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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Mr. Groover filed an initial brief on appeal that addressed three claims. The State filed an answer brief filled with misstatements of fact and law and vicious but unsupported attacks of the witnesses presented by Mr. Groover before the Rule 3.850 trial court. To prevent distortion of the record, Mr. Groover then filed a motion to strike the State's misleading, inaccurate and unprofessional answer brief. The motion was denied. Mr. Groover does not waive that motion by filing this reply, but rather reasserts its contents in conjunction with this reply brief. Furthermore, although Mr. Groover does not wish to duplicate the contents of that motion and realizes that the purpose of a reply brief is to rebut argument, some of the blatant misstatements and factual errors contained in the State's brief demand correction.

Mr. Groover notes at the outset that the essence of the State's brief is its unwarranted and unsupported vituperation of the witnesses called by the defense below. The legal arguments of the brief are on the whole misplaced and unconvincing. The distortion of the record so obvious in the State's statement of facts also prevails in the State's arguments. The legal reasoning, however, is flawed: Mr. Groover demonstrated at the evidentiary hearing that he is entitled to relief as a matter of law and fact. The errors herein at issue undermine confidence in the outcome of the trial and sentencing and undermine the reliability of the proceedings, reliability which is essential and important in capital cases.

Appellant shall attempt only to address the most blatant ones in the body of this brief, in order to keep this reply brief to the point of what is actually at issue in this appeal. With respect to Claim III, Mr. Groover relies on the discussion presented in his initial brief.

Mr. Groover notes that the State's Response to Motion to Strike uses the pronouns "my" and "I", demonstrating that counsel for the State has allowed this matter to degenerate into a personal feud. This matter is of course a serious legal proceeding deserving of the highest professional conduct. Given the page limitation of this brief, Mr. Groover cannot address all of the misstatements contained in the State's brief. Mr. Groover respectfully urges this Court to rely on the record itself.

Citations in this reply 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 proceedings shall be referred to as "RT. ___." The record on appeal from the summary denied 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 shall be self-explanatory or otherwise explained herein.

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ARGUMENT

CLAIM I

MR. GROOVER'S IMPAIRMENTS AND COUNSEL'S FAILURE TO INVESTIGATE MENTAL HEALTH UNDERMINE CONFIDENCE IN THE PROCEEDINGS' RESULTS.

The failure to resolve questions of competency at the initial proceedings violates due process. Pate v. Robinson, 383 U.S. 375 (1966); Hill v. State, 473 So.2d 1253, 1260 (Fla. 1985). The State has failed to address the proper standard of review on the competency question. Relief is required when competency was not addressed because of counsel's failure to investigate the issue if there is a reasonable possibility that a psychological evaluation would have revealed that the defendant was incompetent to stand trial. Futch v. Dugger, 874 F.2d 1483 (11th Cir. 1989).

Mr. Groover richly made this showing. He established through qualified expert testimony and lay and documentary evidence that he was brain damaged, mentally retarded, and improperly medicated by the State, and that there is a reasonable probability that he was incompetent at the original proceedings. The State offered nothing to controvert this evidence, evidence based upon professional testing and evaluations. Indeed, the State's witnesses themselves supported Mr. Groover's claim.

Dr. Smith, an audiologist and speech language pathologist, testified that Mr. Groover suffers from hearing impairment and generalized brain damage. The hearing loss was not solely from auditory nerve damage, but was the result of organic brain impairment. Even the trial record supports this conclusion (See, e.g., RT. 1314)(Prosecutor to Defendant: "You keep asking the questions I ask you, are you hearing me all right?").

Dr. Merikangas, a psychiatrist and neurologist, also discussed Mr. Groover's brain damage. He reviewed extensive records and conducted a mental and neurological examination. Dr. Merikangas explained that the brain damage was present since early development, but that the long term abuse of drugs, and the "huffing" of organic solvents, contributed to the impairment.

Dr. Greenberg, a psychologist with unimpeachable qualifications, determined that Mr. Groover suffered from brain damage. His account was also based upon a thorough review of records and extensive testing. Dr. Greenberg testified, in detail, concerning Mr. Groover had organic brain impairment (H.T. 228).[1]

Dr. Krop, a clinical psychologist, also reviewed the records and evaluated and tested Mr. Groover. His findings were consistent with those of Drs. Smith, Merikangas, and Greenberg: Mr. Groover suffered from organic brain damage. This conclusion was consistent with injuries to Mr. Groover's mother during her pregnancy, a severe fever that Mr. Groover suffered from during his childhood, and his long history of drug and alcohol abuse.[2] The finding of substantial brain damage was absolutely unrebutted.

Mr. Groover is also mentally retarded (See, e.g., H.T. 168). As Dr. Smith explained, he functions at the level of a nine year old. Mr. Groover's IQ is 60, which as Kr. Krop testified is in

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[1]Appellant shall not take the Court's time, given page limitations, in an attempt to straighten out the State's various inaccuracies concerning the record.

[2]Dr. Krop's neuropsychological testing included the Bender-Gestault, auditory memory examination, Weschsler Memory Test, finger tapping, Wechsler Adult Intelligence Scale Revised, and the Aphasia screening examination. The tests establish Mr. Groover was brain damaged which was consistent with his history (H.T. 171).

"essentially the lowest range of mental retardation. This would be about the lowest one, one-and-a-half percent of total population if he were compared to other individuals." (H.T. 168). All the experts found that Mr. Groover was mentally retarded.[3]

The overwhelming evidence concerning Mr. Groover's mental retardation was unchallenged by the State. There was no rebuttal of the evidence that Mr. Groover was improperly medicated with psychotropic drugs by the State throughout the pretrial and trial process. The State's records prove that Mr. Groover received large dosages of Mellaril, an anti-psychotic drug.[4]

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[3]As Dr. Merikangas explained, Mr. Groover "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 really incapable of deciding anything of major importance" (H.T. 128). Dr. Greenberg explained that Mr. Groover suffered from mild retardation and that it was related to his long term organic impairment (H.T. 228).

Dr. Smith's findings were also consistent with those of Drs. Krop, Merikangas, and Greenberg: that Mr. Groover was mentally retarded (H.T. 91). As Dr. Smith indicated, one of the first things she must do when examining a patient is to evaluate their level of intellectual functioning--their language level (H.T. 75-76). She is trained to gauge mental retardation and does so on a routine basis. Her evaluation of Mr. Groover found him to be functioning at the level of a nine-year-old (H.T. 76).

[4]Dr. Merikangas explained that the dosages being given Mr. Groover were appropriate for someone who was actively psychotic (H.T. 126). Dr. Krop indicated that it is "unusual for a person who is not psychotic to be put in such high doses of Mellaril which has to cause some type of impairment of functioning" (H.T. 189). Likewise, Dr. Greenberg indicated that Mellaril can have disorienting effects (H.T. 234). He further explained that Mellaril sometimes has a paradoxical effect on the patient. Instead of calming them down, it excites them and makes them agitated (H.T. 234). There is no question that Mr. Groover became excited and agitated during this period. As a result, he effectively waived himself into the electric chair.

Testimony from the State's own experts concerning the amounts of Mellaril given to Mr. Groover supports many of these findings. Dr. Miller admitted that Mellaril could generate incompetent

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Not only was the evidence concerning the improper level of medication confirmed by Dr. Miller, who was called by the State, Dr. Innocent, who gave Mr. Groover the drugs, testified in such a manner as to all but acknowledge the impropriety. The essence of Dr. Innocent's testimony on the medication provided during cross-examination appears at H.T. 670-76. Given page limitations, those portions of the record are appended hereto for the Court's review.

Dr. Innocent testified that he was not a certified psychiatrist. He testified that based on a 15 minute interview, at which he obtained limited and superficial information, he determined that Mr. Groover was in need of a high dosage of a tremendously strong drug because of problems "sleeping". As his testimony reflects, Dr. Innocent's qualifications and expertise leave quite a great deal to be desired. That this was professionally improper medication simply cannot be disputed.

Ample evidence was adduced at the evidentiary hearing demonstrating that Mr. Groover was brain damaged, mentally retarded, hard of hearing and improperly drugged with excessive amounts of powerful, mind-affecting drugs. All of this <u>uncontroverted evidence</u> establishes that if a proper mental health

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disturbances in agitated patients and noted that drug users might be able to tolerate heavier doses, <u>all other things being equal</u> (H.T. 619-20). All other things were not equal in Mr. Groover's case. Mr. Groover was burdened not only with a large dosage of this powerful drug but also by his mental retardation and brain damage. Dr. Miller also recognized that an appropriate starting dose of Mellaril would be 50-100 milligrams three times a day (H.T. 625), much less than the 300-500 milligrams a day that Mr. Groover received. He recognized that Mellaril can have profound and damaging side effects (H.T. 624) and that it could have paradoxical effects on brain damaged patients (H.T. 626).

evaluation had been conducted, there exists "at least a reasonable probability" that a "psychological evaluation would have revealed that [Mr. Groover] was incompetent to stand trial." Futch, 847 F.2d at 1487; Hill, supra. The proper standard of review, was never applied by the lower court nor discussed by the State.

Based on Mr. Groover's brain damage, his mental retardation, his use of Toluene and other organic solvents, and the dosages of mellaril and other drugs given to him, 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). Mr. Groover's mental retardation and psychiatric impairments, coupled with the circumstances of bargaining for his life while being (improperly) "sedated" with such powerful, mind-altering medication (e.g., Mellaril), were obvious indicia of incompetency at the time of the trial-level proceedings (H.T. 144). Dr. Greenberg explained 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: "If he were a patient or a client of the Veteran's Administration we would appoint a guardian" (H.T. 231-32), and discussed Mr. Groover's lack of competency in 1982 and the indicia of incompetency in this case. 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). Dr. Krop testified that it was difficult to say that Mr. Groover was competent at the time of trial. Dr. Krop noted that Mr. Groover's retardation, drug abuse,

organic brain damage and medication with Mellaril all indicated he would have been at most marginally competent, and would have had trouble understanding complex statements (H.T. 188-89).

The evidence presented at the hearing established that there was a reasonable probability that a psychological evaluation would have revealed that Mr. Groover was likely not competent at the time of the original trial proceedings, and the State's legal arguments on these issues are misplaced and inaccurate. Mr. Groover is only required to show a reasonable possibility of incompetence. Hill, 473 So.2d at 1260; Futch, 874 F.2d at 1483. As even case law cited by the State holds, the defendant is required to establish a "bona fide doubt" on the question of competency. Strickland v. Francis, 738 F.2d 1542 (11th Cir. 1984). Relief is required if there exists "at least a reasonable possibility" that a "psychological evaluation would have revealed that he was incompetent to stand trial." Futch, supra at 1487; Hill, supra at 1253. Mr. Groover has met that burden.[5]

Mr. White and Mr. Burr testified in accordance with the standards of Strickland v. Washington, 466 U.S. 688 (1984). To establish ineffective assistance regarding competency a defendant need not prove incompetence. The defendant must establish a reasonable possibility that a mental health evaluation would have found the defendant incompetent. Futch, supra at 1487. Here as in

[5]Interestingly, in most of the cases cited by the State the defense attorney had obtained expert evaluations pretrial, e.g., Bush v. Wainwright, 505 So.2d 409 (Fla. 1987); Card v. State, 497 So.2d 1169 (Fla. 1986), or had investigated previous mental evaluations, Foster v. Dugger, 823 F.2d 402 (11th Cir. 1989); Foster v. Strickland, 707 F.2d 1339 (11th Cir. 1983). In contrast, no one had Mr. Groover evaluated at trial in this case.

Futch, "[d]efense counsel did have a duty to investigate petitioner's competency." Id. The record shows counsel failed to fulfill either part of the duty to investigate: they did not investigate Mr. Groover's mental health and had no strategic reason not to. See Futch, supra; Strickland, 466 U.S. at 691.

Mr. Burr testified about the duty of counsel to investigate the client's mental health (H.T. 254-56). He specifically addressed the reasonableness of the trial attorneys' conduct, and testified that it was unreasonable not to pursue the "red flags" of Mr. Groover's diminished mental health in this case, particularly in light of the important and well-recognized legal issues relating to mental health in Florida capital cases (H.T. 281).[6]

The inability of a layman to make mental health determinations and the vital importance of these issues in a capital case are two of the reasons why Mr. Burr and Mr. White testified that a reasonable attorney would at least investigate mental health issues in capital cases (H.T. 66; 281). Some

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[6]Mr. Burr also pointed out a key principle also recognized by Mr. White and, more significantly, by this Court. An attorney simply is not trained to decide if a defendant's memory, thought processes and rationality are impaired. Investigation and expert evaluation are necessary to determine if a defendant's memory loss is the result of impairment (H.T. 285). Mr. White echoed this principle (H.T. 51). He explained that a client may appear normal although his conduct at the time of the offense was not normal. Expert evaluation is necessary to determine what may lay beneath the "normal" appearance of a client (H.T. 51-52). The Eleventh Circuit has also recognized this principle, in a case also holding that clear and overwhelming expert testimony cannot be ignored in favor of layman observations. Strickland v. Francis, 738 F.2d 1542 (11th Cir. 1984). Interestingly, this is what the State has asked the Court to do here. The State wants this Court to ignore the clear and convincing expert testimony that Mr. Groover was not competent in favor of the testimony of lay testimony that he seemed okay. As Dr. Merikangas noted, there was a "vacuum of information behind this normal appearing person" (H.T. 136).

investigation must be conducted before any decision is made. Here, with obvious "red flags" of mental impairments on Mr. Groover's part, counsel did nothing. There was no investigation, not even a preliminary investigation, and there was no tactical or strategic reason for not investigating. The question here is whether counsel's conduct was reasonably competent performance in a capital case in Florida. Mr. Burr and Mr. White testified that a reasonable attorney would have investigated Mr. Groover's mental health and sought an expert evaluation in this capital case.[7]

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[7]The remainder of the State's argument is similarly misdirected. The State mistates the rulings of the Foster decisions. The Foster cases cited by the State (which, incidentally, are two opinions at different stages of the same underlying case) hold that an attorney does have a duty to make a reasonable investigation or a reasonable decision not to investigate the defendant's competence. Foster v. Dugger, 823 F.2d 402, 404-405 (11th Cir. 1987); Foster v. Strickland. 707 F.2d 1339, 1342-43 (11th Cir. 1983). "[C]ounsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. The Foster decisions differ from Mr. Groover's case because those cases found that counsel adequately fulfilled that duty by talking to the family, talking to the psychiatrist who treated the defendant, and reviewing the reports of three court-appointed psychiatrists who evaluated that defendant. The attorneys did none of this in Mr. Groover's case. No evaluation was even requested--one should have been, for a reasonable probability that such an evaluation would have reflected Mr. Groover's impairments and lack of competency certainly exists here. See Futch, supra.

The Foster v. Dugger court further found that the trial attorney formed his trial strategy only after frequent consultation with his client and informed mental health evaluations. Foster v. Dugger, 823 F.2d at 408. Mr. Groover's trial counsel, on the other hand, formed strategy without any of the necessary reasonable investigation. The "strategy" was made on the basis of the misguided wishes of a mentally retarded, brain damaged, and mentally ill defendant (H.T. 516-26). What counsel pursued required that Mr. Groover be a very credible and competent witness, making it all the more important to ascertain his mental state. Mr. Groover also was required to deal directly with the prosecutor, with devastating consequences.

CLAIM II

MR. GROOVER WAS DENIED A COMPETENT MENTAL HEALTH EXAMINATION . . . AND DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO REQUEST A PROPER MENTAL HEALTH EVALUATION.

The State in its answer brief shows its continued misunderstanding of this claim. This claim asserts denials of Mr. Groover's right to professionally adequate mental health assistance, and his attorneys' ineffectiveness in failing to investigate Mr. Groover's mental health or obtain such expert assistance. The law gave counsel the obligation in this capital case to conduct an investigation of Mr. Groover's background; such an investigation would have demonstrated the need for a mental health evaluation; and such an evaluation would have disclosed that Mr. Groover was brain damaged, mentally retarded, mentally altered by his preadolescent misuse of organic solvents and chronic drug abuse, and improperly medicated during critical stages of his criminal case. Counsel, without a tactic, did not investigate. As a result, substantial guilt-innocence, and particularly penalty phase defenses were lost.

The State fails to address anything other than competency or sanity. There is no mention of issues such as lack of specific intent, unknowing waiver of rights, and statutory and nonstatutory mitigating evidence, all of which affect a capital case. By omission, the State virtually concedes that the failure of trial counsel to obtain a mental health examination with regard to the other mental health issues was in fact ineffective assistance of counsel. As Mr. Burr cogently explained, counsel "has a minimal duty to obtain threshold information ... that would indicate

whether further information is necessary," in determining if there are mental health issues in the case. Contrary to the State's assertions, Mr. Burr never testified that counsel should prepare a mental health defense in every single case.[8]

According to the State, counsel had no duty to investigate or "put forward conflicting evidence." But the State overlooks the well established principle that counsel must investigate and make informed decisions, before making any "tactical" decision:

> 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 v. Washington, 446 U.S. 668, 680 (1984)(emphasis added); see also Futch v. Dugger, 874 F.2d 1483 (11th Cir. 1989); Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988). And as this Court

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[8]Mr. Burr explained that the threshold inquiry should be made before counsel decides not to pursue further investigation. The threshold inquiry involves five areas: (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 and 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). As Mr. Burr explained, once this threshold inquiry is made, only then can counsel make strategic determinations that there were no plausible mental health issues. That is the "theory" that Mr. Burr testified about. Even the cases cited by the State acknowledge that this "theory", as discussed by Mr. Burr, is the law. Foster v. Strickland, 707 F.2d 1343 (11th Cir. 1983); Foster v. Dugger, 823 F. 2d 402 (11th Cir. 1987). In both Foster opinions, the courts recognized trial counsel's duty to conduct a threshold investigation, the very duty Mr. Groover has proved that his counsel failed to carry out. The State's attempt to misstate Mr. Groover's argument and to personally attack Mr. Burr shows the lack of any real response to this claim.

has recently noted in Stevens v. State, 552 So.2d 1082, 1087 (Fla. 1989), a strategic decision requires a knowledgeable choice:

> It is apparent here that trial counsel's failure to investigate and present mitigating evidence was not the result of an informed decision because trial counsel was unaware the evidence existed. In this case, it is clear that the failure to investigate Stevens' background, the failure to present mitigating evidence during the penalty phase, the failure to argue on Stevens' behalf, and the failure to correct the errors and misstatements made by the state was not the result of a reasoned professional judgment.

As in Stevens, trial counsel's failures here cannot be excused by any "informed" tactic or strategy. No investigation was done.

Indeed, Mr. Nichols himself acknowledged the need for investigation which was never undertaken here (See H.T. 549) ("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..."). Mr. Nichols acknowledged that he would have done this if he had stayed on the case. He should have done it initially. In place of reasonable investigation, he gave Mr. Groover this advice:

> 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).[9]

As to the prejudice prong of the Strickland test, the State's response is that Mr. Groover is not incompetent. This again shows the State's inability to comprehend the crux of this claim.

Organic mental health problems and mental retardation are significant factors: They are important for numerous reasons relative to both the guilt-innocence and penalty phases of a capital trial. Mr. Nichols agreed with this, as previously discussed, and so did Mr. Shore. He testified:

> 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 If I knew he was brain damaged would it be helpful? It would be information I would like to have, yes.
> Q [If] you 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?
> A Yes.

(H.T. 446-47)(emphasis added). Both trial counsel acknowledged facts which in this case establish prejudice. Mr. Groover met his burden.[10]

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[9]As the State sarcastically notes: "An 'incompetent' Groover could not reap the strategic benefits of the plea." (Answer Brief at 24). The State's answer shows a total lack of an understanding of the role of defense counsel and illustrates that Mr. Groover was surely prejudiced by counsel's deficient performance.

[10]The State also incorrectly argues that Mr. Groover had to demonstrate his incompetence to the trial court, pointing to Ake v. Oklahoma, 470 U.S. 68 (1985). Of course, in Florida, the defense is entitled to a confidential mental health expert to assist the defense. Counsel did not even make this request. Ake addressed the trial court's obligation to provide expert mental health assistance on defendant's showing that insanity would be a significant factor at trial. However, in Ake the error was the court's denial of an evaluation that defense counsel had

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As the State acknowledges, an "incompetent" Mr. Groover could not reap the strategic benefits of the plea. In fact Mr. Groover did not benefit from the plea he entered. Instead, his mental infirmities and the faulty advice he received led him into unwise discussions with the prosecutor and ultimately he confessed to not only the murders he was originally charged with but yet another murder. Then he irrationally chose to withdraw from the plea agreement. An awareness of Mr. Groover's mental limitations and an expert evaluation would have helped counsel guide Mr. Groover through all these crucial stages of the proceedings. Without any knowledge of Mr. Groover's mental condition, his attorneys could not, did not, give him meaningful advice and representation. To the contrary, Mr. Groover was left alone, without counsel present, much of the time he dealt with the prosecutor.

Mr. Groover has shown that his attorneys' representation was professionally unreasonable, and that this unreasonable representation prejudiced him at trial, and particularly at sentencing, where a wealth of substantial mental health statutory and nonstatutory mitigation which should have been but was not heard by the jury, because of counsels' deficient performance.

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requested. Here the issue is defense counsel's failure to investigate or request such an evaluation in the first instance. Had defense counsel investigated and made the request, it could not have been denied. This failure has no relation to any asserted, but denied, need for Mr. Groover to demonstrate to the trial court that he was incompetent. Defense counsel's failures are significant because they violated the principle of Ake. The showing could and should have been made in this case. Expert assistance should have been requested. Counsels' failures to do so were plainly prejudicially deficient performance.

The lack of investigation of Mr. Groover's attorneys undermined confidence in the outcome of the proceedings in this case, from the original plea, resulting confession, and plea withdrawal, to the trial and sentencing. Because of a total neglect of Mr. Groover's mental condition his attorneys never learned about his impairments. They never asked for the mental health evaluation to which he was entitled. They allowed this brain damaged, mentally retarded, and mentally ill man to waive rights, enter a plea arrangement, deal with the prosecutor alone, and withdraw his plea, all with virtually no representation.

But the damage continued to grow. Without knowledge of Mr. Groover's drug abuse, retardation and brain damage, counsel were unwittingly hampered in their choice and implementation of any trial strategy. And finally, counsel's ignorance made Mr. Groover's sentencing basically worthless: a wealth of statutory and nonstatutory mental health evidence was never presented to the jury or the judge, and a reliable and individualized capital sentencing determination did not occur. As Mr. Nichols noted, he would have eventually obtained this mental health information if he had gone to trial. It should have been obtained. The jury never heard anything about the readily available and substantial mental health mitigation which existed in this case. Confidence in the outcome of the penalty proceedings is undermined here, as it was in State v. Michael, 530 So.2d 929 (Fla. 1988).

If counsel had only taken the first step, the necessary threshold inquiry, the unfortunate course of these proceedings would have been altered. The record demonstrates that an inquiry into Mr. Groover's mental condition and a proper evaluation would

have revealed the many infirmities from which he suffered.

The abundant evidence Mr. Groover presented at hearing, both expert testimony and supporting lay testimony, establishes the prejudice resulting from his attorneys' ineffective representation. Mr. Groover suffers from brain damage, mental retardation, drug and solvent abuse, mental illness, and, at the time of his trial he was medicated with a powerful drug. No one heard about this originally. The trial and sentencing were fundamentally flawed. Relief is proper.

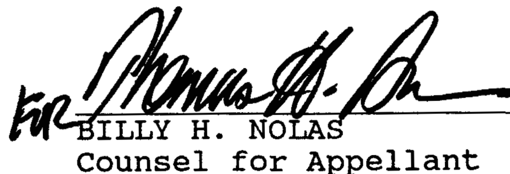
CONCLUSION

Mr. Groover established his right to Rule 3.850 relief. The State's answer brief consists of personal attacks on witnesses and an inaccurate account of the record at worst, and illogical and misplaced legal arguments at best. The fact remains, however, that there is no proper factual or legal basis for denying relief in this case. This Honorable Court should correct the trial court's errors and should grant Rule 3.850 relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Mark Menser, Assistant Attorney General, 111-29 North Magnolia Drive, Tallahassee, Florida 32301, this 20TH day of February, 1990.

Respectfully submitted,



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