

IN THE SUPREME COURT OF FLORIDA

NO. 78,338

ROBERT D. HEINEY,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST
JUDICIAL CIRCUIT, IN AND FOR OKALOOSA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the second appeal of the circuit court's denial of Mr. Heiney's motion for post-conviction relief. The circuit court denied Mr. Heiney's penalty phase ineffective assistance of counsel claim following an evidentiary hearing.

Citations in this brief to designated record references are as follows:

- "R. ___" Record on Direct Appeal to this Court;
- "1PC-R ___" Record on first Appeal of Post-Conviction Motion to Vacate Judgment and Sentence [Docket No. 74,204];
- "PC-R. ___" Record on this Appeal of Post-Conviction Motion to Vacate Judgment and Sentence [Docket No. 78,338].

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

REQUEST FOR ORAL ARGUMENT

Mr. Heiney has been sentenced to death. This Court has consistently allowed oral argument to be conducted in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be an aid to the Court and the parties. Given the seriousness of the claims and the stakes at issue, Mr. Heiney respectfully requests that the Court permit oral argument in this cause.

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STATEMENT OF THE CASE AND THE FACTS

On August 24, 1978, Mr. Heiney was indicted for first degree murder and robbery in Okaloosa County, Florida (R. 1). Attorney David Pascoe, an Assistant Public Defender, was appointed to represent Mr. Heiney prior to the filing of the indictment (see R. 3). Mr. Pascoe later entered private practice, but was appointed to represent Mr. Heiney throughout his capital trial (PC-R. 4; R. 92-93).

Commencing September 28, 1978, Mr. Heiney was tried before a jury (R. 470-1294), and on March 2, 1978, he was found guilty of first degree murder and robbery (R. 171-72, 1291). On March 8, 1978, the penalty phase was conducted before the jury (R. 173-216, 1295-1344). Trial counsel presented no evidence or witnesses on Mr. Heiney's behalf (R. 1310). A majority of the jurors recommended a sentence of life (R. 216, 1344).

Sentencing was conducted on March 29, 1979. Counsel presented no evidence or argument to support the jury's life recommendation (R. 245). The sentencing judge found the existence of three statutory aggravating circumstances. Addressing only the statutory mitigating factors, the judge found none to exist on that record. The sentencing judge overrode the jury's life recommendation and sentenced Mr. Heiney to death (R. 219-223, 244-251).

Mr. Heiney's conviction and sentence were affirmed on direct appeal. Heiney v. State, 447 So.2d 210 (Fla. 1984) (Heiney I). Mr. Heiney's petition for writ of certiorari was denied by the Supreme Court. Heiney v. Florida, 469 U.S. 920 (1984).

Mr. Heiney filed a motion to vacate the conviction and sentence pursuant to Fla. R. Crim. P. 3.850 together with an appendix (PC-R. 195-359, 360-747). On May 23, 1989, the trial court summarily denied all relief without a hearing, and Mr. Heiney appealed.

On February 1, 1990, this Court reversed that portion of the order denying Mr. Heiney's claim of ineffective assistance of counsel at sentencing and remanded the case to the circuit court for an evidentiary hearing on that issue. Heiney v. State, 558 So.2d 398 (Fla. 1990)(Heiney II). Pursuant to the remand, the circuit court conducted an evidentiary hearing on May 6-7, 1991,

limited to the claim of ineffective assistance of counsel during the penalty and sentencing phase of trial (PC-R. 1-194).

At the evidentiary hearing, Mr. Heiney presented the testimony of David Pascoe, his trial attorney, and James Graham, counsel's investigator. Mr. Heiney's sisters, Kay Yanni and Jean Vallera, and niece, Lou Ann Ward, testified. The affidavit of another sister, Jacqueline Ward, who was unable to attend because of medical reasons, was also admitted into evidence (PC-R. 59; Defense Exhibits I & J). Finally, Mr. Heiney presented the testimony of two mental health experts: Dr. Jethro Toomer, a Board Certified psychologist with a specialty in forensic psychology, and Dr. James D. Larson, a neuropsychologist specializing in forensic psychology, each of whom had examined and evaluated Mr. Heiney. Numerous documentary exhibits were received in evidence. The State presented no testimony. The testimony and evidence presented at the hearing is detailed in the argument section of this brief.

On July 1, 1991, following the evidentiary hearing, the circuit court entered the following order:

1. For the purposes of the penalty phase Judge Wells found the following aggravating factors:
 - a) That the defendant was under parole supervision [sic] at the time of the offense;
 - b) The murder was committed during the course of a robbery; and,
 - c) The murder was especially heinous [sic], atrocious and cruel.
2. The trial judge appears to have considered only the seven statutory mitigating factors and found none of them to exist.
3. The defendant has asserted that there exists non-statutory mitigating factors which should have been investigated, discovered and presented by trial counsel. Although numerous in the petition for relief, this court finds that the asserted mitigating factors merge into the following:
 - a) The defendant was a chronic substance abuser and may have been affected by alcohol and/or other drugs at the time of the offense;

b) The defendant suffers and has been diagnosed has [sic] having a borderline personality disorder;

c) That defendant was chronically abused physically and emotionally as a child; and,

d) The combination of these factors could have resulted in a person who has a very difficult time coping with an extremely stressful situation.

There was additional evidence that the defendant has brain damage, however, it was insufficient to establish that fact.

The defense asserted that trial counsel was ineffective because he did not investigate, discover or present the above factors for the trial court's consideration during the penalty phase of the trial.

It is well established that Hitchcock type error has been interpreted by the Supreme Court to be applied retroactively and the State's contention that trial counsel's handling of the case cannot be ineffective because he followed the then-existing law seems to have been disposed of by the Supreme Court's retroactive application of Hitchcock type error. Applying Hitchcock standard, trial counsel should have investigated to determine the existence of the above mentioned mitigating factors. Had counsel done so, he would have discovered them to have existed and should have presented them to the trial court during the penalty phase of trial, which counsel did not.

It is therefore determined that trial counsel's handling of the penalty phase of trial was measurably below the standard for reasonably competent counsel. The question then becomes; is there reasonable probability that the result would have been different had these mitigating factors been presented? Although numerous the mitigating factors found to exist when balanced against the aggravating factors found to exist cannot reasonably be determined to outweigh them. I find no reasonable probability that the resulting imposition of the death sentence would have been different had the trial court been given the opportunity to consider the above found mitigating factors.

Because the non-statutory mitigating factors found to exist in this case when weighed against the existing aggravating factors would not have reasonably persuaded the trial court against a jury override, the Motion for Post-Conviction Relief as to the ineffective assistance of counsel is hereby DENIED.

(PC-R. 2333-36). Thereafter, Mr. Heiney perfected this appeal (PC-R. 2337-38).

SUMMARY OF ARGUMENT

I. The lower court found that trial counsel's performance at the penalty phase of trial was measurably below that of reasonably competent counsel. The court further found that nonstatutory mitigation (set forth in the order) did exist, and that this evidence could have been discovered by trial counsel and should have been presented during the original penalty phase. Additional uncontroverted evidence establishing two statutory mitigating factors was not discussed in the lower court's order. The Rule 3.850 court erroneously concluded that prejudice had not been established because the court determined that the mitigation found by the court did not outweigh the aggravating factors. Because the court believed mitigation did not outweigh the aggravators, the court therefore concluded that there was no reasonable probability that the original trial judge would have acted differently in overriding the jury's life recommendation. The lower court applied the wrong standard when assessing prejudice in an override case where no mitigating evidence was presented at the penalty phase and where the trial judge believed no mitigation existed.

The correct test for prejudice, which the lower court failed to apply, is whether there is a reasonable probability that the mitigating evidence which was not presented at the penalty phase because of trial counsel's deficient performance would have provided a reasonable basis to support the jury's life recommendation. Stevens v. State. Where a reasonable basis exists to support the jury's life recommendation, an override by the sentencing judge is improper. In an override case where no mitigation was presented at the penalty phase or judge sentencing and where the trial judge viewed the case as one without mitigation, when in fact mitigation does exist but was unrepresented because of trial counsel's deficient performance, confidence in the outcome is undermined; consequently, prejudice has been established. Stevens. The lower court erred as a matter of law in concluding that prejudice had not been shown. Mr. Heiney fully met both prongs required by Strickland to show ineffective assistance of counsel during the penalty phase of his trial, and was erroneously denied relief. Mr. Heiney is now entitled to relief.

ARGUMENT

MR. HEINEY WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND THE LOWER COURT ERRED IN DENYING HIS CLAIM FOR RELIEF

Following the evidentiary hearing ordered by this Court, the lower court found that "trial counsel's handling of the penalty phase of the trial was measurabl[y] below the standard established for reasonably competent counsel" (PC-R. 2335). The lower court found as a matter of fact that "trial counsel should have investigated to determine the existence of . . . mitigating factors. Had counsel done so, he would have discovered them to have existed and should have presented them to the trial court during the penalty phase, which counsel did not" (PC-R. 2334-35). The lower court further found, as a matter of fact, that the evidence presented at the hearing established four mitigating factors:

- a) The defendant was a chronic substance abuser and may have been affected by alcohol and/or other drugs at the time of the offense;
- b) The defendant suffers and has been diagnosed []as having a borderline personality disorder;
- c) That defendant was chronically abused physically and emotionally as a child; and,
- d) The combination of these factors could have resulted in a person who has a very difficult time coping with any extremely stressful situation.

(PC-R. 2334).¹

Having found that trial counsel's performance was deficient and that the evidence established mitigating factors, the court nevertheless denied relief based solely upon an erroneous view of the law -- "Although numerous the mitigating factors found to exist when balanced against the aggravating factors found to exist cannot reasonbl[y] be determined to outweigh them. I find no reasonable probability that the resulting imposition of the death sentence would have been

¹Mr. Heiney contends below that additional mitigating factors were also established by the evidence presented at the hearing.

different had the trial court been given the opportunity to consider the above found mitigating factors" (PC-R. 2335). However, in an override case, the correct standard for assessing the prejudice resulting from a trial attorney's deficient performance is the standard enunciated by this Court in Stevens v. State, 552 So. 2d 1082, 1087 (Fla. 1989): "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." Under this standard, Mr. Heiney is entitled to relief: the lower court found, as matters of fact, that defense counsel did not investigate for the penalty phase, that had defense counsel investigated he would have discovered evidence supporting mitigating factors, and that mitigating factors did exist. At trial, defense counsel presented no evidence of mitigation, and the trial judge found that no mitigating circumstances existed. The lower court erred, and Mr. Heiney is entitled to resentencing.

A. The Facts Presented at the Evidentiary Hearing and Found By the Lower Court Establish Mr. Heiney's Entitlement to Relief

A claim of ineffective assistance of counsel is tested by the standard established by Strickland v. Washington, 446 U.S. 668 (1984), which requires the defendant to demonstrate both deficient attorney performance and resulting prejudice. As reflected by the lower court's factfindings at the evidentiary hearing, Mr. Heiney satisfied, through substantial competent and uncontroverted evidence, each prong of Strickland's test concerning the penalty phase of his capital trial.

The Rule 3.850 court concluded that trial counsel's performance was measurably below that required of reasonably competent counsel due to counsel's failure to investigate, discover and present readily available evidence of mitigation. "It should be 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." Stevens v. State, 552 So.2d 1082, 1087 (Fla. 1989), quoting Blake v. Kemp, 758 F.2d 523, 533 (11th Cir.), cert. denied, 474 U.S. 998 (1985).

Mr. Pascoe, the trial attorney, testified that Mr. Heiney's case was his first (and last) capital case (PC-R. 6). Mr. Pascoe admitted that he did not obtain Mr. Heiney's school, juvenile or military records. Counsel did not question Mr. Heiney's family regarding child abuse (physical or emotional), head injuries or substance abuse (PC-R. 11),² nor did he have a recollection of ever interviewing witnesses who had known Mr. Heiney in the time period immediately preceding the offense regarding Mr. Heiney's history of substance abuse (PC-R. 13).

Despite conducting no investigation regarding Mr. Heiney's background, defense counsel did recognize that Mr. Heiney had mental health problems which deserved investigation. Counsel testified that at the time of Mr. Heiney's trial, "I was of the opinion that Mr. Heiney did have drug problems, very serious drug problems" and that he knew that right before the offense Mr. Heiney was drinking alcohol (PC-R. 26). Counsel also testified that one of his conversations with Mr. Heiney "certainly made me suspect something" about Mr. Heiney's mental state (PC-R. 28). At the time of trial, counsel believed Mr. Heiney "had psychological problems" and "obviously he's got some neurosis" (PC-R. 29). Counsel did file a motion for a mental health expert regarding guilt/innocence phase issues (PC-R. 18-19).³ Counsel also acknowledged that his file contained

²The State stipulated, and the lower court accepted, the fact that Jean Vallera, one of Mr. Heiney's sisters, was in contact with defense counsel at the time of Mr. Heiney's trial (PC-R. 63).

³That evaluation was conducted by Linda Haese, whose affidavit was received in evidence without objection (PC-R. 115). Ms. Haese's affidavit states:

2. In 1978 I had just graduated from school and was employed by the Okaloosa Guidance Clinic. I did most of the evaluations at the local county jails. I had little or no guidance, and I didn't really know what I was doing in conducting court-ordered evaluations. Generally, these evaluations consisted of brief interviews and limited testing, and a brief report.

3. I have reviewed my report of one such evaluation I conducted at the time, an evaluation of Robert D. Heiney. As reflected by my report, I had no knowledge of Mr. Heiney's history when I conducted the evaluation, including his prior head injuries, history of child abuse, numerous recommendations by school and prison authorities that he receive psychiatric treatment, history of severe headaches, or history of severe substance abuse.

(continued...)

his handwritten note regarding the need for a motion for a psychiatric examination to be used in the penalty phase (PC-R. 23). The note stated, "mot for psych exam to be used in sentencing hearing or ample time bet trial and sentencing hearing -- shrink of D's choice" (Defense Ex. F; PC-R. 764). Counsel testified that the note indicated he wanted to present mental health evidence at the penalty phase: "This statement -- Motion for Psych Exam to be used for sentencing hearing, I would say obviously, yeah, planning on using it at the sentencing hearing" (PC-R. 23). No such motion was ever filed. Counsel had no recollection of ever discussing mitigation with any mental health expert or what a mental health expert could have said in the penalty phase (PC-R. 21). However, counsel acknowledged that he argued to the jury during the penalty phase that Mr. Heiney was under the influence of extreme mental or emotional distress and that his capacity to conform to the law was substantially impaired at the time of the offense (R. 1328; PC-R. 21-22).

³(...continued)

4. A background of a person being evaluated is essential to conducting a thorough evaluation and arriving at accurate conclusions. For example, a history of head injury, severe substance abuse, explosive behavior, mood swings, and severe headaches are the type of background data which indicate the advisability of testing for brain damage. I was not provided Mr. Heiney's school records, prior prison records, military records or statements of family regarding his history of child abuse.

5. Under the circumstances, I did not have the background information or resources to enable me to do a full blown evaluation of Mr. Heiney. Further, it was not my understanding that I was being asked to do such an evaluation. I was not a licensed psychologist or neuropsychologist so I was not qualified to evaluate Mr. Heiney for brain damage.

* * *

7. Had I been provided with a history of child abuse, head injury, severe substance abuse and mental problems since the age of five, I would have been on notice that further evaluation was necessary. I was not asked to evaluate for mitigation and did not do so.

(Defense Exhibit P; see also PC-R. 97-98)(emphasis added).

In addition to acknowledging his lack of investigation for the penalty phase, trial counsel testified that the information available regarding Mr. Heiney's background was the kind of information he would have attempted to present at the penalty phase:

Q Okay. If there was evidence that you could have presented, for instance, that Mr. Heiney was beaten by his father who had a violent temper, is that the type of thing you would have attempted to present?

A Definitely I would have attempted to present it.

Q If there was evidence that as a child they tied him to a cement block in the front yard and he would go about in the yard dragging the cement block, is that the type of thing you would want them to know?

A Yes.

Q And if there was evidence that due to the abuse and other problems he was having there in the home that he used to deliberately run in front of cars when he was four and five years old, is that evidence you would have wanted them to know?

A Yes.

Q And if, in fact, Mr. Heiney suffered head injuries both as a child and as an adult, is that something you would want the judge and jury to know that he has head injuries that may have damaged his brain?

A Yes, uh-huh.

Q Would you have wanted the judge and jury to know that this brain damage may have or has contributed to mood disorders and temper outbursts, that sort of thing?

A Yes.

Q Now you were trying to prove, I believe at the -- when you argued to the jury, one of the things you argued was that he was drunk when all this happened. Would it have helped to prove or would you have liked the jury to know that he had actually had a lengthy history of very serious drug and alcohol abuse?

A Yes.

Q And would it have been helpful to know that immediately prior to the murder he was abusing heroin, marijuana and alcohol every day?

A Yes.

Q And would it have been something you wanted to present to the judge and jury that he had a lengthy history of serious mental problems due to the child abuse, the brain damage, and the drug abuse?

A Yes.

Q Would you also have wanted in terms of trying to prove his mental state and the mitigation, would you have wanted the judge and jury to know that a mental expert would find that due to all these problems, he was under the influence of extreme mental or emotional disturbance?

A Yes.

Q Would have like them to know that Mr. Heiney's school teacher thought he need psychiatric treatment?

A Yes.

Q Would you have wanted the judge and jury to know that Mr. Heiney's parents told the juvenile authorities that something's been wrong with him since he was five years old?

A Yes.

Q Would you have wanted them to know that the juvenile authorities said that his father had a violent temper and they suspected that had something to do with Robert's problems and his temper?

A Yes.

Q Would it have been helpful for them to know the parents were told to take him to a psychiatrist but they never did that when he was a child?

A Yes.

Q Would you have wanted them to know that the parole authorities in Ohio and Kansas recommended that he get psychiatric treatment when they released him on parole?

A Yes.

* * *

Q Would you like the judge and jury to know that despite all these recommendations that he get some psychiatric help or that he get some treatment for his substance abuse that he was never given any treatment or any counseling or anything in that vein to help him deal with his problems?

A Yes.

Q And would it have been helpful to know that in the Army he suffered severe migraine headaches as a result of head injuries received in a car accident?

A Yes.

Q And that there were various episodes that illustrated that due to his mental problems he had a history of losing control of himself?

A Yes.

(PC-R. 7-10).

Q Now, in your argument that you presented at -- to the jury at the penalty phase, one of the things you argued is that drinking was a problem or that he was drunk and that's in the record. Do you have any independent recollection that you ever interviewed Luwanna Wickline, David Benson and Terry Phillips. These are the three witnesses from Texas that testified regarding that prior shooting.

A No, I didn't -- I don't.

Q Now, if there had been a prior arrest in the State of Florida for public intoxication, is that the kind of thing you might have wanted to use to illustrate that Mr. Heiney had --

* * *

PASCOE: Yes, I would have.

(PC-R. 7-10, 13).⁴

Mr. Pascoe had documents in his file regarding Mr. Heiney's previous arrest for intoxication, but simply failed to present that information to the jury or judge, although he acknowledged that it was the kind of information he would have wanted the jury to know at the penalty phase:

Q . . . Now, the Judge already knew about that Fort Lauderdale assault. Is there any reason why you wouldn't have wanted him to know that it proved that Mr. Heiney had a drinking problem?

A In which state of the proceedings was this? Was this the jury trial?

Q Right.

A Sentencing recommendation?

Q Right, then later on when it came time for the Judge to do the sentencing, there was like a three week interval between when the jury made the life recommendation and the Judge sentenced. I think what Mr. Grinsted is trying to get at here is you didn't want the jury to know this bad thing about Mr. Heiney, but he [the Judge] already knew it.

⁴Defense Exhibits B and C, Ft. Lauderdale police reports concerning Mr. Heiney's arrest for intoxication, were admitted into evidence (PC-R. 14, 15).

A I would think it would have been logical for me to want the jury to know that at sentencing, but not at the jury trial phase. That could be -- that has a tendency to prove the crime, that he gets violent when drunk.

Q On the other hand, wouldn't it also have a tendency to show that his violence is a rage episode that just comes and then it's gone.

A For the sentencing, yes.

(PC-R. 34).

Counsel also knew of evidence showing that Mr. Heiney had cooperated and assisted law enforcement on other occasions, but again failed to present that information, and again acknowledged that it was the kind of information he would have wanted the jury to know at the penalty phase:

DOUGHERTY: Your Honor, I'd like to have a report from the Okaloosa County Sheriff's Department Task Force which again has been removed from the trial attorney's file, marked as Exhibit D. . . . It's only the first page I'm using. What this report indicates is that the detectives here called down to the detective in Fort Lauderdale and inquired about Mr. Heiney and who he was and if they remembered him and so forth. He was told that while Mr. Heiney was down there, he had provided cooperation with the state and in aiding them in investigations down there and had worked with the police department down there. Is that the type of thing that he had provided assistance to law enforcement in the past that you would have wanted the judge and jury to know?

PASCOE: Yes.

(PC-R. 15-16).

Counsel acknowledged he received a written evaluation conducted by the Okaloosa Guidance Clinic prior to trial (PC-R. 28; State Exhibit 1).⁵ Counsel testified that his motion requesting this evaluation went more towards evidence for the guilt/innocence phase of trial (PC-R. 20). Mr. Pascoe could not remember whether or not he had provided the clinic with any collateral

⁵After reviewing this evaluation, Dr. Toomer was deeply disturbed by its contents due to a number of violations of the American Psychological Association's ethical standards, including reliance solely on test results to draw conclusions and lack of identification of the person actually conducting the evaluation (PC-R. 96-101). Dr. Toomer also reviewed and was aware of Defense Exhibit P in which Linda Haese stated by affidavit that she not only was not licensed as a psychologist, but also was not qualified by experience to administer the testing identified in the report; further, her conclusions were drawn only based upon testing and she did not conduct a full clinical interview of Mr. Heiney (PC-R. 97-98). Dr. Toomer testified that all of this calls into question the results of that evaluation (PC-R. 101).

records, files or anything to alert them to such matters as head injuries or brain damage or any of Mr. Heiney's background.⁶ Counsel stated that obtaining background records would probably be something the investigator would have done, but Mr. Pascoe acknowledged that if such records were obtained this would have been done only because he told the investigator to do it.⁷ Mr. Pascoe said he typically gave investigators rather specific instructions as to what he wanted done (PC-R. 32-33).

Concerning the investigation for the penalty phase, James Graham, the investigator, testified:

Q Do you know Robert David Heiney?

A Yes, ma'am.

Q Were you the investigator assigned to the case when Mr. Heiney was being tried for first degree murder in 1979?

A Yes, ma'am.

Q Were you the only investigator assigned to the case?

A Yes, ma'am.

Q Who was the attorney representing Mr. Heiney?

A David Pascoe.

Q Do you recall whether the State was seeking the death penalty in Mr. Heiney's case?

A Yes, ma'am, they were.

Q Do you recall whether you conducted any investigation for a possible penalty phase in this case?

A No, ma'am, I did not.

⁶The resultant report does not indicate that the examiner, Ms. Haese, in fact received, reviewed or considered any collateral information (State Exhibit 1). Ms. Haese's affidavit (Defense Exhibit P) confirms that she "was not provided Mr. Heiney's school records, prior prison records, military records or statements by family regarding his history of child abuse."

⁷Counsel's investigator, James Graham, testified that counsel did not ask him to obtain any background records and that he did not obtain any such records. See infra.

Q Did Mr. Pasco ask you to conduct any investigation for a penalty phase?

A No, ma'am.

(PC-R. 36-37).

Q At the time you were working on Mr. Heiney's case, did you know where he was from?

A No, ma'am.

Q Did you ask him?

A Oh, I knew he was from Ohio, but that's all I knew. That was on the initial intake.

Q Do you recall whether you sought to obtain any records from Ohio regarding Mr. Heiney?

A No, ma'am.

Q Did you get Mr. Heiney's school records?

A No, ma'am.

Q Did you get any juvenile records?

A No, ma'am.

Q How about prison records?

A No, ma'am.

Q Military records?

A No.

Q Did you interview any of Mr. Heiney's family about his background, his life and background?

A No, I did not.

Q Assuming that Mr. Heiney's school, juvenile, and prison records reflect that officials recommended that he receive psychiatric help throughout his life, is that something that you knew?

A I did not know that.

Q Did you know that these records also reflect that he also suffered several head injuries during his life?

A No, ma'am.

Q Did you know that Mr. Heiney had a long-standing drug and alcohol and problem?

A No, I did not.

Q Do you recall whether Mr. Heiney was examined by a mental health expert at the time of trial?

A To my knowledge, I think he was interviewed by the Okaloosa Guidance Clinic, but I don't have any personal recollection of that.

Q Did you ever speak with anyone from the Okaloosa Guidance Clinic about Mr. Heiney?

A No, ma'am.

Q Did you ever provide them any information about Mr. Heiney?

A No, ma'am.

Q You recall the jury in this case recommended that Mr. Heiney receive a life sentence?

A Yes, ma'am.

Q After that recommendation, but before the Judge sentenced Mr. Heiney, did you conduct any investigation about Mr. Heiney's background for mitigation, or were you asked to conduct any investigation?

A I did not, and I was not asked.

(PC-R. 38-40).

As the lower court found, as a matter of fact, trial counsel did not investigate for the penalty phase. This finding is amply supported by the testimony of Mr. Pascoe and Mr. Graham. The lower court also concluded as a matter of fact that had trial counsel investigated, counsel would have discovered evidence supporting mitigating factors. This conclusion is also amply supported by the record.

Several of Mr. Heiney's family members testified concerning his childhood abuse, upbringing and behavior. Kay Yanni, who is six years older than her brother, testified she remembered that Mr. Heiney ran away from home a lot as a very young child. One incident sticks in her mind: when Mr. Heiney was really small, maybe four years old, his father chained him to a cement block in the backyard. She remembers Mr. Heiney picked the block up, put it in a wagon

and ran away again. She also testified that, as a child, Mr. Heiney had two personalities and was two distinct people at times. He was a sweet, loveable little boy most of the time; then there were periods when he was completely different and seemed to have trouble controlling his behavior. When about age 10, Mr. Heiney was taken to a psychologist who made recommendations for treatment which Mr. Heiney never received (PC-R. 47). Despite his conviction, she still loves her brother (PC-R. 49).⁸

Jean Vallera testified she is nine years older than her brother. She said as a child Mr. Heiney was a sweet, blond-haired little kid. She did not think any of the children got praise from their parents. When they misbehaved, the parents came down on all of them (PC-R. 51-52).⁹

A niece, Lou Ann Ward, also testified. She had contact with Mr. Heiney when they were growing up. When their grandparents were alive, the family had a lot of reunions. They always had a good time and Mr. Heiney was just fun to be around. The family was important to Mr. Heiney, she testified. The whole family, including Mr. Heiney, was present at the grandmother's funeral in 1977. Mr. Heiney took his cousin Jerry in to try to help him out and find work (PC-R. 60-61).¹⁰

Another sister, Jacqueline Ward, who resides in Ohio, was subpoenaed to testify at the hearing. The Court of Common Pleas, Columbiana County, Ohio, ordered her exempt from appearing for medical reasons (Defense Exhibit I). In lieu of her testimony, Mrs. Ward's affidavit

⁸Mrs. Yanni stated that Mr. Heiney's attorney did not contact her. If asked, she would have provided counsel with the information she knew about her brother. She was in contact with her sister, Jean Vallera, at the time of Mr. Heiney's trial (PC-R. 48, 50).

⁹She received a call from someone indicating that Mr. Heiney had been charged with murder (PC-R. 54). The caller did not indicate that there was a way for her to assist and did not ask her about her brother (PC-R. 56). Had she been asked, she would have provided information about Mr. Heiney and his life (PC-R. 56-57).

¹⁰Ms. Ward's father learned about the murder charge through an acquaintance on the East Liverpool Police department and shared it with the family. Her father, she said, was devastated; she had never seen him so upset. If she had been contacted in 1978-79 by the attorney or someone on the case, she would have spoken to them (PC-R. 61-62).

was admitted into evidence (PC-R. 58-59; Defense Exhibit J). That affidavit provided the following information concerning Mr. Heiney:

1. My name is Jacqueline Ward and I am one of Robert Heiney's older sisters. I live in East Liverpool, Ohio, where by eight siblings and I spent many of our childhood years.
2. Our father died in 1969 of emphysema, which he developed from four decades of working in the steel mills, and our mother followed in 1977.
3. I remember quite well how upset my mother was when she found out she was pregnant with Bob. She never wanted him, and she blamed herself until the day she died for harboring this feeling.
4. When Bob was small, he would be punished for misbehaving by whippings and spankings. When he was about two or three years old, my parents would tie him to a cement block in the backyard to keep him from playing on the railroad tracks behind the house. We would sometimes find him slowly wandering in the yard, dragging the cement block with him as he went.
5. Bob's attorney never contacted me, and I didn't even know it was possible that he would receive a death sentence in Florida. I would gladly have spoken to him had I been given the opportunity, and would have done whatever I could to help my brother.

(Defense Exhibit J).

At the evidentiary hearing, substantial documentary evidence regarding Mr. Heiney's background was also presented. Records from the juvenile court of Columbiana County, Ohio, elaborate upon Mr. Heiney's sisters' accounts of his childhood. Records from 1962, when Mr. Heiney was about 16 years old, indicate that Mr. Heiney's father "has a violent temper" and that the father "has a quick temper and flies off the handle easily" (Defense Ex. M, Tab 16). These records also indicate that Mr. Heiney's parents "have suspected that Robert's behavior was not normal from the time he was five years of age" (Id.). In the same time period, a report from the Child Counseling Center of East Liverpool, Ohio, noted that Mr. Heiney's teacher believed Mr. Heiney needed psychiatric help (Defense Ex. M, Tab 16), and reported that psychological testing revealed that Mr. Heiney exhibited "bizarre and unusual thoughts," displayed "a splitting of his subjective life from reality," and was "troubled by phobias and/or compulsive behavior" (Id.). The report also predicted that Mr. Heiney might become addicted to alcohol or drugs (Id.). According to

the mental health examiner, Mr. Heiney "never experienced much parental guidance," and "[t]his attitude on the part of the parents seems to me to be the cause of most of [Mr. Heiney's] troubles" (Id.). The examiner concluded by recommending that Mr. Heiney "should be examined by a psychiatrist for diagnosis, prognosis, and recommendations for treatment or counseling" (Id.). A few years later, in 1965, records from the Court of Common Pleas of Columbiana County, Ohio, reported that Mr. Heiney had been arrested for burglary after having become very intoxicated (Defense Ex. M, Tab 18). These records also indicate that Mr. Heiney's mother believed he was "in need of psychiatric attention" (Id.). Mr. Heiney's attorney at the time requested a "psychiatric examination to determine [Mr. Heiney's] mental capacities and capabilities in light of his course of conduct" (Defense Ex. M, Tab 19).

Mr. Heiney's troubles continued, as did his addiction to alcohol. In 1973, Mr. Heiney was arrested for public intoxication in Ft. Lauderdale, Florida (Defense Exs. B and C). An arresting officer reported that Mr. Heiney "was quite unsteady on his feet, and on one occasion almost slipped and fell through [a] plate glass window" (Defense Ex. C). The officer "observe[d] a strong odor of an alcoholic beverage on [Mr. Heiney's] breath, his eyes were red and watery, and his speech was quite slurred" (Id.). When Mr. Heiney was being put in a police car, "[a]t first he refused to get into the vehicle, and then all of a sudden he calmed down and stated he would get into the police vehicle" (Id.). Records from the Kansas State Penitentiary indicate that in 1976 Mr. Heiney was disciplined for possessing "Hooch material" (i.e., material for making alcohol)(Defense Ex. M, Tab 23). Records from the London Correctional Institution, London, Ohio, indicate that in 1978, Mr. Heiney requested psychiatric treatment (Defense Ex. M, Tab 20).

Prior to the offense in 1978, Mr. Heiney had been living with Luwanna Wickline, who described the degree of Mr. Heiney's addiction to drugs and alcohol:

1. My name is Luwanna Wickline Flowers and I live in Columbus, Ohio. I met Robert Heiney in January of 1978 in a bar in Columbus, Ohio.

2. Shortly after meeting Robert we moved in together. We had a lot in common, we would drink and shoot dope together. We were each drinking a fifth of tequilla (sic) a day. Not only did Robert always drink heavily, he would take any

kind of drug he could get ahold of. He had a bad pot habit and would start smoking from the time he got up in the morning. He liked to take barbiturates such as seconal, placedills, PCP, and heroin. What he would do depended on what was available but he was always high [o]n something.

3. In April, 1978 I was arrested for solicitation. After the bust, Robert, myself and one of my tricks, David Benson, moved to Houston, Texas. David was an alcoholic and would bring home gallon jugs of vodka and fifths of tequilla (sic) all the time.

4. Ever since I met Robert, I have thought he had some kind of mental problems. Even when he was not on drugs, he didn't think or act like a normal person. In Houston, I became even more worried about him because he got worse. When Robert would drink and shoot drugs, his personality would change. He would be the nicest person, then all of a sudden he would go off and start throwing things and yelling. He would accuse me of going out on him when I hadn't even left the house all day. This would happen even when he had been at the house and knew that I hadn't left. He really started losing his mind in Houston and all of us were afraid he would do something crazy and unpredictable. David Benson and Terry Phillips were as concerned as I was about how crazy Robert was acting.

5. On June 4th of 1978, Robert told me in the early evening that I should go out and earn some money. I got some money and gave it to Robert then I went out on a date. Robert went to a party. After my date, I went home and went to sleep. Terry had gone to the same party as Robert and told me that Robert was doing PCP. Earlier in the day, we had all been drinking and doing some mushrooms.

6. Robert came in and woke me up by screaming at me. He accused me of going out on him and when I denied it, he went crazy. He was really stoned from drinking, smoking pot, shooting reds and doing PCP. He was acting so crazy that I ran next door. After Robert shot Terry, Terry said Robert started crying and apologizing to Terry for shooting him. Robert helped David carry Terry to the car. I knew Robert well enough that he would never actually shoot or kill someone unless he was out of his mind from doing drugs and alcohol.

* * *

8. Robert's problem with drugs got the best of him and it seemed that he just couldn't stop. He was getting steadily worse. It changed his personality. When he wasn't high, he was easy to get along with but when he was high he would be out of his mind. Robert was shooting a lot of barbiturates and heroin and had needle track marks on his arms.

9. Robert's attorney never talked to me. That really surprised me. If he had talked to me, I would have told him the same things that are in this affidavit and I would have been glad to testify to these same things at the time of Robert's trial.

(Defense Ex. L, Tab 4).

The documentary exhibits also reflect that Mr. Heiney suffered several head injuries in his life. The Columbiana County, Ohio, juvenile records report that in 1949, at approximately age 7, Mr. Heiney "ran into a car [and] received a head injury treated by Dr. Beaumont" (Defense Ex. M, Tab 16). These records also report that Mr. Heiney again ran into a car in 1950 and that in 1950 he "fell from Bike and required stitches on head" (Id.). Mr. Heiney's military records report that in 1964 he experienced "severe headaches" and a "long hx [history] of headaches," attributed to a car accident five years earlier (Defense Ex. N, Tab 25).

Materials regarding Mr. Heiney's history were provided to two qualified mental health experts, who examined and evaluated Mr. Heiney. Dr. Jethro Toomer, an expert in clinical and forensic psychology (PC-R. 65), testified that he conducted a psychological evaluation of Mr. Heiney which included a clinical interview, the administration of psychological tests, and a review of background materials (PC-R. 67). Dr. Toomer reviewed all of the materials contained in Defense Exhibits L, M, N, and O (PC-R. 68; see PC-R. 774-2326 [Defense Exs. L, M, N, O]). Dr. James Larson, a neuropsychologist with specialized training in forensic psychology (PC-R. 137), also conducted an evaluation of Mr. Heiney, including neuropsychological testing and a review of the background information contained in Defense Exhibits L, M, N, and O (PC-R. 138).

As noted above, the lower court found as a matter of fact that the evidence showed Mr. Heiney "was a chronic substance abuser and may have been affected by alcohol and/or other drugs at the time of the offense" (PC-R. 2334). Dr. Toomer discussed what the background materials reflect about Mr. Heiney's history of drug and alcohol addiction and about his intoxication at the time of the offense:

Q In your interview, and testing, and review of the background materials for Mr. Heiney, did you find a history of substance abuse?

A Yes, I did. In the records there was indication of an extensive history of substance abuse that goes back to around age 14.

Q And what types of substances?

A There were a variety of substances that were -- that we[re] utilized. Initially, the drug history began with marijuana on a daily basis. Along with that

experimentation was speed. There was also experimentation with speed balls. There was a period where heroin, pot, PCP was utilized on a regular basis. There were all these kinds of drugs in addition to alcohol being used on a regular basis. His history of alcohol and drug abuse was described in one of the affidavits by Luwanna Flowers that captured the essence of his history of drug abuse.

Q And were -- were some of these drugs being administered by injection?

A Yes, there was mainlining also as a part of the method of ingestion being utilized on a regular basis.

Q Did Mr. Heiney ever -- did the records reflect that he ever went through a treatment program to aid in his recovery from the substance abuse?

A I found nothing in the records to indicate that there had been any kind of intervention taking place in order to deal with that particular problem, no.

Q And was there evidence that this history of substance abuse continued up until the time of the offense?

A Yes, there was ample evidence that reflected that the -- the use of the illicit drugs that I alluded to beginning at age 14 continued, was an ongoing part of his history, development, and functioning.

Q What did he tell you as far as what kind of drugs he was using? Did he -- did he tell you he was using these drugs?

A Yes, he did.

Q And was that also confirmed by the affidavit of Luwanna Wickline Flowers?

A Yes, that's correct. She, in essence, described the utilization of the same kinds of illicit drugs, yes.

Q Okay. I noticed that the records reflect numerous offenses for forgery and bad checks. Would that be the kind of behavior you would suspect of someone suffering from a substance abuse addiction?

A Yes, it's common practice in that that tends to be one of the kind -- one of the behaviors you find on the part of individuals who are supporting a habit of substance abuse or utilization of illicit drugs and substances.

Q And you noted that one of the records you reviewed was a Fort Lauderdale incident describing an arrest of Mr. Heiney for intoxication?

A Yes.

Q Is that the kind of thing you expect to see?

A Yes, that's the kind of behavior we expect to see. I think that incident points out clearly what I alluded to earlier in terms of the kind of behavior manifestations and the extreme lability in behavior that was reflected.

* * *

Q Now, moving on to another area of consideration here. In the records that you reviewed and in your expert opinion, I'd like to ask you if you find any evidence that there was intoxication at the time of the offense in Mr. Heiney's case.

A Yes, it was indicated that there had been a period of ingestion of alcohol prior to or leading up to this particular event. Yes, there was evidence to that effect.

Q Now, you stated that you reviewed the affidavit of Luwanna Wickline Flowers?

A Yes.

Q That affidavit documented a daily serious addiction within days of this offense, is that correct?

A That's correct, yes.

Q What would be the likelihood -- do you have the Wickline affidavit there?

A I don't believe so.

Q Perhaps you could refer to the exhibit in the Court -- to that affidavit and give us an idea of how she describes what his -- what kind of an addition (sic) problem we're talking about here, just days before this offense occurred?

A Okay. Reading from the affidavit of Luwanna Wickline Flowers, focusing on the part that deals primarily with drug abuse and use of substances, she states, "shortly after meeting Robert we moved in together. We had a lot in common and we drank and shoot dope together. We were each drinking a fifth of Tequila a day. Not only did Robert always drink heavily, he would take any kind of a drug he could get a hold of. He had a bad pot habit and would start smoking from the time he got up in the morning. He liked to take barbiturates, such as seconal, Placidil, and PCP, and heroin. What he would do depended on what was available. He was always high, he was on something. In April 1978, I was arrested for solicitation. After the bust, Robert, myself, and one of my tricks, David Benson, moved to Houston, Texas. David was an alcoholic and would bring home gallon jugs of Vodka, and fifths of Tequila all the time." Those two statements give some flavor of the drug abuse, and drug and alcohol abuse that was common.

Q And did your interview, personal interview with Mr. Heiney confirm this level of substance abuse in the days before the offense occurred?

A Yes, it did.

Q Now, doctor, what would be the likelihood that a person with an addiction, a substance abuse problem of this severity that was occurring at this level just days before, what is the likelihood that such a person would suddenly give up that habit or cease taking -- ingesting all intoxicants?

A That's highly unlikely, highly unlikely, if not impossible. You don't find that kind of behavior occurring without some kind of sustained, prolonged, intense intervention.

Q Did your records reflect a blood alcohol level of the victim, Charles Mays?

A Yes, in one of the documents, I believe it was the report by the medical examiner, that the victim's blood alcohol level was .28.

Q And did you review statements by Mr. Tom Tuszynski which reflected what he -- a statement he said was made to him by Robert David Heiney as to how this offense may have occurred?

A Yes, I did.

Q And was there any indication in that statement that Mr. Heiney was intoxicated?

A Yes, the indication was that both parties were drunk or intoxicated.

Q Was there any indication in there, to your recollection, about whether or not they had been in a bar shortly before the incident?

A Yes, prior to their leaving, they had been at a bar ingesting alcohol. As a result of that, they both were drunk.

Q Do you recall the exact time frame or how long it was after they left the bar before the offense occurred or would you like me to show you that from that statement?

A Yes, I think that they left the bar sometime between five and eight in the evening, and there was a drive of approximately 30 minutes or so, at which time, this incident occurred.

Q Now, what -- what is the likelihood that Robert David Heiney being at a bar with another person who was obviously drinking, what is the likelihood that he would abstain from ingesting any alcohol in that situation?

A That's very unlikely. I find it highly unlikely that someone who has a history of ingestion of drugs and alcohol being in a situation with another individual who was ingesting alcohol in a situation where alcohol is served. I find it highly unlikely that person would be able to abstain or would abstain from ingesting some type of substance.

Q In fact, would it be virtually impossible for such a person?

A I would say virtually impossible, yes.

(PC-R. 73-81).

Dr. Larson also discussed Mr. Heiney's history of substance abuse and the probability that Mr. Heiney was intoxicated at the time of the offense:

Q Now, did -- did Mr. Heiney ever indicate in your interview with him that he was abusing drugs and alcohol?

A Yes, he did.

* * *

DAUGHERTY (Cont'g): Did you have any indications -- as I understand you're an expert in judging human, mental status and states, did you have any indication that Mr. Heiney was being untruthful with you or misleading in any way?

A Well, in fact I had corroboration, that is, he gave me a history of substance abuse and as best I could piece together in the record, the history that he gave me corresponded to independent, third party information.

Q Did you have the opportunity to interview -- to review the affidavit of Luwanna Wickline Flowers in that regard as to his substance abuse.

A Yes, I did.

Q And was that consistent with what he had reported to you himself?

A It was essentially consistent with what he reported to me, and it was consistent with a number of indications in the record that he was a poly-substance abuser over a long period of time.

Q All right. In regard to that, were you able to review a record of an arrest he had in Fort Lauderdale.

A Yes, I was. At the time of that arrest, it's documented in the arrest that he had slurred speech. He was poorly coordinated. His behavior was, I would say, bizarre. It was real, real inappropriate, and it would indicate that most likely he was intoxicated. He was real belligerent initially, showed very, very poor judgment, and then very dramatically and very quickly became quite cooperative and calmed down. Additionally, there were other indications. For example, while incarcerated one time he got into difficulty because he had accumulated a good bit of sugar that could have used -- was probably being used to make alcohol in the jail. There was another indication there that he brought in substances and had substances brought in to abuse while incarcerated. All these things are consistent with a long-term poly-substance abuser.

(PC-R. 140-43).

Q Now, when you -- oh, in regard to whether or not Mr. Heiney may have been intoxicated at the time this offense occurred, you have access to the affidavit of Luwanna Wickline Flowers which documented this severe daily addiction right up until a few days before the offense, is that correct?

A That is correct.

Q Do you think that that is an important factor to consider here?

A Well, it's really impossible to say without alcohol levels being taken whether or not he was intoxicated at the time. There are certain patterns of expectation, and my expectation is given that kind of information that he was a daily abuser of alcohol and other substances, and also given the fact that he was in a vehicle with a man whose blood level documented that that man -- that victim was intoxicated, I'd say the probability is certainly there that the defendant in his case was also under the influence of substances.

Q And were you given the statements of Tom Tuszynski who alleged that Mr. Heiney had described the offense to him as to how it occurred?

A Yes, I was given those statements and reviewed those statements. My recollection from those statements is that they describe about drinking and having stopped at a bar, I believe, in Pensacola. I believe they were en route east on the interstate and the incident took place a short time after they left Pensacola, after they left a bar drinking.

Q How likely does it seem to you that someone with a severe substance abuse problem who has been in a bar 30 to 40 minutes earlier with another individual who has a .28 blood alcohol level, how likely is it that Mr. Heiney would have chosen that period of time to quit drinking or quit imbibing intoxicating beverages?

A It's not likely that he would have chosen that particular time to decide to come to task or come to terms with his alcohol habit or substance abuse habit. Usually people come to terms with that in an intervention or other mental health technique. It's one of the more difficult things to target therapeutically successfully.

(PC-R. 146-48).

As noted above, the lower court also found as a matter of fact that the evidence established Mr. Heiney "suffers and has been diagnosed []as having a borderline personality disorder" (PC-R. 2334). Dr. Toomer testified that Mr. Heiney suffers from a borderline personality disorder and explained how that diagnosis is consistent with Mr. Heiney's history:

Q Doctor, did you in your diagnosis find any personality disorders that existed in Robert David Heiney?

A Yes, I did. My conclusion is that Mr. Heiney suffers from a borderline personality disorder. That was the conclusion based upon my examination of the subject, and the evaluation of the documents that we have alluded to earlier.

Q And is that a diagnosis that comes from the DS -- what we call the DSM?

A Yes, the DSM3R, yes.

Q And that's the diagnostic and statistical manual of mental disorders, is that what we're referring to?

A That's correct, yes.

Q Is this a common diagnosis for abuse victims?

A Yes, you find many victims who have suffered abuse, manifest borderline personality disorder, symptomatology that is a part of the constellation of the borderline personality disorder.

Q Now, in making a diagnosis, does the DSM give certain criteria which you then consider to determine whether or not, in fact, a person is suffering from that mental disability?

A Yes, that is correct.

Q And did you review those personality -- the criteria for the borderline personality in regard to Mr. Heiney?

A Yes, I did.

Q And was it your opinion that he satisfied [sic] the diagnosis based on his behavior and the records you have?

A Yes, he, in essence, exceeded the criteria for the diagnosis. There are basically eight standards. The person has to meet five in order to be diagnosed as suffering from that personality disorder, and he had seven of them -- seven of those criteria.

Q How certain do you feel of your diagnosis in this particular instance?

A Oh, very certain. I think Mr. Heiney is almost a textbook case of a borderline personality disorder.

Q And what types of things leads you to that conclusion?

A Basically the borderline personality disorder is a maladaptive pattern of behavior that exists for an extensive period of time that causes -- that causes an individual to behave inappropriately in a variety of areas affecting his or her life. The characteristic here, the primary characteristic, is the lack of stability. It is a pattern of behavior that is characterized by instability in a variety of areas. For example, interpersonal relationships, there is a lack of stability in terms of mood that we have alluded to earlier. And there is a lack of stability with respect to identity. There is an identity disturbance, which in essence, focuses on a sense of self. That's where you get problems in terms of developing career goals, moving toward the accomplishment of certain aims and goals in life or what have you. Those are three basic characteristics of this borderline personality disorder. I think if we look at the history and we take the history in total, we see, for example, the disfunction that has existed in terms of interpersonal relationships beginning with early abuse, with parents, the poor and transient character and nature of interpersonal relationships that existed throughout his life. I think the records show

and demonstrate very aptly the instability with respect to mood, in terms of the labile nature of personality orientation reflected in a variety of instances.

Q Now, let me ask you some examples, for instance. In the interpersonal relationships, do you recall how many different marriages he had?

A I believe he was married on three occasions.

Q Is that -- would that be typical for what you would expect to see?

A It's very typical. With a borderline personality disorder, you tend to find the kind of start-up process, start-up, stop, start over again process. That's reflected in marriage. It's reflected in the inability to maintain and sustain long-term interpersonal relationships. Most interpersonal relationships will be of short duration, will be very transient, will be very superficial. This has been characteristic of Mr. Heiney. Also, the interpersonal relationships, the quality of them -- of those interpersonal relationships would tend to be very intense in terms of -- intense of a short duration, intense in terms of all the possessiveness, intense in terms of just the nature. It's not a relaxed, caring kind of relationship. It's a relationship born out of fear of abandonment that is fueled by early sense of life as a result of a dysfunctional family. And those are examples of the disfunction in terms of interpersonal relationships that were characteristic.

Q One of the criteria for the borderline personality disorder is frantic efforts to avoid real or imagined abandonment.

A Yes.

Q Is that what you think you see in Mr. Heiney?

A Very clearly and very significantly. His history is one of significant abuse. His history is one that is characterized by a lack of nurturing, a lack of caring, a lack of positive, supportive, ego-building communication. As a result of that what you tend to get is a sense of emptiness, a sense of boredom, a sense of loss, a sense of rejection because we're talking about a child who's without defenses, without support and what have you, and the tremendous need for acceptance, the tremendous need for achievement, the tremendous need for caring is never met. As a result the individual comes to a point where he or she begins to expect rejection, begins to expect not to have needs met, begins to expect that as an ongoing pattern he or she is going to be left alone, is going to be abandoned. That need, that search for acceptance is really what fuels a person's behavior throughout his or her life. If you look at the record it's very clear that in many instances where the behavior, the lability in terms of personality function, moving from calmness to agitation centered around events related to a real or perceived sense of loss.

Q What would be an example that you saw in the records?

A I think one example was contained in the Luwana Flowers statement where she described how his behavior would move from calmness to agitation, to belligerence to hostility whenever he perceived that she was -- that he was about to lose her in some way, either perceived that she was seeing someone else or that she was about to leave. Also, if you look at the prison records, it's interesting that

you'll notice that there are periods where his behavior is fine, no reports, everything is fine. He's abiding by the rules. And on one occasion when he was notified by his wife that she was going to divorce or leave him, abandon him, i.e., abandon him, behavior changed, and you get all of the reports, all of the aggressive language and behavior being manifested. And then on another occasion while -- while in prison, he was notified that his son was in the process of being adopted by the step-father. Once again, loss, abandonment, and you see the change in the behavior reflective of that particular need -- that particular fear about being abandoned. So what, in essence, happens is as a result of those early deficits that is attempting to function in a dysfunctional system, the individual spends the rest of his life, in essence, being motivated by his deficiencies seeking nurturing, seeking caring, and because that was not accomplished early on, the individual then was unable to develop any kind of ego strengths that would allow one to grow up, to develop, and function, and be able to do the kinds of things such as enter a stable career path and so forth and so on. Because of that lack of ego strength the individual's life, instead of becoming more and more stable, simply becomes a merry-go-round of discord and behavior.

Q Well, what happened with his childhood? What happened with his parents? How did all of this go wrong for David Heiney?

A The records reflect that problems were first identified -- psychological problems, at age five. The father was described as being abusive and having a volatile temper.

Q Now, you say he was described, where was that?

A In the juvenile records from Ohio, Columbiana County, Ohio.

Q Thank you.

A The abuse took the form of the subject being tied to a cement block in the yard, and the abuse, neglect, lack of nurturing reached a point that the subject was noted on number of occasions to simply run wildly into the street in front of cars.

Q What was going on between he and his mother in this situation?

A The records reflect and my interpretation of those records is that the mother, in essence, was physically present, but psychologically absent. In essence, really removing herself from the process. In fact, in a number of the juvenile records, I think a Judge commented on one occasion and I think a social worker on another occasion or a mental health professional, how perplexed they were that the parents did not take greater concern with respect to these problems that had become identified and not become more involved in terms of trying to intervene to deal with those particular -- those particular problems.

Q In one of the family affidavits his sister, Jean Vallera states, "Our mother tended to always explain things in religious terms and in her heart believed that when Bob would misbehave, it was a punishment from God directed at her. She believed this because she never wanted him." Is that the kind of thing that would create this situation?

A That's exactly the kind of situation that would create this kind of situation. I believe in that same affidavit, it was reflected -- or it might have been in the affidavit of Kay Yanni, it was reflected that the mother would simply not admit openly that there were problems. If there were, they were because of this religious orientation and her being punished.

(PC-R. 81-89).

Q Now, of the records you've reviewed, I believe you had the opportunity to review his military records, is that correct?

A That's correct, yes.

Q And in his military records, was there anything reflected that you thought was indicative of some of these problems that you've been describing?

A I think in the military, as reflected in the military records, what we found was really a continuation of the drama or the play, if you will, that had started early on. For example, the military records describe poor personal hygiene which is often a characteristic of individuals with borderline personality disorder. They tend to neglect hygiene. They mention something, I think, something with regard to the fact that all of his belongings, lockers and everything were junk strewn and what you have.

(PC-R. 102).

Dr. Larson also discussed Mr. Heiney's borderline personality disorder:

Q Now, in regard to other personality problems that he might have, did you -- were you able to any particular personality disorder in this individual?

A Yes, I gave him a diagnosis of a borderline personality disorder. That is a disorder that's characterized by interpersonal instability, mood instability, and impulsivity. It's over a long period of time. It just doesn't have sudden emergency. It's more of an enduring characteristic of personality and characterizes that individual's life style so to speak.

Q And as you -- the records reflect, is that correct, that this type of problem started to emerge in a very early age with Mr. Heiney?

A Yes, this diagnosis was based almost entirely on third party information or on the records as indeed that kind of diagnosis usually is made by history or if one had a good, long baseline with an individual, one could connect that diagnosis. So there have been many, many examples of this kind of pattern of behavior throughout the records over a long period of time. That was the basis for this diagnosis.

Q Is this a common diagnosis for abuse victims?

A Yes.

(PC-R. 146).

The lower court also found as a matter of fact that Mr. Heiney "was chronically abused physically and emotionally as a child" (PC-R. 2334). Dr. Larson summarized what the background information reflected about Mr. Heiney's childhood:

Q Now, briefly, you had an opportunity to review the family affidavits from his sisters regarding the dynamics going on in his family when he was child, is that correct?

A That's correct, I did.

Q And what -- as described in those family affidavits, what did you see as problems in this family?

A Overall the family appeared to be a rather dysfunctional family. The mother appeared to be passive to me. The father appeared to be domineering and to have quite a bad temper. The -- the defendant had been tied, according to these affidavits, to a concrete block as a means of controlling his behavior in the backyard, and he would drag that around. Another major dynamic that his mother identified him as having significant problems at age five or six and then later on, for example, in his juvenile record there were recommendations that he seek -- the family seek psychiatric intervention. The family failed to follow through on those recommendations. So basically it appears to be a family that was quite dysfunctional. It appears to be high risk for child abuse, violence, bad temper on the part of the father, and not very good with controls and not very good on follow through on the recommendations of school personnel and juvenile authorities.

Q One of the affidavits describes that there was very little demonstrative shows of affection in this family as far as, you know, kissing or hugging, or telling the children that they were loved. Is that disabling for a child?

A Yeah, generally there's a body of research that shows when children are told they're loved and they are -- it's demonstrated in the family with physical affection that those children generally have a better psychological adjustment. As adults, they tend to have an overall adjustment which includes vocations, which includes future marriages, includes more stable relationships with their own children.

Q There's also an indication in there that the mother -- that he was the eighth child of nine children and when he would misbehave, she would regard that as a punishment from God because she shouldn't have had another child or something in her mind that he is somehow a punishment from God. Is that --

A I would expect that dynamic was damaging in the sense that it made the child feel rejected, that there were vibrations from the mother at a very early age that the child's being wasn't valued and so there was a lot of subtle rejection. Indeed, he was a punishment to her for her own transgressions whatever they may have been. She would have had great ambivalence. That kind of ambivalence is sometimes called schizophrenogenic which means it promotes schizophrenia. Want to make it real clear there -- I saw no indications at all of schizophrenia in this

individual, but it's these kinds of mixed messages that we frequently see in children who are brought to psychologists and psychiatrists.

Q Did you see any indications in the records anywhere that he was ever given psychological treatment or intervention or substance abuse treatment or intervention at any time?

A I saw recommendations that he would have that treatment, including school personnel, juvenile authorities, and later on, probation and prison officials. I did not find any indications in the record that he had ever received mental health treatment or psychological treatment or substance abuse intervention.

(PC-R. 152-55). Dr. Larson also explained how abuse as a child is reflected in adulthood:

COURT: Well, I may have one more. Severe child abuse -- severe abuse as a child, what would you expect to see in adulthood? What would be the ramifications of it? How would this play out in his life?

LARSON: I would expect to see as the adult ramifications of early childhood abuse?

COURT: Yes.

LARSON: Basically, children who are abused are at a lot higher risk for a variety of mental health diagnoses or problems in life. Basically, children who are abused are more likely to have difficulty with vocations. They're more likely to have difficulty in making a good, interpersonal adult adjustment so they're more likely to have unstable marriages, they're more likely to abuse their own children. They're even more likely to murder their own children, as a group. They're more likely to need psychiatric hospitalization, as a group. As a group they're more prone toward alcohol abuse and other substance abuse, as a group. So, it's -- we're not in a position where we could say if one individual is abused then a particular thing is predictable. But when you take groups of these individuals and look at the research, we see they're at a higher risk for a broad variety of social adjustment tasks or competencies in adult life.

COURT: Would this be separate and distinct from the borderline personality disorder or is it all intertwined.

LARSON: I think it's intertwined. These are also the same kinds of dynamics that can lead one to develop a borderline personality disorder so you can look at it two ways, but it's intertwined. One is you can just ask a question, what are the adult consequences of early childhood abuse in terms of overactions or adjustments in the community and in -- we see there's more psychiatric hospitalization. We see there's more suicide attempts, more homicides, more abuse of their own children and so forth. You ask another more specific question, what's the relationship between early childhood abuse and the development of borderline personality disorder, and in that case we would also expect a correlation between early childhood abuse and a development of a borderline personality disorder, and that disorder is going to reflect some of these some intertwined things.

(PC-R. 169-71).

Dr. Toomer explained what the background records showed about Mr. Heiney's childhood and youth:

Q Going back to -- all the way back to when he was ten years old, was there a psychological evaluation performed at that time?

A Yes, in the Columbiana County, Ohio juvenile court records there was a psychological exam administered back in 1962 and at that point they described his behavior as characterized by bizarre thoughts, bizarre and unusual thoughts. Also they described the splitting of the personality in terms of a process where an individual isolates or separates content from affect where individuals can, for example, describe emotional charged incidents or events without expressing appropriate emotion.

Q But the feelings and the intellect are being --

A Right, the feelings and the intellect are completely separate and that is a defense mechanism that we call isolation which is one we find almost always without exception in individuals who have been abused. It tends to be a primary characteristic and a piece of the symptomatology in individuals who have been abused. It is a defense mechanism. The affect, the emotion is too much to handle, so what you do, in essence, is you pack it up and you store it away then you keep intellectually the description of it and you can talk about it, but all of the emotionality is kept away because to bring it up would be too overwhelming and too disruptive.

Q Now, is that -- would that be this report when he's ten that describes this, is this what you would expect from a person with an anti-social personality?

A No, you don't find that in the anti-social personality -- with the anti-social personality disorder.

Q While we're reviewing the records, do you have in your notes there any other -- oh, I know one thing, who made the referral, when he was ten, who made the referral requesting that he get psychiatric evaluation?

A I believe there was a teacher who had indicated that based upon her observations and working with him that he was in need of psychological evaluation.

Q And what was the final conclusion of that evaluation as far as his need for psychiatric help?

A Very -- there were practically no interventions.

Q But did they feel that he needed it?

A Oh, they felt that he needed it, but there were very few interventions, if any, on his behalf. A lot of the agencies recommended psychological intervention, but very little was ever done to implement that.

Q There's a statement from those records that the attitude on the part of the parents appears to be the cause of most of his problems. Is there indications in there that the parents were not cooperative in attempting to help him?

A Yes, there were at least two indications of that particular phenomenon that they were not cooperative, that they were not involved or that they chose to ignore the gravity of the situation and the problems that had been identified by the helping personnel, teachers and mental health professionals.

Q Now, when he was 19 he was arrested and a probation or parole evaluation was done regarding the circumstances of what did he do, you know, to be charged. And he tells them how the offense occurs, I believe it was a burglary. Do you recall what he describes as to how he happened to get into that?

A I believe it was at age 19 that he was sent to adult prison at that particular time. I'm not sure -- I don't recall off-hand the specific details with respect to that, but at that particular age, he went to -- he was sent to adult prison for the first time.

Q I believe he described being intoxicated and having been to several bars prior to the incident?

A Prior to the incident.

Q Do you recall that?

A Um --

Q Not right offhand?

A I believe he indicated that within a period of time of less than an hour, he had consumed a large number of beers, nine or ten beers and broke into a building. At the time he was questioned by police he could not provide a reason as to why he did it, he just did it.

Q And is that what you would expect?

A That's the kinds of behavior you get. I think at that age -- at that age, if anyone had been following or had been to any degree in touch with what had been going on like a parent or a relative or what have you, you could see the deterioration, the decomposition from an early age. I mean things were getting worse, they weren't getting any better. It was not something he was going to outgrow.

Q Now, is it rather common for a person with brain damage and borderline personality where he is not getting any assistance, counseling or even testing so that people understand what the problem is, is self-medication with substances such as marijuana and alcohol and other drugs common under those circumstances?

A That's a very common phenomenon because what they basically do is to self-medicate because the drugs that are taken serve a purpose and the purpose is that for a brief period of time they provide an escape for the individual. It's -- it's

down a dark road that really has a pit at the end, but for the time and for the moment it provides that particular release and serves that purpose which is why the behavior continues until there is some kind of intervention, often times it has to be forced intervention.

Q One of the affidavits from his sisters describes that after he came back from adult prison that he was very different, he was changed. She says, "I don't know what happened to him there". She noticed a big change. What do you know in regards to the effects of early incarceration in an adult prison for a young man with his disabilities?

A I think what you find is that with that kind of -- with what we know about his history, an incarceration at that age would only serve to make the situation worse. It's not going to rehabilitate. There were no interventions or what have you. So all you stand to do is make the situation worse because a lot of the kinds of experiences there are significant in that they are reflective of the kind of environment from which he came.

Q More abuse?

A Exactly, the kinds of deficits he has experienced his entire life so it does no good in that particular instance other than to hold him in a particular position or in a particular spot or place for a certain amount of time.

Q Now, throughout his prison records, did you see instances where the parole authorities are suggesting or actually requiring psychiatric intervention on Mr. Heiney's behalf?

A There were -- the London Correctional Institution records reflected that very fact. The parole board or the person who submitted the report on their behalf, recommended psychological help. They described him as a follower. They also described him as bragging about himself, and as having unstable thoughts, and they prescribed or recommended psychological intervention for Mr. Heiney.

Q Now, assuming that in a prison setting he is at least relatively drug and alcohol free. Obviously these other problems you've been talking about are still in operation even to the extent that the prison system is identifying those now as someone with emotional problems who needs psychiatric intervention?

A Yes, and the number of instances were recommended in those records.

Q Do you see anywhere in any record that he ever received any substance abuse treatment or mental health intervention treatment?

A No, I did not.

Q What are the likelihood that he would be able to control, prove, or get a hold of his mental -- his life and his mental state without any assistance?

A Practically impossible, given the history, given the early onset and the participation of the dysfunctional system virtually impossible without some intensive, ongoing intervention.

(PC-R. 106-12).

The lower court further found as a matter of fact that "[t]he combination of [Mr. Heiney's substance abuse, borderline personality disorder, and abuse as a child] could have resulted in a person who has a very difficult time coping with any extremely stressful situation" (PC-R. 2334).

In this regard, Dr. Larson explained:

Q And if you are suffering from a borderline personality disorder, it is possible then to have psychotic breaks under times of great stress or that type of situation?

A Well, in fact it is one of the characteristics of a borderline personality disorder that those individuals are oftentimes given to psychotic episodes or a short-term psychotic break, a break from reality as it were. Sometimes those breaks get identified as atypical psychosis or other things, but frequently borderline personality disorders do have under duress, episodes that meet all the criteria of classification of psychosis.

Q Now, is it characteristic for a person with borderline personality to become very dependent upon another person or suffer an extreme fear of abandonment or loss?

A Well, it's one of the defined characteristics of borderline personality disorders. Borderline personality disorders are frequently involved in very intense unstable interpersonal relationships. They very often get very attached to an individual and when that relationship is threatened, then that person makes many desperate attempts to try to control the nature of the relationship because they themselves are very threatened, they're very dependent. That other person provides a lot for them, provides a lot of functions for them so when they see themselves losing that individual or they fear they're going to lose that individual or there's a sense of abandonment, then the reaction is a very intense -- a very intense reaction where there's lots and lots of attempt to try to stop it or control it. Sometimes it's referred to as a last ditch coping technique.

Q And do you think you see that kind of stress [was in] operation in this shooting incident that occurred in Houston a few days prior to the offense here?

A Well, that appears to be the case. My understanding was during that time frame that the defendant wanted Luwanna to go with him. She had been his mistress or lover for perhaps over a year and they lived together, and she didn't want to go with him and -- or she was -- he accused her of stepping out on him or dating, or making passes at another person in the living arrangement, and so he -- they were downstairs or out in the yard arguing about it and it seemed to be that he was real preoccupied and real enraged about her fidelity at the time.

Q And do you think it would have been stressful for him to then leave her behind? I mean, obviously according to the testimony in these records he then hitchhiked and then left and she stayed there in Houston. Would that have been a stressor in his life?

A The answer is yes. We see that borderline personalities just have -- just have great difficulty when they lose their major attachment. They cling to that major attachment almost with desperateness and it's just typical that there's a great period of instability following a break-up of that attachment. In fact, so many times there are -- there's a high census in crises stabilization units when an individual who has borderline personality breaks from another person with a borderline personality disorder. I've worked for those kinds of units before so it's just real routine that those people come in and need to be hospitalized for a few days, and then after a few days with medication, major tranquilizers, minor tranquilizers, and support and structure. Then after several days, they're usually able to make a marginal community adjustment again.

Q So are we talking about a level of a stress here for Mr. Heiney that given his borderline personality and his organicity and his substance abuse history, we have a situation here where potentially he was very vulnerable to having a psychotic break?

A That's correct. He would have been vulnerable to having a psychotic break whether or not he had one, I don't know, but those would be the kind of stressors that could precipitate a psychotic break in a borderline personality.

(PC-R. 149-52). Dr. Toomer testified that Mr. Heiney displays great emotional lability and explained what that means:

Q Could you explain for us what you mean by lability?

A Lability -- the term lability refers primarily to wide mood swings where you have an individual who, for example, appears normal one moment or one instance and a few moments later, or several moments later, is simply, in essence, bouncing off the wall, quote unquote, acting totally in -- totally opposite fashion, acting out, acting belligerent, aggressive, hostile fashion. In other words, the behavior is reflective of what we call wide mood swings, from one continuum all the way over to another, from calmness to agitation, and then oftentimes back to calmness. And you get that kind of mood swing. That's what we mean when we say -- we talk about personality lability. It means the constant changing. And the incident in Fort Lauderdale was reflective of that where, in essence, once again getting back to organicity and how that impacts on one's ability to process information and handle stressors. You have a situation where he was confronted with a situation and could not adapt to that particular situation. As a result of the stressor, his behavior changed of one appearing normal to one characterized by acting out, belligerence, hostility, etc. When the police arrived, the record indicates the -- that their perception was that he was intoxicated. When the police arrived and documented his behavior function, they also documented that in a matter of a few moments he was back to normal again. That's what we're talking about with that personality lability, the wide mood swings from one to another.

Q When a person is in the grip of one of these mood swings, is he thinking in a rational, reasoned manner about his behavior? Is he considering consequences, making judgments about what he's doing?

A No, not at all. In fact, that kind of behavior is often referred to as a mini-psychotic episode reflective of an active psychosis, that the only difference is that that is not ongoing, but by virtue of the fact -- by virtue of the nature and the precipitating causes of that kind of behavior, be it organic, be it other kinds of personality disfunction, the person is not engaging is irrational, cognitive processing where he or she is considering alternatives, weighing consequences or what have you. No, that's not the case.

(PC-R. 76-77). Dr. Toomer further testified that a prior evaluation had found Mr. Heiney reacted poorly to stress:

Q Now, when he was in Kansas, they conducted -- in the prison system there, conducted a psychiatric examination in which they described his personality situation, his mental status, what they see as problems, did you have a chance to review that?

A Yes, uh-huh.

Q And what did you think was significant?

A They described -- in the Kansas State Penitentiary records, they described the subject having difficulty functioning under stress, inability to handle critical situations, and his impulsive nature and anger tended to cloud his judgment and objectivity.

Q And is that precisely what we're talking about here?

A That's precisely what we're talking about here.

(PC-R. 106).

The mitigating factors which the lower court found to be established are amply supported by the record. The lower court's findings of fact in this regard should therefore be accepted.

The lower court rejected one mitigating factor proposed by Mr. heiney and did not discuss others. These factors, too, were established by the evidence presented at the hearing. The lower court found "[t]here was additional evidence that the defendant has brain damage, however, it was insufficient to establish that fact" (PC-R. 2334). However, a mitigating factor should be found if it "has been reasonably established by the greater weight of the evidence: 'A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.'" Campbell v. State, 571 So. 2d 415, 419-20 (Fla. 1990), quoting Fla. Std. Jury Instr. (Crim.) at 81. See also Cheshire v.

State, 568 So. 2d 908, 911 (Fla. 1990)("[a]lthough the judge concluded that [a mitigating factor was not established], we nevertheless must acknowledge that a reasonable jury could have relied upon this evidence"). The evidence presented at the hearing was more than sufficient to reasonably establish that Mr. Heiney suffers from organic brain damage.

The mental health experts explained that the background information regarding Mr. Heiney indicated the need for brain damage testing. Dr. Toomer testified:

[Q] Thank you. Now, in reviewing these background materials, did you see any information that in reading those that would indicate to you that it would be appropriate and important to conduct an inquiry into the possibility of brain damage in this case -- in Mr. Heiney's case?

A Yes, I did.

Q And what was that?

A In evaluating and looking at those -- those documents, there were indications that there was a history of head trauma which may have significantly contributed to the development of organicity or brain damage. Specifically, there were instances documented in the juvenile court records from Columbiana County, Ohio that talked about, for example, head injuries that had occurred -- two specifically were mentioned as a result of Mr. Heiney's being struck by car, running out in front and being struck by a car where he sustained significant head trauma. Those were two specific instances that were -- that were indicated in the records.

Q Was there -- in these records did you see indications of an alcohol or drug abuse problem?

A Yes, another factor related to or that would lead one to suspect that organicity might be a problem, an extensive history of drug and alcohol abuse or the ingestion of illicit substances.

(PC-R. 69-70).

In conjunction with the indications of possible organic brain damage contained in the background materials, Dr. Toomer's testing showed that Mr. Heiney suffered from organic brain damage:

Q Now, did you, yourself, perform any tests which would give an indication of whether or not brain damage existed in Mr. Heiney's case?

A One of the instruments administered, a Bender Gestalt designs which is a protocol that is designed to identify areas of personality deficits as well as the presence of any kind of organicity or brain damage.

Q And what were -- what were your results on that?

A The Bender suggests the presence of organicity on the part of Mr. Heiney.

(PC-R. 70-71).

Dr. Toomer testified that in addition to revealing the need for organic brain damage testing, the information in the background materials showed that Mr. Heiney had exhibited behavior consistent with a diagnosis of organic brain damage:

Q And in reviewing the records, was that finding of brain damage, did that -- was it supported by the behavior and the events that are described in his records?

A In my opinion, yes. Throughout the records, I found -- I was able to find evidence of behavioral patterns suggestive of organicity [sic] of brain damage as reflected in a lack of stability or lability, constant changes in fluctuation in behavior where the individual moves from one moment to what appears to be normality to a state of heightened agitation, hostility, aggressiveness, and then back again to a state of normality. When you get this type of fluctuation in behavior, it is usually suggestive of some type of organicity. Throughout the records, for example, there was a particular instance in Fort Lauderdale. There were instances that were contained in affidavits that demonstrated this behavior pattern, that it was a persistent pattern over a longer period of time where individuals were totally perplexed with this totally erratic behavior and the extreme and excessive instances of lability where you get these vast and these wide mood swings from one extreme to the other.

Q Is that a common characteristic of an individual with brain damage?

A It is. It's a common characteristic in terms of behavioral presentation.

Q And what does this mean in terms of -- in just human terms of that person's life? How is it going to affect living?

A It's going to have a significant effect by virtue of the fact that if this pattern of behavior persists fueled by the organicity, in addition to these mood swings that you're going to have, you're also going to have a pattern of behavior where the individual is going to manifest very significant deficits in terms of simply processing information, planning appropriately, weighing alternatives, considering consequences, in other words, the kind of normal, rational processing that individuals engage in, adapting to one's environment, all of those kinds of activities or the ability to engage in those activities will be impaired. As a result the individuals adapting and functioning will obviously be impaired.

Q And what effect, for instance, would that have on job performance and ability to maintain stable employment?

A That would be significantly hampered. It would be very difficult, if not impossible, for an individual to maintain employment, for that matter to maintain any kind of stable interpersonal relationships with that as a background factor.

Q If a person is suffering from organic brain damage what would be the effects of being placed in a stressful situation? What effect does stress have?

A The -- a stressful situation or the existence or exposure to stressors would only mean that the kind of aberrant behavior, the wide swings in behavior that I alluded to earlier would occur with great frequency because they would be brought on by exposure, constant exposure, or intermittent exposure to certain stressors.

Q And what are the effects of alcohol as to -- or drugs as to a brain damaged person?

A Alcohol or drugs only worsen the situation. If you have someone who is suffering or has some kind of (sic) organically based disfunction and you throw in or you add illicit drugs to the picture, if you add exposure to various kind of stressors then you basically have a situation of an individual out of control.

(PC-R. 71-73).

Dr. Toomer testified that Mr. Heiney's military records contained information indicating organic dysfunction:

[A] And [the military records] also indicated that he reads manuals, instructional manuals, but there seem to been -- he seemed to be at a distinct [dis]advantage because he was unable to apply the learning from reading the manuals to a practical situation which is reflective of some type of organic disfunction.

Q What -- specifically what his commanding officer said here is, "Private Heiney reads many field manuals to improve his knowledge, but cannot apply what he learns". Is that --

A Exactly.

Q Would that be typical for the brain damage?

A That's a very common -- commonly occurring characteristic, individuals who are suffering from some kind of organic disfunction.

Q And this -- was there any other kind of observation made by that commanding officer?

A I think also in those records it was reflected that -- that he had no ability or mentality to carry the load, in other words, to do his share with respect to what was expected in terms of that particular scenario, that particular environment.

Q So that was not a reflection on his motivation or trying?

A Exactly.

Q It's just the mentality to be successful?

A It was not there, the capability was not there. Also, in that same document, in the Army record, they also mention the recurring migraine headaches. Also, they mention that the fact that the migraine headaches might be associated with an accident that occurred five years earlier. So once again, you get really a recreation, if you will, a cleaning-out of a scenario that had been set in motion early on.

Q What is the significance of finding in the records, and I believe it also appears in the prison records, that a person has this history of severe headaches?

A Usually when you have a history of severe headaches, you're talking about organicity, some kind of brain damage or disfunction, or you're talking about a situation where it could be responsive to -- or that pattern of behavior could be responsive to just overwhelming stressors. It's a defense mechanism, if you will, to -- that is to protect the system or it can also be reflective of underlying disturbance. Given his history, we would tend to suspect that it was symbolic or indicative to some underlying disturbance.

Q Have they actually done studies where they've looked at people's brains to see what's going on with these people who have exhibited the disorders?

A Well, what has happened has been they have looked at the brains of individuals who have reflected -- who have manifested in that behavior. These violent extreme mood swings, from violent to depressed, to belligerent, to hostile, and what they have found in a significant number is that there are tiny lesions on the brain about the size of a straight pin. What happens in everyday life is that when individuals have these wide moods swings, oftentimes, they are infrequent, they may occur once and there may be a period of six months or longer before there is another, or maybe two weeks. But what happens is because of their infrequency, people write it off and they say, "Well, just had a bad day, got up on the wrong side of the bed, you know, somebody had too much to drink even". They write it off in that particular vein. And so what happens is you have a -- research suggests that you have a sizeable portion, more so than people would like to know who are walking around with some measure of brain damage or organicity.

Q But it's undiagnosed?

A It's undiagnosed, right.

(PC-R. 103-06).

Dr. Larson also saw information in the background materials indicating a need for organic brain damage testing:

Q Thank you. Now, in these background packets did you generally see any materials or facts that would indicate to you that brain damage testing would be advisable for Mr. Heiney?

A Yes, there were several red flags in the records that indicated to me that it was prudent to move forward with neuropsychological testing, sometimes that's called testing for brain damage. There was a history of head injury and that's one.

For example, in 1949 there was an auto accident, that was documented. In 1950 another accident was documented. Two accidents actually documented in 1950, another one being a bicycle accident. Then there was -- there were several notes in his Army records or military records. Specifically he complained of headaches while in the military and he was evaluated for headaches. In that record, reference is made to a vehicle accident about five years prior to that time. He was given diagnosis of headaches, migraine and tension was actually the diagnosis, and insomnia. So here we have several indications of head trauma. Additionally, in the records there were indications that he really had not been quite right since about age five or six. So that also raises a question. Another concern was that at -- in school he had difficulty. Another indication came from his military record where he was viewed as not having good performance. There was reference made, for example, that he would read manuals and seem to memorize the manuals, but he couldn't translate what went on in the manuals to a real work situation. Also, mention was made of poor judgment or a lack of common sense, as I recall. Additionally, there was a long history of poly-substance abuse including alcohol, including just a variety of substances, and even including heroin. All of these are red flag that I think warrant a neuropsychological evaluation.

Q Now, the trial attorney who testified here the other day indicated that he was aware that there was a history here of drug abuse and alcoholism. Is that the type of thing that would trigger an inquiry into possible organicity or brain damage?

A Yes, the research is very well-documented in that area. The research basically shows that long-term substance abuse alone, without any prior head injury, can cause brain damage. Certainly, it's very, very clear-cut for alcohol. It's very clear-cut for a number of other substances, and indeed, it's also there for opiates or their derivatives.

(PC-R. 139-40).

Dr. Larson's testing revealed that Mr. Heiney suffers from organic brain damage:

Q Now, in regard to the testing which you performed, did those test results indicate organicity in Mr. Heiney?

A Yes, they did. Basically, these tests results showed that he had impairments and considered these impairments to be marked, and that the impairments had particularly to do with what we call higher order cognitive functions. I guess that would translate to a lay person more as impairments in judgment, impairments in reasoning, and in flexibility, problem solving. There were also some other minor impairments, and there were probably about fifteen different kinds of tests given to check out all kinds of things, including motor movement, strength and grip, and so forth, but the major impairments had to do with higher level cognitive flexibility and thought process.

Q So you have what you considered to be a full battery of the organicity testing and the neurological testing?

A That's correct.

Q Now, what would that mean in terms of behavior for someone who has this type -- higher order cognitive impairment, what would we see in that person's behavior?

A Well, we see several things. The example I gave before from the military are a good example that where -- where he read manuals and memorized manuals, but had difficulty translating that into a well-organized plan of action. The ability to take things, conceptualize, but translate it into a practical, real life event is one of the areas we would expect impairment with these kinds of tests results. In fact, that's documented. Another areas we'd expect difficulty is in flexibility of problem solving, that is, these individuals tend to get into a certain rut or a certain set in term of their problem solving and when new information comes in, they aren't able to utilize that information well so they kind of stay on the same track. And so we say that they don't have -- they don't benefit from the consequences of information very well, and they're not very flexible in their problem solving. They don't take into account new information. Another area where I would expect changes in behavior or aberrations in behavior would have to do with changes in mood. I would expect the individual would have mood swings. I would expect that they would be associated also with impulsivity. So basically there would be three general areas that would expect to be affected by these kinds of test results that we have, then one would be in terms of problem solving or judgment, another would be in terms of mood, particularly mood swings, or outbursts, or temper, and then the third would be poor impulse control.

Q And did you see documentation of -- of precisely those expected affects? Did you see where those were documented in regard to Mr. Heiney?

A Yes.

Q Now, if you have any individual that is suffering from brain damage disability, what is the effect of adding drugs and alcohol to that equation?

A Each of those would be expected to have a synergistic effect, that is an interactive effect. So if you have a person who is brain damaged and you add alcohol, you expect that those impairments of judgment would be exasperated. You'd also expect impulsivity to be exasperated.

Q And, in fact, in the reports you have in there, I think there's at least a couple of arrests where he was intoxicated, and the incident of the prior shooting in Texas which we haven't gotten into yet. In each of those instances, are you seeing that type of reaction from this person when he becomes intoxicated?

A Yes, that would be my judgment that those instances all reflect more than just intoxication. They reflect more than just brain damage or appears to be a synergistic effect.

(PC-R. 143-46).

On cross-examination, Dr. Larson emphasized that Mr. Heiney has brain damage:

Q All right. That's all I'm asking. And obviously you are not testifying to this Court that it's a medical certainty that he's got brain damage?

A Oh, no, I am testifying that he has brain damage. The psychological tests that we gave, the neuropsychological tests indicate major deficits in higher order functions or cognitive functions, and that is the main thrust of my testimony.

Q And there's no other possibility that could have caused these through your tests, other than brain damage?

A That's precisely what these tests are. These are two major impairments in the things that are controlled by the brain or the cerebral cortex in particular. Now, the [etiology] of these impairments become the next issue. It's not clear to me whether or not they are related to prior head injury or substance abuse, or idiopathic, meaning that we do not know [etiology].

Q So you're not indicating that he definitely has brain damage from head injury?

A I'm testifying that he does have brain damage, and that the [etiology] is unspecified.

(PC-R. 159-60).

Dr. Larson explained that Mr. Heiney's brain damage is a different impairment than the borderline personality disorder:

COURT: This brain damage that you've described, it is distinct from the borderline personality disorder?

LARSON: Yes, it's quite a different set of criteria, and quite a different way of looking at it. Although there certainly may be people that are brain damaged and they behave in a way that they end up getting a borderline personality disorder diagnosis at some point, but with the neuropsychological test that we gave, these tests have function, they don't have personality dimension. We're looking at specific functions the brain can carry out. So, for example, doing such things as this, to see if a person can do that, see if there are differences in laterization [sic], seeing if there are word-finding problems, seeing if there are difficulties of fluency of speech, and then all kinds of intellectual problem solving, and these -- these are complex tasks and interpretation is real clear in this case that he has impairments of higher order cognitive functions and is deserving of a brain damage diagnosis could as well result from a borderline personality disorder. So, for example, people who have this kind of brain damage can be expected to be impulsive. So can borderline personality disorder. An individual with this kind of brain damage can be expected to have bad judgment and great variability of mood, and that's also true for a borderline personality disorder. And I can't distinguish any particular act he has and say it's attributable only to the brain damage or it's attributable only to the borderline personality disorder. I don't know really how one could differentiate that except on intellectual or problem solving tasks, and I think in that case, that would be much more a function of neuropsychological impairment than personality function, per se.

(PC-R. 164-65).

The evidence was more than sufficient to reasonably establish that Mr. HEiney suffers from organic brain damage. The lower court erred in rejecting this factor.

The lower court's order also did not discuss statutory mitigating factors. At the hearing, the court appeared confused about whether this Court's remand permitted consideration of *statutory mitigating factors or whether the remand was limited to considering nonstatutory mitigating factors* (See PC-R. 186). Counsel for Mr. Heiney argued that the lower court should consider statutory mitigating factors (PC-R. 189), but the court's order nevertheless did not discuss such factors.

The evidence at the hearing established that statutory mitigating factors existed. Dr. Toomer explained how Mr. Heiney's organic brain damage, his borderline personality disorder, his history of drug and alcohol abuse, and events immediately preceding the offense affected Mr. Heiney's mental health status at the time of the offense:

Q Well, what you've described here is a person who is -- basically, their entire life, they're being fueled by this fear of abandonment and then the inability to find acceptance. What would be the effect on Mr. Heiney if a few days before the offense, he suffered the loss of Luwanna Wickline Flowers, who was an individual -- a woman he was living with?

A I think once again you get the anxiety and the effect on behavior which is, once again, fueling the wide mood swings. Once again as a result of the perception or the belief that impending loss is about to occur, so you would get that change in behavior to agitation, to anxious, to belligerent, to aggressive. That is the kind of behavior that accompanies that fear of loss or in some cases other kinds of stressors, also.

Q Were you made aware of the -- of the prior episode here a few days before this offense involving a shooting in Texas?

A Yes, I was.

Q And what was the -- does that -- well, what happened in that situation?

A Well, in that particular instance, one of the parties, one of the three parties, Terry, that had been residing with Mr. Heiney and Luwanna -- as a result of an altercation -- once again, centered around the sense of loss or impending loss was shot.

Q Was this a loss of -- what was David concerned about -- what was he saying?

A The loss of Luwanna -- the fact that Luwanna was seeing someone else, was going out with someone else, and so forth, once again, a sense of impending loss that he was about to lose her. And Terry, in intervening, was shot supposedly by Mr. Heiney.

Q And what was his -- Mr. Heiney's reaction after the shooting?

A Well, after the shooting he was remorseful in respect to the individual having been shot and took steps to try to comfort him and see that he got some needed care. I believe he even inquired as to how he was doing several hours later.

Q Would this be the typical type of -- of an episode that you would expect from Mr. Heiney?

A Yes, you expect that kind of behavior. To put it in a slightly different fashion, this picture that I have described in terms of a dysfunctional situation or system of his early years creates process where there is a tremendous conflict on the part of the individual. You have an individual who needs very much love, attention, nurturance. It creates a whole series of conflicts. On the one hand the person wants to be loved, accepted, respected by his or her parents. On the other hand, conflict and anger is created because it's not forthcoming. What happens is that you have these kind [sic] of conflicts constantly creating. The person, as a result of these deficits, experiences a great deal of anger, experiences a great deal of anger. The lability in terms of moving of behavior, moving from clameness [sic] to agitation is one way of relieving that guilt, that inter-tension -- that anger that's been building up. That's one way of releasing that. Once again, the conflict arises because once the person releases it, then the person becomes guilt-ridden [sic], contrite and penitent. And so you get those kinds of behavior changes. So in this particular instance, he's concerned after this particular explosion, if you will, of anger, of tension that has been building up.

Q Is this -- did it appear to have -- was this the result of his making a plan or thinking through consequences, or making -- choosing between alternatives, that kind of behavior?

A Not at all. I did not find anything that I can recall in my examination of the records that demonstrate strong planning ability or the manifestation of planning lability on the part of Mr. Heiney. Most of his behavior, as reflected in the records, it was impulsive, it was without planning. It was without oftentimes consideration of consequences. It was without having considered alternative plans of action and so forth and so on.

Q What you have described for us is a constellation of disabilities? This isn't a person with just one problem?

A No.

Q And we've got some on here because of the lack of nurture and abuse from the family, the mother and father, the head injuries due to running into the cars, organic brain damage, severe substance abuse, and if you take that constellation or that grouping of disabilities, what effect is that in terms of the overall person's mental status?

A The mental status is going to be one of total -- almost total impairment in terms of ability to function, to make decisions and to behave appropriately. Also, as part of the constellation as you indicated, there are, as I mentioned a few moments ago, the episodic nature of the many psychotic events that occur. So what you get basically is behavior without any kind of plan, behavior without any kind of rationale utilized to foster it. I should also add that with the borderline personality, you would get the symptomatology that I have described in and of itself, just with the existence of the borderline personality disorder in and of itself, and you add organicity and drug abuse, what you're talking about is a multiplicity factor in terms of it's impact on behavior.

Q According to the DSM description of borderline personality disorder, it that the type of thing that can result in psychotic episodes?

A Yes, the characteristic, instability of mood that I alluded to earlier, the movement from being normal to being depressed, to being agitated, to being aggressive, that mood lability is reflective of the many psychotic episodes that I focused on earlier. In some cases, you get delusions, but that kind of behavior which is void of any kind of reason or rational planning.

Q Now, moving to the offense that we're concerned with here, did you review the statement of Thomas Tuszynski in regard to what he alleged that Mr. Heiney told him about how it happened?

A Yes, I did.

Q Are you also aware that Mr. Tuszynski at a later time retracted that statement?

A Yes, I am.

Q And are you basing your opinion entirely on that statement or is that just one of the factors that you're considering?

A No, that's just one piece of the information that went into the total process.

Q And how does Mr. Tuszynski describe how this offense occurred.

A Well, Mr. Tuszynski's account was that these subjects were drinking. They left the bar and proceeded to drive. During this period of driving, the victim, Mr. Mays, I believe, was drunk, was talking loudly, even crying. In order to shut him up, Mr. Heiney reached to the backseat for a coke bottle, but came upon a hammer instead and struck the victim.

Q Let me stop you there. Is this something that a person who's using reasonable thought processes is going to do it you're driving down the interstate with someone and you're going to bop them with the hammer?

A No, not really, not even if they were sober. But, if someone is driving obviously, what you want to try to do if you're processing information rationally is to help them manage the process which is driving. That is simply, I think, reflective

or impulsive behavior which is very characteristic of Mr. Heiney and is reflected, as I indicated, in a lot of events, that were documented in the files.

Q And what -- going on then with Mr. Tuszynski's description?

A After that he indicated that the victim finally stopped the car and got out of the car and as he moved around to the back -- the victim moved around to the back, he was struck again by Mr. Heiney.

Q Why were they moving around to the back?

A Supposedly to change so that Mr. Heiney could drive. The victim was struck again. And from that point on they -- they left -- at that particular point and began to proceed that that was the scenario of Mr. Tuszynski.

Q And do you recall that Mr. Tuszynski said that Mr. Heiney stated that he did not mean to kill him, but only knock him out and take his money?

A I remember that, yes.

Q In your opinion and knowing what you know about Mr. Heiney as an individual and the situation he was in, what would be your opinion -- was he under a state of extreme emotional stress at that time?

A Yes, I believe he was.

Q And would that be true whether or not he was intoxicated?

A Yes.

Q And do you -- assessing this evidence, would he be able to appreciate the criminality of what he's going or conform his conduct to the requirement of law. Was his ability to do that substantially impaired?

A It was very definitely substantially impaired, yes.

(PC-R. 89-95).

Dr. Larson also discussed the applicability of statutory mitigating factors:

Q Now, given the different disabilities that you've described here, the organicity, the borderline personality disorder, the history of substance abuse, and putting aside for just a moment whether or not he was intoxicated, but just taking those disabilities, are those the type of things that you would consider the combined, as you've described it, the synergistic effect of those, as being an extreme emotional disturbance?

A Yes, I think that three of those combined would very readily lead to a state of extreme emotional disturbance.

Q And if, in fact, he was, in addition to all of those intoxicated, what would be your opinion?

A I didn't understand that question.

Q I'm saying that on top of those three problems he was also intoxicated. If we assume that what he told Mr. Tuszynski that we're both drunk. If you just assume that part.

A If you assume that's true then I would think your state of mind would be such that he's more likely to act impulsively. He's less likely to rely on faculties of judgment or have very impaired judgment. He's more likely to go into very abrupt passions or mood swings, including raging or great anger.

Q And all -- normal human beings can go into times of anger, is that correct?

A Of course.

Q What we are talking about here is not just the average person becoming angry about something, is that correct?

A No, this is quite different. This is the kind of anger that is very, very extreme. It's the sort of anger that oftentimes comes to the attention of police. It's qualitatively and quantitatively different, that is it's more extreme and more likely to happen more often with less of a precipitant.

(PC-R. 148-49).

The State presented no lay or expert witnesses to refute or controvert the testimony presented by Mr. Heiney. On the basis of the evidence presented, the lower court found, as a matter of fact, that trial counsel had not investigated for the penalty phase and that if counsel had investigated, he would have discovered evidence establishing mitigating factors. The lower court thus found, "trial counsel's handling of the penalty phase of the trial was measurabl[y] below the standard established for reasonably competent counsel" (PC-R. 2335). The lower court also found, as a matter of fact, that the evidence established four mitigating factors (PC-R. 2334). Additional mitigating factors, not discussed by the lower court, were also established.

B. Application of the Appropriate Legal Standard to the Facts Found by the Lower Court Demonstrates Mr. Heiney's Entitlement to Relief

Under Strickland v. Washington, 466 U.S. 688 (1984), a criminal defendant asserting that he was denied the effective assistance of counsel must establish that counsel's performance was deficient and that the defendant suffered prejudice as a result of counsel's deficient performance. Failing to investigate and prepare for a capital penalty phase constitutes deficient performance.

Stevens v. State, 522 So. 2d 1082, 1087 (Fla. 1989); State v. Lara, 581 So. 2d 1288 (Fla. 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); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988); Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989). Prejudice is established when "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). To establish prejudice in an override case, the evidence must show "a reasonable probability that trial counsel's inaction may have affected the sentence imposed by the trial judge." Stevens, 552 So. 2d at 1088. In order for a judge to override a jury's life recommendation, "the facts suggesting a sentence of death [must be] so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 332 So. 2d 908, 910 (Fla. 1975). Thus, "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 [of life] is undermined." Stevens, 522 So. 2d at 1087.

In Mr. Heiney's case the lower court found that trial counsel's performance was deficient. This finding, based upon the facts the lower court heard at the hearing, should be accepted by this Court. See Bassett v. State, 541 So. 2d 596, 597 (Fla. 1989)(accepting lower court's deficient performance finding on ineffective assistance of counsel claim); Tompkins v. Dugger, 549 So. 2d 1370, 1373 (Fla. 1989)(same); Mitchell v. State, 595 So. 2d 938 (Fla. 1992)(same). The lower court also found as a matter of fact, based upon the evidence presented at the hearing, that four mitigating factors had been established. Accepting the lower court's factual determinations regarding deficient performance and mitigating factors, the issue on appeal is whether the lower court's conclusion that Mr. Heiney was not prejudiced is correct: "The existence of material nonstatutory mitigating evidence that was not discovered by trial counsel is undisputed. The question is whether [the mitigating evidence] raises a reasonable probability that, absent the

deficient performance, the outcome of the penalty proceeding would have been different."

Bassett, 541 So. 2d at 597. Contrary to the lower court's legal conclusion, Mr. Heiney was prejudiced by counsel's deficient performance and is entitled to relief.

This Court has held, "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 [of life] is undermined." Stevens v. State 552 So. 2d at 1087 (citation omitted). In fact, trial counsel here failed to present any evidence of mitigation whatsoever during the penalty phase of trial (R. 1310; PC-R. 6). The jury, nevertheless, recommended a life sentence (R. 216, 1344). Trial counsel then made no argument to the judge in support of the jury's life recommendation and presented no evidence of mitigation to the judge (R. 245). The sentencing court, considering only the statutory mitigating factors, found none to exist on that record and overrode the jury's life recommendation, imposing the death penalty (R. 219-223). Valid mitigation, however, did exist and could have been presented had it been investigated and developed. Trial counsel, as the lower court found, failed to investigate, develop and present any of the available mitigation which the Rule 3.850 court has now determined existed. Had counsel done so either during the penalty phase before the jury or at the time of sentencing before the court, that evidence would have established a reasonable basis in the record to support the jury's recommendation of life, precluding the sentencing judge from overriding the life recommendation and imposing death.

The mitigating factors found by the lower court have been recognized by this Court as valid nonstatutory mitigation which can provide a reasonable basis for a jury's life recommendation. The lower court found that Mr. Heiney "was a chronic substance abuser and may have been affected by alcohol and/or other drugs at the time of the offense" (PC-R. 2334). Numerous cases have recognized that this kind of mitigation can provide a reasonable basis for a jury's life recommendation. Downs v. State, 574 So. 2d 1095, 1099 (Fla. 1991)(drinking at time of offense and history of drug and alcohol abuse); Buford v. State, 570 So. 2d 923, 925 (Fla. 1990)(history

of drug and alcohol abuse; intoxication at time of offense); Cheshire v. State, 568 So. 2d 908, 911 (Fla. 1990)("some evidence" of intoxication at time of offense); Carter v. State, 560 So. 2d 1166, 1168 (Fla. 1990)(history of drug abuse; "possibility" of intoxication at time of offense); Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988)(intoxication at time of offense); Hansbrough v. State, 509 So. 2d 1081, 1086 (Fla. 1987)(history of drug abuse); Amazon v. State, 487 So. 2d 8, 13 (Fla. 1986)("inconclusive evidence" that defendant had taken drugs night of offense; stronger evidence of a history of drug abuse); Buckrem v. State, 355 So. 2d 111, 113 (Fla. 1978)(drinking on night of offense). The lower court found that Mr. Heiney "was chronically abused physically and emotionally as a child" (PC-R. 2334). This factor also has been recognized as valid mitigation which can provide a reasonable basis for a jury's life recommendation. Holsworth, 522 So. 2d at 354 ("childhood trauma"); Hansbrough, 509 So. 2d at 1086 (difficult childhood); Amazon, 487 So. 2d at 13 (defendant raised in negative family setting); see also Campbell v. State, 571 So. 2d 415, 419 n. 4 (Fla. 1990)("valid nonstatutory mitigating circumstances include . . . [a]bused or deprived childhood"). The lower court found that Mr. Heiney "suffers and has been diagnosed [] as having a borderline personality disorder" and that the "combination of [substance abuse, borderline personality disorder, and abuse as a child] could have resulted in a person who has a very difficult time coping with any extremely stressful situation" (PC-R. 2334). Mental health problems have also been recognized as valid mitigation which can provide a reasonable basis for a jury's life recommendation. Perry v. State, 522 So. 2d 817, 821 (Fla. 1988)("psychological stress"); Hansbrough, 509 So. 2d at 1086 (mental and emotional problems); Amazon, 487 So. 2d at 13 ("emotional cripple"); Buckrem, 355 So. 2d at 113 ("extreme emotional conditions"); see also Fla. Stat. §921.141(6)(b)("extreme mental or emotional disturbance") and (f)(capacity to conform conduct to requirements of law substantially impaired).

The mitigating factors which the lower court found are all valid, recognized mitigation. Separately and certainly in combination, these mitigating factors would have established a

reasonable basis for the jury's life recommendation in Mr. Heiney's case.¹¹ Although finding that trial counsel did not investigate for the penalty phase and presented no evidence of mitigation at the penalty phase, and that mitigation existed which should have been presented, the lower court failed to follow the proper legal analysis -- whether the mitigation provided a reasonable basis for the jury's life recommendation.

In Stevens, this Court explained the proper legal analysis of the prejudice component of an 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 . . ." []. 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).

* * *

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 upon 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 [348 (Fla. 1988)] 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, [], and can override the jury only based on specific written findings detailing this weighing process. [] 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. [] 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. [] Moreover, if the trial judge

¹¹The other mitigating factors presented at the hearing would also provide a reasonable basis for a life recommendation. Organic brain damage is valid mitigation. Carter, 560 So. 2d at 1168. Statutory mental health mitigating factors are of course valid mitigation, Fla. Stat. §921.141(6)(b), (f), and can provide a reasonable basis for a life recommendation. Downs, 574 So. 2d at 1099; Buford, 570 So. 2d at 925.

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 (citations deleted where bracketed; emphasis added).

Stevens clearly rejected an analysis of prejudice in an override case predicated upon whether the sentencing court would have found that the mitigation outweighed the aggravation. Others, Stevens noted, may have found such evidence believable and persuasive, and thus weighed it differently. The erroneous analysis rejected in Stevens, however, is precisely the analysis performed by the lower court in Mr. Heiney's case: "Although numerous the mitigating factors found to exist when balanced against the aggravating factors found to exist cannot reasonabl[y] be determined to outweigh them. I find no reasonable probability that the resulting imposition of the death sentence would have been different had the trial court been given the opportunity to consider the above found mitigating factors" (PC-R. 2335).

Assessing prejudice in an override case requires a determination of whether the evidence omitted as a result of counsel's deficient performance would have provided a reasonable basis to support the jury's life recommendation. This is especially so where, as here, no mitigating evidence was presented at the penalty phase and the sentencing judge believed no mitigation to exist. Stevens, at 1087 ("[I]f 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"). The lower court never applied this simple, straightforward legal test for prejudice. Notably, the lower court made no finding that the "found mitigating factors" would not have provided a reasonable basis for the jury's life recommendation.

In an override case, the trial court cannot begin its process of weighing the aggravating and mitigating circumstances unless it has made a determination that there is no reasonable basis in the record to support the jury's recommendation. In Carter v. State this Court held:

As we elaborated in Ferry v. State, 507 So.2d 1373, 1378 (Fla. 1987), the Tedder standard

has been consistently interpreted by this Court to mean where there is a reasonable basis in the record to support a jury's recommendation of life, an override is improper.

(Emphasis added). We thus must look to the mitigating evidence to determine if it provided a reasonable basis for the life recommendation.

Carter v. State, 560 So.2d 1166, 1168 (Fla, 1990)(underlined emphasis in original; emphasis in bold added). In McCrae v. State, 582 So. 2d 613 (Fla. 1991), the sentencing judge considered nonstatutory mitigation but overrode the jury's life recommendation because "when weighed against the aggravating factors, [the mitigation] is so speculative, indefinite and woefully inadequate that it is simply insufficient to overcome the aggravating factors." 582 So. 2d at 614 (quoting sentencing order). This Court rejected that analysis -- the precise analysis used by the lower court in Mr. Heiney's case -- and reversed in the override, finding that the record provided a reasonable basis for the jury's life recommendation. McCrae, 582 So. 2d at 615 ("there was sufficient mitigating evidence to provide a reasonable basis for a life recommendation").

Unless the trial court can find no reasonable support in the record for the jury's life recommendation, the trial court is bound to follow the jury's life recommendation and impose a life sentence. This is so even though the judge may personally believe that the aggravators might outweigh the mitigation. The jury's life recommendation is entitled to such weight. Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). Unequivocally, the Rule 3.850 court rested its decision solely upon the weight of the mitigation compared to aggravation ("[a]lthough numerous the mitigating factors found to exist when balanced against the aggravating factors found to exist cannot reasonabl[y] be determined to outweigh them"). To preclude an override of a life recommendation it is not necessary that the mitigation outweigh the aggravating factors in the judge's mind, because the jury may view and weigh the mitigation otherwise. A difference in opinion as to relative weight is not dispositive on this issue. Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988); Stevens, 552 So. 2d at 1086. Rather, the issue is simply whether the record

provides a reasonable basis to support the jury's life recommendation; if so, an override is improper. Ferry v. State, 507 So.2d 1373, 1376 (Fla. 1987); Stevens, 552 So. 2d at 1085.

The same legal principles are also applied by this Court when assessing the prejudice component of an ineffective assistance claim at the penalty phase of an override case. Stevens 552 So. 2d at 1087. In Stevens, the Court concluded that Stevens had "demonstrated a reasonable probability that trial counsel's inaction may have affected the sentence imposed by the trial judge," a decision centered "on the fact that trial counsel did virtually nothing on Steven's behalf during the penalty phase of trial" and failed to present support for the jury's life recommendation where such evidence in fact existed.¹² Stevens, 552 So. 2d at 1085, 1088, and n.13. This is precisely the case here.

The lower court never determined whether the mitigating factors it found established would have provided a reasonable basis to support the jury's life recommendation. The mitigating factors found by the lower court clearly do just that, however, as demonstrated by the cases cited above which recognize the validity of these mitigating factors.

The Rule 3.850 court found deficient performance by counsel plus the existence of significant non-statutory mitigation: i.e., the defendant was a chronic substance abuser and may have been affected by alcohol and/or drugs at the time of the offense; he suffers and has been diagnosed as having a borderline personality disorder; he was chronically abused physically and emotionally as a child; and the combination of these factors could have resulted in a person who has a very difficult time coping with any extremely stressful situation.¹³ In short, the lower

¹²In Stevens, as here, counsel made no argument to the judge on behalf of his client to support the life recommendation and no evidence was presented in mitigation. Stevens, at 1085.

¹³Standing alone, the nonstatutory mitigation found by the Rule 3.850 court to exist would have been sufficient to support the jury's life recommendation, precluding an override.

In addition to this mitigation, the evidence presented at the Rule 3.850 hearing also included significant statutory mitigation: extreme mental or emotional disturbance at the time of the offense and substantial impairment of the capacity to conform conduct to the requirements of the law. There was additionally evidence that Mr. Heiney is brain damaged. Dr. Larson's
(continued...)

court found the facts demonstrating ineffective assistance of counsel in the penalty phase. However, the court then erroneously weighed the mitigating and aggravating factors rather than applying the Tedder standard as that standard has been interpreted and applied by this Court. The court failed to look to the mitigating evidence to determine if it would have reasonably supported the jury's life verdict. Carter.

Because the nonstatutory mitigation found to exist by the Rule 3.850 court, beyond cavil, would have provided a reasonable basis for the jury's life recommendation, an override would have been precluded; thus, confidence in the original outcome is undermined and prejudice is established. Stevens; Strickland; Eutzy v. Dugger, 746 F. Supp. 1492 (N.D. Fla. 1989). The lower court erred and this Court must reverse and grant Mr. Heiney appropriate relief.

Under Stevens, the appropriate form of relief is a judge resentencing at which Mr. Heiney would receive the benefit of the previous jury's life recommendation. 552 So. 2d at 1088. Under the unique circumstances of this case, however, Mr. Heiney respectfully suggests that a more appropriate remedy would be a remand with instructions to impose a life sentence. This suggestion is made because the trial court has already found as a matter of fact that substantial mitigation exists in Mr. Heiney's case. As discussed above, this mitigation provides a reasonable basis for the jury's life recommendation. Therefore, a remand with instructions to impose a life sentence would serve the interests of judicial economy. If Mr. Heiney's case were remanded for resentencing, presumably the same or very similar evidence would be presented at the resentencing. Cf. McCrae v. State, 582 So. 2d 613, 615 n.1 (Fla. 1991)(noting that testimony presented during a Rule 3.850 hearing was incorporated into the resentencing record and considered by the resentencing court). As noted, the factfindings on that evidence have already

13(...continued)

uncontroverted testimony was that he diagnosed brain damage and that his neuropsychological testing showed brain damage. Although the lower court failed to address the evidence of statutory mitigation and concluded that brain damage was not established, nevertheless, the jury's life recommendation also would have been supported by this evidence. The jury could well conclude that both the two statutory mitigating factors and brain damage had been sufficiently established for its purposes to allow a life recommendation.

been made. The question at resentencing would be whether that evidence provides a reasonable basis for the jury's life recommendation, a question which is also involved in this appeal. After a resentencing, if the trial court again overrode the jury, this Court would then have to consider the same question again. It seems reasonable, therefore, and in the interests of judicial economy, for this Court to remand Mr. Heiney's case with instructions to impose a life sentence.

CONCLUSION

Appellant, ROBERT D. HEINEY, based on the foregoing, respectfully urges the Court to reverse the decision of the lower court and grant all other relief which the Court deems just and equitable.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on June 23, 1992.

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