IN THE SUPREME COURT OF FLORIDA

HAROLD LEE HARVEY,

Appellant,

vs. Case No. 95,075

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT,
IN AND FOR OKEECHOBEE COUNTY, FLORIDA

AMENDED ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CELIA A. TERENZIO
ASSISTANT ATTORNEY GENERAL
FLA. BAR NO.0656879
1655 PALM BEACH LAKES BLVD.
SUITE 300
WEST PALM BEACH, FL. 33409
(407) 688-7759

ATTORNEY FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CITATIONS

FLORIDA STATUTES

IN THE SUPREME COURT OF FLORIDA

HAROLD LEE HARVEY,

Appellant,

vs. Case No. 95,075

STATE OF FLORIDA,

Appellee.
_____/

PRELIMINARY STATEMENT

Appellant, HAROLD LEE HARVEY, was the defendant at the evidentiary hearing below and will be referred to herein as "Appellant" or Harvey. Appellee, the State of Florida, was the respondent in the trial court below and will be referred to herein as "the State." Reference to the trial record will be by the symbol "ROA," and the corresponding volume and page number(s). Reference to the collateral record will by the symbols "PCR" followed by the corresponding volume and page number(s).

STATEMENT OF THE CASE AND FACTS

The state rejects appellant's Statement of the Case and Facts to the extent that it is incomplete, argumentative, and slanted. Rather than present an entire new Statement which would include previously omitted facts, appellee would simply direct this Court to the argument portion of this brief wherein those relevant and complete facts can be found.

SUMMARY OF ARGUMENT

Issue I - The trial court properly found that defense counsel did not render ineffective assistance of counsel at the penalty phase of this trial. The record completely supports that trial court's conclusions that trial counsel conducted a complete and through investigation for the penalty phase and made reasonable and strategic decisions based upon that investigation.

Issue II - The trial court properly found that Harvey consented to the defense strategy of conceding guilt to second degree murder in an attempt to spare him from a conviction to first degree murder.

Issue III - The trial court properly found no evidence to support the allegation that Harvey had invoked his right to counsel upon his arrival at the jail.

Issue IV - The trial court properly rejected appellant's claim that trial counsel committed various other trial errors which rendered his conviction and sentence unreliable.

ARGUMENT

ISSUE I

THE TRIAL COURT CORRECTLY CONCLUDED THAT DEFENSE COUNSEL'S PERFORMANCE AT PENALTY PHASE WAS NOT DEFICIENT UNDER STRICKLAND V. WASHINGTON (Claims A and B restated).

Harvey claims that trial counsel, Bob Watson, made no meaningful attempt to investigate Harvey's familial or mental health background in preparation for the penalty phase of his trial in violation of Strickland v. Washington, 466 U.S. 668 (1984). The focus of Harvey's criticism is Mr. Watson's unreasonable "decision" to rely on the expertise of a psychologist, rather than employ the services of a more qualified psychiatrist.[1] Specifically, Watson's "refusal" to obtain the services of a psychiatrist was not reasonable for the following reasons: (1) a psychologist hired by Watson, Dr. Petrilla, recommended that Harvey been evaluated by a psychiatrist; (2) Watson should have concluded from his own observations that Harvey was suffering from organic brain

[1] In support of his argument, Harvey relies on the testimony of a "legal expert" who offered an opinion that defense counsel was ineffective in several areas. The state asserts that her testimony is irrelevant and should not considered by this Court. See Freund v. Butter worth, 165 F. 3rd 839, 863 n. 34 (*en banc*)(11th Cir. 1999)(finding that expert opinion on issue of counsel's performance was improper since determination was a legal one to decided by court).

damage[2]; (3) Watson was given the funds to secure the services of a psychiatrist; (4) Watson's decision to rely on the opinion of Dr. Petrilla regarding the absence of organic brain damage was unreasonable.

Additionally, Harvey maintains that Watson's deficient performance resulted in prejudice since new doctors have found that Harvey suffers from organic brain damage. Therefore as a matter of law, Watson was ineffective for "unreasonably deciding" not to present "mental health" mitigation.

Harvey's claims are severely rebutted from both the original record on appeal and evidentiary hearing. Watson meticulously detailed the efforts undertaken in preparation for the penalty phase, the information he uncovered, and the reasoning behind all his strategic decisions. Based on the testimony presented, the trial court made specific factual findings regarding Watson's performance. Those findings include the following: Watson met and had dinner with Harvey's family; Watson obtained school records; Watson did not find any evidence of drug or alcohol abuse, or any signs of physical abuse at home; Dr. Petrilla, the clinical psychologist hired by Watson interviewed Harvey's family and co-workers; Watson decided not to pursue

---

[2] Harvey claims that Watson should have been aware of the signs for organic brain damage based on the fact that Harvey suffered a head injury due to a serious car accident while he was in high school, and Harvey exhibited signs of depression, anxiety, immaturity and suicidal tendencies. (IB 57).

further investigation by a psychiatrist for fear that he would not able to reconcile inconsistent theories, especially since there was no corroboration that Harvey had any mental illness; Watson did present sixteen witnesses at the penalty phase including Dr. Petrilla; Watson argued that the murders were out of character for Harvey and only occurred out of panic after completion of the robbery; the final argument was a well-organized plea for mercy. (PCR VOL. 9 1709-1714). These factual findings led the trial court to conclude that Watson's penalty phase performance was reasonable as it was predicated on sound trial strategy after an investigation into mitigating evidence. (PCR VOL. 9 1708-1710, 1717-1718).[3] The trial court's factual findings must be affirmed on appeal. See Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999)(recognizing deference given to trial court's assessment of credibility and findings of fact); Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997)(reasoning standard of review following Rule 3.850 evidentiary hearing is that if factual findings are supported by substantial evidence, appellate court will not substitute its judgment for trial judge's on questions of fact, credibility, or weight). However, the trial court's legal conclusion regarding

[3] The trial court did not address the prejudice of prong of Strickland since Harvey failed to establish the deficiency prong.(PCR VOL. 9 1716).

Watson's performance is subject to an independent *de novo* review. Stephen 748 So. 2d at 1034 (Fla. 1999).

In order to be entitled to relief on this claim, Harvey must demonstrate the following:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Strickland, 466 U.S. at 687 (1984). The Court explained further what it meant by "deficient":

> Judicial scrutiny of counsel's performance must highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Id. at 689 (citation omitted). Moreover, the ability to create a more favorable or appealing strategy several years after the fact, does not translate into deficient performance at trial.

Patton v. State, 25 Fla. L. Weekly S749, 752 (September 28, 2000)(precluding appellate court from viewing issue of trial counsel's performance with heightened perspective of hindsight); Rose v. State, 675 So. 2d 567, 571 (holding disagreement with trial counsel's choice of strategy does not establish ineffective assistance of counsel); Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995)(concluding standard is not how current counsel would have proceeded in hindsight); Rivera v. State, 717 So. 2d 482, 486 (Fla. 1998); Occhicone v. State, 25 Fla. L. Weekly S529 (June 29, 2000)(same).

In support of his claim, Harvey relies on Rose v. State, 675 So. 2d 567 (Fla. 1996); Hildwin v. State, 654 So. 2d 107 (Fla. 1995) and Heiney v. State, 620 So. 2d 171 (Fla. 1993). However, the factual premise for concluding that trial counsel was deficient in all those cases was the complete failure of counsel to conduct any investigation into mitigation. Rose 675 So. 2d at 571; Heiney, 620 So. 2d at 173; Hildwin 654 So. 2d at 110; Cherry v. State, 25 Fla. L. Weekly S719, 721 (September 28, 2000)(distinguishing Rose, Heiney, and Hildwin since trial counsel's failure to present mitigating evidence of drug abuse was not predicated upon lack of investigation but because the evidence at trial did not support the proposed mitigation). In contrast, and discussed in greater detail below, the evidence adduced at the evidentiary hearing clearly demonstrates that

Watson conducted a very through investigation. Simply because Watson's investigation did not uncover evidence of alleged organic brain damage, alleged unloving family, or alleged intoxication, does not entitle Harvey to relief. Harvey's good fortune in finding mental health professionals who will now opine that he suffers from organic brain damage, does not prove that a competent investigation was not conducted at the time of trial. See Rose v. State, 617 So. 2d 291, 295 (Fla. 1993)(rejecting claim that initial findings of mental health experts was deficient simply because defendant obtains new diagnosis of organic brain damage); Provenzano v. Dugger, 561 So. 2d 546 (Fla.1991)(finding no basis for relief by mere fact that defendant has found expert who can offer more favorable testimony); Jones v. State, 732 So. 2d 313, 319 (Fla. 1999)(finding counsel's decision not to pursue further mental health investigation after receiving initial unfavorable report reasonable); Engle v. State, 576 So. 2d 696 (Fla. 1991)(same).

At the evidentiary hearing, Watson detailed the efforts undertaken during his investigation, and the reasoning behind the tactical decisions employed. In preparation for trial, Watson hired a licensed clinical psychologist and an investigator, obtained funds necessary to hire a psychiatrist,[4]

[4] Watson discussed with clinical psychologist, Dr. Petrilla several possible psychiatrists that perhaps could of assistance.(PCR VOL. 10 82).

and obtained Harvey's school and medical records. (PCR VOL. 10 73-74, 80-82, 92, VOL. 12 411). Watson meet with Harvey's parents and sisters and had dinner at their home on more than one occasion. Through his investigator as well as his own interaction with the family, Watson discovered that Harvey came from a positive loving family who was willing to offer all the necessary support to him while he was incarcerated. (PCR VOL. 10 133-134). Given those positive attributes, Watson wanted to humanize Harvey and his entire family. Towards that end, Watson deliberately chose to present Harvey's mother as his last witness.[5] (PCR VOL. 10 135). The plausibility of this defense was enhanced by Dr. Petrilla's findings that Harvey's personality did not fit these murders. Harvey's actions which lead to the death of the Boyds were an aberration in comparison to Harvey's personality. (PCR VOL. 10 134, VOL. 12 360, 412). Harvey's own statement offered further corroboration of this defense as the tapped confession clearly revealed Harvey's deep and sincere remorse for the crimes. (PCR VOL. 12 369-370).

Watson explained that the defense began to come into focus once the trial court denied his motion to suppress the confession. At that point, he was fairly certain that an acquittal was not likely. (PCR VOL. 10 61, 104, VOL. 12 390, 424). Watson formulated a theory of defense that would be

[5] Watson testified that he wanted to put Harvey on at the penalty phase but against his advice, Harvey refused.

consistent throughout both phases of the trial, i.e., this was not a premeditated murder, but the result of a young man who panicked. (PCR VOL. 10 125-127, VOL. 12 394). Such circumstances, if developed at the guilt phase would then be consistent with and considered mitigating evidence at the penalty phase. (PCR VOL. 10 125-127, VOL. 12 424). Watson theorized that the jury would more amenable to a life recommendation if they were certain that the defendant was not likely to kill again.[6] Furthermore, given the positive aspects of this family, Watson emphasized the support Harvey would receive and that his execution would effect the entire family. (PCR VOL. 10 135).

Contrary to Harvey's allegation that Watson "refused" to find mitigation regarding alcohol abuse, organic brain damage, and an unloving family, Watson testified that he decided to pursue the "loving family theory" because that was what he found from his investigation. The defense presented was not "a fabrication," but rather a defense premised on the evidence uncovered through investigation.[7] (PCR VOL. 10 133-134, 137,

---

[6] At the time of this crime, the only two possible penalties were death of life with the possibility of parole in twenty-five years. Watson filed a motion in limine in an attempt to preclude this information from the jury. That motion was denied. (ROA VOL. 19 183, 3173-3174). That ruling was upheld by this Court in direct appeal. Harvey v. State, 529 So. 2d 1083, 1086 (Fla. 1988).

[7] Harvey never told Watson that he drank too much on the night of the crime or that he had any history of alcohol abuse.

VOL. 12 418-419). Watson was never told by any family members that this was anything but a loving and caring family. (PCR Vol. 10 134-136, VOL. 12 381-382).

Additionally Watson instructed Petrilla to review school records, and speak to Harvey's family members, teachers and his principal. (PCR VOL. 10 116-117, VOL. 12 359). Petrilla conducted numerous tests both objective and subjective in order to arrive at an overall picture of Harvey. (ROA VOL. 16 2741, 2759-2764, 2767, VOL. 18 2812). Those tests included the Minnesota Multi-Phasic Personality Inventory, The Weschcler Adult Intelligence Scale, and the Bender Visual Motor Gestalt. (PCR VOL. 12 420-422, Vol. 15 964).[8] Watson discussed the test results with Petrilla and they reviewed the raw test scores together. (PCR VOL. 10 134-136, VOL. 12 381-382). Had there been any significant evidence of organic brain damage or other mental health diagnosis, it would not have been ignored. Indeed the penalty phase theme may have been different.(PCR 349-351, 389, 420).[9] Based on his experience[10], Watson explained that

---

As a matter of fact, Karen Hicks, a family friend for many years, testified for Harvey during the penalty phase that she spent many weekends with Harvey and other neighborhood friends. She specifically stated that never saw Harvey drink.(ROA VOL. 17 2996-2701).

[8] At the evidentiary hearing, Petrilla testified that the intelligence scale and the Bender test are tests that are used to test for organic brain damage. (PCR VOL. 15 965-971).

[9] Harvey's confession and actions completely belied any defense of intoxication. Harvey detailed the events surrounding

credibility was a factor to considered when assessing the type of information to present since you do not want to perceived by a jury as merely grasping for straws.(PCR VOL. 12 357-358, 363,133, VOL. 10 141-142).

Given the lack of any significant evidence of mental health mitigation, Watson decided that Petrilla's purpose was not to excuse Harvey's criminal conduct but to give the jury an opportunity to know about Harvey and why his personality did not fit the crime. (PCR VOL. 10 137-138, VOL. 12 359-360, 369, 380-381, 389, 412-415, 418-421).

In addition to Petrilla's findings, Watson's own observations of his client did not reveal any reason to pursue this fruitless area as Harvey was able to communicate with counsel, Watson did not observe any behavior that he would consider abnormal, there was no history of hospitalizations for mental health problems, nor was he ever enrolled in any classes or given any special attention. (PCR VOL. 12 351-353, 379-381, 414, 420). Watson's decision not to pursue any further testing was reasonable.[11] Bush v. State, 505 So. 2d 409, 410(Fla.

---

the murders including the fact that he returned to the murder scene twice, once to make sure Mrs. Boyd was dead and the second time to retrieve incriminating evidence.

[10] Watson became a board certified criminal attorney within two years of representing Harvey. (PCR VOL. 10 47, VOL. 12 371).

[11] Dr. Petrilla recommended that a psychiatrist hired simply because such an expert would more through and would

1988)(deferring to trial counsel's decision not to pursue mental health defense in light of counsel's intimate familiarity with defendant as well as no discernable evidence of mental health problems); White v. State, 559 So. 2d 1097 (Fla. 1990)(finding counsel not deficient for failing to present voluntary intoxication defense since not supported by the evidence); Cherry, 25 Fla. L. Weekly at S722(rejecting claim of ineffective assistance of counsel since proposed mitigation was controverted and not supported by physical testing).

A review of the testimony actually presented at the penalty phase mirrors Watson's testimony. Harvey's parents, Shirley and Harold, Harvey's sister, Laura and Harvey's brother, Patrick all testified at the penalty phase. The consistent and clear theme was that Lee was a loving son, brother and uncle. Lee had a normal childhood growing up. (ROA VOL. 17 2814-2816, 2897-2898, 2919-2920, 2928, 2920-2925, 2932-2935, 2943-2945, 2682, 2685). The jury viewed several childhood photographs of Harvey with his siblings, as well as home movies of various family outings together, including hunting, fishing and camping. (ROA VOL. 16 2684, 2920-2925, 2928-2931). Harvey would spend quality time with his bed-ridden sister. He also would work extra jobs when his father was in a serious accident and could not work for

---

offer a second opinion. (PCR VOL.15 973-974). Petrilla never warned Watson that he was incompetent to make an assessment regarding brain damage.

six months. (ROA VOL. 17 2815-2816, 2936, 2682, 2685, 2814-2816).

However, Harold's life was not void of hardship or stress. While in high school, he was involved in a terrible car accident in which his companion was killed and he was seriously injured. Harold suffered sever depression after that incident. At the time of the murders, Harold was also under a lot of financial pressure and stress from his wife. (ROA VOL. 16 2686-2687, VOL. 17 2816, 2939, 2691, 2937-2938). The Harveys portrayed themselves as a loving and normal family. Consistent with that theme, these murders were out of character for Harold and his family intended to offer all the necessary emotional support that they could. (ROA VOL. 16 2684, 2688-2689, 2692, VOL. 172816, 2899, 2941-2943). Harvey also presented the testimony of numerous neighbors, and friends who all corroborated testimony that this was a hard working and loving family. (ROA VOL. 16 2697-2700, 2714, 2716-2718, VOL. 17 2879-2882, 2888, 2910-2911). Without exception, they all testified that the murders were totally out of character for Harvey. (ROA VOL. 16 2701, 2874-2877, 2883, 2889). Harvey's junior high school teacher and guidance counselor also testified. They described Harvey as quiet, respectful, withdrawn and never disruptive. However, Harvey was not a good student. (ROA VOL. 16 2722-2737).

Dr. Petrilla, a clinical psychologist, also testified. Petrilla presented a comprehensive assessment of Harvey's personality. A summary of his testimony is as follows: Harvey was very dependent, depressed, insecure, suicidal, and remorseful. He possessed the mental age of an eighteen year old at the time of the crime. (ROA VOL. 17 2810-2811, VOL. 16 2744-2769, 2770, 2757). Petrilla opined that Harvey did not have organic brain damage, he was not a sociopath, nor did he fit the description of one who is. In an attempt to provide a positive prognosis for Harvey's future, Petrilla explained to the jury that there is very little correlation between the act of murder and the possibility of committing subsequent murders. (ROA VOL. 16 2751-2753, 2772). Perilla's findings were based on a variety of tests that could be measured and verified. (ROA VOL. 16 2742-2743, VOL. 17 2802, 2745).

In addition to the presentation of these witnesses, the jury was instructed on the mitigating factors of "no significant prior history"[12]; the capital murder was committed while the defendant was under extreme mental or emotional disturbance"[13]; and Harvey's age.[14] Watson attempted to obtain numerous special jury instructions as well as instructions on the statutory

---

[12] 921.141(6)(a), Fla. Stat. (1985)

[13] 921.141(6)(b), Fla. Stat. (1985)

[14] 921.141 (6)(g), Fla. Stat. (1985)

mitigators of "substantial domination of another"[15] "no significant prior history"[16], and "the capacity to appreciate the criminality of his actions was impaired."[17] (ROA VOL. 18 3590,ROA 3587-3594, 3590). Watson was permitted to argue that appellant would not necessarily be released from prison when he becomes eligible for parole. (ROA VOL. 18 2976-2979). And finally Watson's penalty phase argument centered on Dr. Petrilla's findings, the fact that the murders were the result of a panic reaction by two young men, Harvey was sincerely remorseful, and there was a high probability that Harvey would spend most if not all of his life in prison. (ROA VOL. 18 3020-3038).[18]

In rebuttal to Watson's explanation, Harvey called several family members and friends at the evidentiary hearing. Their testimony contained much of the identical anecdotal evidence that was presented at the penalty phase but with greater detail. (PCR VOL. 14 788-822, VOL. 15 908-927, 945-954). However in contrast to their testimony at trial, Harvey's family stated

---

[15] 921.141(6)(e), Fla. Stat. (1985)

[16] In support of such a finding, Watson argued that Harvey's escape attempt was not proper rebuttal to the existence of this mitigator. (ROA VOL. 18 2973-2975).

[17] 921.141(6)(f), Fla. Stat. (1985)

[18] The trial court found as mitigation that Harvey had a low IQ, poor educational and social skills, and he suffers from feelings of inadequacy, and no self-confidence, and he is introverted. (ROA VOL. 21 3465-3470).

that their family was not as loving and affectionate as they had portrayed earlier. They were poor, and there was not enough food to go around. (PCR VOL. 14 797, VOL. 15 916-917). The parents often drank in access and the children would witness the physical abuse of their mother at the hands of their father. (PCR VOL. 15 800, 928). The children would also disciplined with a stick or belt. (PCR VOL. 15 917). Given that many of these witnesses also testified at trial, they were asked on cross-examination to explain the somewhat contradictory nature of their testimony. They all stated that they had not revealed any of the negative information either because they were not asked about it or Mr. Watson wanted to present a positive image. (PCR VOL. 15 806, 820, 921, 933). None of the family members testified that their penalty phase testimony was false. Rather, they had simply omitted mention of any negative information regarding their family life. In fact several family members reiterated that the there was love in the home and that the children received harsh whippings when they deserved it. (PCR VOL. 15 924-925, 485, 808-809).

Harvey also presented the testimony of psychiatrist Dr. Richard Norco, and two neuro-psychologists Dr. Brad Fisher, and Dr. Fred Petrilla.[19] All three opined that Harvey suffers from organic brain damage and several other disorders which would

[19] This is the same Dr. Petrilla whom Watson is now faulted for relying upon at trial.

satisfy a finding of the three statutory mental health mitigators.

Dr. Norco evaluated Harvey in April of 1990 and in April of 1996. (PCR VOL. 11 269). He conducted a clinical interview, relied on test results provided by Drs. Fisher and Petrilla, reviewed a brief history prepared by collateral counsel, read excerpts from the trial, reviewed affidavits of 40-50 people[20], and spoke to Harvey's mother and two sisters. (PCR VOL. 12 480-483, 271, 274,495-498, 510).

Norco's evaluation lead to the conclusion that Harvey suffers from organic brain damage, depressive disorder, dependent personality disorder, post-traumatic stress disorder, and substance abuse. (PCR VOL. 11 290). These findings formed the basis for concluding that the evidence supported the three statutory mental health mitigators. (PCR VOL. 11 292, VOL. 12 433). Notably, Norco testified that Harvey was not a sociopath, he was not chronically depressed, and he was not retarded. (PCR VOL. 12 475-476). These findings are identical to the observations of Petrilla at trial.

Norco opined that Harvey's mental disorders resulted in poor insight, poor planning, and an inability to make decisions.

---

[20] Norco acknowledged that the affidavits were prepared by collateral counsel and signed by the potential witnesses. (PCR VOL. 12 480-483). He also acknowledged that the affidavits were obviously prepared well after Harvey was convicted and sentenced to death. (PCR VOL. 12 497-498, 510).

(PCR VOL. 13 435-436). The head trauma caused from a car accident Harvey was involved in while in high school, made him irritable, he exhibited rage, mood swings and demonstrated poor impulse control. (PCR VOL. 13 438, 453). His dependent personality, and depression made it difficult from him to problem solve and inhibited his ability to withdraw from negative situations. The effects of alcohol would have a pronounced effect on those deficiencies. (PCR VOL. 12 441-443). Harvey's mental deficiencies will also result in exaggerated responses to certain stimuli. For instance, applied to the facts of this case, Norco opined that the Boyds' attempt to flee acted as a stimulus, which resulted in the "exaggerated response" of their deaths. (PCR VOL. 12 440-441, 454). Harvey's dependent personality was responsible for the fact that Harvey was under the substantial domination of his ex-wife and co-defendant. (PCR VOL. 12 444-451).

Norco testified that he had only two disagreements with Petrilla's initial evaluation of Harvey. First, Petrilla's finding that Harvey did not have organic brain damage was incorrect. Based on Petrilla's own testing, he should have been able to recognize that the point differential in Harvey's IQ scores could have been an indication of brain damage. (PCR VOL. 13 532-533). Second, Petrilla's assessment was geared towards

Harvey's overall personality rather than any specific symptoms of specific disorders. (PCR VOL. 13 539).

On cross-examination, Norco conceded that the tests conducted by both Fisher and Petrilla are only indicative of organic brain damage. (PCR VOL. 12 478, 479, 310). No physical testing of the brain i.e., EEG, CAT, MRI, was recommended and even if conducted, those tests would probably not have uncovered brain damage. (PCR VOL. 12 524). The relevant factors considered by Norco in assessing the likelihood of organic brain damage were Harvey's head injury following a serious car accident, Harvey's substance abuse, genetic predisposition to mental illness in the family, and Harvey's possible exposure to pesticides as a young child. Of those events, Norco specifically stated that after the car accident, Harvey's personality changed, and his school performance decreased. (PCR VOL. 11 297, VOL. 12 434). However Norco conceded that Harvey's grades actually improved the first semester after the accident. (PCR VOL. 12 487). Additionally a review of Harvey's hospital records after the accident demonstrated that there was no medical corroboration of organic brain damage. To the contrary, the observations were that Harvey was alert, attentive, a good historian and did not complain of headaches. (PCR VOL. 12 492, 549, 493). Norco also conceded that there is no medical proof of pesticide poisoning in Harvey, and there is no medical proof

or documentation of any psychiatric problems or diagnosis regarding any other family member. (PCR VOL. 12 497, 530).

Although Norco opines that at the time of the crime Harvey was under the substantial domination of co-defendant Scott Stiteler,[21] Harvey's own confession demonstrated otherwise.[22] The murder weapon was owned by Harvey, Harvey took the trouble to convert the gun into a more lethal weapon by altering it from semi-automatic to fully automatic, Harvey was the actual shooter, Harvey forced Mrs. Boyd into the house at gun point, Harvey was the one who first broached the subject that something had to done to the Boyds since they recognized him, and the decision to kill them was a joint one. (ROA VOL 13 2174-2177, VOL. 18 3617, 3622).

Additionally, Stiteler, four years younger than Harvey, had been diagnosed by a psychiatrist as having the emotional maturity of a five year old. He possess a dull normal intelligence, he is vulnerable to suggestion, and he should be placed in an emotionally handicapped class. (PCR VOL. 12 510-513).

---

[21] Watson requested but was denied a jury instruction regarding the mitigating factor of substantial domination of another. (ROA VOL. 17 2956-2959).

[22] Harvey's confession to the police was consistent with what he told his defense attorney about the events of that day.

Next, Norco's conclusion that Harvey is a poor planner and impulsive is also contradicted by the facts of this case.[23] Harvey cut the phone wires prior to going to the house, Harvey and Stiteler brought ski masks with them, Harvey openly discussed the possibility of killing the Boyds before actually doing so, Harvey took the trouble to convert his gun into a more lethal weapon by altering it from a semi-automatic to fully automatic. Harvey's actions prompted this Court to uphold the trial court's finding that these murders were "cold calculated and cruel." Harvey, 529 So. 2d at 1084 & 1087 (Fla. 1988). (PCR VOL. 12 384-385, VOL. 10 135-136, 382, 385, 528).

And finally, Norco's conclusion that Harvey could not appreciate the criminality of his actions is also belied by the record. After leaving the crime scene, Harvey returned to the house twice. He again shot Mrs. Boyd at point blank range, he collected evidence, i.e. cartridges from his gun, he wiped off his finger prints from a wallet, and he disposed of the murder weapon. Id. (PCR VOL. 12 535-537) Additionally, had Norco or Fisher testified regarding their conclusions, violent or reckless aspects of Harvey's past would have been presented to

[23] In support of this conclusion, Norco in part relied upon Harvey's self report that he consumed two six packs of beer that day. However the facts of the crime including Harvey's attempts to cover-up his actions completely belie any suggestion of intoxication. Additionally, Harvey never told Watson that he was intoxicated on the day of the crime. To the contrary Harvey was able to direct the police to where he had disposed of the murder weapon shortly after the crime.

the jury. Specifically, Harvey had to physically separated from his sister in an effort to prevent him from choking his sister. During a night of drinking in public, Harvey displayed a loaded gun and shot out a street light. And he placed himself and his passengers in grave danger one evening by engaging in a high speed car race of "chicken.".

Next, Harvey presented the testimony of neuro-psychologist Brad Fisher. Dr. Fisher evaluated Harvey in April of 1990. He conducted a battery of neuro-psychological tests, he reviewed school records and background information on co-defendant Stiteler. Fisher's diagnosis is consistent with Norco's opinion that Harvey suffers from five major disorders which would satisfy a finding that he meets the criteria for three statutory mental health mitigators. (PCR VOL. 17 674, 657-658, 660).

Fisher explained that the only significant difference between his findings and the earlier findings of Petrilla center on the existence vel non of organic brain damage. Irrespective of the organic brain damage diagnosis, Petrilla's penalty phase findings are consistent with those of Dr. Fisher. (PCR VOL. 15 995-997). Notably, Fisher was in agreement with Petrilla's trial conclusions on a number of points. They both concluded that Harvey suffered from depression, post traumatic stress syndrome, and dependency. (PCR VOL. 13 679, 686). However, Petrilla should have observed the signs of organic brain damage.

(PCR VOL. 13 676-678). Fisher's opinion regarding the existence of brain damage are based on Harvey's car accident, substance abuse, and exposure to pesticides. (PCR VOL. 13 674-678).

On cross-examination, Fisher conceded that he has testified in over 60 cases, all for the defense. (PCR VOL. 13 691). He also admitted that he undertook the investigation with the specific goal of seeking organic brain damage. In support of his findings, he relied on affidavits that were written long after Harvey was sentenced to death. (PCR VOL. 13 701-703). He conceded that the point differential in Harvey's IQ score, a basis for concluding that organic brain was indicated, could also have been indicative of depression and not organic brain damage. (PCR VOL. 13 694). He conceded that he is not competent to render an opinion that exposure to pesticides caused any organic brain damage to Harold Harvey. (PCR VOL. 13 704). He further admitted that none of the tests conducted by him can conclusively corroborate a finding of organic brain damage. (PCR VOL. 13 703). Fisher recognized that to the extent Harvey suffers from any type of substance abuse it is a condition that was self induced. (PCR VOL. 13 705). And finally Fisher conceded that his assessment that Harvey was unable to plan a robbery is contradicted by Harvey's actions that day. (PCR VOL. 13 710-712).

The final mental health expert to testify at the evidentiary hearing was Dr. Petrilla. Petrilla, discussed the difference between the personality/psychological evaluation that he conducted for the penalty phase in contrast to the forensic evaluation done years later. (PCR VOL. 15 958-959, 988). The difference between the evaluations is the absence of any neuro-psychological testing for organic brain damage in the personality assessment. (PCR VOL. 15 960, 964, 972). Petrilla's penalty phase examination centered on the emotional aspects of Harvey's personality. (PCR VOL. 15 964). Consistent with Watson's testimony, Petrilla stated that the strategy was to explain Harvey's personality and opine that the murders were an aberration. (PCR VOL. 15 973, 975). Petrilla talked with Harvey's family members, his ex-wife, teachers and Harvey's school principal. (PCR VOL. 15 992). Petrilla viewed Harvey's economic, employment and academic history. (ROA VOL. 16 2749, VOL. 17 2801). Petrilla found that Harvey suffered from major depression, dependent personality, and post traumatic stress disorder. (PCR VOL. 15 962, 994).

Petrilla testified at the evidentiary hearing that he was qualified to render an opinion about Harvey's psychological makeup,[24] however he was not competent to render an opinion

[24] Petrilla was qualified as an exert in Florida on several previous occasions prior to his testimony at Harvey's trial. (ROA VOL. 16 2735, 2738).

regarding the presence of organic brain damage.[25] (PCR VOL. 15 988, 966-968, 971). Petrilla does not agree with his earlier assessment regarding organic brain damage. (PCR VOL. 15 969-970, 965). Now that he is competent to render such an opinion he would now opine that the results he found then were indicative of a probability of organic brain damage. (PCR VOL. 15 969-970, 965).

The state asserts that Harvey has failed to establish that Watson's investigation was deficient. He uncovered and relied upon virtually the identical information that collateral counsel has presented years later. The additional doctors all conceded that they were in agreement with most of the conclusions reached by Petrilla. The basic difference between the mental health assessment conducted at trial and the postconviction assessment conducted years later centers on the existence *vel non* of organic brain damage. That fact in and of itself is of no consequence. Johnson v. State, 25 Fla. L. Weekly S578 (Fla. July 13, 2000)(refusing to find counsel's performance deficient simply because new doctors would take issue with failure of prior doctors to detect the existence of organic brain damage). See Rose v. State, 617 So. 2d 291, 295 (Fla. 1993)(rejecting

[25] Irrespective of Petrilla's competency to render an opinion regarding organic brain damage, Drs. Norco and Fisher relied on Petrilla's earlier tests in support of their assessment of Harvey today.

claim that initial findings of mental health experts was deficient simply because defendant obtains different diagnosis now); Provenzano v. Dugger, 561 So. 2d 546 (Fla.1991)(finding no basis for relief by mere fact that defendant has found expert who can offer more favorable testimony); Engle v. State, 576 So. 2d 696 Fla. (1991); Asay v. State, 25 Fla. L. Weekly S523, 526 (Fla. June 29, 2000)(finding that trial counsel's investigation was not deficient given that new opinions of mental health professionals were very similar to findings of original doctor but for a disagreement over the existence of organic brain damage).

Additionally, the conclusions of the postconviction doctors regarding the existence of the two mental health mitigators are not unassailed. Watson's decision not to further pursue that avenue was reasonable since presentation of such incredible evidence would have resulted in the very predicament he sought to avoid, i.e, bad excuse for bad behavior. (PCR VOL. 12 349-351, 368, 385-386). Harvey did not present sufficient evidence to undermine Watson's decisions. See Cherry, (upholding a finding that counsel's investigation was not deficient given that new findings of organic brain damage were not based on physical testing and proposed mitigating evidence was controverted by evidence at trial); Miller v. State, 25 Fla. L. Weekly S649, 650 (Fla. August 31, 2000)(upholding trial court's

rejection of proposed mitigator of abusive childhood since there was no corroborative evidence for the allegation); See also Asay, 25 Fla. L. Weekly at S526 (finding counsel's performance not deficient where new evidence of organic brain damage was simply not compelling); James v. State, 489 So. 2d 737, 738 (Fla. 1986)(denying claim that defendant received an inadequate mental health examination simply because newly acquired psychologist criticizes former mental health professional's failure to uncover organic brain damage); Compare Mann v. State 25 Fla. L. Weekly S727, S728 (September 28, 2000)(finding counsel's explanation regarding presentation of pedophilia amounted to reasonable strategic decision).

Additionally, the significance of Norco's testimony would have opened the door to further evidence of Harvey's poor judgement and somewhat violent nature. And, Watson's decision to pursue the "positive theme" at penalty phase was proper given the consistent nature of that theme with the guilt phase strategy. Watson's performance was therefore constitutionally sound. See Haliburton v. State, 691 So. 2d (Fla 1998)(deciding not to present evidence of organic brain damage was reasonable given that strategy was to present positive image and prevent opening the door to negative information); Cf. Asay v. State, 25 Fla. L. Weekly 523 (Fla. June 29, 2000) (observing that presentation of positive and loving aspects of defendant and

family was reasonable irrespective of postconviction evidence that family life was marred by abuse and poverty); Jones v. State, 528 So. 2d 1171, 1174 (Fla. 1988)(finding reasonable counsel's decision to forgo certain penalty phase evidence in light of strategy to present consistent theme between both phases of trial).

The state further asserts that even if this Court were to reject the trial court's determination regarding the deficiency prong of Strickland, Harvey would still not be entitled to relief. Presentation of the "new" evidence would not have resulted in a different result since the evidence presented at the evidentiary hearing was either cumulative or simply not compelling.

As noted in detail above, the only significant difference between the evidence presented at trial and the evidence presented in postconviction was that Harvey suffered from organic brain damage and that Harvey's family was not very loving and affectionate. This double murder of an elderly couple in their home resulted in the finding of four aggravating factors. The Boyds' murders were the result of Harvey's greed. Harvey planned to kill these people from the beginning as evidence by the lethal alteration of his gun, the cut telephone lines, and the open discussion to do so in front of them. Harvey v. State, 529 So. 2d at, 1087-1088 (Fla. 1988).

Presentation of the additional mitigating evidence would not have resulted in a life sentence for Harvey. See Breedlove v. State, 692 So. 2d 877-878 (Fla. 1998)(concluding that prior violent felony, murder committed in course of a burglary, and HAC was overwhelmed mitigation of child and alcohol abuse); Haliburton v. State, 691 So. 2d 466 (Fla. 1997)(finding compelling aggravation of under sentence of imprisonment, prior violent felonies, commission during a burglary, CCP undermine mitigation of substance, abuse, child abuse, and organic brain damage); Hill v. Dugger, 556 So. 2d 1385, 1388-1389 (Fla. 1990)(finding no prejudice for failure to present mental health experts opinion regarding statutory mitigators based on additional evidence of drug use lack of intelligence since evidence was cumulative and did not objectively establish injury); Chandler v. Dugger, 634 So. 2d 1066, 1069-1070 (Fla. 1994)(finding no prejudice for failure to present cumulative evidence of poor childhood and additional mental health information given brutal nature of this double murder of an elderly couple). The trial courts factual findings are supported by the record and its legal conclusions are correct. Relief must be denied.

ISSUE II

THE TRIAL COURT PROPERLY FOUND COMPETENT, AND SUBSTANTIAL EVIDENCE THAT HARVEY KNOWINGLY AND VOLUNTARILY CONSENTED TO THE CONCESSION OF GUILT MADE BY HIS ATTORNEY AT TRIAL (restated)

Harvey asserts his counsel was ineffective because, without consent, he conceded Harvey's guilt starting with the opening argument and proceeding throughout the trial. In denying relief, the trial court found:

> Defendant's trial counsel was not ineffective because of his opening statement to the jury. Key to whether the opening statement was ineffective is whether the strategy of conceding guilt of murder and arguing for a conviction of murder in the second degree had been discussed with Mr. Harvey. The argument for a second degree conviction is not per se ineffective and is a valid trial strategy, for which there was an evidentiary basis. The facts show a sufficient discussion of this strategy between counsel and defendant before the statement was made to the jury. The facts also show that the concession of guilt to murder was not of guilt of first degree murder and thus not an improper admission of guilty plea.

(PCR VOL. 9 1717). Harvey claims that the trial court erred in denying relief on this claim because, there was no on-the-record waiver by the defendant, Watson's concession was not limited to just second degree murder but included first degree murder as

well, and there was no evidentiary hear support for the second degree murder. Disagreeing, the State submits there is substantial, competent evidence supporting the trial court's factual findings and the conclusions of law.

An ineffective assistance of counsel claim is a mixed question of law and fact, and as such, this Court may conduct "an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings." State v. Riechmann, 25 Fla. L. Weekly S 163, 165 (Fla.), corrected opinion, 25 Fla. L. Weekly S 242 (Fla. Mar. 22, 2000)(correcting spelling and numbering of footnotes); Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999) (giving deference to trial court's factual findings); Rose v. State, 675 So. 2d 567, 571 (Fla. 1996)(same). The trial court's factual finding, should be upheld by the reviewing court when such findings are supported by competent, substantial record evidence. See Stephens, 748 So.2d 1033. Further, it "is the trial court's duty to resolve conflicts in the evidence, and that determination should be final if supported by competent, substantial evidence." Sireci v. State, 587 So. 2d 450, 453 (Fla. 1991), cert. denied, 503 U.S. 946 (1992). See Bottoson v. State, 674 So. 2d 621, 622 n.2 (Fla. 1996) (reasoning conflicts in evidence and witness credibility to resolved by fact finder).

Harvey incorrectly asserts that an on-the-record concession of guilt was required in the instant case. Relying upon Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000), Harvey asserts there must an "on-the-record, knowing, intelligent waiver" of his Sixth Amendment rights (IB 69-70). Such an on-the-record waiver requirement announced in Nixon is prospective only and comes into play when it appears defense counsel is conceding guilt to the crime charged. Nixon, 758 So. 2d at 625. See, Boykin v. Alabama, 395 U.S. 238 (1969)(finding trial court erred in accepting plea from defendant without determining whether it was knowing and voluntary), Francis v. Spraggins, 720 F. 2d 1190, 1194 (11th Cir. 1983)(finding counsel conceded guilt to crime charged), and Wiley v. Sowders, 647 F. 2d 642 (6th Cir. 1981)(same). Conversely, where there has not been a concession to the crime charged, or where the defendant has confessed to the crime, counsel is not ineffective in conceding guilt or arguing for a lesser conviction. See, Nielson v. Hopkins, 58 F. 3d 1331, 1336 (8th Cir. 1985)(distinguishing Francis v. Spraggins and finding counsel not ineffective because counsel never conceded to first-degree murder only to fact shooting took place); Lobosco v. Thomas, 928 F. 2d 1054, 1056 (11th Cir 1991)(rejecting claim counsel conceded guilt because defendant confessed, testified at trail he stabbed victim, and it was clear the defendant had agreed to defense strategy); Magill v.

Dugger, 824 F. 2d 879, 888 (11th Cir. 1987)(reasoning counsel was ineffective because argument to the jury did not clarify defense theory that Magill killed, but was not guilty of first-degree murder, however such was not prejudicial in light of defendant's taped confession and other substantial evidence of guilt).

Additionally the state asserts a defendant's consent may not even be required when the decision to concede is to a lesser included crime. In McNeal v. Wainwright, 722 F. 2d 674 (11th Cir. 1984) the Eleventh Circuit opined:

> An attorney's strategy may bind his client even when made without consultation. Thomas v. Zant, 697 F. 2d 977, 987 (11th Cir. 1983). In light of the overwhelming evidence against him, it cannot be said that the defense strategy of suggesting manslaughter instead of first degree murder was so beyond reason as to suggest defendant was deprived of constitutionally effective counsel.

Id. at 677. See also U.S. v. Simone, 931 F. 2d 1186 (Cir. 7th 1991)(rejecting claim of ineffective assistance of counsel since concession to undisputed evidence in an attempt to to avoid conviction to harsher crime was reasonable). Consequently, Harvey's assertion that Nixon requires proof of an on-the-record concession in the instant case is incorrect.

The trial court correctly determined that Watson's strategy was discussed with and approved by Harvey. During the evidentiary hearing, Harvey testified he had not agreed to a

concession of guilt, but knew the jury would hear his confession (PCR VOL. 15 931-32). Conversely, Watson testified Harvey agreed with the strategy to concede guilt to second-degree murder. According to Watson, the confession "was the case" and its use essentially foreclosed any realistic opportunity for an acquittal (PCR VOL.10 62, 104-06, 124; VOL.12 417; VOL 1.14 931-932). Watson averred also that during his representation, he conducted a series of consultations with Harvey related to the defense and what could be argued. Prior to opening statements Watson told Harvey what would be argued. While Harvey was not informed of the exact words which would used, Harvey was told Watson "was going to say that [Harvey] was guilty of murder." It was Watson's impression Harvey understood as this was not the only conversation they occurred between the two about the defense (PCR VOL. 10 105-06). Watson explained that in his analysis, "the only one thing that we had available to us … was an argument that could be made while tiptoeing through Florida case law that this was second degree murder as opposed to first degree murder and if anybody has a better idea I wish that they would offer it up so I can learn from this process as well." (PCR VOL. 10 106-07).

Giving insight into his thought process, Watson explained:

> It struck me that when the jury in this case heard the evidence and heard Mr. Harvey's taped confession, he was going to get convicted of something, and I was

> offering them the opportunity of convicting him of murder while saving his life and pointing out that second degree murder is murder that they could have in fact returned a murder conviction. They could convict him of murder and feel as though they had done their civic duty while still saving his life.

(PCR VOL. 10 107-08). Describing his practice of advising clients, and in particular, Harvey, of the defense strategy, Watson stated:

> Well, the client's entitled to know what the defense is, and it would be my practice, and I did in this case discuss with [Harvey] the problems that would be associated with the denial of the motion to suppress and what could be argued if in fact the motion to suppress was (sic) denied. And the only thing that ever seemed possible or plausible at that point would be to argue second degree.

(PCR Vol. 10 123-24). At no time did Harvey disagree with this strategy (PCR Vol. 10 124).

Bearing in mind the detrimental effect the confession would have on the case, Watson recognized that defense credibility had to maintained in order to be effective in the penalty phase, if one were necessary (PCR Vol. 10 124-25). Believing the defense had to have a theme, Watson reasoned an attorney who must handle both guilt and penalty phases should "not say something in phase one that's going to cause him to lose credibility in phase two." (PCR VOL. 10 125). Clearly, there is substantial, competent evidence contained within the record to

support the trial court's factual determination that Watson discussed the concession with his client. Watson's strategy was reasonable. Jones v. State, 528 So. 2d 1171, 1174 (Fla. 1988).

Harvey also takes issue with the trial court's finding that Watson's concession was only to second degree-murder, and not first-degree. The defense mounted by Watson was three fold. First, Harvey did not go to the victim's home with the intent to kill, therefore, no premeditated murder (R VOL.15 2464-67). Second, once the robbery was completed, and the defendants had left the victims alive, there could be no felony murder (R VOL.15 2468-71). Third, although Harvey and his co-defendant discussed what to do with the victims there was no planning or premeditation in the killing which occurred out of fear and surprise as Harvey saw the victims begin to run away (R VOL.15 2472-73). Watson carefully navigated through the felony murder case law and refused to draw any tangible link between the murder and the underlying felony. What he did suggest was that the murders were committed as a result of "panic, panic reaction, fearful reaction, and instant reaction without reflection and without a fixed and settled purpose." (R VOL.15 2565). As argued by Watson, the evidence showed "that what happened was [the murder] was a from-the-hip type of shot indicative of less mental thought, less planning, more indicative of a panic reaction by a fearful young man." (R

VOL.15 2465). Knowing Harvey's taped confession[26] to the police would be played for the jury, Watson offered, in opening statements, that his client was guilty of murder, but cautioned the jurors that by making that statement, their consideration of the case was not at an end (ROA VOL.12 1859-60). Watson asked the jury to contemplate what events led up to the killing and to determine what degree of murder was committed while positing that neither premeditated nor felony murder would be established, but that second-degree murder was the appropriate verdict (ROA VOL.12 1860, 1867-68).

> And you will hear that, those tapes, it's actually five tapes, and you will hear what happened there. Now, I want in closing to just say to you that this is a case of murder, and it's a case that's darn close to first degree murder. But at the time that

[26] In his confession , Harvey admitted he and Scott Stiller went to the Boyds' home to rob them; in the process they took masks, cut telephone lines, and armed themselves in case the Boyds would resist (R VOL 1.13 2171-72, 2182-85, 2217, 2220-21). Encountering Mrs. Boyd outside, they escorted her into the house and demanded money from her and Mr. Boyd (R VOL.13 2172-73, 2185-90, 2221-23). After robbing them, and within their earshot, the defendants discussed what they should do next. Deciding to kill the Boyds, Harvey took the semi-automatic gun Scott Stiller had been carrying (R VOL.13 2174, 2196-99, 2226-27). Harvey believed the Boyds heard this discussion and admitted that when he entered to the room where the Boyds were, they asked what he was going to do; "[t]hey started to get up, acted like they's (sic) trying to run you know so I, I had to shoot em." (R VOL.13 2175, 2198-9). Returning later to retrieve the shell casings, Harvey noticed Mr. Boyd was dead, but Mrs. Boyd was alive and moaning, so he shot her in the head (R VOL.13 2175-77, 2200-06, 2228-29). The defendants returned a second time to retrieve the wallets which Harvey had touched and then Harvey disposed of the casings and guns (R Vol.13 2177, 2207-08, 2212-17, 2230-34).

> the trigger was pulled on that automatic weapon there was not a fixed design for premeditated murder which the Judge will tell you is required for premeditated murder. And these people were not shot while Lee Harvey was engaged in a felony.... So the state will try to give you a multiple choice saying that it must have been one of these felonies and therefore it must be felony murder. But you told me that you would hold the state to their burden of proof and that you would apply the presumption of innocence and at the end of this case we will stand up before you again and ask you to return the proper verdict in this case, which is guilty of second degree, depraved mind murder.

(ROA VOL.12 1867-68).

In the defense closing, counsel acknowledged the admissions Harvey made in his confession, again asked the jury to consider what degree of murder was committed, and offered that it was not premeditated murder because there was no fixed plan or forethought to kill, and there was no time for reflection (ROA VOL.15 2461-64). Watson asked the jury to determine the degree of murder, and suggested it was committed out of fear and panic (ROA VOL.15 2465-66). (ROA VOL.12 1867-68; VOL.15 2461-68, 2470-71; VOL.15 2524-26, 2527-29). Watson argued there was no fixed or settled purpose to kill and that Harvey had no time to reflect upon the thought to kill, and as such, premeditation was not proven (ROA VOL.10 1860, 1867-68; VOL.15 2461-67, 2524-26).

Anticipating the State's argument that the crimes were felony murder, defense counsel offered that the underlying

felonies either were completed before the killings or did not apply (ROA VOL.15 2468). It was defense counsel's position that Harvey neither was engaged in a felony nor escaping from one when the killings took place, thus, the jury could not convict under felony murder (ROA VOL.15 2470-71). As part of his rebuttal, Watson reminded the jury that the State had the burden to prove the crime was first-degree murder, but that the evidence did not show first-degree murder (ROA VOL.15 2524-26). Again, Watson argued that the State had not established felony murder or premeditation while giving the jury the option to find second-degree murder (R Vol.15 2527-29). Watson instructed them that the evidence would show there was no premeditation, thus the verdict should be second-degree murder. (ROA VOL.12 1859-60, 1867-68). Here, Appellant complains counsel told the jury Harvey and his co-defendant formed the intent to kill at the time of the shooting (IB 71). However, Harvey has taken the statement out of context. At trial, Watson stated:

> … They went there to rob those people. And that's what they did. But after the robbery was over they talked about committing the murder.
>
> You may even say they has decided to commit the murder at the time of the shooting. But the judge will tell you that for premeditation it requires more. It requires that there be a fixed and settled purpose and that there be time for reflection. … That's different than something done very quickly with a very bad weapon.

(ROA VOL.15 2472).

Watson hammered upon the fact that the underlying felonies, robbery, burglary, and kidnaping, were completed, therefore, there was a break in the chain of circumstances and that the murders did not arise during the course of or escape from the felonies. As such, Watson asserted Harvey was not guilty under the felony murder theory (ROA VOL.10 1867-68, Vol.15 2468-72, 2527-29). Clearly, Watson was attempting to have the jury conclude the nexus between the felony and homicide had been broken. Watson's strategy was reasonable. Cf. Parker v. State, 570 So. 2d 1048, 1051 (1st DCA 1996)(explaining what factors may be considered in determining whether there has been a sufficient break in the chain of circumstances between felony and murder to reject a finding of first degree murder); Compare Jackson v. State, 575 So. 2d 181, 186 (Fla. 1991)(rejecting defense argument that state failed to prove that theft had been completed prior to murder in effort to rebut a finding of felony murder). As such, there is substantial competent evidence in the record to support the trial court's conclusion that the only concession was to second-degree murder[27].

---

[27] This Court's opinion remanding the case for a hearing supports the conclusion the concession was to second-degree murder only. In Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995), this Court opined, "[b]ecause the record before us is unclear as to whether Harvey was informed of the strategy to concede guilt and argue for second-degree murder, we remand to the trial court for an evidentiary hearing on this issue." (emphasis added). Clearly, this Court found the concession was

And finally, Harvey challenges the trial court's conclusion that there was a "valid evidentiary basis" for the second-degree murder conviction argument (IB 72-73). Harvey attempts to twist the finding, however, a review of the order reveals the clear import of the trial court's ruling. The trial judge opined, [t]he argument for a second degree conviction is not per se ineffective and is a valid trial strategy, for which there was an evidentiary basis." (PCR VOL. 9 1717). Without question, the trial court found that there was record evidence to support a second-degree murder conviction, and that as such, the strategy to pursue a second-degree conviction was valid under the circumstances of this case. As was the case in Brown v. State, 755 So. 2d 616 (Fla. 2000), a defense strategy to concede guilt of second-degree murder when the defendant is facing the death penalty is a valid and responsible strategy, especially where, as here, the defendant has confessed to the crime and the confession was presented to the jury.

> Thus, the record reflects that Chalu [defense counsel] did not concede first-degree premeditated murder or felony murder, but rather, the record supports that Chalu set upon a strategy to do what he reasoned he could do in light of Brown's confession to convince the jury to find Brown guilty of a lesser offense. Faced with the overwhelmingly inculpatory evidence of Brown's confession, Chalu made his informed decision to argue for a lesser

---

addressed solely to second-degree murder and not the charged crime of first-degree murder.

> conviction in an effort to avoid a death sentence. See McNeal v. Wainwright, 722 F. 2d 674 (11th Cir. 1984). In this case, we find that Chalu provided full representation to Brown and made reasonable, informed tactical decisions as to his defense. Thus, we find that Chalu did act as an advocate for Brown, who has failed to demonstrate that Chalu's tactical decision to argue for a conviction on a lesser charge constitutes ineffective assistance of counsel under either prong of Strickland.
>
> On this record, it is clear that Chalu repeatedly informed Brown of his strategy, believed that Brown understood it, and concluded that Brown agreed with the strategic approach. As to trial strategy, Chalu testified that Brown was cooperative and "agreeable to pretty much everything we did." We note that Brown did not testify as to this or any other claim during the postconviction hearing. Thus, on this record, we find that Brown has demonstrated no ineffectiveness because the evidence presented during the postconviction hearing was that Chalu insured Brown's understanding of the implications of conceding guilt to a lesser homicide charge and that Brown consented to Chalu's trial strategy.

Brown, 755 So. 2d at 630. Brown supports the trial court's conclusion in the instant case that Watson was not ineffective.

The state also asserts that Harvey does not bother to suggest what should have been presented as a possible guilt phase strategy. Harvey's confession to police was consistent with his statements to counsel and were also corroborated by the physical evidence. (PCR VOL. 12 385-387). Consequently as a matter of law, Harvey has failed to meet his burden of

establishing prejudice under Strickland. See also Harris v. State, 25 Fla. L. Weekly D2247 (September 20, 2000 4th DCA)(rejecting claim of ineffective assistance of counsel for concession of guilt on lesser charge where there was overwhelming evidence of guilt including defendant's statement); Cf. Van Poyck v. State, 694 So. 2d 686, 696-697(Fla. 1997)(finding no prejudice in claim of ineffective assistance of counsel at guilt phase as defense witnesses even admit that the case was a "loser" at guilt phase); Zamora v. Dugger, 834 F.2d 956, 960 n.3 (11th Cir. 1988)(rejecting expert testimony regarding criticism of trial attorney's strategy since expert did not present a more plausible or better defense).

In conclusion, this Court should reject Harvey's contention that there should have been an on-the-record announcement that he agreed with the defense strategy to concede guilt to a lesser offense. While Nixon, holds that "to avoid similar problem in the future … that if a trial judge ever suspects that a similar strategy is being attempted by counsel for the defense, the judge should stop the proceedings and question the defendant on the record as to whether or not he or she consents to counsel's strategy" Nixon, 758 So. 2d at 625 (emphasis supplied), such is a prospective procedure only. Moreover, the situation addressed in Nixon is where the concession was to the crime charged, not a lesser included offense. Where counsel argued the lesser

crime, both Florida and federal courts have concluded that the strategy is valid and there does not have to an on-the-record examination. See, Brown, 755 So. 2d at 629-30 (finding counsel was not ineffective in arguing for second-degree murder where defendant faced the death penalty who has confessed to the crime); Simone, 931 F. 2d at 1195 (finding strategy to admit guilt to lesser crimes while contesting guilt to higher charges was reasonable); McNeal, 722 F. 2d at 677 (finding no constitutional violation where counsel admitted defendant's guilt to lesser charge in light of overwhelming evidence even where admission was without defendant's consent).

ISSUE III

THE TRIAL COURT'S FACTUAL FINDING THAT HARVEY DID NOT INVOKE HIS RIGHT TO COUNSEL PRIOR TO SPEAKING WITH POLICE IS SUPPORTED BY SUBSTANTIAL AND COMPETENT EVIDENCE

Harvey claims that trial counsel, Bob Watson, was ineffective for failing to uncover the booking sheet that was prepared on the day of Harvey's arrest. Harvey alleges that the booking sheet reveals that he initially invoked his right to counsel as soon as he was brought to jail. In denying relief, the trial court made the following specific findings: Harvey was "partially" booked at 6:30 a.m.; he was not asked by the booking officer if he wanted a lawyer; Harvey was questioned by police shortly thereafter; the interview lasted into the afternoon; during Harvey's confession he never asked for a lawyer; the corrections officer ultimately responsible for completion of the booking sheet reported for duty at 3:40 p.m.; Harvey's request for an attorney was made subsequent to that time; the booking sheet was completed at 5:50 p.m. in the presence of the assistant public defender Mr. Clyde Killer. (PCR VOL. 9 1707-1708). Based on the these factual findings, the trial court concluded that introduction of the booking sheet during the suppression hearing, "would have proven no relevant fact." (PCR VOL. 9 1716-1717).

Harvey claims that the trial court's findings are not supported by the record and should therefore be discounted for

the following reason. Officer Bishop, a corrections officer for Okeechobee Sheriff's department, testified that the policy of the Okeechobee jail was to advise a suspect of the right to attorney immediately upon booking. Therefore Harvey asserts that the trial court and this Court should assume that since Harvey was booked in at 6:45 a.m., he invoked his right to counsel at that time. Harvey's argument is both factually and legally without merit.

When reviewing the merits of a claim, the trial court's factual findings are entitled to a presumption of correctness. See Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999)(recognizing deference given to trial court's assessment of credibility and findings of fact); Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997)(reasoning standard of review following Rule 3.850 evidentiary hearing is that if factual findings are supported by substantial evidence, appellate court will not substitute its judgment for trial judge's on questions of fact, credibility, or weight); Knight v. Dugger, 574 So. 2d 1066, 1073 (Fla. 1990)(upholding trial court's factual findings that state witnesses were more credible than those of defense was within the court's discretion and will not disturbed on appeal); Van Poyck v. State, 694 So. 2d 686 (Fla. 1997)(upholding credibility determination by trial court when it rejected ineffective assistance of counsel claim based on

testimony of defense counsel irrespective of contrary testimony of co-counsel).

In the instant case, the trial court's findings are overwhelming supported by the following evidence. At the evidentiary hearing Ms. Alsdorf, corrections officer for Okeechobee Sheriff's Office, was the booking officer on duty the morning that Harvey was arrested. (PCR VOL. VOL. 10-11 11 166). On that morning, Alsdorf asked Harvey only his name and address. She did not check the box on the booking sheet indicating whether the defendant invoked his right to an attorney. She testified that the normal practice at the jail was not to inquire about an attorney until after the police were finished questioning the suspect. (PCR VOL. 9 173, 179, 181, 183, 185).

A second corrections officer, Eddie Bishop, was also on duty when Harvey was arrested and brought to jail. (PCR VOL. 11 231-232). Mr. Bishop testified that normally, the booking process does include asking a defendant if they want an attorney, however, he does not remember whether he was a part of the booking process in this instance. (PCR VOL. 12 245, 253, 257-258).

A third corrections officer, Rose Bennet, testified that she completed the booking sheet, including the pertinent part regarding Harvey's invocation of his right to an attorney. She

started her shift that day at 3:40 p.m. (PCR VOL. 13 714-717). Consequently her initial contact with Harvey was well after he concluded his confession to police. (PCR VOL. 13 718). Bennet testified that she checked the box indicating Harvey's request for an attorney shortly after he saw the public defender, Clyde Killer. Bennet also made a written notation on the booking sheet indicating that Harvey saw Mr. Killer in person. (PCR VOL. 13 721-723, 727). Bennet says the booking sheet was completed sometime before first appearance which commenced at 5:50 p.m. (PCR VOL. 13 724).

In addition to this testimony, Watson explained that he did not raise this particular argument because his client never told him that he had initially invoked his right to counsel prior to questioning. (PCR VOL. 10 118-119, 122, VOL. 12 399, 424-425). Harvey's sworn testimony at the suppression hearing corroborates this fact. He admitted that he signed five separate waiver cards on that day and more importantly he admitted that he never asked to see a lawyer. (ROA VOL. 2 543-544, 554, 557).

Given the overwhelming record support for the trial court's findings, Harvey's argument that those findings should be ignored is without merit. Harvey has failed to present any evidence which would call into question this Court's previous finding that the confession was voluntary and made subsequent to

any invocation of his right to counsel. Harvey v. State, 529 So. 2d 1083, 1084-1085 (Fla. 1988).

ISSUE IV

THE TRIAL COURT CORRECTLY FOUND NO MERIT TO HARVEY'S ALLEGATION THAT CUMULATIVE ERROR RESULTED FROM TRIAL COUNSEL'S INEFFECTIVE ASSISTANCE OF COUNSEL

Harvey claims that Watson failed to maintain credibility with the jury when he failed to deliver on various promises made during opening statements. However, Harvey fails to allege or state with any particularity what specific promises were made and broken. Rather he references the state's closing argument as support for his claim. (IB at 85). The state asserts that this claim is not sufficiently pled as mere references to other pleadings or proceedings does not state a proper basis for relief on appeal. Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990); Roberts v. State,568 So. 2d 1155, 1160 (1990); Knight v. Dugger, 574 So. 2d 1066, 1073 (Fla. 1990)

The first specific allegation of error presented by Harvey is counsel's unreasonable refusal to waive the mitigating factor of "no significant prior history". The alleged harm to appellant is that the state was able to make reference to the guilt phase evidence in its penalty phase closing argument.(ROA VOL. 18 3004-3005). In denying this claim, the trial court determined that Watson made a strategic choice not to waive this mitigator since evidence of the escape had already been admitted

at the guilt phase. (PCR VOL. 9 1713). The record supports the trial court's findings.[28]

Watson explained that since the jury was already aware of the escape attempt, there was very little to gain in waiving a potential legal right, i.e., a finding of a statutory mitigator. (PCR VOL. 10 112, VOL. 12 402-404). Watson vigorously argued that the state should not be allowed to rely on the escape evidence as rebuttal to the mitigator. He lost that battle based on the then current state of the law. (ROA VOL. 16 2587-2597, 2626-2635). However, Watson minimized the impact of the state's argument by continuing to stress his guilt/penalty phase theme that these murders were an aberration given that Harvey, had no criminal background at the time of the crime[29], and therefore he deserved their mercy. He argued that the evidence clearly established that the murders were committed in a panic by two young boys after a robbery had gone terribly wrong. Watson reminded the jury that the escape was set into motion after Harvey walked out of an open jail door. (ROA VOL. 18 3032-3034). No additional evidence was presented at the penalty

---

[28] The state presented evidence of the escape through several officers during its case-in-chief to demonstrate conscience of guilt. (ROA 2305-2358). The propriety of that admission was upheld by this Court. Harvey v. State, 529 So. 2d 1083, 1086 (Fla. (1988).

[29] The significance of that theme was later codified by this Court in Scull v. State, 533 So. 2d 1137 (Fla. 1988)(explaining that "history" of capital defendant's criminal background should not include any contemporaneous crimes).

phase regarding the escape, nor did the state mention the escape in its opening argument. (ROA VOL. 16 2650-2679, 2981). Watson's decision to press forward with his theme of no significant prior history was reasonable given that the jury was already aware of this evidence and Watson was able to maintain continuity in his overall trial strategy. Cf. Shere v. State, 742 So. 2d 215, 220 (Fla. 1999)(rejecting claim of ineffective assistance of counsel since admission of damaging evidence had been minimized given admissibility of evidence through state witness); compare Lawrence v. State, 691 So. 2d 1068, 1073 (Fla. 1997)(finding erroneous admission of evidence to be harmless given that it was already properly admitted at guilt phase).

Harvey next argues that trial counsel improperly attempted to distance himself from his own client and improperly conceded aggravating factors. In an effort to demonstrate error, Harvey selects isolated comments, and compares them side by side to comments from Clark v. State, 690 So. 2d 1280 (Fla. 1997). (IB at 91-92.) A review of the record clearly demonstrates that the comments are taken out of context.

Several of the comments were made during guilt phase. Those comments appear at (ROA VOL. 12 1859-1860, 1861, 1864, VOL. 15 2528, 2459). As noted elsewhere, Watson explained at the hearing that his strategy was to use the guilt phase to set the tone/theme for the penalty phase. (PCR VOL. 12 391-394, 424).

Again, the strategy ultimately employed was predicated in large part on Harvey's 21/2 hour confession wherein he repeatedly admitted to intentionally killing this defenseless elderly couple. (ROA VOL. 13 2171-2238, 3027). Against the backdrop of those facts, Watson's comments were proper. See Stewart v. Dugger, 877 F.2d 851 (11th Cir. 1989)(rejecting claim of ineffective assistance of counsel since decision to present claim of innocence at guilt in order to create lingering doubt to avoid death penalty was reasonable strategy); Zamora v. Dugger, 834 F.2d 956, 960 (11th Cir. 1988)(holding that counsel's decision to argue that defendant knew right from wrong was not improper concession of guilt as comments were proper in larger context of defense, especially in light of lack of evidence to support true insanity defense).

The remainder of the comments cited were all made during counsel's penalty phase closing argument. It is clear that the comments were apart of Watson's overall strategy to portray Harvey as a panicked young man who did not intend for these murders to happen. They were an aberration given Harvey's personality traits and circumstances surrounding his life at the time of the crimes. During his confession, Harvey can be heard expressing deep remorse for his actions. Additionally, Watson was allowed to argue that in all likelihood, Harvey would not be released from prison, he would adjust well to prison especially

in light of the positive influence his family would be able to provide. (ROA VOL. 16 2642-2644, VOL. 18 3020-3038). Watson explained that given the jury's decision to convict he could not very well tell them that their decision was unreasonable. Rather he acknowledged their verdict yet made a plea that Harvey was remorseful and was deserving of mercy. (PCR VOL. 12 367-370).

As repeatedly pointed by the state, and totally ignored by appellant, Watson was battling the damaging effect of his client's confession. That confession provided substantial evidence in support of several of the aggravating factors. (ROA VOL. 15 2171-2235). In upholding all the aggravators this Court found:

> Finally, Harvey attacks the imposition of the death penalty on the premise that there was insufficient evidence to support three of the four aggravating circumstances which were found by the trial judge. (FN4) Thus, he disputes the findings that the murders were (1) especially heinous, atrocious and cruel, (2) were committed for the purpose of avoiding lawful arrest, and (3) were committed in a cold, calculated and premeditated manner. In determining whether the circumstance of heinous, atrocious and cruel applies, the mind set or mental anguish of the victims is an important factor. Phillips v. State, 476 So.2d 194 (Fla.1985). Both victims in this case were elderly persons who had been accosted in their home. They became aware of their impending deaths when Harvey and Stiteler discussed the necessity of disposing of witnesses. In desperation, the Boyds tried to run away, but Harvey shot both of them.

When Harvey later came back into the house and realized that Mrs. Boyd was not yet dead, he fired his gun into her head at point blank range. See Hargrave v. State, 366 So.2d 1 (Fla.1978), cert. denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979). We find these facts sufficient to support a finding that both murders were especially heinous, atrocious and cruel.

[6] We also find that the murders were committed for the purpose of avoiding lawful arrest. The test is whether the dominant motive behind the murders is to eliminate witnesses who can testify against the defendant. Floyd v. State, 497 So.2d 1211 (Fla.1986). Both Harvey and Stiteler were known by their victims, and they discussed in the Boyds' presence the need to kill them to avoid being identified.

[7] [8] Finally, the facts support the finding that the murders were committed in an especially cold, calculated and premeditated manner. Rogers v. State, 511 So.2d 526, 533 (Fla.1987). That Harvey and Stiteler planned the robbery in advance and even cut the phone lines before going over the bridge to the Boyds' home would not, standing alone, demonstrate a prearranged plan to kill. However, once the Boyds were under their control, they openly discussed whether to kill the Boyds. These murders were undertaken only after the reflection and calculation which is contemplated by this statutory aggravating circumstance. See Rogers v. State, 511 So.2d 526, 533 (Fla.1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). We hold that the trial judge did not

err by concluding that there were insufficient mitigating circumstances to outweigh the aggravating circumstances.

Harvey v. State, 529 So. 2d 1083, 1088 (Fla. 1988). Given the overwhelming evidence against appellant, Watson's strategy as reflected in his arguments was reasonable. Cf. Brown v. State, 755 So. 2d 616, 631 (Fla. 2000)(denying claim of ineffective assistance of counsel since presentation of defense must viewed in context of strength of inculpatory evidence).

Harvey also alleges that trial counsel failed to investigate evidence which would have either rebutted an aggravating factor or supported a finding for a mitigator. Specifically Harvey alleges that Watson failed to uncover evidence regarding the Boyds' inability to hear him and co-defendant, Stiteler, discussing the need to kill the couple in their presence. This information was a contributing factor in this Court's affirmance of the "HAC" factor. Id. The available evidence now offered by Harvey is the following: (1) an affidavit from the Boyds' maid who stated they suffered from hearing loss; (2), the victim's brother Clyde Boyd testified at trial that his sister-in-law usually kept the television volume loud because she was hard of hearing.[30] (ROA VOL. 12 1946-1947).

In rejecting this potential strategy, Watson explained that the evidence in support of this contention was not significant in light of the contrary evidence that Harvey told counsel, and

[30] At the risk of over stating the obvious, the jury was therefore aware of Mr. Boyd's opinion that his sister-in-law had difficulty hearing.

the police, that the Boyds overheard the conversation between himself and Stitler. Moreover, this admission was corroborated by the physical evidence since the positioning of Mrs. Boyd's body illustrates that she was attempting to run when she was shot. (PCR VOL. 10 112-116, 130). Additionally, Watson feared that if the jury did believe that this couple was in fact very hard of hearing, that would engender greater sympathy for this feeble, elderly couple. Given this double-edged sword, Watson decided not to pursue this point. His actions were reasonable. (PCR VOL. 9 1711, 1716). Cf. Van Poyck v. State, 696 So. 2d 686, 697 (Fla. 1997)(finding trial counsel's decision not to attack witness during cross-examination was reasonable given that the jury would be sympathetic to this witness/victim).

Harvey next complains that Watson failed to present evidence of co-defendant's domination over him. In support of this factor, Harvey relies on the testimony of Drs. Norko and Fischer, the mental health experts who testified at the evidentiary hearing. Watson explained that he did consider portraying the co-defendant as the dominant character however he decided against this strategy because the evidence just was not there. (PCR VOL. 12 360-361). Harvey was older, it was Harvey's car, it was Harvey's gun, Harvey was the shooter, Harvey was responsible for altering the gun into a more lethal weapon, and in his confession, Harvey never mentioned that

Stitler was the dominant force in this double homicide. Watson wanted to avoid telling the jury a different story at trial than what was told by Harvey during his confession. (PCR VOL. 12 360-364).[31] Watson's decision not to pursue this fruitless line of defense was reasonable. See Van Poyck, 696 So. 2d at 697(affirming counsel's strategy not to pursue voluntary intoxication since investigation conducted by counsel proved fruitless).

Harvey next complains that Watson inexplicably allowed the jury to hear irrelevant and prejudicial information from Officer Platt that he overheard Harvey saying that he would kill again if he had the chance. To bolster this argument, Harvey alleges that trial counsel admitted that his performance on this issue was questionable. Harvey misreads the record.

First, Watson never admitted at the evidentiary hearing that he failed to raise a proper objection to the admission of Platt's testimony.[32] The trial record unequivocally demonstrates that Watson did object to Platt's testimony. (PCR VOL. 12 372-373) (ROA VOL. 14 2433-2441). The trial court limited his

---

[31] Watson requested but was denied an instruction on the factor of substantial domination of others. His reasoning for doing so was two fold, he was attempting to create an appellate issue and he wanted to argue that the domination was an internal struggle developed through his personality (PCR VOL. 12 364).

[32] In support of this alleged admission of incompetency, Harvey relies on Watson's prior sworn affidavit. The trial court properly precluded counsel from impeaching the witness with that document. (PCR VOL. 10 100-102).

testimony to the following, “Yes I have already killed twice. I don’t have anything to lose.” (ROA VOL. 14 2440, 2444). Given that ruling, Watson decided that he would ask Platt to explain the circumstances surrounding Harvey’s statement in an effort to defuse the potential damage. (PCR VOL. 12 373-374). Platt testified that inmate Davis started an argument with Harvey. Harvey ignored it for nearly one half hour before the two inmates began a verbal war. Harvey’s threatening words to Davis were uttered at that time. (ROA VOL. 14 2444-2445). Platt further explained that it was not unusual for inmates to make such threats like that at one another. (ROA VOL. 14 2447). Harvey’s claim that Watson somehow opened the door to a statement that he would kill again is simply false. There is no basis for relief.

Harvey also claims that Watson was ineffective for failing to preclude the state from presenting evidence of a picture drawn by him depicting a man shooting someone in the back. The caption beneath the picture was, “If I can’t kill it it’s already dead.” (ROA 2661). Harvey alleges that Watson should have argued that the evidence of lack of remorse was inadmissible since the defense had not relied upon remorse as mitigation. Harvey is incorrect as the record demonstrates that he did present evidence of remorse during the penalty phase. (ROA VOL. 16 2752, 2770-2772, VOL. 18 3016-3018). Despite

Watson vigorous objection, the evidence was properly admitted. (ROA VOL. 16 2586, 2593, 2620-2622). See Walton v. State, 547 So. 2d 622, 625 (Fla. 1989)(allowing state to present evidence of lack of remorse as proper rebuttal to nonstatutory mitigation of remorse).

Lastly, Harvey alleges that Watson did not present any further argument or witnesses at the trifurcated proceedings.[33] The state asserts that this claim is legally insufficient as pled. Harvey does not state with any specificity what evidence was omitted from these proceedings that would call into question the fairness of the process. Consequently summary denial is warranted. Armstrong v. State, 642 So. 2d. 730 (Fla. 1994)(rejecting claim that trifurcated sentencing procedure was incomplete given that defendant could not demonstrate that he was precluded from presenting any evidence). All relief was properly denied.

[33] To the extent Harvey is relying on the procedure set forth by this Court in Spencer v. State, 615 So. 2d 688 (Fla. 1993), the state asserts that he is not entitled to relief as the "trifurcated system" announced therein was subsequent to this trial and was not considered a fundamental change in the law. Armstrong v. State, 642 So. 2d 730 (Fla. 1994)

CONCLUSION

Wherefore, based on the foregoing arguments and authorities, the State requests that this Honorable Court affirm the trial court's DENIAL of appellant's motion for postconviction relief.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

_____
CELIA A. TERENZIO
Assistant Attorney General
Fla. Bar No. 0656879
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401-2299
(407) 688-7759

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by United States mail, postage prepaid, to Ross Bricker, Jenner & Block, One IBM Plaza, Chicago, Illinois, 60611, this _____ day of December, 2000.

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of the type used in this brief is Courier New, 12 point, a font that is not proportionately spaced.

_____
CELIA A. TERENZIO
Assistant Attorney General