IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,367

GREGORY MILLS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR
SEMINOLE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This case involves the appeal of a trial court's denial of Rule 3.850 relief in a capital post-conviction proceeding. The evidence presented at the hearing included testimonial and documentary evidence. This brief discusses that evidence. The post-conviction record is cited as "R.___" with the appropriate page number following thereafter. The direct appeal record is cited as "ROA ___" with the appropriate page number following thereafter. All other citations are self-explanatory or are otherwise explained.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action will determine whether Mr. Mills, whose jurors voted for life, lives or dies. This Court has traditionally allowed oral argument in capital cases. A full opportunity to air the issues through oral argument is appropriate in this case, given the significance of the issues involved and the stakes at issue, and Mr. Mills through counsel, accordingly respectfully requests that the Court permit oral argument.

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STATEMENT OF THE CASE

Mr. Mills was convicted of first-degree murder and related offenses in the Circuit Court of the Eighteenth Judicial Circuit, Seminole County, Florida. Mr. Mills' jury recommended he be sentenced to life imprisonment, but the judge overrode that recommendation and imposed death. On direct appeal, this Court struck three[1] of the six aggravating factors which the trial court had found. The offense was committed during a burglary, when the decedent surprised the burglar. The decedent died as a result of one gunshot. Codefendant Ashley "received immunity from prosecution for this crime and other crimes in exchange for his testimony" against Mr. Mills. Mills, 476 So. 2d at 180 (McDonald, J., dissenting as to sentence); see also id. at 176 (majority opinion).

Affirming the trial court's ruling that no mitigating circumstances had been established, the Court upheld the override. See Mills v. State, 476 So. 2d at 179 ("There are three valid statutory aggravating circumstances, and the trial judge has found that there are no valid mitigating circumstances"). Apparently because of the Court's affirmance of the ruling that no valid mitigating factors had been presented at sentencing, the Court also did not remand for further consideration after striking three of the aggravating factors.

Mr. Mills filed a motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.850. Among other grounds, he presented a claim (supported by affidavits and other documentary evidence) that his defense counsel failed to

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[1] The Court struck "pecuniary gain" as improperly doubled, Mills, 476 So. 2d at 178; "heinous, atrocious or cruel" as not valid on the facts of this case, id. at 178; and also held that "[t]he finding that Mills knowingly created a great risk of death to many persons was, as the state concedes, erroneous." Mills, 476 So. 2d at 178 (citation omitted).

The remaining aggravators were "under sentence of imprisonment" because Mr. Mills was on parole at the time of the offense. Mills, 476 So. 2d at 178. (In the Rule 3.850 proceedings Mr. Mills presented evidence indicating that he had in fact completed his parole but that his trial counsel had not investigated this issue. The trial court declined to hold a hearing on this issue, and this Court did not later order that a hearing thereon be held.) The other two remaining aggravators were "previous [felony] conviction," Mills, 476 So. 2d at 178, and that the offense was committed "in the course of a burglary." Id.

reasonably investigate and prepare for sentencing and that because of the unique circumstances of this case the proper investigation and development of mitigation was not conducted. The Rule 3.850 motion alleged that as a result of the failure to investigate, no mental health evaluation of Gregory Mills was obtained, and no effort was undertaken to develop mitigating evidence related to Mr. Mills' mental health impairments. The Rule 3.850 motion also alleged that substantial information was available indicating the need for a mental health evaluation: reports, evaluations, and testing conducted before the offense, while Mr. Mills was incarcerated as a juvenile, all indicated mental health problems; Mr. Mills' history included his premature birth to an anemic and alcoholic mother, and included severe head injuries; prior evaluators and the staff at the jail prescribed Mellaril; Mr. Mills' records reflected fainting spells, seizures, and headaches; a prior MMPI related "psychiatric" problems; motions filed by the public defender in other cases involving Mr. Mills spoke to his memory problems; and Mr. Mills has a three inch scar on his head.

The trial court summarily denied relief. This Court granted a stay of execution and remanded for an evidentiary hearing, finding that the facts pled, if established at a hearing, would warrant relief:

> In that [3.850] motion Mills claimed that his counsel rendered ineffective assistance by not developing and presenting evidence of his mental impairment and deficiency in an attempt to mitigate his sentence ... [W]e find that a hearing on this issue is needed. Therefore, we direct the trial court to hold an evidentiary hearing in regards to counsel's failure to develop and present evidence that would tend to establish statutory or nonstatutory mental mitigating circumstances.

Mills v. Dugger, 559 So. 2d 578-579 (Fla. 1990).

At the evidentiary hearing Mr. Mills presented the testimony of the former attorneys, two mental health experts, family and other individuals who knew Mr. Mills, and other witnesses; he also presented reports, affidavits, evaluations, and other documentary evidence from HRS, school, juvenile, incarceration and other records which defense counsel had never obtained. The State presented no rebuttal.

The circuit court denied relief (R. 1057-58), and Mr. Mills appealed (R. 1059). The facts presented at the evidentiary hearing are discussed in the Argument section of this brief.

SUMMARY OF ARGUMENT

This Court directed that a hearing be held "in regards to counsel's failure to develop and present evidence that would tend to establish statutory or nonstatutory mental mitigating circumstances." Mills v. Dugger, 559 So. 2d 578, 579 (Fla. 1990). At that hearing all the evidence, including the testimony of each of the attorneys involved at trial and sentencing, conclusively established that there was no tactical or strategic reason for counsel's failure to develop and present evidence of mental health mitigating factors. The evidence at the hearing also established that facts were available upon which reasonable counsel would investigate and develop such evidence, and, as each attorney testified, that such evidence should have been developed and presented in this case. The evidence further established that without a tactic or strategy, no attorney investigated and that, had reasonable investigation of Mr. Mills' mental health been undertaken and an evaluation sought, statutory and nonstatutory mitigating mental health factors would have been presented. The omission undermines confidence in the result of the judge's decision to override the jury and this Court's decision affirming the override after striking three aggravating factors on direct appeal. The mental health mitigating evidence in this case, which each attorney testified should have been developed and presented and which would have been if not for the unique circumstances which undermined proper defense preparation in this case, is compelling and is of the type which this Court has consistently held to establish a reasonable basis precluding a jury override. Mr. Mills has established that relief is appropriate.

ARGUMENT

GREGORY MILLS' CLAIM WARRANTS THE GRANTING OF RELIEF.

The evidence presented to the circuit court conclusively establishes Mr. Mills' entitlement to relief. Based upon the record of the Rule 3.850

hearing, there can be no dispute that no attorney investigated in preparation for Mr. Mills' penalty phase or judge sentencing, that no attorney had a tactical or strategic reason for failing to investigate, that no attorney obtained any records regarding Mr. Mills, that no attorney interviewed Mr. Mills or his family members regarding mental health issues, and that no attorney obtained a mental health evaluation of Mr. Mills or had a tactical or strategic reason for failing to do so. There also can be no dispute that evidence of substantial mental health mitigation was available and that the attorneys would have presented such evidence if they had had it. Finally, there can be no dispute that the evidence presented at the hearing, unrebutted by the State, established statutory and nonstatutory mental health mitigation which would have provided more than a reasonable basis for the jury's life recommendation. The State cannot point to anything in the record to the contrary, and the circuit court erred in denying relief.

A. EVIDENCE PRESENTED AT THE HEARING

1. The Evidence Presented at the Hearing Establishes That Trial Counsel Conducted No Investigation for the Penalty Phase.

a. Trial Counsel's Testimony

Mr. Mills was represented by two attorneys during his capital proceedings. Assistant Public Defender Thomas Greene conducted the guilt phase. Special Assistant Public Defender Joan Bickerstaff conducted the penalty phase before the jury. Mr. Greene returned for the judge sentencing.

Neither Mr. Greene nor Ms. Bickerstaff investigated evidence in mitigation. As he testified below, Mr. Greene's sole responsibility was for the guilty phase (R. 7, 30); his responsibility ended once Mr. Mills was found guilt (R. 8, 19). Ms. Bickerstaff was contacted by the Public Defender's Office on a Saturday, the day after the guilt phase ended, and asked to conduct the penalty phase, which was to be held on Monday, two days away (R. 40). Prior to that Saturday, Ms. Bickerstaff had had no involvement in Mr. Mills' case (Id.).

At the hearing, attorney Thomas Greene testified:

Q. Can you relate to us briefly what your duties were? What you understood your duties to be as to Mr. Mills' case?

A. All cases assigned to Judge Woodson at the time were my responsibility as far as trying those cases including first degree murder cases.

Mr. Mills was charged with that. He was on Judge Woodson's docket. Therefore, I was responsible for his case.

Q. Now, at the time of the proceedings in Mr. Mills' case, did you understand yourself to have any responsibility as far as a potential penalty phase in the proceedings?

A. No.

Q. Can you tell me how that transpired from when the guilty verdict came in to the jury portion of what your involvement then became?

A. As I indicated, once the verdict came in, which in this case was guilty, my involvement or responsibility in this case ended.

(R. 8).

Q. And was that your understanding throughout your representation of Mr. Mills?

A. Yes.

(R. 9).

Q. Is it fair to say that throughout the course of your representation of Mr. Mills, that you did not believe that either you yourself was responsible for the sentencing?

A. I knew I was not responsible for the sentencing.

(R. 30).

Ms. Bickerstaff testified at the hearing:

Q. Can you tell us how it is that you know Mr. Mills?

A. Back in August of 1979, I represented Mr. Mills in the [sentencing] phase of the first degree murder trial in Seminole County.

Q. The jury sentencing portion of Mr. Mills' case occurred on August 20th, 1979.

Do you have any reason to dispute that date?

A. No.

Q. The record so reflect[s].

A. No, I don't have any reason to dispute it.

Q. And do you recall what the day of the week that was?

A. It was a Monday.

Q. Do you recall when you were first contacted concerning Mr. Mills' case?

A. I received a telephone call about the case on Saturday morning of the two days preceding that date.

I guess it would have been the eighteenth.

Q. Prior to that telephone call, had you had any involvement whatsoever in Mr. Mills' case?

A. No.

Q. [C]an you tell me what happened with the phone call?

A. Bennett Ford, who was an Assistant Public Defender with the Seminole Office for the Eighteenth Judicial Circuit called me and asked me if I would be willing to handle the penalty phase portion of Mr. Mills case.

And he told me that Mr. Mills had just been convicted of first degree murder, and that he needed me to do the capital punishment phase.

Q. Do you recall specifically what you may have said to Mr. Ford during that conversation?

A. I was kind of reluctant to get involved in the case at that point because I didn't know anything about it.

And Mr. Ford told me that the sentencing phase of the case was to go forward in two days, starting on Monday.

I had not participated in any capacity. I had no knowledge about any of the proceedings that had happened during the guilty and innocence phase of the trial.

My understanding was that there was no transcript that would be made available to me so that I could review it, and I felt like two days was a woefully inadequate period of time in order to prepare for that type of a serious event. But Mr. Ford indicated to me that it was a really great need.

(R. 40-42).

Q. When was the first time that you actually met Mr. Mills?

A. I met him at the Sanford Jail the morning of the penalty phase hearing on August 20th.

Q. Now when Mr. Ford contacted you and [at] the commencement of the jury penalty phase, what kind of information did you review concerning Mr. Mills?

A. Mostly I asked Mr. Ford for information about what had occurred during the trial.

And I got a summary, verbal summary from him of what the nature of the defense was, what the evidence was that had been

presented by the State and by the Defendant and general information of that nature.

I did not have any documents pertaining to the case. I did not review any pleadings. I did not have a file.

(R. 42-43) (emphasis added).

The penalty phase before the jury occurred on August 20, 1979. The judge sentencing occurred on April 18, 1980. During that eight month period, both Mr. Greene and Ms. Bickerstaff believed they had no responsibility for Mr. Mills' case. Mr. Greene testified:

Q. Now, subsequent to the jury sentencing phase there was a judicial sentencing phase before Judge Woodson, do you recall that?

A. I do.

Q. And you appeared at the judge's sentencing phase?

A. I did.

Q. Let me ask you a few questions about that first.

Chronologically between the jury sentencing portion of Mr. Mills' case and the judge's sentencing, did you do any investigation in preparation or development of mitigating factors, statutory or nonstatutory?

A. No.

Q. Did you understand yourself to have any responsibility for sentencing between the jury sentencing phase and the later judicial sentencing phase?

A. I had no responsibility.

* * *

Q. Between [jury sentencing and judge sentencing], did you have any involvement whatsoever in Mr. Mills' case?

A. Not that I'm aware of.

(R. 9-10). Ms. Bickerstaff testified:

Q. After the conclusion of jury penalty phase, did you have any involvement with Mr. Mills' case?

A. No.

Q. Can you tell me what happened, why that is so?

A. I don't really know. Judge Woodson indicated at the conclusion of the testimony portion after the jury had brought back their advisory verdict that he was taking the matter under advisement and I didn't hear anything further.

I was not contacted by Mr. Greene or by Mr. Ford or notified when the sentencing date had been set.

And I found out after the fact when Mr. Mills was sentenced.

Q. Had you -- had anybody ever contacted you; Mr. Greene, for example, and asked you about what transpired at the jury sentencing?

A. No. Mr. Greene was not present during the advisory penalty phase, and I never spoke to him afterwards about the testimony that had been presented except in a general way.

I had a meeting with him and with Mr. Ford after the advisory verdict had been rendered, and it was more in the nature of celebrating the victory of having obtained a recommendation of life from the jury, but there was no in-depth discussion of what the witnesses had testified to or how the hearing had been conducted.

Q. And that meeting, was that the evening after the jury recommended a life sentence?

A. Yes.

Q. And it was sort of an informal --

A. It was very informal. It was a little tavern outside -- outskirts of Sanford.

Q. Had you been contacted by Mr. Greene or anyone else and asked to relay information concerning the jury sentencing or to assist with the judge sentencing, is there any reason why you would not have done that?

A. No.

(R. 60-62). Ms. Bickerstaff further testified, "Basically my role in the case ended after the advisory jury verdict was rendered" (R. 63).

As a result of Mr. Greene's understanding of his responsibilities and Ms. Bickerstaff's late and limited involvement in Mr. Mills' case, neither attorney conducted any investigation regarding evidence of mitigating factors. Mr. Greene did no investigation of mitigation (R. 8), made no effort to develop statutory mental health mitigation (R. 12), never had Mr. Mills evaluated by a mental health expert (id.), did not obtain Mr. Mills' juvenile records, youth services records, or school records (R. 13-14), did not obtain prior mental health evaluations or pre-sentence investigation reports regarding Mr. Mills (R. 19-21), did not obtain prior personality testing of Mr. Mills (R. 24), and did not ask Mr. Mills or his family members about any prior mental health problems Mr. Mills had experienced (R. 26). Ms.

Bickerstaff first met Mr. Mills on the morning of the penalty phase (R. 42), and did not ask Mr. Mills about past mental health evaluations (R. 43), because the meeting was "very short" (R. 44). She did not spend enough time with Mr. Mills to independently determine if mental health was a potential issue (R. 45). Ms. Bickerstaff did not review any HRS, juvenile or mental health reports regarding Mr. Mills (R. 45, 49, 52), did not look at files in the Public Defender's Office of other cases involving Mr. Mills (R. 46), conducted only a "sketchy" interview of Mr. Mills' sister in the hallway before the penalty phase began (R. 46), never asked any witness about mental health issues (R. 49), and made no effort to develop statutory or nonstatutory mental health mitigation (R. 54).

At the hearing, Mr. Greene testified:

> Q. Now, prior to Mr. Mill's [sic] trial, did you conduct any investigation, any development, any preparation in terms of mitigating factors statutory or nonstatutory?
>
> A. No.
>
> Q. Did you conduct any preparation in terms of eliciting evidence to challenge aggravating factors?
>
> A. No.
>
> Q. In terms of Mr. Mills' jury sentencing, did you conduct any investigation, any preparation or any efforts as far as mitigating factors were concerned?
>
> A. No.
>
> Q. Did you attend the [penalty] portion of Mr. Mill's case?
>
> A. I did not.

(R. 7-8).

> Q. Did you yourself speak to any witness concerning [the judge] sentencing proceeding prior to April 18th, 1980?
>
> A. I may have talked to the witness that was called either that day or maybe the day before.
>
> Q. And that witness was a witness by the name of Diannetta, Mr. Mills' sister?
>
> A. Right.
>
> Q. And that was in fact other than Mr. Mills the only witness who testified at the judicial sentencing?

A. That's correct.

Q. Do you recall how much of an opportunity you had to discuss things with her; was it a limited thing, a lengthy thing?

A. I have no recollection of it, but I would presume it would have been relatively short.

Q. Did you yourself subpoena her to come to the proceeding? Do you know why she came to the proceeding?

A. I'd have to look at the file to see if she was subpoenaed. But my understanding was that she was not.

Q. If she were to testify she came to the proceeding of her own accord, would you have any reason to tell us that's not accurate?

A. No, that sounds -- she may have been called, but -- and came voluntarily.

(R. 9-11). Mr. Greene further related:

Q. During the course of your representation of Mr. Mills, was there any effort on your part to develop evidence concerning statutory mental health [mitigation] testimony?

A. No.

Q. Are you aware of what the statutory mitigating factors are in Florida, statutory mitigating factors?

A. I am.

Q. Was there a tactical or strategic reason for not presenting statutory, mitigating factors in Mr. Mills' case.

A. No, not that I'm aware of.

Q. Did you ever ask a mental health practitioner, whether a psychologist or neuropsychologist or psychiatrist, to evaluate Mr. Mills?

A. No.

Q. Was there a tactical or strategic reasoning for not asking [that] Mr. Mills be examined?

A. No.

Q. And the same questions I just asked you concerning nonstatutory mitigating factors. Did you ever consider if development of nonstatutory mitigating factors [should] enter Mr. Mills' case?

A. No.

Q. Was there a tactical or strategic reason for that?

A. No, that I'm aware of.

(R. 11-13).

Q. Now if you recall, [it] was Joan Bickerstaff that did the jury penalty portion of the case?

A. That's correct.

* * *

Q. [D]id you yourself discuss with Miss Bickerstaff after the jury sentencing what it was that she put on and argued before Judge Woodson?

A. I don't think so.

Q. Do you recall having any interaction with Miss Bickerstaff in this case?

A. No, I don't think I even knew who she was.

(R. 28-29). As to developing evidence for the judge, Mr. Greene additionally testified:

Q. And were you aware at the time of the judicial sentencing or prior to that, that evidence of mitigation which would form a reasonable basis [for] the jury's recommendation would preclude [an override] whether by the judge or then later on?

A. I was aware of that.

Q. In this particular case, prior to April 18th, 198[0], prior of the -- at the actual judge sentencing, did you develop mitigating evidence of a mental health or of another nature in Mr. Mills' case?

A. No. As I indicated to you, once the verdict was over, my responsibility in this case ended.

I went back to trying cases in front of Judge Woodson on a regular docket, and it was not my responsibility to do anything else on Mr. Mills' case, period.

Q. And did you have any involvement whatsoever?

A. No.

(R. 18-19).

Because Ms. Bickerstaff came into the case so late, she did not conduct any investigation into Mr. Mills' background or into his mental functioning. She testified about these deficiencies and about her only meeting with Mr. Mills, on the morning of the penalty phase itself:

Q. Now between the time when you received the telephone call and the commencement of the jury penalty phase, did you have an opportunity to investigate or develop mental health evidence concerning Mr. Mills?

A. No.

* * *

Q. When you actually met Mr. Mills, did you inquire from him concerning any history of psychiatric evaluations or anything in terms of mitigation just from him to discuss that with you?

A. No.

Q. And tell me what transpired there.

A. The meeting that we had, as I said, first of all was in the jail. It was in a jail cell that was provided in Seminole County Jail across from the Courthouse.

I was accompanied by Mr. Greene and Mr. Ford who came with me to introduce me to Mr. Mills and to be with me to try and explain to him who I was, how we were hoping to proceed and what the penalty phase of the trial would be like.

We did most of the talking, the lawyers. Mr. Mills wasn't really engaged in any active dialogue with me during the course of that meeting, which was very short meeting.

I don't believe I was with Mr. Mills more than an hour or so and it was a very passive kind of event for him.

I was basically receiving information and being told things. It really was not what I would regard being an attorney-client interview to obtain information from him.

* * *

Q. Normally is evidence concerning any mental health history, mental health information something that you would inquire about from a client in a capital case?

A. Absolutely.

Q. And that did not happen in this case?

A. No, it did not.

(R. 43-45) (emphasis added).

In addition, Ms. Bickerstaff did not gather or review any records concerning Mr. Mills -- records such as HRS records, school records, presentence investigation reports from previous cases, prior evaluations, juvenile records -- which, as the evidence at the hearing showed, all would have indicated the need to have Mr. Mills evaluated by a mental health professional.

Q. During your entire involvement in Mr. Mills' case, did you ever have an opportunity to request, review, look at evidence concerning Mr. Mills in HRS records, in juvenile records, psychological reports ... and those records things along that nature?

A. No.

Q. Was there a tactical or strategic reasoning for not doing that?

A. No.

Q. Is that normally something that would be done in a capital case?

A. Yes.

Q. Were you aware of Mr. Mills' history, juvenile history?

A. Only insofar as I obtained information primarily from his sister Diannetta who was there and who was one of the witnesses that we called at the sentencing hearing.

But once again, that was in the context of an interview that I had with her in the courthouse standing out in the hallway awaiting the beginning of the proceedings.

It was a very sketchy and not conducted under the best of circumstances.

Q. Now, I'll ask a couple of questions about the interviews in a moment. But in terms of other cases that Mr. Mills had that were pending at the time, did you ever ask to look at Public Defender files in those cases to see what information about those might be contained in those files?

A. No, I didn't have time.

Q. Was there a tactical or strategic reason for not doing that?

A. No.

(R. 45-46).

In addition to not gathering and reviewing records concerning Mr. Mills, Ms. Bickerstaff testified that she did not investigate Mr. Mills' background or family history. She testified that she was advised that witnesses would be attending the penalty phase. She interviewed those who came of their own accord briefly outside the courtroom prior to putting them on the witness stand:

A. ....I came to the courthouse and was told that there were certain individuals who were there who were willing to testify on Greg's behalf.

Q. If Diannetta would have testified that she came of her own accord and brought the other two witnesses, the grandfather and the [employer] with her, would you have any reason to contradict that testimony?

A. No, it wouldn't surprise me at all.

* * *

THE WITNESS: As far as I know they weren't subpoenaed.

Of course, I wasn't privy to any of Mr. Ford's conversations with Mr. Mills' sister.

Q. Do you know if Mr. Ford asked the witnesses to come or whether they told Mr. Ford they would be coming?

A. I don't know.

Q. [H]ow did the conversation with the witnesses take place?

A. As I recall we're in the courthouse, I believe in the hallway outside of the courtroom where the proceedings were going to be held, and I talked with each of them in that setting very briefly about what type of questions I was going to ask, what kind of testimony I was attempting to develop, which was in an effort to try to humanize Gregory and try to explain as best we could what his background was like, what kind of a person he was.

Q. During the course of that interaction of the witnesses, did you make inquiries concerning mental health history, mental problems Mr. Mills may have had or anything along that nature?

A. No, I didn't have any knowledge that that was a potential issue to be developed.

My contact with Mr. Mills was so short and his involvement was so passive that it just didn't occur to me.

(R. 46-49) (emphasis added).

Attorney Bennett Ford was also called at the evidentiary hearing. He testified that his role in Mr. Mills' case was that of an advisor. He had no active role in the investigation or preparation of the case whatsoever:

A. Back at that period of time I was [a] supervisor in the Public Defender's office in the Eighteenth Circuit. I initially assigned Mr. Greene to the case, to handle the case.

And then ultimately after the guilty phase of the case was over, I contacted Mrs. Bickerstaff to handle the penalty phase of the case.

Q. Were you lead counselor in the case?

A. No. Mr. Greene was.

Q. Did you consider yourself responsible for investigating the case, developing evidence, developing theories of defense, presenting evidence, either at the guilt or innocence or penalty phase?

A. No. Mr. Greene was primarily handling it. I was working mostly out of the the [sic] Titusville office back at that time. And Mr. Greene was over in Sanford where this case occurred. I was back and forth.

But primarily Mr. Greene was handling that case.

Q. So you didn't consider yourself responsible in the sense of being the lead attorney in the case?

A. No.

Q. Would it be fair to say that your role was more to be there in an advisory capacity in case Mr. Greene needed anything?

A. That was essentially the set up we had at the time. We had several first degree murder cases going at that time and I was handling some over here in Brevard County.

I assigned Mr. Greene to that case over there. I couldn't be everywhere I needed to be.

Plus I was trying to administer the office; the elected Public Defender at the time was incapacitated. I was trying to do everything.

Q. Was it a busy time period for you?

A. Very busy time period.

(R. 428-29) (emphasis added).

Mr. Ford explained the circumstances under which he asked Ms. Bickerstaff to handle the penalty phase on such short notice.

Q. In terms of the penalty phase, do you recall the timing when Miss Bickerstaff was brought into the case?

A. If I recall when the guilty phase, when the guilty verdict came back in, it seemed to me it was within just a couple days.

And I believe a weekend in between the guilty verdict and the guilty phase, and then when the penalty phase was to be put on.

So I know I contacted Miss Bickerstaff at her home in Rockledge at that time.

(R. 430).

Q. In terms of the timing when Miss Bickerstaff was brought in, was there a tactical or strategic reason for that?

A. No. Again my recollection, this being some time back, and my theory also was if one person lost the guilty phase, I try to bring in another person to do the penalty phase.

(R. 430).

Like Mr. Greene and Ms. Bickerstaff, Mr. Ford testified that he conducted no investigation with regard to sentencing:

Q. Had you yourself undertaken any investigation in terms of the penalty phase?

A. No.

Q. Had you yourself developed any penalty phase type evidence?

A. No. Again, I mean right there that weekend, you know, was when everything was done.

Q. And that was based on what had come out at the trial?

A. That's correct.

Q. Now independently of that, had you spoken to, you yourself, spoken to any mitigation witnesses, either prior to that weekend or during that weekend?

A. I don't recall that I spoke -- no, in answer to that question.

I feel certain I didn't, because I don't believe I spoke with any witnesses in the case prior to the trial.

The reason being there was a person who has been allegedly with Mr. Mills at the time of the offense, Mr. Ashley, who I had previously represented and I felt some sort of a conflict in there.

And I frankly did not become involved actively with the case.

* * *

Q. Did you ever speak to a woman Diannetta Alexander or any other family member?

A. If I did, I don't recall. I certainly don't recall that name.

Q. Do you recall telling witnesses, family members of Mr. Mills, any other mitigation coming to court for the penalty phase, you yourself?

A. No. Again, I believe that was left up to Mr. Greene, ...

* * *

Q. Was there any tactical or strategic reason for not preparing the penalty phase in advance of the trial?

A. No. I mean, again, twenty/twenty hindsight looking back, I don't recall any reason for not doing that. I think I was somewhat surprised by the short period of time we had to prepare.

It's one of those situations where for one thing you don't necessarily anticipate that's going to be required.

(R. 432-34).

Q. And did you yourself or Mr. Greene, Miss Bickerstaff, to your knowledge, ever secure Mr. Mills' prior records, school records, incarceration records, juvenile records, jail records

where he was incarcerated during the course of the proceedings, that type of thing?

A. I can only say I personally did not. As to whether or not Mr. Greene did, I'm not certain.

As to whether Miss Bickerstaff did, I believe she would have only got what Mr. Greene had.

There was not a time period sufficient for her to get any records, I don't believe.

Q. Was there a tactical or strategic reason for that, for not securing the records?

A. No. There wasn't.

Q. Let me show you certain documents marked into evidence and ask you questions about it. The first one is a report by Doctor Fumero dated, it has a stamp on it October 19, '73.

Doctor Fumero saw Mr. Mills during one of his juvenile proceedings.

Let me ask you to look the document over and specifically the recommendation section.

And for the record, this is [the] same report along with Doctor Austin's stapled to all the PSI's along the way.

A. I don't know this doctor. I don't know this report. I don't know anything about it.

Q. You don't recall seeing that prior to the Jury or Judge sentencing in Mr. Mills[']s case?

A. No.

Mr. Ford, like Mr. Greene and Ms. Bickerstaff, also did not develop or investigate mental health mitigating evidence:

Q. ... Mr. Mills was never evaluated by mental health expert for purposes of the penalty phase?

A. I never arranged for any evaluation. To my knowledge he was not.

Q. Was there a tactical or strategic reason for you not arranging an evaluation?

A. For the penalty phase?

Q. Yes?

A. No. Again I mean the time constraints were so short, it would not have been practical to do it within that period of time.

But I don't recall, frankly I don't recall discussing it or anything.

(R. 434).

Mr. Ford neither undertook nor arranged for an investigation during the time period between the jury recommendation and the judge sentencing:

> Q. During that time period did you have any involvement in Mr. Mills' case?
>
> A. Again if I did it was indirect involvement just having passingly spoken with Mr. Scarpella or Mr. Greene perhaps.
>
> Again I felt at the time I was putting out fires every day. There was something either in Brevard or Seminole County for me to do.
>
> And we had, I believe during that year we did twelve first degree murder cases in the circuit.
>
> It was just a constant thing which ultimately lead to me handling, someone full time, handling nothing but first degree murder cases.
>
> Q. During that time period between the Jury sentencing and Judge sentencing, did you investigate, develop any mitigating evidence?
>
> A. Did I personally?
>
> Q. Yes?
>
> A. No.
>
> Q. Was there any tactical or strategic reason for that?
>
> A. No.

(R. 437-38).

Mr. Ford testified that he did not prepare for, or alert anyone else to prepare for, the sentencing phase before the judge:

> Q. And do you recall how Mr. Greene became involved in the Judge sentencing?
>
> To put it another way why, [was] Miss Bickerstaff ... not involved in the Judge sentencing?
>
> A. I don't recall when notice came out as to exactly when the sentencing was going to be.
>
> I knew Mr. Greene, again Mr. Greene was in Sanford. Miss Bickerstaff and I were both from Brevard County.
>
> She was not a full time employee of the Public Defender's office. We hired her specifically on certain occasions she wasn't a regular employee.
>
> I frankly didn't have a lot of concern about the sentencing phase. I presumed that, wrongfully, that the Jury's recommendation would be applied.

As far as I didn't have any, I don't recall having any discussion with Mr. Greene about it.

Apparently, you know, the sentencing docket came out, he was noticed, he was there in the Sanford office, and he appeared.

Q. Do you recall speaking to any family members of Mr. Mills there, any other witnesses during this time period between the Judge and Jury sentencing, asking any witnesses to come to Court, anything like that?

A. I don't recall that I ever spoke with any of Mr. Mills' relatives or friends or anyone.

(R. 438-39). Mr. Ford summarized:

Q. During your interaction at the trial, did you ever have an opportunity to sit down with Mr. Mills, discuss his background, ask him questions about his background ask him whether he's ever had any head injuries or just anything concerning his background?

A. No. I don't recall. I don't believe I ever went back into the jail and spoke with Mr. Mills.

And the only time I recall being in the presence of Mr. Mills, was sitting at the table in the courtroom during the course of the proceedings.

Again, you know, I was there for Mr. Greene, if he ran into a problem or needed some assistance of some sort, you know. He could turn to me and ask me, I would do what assistance I could give him.

But I feel primarily the case was his case.

Q. It was Mr. Greene's responsibility and then Miss Bickerstaff at the time she was involved, was appointed and responsible for preparing the case?

A. Right.

(R. 445) (emphasis added).

The attorneys all agreed that the matters they had not investigated, the records they did not obtain or review, and the questions they did not ask Mr. Mills or his family members were all matters which they would have investigated for the penalty phase. The attorneys had no strategy or tactic for failing to conduct this investigation. The attorneys also agreed that Mr. Mills' prior records and mental health evaluations indicated a need for a mental health evaluation and that had they seen the prior records and evaluations, they would have arranged for a mental health evaluation. Again,

the attorneys had no tactic or strategy for failing to have a mental health evaluation performed.

Mr. Greene testified that if he had been responsible for the penalty phase, he would have obtained records, interviewed Mr. Mills and his family members regarding Mr. Mills' mental health history, and arranged for a mental health evaluation:

> Q. Had you been responsible for the penalty phase, would you have asked [Mr. Mills] those questions [regarding mental health problems]?
>
> A. Yes.
>
> Q. Was there a tactical or strategic reasoning for not making those inquiries or pursuing mental health evidence?
>
> A. Not that I'm aware of.
>
> Q. From your perspective as a practitioner, is Mr. Mills' record, his arrest record consistent with somebody who has impulse control problems?
>
> A. Well, I'm not really sure what you mean by impulse control problems.
>
> You asking me to give you an opinion on that?
>
> Q. As I recall, you argued to Judge Woodson that his history shows that he hasn't capacity to conform, his conduct is impaired and you argued that.
>
> A. Exactly.
>
> Q. Based on?
>
> A. His record.
>
> Q. His prior record.
>
> Would testimony from a mental health expert explaining that record and explaining why the statutory mental health mitigating factors exist in this case, would that have been something that would have been important to your presentation before Judge Woodson?
>
> A. Yeah, I think that would have -- could have explained -- I like meshed the two theories together as far as why his record was so bad, why he had so many arrests and convictions, what everybody -- it's as a possible explanation for that consistent with the inability to conform, I think that's true.

(R. 26-28).

During cross examination, Mr. Greene was asked whether he saw indications that Mr. Mills needed to be examined by a mental health expert.

Mr. Greene responded that since his responsibility went only to the guilt phase, he did not even consider mental health issues that may relate to sentencing (R. 31-33). Mr. Greene stated:

> [MR. GREENE] A. There was no defense put on that Mr. Mills was insane at the time of the commission of the crime. It was not an insanity defense.
>
> [BY MR. HASTINGS] Q. There was nothing about the facts of this case that would suggest he had any sort of mental impairment or mental dysfunction, was there?
>
> A. Well, now, you know, I'm only talking as far as whether the defense of insanity is at issue or not.

(R. 32). Mr. Greene also stated, "But anything else I wouldn't address" (Id.).

> Q. Well, even looking back upon it now. As an attorney, even with more years of experience than you had at that time, there's nothing about the facts of this case that suggest any sort of mental impairment or any mental dysfunction on the part of this defendant, is there?
>
> A. Well, I can't say that. All I can say is that there's no evidence that there was a legal defense of insanity at the time.

(R. 32).

On redirect examination, Mr. Greene was asked whether he would have pursued mental health issues had he been responsible for the penalty phase of Mr. Mills' trial:

> Q. ... Going back to Doctor Austin's report, let me just provide you a copy as well.
>
> Looking at the bottom of the report it indicates he has a strongly fatalistic attitude about his life going from bad to worse.
>
> Skipping down to impressions, it is my impression that an intensive rehabilitation and treatment program in a controlled environment could help this boy.
>
> At the time of the offense, Mr. Mills was twenty-two years old. This report was done approximately five years before that so he would have been sixteen, seventeen; something along that nature.
>
> Is that information that an intensive rehabilitation and treatment program in a controlled environment is necessary to help Mr. Mills?
>
> Is that something that as a practitioner if

you had only that report, it would make you say let me get an expert to take a look at this type of thing, see what Doctor Austin was talking about, see what's wrong with Mr. Mills?

A. I think that's -- yes, I would have.

Q. Did you ever undertake any assessment, any consideration as to the issue of whether Mr. Mills' capacity to conform his conduct to the requirements of the law were substantially impaired [sic] at the time of the offense in your representation of Mr. Mills; that is, as to that statutory mitigating factors?

A. No, because as I stated a number of times, I only represented him for the trial. Unless it was so obvious that he was, again, insane or incompetent then I would not have pursued any of those issues.

Q. And as you indicated, had you been responsible for the penalty phase, based on the evidence that we've discussed here today and based on your representation of Mr. Mills, you would have pursued those issues, the statutory mental health factors and nonstatutory information?

A. I would have.

Q. And you would have presented that evidence to Judge Woodson?

A. I would have.

(R. 35-36) (emphasis added). Mr. Greene also explained that had he been responsible for the penalty phase, he would have obtained records regarding Mr. Mills:

Q. ... You were aware of the fact that Mr. Mills had been represented by other individuals in the Public Defender's Office concerning other charges?

A. That's correct.

Q. And you were also aware of the fact that Mr. Mills had a juvenile youth services and juvenile incarceration record?

A. That's correct.

Q. Had you been responsible for the penalty phase, would you have secured those records and reviewed them concerning Mr. Mills?

A. Yes. They were in our office. They were easily available.

Q. Was there a tactical issue for not getting those records?

A. Not on my behalf.

Q. Had you been involved in the case, would you have secured Mr. Mills' juvenile youth services records, school records, that type of information?

A. Oh, definitely.

Q. In your experience, those type of records provide information that is significant in terms of developing mitigating evidence?

A. Sure. Back then I think that the HRS or whoever did the predispositional reports, if they were called that back then, would do a better job as far as they do now.

I mean, I think they had more resources actually had evaluations, things like that done back then.

Q. And would that type of information have been something important had you been responsible for the penalty phase for you to consider?

A. Sure would have been a good starting point to develop any type of mental problems or whatever.

(R. 13-15). Regarding the scar on Mr. Mills' forehead, Mr. Greene testified:

Q. ... In general terms in representing a client who may have a scar or an obvious physical defect, is that something that a mental health expert would be asked to look --

A. If you were responsible for the penalty phase of such proceeding having -- well, if someone has a scar apparent injury to the head I would ask them how they obtained it.

If it was from a blow to the head or something like that, then obviously you would have it examined if that was part of your responsibility.

If it was something else, you wouldn't but obviously that's true.

Q. And in this case, again, not being responsible for the penalty phase, the evidence along that nature and mental health-type information, did that strike you as being particularly important to the guilt or innocence of the trial?

A. As to the guilt of innocence, the only aspect you need to consider if he was incompetent if that was a possible defense or insane or something like that.

Other than that, I wouldn't have done anything past that point.

(R. 16-17). Prior mental health evaluations of Mr. Mills were then specifically discussed with counsel. Two of these evaluations (by Dr. Fumero and Dr. Austin, conducted in 1973) had been attached to presentence investigation reports in Mr. Mills' cases.

Q. Mr. Greene, let me show you two documents that have been marked as Defense Exhibit "B" for identification.

One is dated January 24th, 1980, and one is dated February 29th, 1980, and they're presentence investigation reports done in other cases that Mr. Mills had pending prior to the judicial sentencing.

Did you ever obtain those documents and review them prior to attending Mr. Mills' sentencing?

A. No.

Q. If you could just leaf to the last page of those two. Both of those do have Doctor Fumero's report attached, do they not?

A. Yes, both of them do.

Q. Now Doctor Fumero's evaluation, and you've had an opportunity to read it, a number of items of information here.

But just in the recommendations section, it indicates EEG to rule out minimal brain dysfunction. It recommends Mellaril.

And then under diagnosis it indicated unsocialized aggressive reaction of childhood and adolescence to rule out minimum brain dysfunction.

This type of information and the other matters noted in the report concerning Mr. Mills being concrete, things along that nature had you been involved in the penalty phase, would this be the type of evidence that would lead you to say that a mental health evaluation was necessary for Mr. Mills concerning mitigation?

A. Yes.

Q. Is this evidence, that is, as a practitioner would say there's some indication of potential brain damage issues in the case?

A. That's what the report basically says.

(R. 21-22). Prior psychological testing included in Mr. Mills' juvenile records were also discussed with Mr. Greene:

Q. Now, Mr. Greene, let me show you a Minnesota Multiphasic Personality Inventory Test concerning Mr. Mills dated 1976; and this is from Mr. Mills' prior juvenile records.

And let me ask you to just real quickly take a look at some of the summary concerning Mr. Mills in that report.

Did you ever have an opportunity to -- withdrawn.

Did you ever get that document prior to the judge sentencing on Mr. Mills' case?

A. No.

Q. In that document indicates that there are problems with impulse control and certain other behavioral problems, does it not?

A. Appears to.

* * *

Q. -- would that be information that would lead you to say a mental health evaluation was necessary in Mr. Mills' case?

A. I think that's fair to say.

(R. 23-24).

The speedy trial motions which the public defender's office had filed and which related problems with Mr. Mills' memory were also discussed with Mr. Greene:

MR. NOLAS: Let me also show you if I can have that marked, Your Honor, and for the record this is a Motion for Speedy Trial filed by Mr. Figgatt of the Public Defender's Office in one of the other cases that Mr. Mills had pending at the time.

Q. Mr. Greene, let me just show you this motion and let me ask you if you understand the title of it and if you know who the individual who signed off on it is?

A. Oh, yeah. I know Mr. Figgatt.

Q. And Mr. Figgatt was with the Public Defender's Office?

A. Still is.

Q. If you could turn to page two of that motion, and there's other little -- maybe five or six sentence section beginning with Subsection A.

And if you could just read that section to yourself. It has some information there concerning memory loss on Mr. Mills' part.

A. Okay.

Q. Would that type of information have been something that as practitioner would have lead you to conclude that a mental health evaluation was necessary in Mr. Mills' case?

A. Yes.

Q. And can you tell us why that is so?

A. Well, according to what Mr. Figgatt said, Greg had no recollection of a series of events that allegedly occurred which he was subsequently charged with a criminal -- or crime for.

Obviously, that would need to be checked out to see if he was indeed suffering from amnesia or some type of brain dysfunction.

Q. When you spoke to Diannetta prior to her testifying, do you recall if that was the morning that she testified on the eighteenth when that conversation took place?

A. I have no recollection.

Q. Do you recall during that conversation asking her anything about Mr. Mills' background in terms of mental health problems, in terms of problems with dysfunctioning, things along that nature?

A. I have no recollection of the conversation with her at all.

(R. 24-26).

Ms. Bickerstaff was also shown several records concerning Mr. Mills, which were available but not investigated or reviewed originally. Like Mr. Greene, Ms. Bickerstaff testified that if she had reviewed those records prior to the penalty phase, she certainly would have investigated mental health issues and presented testimony and evidence regarding statutory and nonstatutory mental health mitigating factors:

Q. Let me show you a document which has been marked as Defense Exhibit "A". It is an October, 1973 evaluation of Dr. Fumero.

Let me ask you to take a look at that[,] particularly the recommendation in the summary portion.

A. I've seen this exhibit before and I recognize it; however, I didn't have the benefit of it at the time.

Q. Had you had that type of documentation ... that's from the HRS records concerning Mr. Mills from his prior juvenile records.

Had you had that type of information, would you have requested that mental health issues concerning statutory and nonstatutory mitigating circumstances or just mental health issues in general be assessed in Mr. Mills' case?

A. Yes.

Q. Would you have requested that an expert evaluate Mr. Mills?

A. Yes.

Q. And why is that just based on that type of documentation?

A. Because the documentation indicates that there's a possibility of brain dysfunction ....

* * *

Q. And the next portion is, Miss Bickerstaff, does that --

A. The recommendation.

Q. -- report recommend any testing as to brain damage?

A. Well, the recommendation in the report is EEG to rule out minimal brain dysfunction.

Q. In your experience in capital cases, just in your experience in general as an attorney, one of the -- when a mental health practitioner says something should be ... ruled out, what does that mean?

A. It means it ought to be pursued.

Q. And at the time of your representation of Mr. Mills, would you have understood this to mean that it's an issue that should have been pursued?

A. Yes.

Q. Was there a tactical or strategic reason for not securing these types of records in Mr. Mills case?

A. No, I did not have the benefit of the report or any other information at the time.

There was no strategy.

Q. And as you indicated, had you had the benefit of this type of information, you would have asked for a mental health evaluation?

A. Yes.

Q. Would that evaluation have covered statutory mental health mitigating factors?

A. Yes.

Q. Would it have also covered any nonstatutory mental health information?

A. I would hope so, yes.

Q. Now, let me also show you an evaluation by Dr. Austin, a clinical psychologist, and specifically let me ask you to look at the first sentence under the -- it's the conclusions and recommendation portion at the bottom.

I think you've had a chance to look over the whole document, but just that if you could just refresh yourself with that one sentence. I think it's under impressions.

A. Yes.

Q. Now does that type of recommendation suggesting that -- well, actually you concur that therapy is needed for Mr. Mills?

Is that something that would have triggered for you the need for a mental health evaluation of Mr. Mills?

A. Not as strongly as the other report; but, yes, I would hope so.

Q. Let me also show you a 1976 Minnesota Multiphasic Personality Inventory Test.

Do you know what that test is, an MMPI?

A. In general terms, yes.

Q. And if I could just ask you to look over -- this is again from Mr. Mills' incarceration and HRS records. If you could just look over the summary portion of it concerning that test assessment of Mr. Mills?

A. Yes.

Q. Would that type of information have triggered for you the need to have Mr. Mills evaluated?

A. Absolutely. The first sentence says considered psychiatric evaluation.

Q. You indicated that you never did obtain prior records concerning Mr. Mills?

A. That's right.

Q. In this case, was there any effort on your part to develop statutory or nonstatutory mental health mitigating evidence?

A. No.

* * *

Q. Was there a tactical or strategic reason for not pursuing those issues?

A. No.

(R. 49-54) (emphasis added). Another indication that Mr. Mills should have been evaluated for mental health impairment was the scar on his forehead. Ms. Bickerstaff testified:

Q. ... Do you recall whether Mr. Mills had a scar on his head during your interaction with him?

A. I don't have any independent recollection of that now. But having looked at him today he does.

I just can't tell you that. I can recall that from the time that I saw him eleven years ago.

Q. And the scar, is it readily visible?

A. Yes, it is to me.

* * *

Q. Now, Miss Bickerstaff, in looking at Mr. Mills or just in general dealing with the client with physical symptomatology like that, is that something ... that normally should trigger for you any inquiry to mental health evidence?

A. Yes, because it's potential of a head trauma.

(R. 54-56). Ms. Bickerstaff also testified:

Q. Looking at this information that we've been discussing here today and looking back on your role in Mr. Mills' case, should you have requested an evaluation concerning statutory and nonstatutory mental mitigating factors?

A. Yes.

Q. And even after the jury portion should such information have been independently presented to the judge?

A. Yes. In fact, I think I requested an opportunity to file a sentencing memorandum, but I don't believe that was ever followed up by anybody.

(R. 63-64).

Attorney Ford testified similarly that the prior reportsand records regarding Mr. Mills would have alerted counsel to arrange for a mental health evaluation:

Q. Had you looked at [Dr. Fumero's] report originally, would you have recommended a mental health evaluation for Mr. Mills concerning mitigating evidence?

A. Okay. Considering mitigating evidence for the penalty phase?

Q. Um-hmm?

A. That's a tough question to answer. Looking back all that period of time, I know what I did today. What I did back then, I don't recall my feeling today.

Anytime I see an indication a person has a past history of mental illness or taking anti-psychotic medication such as Mellaril, that is a red flag for me to do something.

* * *

Q. And specifically looking at the recommendation section [of Dr. Austin's report]; had you looked at that type of information originally, would a mental health evaluation been something warranted in Mr. Mill's case?

A. If you're asking me if I were handling the case?

Q. Um-hmm. And you had seen those reports?

A. And were there sufficient time before the penalty phase, yes. I would have.

I think I would do it basically in any case.

But, you know, again that's a red flag when someone is taking Mellaril to me, that shows to my knowledge, an anti-psychotic medication.

So my answer today is yes, I would.

Q. Let me also show you a document that's been marked as Defense Exhibit C, this is MMPI summary of a test given to Mr. Mills, again prior to the proceedings here.

* * *

Q. Had you reviewed that type of information originally, had you looked at it and you were doing the case, now take it as a hypothetical.

Would a mental health evaluation for penalty phase be in appropriate concerning both statutory and non-statutory mental health mitigation?

A. I mean the expert [says he] may have significant psychiatric problems. To me, that's a red flag. I guess my answer to that would be yes.

Q. Had there --

A. This is something that was obtained back then?

Q. That was prior.

A. Okay.

Q. ... [Y]ou indicated you did not have an opportunity to review Mr. Mills' jail records pending trial?

A. No. As far as I know, I have no recollection of ever doing that. I don't believe I would have done that.

Q. Those records reflect that Mr. Mills was given medication, and also reflect that he had medication during the course of his incarceration at the jail; would that information be relevant as to whether or not a mental health, do an evaluation with respect to mitigation?

A. If he were given aspirin for headaches or given Mellaril, Hallaril, Thorizene, to me, again those are red flags that the person should be evaluated.

Q. And the reports do recommend Mellaril?

A. Right.

(R. 440-43)(emphasis added).

In addition to testifying that they would have investigated mitigation and had a mental health evaluation performed, the attorneys all testified that

if they had developed mental health mitigation, they would have presented it to the jury and judge. The attorneys had no strategic or tactical reason for failing to present such evidence. When asked about his argument to the judge, Mr. Greene testified:

> Q. While Ms. Naylor is pulling a document, let me ask you do you recall at the judge sentencing phase arguing to Judge Woodson that -- let me quote it.
>
> "One of the two mitigating factors which should be emphasized" -- and, Your Honor, this is at page nine twenty-nine to nine-thirty of the record on appeal.
>
> "One of the two mitigating factors that should be emphasized is that Mr. Mills had a substantial impaired capacity to perform his conduct -- conform his conduct to the requirements of the law."
>
> Do you recall making that argument?
>
> A. If it's in the record, I made it.
>
> Q. In terms of representing Mr. Mills at the actual judge sentencing, had you had evidence of statutory mental health mitigating factors, would you have presented that independently to Judge Woodson?
>
> A. Obviously, yes.
>
> Q. Is there anything about that type of evidence that would have been inconsistent with your arguments to Judge Woodson at the original trial or then later at the judge sentencing?
>
> A. No.
>
> Q. Would such type of evidence have been helpful evidence on statutory and nonstatutory mental health evidence?
>
> A. Yes.

(R. 17-18). Ms. Bickerstaff testified:

> Q. Had you had evidence of the statutory mental health mitigating factor[s], would you have presented those at the penalty phase before the jury?
>
> A. Yes.
>
> Q. Is there any question about that?
>
> A. Absolutely none.
>
> Q. Would any of that type of evidence, evidence of a substantially impaired capacity to conform conduct within requirements of law, evidence of an extreme mental disturbance at the time of the offense, would any of that have been inconsistent with what you were attempting to argue to the jury at the penalty phase?

A. No.

Q. Would evidence of the nonstatutory mental health information; for example, brain damage explaining Mr. Mills' history of offenses or brain damage in general, would that have been evidence that you would have presented?

A. Yes.

Q. Would there have been any tactical or strategic reason for not pursuing the ... statutory or nonstatutory mental health evidence in Mr. Mills' case?

A. No.

(R. 54-58) (emphasis added).

Q. Evidence that Mr. Mills' capacity to conform his conduct to the requirements of law [was] substantially impaired at the time of the offense.

Is there anything about your understanding of the facts of the offense that would be inconsistent with that statutory mitigating factor?

A. No.

Q. Evidence concerning an extreme mental disturbance by Mr. Mills at the time of the offense, not insanity but the statutory mitigating factor, is there anything about the facts of the offense that would have been inconsistent with that statutory mitigating factor?

A. No.

Q. Evidence concerning Mr. Mills suffering from brain damage, is there anything about that that would have been inconsistent with the facts of the offense or with Mr. Mills' history?

A. No.

Q. And you indicated, I think, on direct examination that could -- would have explained his history to the jury?

A. Yes. I think it would have provided some explanation for it in addition to other factors concerning his upbringing and so forth, his childhood, yes.

Q. And that could have explained [it] to the judge, as well?

A. I believe so. I hope so.

Q. In a Florida capital sentencing proceeding based on your own experience and your own knowledge of the law, is the role of an attorney to obtain a life recommendation from the jury or the life sentence from the judge?

A. Both. I mean, I knew at the time that was the law and remains the law, that the judge had authority to override the

jury's recommendation and that their sentence was only advisory and that the person who had the last word was the judge.

Q. Is this a case where you tactically chose not to pursue mental health mitigating evidence because it would have been consist --inconsistent with anything you were trying to do or with other evidence in the case?

A. No.

(R. 71-73). Mr. Ford testified:

Q. Evidence of brain damage that Mr. Mills is brain damaged, evidence that Mr. Mills suffers from impulse control problems, problems in emotional [l]ability, problems in ability to reason, problems in judgment; would that type of evidence have been evidence that was mitigat[ing] in this case to present to either to the Judge or to the Jury?

A. Well, I can't, you know, from my knowledge of the case law that at penalty phase practically anything is mitigating, that would fall within that category.

Q. Would there have been a tactical or strategic reason for not presenting that type of evidence to the Jury, and Judge Woodson at the Judge sentencing independently?

A. To not present that evidence?

Q. Right?

A. No.

(R. 439-44).

When closing arguments were being presented at the conclusion of the hearing Judge Woodson agreed that no tactical reason had been heard as to the attorneys' omissions:

MR. NOLAS: So the question again is, is there a reasonable basis in this case that existed. Was there a tactical or strategic reason for the lawyers not to bring it to Court.

I don't think I need to go specifically through their testimony. They said no tactical or strategic reason.

THE COURT: Right. I agree. They said no tactical reason.

(R. 580). And the Court also agreed:

MR. NOLAS: It was not investigated, thought through in advance. This is not the kind of case where anybody sat down with Mr. Mills and said tell me about this head injury.

THE COURT: No. I agree, they didn't.

(R. 617).

As the attorneys testified, each believed that the other was responsible and neither investigated or developed mitigating evidence. Although each of the attorneys explained that because of Mr. Mills' history and what prior records (including mental health evaluations) reflected, a mental health evaluation was necessary, no evaluation was requested. The attorneys testified that they would have presented mental health mitigating evidence on Mr. Mills' behalf but that they failed to secure his records, investigate his history, or arrange for an evaluation. And each attorney testified that there was no tactical or strategic reason for the omissions.

b. The Family Members' Testimony

Mr. Mills also presented the testimony of his sister, Diannetta Alexander, and his brother, Lamar Mills, as well as affidavit evidence from other witnesses. This evidence confirmed that trial counsel did not investigate and prepare for the penalty phase, although significant mitigating evidence was available.

As the testimony of trial counsel indicates, Ms. Alexander attended the trial and the penalty phase because she was concerned about her brother. No attorney ever asked her to attend, nor told her what the penalty phase was about:

> Q. Diannetta, you testified in front of the Jury and in front of the Judge at Greg's trial, right?
>
> A. Yes.
>
> Q. How did you end up going to the trial?
>
> A. Well, I would go to see Gregory. And when I talked with Gregory first, you know, I didn't know the severity, you know, of the case.
>
> Q. Did the attorneys call you and explain to you?
>
> A. No. I went to attorney myself.
>
> Q. You went to Mr. Greene?
>
> A. I went to Mr. Greene.
>
> Q. And did he explain to you what penalty phase was all about?
>
> A. No. He didn't explain nothing to me.

Q. Did he tell you it might go to penalty phase?

A. No.

Q. Did you even know what penalty phase was?

A. No, I didn't.

Q. Did Miss Bickerstaff ever call you?

A. No.

Q. Ask you to come?

A. No one called me. I called Mr. Greene on several occasions, but no one called me.

The reason why I called him, I had gone to visit Greg. I asked him who was his attorney. And he told me.

I called Mr. Greene. Mr. Greene asked me, you know, what did I have to do. I told him I was Gregory's older sister. I helped practically raised Greg.

So I went down to his office and I talked with him.

Q. And did he tell you he might call you as a witness?

A. No. He didn't know. He didn't say anything about a witness, say anything.

Q. Did he ask you in detail about Greg's life?

A. No. He didn't ask me anything. Mr. Greene didn't ask me anything.

Q. Did you end up testifying, did you talk to Miss Bickerstaff before you testified?

A. No.

Q. She just called you as a witness?

A. I went in cause I had talked with Greg. I went to the trial and I was out there. That's when I remember her asking me my name, and.

Q. When did she ask you that?

A. Sitting in the courtroom.

(R. 513-15).

Q. ... was this before or after Greg was convicted?

A. This was after.

Q. After, he was convicted?

A. After.

Q. And Miss Bickerstaff said who are you?

A. Um-hmm.

Q. And did she explain to you she might call you as a witness and tell you what, you know, what your testimony would be used for?

A. No. Mr. Greene, no.

Q. Neither of them did that?

A. No.

Q. When was it that you realized how serious the case was?

A. When they asked me why I think Greg should not receive the penalty [of] death.

Q. That was while you were on the witness stand?

A. Um-hmm.

Q. No one had explained to you before, it was that serious?

A. No one talked to me.

(R. 515-16).[2]

Q. Then you testified in front of the Judge later at the sentencing?

A. (Witness nods head.)

Q. How did you end up going there; did the attorneys call you and ask you to come testify?

A. No. I had, here again, I talked with Gregory, find out did we have Court. I went, like I told you, I called Mr. Greene, and he, I asked him, you know, when the next time, when we going to Court.

He was really nice and everything. He said well, I'll get back with you. He never did get back with me. That's when I went to my grandfather and said they're having Greg's trial. I took my grandfather along.

Q. You took your grandfather to the penalty phase in front of the Jury?

A. Yes.

Q. Do you know how the other gentleman, Greg's [employer] --

---

[2]The record reflects that Ms. Alexander was asked why she thought Mr. Mills should not be sentenced to death at the judge sentencing (ROA 898). She was not asked this question at the penalty phase before the jury (see Transcript of Penalty Phase, pp. 70-79). In conjunction with her evidentiary hearing testimony, the record establishes that Ms. Alexander was not aware until the judge sentencing, some eight months after the penalty phase, that Mr. Mills was facing the possibility of a death sentence.

A. I asked him to go with him. Asked him to go to the trial with me.

Q. Did the attorneys ask you to gather people and bring them?

A. No. I asked him, he really. It was like telling, he was concerned. I was telling him about the little bit I knew. So he said I'd like to go with you.

He really volunteered more or less in support for me, because I worked for them first when I was going to school. They gave me a job. And he was really kind. They were just real kind. So he said he volunteered to go.

(R. 518-19).

Q. Did Miss Bickerstaff talk to you about any of that stuff before she put you on as witness?

* * *

THE WITNESS: No, she didn't.

Q. Did Mr. Greene?

A. No.

Q. Do you know a man, an attorney named Mr. Ford, did you ever have contact with him?

A. Not that I remember.

Q. Bennett Ford?

A. I remember the name, I don't remember having a conference.

Q. He didn't call you, ask you to come testify?

A. No.

* * *

Q. If the attorneys had called you during the trial, before the trial, anytime back then, asked you to get family members together, would you have done that?

A. Yes.

(R. 520-521).

Similarly, Lamar Mills testified that no one working on Mr. Mills' case contacted him at the time of trial or sentencing, and that he would have talked to Mr. Mills' attorneys and a psychologist about Mr. Mills' life if he had been asked (R. 379). The affidavits of Vivian Mills Staley, Mr. Mills' sister, and John Lee Mills, Mr. Mills' brother, were received in evidence (R.

1148-56). Ms. Staley was also not contacted by Mr. Mills' attorneys at the time of trial, and would have told everything in her affidavit if she had been contacted (R. 1152). John Mills also would have been willing to tell what he knew about Mr. Mills, but was never asked by Mr. Mills' attorneys (R. 1156). Likewise, Robert Thomas, a truant officer in Seminole County who was well-acquainted with the Mills family, testified that he was not contacted at the time of Mr. Mills' trial (R. 475). As discussed in section (2)(b), infra, all of these witnesses had valuable information to impart, information which was mitigating on its own, which would have been of significant value to a mental health expert, and which would have supported mental health mitigating factors.

2. The Evidence Presented at the Hearing Establishes That Trial Counsel's Failure to Investigate Deprived Mr. Mills of Significant Mitigating Evidence.

a. The Mental Health Mitigation.

Dr. Henry Dee and Dr. Joyce Carbonell reviewed Mr. Mills' history, his prior records, records relating to this case, records of prior evaluations, and spoke to witnesses. The doctors also examined Mr. Mills and conducted the cerebral dysfunction testing which Dr. Fumero noted in 1973 to be necessary. Each doctor is eminently qualified in psychology and neuropsychology and each was found to be an expert by the trial court. Dr. Dee's report was also introduced below (see R. 1113-1120). At the hearing the doctors presented detailed testimony (R. 75, et seq., Dr. Dee; R. 172, et seq., Dr. Carbonell), relating the results of the neuropsychological and psychological testing of Mr. Mills, discussing his impairments, and discussing his history. The doctors testified that Mr. Mills is severely impaired, suffers from brain damage, and has so suffered since childhood. His intelligence is diminished, as is his ability to control impulses and to reason; his judgement is significantly impaired because of his cerebral dysfunction; he suffers from severe mental health impairments. His childhood was an atrocious example of physical and emotional abuse and deprivation, further complicating his impairments. The etiology of his significant cerebral dysfunction relates to

his premature birth to an anemic and alcoholic mother, the lack of medical and other care which he needed as a child, and two serious head injuries he received while he was a child.

The doctors' testimony was consistent with the evidence about Mr. Mills' history which was available pretrial. This evidence included: Mr. Mills being medicated with Mellaril by juvenile authorities and at the jail pending trial; his history of seizures, fainting spells, dizziness, headaches, and inability to sleep because of these ailments and the medication for these ailments (R. 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1146, 1157, 1271, 1082); the serious head injuries he suffered as a child, the accounts of the witnesses who knew him and who testified that his behavior changed after those injuries (he became withdrawn, different, and thereafter constantly complained of headaches), and the prior incarceration records relating that he had a three-inch scar on his forehead (R. 1133, 1134, 1135); the 1978 recommendations by juvenile authorities that Mr. Mills receive psychological counseling (R. 1136); the 1973 evaluations by Dr. Austin, who noted that Mr. Mills needed a structured environment because of his difficulties, and Dr. Fumero, who prescribed Mellaril, noted that Mr. Mills was "concrete," and recommended that an EEG be provided to assess brain dysfunction (R. 1082, 1092, 1104); the 1976 MMPI administered to Mr. Mills by the juvenile authorities whose results indicated "[c]onsider psychiatric evaluation" and "may have significant psychiatric problems" (R. 1102); and the motions filed by the Public Defender's Office in other cases relating to Mr. Mills indicating that he had problems with his memory. The doctors explained that these records, as well as the family's account (see Section (2)(b), infra), signalled the need for a mental health evaluation. As noted above, each of the attorneys agreed that a mental health evaluation as to mental health mitigating issues was necessary and, given this history, should have been pursued.

Each doctor concluded, based on the history, their examinations, and their testing, that Mr. Mills suffered from a substantially impaired capacity

to conform his conduct to the requirements of the law and from an extreme mental/emotional disturbance at the time of the offense. The doctors also explained that Mr. Mills' level of functioning, given his impairments, was below that of his chronological age of 22 at the time of the offense. In addition to these statutory mitigating factors, the doctors explained that Mr. Mills' brain damage, low intelligence, psychological deficiencies, and history of traumatic abuse and deprivation had left him scarred and further diminished his functioning throughout his life and at the time of the offense.

The trial court made no findings that the doctor's accounts were unreliable or not credible. As the doctors' testimony demonstrated, significant statutory and nonstatutory mitigating evidence was available and could have been developed and presented in this case.

The first thing Dr. Dee noticed when he began to examine Mr. Mills was the scar on his forehead (R. 86). This led him to inquire about possible trauma to the head:

> Q. And why is that? Why would that inquiry be something significant?
>
> A. Well, the issue of integrity of the brain is something that would be important in a forensic case involving statutory mitigating factors or aggravating factors; because the finding of cerebral damage would usually indicate statutory mitigation because under the statutory language it says that does a person suffer from significant mental defective emotional disturbance at the time of the crime is committed.
>
> If he did, suffer mental defective -- I interpret that as meaning was his brain in tact, you know, that's the way we think of it. If it was not, then there's an extremely high probability that he would show certain symptoms.
>
> And most people that have brain damage, I provide references in the report, suffer impairments of memory and a variety of cognitive functions.
>
> They suffer increased impulsivity and emotional [l]ability, both of which would make it more difficult for them to render their conduct consistent with the dictates of law.

(R. 88-89). Dr. Dee tested for brain damage, using a number of neuropsychological tests (R. 89, et. seq.). Dr. Dee's testing, together with all the data he reviewed and the people he interviewed regarding Mr. Mills, led to the conclusion that, to a reasonable degree of neuropsychological and

psychological certainty, Mr. Mills does suffer from brain damage (R. 120). Dr. Dee explained how the environment Gregory grew up in affected him, in light of his brain damage:

> Certain brain damage[d] individuals can grow up with normal emotional control.
>
> That is, if they grow up in the kind of prostetic environment. What I mean by that is one that is nourishing but structured and which takes account kinds of behavioral deficits.
>
> They have a -- make some attempt to correct them.
>
> [In] Mr. Mills' case exactly the opposite was true. He grew up in [an] extreme kind of environment, basically emotionally abandoned by both his parents. His father died at a young age when he was very young.
>
> Q. In fact, his father was killed?
>
> A. Yes, by his aunt. There was very little food in the house. They have ample testimony to that from the relatives. He went out to steal food from an early age and clothing.
>
> I mean, the degree of neglect is shocking and is something one rarely runs across that -- that I rarely run across on the Child Protection Team.
>
> In fact, it's shocking to me that no state agency ever looked at this family and moved every child out of that home, because they were consistently neglected.
>
> They witnessed abuse of the mother by the father. Alcoholism by both parents.
>
> The father took the child to gambling establishments. Introduced him to illegal and immoral activities at an early age, which he was later to pick up on when his father died.
>
> That's how he got along on the streets beginning at about age eleven or twelve.
>
> He said he had to look after himself after his father died, basically on his own from then on.
>
> Now a person who is brain damaged is certainly not going to develop any kind of control in that kind of environment. It's going to exacerbate everything; that kind of environment, that very deprived kind of environment. In fact, it was a deprivation so severe we characterize it as abuse. And that would certainly interact with the fact he was brain damaged, make him less controllable.
>
> And then there are the more subtle psychological things that I think are not so subtle, they're obvious.
>
> Q. For example?

A. For example, he's going to act out. He's going to resist authority, 'cause he's never had anybody controlling him. He's not used to anybody telling him what to do.

And he develops a false kind of bravado. You see this frequently in ghetto children who are neglected by the parents. They've only got themselves to depend upon, so they got to act like they can take care of themselves.

And in fact personality tests reflect this is just a facade with Mr. Mills. He's a very tender-minded, sensitive, clinging person who's very submissive, go along with other people, do whatever they want to get their approval.

Q. And the testing does reflect that?

A. Yes, that's what the testing reflects. It's not my impression, that's what the testing says. It's valid on the scales. And yet he would and did present a rather -- if you read his juvenile history, a tough facade, macho facade. That's what you expect when a child is neglected to that degree.

(R. 120-23).

Mr. Mills' cognitive functioning is impaired by brain damage:

Q. ... In terms of Mr. Mills' cognitive functioning, are those areas also impaired because of his brain damage?

A. Yes.

Q. And that's ability to reason, ability to rationalize, memory, those types of things?

A. Yes.

Q. He's not normal in those areas?

A. No, he's not.

(R. 125).

Dr. Dee found that statutory mitigating factors applied to Mr. Mills:

Q. To a reasonable degree of psychological and neuropsychological certainty, were you able to form an opinion as to whether or not at the time of the offense, Mr. Mills' capacity to conform his conduct to the requirements of the law was substantially impaired?

A. I believe that it was.

Q. And to a reasonable degree of psychological and neuropsychological certainty, were you able to formulate an opinion as to whether Mr. Mills suffered from an extreme mental disturbance at the time of the offense?

A. I believe that he did.

Q. And can you tell us and in answer to the question His Honor posed a few minutes ago, why it is you say that?

A. Well, he suffers -- well, in the old DSM III, when a diagnosis that was called organic brain syndrome with mixed [features] that would actually cover what he shows, okay?

In today's revised edition and it's a psychiatric misology by the way classification scheme, they've dropped that and then they've left us with such a vague diagnosis it doesn't mean anything. It's organic brain syndrome not otherwise specified.

So I would probably put his case under that diagnosis that is called organic affective syndrome, which would include the impulsivity, the unexplained explosive behavior, aggressive acting out that is catalogued in the record and what you inquired about, that would be the nature of it.

And you'd also have to add that he has severely impaired cognitive functions, but that's not part of the diagnosis. That's evidence of the diagnosis, you understand.

See, there has to be some organ[ic] etiology. That's what makes it different from an antisocial personality or something else.

(R. 126-27). Dr. Dee also opined that several aggravating factors ought not to apply to Mr. Mills. Because of the degree of Mr. Mills' psychological deficits, no intent, planning, or higher cognitive functioning was involved in the offense (R. 132-33).

Finally, Dr. Dee testified that his testing was entirely consistent with the testing conducted on Mr. Mills in 1976 (R. 139), and that Mr. Mills' behavior was attributable to his brain damage:

Q. ... In terms of the behavioral problems in Mr. Mills' case, and in terms of who Mr. Mills is, as you assess them, is that consistent with the accounts that his family members and other witnesses have provided you in the affidavits?

A. Yes.

Q. And to a reasonable degree of psychological certainty, has Mr. Mills' impulsivity affected his behavior throughout his adult life?

A. Yes.

Q. Is that also true throughout his teens?

A. Yes.

Q. Would it be fair to say that throughout that time period, he has had problems controlling his behavior?

A. Obviously.

Q. And that's attributable to his brain damage to a certainty?

A. Interacting with his environment, yes.

(R. 150-51).

Dr. Carbonell's evaluation consisted of various psychological and neuropsychological tests (R. 190-91) and the review of substantial information concerning Mr. Mills, including, inter alia, school records, prior incarceration and medical records, the trial and sentencing transcript, Dr. Dee's report, and interviews of family and other witnesses (R. 188-90). Upon first meeting Mr. Mills, Dr. Carbonell was also struck by the "three inch[]" (R. 194) scar on his head: "If they've had the blow to the head, you know, you want to look further in terms of what kind of effect that might have on their neuropsychological [functioning]" (R. 192-93). As a result of her evaluation, Dr. Carbonell concluded that, to a reasonable degree of psychological and neuropsychological certainty, Mr. Mills is brain damaged (R. 197-98; 235).

Dr. Carbonell explained in detail the testing she performed on Mr. Mills, how the particular tests are conducted, and the results of those tests (R. 198-235). For example, on one particular test, the Halsted Reitan, Mr. Mills scored a point nine, on a scale of zero to one, with zero being no impairment (R. 199). Dr. Carbonell explained that her conclusions were consistent with those of the examinations of Mr. Mills before the offense (R. 283-85). Mr. Mills' brain damage was reflected by the testing, as well as other evidence:

> Damaged, okay. I believe given his family history that he had some brain damage at birth.
>
> His mother was a heavy drinker, and drank throughout her pregnancy.
>
> And he -- the affects on that -- on the fetuses and in fact are well know.
>
> Now, she never went to a doctor. She didn't go to Doctor "A". He was delivered by a midwife.
>
> We also know she was anemic during her pregnancy, was constantly sick, had to stop working and was drinking.

(R. 238).

A. His mother drank during the pregnancy, and from what I have heard of the family history and if -- some I have gotten from people.

This was not just have a drink at the end of the week. This was heavy chronic drinking on the part of both his parents.

He had -- I know he was abused as a child. According to the family members, the mother would hit whatever was convenient, which was sometime the head, on the stove, wood, wood cords, whatever, and [he] also had two fairly significant head injuries.

And in fact, it's -- some people say the scar came from the second one. A few people think it might have come from the first one.

He was approximately seven years old. He was approximately apparently about second grade.

He and his older brother dove into the St. Johns River, and he landed on a rock hit his head on the rock.

He was pulled out of the water by his brother, and taken home, and he was apparently groggy and he got no medical attention.

I don't think he had any medical attention all throughout his childhood, although he was apparently -- the memories are he was bleeding. Had to be pulled out of the water by his brother and apparently another friend who was with them.

That was approximately second grade that that happened.

There was another injury that happened later on, probably pre-teen that Mr. Mills remembers and family members also remember, and they used to run beneath the stadium, and he ran into a concrete post.

And most people believe that's where that scar came from. That he was brought home once again by his friends, and he was reported to be groggy and dazed and his memory is that he just laid around for days with wet rags on his head.

Like I said, there was no medical attention for him.

(R. 244-46). Dr. Carbonell explained that repeated injuries to the head result in geometric damage:

Q. The evidence indicates that the etiology of the brain damage could be while Mr. Mills was in the fetal stage?

A. It could be. It could be. I think that's why it looked so global in terms of having difficulties, those sort of things. Tasks in spite of them, low average.

Q. What would a head injury -- would it add to it? How would a head injury work in that regard?

A. It would add to it. Cause more diffuse -- I think that's why you see that some of that left sided focus, because he may have more insult or injury to that side of his head.

In those -- you know, in those blows. No, but those things were just compounded. I think it would be more geometric progress than additive.

(R. 155-56). Dr. Carbonell also explained the cognitive effects of brain damage:

A. The general effects you see from cognitive dysfunction, the behavioral sense are problems with impulse control, and lack of judgment, irritability, essentially.

The end result is that the person makes poor decisions, does things impulsively, and, you know, without the ability to essentially -- they don't think out well what is happening in that sense.

That is, they're rather reactive rather than proactive.

Q. Has that been consistent throughout Mr. Mills' life?

A. Yeah. I mean starting early on, he was doing very impulsive things.

Q. What about cognitive deficiencies?

A. Cognitive deficiencies?

Q. Relating to brain damage.

A. Yeah, [there are] going to be problems with memory. Problems with information processing.

I mean, the cognitive and behavioral go together.

It's a question of whether the cognitive and behavioral fit, and they do in the sense that the difficulty and information processing, that is, the trouble that you would have understanding what's happening leads you to problems in judgment.

It leads to the behavioral things. The cognitive problems you have also tie into the behavioral things.

Q. And you already indicated the degree of brain damage in Mr. Mills' case is severe?

A. In a global sense, yes.

(R. 257-59). Dr. Carbonell summarized, "Overall he scores on an impairment index range called severe" and then explained:

Q. ... Is Mr. Mills the type of person, given these deficits, who can control his behavior, who can stop, plan, think, control his impulses?

A. It's highly unlikely.

* * *

Q. Is that consistent in brain damaged people?

A. Yes. I mean one of the hallmarks is problems with impulse control.

(R. 257-59). Dr. Carbonell also agreed with Dr. Dee that Mr. Mills' childhood did nothing to mitigate his brain damage:

Q. ... Let me talk about the environment a little bit. Taking a normal person, not brain damaged and in putting them in Mr. [Mills'] environment, growing up, such a person would have trouble, would they not?

A. Yes, they certainly would. I mean --

* * *

A. ... the environment does have a lot to do.

If you put a normal healthy neurologically intact child in that environment, and they're going to have problems.

I've spoken to a number of his brothers and sisters, and there are -- I mean these are people who do have problems.

But take a child who has special needs, which a child like him does, and in any environment they're going to have trouble worse [when] the environment is not good.

Certainly better if the environment is good. Let me give you an example.

I have a cousin who is mildly retarded. She has Cerebral Palsy.

She grew up in a very supportive, warm, structured, environment where they did everything they could to enhance her functioning.

And she functions quite well. Had she been in a different environment, she would not have functioned as well.

But she is still limited. She will probably never live on her own....

So it's a function of both. You know given some environmental things, it would be better, but -- in other words, you can't take one and say without this one he would have been fine, or pull away the other one, say without that one he would have been fine.

The combination of the two is terrible.

(R. 269-71). Dr. Carbonell described Mr. Mills' environment as one that heightened his problems:

A. Okay. [His environment] was what could, at best, be called dysfunctional. His mother had the first child at age twelve.

She married a man who was a boy who was seventeen. She was still a child too, because she had become pregnant by him.

She said he forced himself on her. She expressed to some people she didn't want her children.

She should never have had them. She was a heavy drinker as well as her husband. [There] were frequent fights between the two of them.

He beat her even while she was pregnant. She stabbed him. The children were beaten, burned. Burned abused. There was was frequently a lack of food.

His oldest sister, Dianetta who was put in charge of them reports having to steal cabbage to feed them, because there would be no food to feed them. Her father was a compulsive gambler.

She reported that although he did express affection to them, that he would just gamble everything he got his hand[s] on. He also drank.

When they were fairly young, the father was shot by the mother's sister numerous, I think, six times in the head.

They were then left with the mother who was described as being even more abusive to them.

The mother, by her own reports, knows very little of what went on with them as children.

Yeah, she knew he got hit in the head, but she didn't have too much [to] do with them.

At that point, she was essentially a child herself. She was also drinking heavily.

At that point, she eventually, she left them at one point, abandoned them. This is before the husband was shot.

Abandoned them. Left them with the father. Left for a few months, came back pregnant with a child by another man, came back to her husband, and he kept the child as if it were his.

After he was shot, she started dating a number of other men.

When they didn't like the children, she would request the children to leave.

She moved several times without telling them she was moving until the day she was moving.

She threw them out approximately [at] age fourteen or fifteen, because she believed that the man she was with would not want them there did not want her to support them.

She had three more children, three more children after that.

Q. A child, a young man such as Mr. Mills suffering from brain damage, would he need more care and affection? Is that something that would help?

A. Certainly he would certainly need more care and affection than another child could provide to him.

And that's basically what he had ... another child [his sister] was eight years old when she started caring for him.

(R. 279-81).

Dr. Carbonell explained that Gregory Mills' brain damage explained his conduct:

A. I think [his problems] are a result of his cerebral dysfunction in conjunction with a treatment or a lack thereof as a child.

Q. Does Mr. Mills' brain damage explain his history of breaking the law?

A. Yeah, yes, it does. I mean he's been doing relatively impulsive things since he was a child.

Q. Does it also explain his history, ... his history of poor judgment, his history of impulse control problems?

A. That's what it is.

THE COURT: You're saying if he didn't have this he wouldn't have been breaking the law, or you couldn't say that, could you?

THE WITNESS: I can say that plenty of people break the law without brain damage, but I'm telling you that in his case, it clearly appears to be that case...

(R. 289-90). Cerebral dysfunction affected Mr. Mills' behavior, and his cerebral dysfunction is severe. Dr. Carbonell testified that two statutory mitigating circumstances applied to Mr. Mills:

Q. Were you able to formulate an opinion to a reasonable degree of psychological or neuropsychological certainty concerning the mitigating factors concerning whether Mr. Mills suffered from extreme mental disturbance at the time of the offense?

A. Yes.

Q. In formulating that opinion, did you assess your testing of Mr. Mills, the history of Mr. Mills, your interview with him?

The facts concerning the offense, prior testing of Mr. Mills before the offense; all of that type?

A. Yes, I did.

Q. Can you tell us, to a reasonable degree of psychological [and] neuropsychological certainty, whether Mr. Mills suffers from any extreme mental disturbance at the time of the offense?

A. Yes, he did.

Q. Can you tell Judge Woodson why it is you say that?

A. Because of the problems he had in terms of his brain damage.

His long history of having noted to have had psychological psychiatric problems.

The indications that he had brain dysfunction very early on, and his childhood history.

I mean all those things combined. His lack of any treatment. His lack of any reasonable environment, even on a minimal level all contribute to that.

Q. Is brain damage significant to that finding?

A. Yes, it is.

Q. And you testified that the testing that you conducted was available at the time of [the] original proceedings?

A. Yes, I mean -- like -- I think it might not have been the revised version of some of the tests. Certainly these were things that were available at that time.

I had already been doing it in graduate school at that time.

Q. And you also testified that his level of brain damage is severe?

A. On the Halsted Raitane Impairment Index falls into the severe ranges.

(R. 306-08).

Q. Were you able to formulate an opinion to a reasonable degree of psychological and neuropsychological certainty as to whether at the time of the offense, Mr. Mills' capacity to conform his conduct to the requirements of the law [was] substantially impaired?

A. Yes.

Q. And can you tell us what that opinion is?

A. Is that his capacity to conform his conduct to the requirements of law were substantially impaired.

Q. Can you tell us -- describe for us why it is that you say that?

A. Because of his problems in terms of his brain damage, his upbringing. His lack of any treatment for those problems.

His lack of any environ[ment] that would have sort of mitigated those problems.

Q. Is brain damage an extreme mental disturbance?

A. It can be, yes.

Q. And is it in Mr. Mills' case?

A. In Mr. Mills' case, yes.

Q. Is brain damage something that substantially impairs ones capacity to conform his conduct?

A. In some cases, yes.

Q. And is that the case in Mr. Mills' case?

A. Yes, it is.

(R. 311-12).

b. Additional Mitigating Evidence

Mr. Mills also presented the testimony of his sister, Diannetta Alexander, his brother, Lamar Mills, and testimonial and affidavit evidence from other witnesses which related the horrendous nature of the abuse and deprivation which Gregory Mills experienced as a child. This evidence also confirmed the two serious head injuries which Gregory had suffered in his childhood. The testimony of these witnesses demonstrated that what counsel, who were admittedly unprepared, presented at sentencing was barely the tip of the iceberg. Just as significantly, the testimony of these witnesses would have been of significant value to a mental health expert and, with a proper mental health assessment of this significant evidence, would have supported mental health mitigating factors.

For example, Diannetta Alexander, Mr. Mills' sister, testified that Gregory Mills was one of nine children (R. 486). When she was pregnant with Gregory, Mrs. Mills drank and was sickly:

Q. Do you remember when your mom was pregnant with Greg?

A. Yes.

Q. Did she drink during that time period?

A. Yeah. She drank.

Q. Do you remember her drinking, you remember seeing her drinking?

A. Yes.

Q. Did she have any other problems while she was pregnant?

A. I remember she started bleeding, and they put her to bed. She had to keep her feet elevated.

Q. That was during quite a, quite a bit of the time?

A. (Witness nods head.)

A. Was she anemic also, during that time period?

A. Yes.

* * *

Q. How did she act, like she was feeling sickly all the time?

A. Yes. She was sickly all the time.

Q. She was in bed most of the time?

A. Yes.

Q. Then you said she was bleeding?

A. Yeah, bleeding.

(R. 487-88). Mr. Mills' parents were farm workers, and they worked from six in the morning until six at night. After Gregory was born, Diannetta, the oldest child, started taking care of the children, as her mother would not (R. 488):

Q. Who took care of the kids?

A. I did.

Q. When did you start doing that?

A. Well, I can remember when I was in, I was about six years old. That's when I started cooking their first meals, cooking for them and everything.

Q. Were you tall enough to reach the stove?

A. No. Cause I was short. I was small, but I had, I knew how to cook because she taught me to cook. I wasn't a good cook, but I cooked.

(R. 488).

Q. What other stuff did you do around the house?

A. I did all the cleaning, the mopping, the cleaning and discipline, the little bit I did.

Q. And you were how old at that time, did you say?

A. Well like I tell you, I started off when I was six years old. This was all through elementary years. We went from K to the eighth grade till I got in high school, till I moved out.

(R. 489-490).

When Mr. Mills' parents were home, they often fought with each other, or beat the children.

Q. How did your parents get along with each other, did they ever fight?

A. They fight constantly. There was a fight almost all -- constantly. Argument, you know, verbal fighting, arguments constantly.

A lot of time be physical fights where they would be screaming, hollering, stuff like that to stop it, it was ongoing thing.

* * *

Q. What did your parents fight over?

A. Mostly money. Mostly fought about money and the discipline by my mom.

Q. How did she discipline you?

A. My dad would talk to us. He would talk to us before he paddles. But she always beat you. I mean in a rage, you know, she'll slap you or choke you.

Or [if] it wasn't too much paddling and extension cords, you know, ironing cords. ...

* * *

On the weekends it would be about him gambling. He would give her money, but he would come back and take the money. Then, you know, she would fuss about him not having food in the house.

Q. Did she discipline all the kids or just you?

A. She discipline all of us. But my oldest brother, he was her favorite. She didn't discipline him much. He got away with it.

But the rest she was cruel. I remember when my brother, she got angry with him and she pushed him and he fell out the door and got a hole knocked in his side.

Or she would slap you, choke you. And if you were afraid, like I was afraid to get up on the bed, she put you up on the bed and make you stay, put you up under the bed and make you stay.

Q. Was there usually a reason for her beating you guys?

A. Sometimes it wasn't no reason. Sometime it was, sometimes if she told us not to go off and we went, she would spank us because we were disobedient.

Sometimes it wouldn't be, like I told you, if she told you to do something and you forget usually she would leave so many for you to do, if you forget it, she would just, you know, slap you, choke you.

And it wasn't no whipping like you would whip a child, it would be violent, something like that.

Q. Was it the same kind of discipline your dad used on you?

A. No. Cause he never whipped us with [an] extension cord. I remember once she would tie us to the bed and whoop us, you know.

I remember one time she tied one of my brother's hands, you know, and feet and whip them. She whipped them until the neighbor came over and made her stop.

(R. 490-497).

Although their father did not beat them to the extent the mother did, his gambling often left the family with little or nothing to eat.

Q. What did your dad do besides work?

A. He was a gambler. He gambled a lot.

Q. Were there times when you didn't have food in the house to eat?

A. Yes there was, they were quite frequently. When my mom left us we didn't have food. My dad was still with us. But most of the time he would be gone.

Because when he leave the house early in the morning, he don't come back to sundown.

Especially on the weekends, to him gambling he leave Friday evenings and don't come back till Monday morning most of the times....

* * *

Q. .... Do you know if there were times that your mom had food in the house that she wouldn't give to you guys when you were hungry, ...?

A. Yes. I remember that. Most of the time she had stuff that was out of limits to us.

Because I think my dad had it like that too. Certain things she had she didn't want us to eat. We knew that was hers and we couldn't touch it whether we are hungry or not. You were not to bother it.

(R. 490-492).

When Gregory was very young, his mother ran off with another man. She returned to the house, pregnant with the other man's child, and even though the children asked their father not to take her back, he did:

Q. Did she ever come back to live with you?

A. Yes.

Q. Tell me what happened?

A. Well, when she came back after I saw her at the school, she came back, she was pregnant.

What happened, my dad got us round robin, asked us did we want her back. I told him no. He said he felt we needed her, me being a girl I needed her in the house.

She came back, she was pregnant, and six months pregnant at the time, you know, she told us she was six months pregnant.

Q. How long had she been gone?

A. Well, about nine months. She had been gone nine months. But I specifically remember nine months because when she came back, she said I know I been gone from you all for quite some time, and I'm pregnant.

So I asked her, you know, how many months she was pregnant. That's when she told me, six months.

Q. Do you know if she ever saw other men while she was married to your father, she dated other men?

A. Yes.

Q. Was that something that the kids were all aware of?

A. Yes. We were aware of it, mostly me because I seen her.

(R. 494-95).

Mr. Mills' brother, Lamar, confirmed Diannetta's description of Gregory's childhood:

Q. Tell Judge Woodson what it was like growing up in that neighborhood in your family?

A. In my particular family.

Q. Sure.

A. Yeah. It was like hell, mean, and -- me and [Gregory] was coming up it wasn't like he could get -- go home and relax on the sofa. Maybe like you could have done when you was young.

We weren't able to do that. We didn't have any luxury. We had to be out of the house somewhere or around the house doing something else.

Q. Why was that?

A. Excuse me.

Q. Why? Why didn't you have --

A. I don't know why, but all I know is this. It was always somebody's saying something like you the worses child I ever had.

I done raise you, why don't you just go head on out and do something.

It's been like fifteen or sixteen years old. You know. I mean the whole thing was like -- it was like always cold.

Never enough for nothing. Where your own mom telling you or calling you son of a bitch.

I'm tired of your damn ass. You never -- daddy never did nothing. Call you a mother fucker, things like that.

All of the time you be sitting here living all off of me, all your Goddamn life. I'm tired of this shit.

This is what we had to listen to over and over and over and over.

Q. And that was from your mother?

A. Yes.

Q. Did she also physically abuse the children and --

A. Well, I just told you, I was slapped upside the damn head by a black -- can of Black Flag can where she told me to get out of the house.

So I was going to accommodate her. I was getting out. Before I could get out of the house, I got damn near knocked out with a spray can.

That's the way it was in my house where everybody had to compete for everything.

For a single piece of bread. Everybody trying to back stab the other one in some shape, form or fashion.

Where you couldn't sit there and enjoy a simple damn cartoon without some kind of thing that you have to do.

Really ain't nothing to do, but somebody making something else for you to do.

Then if you do go out and try to do something, you got something else.

You never appreciate. Many days if one of the other ones went out there and worked and we can't have the luxury of having -- see I have never seen or have our own chicken.

I worked on out the farm where I was called up looked for my check and got it.

The man told me your mother got it. I go home. I ask my mom for it, the check. Nobody seen where that check at.

Can't nobody find that. But nobody know where it went at. I know I ain't got it, but I worked out in the field for it for two or three weeks.

I ain't not nothing to show for it. You can't even have a decent pair of shoes to have for my feet.

That's how it was at -- walking in the house seeing four and five different men.

You have your own saying all kinds of provication [sic]. Going on right in the house, no respect for you, your little brother or nobody.

Seeing your momma there naked with another man and daddy ain't been dead for two weeks.

That's what it was like. That's how it was. Never nothing to eat.

People telling you the check coming. Everybody else laying out around drunk, but you ain't got nothing to eat. That's how it was.

That's how it be. Even to this day around here, if he should get out and go home right now, he couldn't go there.

He go there for two weeks, but later on he going to be where she there going to drive him away.

Q. Did your mom ask you and the other siblings to leave the home?

A. He was forced to. She never asked. It was the man to leave.

Q. How did that happen?

A. Well, he got several different ways. Which one you want me to start off with?

Q. Whichever one.

A. Says well, he got out there. You had the physical way. Okay.

Well, she threatened to hurt you, this kind of way. Okay.

Calling the police on you, accusing you of something that you haven't done.

You got the mental way. Looking at you and pounding your ears with the same thing about how you was the worstest child.

And how she wish she wouldn't have never have had you. Someone -- that your mom especially how I wish I would never had you, you know.

Or you just got this guy sitting there. You don't know him from Adam's apple, but your brother out there sleeping in the car.

And you go to your mom and say I will pay you to let him sleep here for a couple of weeks so I can get him a room.

She said no. And there's an extra bed in there. That's how it was at home. So --

(R. 368-72). Lamar also described Gregory being physically abused:

Q. Did you observe Greg getting physically struck?

A. Greg has been whooped with anything from -- that you can imagine. From an iron, from not a switch but a limb from [trees] to high heel shoes.

From coke bottles to a closed fist. You know, be choked, picked up off his feet and slammed to the floor.

(R. 372-3).

The siblings' portrait of Gregory's childhood is also confirmed by Robert Thomas, who testified at the hearing. Mr. Thomas, a truant officer for the Seminole County School Board (R. 456) and a City Commissioner for the City of Sanford (R. 466), got to know Gregory and his family situation when Gregory was in the third grade (R. 457). Mr. Thomas testified that when Gregory missed three days of school in a row, Mr. Thomas went to his home to investigate (R. 457-58):

And I got the referral from the school and went to the home and I knocked on the door and Mrs. Mills along with her oldest child Darnell had came to the door.

And I identified myself, told her why I was there. And she said I asked her why has Greg been out of school. And she said well, he doesn't have any clothes.

I said well, that's no problem cause we have a source where we can get Greg some clothes.

This was all, this was all she said. She didn't say, in other words, she didn't seem to be concerned about his going to school.

(R. 458). Mr. Thomas continued to have contact with the Mills family for several years (R. 458-60). At the hearing, he described what he observed:

Q. During those interactions, did Lucille [Mr. Mills' mother] always appear indifferent to you concerning Greg and the other children?

A. She wasn't indifferent, but she just did not show any concern about Greg's educational pursuits or opportunities. She didn't show any interest at all.

Q. In the past, you indicated that Lucille was not capable of parenting. That she was not a responsible parent.

What did you mean by that, in what sense?

A. Because the oldest child Diannetta assumed the bulk of the responsibility.

It was, I talked to Diannetta more than I talked to Mrs. Mills.

Q. I'm sorry. Go ahead.

A. She just, there were many times that she wasn't even at home when I would go there. And I would always have to talk with Diannetta, even after school that would turn out and she would have come back home. I would go back and talk to her.

But Diannetta was really the mother to the child. And she was just a child herself.

Q. Now I'll ask you about Diannetta in a second.

During your interaction with Lucille, with the mother, did she, is there anytime that you can recall that she showed concern for the child?

A. Not one time.

Q. Turning to Dianetta, how old was she when you observed she was assuming responsibilities for being taking care of the household, she had to cook and clean and all that?

A. Yes. She had to cook. She was in the seventh grade, I believe. I guess that was around twelve years old, I suppose.

Q. And there were a number of siblings, brother and sisters in the household?

A. Yes.

Q. Did you consider that to be a healthy way for a family to raise --

A. No. No. Not at all. A child can't rear a child, another child, there's no way.

If I might, I would like to --

Q. Sure.

A. -- unfold something here.

Q. Sure.

A. Diannetta told me one time there was no food in the home. They didn't live too far from a cabbage field. She went to this cabbage field, got two cabbages and came back. That's all they had. She cooked them and fed the children. This is what, this is how how he grew up really.

If I might say here, it's my opinion, my opinion from the very inception into his life, he just never had a chance.

Not from even after the benefit of coming from a stabilized family, no structure. No real structure. He grew up, other than what Diannetta did, like a wild flower or something.

Q. Did you find out why Diannetta had to assume all these responsibilities?

A. It was simply because she loved her brothers and sisters, she just undertook that responsibility.

Q. And the parents weren't, the parents were not undertaking those responsibilities?

A. They really weren't. They really weren't. In all of my dealing with parents and children, this is the most, this is the worst case of all where children are really neglected. They were deprived of mother and father guidance, just general parental guidance. They were deprived of that.

(R. 461-63)(emphasis added).

Witnesses also described the head injuries Gregory suffered as a child. Ms. Alexander testified:

Q. Do you remember a time when Greg had a head injury?

A. Yes. I remember.

Q. What do you remember about that?

A. I remember LeMar and the other boy named Samuel bringing him home. He had a big gash up here (indicating).

Q. You indicating over your forehead?

A. Up above his forehead.

THE COURT: Which forehead?

THE WITNESS: Up above, (indicating).

THE COURT: Above left eye?

THE WITNESS: It was here, more or less (indicating).

THE COURT: Pointing above the left eye near the hairline?

THE WITNESS: It was up here (indicating), near the forehead.

Q. They brought him home, what happened?

A. They showed it to me like they usually do. And I asked him what happened. There was some peroxide, I put the peroxide on his head. I made him go to bed.

Q. How big a gash was it?

A. It was a big, it was a lot open, you know, wasn't, I just, you know, all I know it was open, you know, open and up here.

And it was pretty big to me, you know, it appeared, I guess to me it appeared worse than what it was, you know, but it was bad.

Q. Was it bleeding?

A. Uh-huh. It was bleeding.

Q. Do you remember about how old Greg was at the time or how old you were?

A. I was in -- I was a teenager, cause I had gone to high school, I know I was about fourteen.

Q. Did LeMar tell you what happened to Greg's head?

A. Yeah. LeMar told me that.

* * *

Q. What did LeMar tell you?

A. He said they were diving in the river and said that he dove in the river and said Gregory dived and hit his head on a rock. And then I asked the other boy what happened. And he told me someone pushed Greg in the river.

And so I just took him and put him to bed. I cleaned the blood off, put him to bed.

(R. 500-02). After the injury, Gregory's personality changed:

Q. How did he act when they brought him home?

A. He slept a long time. He slept a long time. And I told the neighbor Miss Sharlton (phonetic spelling), the older lady, he got cut, she came over, told me to wake him up.

She said when a person has a injury to the head, you are not suppose to let him sleep.

But he stayed asleep. He stayed asleep all that evening.

* * *

Q. Did anybody take him to the doctor?

A. No.

(R. 503).

Q. What else did you notice about Greg, he slept a long time, what else?

A. I remember he slept, then he started talking about he had headaches, headaches, no toothaches this is what he was saying. Then all of a sudden, you know, he started, he stopped playing.

Q. That was right after?

A. Um-hmm. He stopped playing. He was withdrawn. He used to be with us playing all the time. And he would sleep a lot.

Then he started talking about his head would hurt him all the time. And I would give him BC, you know, the powder.

Q. Is that like aspirin?

A. It's aspirin powder.

Q. Did he complain about headaches for a long time?

A. Well, yes. All the time he would complain and I remember once he complained and the school nurse would come out to the school.

And he told Miss Kibby (phonetic spelling), that was her name, and Miss Kibby told about his, he told her he had a toothache. And Miss Kibby had, they used to let the dentist come to the school and check teeth.

They check for cavities in the mouth, and the doctor, he couldn't see why he was having toothaches. So they told us it was headaches that he had.

Q. But he had headaches before?

A. Not that I know of. He had never had any.

Q. When they first, getting back to when they first brought him home, you said he went to bed and slept a long time. Did he act any other way dizzy or anything like that?

A. Dizzy. He just curled up. I'm the one picked him up, put him in the bed. He curled up in the living room.

We had a three room house. He was curled up on the floor. I picked him up, put him in the bed and with the pillow and put the ice on the head and slept through dinner. He slept up in a ball. He was really active. But he just always slept.

Q. He was active before, and then he slept afterwards; is that what you're saying?

A. Um-hmm. Um-hmm.

* * *

Q. You said that he acted withdrawn after he hit his head, what do you mean by that, can you give us examples?

A. You know, like they would play. He used to always play with the other kids. From then on he didn't play. He loved the television. He didn't hardly watch television or nothing.

He just was withdrawn. He didn't involve himself with the rest of us.

* * *

Q. You had mentioned to me earlier he acted nervous; do you remember anything like that[,] fretful?

A. Yeah. I remember telling about how he would cry, you know, be crying. The others would say fretful. He was always crying.

He wouldn't eat properly. He used to have a good appetite. He wouldn't eat right or nothing like that.

He didn't get involved too much. Cause see, like where we lived at, it was like family quarters, you know, family, everybody lived, grandfather, everybody.

Q. Lived in the same area?

A. Same area. They, Miss Sharlton noticed it first, and he just, I remember saying there's something wrong with that boy. You know, I didn't know what it was. I was a child.

I didn't know why he acted like the way he did, why he acted, I just thought he was just having the headaches cause he used to just cry, you know.

Q. And did the headaches last a long time after that?

A. All I know he would tell me about them, he would have them and he would go to sleep, you know, he would sleep, but I don't remember how long they lasted, you know, on that particular day. But I knew from then on up he would have headaches.

(R. 504-08).

Lamar Mills also observed Gregory Mills' head injuries:

Q. ... Do you recall injuries to Gregory's head when he may have hit his head as a child?

A. Yes.

Q. How many of those were there?

A. He had a couple of severe ones.

Q. Let me ask you about the first one that happened when Gregory was about seven or eight years old?

A. Yeah, somewhere in that range.

Q. How did that happen?

A. Diving.

Q. And where was that?

A. St. Johns River in Sanford, Florida.

Q. Were you with Gregory when it happened?

A. Yes, I was.

Q. And specifically just describe it for me. How he was diving and --

A. It was a shallow. It was a boat ramp, used to be down long years ago.

Right before it became the holiday, in -- it was concrete. People used to take th[eir] boats and go fishing from that ramp.

And at the time, boats were loose, and where we used to jump out in the water and get the boat from, and pick up a little extra change and stuff.

And this one particular weekend, a guy had a pretty big boat.

The rest of us were like on our way out, and Greg was on -- running back towards the water.

So we turned and see it was a boat that was loose, and I guess he was trying to get that piece of change over to him.

And he dived off into the water, and he underestimated where he was diving from, you know, and he hit the concrete.

Q. He hit concrete or rock type thing?

A. It was concrete there. They [sic] raft was concrete. He tore it up.

Q. Did he go head first into it?

A. Yeah.

Q. Was he knocked unconscious?

A. For -- well, he come to liked he bounced up. He was like dazed, but he was not -- he was bleeding from the head.

We drug him back out and laid him on the side of the river. And then a lady come and take us home.

Q. When you first went up after, did you see him actually go over and hit his head?

A. Yeah.

Q. Did he go out when he first hit his head and turned over?

A. I really couldn't say that he went out, because my main objective was getting him out of there.

So we just we drug him out. But I assume that he was out. He wasn't like helping us getting him out of there.

(R. 351-353). Lamar further testified:

Q. How was he right after that? He was groggy? Was he talkative. Just describe how he was?

A. He went to sleep in the car. The midwife that delivered him -- me, I know was the lady that took him home.

And we saw -- were sort of scared to go home 'cause kind of scared he would get a whooping.

Q. He was afraid he would get him for hitting his head?

A. Yeah. Like we weren't supposed to be out there from the start.

Q. Did you take him home?

A. Yeah.

Q. And then what happened, one, two, three weeks after that? How was Greg during that time. What did he do?

A. Kind of sleepiness like he didn't want to go out and do nothing, you know. I don't think mom would let him go nowhere any way.

Q. Did anyone in the family take him to the hospital?

A. No, no.

Q. Did anybody do anything about his head?

A. No more than give him some aspirin.

Q. Give him some aspirin. Did anybody put any rags or anything on his head?

A. Oh, I put my T-shirt over his head.

Q. And for like the two weeks after that, would he be on the couch? Would he be in bed? How was he acting?

A. He didn't want to participate in anything. Like we usually call a little game called robbery, excuse the expression.

That's throwing oranges at each other, and we used to do it at night.

And it was kind of like a neighborhood game that we played. Georgetown against the other side of town.

And he never wanted to go. He always be sleeping when we going.

Q. Did Greg have headaches during that time? Did he feel dizzy?

A. He wasn't acting like kind of like he called -- I called it punkish scary. I thought he was just scared.

He said he didn't never feel good. I thought it was a cop, just a copout not to be going with the fellas.

They used to tease him call him whimpish, punk. Then I called him told him he was scary. He didn't want to go. He was scary.

* * *

A. He moped around, you know, In -- he acted weird. He didn't act like he used to. I call it punkish.

(R. 354-56). Lamar also remembered another time when Gregory had a serious head injury at an old stadium:

Q. You actually saw him actually hit his head?

A. Yeah.

Q. Did he hit it full force against the concrete?

A. Yeah. That's what prevented me from hitting mine 'cause he got it first.

Q. Did he fall back after he hit his head?

A. Like a slingshot.

Q. Did the back of his head hit the ground?

A. Yes.

Q. What was the ground made of?

A. It was like hard packed dirt and debris, like rocks, the construction of it.

Like it was -- they thrown old mortar mix and stuff.

Q. And when he hit his head on the pillar and then back of his head hit the ground, did he lose consciousness at that time?

A. He didn't get up for awhile.

Q. Okay. What did you do? What did the other kids around do?

A. Well, it was just another guy got him, shook him a little bit. Called him, and he sitting there.

He was like he was moaning and crying, you know. He got a little head gashed over.

Q. His head was cut open?

A. Yeah.

Q. Was he bleeding at the time?

A. Yeah, like a faucet.

Q. And then what did you do? Did you take him home?

A. Yeah.

Q. What happened when you got home?

A. He got a whooping, and then he got his head bandaged up with some old cloth.

Q. Who whipped him?

A. My mom.

(R. 358-60). Lamar also testified about the effect this head injury had on Gregory:

Q. After this happened, did Greg lay around for a couple weeks or so around the house or how did -- what happened a couple weeks after it happened?

A. He went like -- the dude was acting like he got touchy, you know.

Q. But specifically, when he was around the house, did he -- when the cloth was on his head, did he sleep a lot?

Did he say he had headaches? How did he act during that right after he got hit on the head during those two days after?

A. He got like a personality would change from being cool to like argumentary (sic).

He wanted to act -- it's mine, you know. He picked things just to get into arguments over with, and then he would go off somewhere by himself.

He would lie out in the sun by himself. We had the orange tree in the yard and he had like a porch that goes around.

He would sit there. He just go to nod in that. He didn't want to do nothing no more.

(R. 360-61).

Lamar testified that after the head injuries Gregory's behavior changed:

A. [Gregory] used to be like he'd be sentimental before he hit his head. And things he used to do like we used to call each other like names, okay.

He didn't participate because he couldn't stand the joke. He used to cry, you know, what I mean?

He didn't never endure in the good stuff like when you come down and talk about whose momma and I mean whose sister, and he didn't participate in that 'cause he couldn't stand it.

He didn't have the heart for that, you know. He didn't -- that kind of -- you know, of trip.

He was scared of stuff. Like he was scared of spiders and rags. He thought he was going to come out kind of -- you know.

Q. After the head injuries he changed?

A. Yeah.

Q. Now, did he change after the first one?

A. Not as much as the second one. But he did. He did. He was sort of like -- you know, oh my goodness. He used to be in sports, into sports.

He didn't want to do no more of that. He didn't want to play any more kill the man with the the [sic] ball and stuff.

* * *

Q. But comparing him before he hit his head to after, his personality changed, is that what you're saying?

A. Yeah.

(R. 362-64).

Q. Is there something that Greg did rolling his eyes and his head after he hit his head that he didn't do before?

A. Yeah. Even now I notice it. Then I noticed it. Now he have a tendency to raise his eyebrows and look at you like this.

He never used to do that. And he was -- I thought it was some disease or something he was catching.

That muscle twisting thing you can't control. That's what I thought it was.

(R. 366).

Mr. Thomas, the truant officer, also recalled seeing Gregory after he had injured his head. Once when Mr. Thomas went to the Mills' home, he saw Diannetta "massaging" Gregory's head (R. 467). Gregory had "contusions" (R. 467), an injury on his head (R. 468), and his eyes "seemed to be a little glassy like" (R. 469).

When Gregory was ten years old, his father was shot to death by his mother's sister (R. 509). After that, things became even worse, as Mr. Alexander explained:

Q. After your dad died?

A. After then we was scattered. I was seventeen, my mom put me out at seventeen. She put me out because she had started dating, you know, and I would just tell her about, you know, when the men would come in the house, I had never stood up to my mom. I stood up there and told her it was wrong.

This particular man, he wanted my brothers and us to call him dad. I told her it wasn't right for him to come in, all my dad's stuff and want him to come in on my dad's stuff and want us to call him dad and stuff.

She told me two grown people couldn't live in the house together. She put me out. I didn't move out because I was working helping her take care of the kids.

Q. Do you know how these men that your mom say, do you know how they treated the other kids, Greg in particular?

A. Yeah. They were mean to them. And they just in particular, they tried, you know, they would come in and they didn't have no respect, you know.

I say respect, when a man know that you have children and trying to kiss on you, hold on you in front of your kids and stuff, you're not married, that's not respect.

They didn't have no respect, the mens didn't.

Q. Do you know if they encouraged the rest of the kids to leave?

A. Yeah, I know, cause I communicated with them, even though I wasn't there. I communicated with them.

Q. You were still in the area?

A. Um-hmm. I was living with my dad's Godmother.

Q. Did your mom's beating get any worse after your dad died?

A. Her what?

Q. Your mom beating the kids?

A. Well, after my dad died she was meaner, I know that. She was very, she was very mean.

A lot of things he prevented her from doing to us, we were no longer protected from that because, you know, he protected us from a lot of things.

I guess by me being older with her threatening me, once before she subdued, stopped threatening me so much and hitting me. She was mean to them.

Q. Do you know if she drank more or less?

A. She drank more.

Q. What kind of stuff did she drink?

A. In particular Barcardi Rum, that was her favorite, some kind of gin, I think it was Seagrams. That's what she's always having. She was always talking about Barcardi Rum.

(R. 510-12).

Jerome Miller also testified. Dr. Miller is the founder of a nonprofit organization dealing with the area of children and criminal justice. He is also an expert criminologist and has been involved in a number of

investigations of the backgrounds of defendants in parole, probation, and capital and non-capital sentencing proceedings. Dr. Miller has had extensive experience with abused and neglected children and with children who become involved in the criminal justice system (R. 397). After reviewing a number of records regarding Mr. Mills, and talking to people who knew Mr. Mills, Dr. Miller explained how an abusive, neglected childhood and brain damage would affect someone like Mr. Mills:

> Well, it's clearly a very difficult upbringing.
>
> A lot of violence in the family. A lot of neglect. But in this case, you have some other aspects to it that I think is very much -- should be very much stressed with particular in terms of crimes of violence.
>
> The issue of the head trauma, for example, and the potential for brain damage, and for lack of ability to inhibit ones impulses.
>
> When that is tied with a very specific kind of family history, there's a good deal of research to suggest that a great deal of violence can follow in sporadic outbursts from time to time.
>
> * * *
>
> That it isn't simply the brain damage that causes or that goes along with the violence.
>
> But it's the brain damage associated with the very specific kind of family and personal history, that his history usually in addition to history of head trauma, it involves a great deal of physical abuse and we're not now simply talking about routine spankings or disciplining, but really irrational, wild, violent physical attacks and abuse.
>
> * * *
>
> And often, history early on of sexual abuse, and similar kind of situation, and a history psychologically of someone that's withdrawn that's paranoid about relationships, and when all of those things come together for a particular individual, there's a good deal of research to suggest that the inhibitions that one would normally come into play are simply not there.
>
> That one -- when one gets worked up, they have literally a brain storm, and things explode and goes way beyond what they would normally allow themselves in that kind of situation.

(R. 398-400). Dr. Miller characterized Mr. Mills' mother as "very, very unpredictable, very violent, very rejecting," and, based upon his experience, concluded, "the extreme elements in this are quite different from average abuse" (R. 402).

Dr. Miller had also previously been involved in an expert capacity with the Dozier School for Boys, where Mr. Mills had been sent at a young age. Dr. Miller explained that at the time Mr. Mills was involved with the juvenile system, institutions like Dozier were "very, very brutal places" which offered no rehabilitation (R. 406) and which did not provide treatment for children like Mr. Mills with cerebral dysfunctions (R. 408). Dr. Miller explained how the combination of Mr. Mills' impairments, his home life, and his life at Dozier would have affected him:

> Because very often, these types behavior, particularly violent behavior don't fall out of the sky.
>
> They fall out [of] a particular kind of background and experience of a person, particularly in those formative years.
>
> And one wonders why in fact he was returned to that home at eleven, twelve years old.
>
> Why he was sent out oh three or four months here, and [then] bumped back into the [Dozier] school.
>
> There's almost nothing in any of the records with reference to the family to the possibility of an alternative placement to other kinds of therapy that might be warranted.
>
> Just simply out of the institution, back into this crazy household, and then back into the institution with at least from the record, very little indication that anything else was ever done.

(R. 411).

B. MR. MILLS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL.

The record of the Rule 3.850 hearing establishes that Mr. Mills was denied the effective assistance of counsel at his capital sentencing. Trial counsel's performance was deficient, and the deficiencies prejudiced Mr. Mills. See Strickland v. Washington, 466 U.S. 668 (1984). Defense counsel failed in their "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688 (citation omitted). The Rule 3.850 record, thoroughly discussed above, clearly demonstrates that trial counsel's performance during the penalty phase of Gregory Mills' trial was deficient in that counsel unreasonably failed to investigate and thus discover substantial mitigation evidence. Had trial

counsel engaged in a reasonable investigation into Mr. Mills' background, particularly regarding mental health mitigation, such evidence would have been discovered, would have been presented, and would have provided a reasonable basis for the jury's life recommendation.

In Stevens v. State, 552 So. 2d 1082 (Fla. 1989), this Court affirmed the necessity of appropriate investigation by trial counsel into his or her client's background for presentation of mitigation at the penalty phase of a capital trial. In Stevens, a jury override case, this Court wrote:

> 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. Trial counsel essentially abandoned the representation of his client during sentencing. "It is beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness." Blake v. Kemp, 758 F.2d 523, 533 (11th Cir.), cert. denied, 474 U.S. 998 (1985). At the very least, any evidence presented and any plausible arguments made to the trial court could have provided the trial court with a basis to follow the jury's recommendation of a life sentence. We find that trial counsel's inaction at the penalty phase of the trial amounted to a substantial and serious deficiency measurably below the standard for competent counsel.

Stevens, 552 So. 2d at 1087 (emphasis added).

As stated above, in order to prevail on a claim of ineffective assistance of counsel, Mr. Mills must establish deficient performance and prejudice. Because this case is an override case, once deficient performance is established, Mr. Mills must show that "confidence in the trial judge's decision to reject the jury's recommendation is undermined." Stevens, 552 So. 2d at 1087. Confidence is undermined when "the trial judge views the case as one without any mitigating circumstances when in fact those circumstances exist." Id.

The circumstances regarding ineffectiveness of counsel in Stevens are strikingly similar to those in Mr. Mills' case and, in fact, Mr. Mills' case presents a more compelling situation, requiring relief under Stevens. In Stevens, the trial judge overrode the jury's life recommendation, finding six aggravating factors and no mitigating circumstances. 552 So. 2d at 1085. In

Mr. Mills' case, while the trial court originally found six aggravators, this Court struck three of them on direct appeal. Mills v. State, 476 So. 2d 172, 178 (Fla. 1985). This Court also upheld the trial court's ruling that no mitigating circumstances existed. Id. at 179. The Rule 3.850 hearing, however, established that substantial statutory and nonstatutory mitigation did exist, but was not presented because of trial counsel's deficiencies. As in Stevens, the existence of mitigating circumstances undermines confidence in the jury override.

In both Stevens and the instant case, trial counsel failed to adequately investigate and present mitigating evidence at the penalty phase or before the trial judge at sentencing. Unrebutted testimony at the Rule 3.850 hearing indicated that prior to trial and penalty phase, as well as during the eight (8) months which elapsed between the jury's life recommendation and the sentencing hearing before the judge, no investigation was made into possible statutory and nonstatutory mitigation, including mental health mitigation. Both Mr. Greene and Ms. Bickerstaff testified that they had no tactical or strategic reason for this failure to investigate. Their failure to investigate precluded the making of reasonable, informed decisions and therefore, their performance "fell outside the range of professionally competent assistance." Cunningham v. Zant, 928 F.2d 1006, 1018 (11th Cir. 1991).

In Stevens, this Court found that "trial counsel's inaction in the penalty phase of the trial amounted to a substantial and serious deficiency measurably below the standard for competent counsel." 552 So. 2d at 1087. The same can be said for Gregory Mills' case. Both the trial and penalty attorneys testified that no investigation was done regarding the penalty phase of the trial. Mr. Greene testified that he was not responsible for the penalty phase, and thus did not even think about anything pertaining to the penalty phase. The penalty phase attorney, Joan Bickerstaff, was not even informed of her role in the case until two days before the penalty phase was to be conducted -- she did not even have a file on the case. Bennett Ford, a

supervisor at the Public Defenders' Office at the time of Mr. Mills' trial, verbally summarized the case for her. The first time Ms. Bickerstaff ever met Gregory Mills was during a very short meeting in the jail on the morning of the penalty phase, and she only spoke briefly with Diannetta Alexander in the hallway of the courtroom just before the penalty phase. At no time did she develop statutory or nonstatutory mitigation, although she was familiar with the mitigation factors provided by law (R. 54). Neither attorney felt they had any responsibility for the judge sentencing, and so in the eight months between judge sentencing and the penalty phase, neither attorney conducted any investigation. Indeed, Mr. Ford testified that he "didn't have a lot of concern about the [judge] sentencing phase. I presumed that, wrongfully, that the Jury's recommendation would be applied" (R. 438).

During the Rule 3.850 hearing, collateral counsel showed Mr. Greene and Ms. Bickerstaff the 1973 reports of Dr. Austin and Dr. Fumero, the 1976 psychological testing of Mr. Mills, and other documents and records. Both attorneys testified that they did not have these reports and records at the time of Mr. Mills' penalty phase and sentencing. Moreover, both attorneys also testified that if they had had these reports and records, they would have had an expert mental health evaluation done on Gregory Mills. All of these records indicated the possibility of brain dysfunction in Gregory Mills, yet defense counsel unreasonably failed to obtain these reports or even question Gregory as to his mental health background (R. 49). Both attorneys also testified that had they properly investigated and developed statutory and nonstatutory mental health mitigation, they would have presented such evidence at the penalty phase and judge sentencing. As in Stevens, "[i]t 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." 552 So. 2d at 1087. Given the wealth of mitigation, particularly mental health information, which was adduced at the Rule 3.850 hearing and which could and should have been obtained at the time of trial and during the eight months between penalty phase and sentencing, and

given the lack of strategy or tactics, counsel's failures were unreasonable performance which "amounted to a substantial and serious deficiency measurably below the standard for competent counsel." Stevens, 552 So. 2d at 1087. See State v. Lara, 16 F.L.W. S306 (Fla. May 9, 1991); Bassett v. State, 541 So. 2d 596 (Fla. 1989); State v. Michael, 530 So. 2d 929 (Fla. 1988); Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991); Stephens v. Kemp, 846 F.2d 624 (11th Cir. 1988); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988); Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985); Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985).

The trial court, in its order denying relief, wrote:

> The Court finds that notwithstanding an earlier report pertaining to the defendant that recommended testing to rule our minimal brain dysfunction, there was nothing to indicate to reasonably competent counsel, the existence of any mental mitigating factors. The facts of the case did not suggest it, and conversations with the defendant at no time prior to sentencing, suggested it.

(R. 1058). The trial court, however, failed to take into account that trial counsel in a capital sentencing proceeding have a duty to investigate and prepare mitigation evidence. See Strickland; Stevens; Cunningham. More significantly, the trial court's ruling is directly contrary to the record: all of the attorneys testified that prior reports and records regarding Mr. Mills, which defense counsel did not obtain, indicated a clear need for a mental health evaluation. Had they obtained those reports and records, the attorneys testified, they would have arranged for a mental health evaluation of Mr. Mills.

Further, the facts of this case did indicate to Joan Bickerstaff that mental health evidence should have been pursued, as she indicated on cross-examination at the Rule 3.850 hearing when asked if the facts would have suggested any mental impairment. According to Ms. Bickerstaff, the facts of the crime were "somewhat ludicrous" (R. 68). She went on to explain:

> The fact that Mr. Mills' get away vehicle was a bicycle. The fact that he went to the hospital after the offense and certain other circumstances as I said, in retrospect made me think that perhaps I should have looked more closely

at the facts surrounding the crime itself because those were very odd factual circumstances.

(R. 68). Furthermore, at the evidentiary hearing when the State questioned the attorneys regarding the very theory upon which the trial court's order relies, both attorneys emphatically rejected that theory. Mr. Greene testified:

> Q. [by Mr. Hastings]: Well, there's nothing to even suggest anything other than the fact that he was mentally functional, was there?
>
> A. [by Mr. Green]: There was no defense put on that Mr. Mills was insane at the time of the commission of the crime. It was not an insanity defense.
>
> Q: There was nothing about the facts of this case that would suggest he had any sort of mental impairment or mental dysfunction, was there?
>
> A: Well, now, you know, I'm only talking as far as whether the defense of insanity is at issue or not. As far as that issue is concerned, no there is no evidence that he was insane at the time of the commission of the crime. But anything else I won't address.
>
> Q: Well, even looking back upon it now. As an attorney, even with more years of experience than you had at that time, there's nothing about the facts of this case that suggest any sort of mental impairment or any mental dysfunction on the part of this defendant, is there?
>
> A: Well, I can't say that. All I can say is that there's no evidence that there was a legal defense of insanity at the time.

(R. 32). Despite the State's repeated questioning on this line, Mr. Greene clearly testified that he was concerned only with guilt/innocence issues and never considered whether mental health mitigation existed: "as I stated numerous times, I only represented him for the trial. Unless it was so obvious that he was, again, insane or incompetent then I would not have pursued any of those issues" (R. 36).

Moreover, the trial judge, in his order denying relief, wrote that because conversations between Mr. Mills and his counsel prior to sentencing did not suggest the existence of mental mitigating factors, counsel's performance was not deficient. The overwhelming testimony at the Rule 3.850 hearing, however, was that counsel <u>did no investigation</u> into mental health mitigation, including asking Mr. Mills or his sister about it. Mr. Greene,

the guilt/innocence attorney, testified that because he was not responsible for the penalty phase of the trial, he did not and would not have investigated mental health issues for the penalty phase: "As to the guilt or innocence, the only aspect you need to consider if he was incompetent if that was a possible defense or insane or something like that. Other than that, I wouldn't have done anything past that point" (R. 17) (emphasis added). Mr. Greene also testified that he had no recollection of any conversations with either Gregory or Diannetta regarding mental health mitigation. Ms. Bickerstaff testified that she only found out about her role in the case two days before the penalty phase was to begin, and that she had a "very short meeting" with Gregory at the Sanford Jail the morning of the penalty phase hearing (R. 42). She explained what occurred at this meeting:

> Mr. Mills wasn't really engaged in any active dialogue with me during the course of that meeting, which was very short meeting. I don't believe I was with Mr. Mills more that an hour or so and it was a very passive kind of event for him.... It was really not what I would regard being an attorney-client interview to obtain information from him.... And I was in the context of this very short-pressed meeting with -- with the client in anticipating of the -- required to go into Court and having other witnesses who were unavailable whom I also needed to speak with did not spend enough time with Mr. Mills to be able to make any independent determination that a -- that [mental health] was a potential issue for exploration.

(R. 44-45) (emphasis added).

Insofar as Ms. Bickerstaff's contact with Diannetta Alexander, the attorney testified that she met Ms. Alexander in the hallway outside the courtroom, and that their meeting was "very sketchy and not conducted under the best of circumstances." (R. 46). No inquiry was made into mental health history because "it just never occurred to me." (R. 49). Mr. Ford testified that he never interviewed any of Mr. Mills' family members and that the only contact he had with Mr. Mills was in court during the trial.[3]

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[3]The trial court's order also states, "the defendant, as indicated in the Pre-Sentence Investigation, indicated an absence of any past serious injuries or illnesses" (R. 1058). However, Mr. Greene testified that if he saw the PSI, he did not see it until the day of judge sentencing (R. 21). Obviously, therefore, Mr. Greene could not have relied on the PSI to plan for sentencing. More importantly, all of the attorneys testified that they did not investigation and made no inquiries regarding Mr. Mills' mental health

(continued...)

The trial court, in its order denying relief, also indicated that counsel was not deficient in failing to investigate mental health mitigation because "the presentation of mental mitigating factors would have been inconsistent with the defense raised at trial" (R. 1058). This strategic reasoning, however, was explicitly rejected by Mr. Greene and Ms. Bickerstaff at the evidentiary hearing. Mr. Greene testified on cross-examination:

> Q. [by Mr. Hastings]: In fact, any evidence about mental dysfunction or mental impairment would have been inconsistent with his defense at trial as you look back upon it now, wouldn't it?
>
> A. [by Mr. Greene]: Well, again you're talking about a broad range from insanity all the way down to a slight mental disorder. I don't think it's necessarily inconsistent unless there was enough evidence to show he was insane. If his defense was that he was not guilty by reason of insanity and also not guilty by reason he didn't do it, that would be inconsistent. The fact he may have had brain problems or brain injury or some type of disorder would not be inconsistent with a not guilty, or I didn't do it type of defense.

(R. 32-33) (emphasis added). Ms. Bickerstaff repeatedly testified that the bringing out of statutory and nonstatutory mitigation would "certainly not [have been inconsistent with the defense of innocence] during the penalty phase" (R. 67, 72-73), because the standards for insanity and mental health mitigation are quite different (R. 67-68).[4] Moreover, Bennett Ford testified that the reason he wanted another attorney to preside over the penalty phase was to avoid any inconsistency problem (R. 454).[5]

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[3](...continued)
history, and all of the attorneys testified that if they had had the documents indicating possible mental health problems, they would have arranged for a mental health evaluation and would have presented mental health mitigation. The trial court's conclusions are contrary to the record.

[4]Mr. Greene and Ms. Bickerstaff were correct in pointing out that insanity and mental health mitigation are assessed under distinctly different standards. Perri v. State, 441 So. 2d 606, 609 (Fla. 1983)("A defendant may be legally answerable for his actions and legally sane, and even though he may be capable of assisting his counsel at trial, he may still deserve some mitigation of sentence because of his mental state"). Further, regarding the supposed inconsistency of mental health mitigation with the guilt/innocence defense, this Court has explained, "entering a plea of not guilty does not preclude consideration by the sentencer of matters relevant to mitigation." Holton v. State, 573 So. 2d 284, 292 (Fla. 1990).

[5]In addition to being contrary to the record, this statement by the trial judge is faulty under Lockett v. Ohio, 438 U.S. 586 (1978). "Mitigating (continued...)

Both trial attorneys specifically stated that mental health mitigation would not have been inconsistent with the guilt/innocence defense or with their penalty phase arguments. Yet, the trial court attributed counsel's failure to investigate and present mitigation to this supposed inconsistency problem. Counsel explicitly and repeatedly stated that there was no tactical or strategic reason for failing to investigate and present mental health mitigation; the judge, however, created such a reason in his order. In Harris v. Reed, 894 F.2d 871 (7th Cir. 1990), the court faced this very issue, and held, "Just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer." Harris, 894 F.2d at 878 (emphasis added). In Harris, just as in Mr. Mills' case, "the court went on to construct a trial strategy supporting counsel's decision." Id. As in Harris, counsel in Mr. Mills' evidentiary hearing "did not offer the strategic justifications provided by the [trial] court." Id. In fact, in Mr. Mills' case, counsel expressly denied that they had any strategic or tactical justifications for their failure to investigate or present mental health mitigation on behalf of Greg Mills either at penalty phase or at judge sentencing. Defense counsel specifically testified that they would have presented evidence of statutory and nonstatutory mental health mitigation if they had investigated and developed such evidence.

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[5](...continued)
evidence is not limited to the facts surrounding the crime but can be anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant." Brown v. State, 526 So. 2d 903, 908 (Fla. 1988)(citing Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978)). The eighth and fourteenth amendments require that the sentencer in a capital trial not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Lockett, 438 U.S. at 604. In Mr. Mills' case, the jury found him guilty at his trial, so no mitigation presented at penalty could have been "inconsistent" with a trial defense -- the trial was over and the penalty phase is a separate proceeding entirely. Certainly the plethora of mitigation which could have been presented in Mr. Mills' case cannot be ignored based upon some supposed inconsistency.

Counsel's failures in this regard were not based on "tactics"; rather, they were based on the failure to adequately investigate and prepare. No tactical motive can be ascribed to an attorney whose omissions are based on a lack of knowledge, see Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989), or on the failure to properly investigate and prepare. See Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989). Only if adequate investigation has been conducted may counsel make reasonable tactical decisions. Chambers v. Armentrout, 907 F.2d 825 (8th Cir. 1990) (en banc). "A strategic decision . . . implies a knowledgeable choice." Stevens, 552 So. 2d at 1087 (quoting Eutzy v. State, 536 So. 2d 1014, 1017 (Fla. 1988) (Barkett, J., dissenting)). In Gregory Mills' case, there was no adequate investigation nor an informed decision not to present mental health mitigation. There was simply no thought given to mental health mitigation. In Eutzy v. Dugger, 746 F. Supp. 1492 (N.D. Fla. 1989), aff'd, No. 89-4014 (11th Cir. 1990), the court explained:

> A tactical, or strategic, decision implies an informed, knowledgeable, reasoned choice. Such a reasoned judgment cannot be made and options exercised unless and until an investigation into the defendant's background and character has been made. The court recognizes that counsel has to balance the good against the bad and decide whether presenting the good side of the defendant will outweigh the adverse evidence that may come in by way of cross examination or rebuttal. Certainly, if counsel feels that under the circumstances, it would adversely affect the defendant to present the positive evidence, he can and should make the strategic choice not to do so. A strategy of silence, however, may be adopted only after an investigation, however limited. In this case, the record reveals that counsel conducted virtually no investigation at all.

Eutzy, 746 F. Supp. at 1499. Counsel's performance in Mr. Mills' case was clearly deficient.

At the Rule 3.850 evidentiary hearing, Mr. Greene testified that he was responsible only for the guilt/innocence phase; Ms. Bickerstaff stated that she was responsible only for the penalty phase, a fact of which she was made aware scarcely forty-eight hours prior to commencement of the penalty phase. Mr. Greene also testified that he had no responsibility for the judicial sentencing hearing (R. 9). It is apparent from the testimony of the attorneys that except for the guilt phase, there was a complete lack of communication as

to who was handling what, at least until the eve of the penalty and judicial sentencing phases.

In Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989), the Eleventh Circuit confronted a similar factual circumstance in an ineffective assistance of counsel claim. In that case, the state court had held an evidentiary hearing, at which the two attorneys had testified that neither one had investigated the defendant's background, and in fact, "their failure to investigate occurred because each believed that the other was preparing the penalty phase of the trial." Id. at 759. Although the attorneys in Mr. Mills' case did not place blame on each other as to who had the actual responsibility, the underlying lesson of this discussion in Harris pertains to Mr. Mills' case -- of the two attorneys responsible for the case, neither adequately investigated and prepared, and compelling mental health mitigation went undiscovered. Counsel was clearly ineffective, and the fact that counsel obtained a life recommendation from the jury does not render her representation effective. See Stevens; Francis v. State, 529 So. 2d 670, 674 (Fla. 1988) (Barkett and Kogan, JJ., dissenting) ("I cannot conclude, as the majority suggests, that the jury's life recommendation in this case excuses any and all of counsel's manifest and prejudicial deficiencies. Such a position means that what may have been a mere fluke at trial . . . now renders counsel's performance non-reviewable by this Court").

As to prejudice, Mr. Mills 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." Porter v. Wainwright, 805 F.2d 930, 935 (11th Cir. 1986) (quoting Strickland, 104 S. Ct. at 2068). See Stevens; Eutzy. Because the instant case involves a jury override, Mr. Mills "must show enough to undermine the court's confidence in the trial judge's decision to reject the jury's recommendation of life." Eutzy, 746 F. Supp. at 1500. Moreover, in Florida, in order for a judge to reject a jury's life recommendation, "the facts justifying a death sentence

must be so clear and convincing that virtually no reasonable person could differ as to the appropriateness of the death penalty." Id. (citing Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975)).

In Stevens, this Court explained the proper analysis of the prejudice component of a penalty phase ineffective assistance of counsel claim in an override case:

> "A jury's advisory opinion is entitled to great weight, reflecting as it does the conscience of the community...." Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988). Under the standard set forth in Tedder v. State, a trial judge may not override a jury recommendation of life unless "the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ." 322 So.2d 908, 910 (Fla. 1975). If there is a reasonable basis in the record to support the jury's recommendation, an override is improper. Ferry v. State, 507 So.2d 1373, 1376 (Fla. 1987). In some instances, the presence of valid mitigating circumstances discernible from the record may be the decisive factor when determining whether a reasonable basis exists for the life recommendation. Id.; Francis v. State, 529 So.2d 670, 677 (Fla. 1988)(Barkett, J. dissenting). If it can be determined that the life recommendation was based on valid mitigating factors, then an override may be improper. Ferry v. State, 507 So.2d at 1376.
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> * * *
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> Had trial counsel ... discovered any of the mitigating evidence and presented it to the jury, he could have argued these grounds to the trial judge as support for the life recommendation based on the principles enunciated in Tedder. When trial counsel fails to develop a case in mitigation, the trial court is prevented from considering whether the jury could have based its recommendation upon this aspect of the case. Although a trial judge may not believe the evidence presented in mitigation or find it persuasive, others may. Robinson v. State, 487 So.2d 1040, 1043 (Fla. 1986). It takes more than a difference of opinion for a trial judge to override a jury's life recommendation. Holsworth v. State, 522 So.2d at 354. The presentation of this mitigating evidence may have persuaded the trial judge that an override was unreasonable under the circumstances.
>
> When determining if death is an appropriate penalty, the trial court must weigh the aggravating circumstances against any mitigating circumstances, State v. Bolender, 503 So.2d 1247, 1249 (Fla.), cert. denied, 484 U.S. 873, 108 S.Ct. 209, 98 L.Ed.2d 161 (1987), and can override the jury only based on specific written findings detailing this weighing process. Sec. 921.141(3), Fla. Stat. (1987). A trial judge is permitted to determine the weight to be given the mitigating evidence, but a judge may not refuse to consider any relevant mitigating evidence presented. Eddings v. Oklahoma, 455 U.S. 104, 114, 102 S.Ct. 869, 877, 71 L.Ed.2d 1 (1982). The sentencing decision is to be made based on evidence which supports the aggravating and mitigating circumstances. Thus, when counsel fails to develop a case in mitigation, the weighing process is necessarily skewed in favor of the aggravating factors argued by the state. Francis v. State, 529 So.2d at 677

> (Barkett, J. dissenting); Amazon v. State, 487 So.2d 8, 13 (Fla.), cert. denied, 479 U.S. 914, 107 S.Ct. 314, 93 L.Ed.2d 288 (1986). Moreover, if the trial judge views the case as one without any mitigating circumstances when in fact those circumstances exist, then confidence in the trial judge's decision to reject the jury's recommendation is undermined. Porter v. Wainwright, 805 F.2d 930, 936 (11th Cir. 1986), cert. denied, 482 U.S. 918, 107 S.Ct. 3195, 96 L.Ed.2d 682 (1987). At that point it cannot be said that no reasonable person could differ as to the appropriate penalty. Id.

Stevens, 552 So. 2d at 1085-87 (emphasis added).

Prejudice is clearly established in this case. The trial court's order denying Rule 3.850 relief does not discuss the mitigating evidence presented at the hearing. However, given the wealth of mental health mitigation that could and should have been presented at the sentencing phase of trial, confidence in the trial judge's decision to reject the jury's life recommendation is certainly undermined. The evidence established more than a reasonable basis for the jury's life recommendation, and would have precluded an override had it been presented.

In override cases involving compelling evidence of brain damage, psychological impairment, and/or a long history of physical and emotional abuse and deprivation, as well as a host of other statutory and nonstatutory mitigation, this Court has consistently held that such factors establish a reasonable basis demonstrating that the jury's verdict of life should not be overridden, irrespective of the trial judge's view. See Carter v. State, 560 So. 2d 1166 (Fla. 1990) (organic brain damage, childhood beatings, severe head injuries, extreme mental disturbance, inability to appreciate criminality of conduct, rehabilitative potential); Craig v. State, 585 So. 2d 278 (Fla. 1991) (mentally handicapped, emotional age); Freeman v. State, 547 So. 2d 125 (Fla. 1989) (age, dull-normal intelligence, childhood abuse); Hegwood v. State, 575 So. 2d 170 (Fla. 1991) (age, impoverished childhood, drug-addicted and alcoholic mother who abandoned kids); Buford v. State, 570 So. 2d 923 (Fla. 1990) (impoverished childhood, parental neglect and abuse, father's alcoholism, mother's abandonment of kids, inability to appreciate criminality of conduct, mental and emotional disturbance); Amazon v. State, 487 So. 2d 8 (Fla. 1986) (drug abuse, age, negative family setting,

"emotional cripple"); Neary v. State, 384 So. 2d 881 (Fla. 1980) (slow learner, grew up without a father, reared by mother and another woman); Stevens v. State, 552 So. 2d 1082 (Fla. 1989) (poverty and neglectful childhood, physical and verbal abuse by both parents, drinking problem, responsible family man, kind and generous, honorable discharge from Army); Savage v. State, 16 F.L.W. S647 (Fla. 1991) (traumatic childhood, drug and alcohol abuse, organic brain dysfunction, substantially impaired capacity to appreciate criminality of conduct).

Insofar as mitigation, both statutory and nonstatutory, which could and should have been presented, many of the circumstances which this Court has held to establish a reasonable basis are present in Mr. Mills' case. Dr. Henry Dee testified at the Rule 3.850 evidentiary hearing that, based upon the myriad of tests performed over the years, in addition to Greg's background, Greg Mills suffers from organic affective syndrome, i.e., brain damage (R. 127). Consequently, Dr. Dee stated that at the time of the crime, Mr. Mills' capacity to conform his conduct to the requirements of the law was substantially impaired, and that Mr. Mills suffered from an extreme mental disturbance (R. 127). Dr. Joyce Carbonell also testified at the hearing that Mr. Mills was severely brain damaged and, in fact, given his family history, he may have been brain damaged since birth (R. 238). Dr. Carbonell also testified that at the time of the offense, Mr. Mills' capacity to conform his conduct to the requirements of law was substantially impaired (R. 311), and Mr. Mills suffered from an extreme emotional disturbance (R. 307, 312). Both experts testified to the traumatic and abusive upbringing suffered by Mr. Mills, including physical and verbal abuse by his mother, and the fact that medical treatment was never sought after he suffered trauma to his head. What makes this case even more compelling is that, unlike some other capital defendants, Greg Mills is not in any way at fault for his impairments -- they were not the result of drugs or drinking on his part, but rather resulted from complications in utero and the serious head injuries he suffered as a child. Even in cases of drug and alcohol intake by the defendant, however, this Court

has consistently found an override to be improper. See Savage; Stevens; Amazon; Downs v. State, 574 So. 2d 1095 (Fla. 1991); Cheshire v. State, 568 So. 2d 908 (Fla. 1990).

The evidence at the Rule 3.850 evidentiary hearing also addresses the mitigating factor of age, a factor which this Court has held to establish a reasonable basis for a jury's life recommendation. See Carter; Downs; Freeman. At the time of the offense, Gregory Mills was 22; due to his impairments, however, his true level of functioning was well below that age. According to Dr. Carbonell, the results of the battery of testing performed on Mr. Mills indicated that he scored at a seventh grade level in reading, eighth grade in spelling, and third grade in arithmetic (R. 231).

Testimony at the evidentiary hearing also demonstrated the level of severe abuse and deprivation suffered by Gregory Mills during his childhood, a fact which only served to exacerbate his already-existing cerebral dysfunction. Lamar Mills, Gregory's brother, testified at the hearing about life in the Mills home during Gregory's childhood. He was also a witness to the two times his brother severly injured his head, and explained the changes he observed in his younger brother. Diannetta Alexander provided an in-depth look into the environment in which her brother was raised, and testified that the level of indifference and neglect by the mother was great. In fact, Diannetta Alexander, at the age of 6, found herself the head of the household, and took care of her young brother Gregory -- she admitted that "he [Gregory] was like my child" (R. 500). The prejudice is clear -- this Court has repeatedly found that evidence of a deprived and abusive childhood is a reasonable basis to sustain a life recommendation. See Amazon; Freeman; Buford; DuBoise v. State, 520 So. 2d 260 (Fla. 1988); Holsworth v. State, 522 So. 2d 348 (Fla. 1988); Burch v. State, 522 So. 2d 810 (Fla. 1988); Brown v. State, 526 So. 2d 903 (Fla. 1988).

Where, as here, defense counsel without a tactic or strategy fails to develop and present evidence which can be developed and which establishes a reasonable basis in an override case, ineffective assistance is demonstrated.

Stevens, 552 So. 2d at 1087. In the instant case, Mr. Mills has presented an abundance of sufficient evidence which demonstrates "a reasonable probability that trial counsel's inaction may have affected the sentence imposed by the trial judge." Id. at 1088 (footnote omitted). See Porter v. Wainwright, 805 F.2d 930, 936 (11th Cir. 1986); Eutzy v. Dugger, 746 F. Supp. 1492, 1500, 1501 (N.D. Fla. 1989). Where mental health mitigating evidence can be develped and presented but counsel unreasonably and inexplicably fails to do so, confidence in the result is undermined. State v. Lara, 581 So. 2d 1288 (Fla. 1991); State v. Michael, 530 So. 2d 929 (Fla. 1988); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988); Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988).

This Court has held that "if the trial judge views the case as one without any mitigating circumstances when in fact those circumstances exist, then confidence in the trial judge's decision to reject the jury's recommendation is undermined. At this point it cannot be said that no reasonable person could differ as to the appropriate penalty." Stevens, 552 So. 2d at 1087 (citations omitted). In Mr. Mills' case, the trial judge believed that no mitigation existed. The evidentiary hearing established that substantial compelling mitigating evidence did exist but was not presented because of defense counsel's deficiencies. Confidence in the outcome is undermined.

Under settled principles of law, in conjunction with the compelling and unrebutted testimony adduced at the Rule 3.850 evidentiary hearing, Mr. Mills is entitled to relief. The question posed by this Court as to the scope of the hearing -- that the hearing should be "in regards to counsel's failure to develop and present evidence that would tend to establish statutory or nonstatutory mental mitigating circumstances," Mills, 559 So. 2d at 579 -- has now been conclusively answered by the record of this evidentiary hearing. Counsel themselves testified that because of Mr. Mills' history and records they should have had him evaluated but that they failed to investigate his history or review his records. Counsel testified that their omissions were not tactical. Counsel testified that they should have developed and presented

evidence on statutory and nonstatutory mental health mitigating factors. Counsel testified that had they properly prepared, they would have presented such evidence, but did not do so because they did not prepare reasonably or appropriately.

This Court did not know that Mr. Mills was substantially impaired when it affirmed the override after striking three aggravating factors on direct appeal. The evidence reflected by this record compellingly speaks to the statutory mitigators of a substantially impaired capacity to conform conduct to the requirements of law, of extreme mental/emotional disturbance, and of age, because Mr. Mills' impairments demonstrate that his true level of functioning was well-below his chronological age of 22 at the time of the offense. This establishes a reasonable basis. The evidence of Mr. Mills' significant cerebral dysfunction and impairments and of his history of severe abuse and deprivation, among the many other items of mitigation reflected by this record, compellingly speaks to a host of nonstatutory mitigating factors. This too establishes a reasonable basis. This Court would not have remanded for a hearing if the mental health evidence would not have made a difference. Because the evidence was not insubstantial, this Court ordered a hearing. The existence of a reasonable basis which counsel, without a strategy, failed to develop and present undermines confidence in the result.

Where mental health mitigating evidence can be developed and presented but, without a tactic, counsel does not attempt to develop it, confidence in the result is undermined. State v. Michael; State v. Lara; Middleton v. Dugger; Stephens v. Kemp. Where a reasonable basis counseling that a jury's verdict of life should not be overridden is available but counsel without a tactic fails to even attempt to develop it, confidence in the judge's override and the appellate court's affirmance of the override is established. Stevens v. State; Porter v. Wainwright. Mr. Mills is entitled to relief.

CONCLUSION

Based on the foregoing and on the record now before this Court, Gregory Mills respectfully requests that this Honorable Court set aside his override

death sentence and remand this case for a judicial resentencing at which the evidence discussed herein can be considered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Barbara Davis, Assistant Attorney General, Department of Legal Affairs, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, this 22nd day of November, 1991.

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