, however, wholly ignored this standard of review, and then compounded the error through its selective and biased interpretation of the facts. Relief is appropriate under the proper legal standard, Futch; Hill, a standard which the trial court wholly failed to apply.

The hearing ordered by this Court was a hearing to determine whether counsel unreasonably failed to investigate Mr. Groover's competency or to have competency determined pretrial. The

evidence conclusively showed that counsel were unreasonable. Relief was and is proper.

Even though the lower court placed great emphasis on the State's position that since Mr. Groover testified, he was therefore competent, this Court has clearly spoken otherwise:

> The trial court found that Bishop testified coherently and was adroit in explaining eye-witness testimony; that he withstood severe and long cross-examination, and that approximately one month before the trial a psychiatric evaluation determined that Bishop had no mental disorder. On the basis of this evidence, the court of appeals held that there was substantial evidence upon which the trial court could find that Bishop was competent to stand trial. The United States Supreme Court, however, found this evidence insufficient. . . . This decision stands for the principle that the trial court must conduct a hearing on the issue of a defendant's competency to stand trial where there are reasonable grounds to suggest incompetency.

Hill, 473 So. 2d at 1256(emphasis added). In Mr. Groover's case, there were more than "reasonable grounds to suggest incompetency," and counsel were plainly ineffective in failing to pursue the issue. Ample evidence was adduced at the evidentiary hearing demonstrating that Mr. Groover was mentally retarded, brain damaged, hard of hearing and drugged with excessive doses of an anti-psychotic drug. Former counsel failed to investigate any of this. This is ineffective assistance. As the District Court of Appeals explained in W.S.L. v. State,

> We believe the psychologist's report provided reasonable grounds for a belief that defendant at least *may* have been incompetent. Under these circumstances the rule required a hearing on defendant's competency to stand trial. Cf. Boggs v. State, 375 So. 2d 604 (Fla.2d DCA 1979)(holding that under . . . Rule . . . 3.210 a hearing to determine defendant's competency to stand trial is

> required if there are reasonable grounds to believe defendant is incompetent, regardless of whether or not the trial court has formed a belief in that regard).

470 So. 2d 828, 830 (Fla.2d DCA 1985)(Lehan, Ryder, and Grimes, JJ.)(emphasis in original). The evidence here was much more than sufficient to show that Mr. Groover "may have been incompetent," id., and a hearing should therefore have been conducted at the time of the original proceedings. None was, because defense counsel failed to investigate, failed to request an expert competency evaluation, and failed to request the requisite hearing. This denied Mr. Groover the right established in Pate: to have a competency hearing during the initial proceedings when indicia of incompetency exist. The denial of this right is plain prejudice to Mr. Groover.

As the record reveals, Mr. Groover's conviction and death sentence resulted in large part from his decisions regarding the waiver and assertion of fundamental constitutional rights. He was convicted and sentenced to death in large part on the basis of statements extracted from him during the time of the failed guilty plea. Former trial prosecutor Ralph Greene's and former defense counsel Nichols' testimony in particular underline this scary reality. This mentally deficient defendant literally made life and death decisions on his own, without counsel, during his discussions with his protagonist/antagonist, prosecutor Ralph Greene. The statements introduced against Mr. Groover at trial arose from the grossly mismatched battle of intellect between Mr. Groover and Mr. Greene.

Mr. Groover's mental condition vis-a-vis waivers should have been raised, and counsel's failure to raise it was patently

prejudicial. The government bears the burden of proving that a defendant's confession is voluntary. See Lego v. Twomey, 404 U.S. 477 (1972). See also Culombe v. Connecticut, 367 U.S. 568, 602 (1961). The question of voluntariness, especially when that question involves a mentally deficient defendant, requires adversarial evidentiary testing. No such testing occurred here: counsel undertook no investigation into this deficient client's diminished mental health.[7]

Mr. Groover needs a guardian. He needed a guardian at the time of the original proceedings. He does not know the president's first name. He cannot abstract to interpret proverbs. He cannot use a ruler. Ninety-nine percent of the

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[7]A court examining the voluntariness of a confession "must take into account a defendant's mental limitations, to determine whether through susceptibility to surrounding pressures or inability to comprehend the circumstances, the confession was not a product of his own free will." Jurek v. Estelle, 623 F.2d at 929 (en banc). It is "settled that statements made during a time of mental incapacity or insanity are involuntary and consequently inadmissible..." Sullivan v. Alabama, 666 F.2d 478, 482 (11th Cir. 1982). One "fundamental concern is a mentally deficient accused's vulnerability to suggestion." Henry v. Dees, 658 F.2d 406, 409. See also Sims v. Georgia, 389 U.S 404, 407 (1967); Culombe v. Connecticut, 367 U.S. 568, 624-25 (1961); Townsend v. Sain, 372 U.S. 293 (1963); Blackburn v. Alabama, 361 U.S. 194, 207 (1960); Fikes v. Alabama, 352 U.S. 191, 196 (1957).

In proving waiver of fifth or sixth amendment rights, the burden is on the state to demonstrate an "intentional relinquishment or abandonment of a known right or privilege." Brewer v. Williams, 430 U.S. 387, 404 (1977)(quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)); Tinsley v. Purvis, 731 F.2d 791, 793 (11th Cir. 1984). The Constitution places a "heavy burden" on the government to demonstrate that the defendant's "waiver" was voluntarily, knowingly and intelligently made. Brewer v. Williams, 430 U.S. at 404. "The courts must presume that a defendant did not waive his rights; the prosecution's burden is great." North Carolina v. Butler, 441 U.S. 369, 373

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population is intellectually superior to him. He is brain damaged. He is mentally retarded. He was sedated with great dosages of medication while bargaining, confessing, retracting bargains, and making "life and death" decisions. His competency was and is more than open to serious questions. Futch, supra; W.S.L., supra; Hill, supra. The relief urged in these proceedings was and is appropriate.

Indeed, the bizarre aborted guilty plea proceedings provide further indicia of Mr. Groover's inability to make logical decisions in his own best interest. His judgment is markedly poor, and abnormal (H.T. 171):

> "He falls into the range of I.Q. scale where he would be easily led and where his lack of understanding, his being illiterate, his inability to comprehend anything abstract would render him incapable of deciding anything of major importance.

(H.T. 128).

The guilty plea was a plea to one count of first degree murder for which he would be sentenced to life. Against the advice of counsel, Mr. Groover withdrew that plea, withdrew it without any benefit to himself, and withdrew it after extensive

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(1979). The Court has emphasized that this is not a standard of proof to be taken lightly: courts must "indulge in every reasonable presumption against waiver." Brewer v. Williams, 430 U.S. at 404. See also Brookhart v. Janis, 384 U.S. 1, 4 (1966); Glasser v. United States, 315 U.S. 60, 70 (1942); Tinsley v. Purvis, 731 F.2d 791, 794 (11th Cir. 1984). This "strict standard applies equally to an alleged waiver of the right to counsel whether at trial or at a critical stage of the proceedings." Brewer v. Williams, 430 U.S. at 405. None of this was properly assessed at the time of the original proceedings, because counsel never investigated the client's diminished mental health.

dealings with the prosecutor during which he was not represented by counsel. The facts involved in the aborted guilty plea were quite bizarre. In Scott v. State, 420 So. 2d 595 (Fla. 1982), this Court noted a similar situation as one incident persuasive that the defendant may have been incompetent. There the defendant "overrode his lawyer's recommendation and rejected this eminently-favorable bargain." Scott, 420 So. 2d at 597. This Court concluded that this was one of the factors "each minor by itself but taken together, combin[ing] to persuade this Court that a competency hearing should have been held." Id. More factors than those involved in Scott are involved in Mr. Groover's case. A competency hearing was never held in conjunction with the original proceeding. This violated Pate. Defense counsel never pursued the matter, and had no reasonable excuse for completely failing to investigate their client's diminished mental health. (Such an investigation is routine in almost all capital cases, as this Honorable Court is well aware.) In this, defense counsel's performance was ineffective. Counsel failed to investigate notwithstanding the myriad red flags that would have shown reasonably effective counsel that mental health issues should have been pursued.

Mr. Groover's capital conviction and sentences are fundamentally unfair and unreliable. Rule 3.850 relief is proper.

CLAIM II

MR. GROOVER WAS DENIED A COMPETENT MENTAL HEALTH EXAMINATION IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS, AND DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO REQUEST A PROPER MENTAL HEALTH EVALUATION.

A defendant is entitled to an independent competent mental health expert evaluation when the state makes his or her mental state relevant to "his criminal culpability and to the punishment he might suffer." Ake v. Oklahoma, 105 S. Ct. 1087, 1095 (1985). What is required is an "adequate psychiatric evaluation of his state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). As important as this right is to a defendant facing the ultimate punishment, the right alone -- as with any right -- is useless without "the guiding hand of counsel" to enforce and implement it. See Powell v. Alabama, 287 U.S. 45, 69 (1932).

There is a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Edwards, 488 F.2d 1154, 1163 (5th Cir. 1974). Mental health and mental state issues permeate the law. Their significance is amplified in capital cases where the jury is to give a "reasoned moral response" to the defendant's "background, character, and crime." Penry v. Lynaugh, 45 Cr. L. 3188, 3195 (1989). In a capital case, counsel has the duty to conduct a minimally competent independent investigation to discover if his or her client has any mental health problems and to understand the legal impact of such problems on competency, sanity, waivers, specific intent, and mitigating circumstances. This careful investigation and

assessment must be done before any "strategy" decisions are made. Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986). If not, the "strategy" decisions, if any, are tantamount to no strategy at all. Id. See also Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988).

"The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." Strickland v. Washington, 104 S. Ct. 2052, 2063 (1984). The Sixth Amendment envisions that every client will be assisted by an attorney "who plays the role necessary to ensure that the trial is fair." Id., at 2063. Whether a defendant was denied the effective assistance of counsel depends upon the two-prong analysis set forth in Strickland.

Under the Strickland test, a defendant must identify particular acts and/or omissions of counsel that are outside the range of reasonable competent attorney performance under prevailing standards, and demonstrate that there is a reasonable probability that the errors could have had some impact on the proceedings, that is, that confidence in the result of the proceedings is undermined because of counsel's errors. Mr. Groover amply met these requirements with the overwhelming and competent evidence that was presented at the evidentiary hearing. Because of his counsels' errors, he never received the competent psychiatric/psychological examination that was necessary for a "just result" and "fair trial." See Futch v. Dugger, supra, 874 F.2d at 1487; Evans v. Lewis, supra, 855 F.2d 631 (where counsel does not timely and reasonably employ expert assistance in a case

in which mental health is or should be at issue, no "tactic" can be ascribed to any decision counsel may make regarding mental health issues).

A. COUNSEL DID NOT FULFILL THEIR DUTY TO INVESTIGATE

In a capital case, Florida law makes the mental condition of the defendant relevant to criminal culpability and punishment in many ways: (a) competency at trial and sentencing, (b) legal insanity at the time of the offense, (c) specific intent to commit first degree murder (either premeditation, or the specific intent requirement for underlying felonies in felony murder), (d) statutory mitigating factors, and (e) a myriad of nonstatutory mitigating circumstances. Consequently, Mr. Groover's counsel should have been aware of the importance of mental health issues and how they may impact on virtually every stage of a capital case.

At the evidentiary hearing pre-trial and trial counsel admitted the unavoidable truism: had they known that Mr. Groover was brain damaged, mentally retarded, a chronic drug addict since his pre-adolescent years and heavily sedated with anti-psychotic drugs throughout his trial, their approach to the case and their client would have been very different. Their failure to learn this crucial and readily learnable information relates to the first prong of the Strickland test, unreasonable attorney conduct. See also Futch v. Dugger, supra; Evans v. Lewis, supra. "The Sixth Amendment imposes on counsel a duty to investigate, because reasonably effective assistance must be based on professional decisions and informed legal choices can be made only after investigation of options." Strickland, supra, 104 S.

Ct. at 2061 (emphasis added). Counsel can make no strategic choice until substantial investigation is undertaken, id. at 2061, particularly in the area of mental health, where lawyers have little expertise, and where expert assistance is a dire necessity. See Evans v. Lewis, supra. This is so because "facts form the basis of effective representation. . . . The basis for evaluation of (legal issues) . . . will be determined by the lawyer's factual investigation, for which the accused's own conclusions are not a substitute." A.B.A. Standards on Criminal Justice, The Defense Function, p. 4.55.

Investigation is particularly and critically important with regard to sentencing considerations, especially in a capital context where the counsel can never lose sight of the fact that the client may live or die depending on the lawyer's preparation for a sentencing case. "Trial counsel has a duty to investigate the client's life history, upbringing, education, and relationships, friendships, formative and traumatic experiences, personal psychology, and present feelings." Goodpaster, "The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases," 58 N.Y. Univ. L. Rev. 299, 323-24 (1983). Sentencing is too critical to depend on the statements of the client:

> The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. This cannot effectively be done on the basis of broad general emotional appeals or on the strength of statements made to the lawyer by the defendant. Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense

> itself. Investigation is essential to fulfillment of these functions.

A.B.A. Standards, The Defense Function, 4.55 (emphasis added).

The circuit court and the State have never comprehended the crux of this claim and merely saw it as a restatement of the competency claim. The court found that neither attorneys' performance was ineffective, and that Mr. Groover was "in no way prejudiced by any action or inaction of" his counsel (H. 211). These conclusions of law are legally wrong; the findings are contrary to the evidence presented at the evidentiary hearing and rely solely upon the "appearances" of the defendant to the court. Cf. W.S.L. v. State, 470 So. 2d at 830 (how defendant may "appear" to the court is not determinative when the record reflects facts which show that the defendant "may have been incompetent" [emphasis in original]); Bishop, supra (same); Hill, supra (same). The lower court and the State refuse to accept that the crux of this claim is that both counsel were ineffective because they failed to take note of the obvious "red flags" which indicated that the defendant had significant mental health problems that could have and should have been investigated.[8]

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[8]Of course, appearances deceive, especially in cases involving mentally ill clients. That is why a proper mental health evaluation and proper testing are required. As this Court has explained in a related context:

> Commentators have pointed out the problems involved in basing psychiatric evaluations exclusively, or almost exclusively, on clinical interviews with the subject involved . . . In light of the patient's inability to convey accurate information about his history, and a general

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They failed to recognize the importance of an investigation of mitigating circumstances in order to provide their client with an effective defense.

Mr. Groover proved that both counsel were guilty of acts and omissions which were not the result of reasonable professional judgment. Counsel's own testimony, and the other evidence introduced at the hearing demonstrated that the attorneys' performance was deficient. For example, Mr. Richard H. Burr, qualified as an expert, ably discussed counsels' deficiencies. At the time of the hearing, Mr. Burr was an assistant public defender for the 15th Judicial Circuit in West Palm Beach. Mr. Burr had for seven years practiced exclusively in the area of death penalty defense litigation. He was acknowledged by the trial court as an expert on the issue of effectiveness of counsel in capital cases.

In establishing a framework from which to assess whether counsels' performance was reasonable, he emphasized that counsel must first

> be familiar with the variety of contexts in which mental health is relevant and

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> tendency to mask rather than reveal symptoms, an interview should be complemented by a review of independent data. See Bonnie, R. and Slobogin, C., The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 Va.L Rev. 427, 508-10 (1980).

Mason v. State, 489 So. 2d 734, 737 (Fla. 1986). No mental health evaluation was undertaken at the time of trial because counsel failed to investigate their client's mental health and failed to request one. This was ineffective assistance.

> material in a criminal prosecution beginning with pretrial competency and competency to stand trial, moving through sanity, insanity, through specific intent issues that require a specific mental intent, . . . in a capital case, mitigating circumstances both statutory and nonstatutory.

(H.T. 256). Thus, the focus is not solely upon competency or insanity or even diminished capacity but must involve the entire spectrum of legal issues involving mental health. In the context of a capital case, even relatively minor mental health problems must be investigated to determine if there is evidence of possible statutory or nonstatutory mitigating circumstances.

Only with that crucial understanding of the importance of mental health issues can an attorney provide effective representation. The next step, Mr. Burr explained, is that counsel "has a minimal duty to obtain threshold information from his client that would indicate whether further information is necessary." This does not mean, as the trial court and the State suggested below, that counsel must move for a competency examination whether or not they have a "good faith" basis to do so (H. 200). What it does mean is that counsel must make a "conscious" inquiry into whether his client has any potential mental health problems, and must fully investigate the client's mental health, including obtaining the client's records, and obtaining mental health expert assistance in order to properly assess these issues. Counsel had the duty to investigate the possibility of any such issues. These attorneys did not even take that basic step.

Mr. Burr further explained that this threshold inquiry involves five areas. They are:

(1) The circumstances of the offense itself (H.T. 257).

(2) The way the client presents himself during the course of the interview with the attorney (H.T. 259).

(3) How other people perceive the client at the time that the attorney is representing him (H.T. 260), and in the past.

(4) The attorney must elicit from the client some critical areas of history that might be indicative of mental health problems (H.T. 261).

(5) Finally, in order to sort out the attorney's impressions, he must discuss the client with somebody who knows him well, either a close family member or a close friend (H.T. 262).

These are matters that "ought to be routinely gone over in every case" (H.T. 262). Once this threshold inquiry is made, only then can counsel make "strategic" determinations that there are no plausible mental health issues. If Mr. Groover's counsel had made this threshold inquiry, the bare minimum required by professional norms, they would have taken notice of the numerous "red flags" which indicated that mental health issues existed in the case.

To illustrate how this threshold inquiry would present a number of "red flags" in Mr. Groover's case, Mr. Burr interviewed Mr. Groover, and reviewed the 3.850 motion and its appendix, the Florida Supreme Court opinions, the statements given by Mr. Groover on May 17, 1982, and July 9, 1982, and the guilty plea colloquy and the subsequent withdrawal, among other matters (H.T. 263). After this review, Mr. Burr explained that:

> counsel missed a number of the red flags that either had rised before him or would have rised had he done the preliminary inquiry into five areas that I talked about.

> Counselor missed -- apparently missed virtually all of those or gave no significance to them because he apparently took no further investigation as they called for.

(HT 264). Mr. Burr then explained his opinion in the context of the five areas of concern.

First, concerning the circumstances of the offense, there were two aspects which caused "a great deal" of concern. One was the rampant evidence of Mr. Groover's use of drugs and alcohol during the course of the crimes and the immediate period before them. This was especially noteworthy because of the combination and the mind-altering qualities of the drugs: P.C.P., quaaludes, L.S.D., marijuana, and alcohol. As Mr. Burr indicated this should have caused counsel to talk with the family concerning Mr. Groover's history of drug abuse and to contact an expert to at least explore possible effects of these drugs taken together (H.T. 266).

Had counsel inquired of the family about Mr. Groover's history of drug abuse they would have learned that it started early in life, was extensive, and was undoubtedly related to his mental retardation. Counsel would also have learned that Mr. Groover's first form of drug abuse -- huffing of organic solvents -- was probably the most damaging and had set the course of drug abuse for the rest of his life.

The other circumstance regarding the offense that reasonably competent counsel should have seen as involving mental health issues, but that these attorneys ignored, was that Mr. Parker was the dominant party and Mr. Groover was the passive party. As Mr. Burr indicated that <u>was</u> the theory of the defense and "yet a

crucial aspect to presenting evidence of dominance and submission is the psychological and personality profile" and that was never investigated, developed or presented. As Mr. Burr explained:

> Here again a minimal amount of investigation would have shown just with the family members would have shown that Mr. Groover was an extraordinarily docile, suggestive, submissive person from day one. He was always a follower and was always slower than his peers and taken advantage of by his peers because of his disabilities, and so that whole defense lost it's credibility I think because there wasn't any substance other than Mr. Groover's testimony itself to support that he was truly dominated by Mr. Parker.

(H.T. 266-267).

On those two areas alone, common sense and a basic appreciation of mental health issues should have caused counsel to investigate further. As Mr. Burr concluded, it was an unreasonable attorney omission not to pursue mental health issues by requesting expert assistance in order to further develop those issues (H.T. 267).[9] In fact, Dr. Merikangas indicated that Mr. Groover's lack of any other violent behavior prior to these crimes would be further reason to inquire into Mr. Groover's mental health (H.T. 135).

The second area, the way the client presents himself, should also have raised some questions in the minds of counsel. As Mr. Burr testified, Mr. Groover was illiterate. "He was a 24 year old man who could neither read nor write and who had been socially promoted throughout his school career" (H.T. 267). Mr.

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[9] See, e.g., Fla. R. Crim. P., Rule 3.216 (1980) (providing for appointment of confidential expert to assist the defense).

Groover was obviously slow and had a hard time understanding things. Mr. Burr cited as an example a portion from Mr. Groover's July 9 deposition where it was apparent that he was unable to measure something with a ruler, an aspect of Mr. Groover's mental deficiencies which is not even necessarily related to illiteracy (H.T. 268). Also, the record established that Mr. Groover was a concrete thinker and, as Mr. Burr related, this is something that is commonly associated with mental health problems (H.T. 271). And closely related to that is the fact that Mr. Groover showed signs of confusion and memory impairment, which Mr. Burr discussed (H.T. 271-276). All of these items should have caused counsel to have an expert look into whether there was some mental health disorder. They are all signs for concern, above and beyond the issues of competency and/or insanity.

The third area, how others perceive the client at the time, provides one of the most obvious signs of possible mental health issues in Mr. Groover's case. The most obvious source for such information in a capital case is the jail personnel where the client is incarcerated. A check with the jail would have disclosed that Mr. Groover was being medicated with large dosages of Mellaril, an anti-psychotic drug. Neither counsel checked with the jail. In fact, Mr. Nichols was never aware of this fact at all. (Mr. Shore learned it, but did absolutely nothing about it.) Mr. Groover was taking this drug through pretrial negotiations, his plea and the subsequent cooperation and withdrawal from the plea, but his counsel never knew this because

he in effect abandoned his client once a plea of guilty was entered.

Mr. Shore who realized this while reading the transcript of a deposition Mr. Groover had given, merely asked Mr. Groover about it, but did nothing further. He never checked with the jail personnel: he never even determined what type of drug it was or what it was commonly used for. All of this was in spite of the fact that the defense counsel for Mr. Parker, Mr. Groover's co-defendant, at the deposition picked up on the underlying mental health issue:

> MR. ARNOLD: Excuse me. Can we go off the record for a second?
>
> MR. LINK: Sure.
>
> (Off-the-record discussion)
>
> BY MR. LINK [MR. PARKER'S COUNSEL]:
>
> Q: Mr. Groover, we just had a recess so that you could take some medication. As long as we're talking about it, what kind of medication are you taking?
>
> A: Mellaril.
>
> Q: And what dosage?
>
> A: Five -- I can't remember what they call it, that much (indicating), a teaspoon full.
>
> Q: How often do you take the Mellaril?
>
> A: Three times a day. I take a stomach medication, and I take medication for my back.
>
> Q: What kind of medication do you take for your stomach and your back?
>
> A: I can't remember the name of either one of them. It's some kind of green liquid for my stomach and white pills for the back.
>
> Q: How long have you been taking Mellaril?

A: Since about two weeks after I got in jail.

Q: Who prescribed it for you?

A: The doctor over there.

Q: The jail doctor?

A: Yes. Marilyn. Mental health lady over there had me go see some doctor over there on Friday. He prescribed it for me. I was having problems sleeping and stuff.

Q: Does any of the medication that you're taking interfere with your ability to think clearly?

A: No.

Q: Does it interfere with your ability to understand what I'm asking you or understand what you're saying?

A: No.

Q: You said you needed something other than water to chase your medication; you have a coke there?

A: Yes.

Q: Who bought the coke for you?

A: Him. (Pointing)

Q: The State Attorney?

A: Yes.

(H. 497-499). Later in the deposition, Mr. Link, the co-defendant's attorney, returned to the medication issue, and its obvious mental health implications. The State, there to protect someone who was then purportedly its client,[10] actually objected:

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[10]Mr. Groover's counsel did not bother to show up at the deposition, or at any of the other interactions between Mr. Groover and the State during this time period.

BY MR. LINK:

Q: Why are you taking medication?

A: Why am I taking my medication?

MR. ARNOLD: We've already been through this already; haven't we?

THE WITNESS: For my nerves and to sleep at night.

BY MR. LINK:

Q: Is that your understanding of why you are taking it?

A: Yeah.

Q: Did your doctor give you a diagnosis as to what was wrong with you, why you couldn't sleep and what kind of nerve problems you had?

A: No.

Q: Have you ever been treated for mental illness before?

MR. ARNOLD: Object.

THE WITNESS: No. Not really, no.

BY MR. LINK:

Q: Okay. Not really, no?

A: No.

Q: Have you ever been seen by a psychiatrist before?

A: I can't recall if I have.

Q: You don't know whether you have or not?

A: No. I don't think I've talked to any of them.

Q: How about a psychologist?

A: No.

Q: Have you ever been treated for drug abuse or alcohol abuse?

A: No. I ain't never been treated for it.

(H. 504-506). From this colloquy, it is clear that Mr. Link was going to definitely develop that area for further cross examination. He saw the "red flag" of the mental health problems of Mr. Groover. In fact, the state attorney's response to the questioning is more indicative of protecting the case -- because he saw the potential for devastating cross-examination if he were to use Mr. Groover as a witness -- than a heartfelt desire to protect Mr. Groover. Failure to follow up on this can by no means be characterized the result of reasonable professional judgment. Strickland, supra, 104 S. Ct. at 2066.

The fourth area of inquiry, critical areas of history that might be indicative of mental health problems, was also never properly explored. There is absolutely no indication whatsoever that Mr. Nichols inquired into this area. Mr. Shore made only a cursory inquiry and accepted without any investigation Mr. Groover's adverse reaction to raising a drug-related defense. See Martin v. Maggio, 711 F.2d 1273, 1280 (5th Cir. 1983)("Uncounselled jailhouse bravado, without more, should not deprive a defendant of his right to counsel's better-informed advice."); Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir. 1986)("[T]he lawyer first must evaluate potential avenues [of defense] and advise the client of those offering possible merit.") Here, there was no investigation of Mr. Groover's mental health, and thus Mr. Groover's assertions were patently uninformed: since counsel did not investigate, they could provide no reasonable advice to the client. Both attorneys knew that Mr. Groover was illiterate, and had a history of drug abuse

as evidenced by his arrest record (all of Mr. Groover's previous arrests were drug and alcohol related). Yet neither made an adequate (or indeed any) inquiry into these fruitful areas. Tactical decisions are not reasonable unless based upon facts gathered through reasonable investigation. Martin; Thompson. These lawyers did not have the facts, and thus could make no reasonable tactical decision.

The final area, the testing of the attorney's impressions through family and friends, would have led to further helpful information. Mr. Burr explained:

> I think the first investigative step counsel was required to take was to talk to the family because that was the next step to either sort or confirm or deny the impressions that counsel had to have from all of these factors. Had he talked to these folks as their testimony will show and as their affidavits show, he would have uncovered an enormous history of substance abuse, abuse of organic solvents which by 1982 was well known to be associated with permanent brain damage.

(H.T. 279). An adequate investigation of Mr. Groover's background through the family would have also disclosed that his drug abuse began at the urging of an older, dominant male and that that pattern plagued Mr. Groover throughout life (H. 288-324).

All of the factors led Mr. Burr to the conclusion that it was unreasonable attorney conduct not to pursue mental health issues in Mr. Groover's case when there existed clear information which would have led reasonably competent counsel to pursue such issues. This analysis does not suggest a "lofty standard" for which attorneys should aspire, rather it presents a framework of analysis which reflects "prevailing norms of practice."

Strickland, supra, 104 S. Ct. at 2065. In fact, Mr. Burr's analysis went to great lengths to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 2065. The analysis was not made from facts that the attorneys did not have at the time, but presented their shortcomings based solely upon the evidence that they had. Mr. Burr's approach, an approach in accord with recognized standards in the profession, was cogent, intelligent, and effective.

Mr. Burr's analysis was also supported by Mr. William P. White. At the time, Mr. White was the chief assistant public defender for the Fourth Judicial Circuit. Since 1976, he had been responsible for the assignment and supervision of the capital trial attorneys in that office (H.T. 44). The court recognized him as an expert in the preparation for and conduct of capital sentencing proceedings within that county, circuit and the state (H.T. 47). Mr. White's testimony established that the standards discussed by Mr. Burr are in fact the same in Duval County and the Fourth Judicial Circuit, and that the standards were not met in this case.

Mr. White began his testimony by emphasizing that reasonably competent counsel approach a capital case in a different way than other cases. He explained:

> The capital case is a bifurcated trial and you right away have to face the issue of the penalty phase once you have an indictment for first degree murder. You can't wait to find out whether there is going to be some serious negotiation of a lesser included

> offense. You can't wait to find out whether you have a winable case.
>
> You must find out immediately whether you are dealing with one or more of the aggravating circumstances in section 921.041 or whether you have available to you evidence of the mitigating circumstances contained in that statute, so in that sense you have to immediately begin looking at the penalty phase of the trial whereas in a non-capital offense it's not as important to begin looking at that. You can look at the sentencing guidelines in a non-capital case and it's a fairly simple procedure.

(H.T. 48). Crucial to such an approach is the investigation of the client's background through family members and friends (H.T. 49). He also indicated that the common practice is to request the school, military and medical records of the defendant. All of this is required to determine if any statutory or non-statutory mental health mitigating circumstances exist. The purpose is to find evidence of emotional disturbance, diminished capacity, duress, susceptibility to domination by another, and any impairment in mental capacity (H.T. 49-50). Such an investigation was never undertaken by Mr. Groover's attorneys.

Mr. White testified concerning the importance of obtaining the assistance of a mental health expert to help evaluate these areas. He discussed the problem of counsel actually pin-pointing definite mental health problems without the assistance of an expert because many times the problems are masked. Mr. White explained the problem of masking:

> The way they present themselves to you when you go to talk to them appears normal. Their conduct may not have appeared normal at the time of the offense. So the conduct may not be consistent with something they have done before. You can't see any reason for it, and an organic brain syndrome can be

> determined by resorting to an expert in the field of neurology.

(H.T. 52). This highlights the importance of that threshold inquiry that Mr. Burr discussed; telltale signs of mental illness may not be apparent from a lay person's observations.

Mr. White made it clear that during 1982 in that jurisdiction attorneys in general were aware of the availability of experts to assist them. He indicated that the procedures for requesting such experts were available in 1982 and that the initial threshold for a showing of facts to support such a request was very low (H.T. 58), and that he had never been denied an expert (H.T. 61). In fact, Mr. White testified that he had never been involved in the preparation of a capital case where an expert was not used (H.T. 59).[11] Mr. White explained that this went beyond issues of competency and insanity and included development of mitigating factors:

> As we began I think it was the first question why is it different and it's because you have the mitigating factors that you can't as an attorney look at your client and say my client has mitigating factors or does not have them. We are not experts in the field of psychology and mental disturbance. We need an expert to assist us in that.
>
> I think you would be remiss in not asking for the expert that the law provides for you to prepare your defense, and part of your defense in a capital case has the anticipation of the penalty phase and mitigating circumstances, so I believe it's necessary in a capital case to do that.

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[11]Indeed, the rule applicable at the time made provision for a confidential defense expert. See Rule 3.216 (1980).

(H.T. 59). Finally, Mr. White stressed that a tactical decision not to raise a mental health issue could only be made after an independent investigation and a weighing of the options (H.T. 71). This also was not done in Mr. Groover's case.

"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Strickland, supra, 104 S. Ct. at 2065. The evidence presented at the evidentiary hearing establishes that both Mr. Nichols and Mr. Shore failed to pursue through reasonable investigation the tell-tale signs of mental health problems involved in Mr. Groover's case. Had they done that, they would have discovered the information that they themselves indicated would have changed their approach to the case.

The lower court's findings that counsels' performance met the reasonableness standard was based upon two factors: "there is no doubt from the record that Shore and Nichols each made conscious tactical choices when dealing with the defendant and during the formulation of his defense," and that neither counsel observed an indication that the defendant was "suffering from diminished capacity due to the administration of Mellaril." The "evidence" cited by that court to support its proposition all took the form of: he looks O.K., he talks O.K. (sometimes), therefore, he is O.K. Prosecutors, jail personnel, and police officers can take that sort of cavalier approach to the mental health status of the defendant, but surely his own counsel should not, and -- under "prevailing professional norms," Strickland, 104 S. Ct. at 2065 -- cannot. With regard to the trial court's first ruling, it is obvious that the court erred as a matter of

law: no "tactic" or strategy" can be ascribed to an attorney's decisions founded on inadequate investigation. See Strickland v. Washington, supra; Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). The second ruling is also an error of law: counsel should have investigated, they should have obtained records and spoken to the family, they should have asked, at a minimum, for a confidential expert's assistance. This is the prevailing standard in the profession. Relying on "he looks o.k.,/he talks o.k. (sometimes)" is clearly not.

In fact, Mr. Nichols himself agreed with this principle while testifying at the hearing:

> Q During the course of your advising and working with Tommy Groover, if you had the opinion of experts that he, Tommy Groover, suffered from mental retardation and an I.Q. of 65, suffered from brain damage, suffered from the effects, toxic affects of huffing glue, paint, et cetera and had been recently before the representation you were provided addicted to P.C.P. and was using it and information from experts that that combination of factors could effect Tommy Groover's judgment, would that have been information that would have been helpful to you in dealing with Mr. Groover?
>
> MR. WHITE [ASSISTANT STATE ATTORNEY]: Objection, Your Honor. It's beyond the scope of direct and calls for speculation.
>
> * * *
>
> THE COURT: I think the question is proper. Proceed.
>
> BY MR. OLIVE:
>
> Q Is that the kind of information that if -- you remember the question?
>
> A I do.
>
> Q Okay.

> A Certainly if I -- if we got to the position I knew this case had to be tried, his specific background and health and that sort of thing would have been looked into more carefully, and if at the time I was negotiating with the state I had the information that you just suggested I think it would have been relevant, but let me add that there was nothing about my conversations with Groover that raised a red flag to me to say go look at it.

(H.T. 548-9) (emphasis added). Mr. Nichols conceded that he would have gotten the requisite information if he had proceeded to trial. He also conceded that the information would have been relevant to the negotiations with the State. But the needed investigation was never undertaken in this case.

Had counsel obtained the necessary information two months prior to the negotiation for the plea as he should have, he could have effectively represented his client by giving him the "guiding hand of counsel at every step in the proceedings against him." Powell v. Alabama, 287 U.S. 45, 69 (1932). In fact, his testimony gives a strong suggestion that the first time he realized that Mr. Groover could not read was during the plea negotiation (H.T. 529). Counsel did not pursue the facts. He missed obvious red flags, and did not investigate. Indeed, he himself made clear that Mr. Groover's choices in the plea context were far from "informed":

> I explained clearly to Mr. Groover that I couldn't conceive of a case of this magnitude going to trial without some appealable issue being created. I explained to him that even if he went to trial and the death penalty was sought and imposed that it would be in my opinion an awful long time before he would ever be executed if he ever would at all. And I explained to him that in my opinion there were a lot of political factors that affected the appellate process

> and whether or not executions actually took place.
>
> And I also explained to him what I thought was the real question was whether or not he wanted to serve his time in the general population or whether he wanted to serve his time on death row. The authority or suggestion of threat of actual execution was really minimal in the conversations that we had.

(T.R. 157)(emphasis added). Such strange advice falls far short of the prevailing norms of practice. One can only imagine how this information was processed by the brain-damaged mind of this mentally retarded, and sedated defendant.

Counsel's errors were compounded when he unwittingly left his retarded and illiterate client, who was being improperly given large doses of drugs, with a prosecutor for whom his client had expressed an outward dislike. He left his client to deal with the prosecutor alone, knowing that his client's life depended upon "cooperation" (H.T. 541). He shifted the burden from himself to his client's hands. We all now know that Mr. Groover, who is substantially impaired, could not handle that responsibility. Mr. Nichols should have known that at the time. Had he conducted the threshold investigation required by professional norms, he would have known this. Instead, he then abandoned his client. This was not effective assistance of counsel.

Mr. Shore inherited Mr. Nichols' client and Mr. Nichols' ignorance of Mr. Groover's mental health problems. Unlike Mr. Nichols, who said he would have conducted the necessary investigation eventually, Mr. Shore never conducted the

investigation. He made tactical decisions without the most essential facts. He testified:

> Q I ask you, sir, if an individual who has an I.Q. of 65 or if an individual has an I.Q. of 65, between 60 and 65, has significant organic brain damage or malfunction or mild organic brain damage, is mentally retarded and has neurological dysfunction, possibly suffers from for all their lives and that is information which you think would be relevant in a capital sentencing to a jury?
>
> MR. WHITE: I think that's speculative and asking a lay witness a hypothetical question.
>
> THE COURT: Overrule the objection.
>
> THE WITNESS: If that information is available would it be relevant?
>
> BY MR. OLIVE [DEFENSE COUNSEL]:
>
> Q Right.
>
> A Yes. I think it would probably be relevant.
>
> Q It would be helpful to you in your preparation of a case, wouldn't it, to know that your client is brain damaged?
>
> A <u>If I knew he was brain damaged would it be helpful? It would be information I would like to have, yes</u>.
>
> Q [If] <u>[Y]ou knew he was mentally retarded, that would be information that you would like to have in preparing your client and the trial -- for the trial</u>?
>
> A <u>Yes</u>.
>
> Q You would be able to, and correct me if I am wrong, better advise and speak for the client if you knew the client suffered from brain damage, couldn't read or write, had neurological dysfunction and psychiatric disorder, is that correct?
>
> A I don't know if it would change my communication with him. <u>It would certainly make me be more cautious</u>.

Q Someone who had all of those problems you would allow them to make decisions in a case for you?

A If I knew that the person had all of those problems, I would still give the person input into making decisions in the case. That doesn't mean in any event that I would absolutely follow those instructions, but I would certainly give the person input depending upon how that person related to me at that time.

(H.T. 446-47) (emphasis added). But no mental health expert was ever requested, and no investigation into these issues was undertaken. Counsel should have conducted such an investigation. Professional standards required it. He was aware of several of the red flags, and he ignored them. Indeed, the most significant "red flag" was that his new-found client had just waived himself into the electric chair. This alone should have alerted him. He saw others, the low intelligence and the medication, but he never went beyond the surface. Even prior counsel's (Mr. Nichols) statement that he would have done the investigation establishes that Mr. Shore was ineffective for not doing it.

The lower court ignored and discounted what Mr. Groover's counsel and experts said, and amplified an erroneous standard of review. The lower court's disposition of Mr. Groover's claims was patently unfair: it took no note of what Mr. Nichols and Mr. Shore actually said, while adopting without question what the State (erroneously) said this case involved. Behind all this, the lower court's disposition shows that it never understood the crux of Mr. Groover's claim and decided it upon the basis that Mr. Groover "looked like" he was competent.

The facts have shown that Mr. Nichols' and Mr. Shore's performance was unreasonable. At a minimum, they should have undertaken the threshold investigation; if they had, they would have discovered the Tommy Groover they were truly dealing with: a client whose mental deficiencies were readily provable.

When counsel unreasonably fails to properly investigate incompetency, Speady v. Wyrick, 702 F.2d 723 (8th Cir. 1983); Adams v. Wainwright, 764 F.2d 1356 (11th Cir. 1985); United States v. Edwards, 488 F.2d 1154 (5th Cir. 1974), insanity and diminished capacity, Beavers v. Balkcom 636 F.2d 114 (5th Cir. 1981); Davis v. Alabama, 596 F.2d 1214 (5th Cir. 1979), or mental circumstances relevant to sentencing, State v. Michael, 530 So. 2d 929 (Fla. 1988); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985), ineffective assistance is demonstrated. Counsel failed in this case, and ineffective assistance has been demonstrated.

B. COUNSELS' ERRORS ARE SUFFICIENT TO UNDERMINE CONFIDENCE IN THE PROCEEDINGS

In order to satisfy the second prong of the Strickland test "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, supra, 104 S. Ct. at 2068. See also State v. Michael, supra (same).

The circuit court found, contrary to overwhelming evidence, that even if counsel had been ineffective, no prejudice was shown (H. 164-165). In this regard, the trial court erroneously focused solely upon issues of competency and insanity, while

never considering any of the other important mental health issues at the other end of the spectrum in a capital case.

1. Legally Significant Mental Health Facts

The lower court totally ignored the extensive amount of expert psychiatric and psychological testimony which was presented at the evidentiary hearing, and the ample lay and documentary evidence supporting it. In order to best establish that Mr. Groover was in fact prejudiced by his counsels' ineffectiveness, it is necessary to summarize the evidence that could have been developed had Mr. Groover's attorneys investigated the mental health issues which were available in this case, evidence which the lower court ignored.

The four mental health experts who evaluated mental health mitigating factors[12] and testified at the hearing were strikingly consistent in their conclusions about Tommy Groover's crippling mental condition: Tommy is brain damaged, mentally retarded, also altered from his pre-adolescent misuse of organic solvents and later drug abuse, and he was improperly medicated by jail personnel. Even the State's expert, Dr. Ernest Miller, stressed the impropriety of the Mellaril administered (H.T. 623). In this section, Mr. Groover will discuss the experts' conclusions, and the basis therefore.

a. James Ray Merikangas, M.D.

Dr. Merikangas is a most eminently qualified psychiatrist and neurologist. His curriculum vitae outlines his impressive

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[12]The State's experts never assessed mitigating factors, and thus could provide nothing shedding light on these issues.

qualifications which were stipulated to by the State (see Exhibit 3). He teaches psychiatry at the Yale University School of Medicine, he is Board Certified and licensed in psychiatry and neurology, and he is an expert consultant to many state and federal agencies (H.T. 106-108).

Dr. Merikangas was qualified to and did express expert opinions. His opinions were based on a review of extensive records, the testing and reports from other experts, and his own thorough physical and neurological examination of Tommy Groover, all of which are matters experts in the field regularly rely upon when forming and expressing expert opinions (H.T. 110).

Dr. Merikangas' account was compelling: Tommy Groover suffers from diffuse brain damage (H.T. 115), is mentally retarded (H.T. 128), has a substantial history of misuse and abuse of organic solvents (H.T. 117), illicit drugs (H.T. 117), and was improperly given Mellaril (H.T. 124) and other drugs which exacerbated and amplified the effects of his inherent mental deficiencies. The mental condition was probably extant from birth. The Mellaril given to Tommy was grossly improper, and resulted in excessive sedation (H.T. 125-127). As a result of the above, and other considerations, it was Dr. Merikangas' expert opinion that Tommy Groover was incompetent in 1982, and could decide little of consequence, much less assist meaningfully in his own defense (H.T. 128). He further explained that Tommy was incapable of forming specific intent (H.T. 134), was pliable and easily led, and had a personality which led him to try to avoid conflict (H.T. 130). Tommy is not a violent person, but, as the doctor revealed, PCP can cause atypical uncharacteristic

violence in an individual (H.T. 135). (It is again worth noting that Tommy's history prior to this case involves <u>no</u> acts of violence.)

According to Dr. Merikangas, Tommy Groover's shortcomings should have been apparent to a layperson (H.T. 136). He had no interest or bias in or toward these proceedings.

b. <u>Samuel I. Greenberg, M.D.</u>

Dr. Greenberg's credentials are equally impeccable. He has practiced psychiatry for over thirty-five years, he is Board Certified, he is Chief of the Mental Hygiene Clinic, V.A. Medical Centre, Gainesville, and he is a clinical professor of psychiatry, University of Florida College of Medicine. His unimpeachable qualifications as an expert psychiatrist were stipulated to by the State (H.T. 216-219).

Dr. Greenberg was qualified to and did express expert opinions. The basis for his opinions were a review of records and other materials, including Exhibit 23, and his own independent evaluation and testing of Tommy Groover, all of which are normally and regularly relied upon by experts in the field when forming and expressing opinions (H.T. 221).

Dr. Greenberg's expert opinion was that Tommy's mental condition was so poor that he could not make day to day decisions, and that if Tommy were to be evaluated for VA assistance, <u>a guardian would have to be appointed to protect his interests</u> (H.T. 231). Dr. Greenberg concluded that Tommy suffered from organic brain damage, secondary to alcohol and drug abuse, was mentally retarded, and was grossly impaired in adaptive functioning (H.T. 228).

Dr. Greenberg explained that Tommy Groover is presently incompetent (as of 1986), and that Tommy's condition was worse at the time of trial (H.T. 231-232). He further explained that Tommy was pliable and easily led (H.T. 231). Dr. Greenberg had no interest in the outcome of these proceedings.

c. Francis Smith, Ph.D.

Dr. Smith is licensed and certified in Speech Pathology and Audiology. As outlined in her vita, she is vastly experienced and qualified in detecting both speech and hearing defects in children and adults, and in ascertaining the cause for the defects. Her qualifications were stipulated to by the State (H.T. 72-73).

Dr. Smith examined Tommy Groover, and detected that his language and mental skills were equivalent to that of a nine (9) year old child (H.T. 76). For Tommy to communicate at all, the person speaking to him must speak at the level of a nine year old. Dr. Smith also noted speech patterns that indicated hearing problems (H.T. 90). This hearing loss was then verified by further testing, which revealed that Tommy had moderate to severe hearing loss at high frequencies in both ears, and more moderate hearing loss at lower frequencies (H.T. 82-84). Her expert opinion was that the hearing/speech impediment was neurologically based, and had been present for at least ten years. She thus agreed with the other experts -- Tommy is brain damaged and mentally retarded (H.T. 91). She had no interest in the outcome of these proceedings.

d. Harry D. Krop, Ph.D.

Dr. Krop is a qualified and experienced clinical

psychologist, specializing in forensics, and has experience in capital cases. He too personally evaluated Tommy Groover, performing neurological and psychological testing, and reviewed data and information about Tommy regularly relied upon by experts in his field. His qualifications were stipulated to by the State (H.T. 162-164).

His findings verified and corroborated the findings of the other experts: Tommy Groover is brain damaged and mentally retarded, has an I.Q. of 65 (H.T. 168), is mentally ill, and has significant deficits. Dr. Krop testified that there were doubts about Mr. Groover's competency. His expert opinion was that Tommy was not a violent person, but was easily led, and suffered from extreme emotional disturbance (H.T. 180). It was also his expert opinion that there was irrefutable evidence of the existence of several statutory and nonstatutory mitigating circumstances, proveable at capital sentencing (H.T. 180-186).

e. Basis for Expert Conclusions

Each of the experts who testified conducted their own examinations and evaluations independent of each other. Each also relied on information provided from, *inter alia*, school records, medical records, jail records, and family statements. Dr. Krop also personally interviewed Tommy's family members.

The background history of Tommy Groover is outlined in the Motion to Vacate Judgment and Sentence (pp. 7-31), and in the Exhibits admitted into evidence. Testimony also provided the salient background information, which was available to reasonably competent counsel at and before the time of trial. In particular, the birth and pre-birth trauma to Tommy Groover was

documented, with Tommy's resulting skull disfigurement. Infant illness and fever, and uncharacteristic slowness and inability to learn was revealed. A day care operator testified that out of all her charges, Tommy was the "slowest", and he could not learn despite all her efforts. He was called "retard" and "retarded fool" by playmates and siblings. He could not learn in school, was socially promoted (i.e., promoted solely because of age), and was required to seek psychiatric treatment during schooling. At nine years of age he began "huffing" organic solvents, at the urging of a much older neighbor. He huffed every day from then on, and it caused obvious gross symptoms and brain damage. He began other heavy drug use by age 13, became addicted to multiple drugs (including PCP), and was lead into this usage by older others. This is just a portion of the information provided.

The evidence presented at the hearing was conclusive and unrebutted with regard to the mental health mitigation available in Mr. Groover's case: Mr. Groover suffered from an extreme mental/emotional disturbance; his capacity to conform his conduct to the requirements of law was substantially impaired; he was dominated by the co-defendant; his level of functioning made his true "age" that of a child's; and myriad nonstatutory mitigating factors applied to Mr. Groover, as the evidence discussed throughout this brief reflects. The evidence, however, was never investigated and consequently the many statutory and nonstatutory mental health mitigating factors available in this case were never developed or presented by trial counsel.

In fact, potent evidence of incompetency, insanity, lack of specific intent, *unknowing* waivers, and copious mitigating

circumstances was available for the asking. The prejudice to Tommy Groover resulting from the jury's ignorance of his mental condition is plain: trial could have been avoided altogether (incompetency/waivers), acquittal could have occurred (lack of intent/insanity), and overwhelming mitigating circumstances could have been presented, circumstances which would have established a substantial, compelling case for life. But for counsel's shortcomings, a different result was more than probable. Confidence in the outcome of these proceedings (in the reliability of Mr. Groover's death sentence) is plainly compromised, as the evidentiary hearing record overwhelmingly demonstrates. The importance of mental health issues in defending a capital case could not be better illustrated than through the prejudice suffered by Mr. Groover.

1. Competency

Although this area has been thoroughly briefed in Claim I, it is still important to understand that if counsel had raised the issue of competency, that would have affected the proceedings. Mental health experts would have been appointed, and, but for other unreasonable omissions by counsel, would have been provided relevant background information about Mr. Groover, and would have conducted appropriate examinations. At least counsel and the court and eventually the jury would have been informed of Mr. Groover's mental health deficiencies, and their effect on the plethora of other mental health legal issues could then have been properly pursued and assessed. The impact of the unreasonable failure to pursue incompetency is thus not restricted to the competency issue: there is a reasonable

probability that a competency determination, by exposing further information, would have affected the outcome of other mental health issues.

2. Specific intent/insanity

Mr. Groover's rampant drug use immediately before and during the crimes, coupled with his preexisting mental problems, presented a reasonable claim that he was unable to form specific intent. As Dr. Merikangas testified:

> I think he was intoxicated with drugs, P.C.P., alcohol to a degree; that he could not form specific intent to carry out an action and that when taken in the context of his mental retardation, his culpable ability to be led and have his will overborne, the term we used when I was a medical consultant at the retardation unit at the University of Pittsburgh became prey to designing others.
>
> He is someone who can be taken advantage of, both in the setting of being in fear of events, threats, but where he was intoxicated to where he would in all likelihood did not know what he was doing at the time of this alleged event. He is taking from the descriptions that I have been given.
>
> The question whether that is mitigating certainly if the man is intoxicated on a psychodelic type drug like P.C.P. that produces a psychoses and that produces a delirium regularly and is under the influence of alcohol. Then I don't think that he is someone who is able to really control his actions.

(H.T. 134-135). As Dr. Merikangas further explained, this would definitely be mitigating evidence even if it did not conclusively establish that Mr. Groover was unable to inform specific intent.

Additionally, Dr. Benjamin Greenberg, expressed his opinion that with Mr. Groover's mental health problems the influence of drugs at the time of the offense could readily have rendered him

legally insane, and certainly affected his ability to form specific intent:

> Scientific literature and research report that PCP abuse is associated with bizarre and unpremeditated violent behavior. PCP-related violent behavior has been observed in a variety of settings from controlled experiments to hospital emergency rooms. Repeated PCP ingestion increases the probability of psychotic reactions in humans and can cause a schizophrenic-like state. PCP causes pronounced alterations in perceptions of reality and disordered thought, which result in a significantly lessened ability to conform conduct to the requirements of the law.

(H. 253-254).

3. Waivers

Mr. Groover waived himself into the electric chair. He withdrew a plea that would have saved his life, and incredibly damaging statements were introduced against him, the significance of which he did not understand when he gave them. See n.7, supra, and accompanying text (discussing Mr. Groover's inability to formulate valid waivers and the applicable case law in that regard).

Tommy Groover needs a guardian. He does not know the president's first name. He cannot abstract to interpret proverbs. He cannot use a ruler. Ninety-nine percent of the population is intellectually superior to him. He does not know what "fabric" or "enormous" mean. His I.Q. is 65, he is brain damaged, he is mentally retarded, and he was sedated with Mellaril while bargaining, confessing, retracting bargains, and making "life and death" decisions. The State simply could not have demonstrated valid waivers on Mr. Groover's part.

Even if Mr. Groover was a defendant who could have knowingly and intelligently entered into the plea agreement and thereby waived his rights (a proposition that is highly doubtful, at best) that Mr. Nichols ineffectively represented Mr. Groover was adequately demonstrated. As Mr. Nichols conceded, if he had gone to trial Mr. Groover's "specific background and health and that sort of thing would have been looked into more carefully" (H.T. 548). In addition to this, Mr. Nichols acknowleged that if he had the information that was uncovered post-conviction (but that he should have uncovered) about Mr. Groover's mental health problems at the time of negotiating with the State, "I think it would have been relevant" (H.T. 548).

At the time of the negotiations with the State, Mr. Nichols had been representing Mr. Groover for approximately three months, however he had never asked Mr. Groover any questions which would relate to any mental health problems and which Mr. Nichols admitted he would have had to have asked eventually. Both Mr. Burr and Mr. White testified unequivocally that this threshold investigation not only has to be done but must be done immediately upon entering the case. Mr. Nichols did not do that (indeed he admittedly did nothing in that regard although he agreed he would have done it "later"), and the prejudice to Mr. Groover's case was devastating.

Mr. Nichols never investigated the substantial handicaps that Mr. Groover was dealing with at the time of his life or death decision-making. He never knew that these handicaps were aggravated by the State's dispensing of large dosages of anti-pychotic drugs at the time (because he never checked the records

and never even attended his client's deposition). If Mr. Nichols had known his client's deficits, as any reasonably competent counsel would have, he would have approached this life or death decision-making process differently. However, not only did this lawyer fail in the overarching duty to investigate, see Kimmelman v. Morrison, supra, he actively gave his client patently erroneous advice with regard to plea bargaining in a capital case (see supra).

The testimony of Mr. Nichols, Mr. Greene, and Mr. Arnold in particular underline the scary reality. Instead of having the "guiding hand of counsel at every step of the proceedings against him," Powell v. Alabama, supra, Mr. Groover literally made life and death decisions without the assistance of or even presence of counsel. He made those decisions during discussions with his protagonist/antagonist, Mr. Greene. The statements introduced against Mr. Groover at trial arose from the grossly mismatched battle of intellect between Mr. Groover and Mr. Greene.

After Mr. Groover entered his plea on May 18, 1982, Mr. Nichols in effect abandoned his client. He did this not knowing that Mr. Groover's mental handicaps made it impossible for Mr. Groover to knowing and intelligently deal with officials of the State who were literate, intelligent, and trained attorneys. The lawyer was not present during any of the interviews or depositions between his handicapped client and the prosecutors and police. Mr. Groover was placed in a situation without the assistance of counsel, totally unaware of the fact that the State could not lose. He had already incriminated himself -- the State would come out ahead whether he complied with the agreement or

not. Mr. Groover lost his life sentence because Mr. Nichols failed to provide him the protections to which even an intelligent and educated layman is entitled. In the words of the United States Supreme Court: "If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." Powell, supra, 287 U.S at 69.

4. Mitigating Circumstances

The jury never heard about the "real" Mr. Groover. Because of the ineffectiveness of counsel, they were never presented with evidence that was necessary for them to make a "reasoned moral response" to Mr. Groover's background, character, and offense. Penry v. Lynaugh, 45 Cr. L. 3588, 3195 (1989). The jury never received any of the ample evidence of Mr. Groover's grossly deficient mental health, and the effects of these deficits on his behavior at the time of the offense. In Penry, the law kept this type of information from the jury. In Mr. Groover's case it was his counsels' omissions. The result, however, is the same: Mr. Groover's death sentence violates the eighth and fourteenth amendments; it is neither individualized, nor reliable. See Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986); Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985).

> The key aspect of the penalty trial is that the sentence be individualized, focusing on the characteristics of the individual. Gregg v. Georgia, 428 U.S. 153 (1976). Here the jurors were [not permitted to] mak[e] such an individualized determination.

Thomas v. Kemp, 796 F.2d at 1325. The same is true of Mr. Groover's case. No one took note of anything concerning the character, background, and make-up of the offender and

circumstances of the offense, Gregg v. Georgia, which mitigated against death at the time of the original proceedings.

The mental health experts and lay witnesses who testifed at the evidentiary hearing established that there was an enormous amount of mental health and other mitigating evidence that should have been investigated, developed, and presented. Dr. Krop, for example, cogently summarized some of the available statutory and nonstatutory mitigating factors:

> Even if sane at the time of the offense, Mr. Groover was acting under extreme duress and under the substantial domination of others involved. It is also my opinion that Mr. Groover was under the influence of extreme emotional disturbance in that he was heavily intoxicated and feared for is life. He was also functioning with a mental age equivalent of a 10-year old individual compared to a person with average intelligence. Mr. Groover's background also reveals that at least the following nonstatutory mitigating facts should be considered in understanding his behavior at the time of the offense:
>
> 1. Mental retardation
> 2. Organic brain damage
> 3. Drug and alcohol abuse
> 4. Specific learning disability
> 5. Sensory deficit (hearing loss and speech impediment)
> 6. Lack of history of violence
> 7. Physical abuse by parents
> 8. Sexual abuse by nonfamily adult
> 9. Impaired self-concept due to academic and vocational failures, inability to read, and peer ridicule.

(M. 204-05; see also H.T. 180-186). Because of the complete lack of psychiatric/psychological assistance, none of the readily available and clearly relevant statutory and nonstatutory mitigating circumstances were provided to Mr. Groover's jury.

C. CONCLUSION

Mr. Groover has shown that because of the ineffectiveness of his pretrial and then his trial counsel his case was prejudiced at virtually every stage of the proceedings. Without any understanding of Mr. Groover's mental health problems, and without any of the requisite investigation, the attorneys took actions which were devastating to Mr. Groover's case. Mr. Groover has satisfied both prongs of the Strickland test. Counsels' unprofessional errors in this case surely "undermine confidence in the outcome." Strickland, supra, 104 S. Ct. at 2068.

CLAIM III

THE APPELLANT'S RIGHT TO AN INDEPENDENT FACT FINDING, REASONED JUDGMENT, AND FULL AND FAIR POST-CONVICTION RELIEF WERE DENIED, CONTRARY TO HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

On June 1, 1986, the circuit court summarily denied Mr. Groover's motion to vacate judgment and sentence without an evidentiary hearing. On appeal from that denial, this Court reversed and remanded with instructions that Mr. Groover be granted an evidentiary hearing. Groover v. State, 489 So. 2d 15, 18 (Fla. 1986). The circuit court's true feelings on the case were suggested in the first page of its order denying the motion:

> On January 8, 1983, the defendant was convicted of:

> First Degree Murder of
> Richard Allen Padgett, Age 23;
>
> First Degree Murder of
> Nancy Lee Sheppard, Age 17; and
>
> First Degree Murder of
> Jody Ann Dalton, Age 21.
>
> On February 18, 1983, I sentenced the defendant to death. <u>Now, approximately four years later, the defendant is back before this Court</u>.

(H. 112). More telling than the language alone is the fact that the court never entered the order denying the motion until over twenty-four months after the evidentiary hearing: twenty-four months to enter an order which then went on to describe the claims presented as "frivolous." Certainly if the claims were frivilous, it would not have taken over two years and over 100 pages to say so. The claims were not and are not frivilous. To the contrary, they are more than sufficient to establish Mr. Groover's entitlement to relief. Mr. Groover, however, was denied the opportunity to have those claims heard by a fair factfinder.

Throughout the over 100 page order, the circuit court cites extensively from the testimony of witnesses, with long and detailed blocked quotes. Those pages of long quotes are almost exclusively from the State's cross-examination of defense witnesses, and state direct examination of State witnesses. Needless to say, extensive quotes from defense witnesses, and from defense cross-examination of State witnesses, would present quite a different picture. However, even a full (i.e., fair) reading of the text surrounding what the lower court cited reveals that that court chose to ignore everything except those

bits and pieces of evidence which supported the State's position. The court justified this procedure to "spare the review courts the time and tedium of searching through" the record. Mr. Groover prays that this Honorable Court review the full record, for it shows the gross errors in the lower court's disposition of the claims.

The lower court was not only guilty of grossly selective review, but quoted testimony in support of its findings which it had ruled would be disregarded and inadmissible. For example, the court quoted portions of Mr. Arnold's testimony:

> A. Yes, more selective I would say than anything else.
>
> Q. What do you mean by that?
>
> A. Well, my impression of him when he would be answering questions is that when he wanted to go into detail to help his own position he would do so, however, when he did not want to go into detail and it might be detrimental to him he would say I was wasted, man, I don't remember that, and the impression I was getting is that more was a cop out to protect himself that the actuality of not remembering.

(H. 184). But failed to quote what immediately followed:

> MR. OLIVE: I object to the impression and move to strike, Your Honor.
>
> THE COURT: All right. I will disregard the impression and consider the answers he has given.

(H.T.573). Again by way of example we can look at the lower court's quoting of Mr. Greene:

> A. Certainly. There was no question that his motivation was to minimize his own involvement and to portray Mr. Parker, Tinker Parker was being someone he was very afraid of and who was coercing him or making him as it were do his bidding, and he was very

> careful in not only his dealings with me but
> in his trial testimony.

(H. 173). The court failed to quote the entire portion of this colloquy:

> MR. OLIVE: I object and move to strike that what he recognized and what he intended to make sure of.
>
> THE COURT: All alright. I think that the objection is well taken.

(H.T. 497)

In an effort to reach at all straws in order to justify its conclusion that relief should be denied, the lower court ignored even its own rulings and quoted portions of the testimony it had ruled was not admissible. This is far from a full and fair disposition. The trial judge's bias against Mr. Groover and his counsel speaks for itself, and leaps out from even a cursory review of the lower court's order and the record now before this Court.

Finally, the most troubling aspect of the order is that it was in large part written by the State. Any review of the State's post-hearing memorandum will establish that almost all of the trial court's order was lifted from what the State wrote. The only thing the trial judge added were his grossly selective transcript quotes, and only the trial judge got a transcript -- Mr. Groover's counsel was never provided with one, although one was requested (and indeed, Mr. Groover's motion for rehearing was in no small part a request that the judge give to counsel the transcript that the court had, so that petitioner's counsel could properly point out to the court the plain errors it had made). No notice was provided that such procedures would be followed.

No notice was provided that the lower court was considering allocating to the State the responsibility of rendering findings of fact and conclusions of law. Counsel therefore could not object to these procedures at the time of the hearing. This was all patently unfair.

Examples of the lower court's abdication of its review function to the State are abundant. One such example is Section XIII of the order, entitled "State's Evidence is Overwhelming" (H. 200), a section which is directly lifted from the the State's memorandum (H. 104) -- word for word, type style highlighting, and footnotes included. The same is true for the section entitled "Discussion of the Law" (compare H. 201-209 and H. 104-110). And not surprisingly, the court's two page conclusion is exactly the same as the State's.

While it may be assumed that the lower court believed the Motion to Vacate should be denied, the reasons provided for that denial can by no means be fairly said to have been independent court findings. When a court is "required" to make findings of fact, "the findings must be based on something more than a one-sided presentation of the evidence... [and] require the exercise by an impartial tribunal of its function of weighing and appraising evidence offered, not by one party to the controversy, but by both." Simms v. Greene, 161 F.2d 87, 89 (3rd Cir. 1947). A death-sentenced inmate, deserves at least as much:

> [T]he reviewing court deserved the assurance [given by even-handed consideration of the evidence of both parties] that the trial court has come to grips with apparently irreconciliable conflicts in the evidence... and has distilled therefrom true facts in the crucible of his conscience.

E.E.O.C. v. Federal Reserve Board of Richmond, 698 F.2d 633, 640-41 (4th Cir. 1983), quoting Golf City, Inc. v. Sporting Goods, Inc., 555 F.2d 426, 435 (5th Cir. 1977). The practice is no less odious when the court recites that it "agrees" with one side's proposed findings, while the lower court here did much worse than that: it never informed Mr. Groover's counsel that it was considering accepting solely the State's submissions, verbatim. The sour taste remains in this case that the lower court's order was all but "written by the prevailing party to a bitter dispute." Amstar Corp. v. Domino's Pizza, Inc., 615 F.2d 252, 258 (5th Cir. 1980). See also Shaw v. Martin, 733 F.2d 304, 309 n.7 94th Cir. 1984).

This Court having instructed the circuit court that Mr. Groover was entitled to an evidentiary hearing on two of the issues presented in the Rule 3.850 motion, Mr. Groover was entitled to all that due process allows -- a full and fair hearing on his claims. Cf. Holland v. State, 503 So. 2d 1250 (Fla. 1987). Mr. Groover's due process rights to a full and fair hearing were abrogated by the trial court's adoption of the State's factually and legally erroneous submissions.

CONCLUSION

Mr. Groover has established his entitlement to Rule 3.850 relief. The lower court's disposition of the claims presented was permeated with legal and factual error, and was an example of how the significant life and death issues involved in capital cases should not be "disposed of." The relief sought by Mr. Groover nevertheless remains appropriate. This Honorable Court

should correct the trial court's errors, and should grant Mr. Groover the relief to which he is plainly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished by first class, U.S. Mail, postage prepaid, to Mark Menser, Assistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, 111-29 North Magnolia Drive, Tallahassee, Florida 32301, this 30th day of August, 1989.

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