No. 95,075

In the

Supreme Court of Florida

HAROLD LEE HARVEY, JR.,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court for the Nineteenth Judicial Circuit,
in and for Okeechobee County, Florida
Honorable Dwight L. Geiger

Appellant's Amended Initial Brief

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ORAL ARGUMENT REQUESTED

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I.

STATEMENT OF THE CASE

This is a capital case. Appellant Harold Lee Harvey, Jr. ("Mr. Harvey") is sentenced to die under an unconstitutional conviction and judgment. He sought post-conviction relief before the trial court pursuant to Fla. R. Crim. P. 3.850 alleging ineffective assistance of counsel. The trial court denied Mr. Harvey's request and he appealed. This Court remanded for an evidentiary hearing on claims 1(a),1(f), 2(a), 2(b), 2(c), 2(d), 2(e), 2(f), 2(g), 3, and 16 raised in the Rule 3.850 Motion. In response, the trial court conducted a six-day evidentiary hearing between August 17 and August 24, 1998. In January 1999, the trial court again denied Mr. Harvey's request for post-conviction relief.

As demonstrated below, the order denying post-conviction relief is erroneous and contrary to law. It should be reversed, Mr. Harvey's conviction and sentence vacated, and the case remanded for a new trial.

II.

COURSE OF PROCEEDINGS BELOW

A. ARREST, TRIAL, AND DIRECT APPEAL

On February 27, 1985, the Okeechobee County Sheriff arrested Harold Lee Harvey, Jr. and charged him with second-degree murder and robbery in connection with the deaths of William Herman Boyd and Ruby Louise Boyd, husband and wife. (R. 03111.).[1] Another individual, Harry Scott Stiteler, also was

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[1]The record in this case derives from three sources: (1) the record from Mr. Harvey's direct appeal, cited as "(R. _____)"; (2) the collateral record from Mr. Harvey's appeal from the first denial of his Rule 3.850 motion, cited as "(CR __)." The collateral record includes the transcript of an evidentiary hearing conducted in March 1993 on a juror issue; and (3) the current Post-Conviction

arrested and similarly charged. (R. 03102). On March 7, 1985, a grand jury indicted Mr. Harvey and Mr. Stiteler for first-degree murder. Both defendants pled not guilty to the charges. (R. 3104-5.)[2]

The trial court appointed Robert J. Watson ("Attorney Watson") of Stuart, Florida, a solo practitioner, as counsel for Mr. Harvey. (R. 03127.) Mr. Watson, who had never before tried a capital case alone, moved in advance of trial for appointment of co-counsel. (R. 03237-39, CR. 937.) The motion was denied. (R. 03261.)

During the guilt phase, the State relied primarily on Mr. Harvey's confession and the physical evidence derived from it, as well as graphic post-mortem photographs of the victims. (R. 01874-02356.) Although Attorney Watson moved to suppress the confession, he failed to raise as grounds for suppression Mr. Harvey's unequivocal request for counsel before any incriminating statements were made, as reflected in a booking sheet prepared shortly after Mr. Harvey's arrest.

The State's evidence of Mr. Harvey's guilt went essentially unrebutted and unchallenged. Attorney Watson did not call any witnesses in his guilt-phase

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Record from the January 1999 denial of Mr. Harvey's Rule 3.850 motion following an August 1998 evidentiary hearing mandated by this Court, which is cited as "(PCR ___)." In addition, the Court should note that because the court reporter and Okeechobee County Clerk failed to paginate consecutively Volumes 10-15 of the Corrected Post-Conviction Record to follow Volumes 1-9, Volumes 10-15 of the Corrected Record have their own internal, non-consecutive, pagination. Rather than continuing to delay this appeal by sending the Corrected Record back for repagination, Mr. Harvey's counsel has elected to file the brief and cite to the Post-Conviction Record by citing the volume and pagination used in that volume.

[2]The Court later severed the two cases. (R. 03430.) On the eve of his trial, Mr. Stiteler pled guilty pursuant to a plea agreement and received a life sentence.

defense. Nor did he conduct any meaningful cross-examination of the State's witnesses. Not surprisingly, the jury deliberated less than one hour before returning guilty verdicts on two counts of first-degree murder.

The State's sentencing case included photographic evidence depicting drawings on the wall of the jail cell in which Mr. Harvey had been held, and authentication and foundation witnesses. For Mr. Harvey's case, Attorney Watson called friends, family members and a psychologist. (R. 02734-02812.)

The jury retired to deliberate sentencing at 4:10 p.m. on June 20, 1986. Approximately 51 minutes later, the jury voted eleven to one to recommend sentences of death on both counts. (R. 03046-47.)

The trial court followed the jury's recommendation. (R. 03051-52.) In a later written memorandum, the court found that the State had established four statutory aggravating factors: (1) the murder was committed while engaged in a robbery or burglary; (2) it was heinous, atrocious, and cruel; (3) it was committed for the purpose of avoiding lawful arrest; and (4) it was committed in a cold, calculated, and premeditated manner. Harvey v. State, 529 So. 2d 1083, 1087 & n.4 (Fla. 1988). The only mitigating circumstances found by the court were the non-statutory factors of low IQ, poor educational skills, and poor social skills. Id. at n.5.

Mr. Harvey appealed his conviction and death sentences to this Court, which affirmed the trial court's judgment. Id. at 1088. The United States Supreme Court denied certiorari on February 21, 1989. Harvey v. Florida, 489 U.S. 1040, 109 S. Ct. 1175, 103 L.Ed.2d 237 (1989). The governor denied Mr. Harvey's request for executive clemency.

B. POST-CONVICTION PROCEEDINGS.

1. The Rule 3.850 Motion

On August 27, 1990, Mr. Harvey timely filed a motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.850 (the "Rule 3.850 motion"). (CR. 169-548.) On October 5, 1992, the trial court summarily denied all but one of Mr. Harvey's claims. The court denied the one surviving claim, Claim 1(b), on March 17, 1993 after an evidentiary hearing. (CR. 1649-50.)

2. Remand From Florida Supreme Court

Mr. Harvey appealed the trial court's denial of his Rule 3.850 motion. On February 23, 1995, in a revised opinion, this Court found merit to certain issues raised in that motion and directed the trial court to hold an evidentiary hearing on claims 1(a),1(f), 2(a), 2(b), 2(c), 2(d), 2(e), 2(f), 2(g), 3, and 16 to determine whether Mr. Harvey was denied effective assistance of counsel. Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995).

3. Motion To Disqualify Judge Dwight L. Geiger

On remand, the acting chief judge of the Nineteenth Judicial Circuit reassigned the case to Judge Dwight L. Geiger after Chief Judge L.B. Vocelle, to whom the case had been assigned on remand, became ill on the eve of the evidentiary hearing. On November 25, 1996, Mr. Harvey filed a Motion To Disqualify Judge Geiger because, *inter alia,* Attorney Watson's wife and legal associate had represented Judge Geiger's estranged wife for several years in a bitter and contentious divorce proceeding against Judge Geiger. Judge Geiger denied Mr. Harvey's motion to disqualify on the same day he received it. (R. 1560.) On

February 20, 1997, the Fourth District Court of Appeal issued an Order to Show Cause why Mr. Harvey's Petition should not be granted.

On February 24, 1997, the State filed a Petition for Writ of Mandamus in this Court against the Fourth District Court of Appeal. (R. 1564.) On May 1, 1997, this Court held that it had direct jurisdiction over all appeals from the circuit courts in death cases. (R. 1566.) On December 29, 1997, this Court denied Mr. Harvey's Petition for a Writ of Mandamus to disqualify Judge Geiger on a 5-2 vote. (R. 1571.)

4. The August 1998 Evidentiary Hearing And Judge Geiger's Denial Of Post-Conviction Relief.

With the jurisdictional and disqualification issues resolved, the trial court conducted a six-day evidentiary hearing between August 17 and August 24, 1998. Mr. Harvey called 18 witnesses, including Attorney Watson, three mental health experts, and a capital defense expert. The State called one witness, a jailer. It did not present any mental health evidence.

On January 26, 1999, Judge Geiger denied post-conviction relief in an Amended Order On Motion For Post Conviction Relief ("Order"), finding that Attorney Watson's performance did not fall below the reasonable conduct standard of Strickland v. Washington, 466 U.S. 668 (1984). (See Order at 10.) Judge Geiger did not address whether Attorney Watson's conduct had prejudiced Mr. Harvey. (Order at 10.) Nor did Judge Geiger cite any case law in support of his conclusions.

III.

STATEMENT OF FACTS DEVELOPED DURING THE AUGUST 1998 EVIDENTIARY HEARING

Mr. Harvey's case generated significant publicity in Okeechobee and the surrounding communities, including widespread television, newspaper, and radio coverage. The case was investigated by a team of Florida Department of Law Enforcement and Okeechobee County Sheriff's Department agents. It was personally prosecuted by the newly-elected State's Attorney, along with his Chief Assistant and numerous members of his staff. The victims were of wealth and station in Okeechobee and in Florida.

While Attorney Watson is today an accomplished criminal trial lawyer, he was not so qualified at the time he represented Mr. Harvey. Mr. Harvey's case was Attorney Watson's first capital murder trial as lead counsel, and his first as sole counsel. He had never conducted a penalty phase before Mr. Harvey's trial.

The notoriety of this case, and the disparity in experience and resources between Attorney Watson and the State might well underlie, in some way, the errors and misjudgments by Attorney Watson identified during the evidentiary hearing before Judge Geiger. These factors do not, however, excuse them. The Sixth Amendment entitles Mr. Harvey to the effective assistance of counsel in his defense. He did not receive that assistance here, to his great prejudice.

As demonstrated below, Attorney Watson failed to conduct any investigation of Mr. Harvey's background, sabotaged the possibility of a competent mental health examination, and overlooked critical evidence in his own files. The result was that Attorney Watson was blind to possible theories of defense based on Mr. Harvey's lack of criminal responsibility, made a grossly ineffective -- indeed

fraudulent -- presentation of statutory and non-statutory mitigating evidence, and failed to raise as grounds for suppression Mr. Harvey's unequivocal request for counsel before any incriminating statements were made to the State. These textbook errors were exacerbated when Attorney Watson unilaterally admitted Mr. Harvey's guilt to first-degree murder, conceded aggravating factors for sentencing, and distanced himself from Mr. Harvey in his remarks to the jury, all in derogation of the Florida and federal Constitutions. The cumulative impact of these and Attorney Watson's other failures to meet applicable professional norms for defense counsel undermined the reliability of Mr. Harvey's entire criminal trial.

A. ATTORNEY WATSON DID NOT INVESTIGATE OR PRESENT EVIDENCE OF MR. HARVEY'S MENTAL ILLNESSES, INCLUDING ORGANIC BRAIN DAMAGE.

This Court directed the trial court to conduct an evidentiary hearing on Claim 3 of Mr. Harvey's Rule 3.850 motion, which asserts that "Mr. Harvey was denied a competent mental health examination and counsel was ineffective for failing to investigate and arrange for such an examination." 656 So. 2d at 1257. The evidence adduced on Claim 3 at the evidentiary hearing shows the following:

1. Attorney Watson Limited Mr. Harvey's Psychological Examination To A Personality Assessment, Refused To Provide The Psychologist With Information On Mr. Harvey's Background, And Refused To Permit The Psychologist To Discuss The Circumstances Of The Crime With Mr. Harvey.

Attorney Watson hired Dr. Fred Petrilla, a grammar school psychologist from Vero Beach, to conduct a personality evaluation of Mr. Harvey in preparation for Mr. Harvey's trial. (PCR. v. 15, p. 959.) At the time, Dr. Petrilla's practice consisted exclusively of counseling Vero Beach teenagers and adolescents. (PCR. v. 15, p. 963.) Dr. Petrilla had no training whatsoever in neuropsychology

and had no experience in capital cases. Mr. Harvey was only the second criminal defendant that he had ever examined. (PCR. v. 15, p. 964.)

Attorney Watson directed Dr. Petrilla to conduct a "personality assessment" of Mr. Harvey. (PCR. v. 12, p. 389, v. 15, pp. 959-60, 963.) A personality assessment is fundamentally different from a forensic mental health evaluation. It is oriented towards understanding psychological issues in an individual's personal life and developing a suitable course of counseling or therapy. (PCR. v. 15, p. 961.) A personality assessment does not include neurological testing to determine whether the subject has brain damage. Nor does it attempt to relate the subject's mental health in any way to the crime at issue. (PCR. v. 15, pp. 960-61.)

Dr. Petrilla conducted the personality assessment in an examination of Mr. Harvey over a few hours at the county jail. He concluded that Mr. Harvey was insecure, suffered from low self-esteem, was anxious, depressed, had low intelligence, and lacked social skills. (Def. Ex. 11.) Although Mr. Harvey was in jail facing the possibility of a death sentence, Dr. Petrilla's recommended course of treatment was for Mr. Harvey to commence self-esteem counseling and assertiveness training. (Def. Ex. 11.)

During the course of his limited "personality assessment," Dr. Petrilla asked for information concerning Mr. Harvey's social, developmental, and life history to better understand his subject. (PCR. v. 15, p. 963.) Attorney Watson refused to provide Dr. Petrilla with this information. Furthermore, Attorney Watson forbid Dr. Petrilla from discussing the circumstances of the offense with Mr. Harvey. (PCR. v. 15, p. 975.)

2. Attorney Watson Refused To Retain A Psychiatrist For Mr. Harvey Even After Dr. Petrilla Recommended A Companion Psychiatric Examination Because He Recognized "Red Flags" Of Organic Brain Damage.

Dr. Petrilla recognized that some of Mr. Harvey's responses to the personality tests were "red flags" suggesting the possibility of organic brain damage. (PCR. v. 15, p. 974.) He also recognized that his examination had not been "overly comprehensive." (PCR. v. 15, p. 974.) As a result, Dr. Petrilla told Attorney Watson to obtain a companion psychiatric evaluation of Mr. Harvey. (PCR. v. 15, pp. 972-75.) Dr. Petrilla reasoned that only a psychiatrist could evaluate the red flags he discovered, test more thoroughly for organic brain dysfunction, and evaluate the functioning of Mr. Harvey's frontal, temporal, occipital, and parietal brain lobes. (PCR. v. 15, pp. 974-75.)

Dr. Petrilla recommended three or four specific psychiatrists to Attorney Watson. On February 22, 1986, following up on Dr. Petrilla's recommendation, Attorney Watson prepared a "Memo to File" to remind himself to retain a psychiatrist. (Def. Ex. 4; PCR. v. 10, p. 82.) The Memo to File, introduced into evidence as part of Defendant's Exhibit No. 4, states:

> I need to get a hold of a psychiatrist to examine Mr. Harvey. I should probably call one of the Desais in Fort Pierce.

Dr. Petrilla also telephoned Attorney Watson with other recommendations of specific psychiatrists. For example, a telephone message slip, also introduced into evidence as part of Defendant's Exhibit No. 4, reflects that on May 22, 1986, Dr. Petrilla telephoned Attorney Watson and left a message that he "knows a psy [psychiatrist] Carmen Ebalo - give her a call & tell her I referred her to you - she also works @ IR [Indian River] Mental Health Center." (Def. Ex. 4; PCR. v. 10, pp. 81-82.) Attorney Watson conceded during the evidentiary hearing

that Dr. Petrilla told him to retain a psychiatrist to evaluate Mr. Harvey and gave him several recommendations, including Dr. Ebalo and another psychiatrist, Dr. Alcady. (PCR. v. 10, pp. 81-82.)

The evidence shows that Attorney Watson took some steps to retain a psychiatrist, but ultimately failed to do so. On or about April 23, 1985, Attorney Watson filed a Motion to Adopt the April 19, 1985 motion by Mr. Harvey's co-defendant, Scott Stiteler, requesting authorization to retain *both* a *psychiatrist and psychologist*. (Def. Ex. 2; PCR. v. 10, pp. 76-77.) As Stiteler's counsel explained, and as Attorney Watson specifically adopted, "[i]t is necessary to have both a psychological and psychiatric examination in order to receive a total picture of the defendant's mental condition in relation to the situation at the time of the alleged offense." (Def. Ex. 2; PCR. v. 10, pp. 76-77.) The State agreed to the appointment of both a psychiatrist and a psychologist for both defendants so they could investigate all aggravating and mitigating circumstances.

On May 2, 1985, the court granted the motions, authorizing Attorney Watson to hire both a psychologist and a psychiatrist. (PCR. v. 10, p. 80.) Attorney Watson thereafter represented to the court time and time again that he planned to retain a psychiatrist. For example, on January 16, 1986, Attorney Watson moved to postpone the penalty phase on grounds that he would move for a psychiatric evaluation prior to the penalty phase. (PCR. v. 10, pp. 78-79.) On February 18, 1986, Attorney Watson moved the court to increase professional mental health fees so that he could obtain a psychiatrist for Mr. Harvey. (PCR. v. 10, pp. 79-80.) The State had no objection. The court approved the request. (PCR. v. 10, p. 80.)

For inexplicable and inexcusable reasons, despite Dr. Petrilla's specific recommendation, Attorney Watson's own representations to the court, his co-

defendant's use of a psychiatrist, and the court's authorization of funds for such a purpose, Attorney Watson did not retain a psychiatrist to evaluate Mr. Harvey. (PCR. v. 10, pp. 72-73.)

3. Expert Testimony That Attorney Watson's Failure To Investigate Mr. Harvey's Mental Health Violated Reasonable Professional Norms And Prejudiced Mr. Harvey.

Capital Defense Expert Andrea Lyon testified concerning Attorney Watson's acts and omissions in the trial. At the time of the 1998 evidentiary hearing, Expert Lyon was a professor at the University of Michigan Law School. (PCR. v. 13, p. 563.) Before joining the faculty there, Expert Lyon worked for over 20 years at the Cook County Public Defender's Office in Chicago, Illinois, where she was chief of the homicide division and supervised 22 attorneys. (PCR. v. 13, pp. 563-65.) Expert Lyon also founded the Illinois Capital Resource Center, and has taught numerous seminars and workshops on defending capital cases. (PCR. v. 13, pp. 563-64, 566-67.) She has personally tried 131 homicide cases. Of those trials, Ms. Lyon tried 18 through a penalty phase in which the State was seeking the death penalty. She won all of them; no death sentences were imposed in any of her cases. (PCR. v. 13, p. 566.)

Expert Lyon testified that she was familiar with the professional norms for the investigation and defense of capital cases in Florida in 1985-86. (PCR. v. 13, p. 570.) Those norms included arranging for a thorough mental health examination and pursuing signs of organic brain damage vigorously. (PCR. v. 13, p. 578.) An attorney should particularly look at the defendant's history for any major trauma involving the head. (PCR. v. 13, p. 579.)

Expert Lyon testified that Attorney Watson's investigation of Mr. Harvey's mental health fell below reasonable professional norms. (PCR. v. 13, p.

591.) In particular, Ms. Lyon stated that Attorney Watson should have recognized that Dr. Petrilla lacked forensic expertise or any understanding of statutory and non-statutory mitigating factors because he recommended self-esteem therapy and assertiveness training. (PCR. v. 13, pp. 592-93.) In Expert Lyon's opinion, Dr. Petrilla's recommendation was "patently ridiculous" for a capital case mental health evaluation and "seems to indicate really no understanding of the purpose of this investigation or of his evaluation." (PCR. v. 13, p. 593.)

Expert Lyon further opined that Attorney Watson was ineffective for himself failing to recognize the many red flags of organic brain damage in Mr. Harvey's case, including the car accident, medical records, and the tire iron incident. (PCR. v. 13, p. 595.) Expert Lyon testified that such evidence of organic brain damage:

> couldn't be any clearer indication of, barring like actually seeing the scar on a head or something, that you ought to take a look and see if there's organic brain damage. This is particularly important because studies have shown that organic brain damage is a mitigating factor that a death qualified jury pays attention to and cares about.

(PCR. v. 13, p. 595.)

Finally, Expert Lyon testified that Attorney Watson's failure to retain a psychiatrist after being told to do so by Dr. Petrilla violated reasonable professional norms. (PCR. v. 13, p. 597.) In Expert Lyon's opinion, Attorney Watson had "every indication in the world including from the psychologist that [he] needed a neurological psychiatric examination for organic brain damage," but he did not get one. (PCR. v. 13, p. 597.) Expert Lyon deemed Attorney Watson's failure to follow up and retain a psychiatrist "inexplicable," especially in light of the fact that he had won court approval to do so. (PCR. v. 13, p. 597.)

4. The Consequence Of Attorney Watson's Failure To Arrange For A Competent Mental Health Examination: A Psychiatric Evaluation Would Have Revealed Mr. Harvey's Organic Brain Damage And Severe Mental Illness, And Would Have Established The Presence Of Three Statutory Mitigating Factors.

The undisputed evidence from the 1998 hearing before Judge Geiger shows that Attorney Watson's approach to investigating, understanding, and assessing Mr. Harvey's mental health caused severe prejudice. It resulted in Dr. Petrilla presenting false testimony to the jury. Furthermore, it prevented the jury from hearing evidence of numerous statutory and non-statutory mitigating factors, including organic brain damage, that would have changed materially the balance of aggravating and mitigating factors to be considered by the trier of fact.

a. Attorney Watson's Refusal To Arrange For A Thorough Forensic And Psychiatric Examination Resulted In Undetected Errors By Dr. Petrilla That Prejudiced Mr. Harvey.

Since the time of Mr. Harvey's trial, Dr. Petrilla has been trained in neuropsychology, become Board-certified in the field, and regularly administers and interprets neuropsychological tests. (PCR. v. 15, pp. 968-69, 978-79.) During the 1998 evidentiary hearing, Dr. Petrilla was asked to review his work and interpretations from 1986 in light of his acquired neuropsychological training and experience. His testimony was extraordinary.

Dr. Petrilla testified that he made numerous critical mistakes during his prior evaluation of Mr. Harvey because of his "incompetence" at that time. (PCR. v. 15, pp. 969-70.) Dr. Petrilla stated that he did not understand or appreciate at the initial trial the potential significance of Mr. Harvey's 12-point differential on the Wechsler Adult Intelligence Scale Test ("WAIS-R"). (PCR. v. 15, pp. 965-67.) Dr. Petrilla has since learned, and testified before Judge Geiger, that anything over a 10-

point difference in verbal and performance scores is highly indicative of organic brain damage, particularly where, as with Mr. Harvey, the performance score is below the verbal score. (PCR. v. 15, pp. 965-66.) In addition, Dr. Petrilla testified that the Digit Symbol subtest of the performance portion of the WAIS-R is the most reliable indicator of organic brain dysfunction. (PCR. v. 15, pp. 967-68.) Mr. Harvey's score on the Digit Symbol subtest was his second-lowest score on all the subtests administered as part of the WAIS-R. (PCR. v. 13, p. 678.) Dr. Petrilla testified that Mr. Harvey's WAIS-R scores were two standard deviations below the mean and therefore "highly indicative of the probability of brain dysfunctioning." (PCR. v. 15, pp. 967-68.)

Dr. Petrilla also acknowledged that he misinterpreted Mr. Harvey's responses on the Bender-Gestalt examination, a shape and angulation test that is also a reliable screening device for organic brain damage. (PCR. v. 15, p. 969.) In 1986, Dr. Petrilla did not recognize any errors in Mr. Harvey's responses on the test. (PCR. v. 15, p. 969.) In reviewing those results at the August 1998 evidentiary hearing, however, Dr. Petrilla testified that "there [were] some angulation errors that I missed." He now identifies two obvious angulation errors by Mr. Harvey. (PCR. v. 15, pp. 969-70.) Those errors indicate that Mr. Harvey suffers from organic brain damage and, in fact, has the mental status functioning of a young child. (PCR. v. 15, p. 970.)

Dr. Brad Fisher, an experienced forensic neuropsychologist who examined Mr. Harvey in connection with the evidentiary hearing, compared Dr. Petrilla's 1986 conclusions to Mr. Harvey's raw psychological test data. Dr. Fisher confirmed that Dr. Petrilla made critical mistakes in his interpretation of Mr. Harvey's responses on the WAIS-R test (PCR. v. 13, pp. 675-76), in his failure to

recognize obvious, objective errors in order, sizing, and angulation in Mr. Harvey's responses to the Bender test (PCR. v. 13, p. 676), and in his interpretation of the digit symbol test. (PCR. v. 13, p. 678.)

Dr. Petrilla admitted these mistakes during the 1998 evidentiary hearing. For example, Dr. Petrilla testified that he failed to focus on Mr. Harvey's responses on the WAIS-R, Digit Symbol, and Bender-Gestalt tests because "I didn't understand significance with regard to the probability of brain dysfunctioning." (PCR. v. 15, p. 968.) He testified that he made errors in grading Mr. Harvey's responses on the Bender-Gestalt because "[i]t's a lack of competence on my part and lack of inexperience [sic] on my part with regard to dealing with adults." (PCR. v. 15, p. 970.) Finally, he testified that his passing comment in Mr. Harvey's suppression hearing to the effect that Mr. Harvey did not have organic brain damage was based on "my lack of competence in that area." (PCR. v. 15, p. 972, 990.) As Dr. Petrilla grudgingly concluded, "I don't like to get up here admit to this. I mean, this isn't one of my favorite times here." (PCR. v. 15, p. 994.)

b. A Competent Forensic And/Or Psychiatric Evaluation Would Have Revealed Evidence Of Organic Brain Damage, Severe Mental Illness, and Statutory Mitigating Factors.

At the evidentiary hearing, psychiatrist Dr. Michael Norko testified as to the mitigating evidence that a psychiatrist could have offered at Mr. Harvey's trial if Attorney Watson had followed through on his commitment to retain a psychiatrist. Dr. Norko is a psychiatrist who is board-certified by both the American Board of Forensic Psychiatry and the American Board of Psychiatry and Neurology. During his career, Dr. Norko has held positions as director and chief executive officer of the Whiting Forensic Institute in Connecticut, director of River Valley Mental Health Services in Connecticut, and as a private psychiatrist. Dr. Norko also has held a

teaching position in psychiatry at the Yale University School of Medicine for ten years. He has authored scores of scholarly articles in the field of psychiatry and is a member of the editorial board of two professional psychiatric journals. He is a Rappaport Fellow of the American Academy of Psychiatry & Law and a fellow of the American Psychiatric Association. (PCR. v. 11, pp. 261-68.)

In contrast to Dr. Petrilla, Dr. Norko had the benefit of extensive background and medical information about Mr. Harvey, conducted unrestricted clinical interviews with Mr. Harvey that included a discussion of the circumstances of the crime. (PCR. v. 11, pp. 269-73.) He found the following:

(1) Three statutory mitigating factors present on day of crime.

Dr. Norko testified that three statutory mitigating factors were present at the time of the offense: (1) Mr. Harvey lacked the capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law due to his organic brain dysfunction, impaired executive functions, depression, hyper arousal or impulse-control problems due to Post-Traumatic Stress Disorder, Dependent Personality Disorder, and intoxication at the time of the crime (PCR. v. 12, pp. 435-44); (2) Mr. Harvey acted under the substantial duress or domination of another, namely his co-defendant, Scott Stiteler (PCR. v. 12, pp. 444-51); and (3) Mr. Harvey committed the offense under the influence of an extreme mental or emotional disturbance, namely his Organic Brain Dysfunction, Major Depressive Disorder, Post-Traumatic Stress Disorder, and Substance Abuse disorders. (PCR. v. 11, p. 292, v. 12, pp. 434, 451-59.)

For unknown reasons, Dr. Petrilla was *not* asked to opine at the original trial on the presence or absence of statutory mitigating factors.[3] (PCR. v. 15, pp. 981-82.) As a result, the jury did not hear any professional opinion on the presence of statutory mitigating factors on the day of the crime.

(2) Severe mental illness, including organic brain damage

Dr. Norko also made medical diagnoses that Dr. Petrilla could not. Using objective diagnostic criteria found in the DSM III-R, the standard diagnostic tool for psychiatry, Dr. Norko testified that Mr. Harvey suffered from four objective mental illnesses at the time of the 1985 crime: (1) Organic Brain Dysfunction, consistent with both frontal lobe and brain stem damage; (2) Major Depressive Disorder; (3) Post-Traumatic Stress Disorder; and (4) Substance Abuse Disorders related to Mr. Harvey's long-term cocaine, amphetamine, sedative, and alcohol abuse. (PCR. v. 11, p. 290.) Evidence relating to each of these illnesses is addressed below.

(a) Organic Brain Damage

The uncontroverted evidence in this case is that Mr. Harvey suffers from organic brain damage, as reflected in both clinical observation and psychological testing. (PCR. v. 11, pp. 289-90, 298-308, 320, v. 13, pp. 657-68.)

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[3]At the August 1998 evidentiary hearing, however, Dr. Petrilla testified that based on his acquired knowledge and experience in the field of neuropsychology, and in light of his review of the circumstances of the crime and the additional developmental history developed by collateral counsel, the following statutory mitigating factors existed at the time of the crime: (1) Mr. Harvey acted under the substantial duress or domination of another; (2) Mr. Harvey lacked the capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law; and (3) Mr. Harvey committed the offense under the influence of an extreme mental or emotional disturbance. (PCR. v. 15, p. 982.)

Clinically, Dr. Norko diagnosed Mr. Harvey with post-concussion syndrome and significant personality change. (PCR. v. 11, pp. 297, 298, 304-05.) Mr. Harvey's post-concussion syndrome manifested itself through repeated head injuries that had a cumulative effect, including a 1979 car accident that claimed a girl's life and critically injured Mr. Harvey (PCR. v. 11, p. 298), loss of consciousness (PCR. v. 11, p. 298), amnesia (PCR. v. 11, p. 298), headaches (PCR. v. 11, p. 299), decreased attention (PCR. v. 11, pp. 299-300), staring into space (PCR. v. 11, pp. 299-300), memory problems (PCR. v. 11, p. 300), emotional changes (PCR. v. 11, pp. 300-01), depression and insomnia. (PCR. v. 11, pp. 298-303.)

Dr. Norko also observed a clinically significant personality change after Mr. Harvey's 1979 car accident. (PCR. v. 11, p. 304.) Those personality changes, which were confirmed by virtually every mitigation fact witness at the evidentiary hearing, included decreased attention (PCR. v. 11, p. 304), affective liability (PCR. v. 11, pp. 304-05), irritability (PCR. v. 11, p. 304), a sudden changing of expressed emotion or mood for no apparent reason (PCR. v. 11, pp. 304, 306), depression (PCR. v. 11, p. 307), a reckless or apathetic attitude (PCR. v. 11, pp. 307-308), staring into space (PCR. v. 11, p. 304), intolerance at being touched (PCR. v. 11, p. 306), excessive interpersonal withdrawal (PCR. v. 11, p. 307), hopelessness (PCR. v. 11, p. 307), and increased drug and alcohol use. (PCR. v. 11, p. 308.) Mr. Harvey's organic brain damage could be expected to cause him to respond quickly and suddenly in an unprovoked manner to stimulus around him, develop rages or irritability, and explode into sudden violent behavior. (PCR. v. 12, p. 437.)

Dr. Norko confirmed his clinical conclusions about Mr. Harvey's organic brain dysfunction with Mr. Harvey's psychological test results. For

example, Mr. Harvey's scores on his IQ test showed a 12 point difference between his verbal and performance scores. (PCR. v. 11, p. 310.) A difference of 10 points or more indicates organic brain damage. (PCR. v. 11, p. 310.) Dr. Norko also examined the raw data of Mr. Harvey's responses to the Halstead-Reitan trail making test (administered by Dr. Fisher) and the WAIS-R test (administered by Dr. Fisher and Dr. Petrilla), both of which indicated organic brain damage. (PCR. v. 11, pp. 316-17.) Finally, Dr. Norko found that Mr. Harvey's psychological test responses indicated problems with abstract thinking and executive functions, which are higher level brain functions attributed to the frontal lobes. (PCR. v. 11, pp. 315-16.) Executive functions affect an individual's organization, insight, foresight into planning, decision making, and behavior. (PCR. v. 11, p. 316.)

(b) Debilitating Depression

Besides organic brain damage, Dr. Norko diagnosed Mr. Harvey with a Major Depressive Disorder. (PCR. v. 11, p. 320.) Mr. Harvey had been predisposed to major depressive disorders by virtue of a family history of mental illness, the poor nutrition of his mother while pregnant with Mr. Harvey, exposure to toxic pesticides as a child, alcohol abuse, and head trauma. (PCR. v. 11, p. 321.) Dr. Norko also identified several depressive periods during Mr. Harvey's life, including the period during which the crime was committed. (PCR. v. 11, pp. 322-23.)

Mr. Harvey demonstrated classic symptoms of major depression including weight loss, anorexia, sleep difficulties, poor concentration, and suicide attempts. (PCR. v. 11, p. 323.) Mr. Harvey attempted suicide on many occasions prior to his arrest that included deliberately crashing his car into bridges and an episode of putting a loaded gun to his head. (PCR. v. 11, pp. 286-87.) After his

arrest, Mr. Harvey attempted to kill himself several times by cutting his wrist with wire found in his cell, making a noose out of a blanket, cutting his wrist with a scraped-down dime, and making a noose with bedding material. (PCR. v. 11, pp. 287-88.) Mr. Harvey's test results on the WAIS-R and MMPI confirm a major depressive disorder. (PCR. v. 11, pp. 323-24.)

(c) Post-Traumatic Stress Disorder

Mr. Harvey also suffered from Post-Traumatic Stress Disorder ("PTSD") brought about by the 1979 car accident in which Mr. Harvey witnessed the gory death of a female companion and barely escaped with his own life. (PCR. v. 11, pp. 324-325.) Mr. Harvey continues to experience the accident, has nightmares, sleeping problems, anger outbursts, and concentration problems. (PCR. v. 11, pp. 326-327.) PTSD restricts the ability of one to see options and causes problems in planning and withdrawing from situations. (PCR. v. 11, pp. 327-328.) PTSD also creates a "hyper arousal phenomenon" that causes an exaggerated reaction to stimuli. (PCR. v. 11, p. 328.) Dr. Norko testified that Mr. Harvey probably experienced an exaggerated startle response when he reacted to the Boyds' sudden attempt to run by pulling the trigger, and that his exaggerated response was exacerbated by his organic brain damage. (PCR. v. 11, p. 328.)

(d) Dependent Personality Disorder

Dr. Norko diagnosed Mr. Harvey with Dependent Personality Disorder. (PCR. v. 11, p. 328.) Finding that Mr. Harvey was by nature shy, quiet, withdrawn, and consistently described by friends and family as a follower, Dr. Norko testified that Mr. Harvey was dependent on others for making decisions and would defer to the wishes of others. (PCR. v. 11, pp. 328-330.) Mr. Harvey's responses on the MMPI and the thematic apperception test (administered by Dr.

Fisher) support Dr. Norko's diagnosis. (PCR. v. 11, p. 334.) Dr. Norko testified that Mr. Harvey was dependent on his co-defendant, Scott Stiteler. (PCR. v. 11, p. 332.)

(e) Substance Abuse Disorders

Finally, Dr. Norko diagnosed Mr. Harvey with several substance abuse disorders, including alcohol abuse, cocaine abuse, amphetamine abuse, and sedative abuse. (PCR. v. 11, p. 337.) Mr. Harvey's family abused alcohol and Mr. Harvey himself began drinking heavily – to the point of passing out – as early as age 14. (PCR. v. 11, pp. 338-39.) The substance abuse exacerbated Mr. Harvey's organic brain damage. (PCR. v. 11, p. 340.) Mr. Harvey drank two six-packs of beer and did cocaine on the day of the crime. (PCR. v. 11, p. 340.)

(3) <u>Non-statutory mitigating factors</u>

In addition to his analysis of Mr. Harvey's mental illnesses and his application of those mental illnesses to the statutory mitigating factors, Dr. Norko testified that, through his interviews with Mr. Harvey and Mr. Harvey's friends and family, as well as in his review of affidavits submitted by those individuals, various non-statutory mitigating factors existed at the time of the offense. Those included: maternal and paternal family dysfunction; physical abuse of Mr. Harvey's mother; probable malnutrition of Mr. Harvey's mother during her pregnancy with Mr. Harvey; physical abuse as a child; emotional abuse as a child; lack of medical care for illnesses; exposure by Mr. Harvey to toxic substances like pesticides; domestic violence in Mr. Harvey's household; poor school performance by Mr. Harvey; significant head trauma on several occasions; recklessness and self-destructive practices; periods of major depression; sleep pattern dysfunction; nightmares and flashbacks about a traumatic event; an exaggerated need for approval from others; a

detached, distant, and shy disposition; fear of abandonment; alcoholism; drug addiction secondary to amphetamine, marijuana, hallucinogen, and sedative abuse; blackouts not caused by alcohol or drug use; hyperactivity; stupor; a submissive "follower" personality; weight loss; and suicide attempts.[4] (PCR. v. 11, pp. 279-289, 337, v. 12, pp. 466-69.)

c. A Competent Forensic Psychological Examination Would Have Produced Mitigating Evidence For Mr. Harvey.

The evidence at the hearing also showed what an appropriate forensic psychological examination would have revealed. Dr. Brad Fisher, a forensic psychologist, testified as to the results of his forensic psychological examination on Mr. Harvey. Dr. Fisher is a clinical forensic psychologist who, at the time of the hearing, had practiced for 22 years. He is board-certified by the American Board of Forensic Examiners and his career has included extensive experience evaluating criminal defendants, including developing and directing large-scale programs for Alabama, North Carolina, and the Department of Justice. Dr. Fisher has taught forensic psychology at a number of institutions, including Duke University and the University of North Carolina. (PCR. v. 13, pp. 648-52.)

Dr. Fisher, who both administered his own psychological tests and reviewed raw data from the tests administered by Dr. Petrilla, echoed many of Dr. Norko's conclusions during his testimony. For example, Dr. Fisher opined that three statutory mitigating factors were applicable to Mr. Harvey at the time of the offense. Dr. Fisher testified that (1) Mr. Harvey committed the offense under the influence of an extreme mental or emotional disturbance (PCR. v. 13, p. 659); (2)

[4]Each of these factors were also supported during the 1998 evidentiary hearing by the testimony of mitigation fact witnesses. The testimony of those witnesses is summarized infra at pp. 26-31.

Mr. Harvey acted under the substantial duress or domination of another (PCR. v. 13, p. 659); and (3) Mr. Harvey lack the capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law. (PCR. v. 13, p. 660.)

Likewise, Dr. Fisher diagnosed Mr. Harvey as suffering from organic brain damage, post-traumatic stress disorder, depressive disorder, substance abuse, and dependent personality disorder on the day of the crime. (PCR. v. 13, p. 661.) Dr. Fisher testified that he found the head injuries sustained by Mr. Harvey in the 1979 car accident and after being hit with a tire iron as significant "red flags" suggesting organic brain damage. (PCR. v. 13, pp. 663-64.) Dr. Fisher recognized evidence of organic brain damage in Mr. Harvey's responses on the Bender Visual Motor Gestalt test, the Halstead-Reitan battery, the digit symbol test, and the WAIS-R test, in which Dr. Fisher recorded a clinically significant difference between scores on the performance and verbal portions of the test. (PCR. v. 13, pp. 665-67.)

B. ATTORNEY WATSON FAILED TO INVESTIGATE OR PRESENT NONSTATUTORY MITIGATING EVIDENCE CONCERNING MR. HARVEY'S TROUBLED AND VIOLENT PAST.

Claim 2(a) of Mr. Harvey's Rule 3.850 motion, remanded by this Court, asserts that Attorney Watson's investigation of statutory and non-statutory mitigating circumstances was grossly ineffective. (R. 1143-1267.) Evidence adduced at the August 1998 evidentiary hearing on this issue shows the following.

1. Attorney Watson Limited His Penalty Phase Investigation To Finding Only People Who Would Say That Mr. Harvey Had "Socially Redeeming Qualities."

The court authorized and approved funds for Attorney Watson to hire an investigator in connection with his representation of Mr. Harvey. (PCR. v. 13, p. 761.) Two months after being appointed to the representation, Attorney Watson hired investigator Joseph Krumey. (PCR. v. 10, p. 91.) He was the only investigator at the time. (PCR. v. 13, p. 761.) Attorney Watson immediately sent Krumey a single letter with instructions restricting Krumey's entire investigation effort to finding individuals who would testify that Mr. Harvey had "redeeming social qualities." (PCR. v. 13, p. 759.)

Krumey testified during the 1998 hearing that he did exactly as Attorney Watson had asked, interviewing some witnesses, and providing written statements to Attorney Watson from individuals who had "nice" things to say about Mr. Harvey. (PCR. v. 13, pp. 759-60, 763.) He characterized Attorney Watson's overall investigation as "very poor." (PCR. v. 13, p. 769.) He said that Attorney Watson did not return his follow-up phone calls, and that Attorney Watson met with him only once. (PCR. v. 13, p. 760.) Krumey did not receive any additional instructions from Attorney Watson. (PCR. v. 13, p. 761.)

Attorney Watson disagreed with Krumey's assessment. He claims the problem that was Krumey did not perform well and was not timely. (PCR. v. 10, pp. 90-91.) Whatever the truth, Attorney Watson and Krumey agree that Krumey was fired eight months before trial. (PCR. v. 10, p. 90, v. 13, p. 770.) Instead of hiring a new investigator, Attorney Watson went without investigative assistance until just before the eve of trial. At that time, he hired a substitute "investigator,"

Larry Todd Barninger, for the sole purpose of serving subpoenas. (PCR. v. 12, pp. 411-12.)

Attorney Watson's limitation on his investigators to find people who would say that Mr. Harvey was "nice" or had "socially redeeming qualities" (PCR. v. 12, pp. 412, 418), and to serve trial subpoenas together with his limited inquiry into Mr. Harvey's mental health, was a disaster. It resulted in a blind eye being turned to evaluation of an array of defenses to both guilt/innocence and penalty issues, and a complete failure to discover or consider the truth of Mr. Harvey's life.

The evidence showed, for example, that Attorney Watson made no effort to uncover facts that could serve as nonstatutory mitigating factors, such as evidence of birth records, family health records, substance abuse, trauma, abuse, illness, and life history. (PCR. v. 12, pp. 411-12.) He did not investigate whether any evidence supported the heinous, atrocious, and cruel aggravating factor -- the Boyds' ability to hear Mr. Harvey's alleged discussions -- despite notes in his own handwriting suggesting that Mr. Harvey told him the Boyds were out of earshot. (PCR. v. 10, pp. 94-97.)

He directed Mr. Krumey *not* to investigate (or to suppress information he discovered about) Mr. Harvey's prenatal care, dysfunctional characteristics in Mr. Harvey's paternal and maternal extended families, birth complications, childhood accidents, medical care while a child, exposure to toxic substances, poverty of the family, alcohol or drug abuse, domestic abuse, mental health problems, suicide attempts, depression, whether Mr. Harvey was a leader or a follower, or Mr. Harvey's co-defendant, Scott Stiteler. (PCR. v. 13, pp. 763-66.)

Attorney Watson's approach is illustrated in the now fourteen-year old notes that Mr. Harvey's father kept, in Attorney Watson's own handwriting,

reflecting not what a reasonable investigation would have revealed, and not the truth of the Harvey family, but what Attorney Watson wanted the mitigation witnesses to say at trial, regardless of its veracity. (Def. Ex. 23.) Those notes indicate that Attorney Watson wanted Mr. Harvey's father to state that the Harvey family was good and loving, regardless of the completeness or truthfulness of that statement. (PCR. v. 14, pp. 789-90.)

As demonstrated by unrefuted evidence presented to Judge Geiger, if Attorney Watson had investigated Mr. Harvey's background and life thoroughly and responsibly, he would have discovered ample evidence that could have been used to construct a more compelling -- and more truthful -- mitigation case. Some of the evidence he would have discovered and been able to consider and evaluate is set forth below.

2. Attorney Watson Failed To Consider Or Present Evidence Of Mr. Harvey's Troubled And Violent Past.

If Attorney Watson had conducted a reasonable mitigation investigation instead of immediately and permanently latching onto a theory of only presenting Mr. Harvey's "socially redeeming qualities," he would have been armed in the penalty phase with substantial mitigation evidence that was readily available. (PCR. v. 12, p. 412, v. 13, pp. 579-80, 595, 597-598.)

a. Poverty and poor living conditions

The evidence, for example, would have shown that Mr. Harvey's mother and father were raised in a dysfunctional, abusive, poverty-stricken environment in which they had no role models for good parenting and apparently took no particular interest in it. Mr. Harvey's parents were both from broken homes. (PCR. v. 14, p. 793, v. 15, p. 838.) Mr. Harvey's father grew up on a

tenement farm in rural Alabama where the family's rickety shack permitted him to see the stars at night and feel the cold wind at night through the cracks. (PCR. v. 14, p. 793.) He quit school at age 15 to pick cotton. (PCR. v. 14, p. 793.) His family did not have adequate access to food or medical care. (PCR. v. 14, p. 793.) Mr. Harvey's mother grew up in a similar environment. She knew, for example, that her father was repeatedly unfaithful to her mother. (PCR. v. 15, p. 910.) Her father beat her with a whip. (PCR. v. 15, p. 910.) Her father also abused her mother, including one time in which Mr. Harvey's mother had to intervene as a child to prevent her father from choking her mother and another time to prevent her mother from shooting her father with a gun. (PCR. v. 15, p. 910.) Mr. Harvey's mother married Mr. Harvey's father at age 15 and quickly became pregnant with Mr. Harvey. Even though she had previously had a miscarriage, she ate poorly and infrequently during her pregnancy with Mr. Harvey because "I didn't want to gain weight and lose my 15 year old girl figure." (PCR. v. 15, p. 911.) Mr. Harvey was born with a physical problem with his head, which one witness described as being "stretched out" and another witness described as being "cone shaped." (PCR. v. 14, p. 839, v. 15, p. 911.)

Mr. Harvey and his siblings were raised in abject poverty. (PCR. v. 14, pp. 796, 812, 829.) The family was very poor and food was often scarce. (PCR. v. 14, pp. 797, 813, 829.) Moreover, except for one member of the Harvey family who suffered from debilitating scoliosis (PCR. v. 14, p. 811), the Harvey children did not receive any medical care from doctors whatsoever during their childhood. (PCR. v. 15, pp. 883, 912-13.)

Eventually, the poverty in the family forced them to put Mr. Harvey to work at MacArthur's Dairy at a very young age so that his family could use his

wage to eat. (PCR. v. 14, pp. 795, 828, v. 15, pp. 880-81, 915.) He also worked in the citrus fields to support the family rather than attend school, and Mr. Harvey did not, in fact, ever complete high school as a result. (PCR. v. 15, p. 880.) During this work in the fields and his childhood living at Evans Properties, Mr. Harvey was exposed over many years to deadly pesticides and neurotoxic chemicals. (PCR. v. 14, pp. 798-99, 913-15.) Mr. Harvey frequently experienced headaches and diarrhea, which were similar to the symptoms experienced by other children who played in or near the pesticides. (PCR. v. 14, p. 798-99.)

b. <u>Abusive family relationships</u>

The Harvey children were emotionally impoverished and abused by their parents. The testimony at the hearing established that the Harvey family was not loving or affectionate, and that Mr. Harvey's parents did not show interest in the well-being of their children. (PCR. v. 14, p. 816, v. 15, pp. 881, 916.) Both Mr. Harvey's father, Harold Lee Harvey, Sr., and his step-grandfather, Ed Weeks (to whom Mr. Harvey was very close), were alcoholics. (PCR. v. 14, pp. 799, 801, v. 15, pp. 882, 916-17.) Both of these important figures in Mr. Harvey's life drank on a daily basis. (PCR. v. 15, pp. 916-17.) Mr. Harvey's father took the family grocery money to buy alcohol and drank "just about all the time." (PCR. v. 14, p. 799.)

The Harvey family also was abusive. Mr. Harvey's father beat young Mr. Harvey harshly with solid wooden boards or whatever was around at the time. (PCR. v. 14, pp. 799-800.) Those beatings included blows everywhere on Mr. Harvey's body, including his face and head. (PCR. v. 14, p. 800.) Not surprisingly, these beatings were often administered when Mr. Harvey's father was drunk.

(PCR. v. 14, pp. 799-800.) Mr. Harvey's mother, Shirley Harvey, also beat him. (PCR. v. 15, p. 917.)

In addition to beating Mr. Harvey, Mr. Harvey's father also regularly beat his wife, Shirley. (PCR. v. 14, pp. 800, 814, v. 15, p. 917.) Family members testified that Mr. Harvey routinely witnessed the domestic abuse between his mother and father when he was a child, and even physically intervened on some occasions to prevent exceptional violence between his parents, including one occasion where Mr. Harvey stopped his mother from shooting his father with a shotgun. (PCR. v. 15, pp. 800, 883, 917.)

Perhaps because of his unfortunate familial environment, Mr. Harvey was described as "odd" during his childhood. (PCR. v. 14, p. 814.) Mr. Harvey's father thought Mr. Harvey had "some kind of problem" but did not take him to a doctor. (PCR. v. 14, p. 795.) Mr. Harvey had low self esteem and a low self image. (PCR. v. 15, p. 883.) His parents, teachers and friends noticed that, although good-natured, Mr. Harvey was slow to comprehend things, unable to make independent decisions and frightened of being alone. (PCR. v. 14, pp. 814, 856.) He was shy and withdrawn. (PCR. v. 14, p. 830.) Witnesses repeatedly described Mr. Harvey as a "follower" and as someone who would do "whatever the group wanted," but who would not lead. (PCR. v. 14, pp. 803, 818, v. 15, pp. 888, 912, 950.) Others took advantage of Mr. Harvey's docile nature, including one individual who snuck up behind Mr. Harvey one night and hit him in the head with a tire iron, producing a gash that was long and deep. (PCR. v. 15, p. 918.) Mr. Harvey initially sought medical attention for the wound, but abandoned it after several hours of waiting at the hospital. (PCR. v. 15, p. 918.)

c. Tragic 1979 car accident and Mr. Harvey's subsequent and inexplicable personality change

On March 3, 1979, Mr. Harvey was involved in an auto accident in which he was critically injured and suffered a head trauma that left him unconscious and unable to remember details preceding the accident. (PCR. v. 14, pp. 802, 815, v. 15, p. 884.) The accident killed Mr. Harvey's female companion, who was driving the vehicle. (PCR. v. 10, p. 88, v. 11, pp. 282-283.) At the hearing, Mr. Harvey's family described their first visit to the hospital on the night of the accident, where they witnessed Mr. Harvey's semi-conscious state, the glass protruding from his head and neck, and blood streaming down from his nose and ears. (PCR. v. 14, p. 802, v. 15, p. 884.) Mr. Harvey's mother fainted at the sight. (PCR. v. 14, p. 802.) After first seeing Mr. Harvey after the accident, both his mother and father "thought he was dead." (PCR. v. 14, p. 802.)

Mr. Harvey suffered severe physical and emotional injuries as a result of the accident that forever altered his behavior dramatically. (PCR. v. 14, pp. 803, 815, 856, v. 15, pp. 884-85, 921, 949.) Mr. Harvey's family and friends -- including David Woodall, a retired state correctional officer who formerly worked with Mr. Harvey -- testified that in the months and years following the accident, Mr. Harvey became moody (PCR. v. 14, p. 815, v. 15, p. 885), silent and withdrawn (PCR. v. 15, p. 885), irritable (PCR. v. 14, p. 815), had inexplicable mood swings (PCR. v. 14, p. 815, v. 15, p. 885), experienced headaches (PCR. v. 14, pp. 803, 856-858, v. 15, p. 920), and became easily distracted. (PCR. v. 14, pp. 803, 856-857.) Mr. Harvey began repeating things to himself and experienced hearing difficulties. (PCR. v. 14, pp. 813-814, v. 15, p. 885.) His legs would shake

involuntarily for no apparent reason. (PCR. v. 14, p. 860, v. 15, p. 920.) He had unexplained blackouts. (PCR. v. 14, pp. 856-57.)

Mr. Harvey also experienced intense feelings of guilt and remorse due to the accident and the death of his companion, manifested by nightmares and flashbacks, and by panicked questions of whether he was somehow responsible for the tragedy. (PCR. v. 11, p. 326.) Sometimes he even denied that he had been in an accident. (PCR. v. 15, p. 948.) Mr. Harvey increased his drug and alcohol use during this period, possibly in an attempt to self-medicate himself through the physical and emotional pain. (PCR. v. 15, pp. 948-49.) Several individuals observed Mr. Harvey engaging in uncharacteristic reckless behavior that many characterized as suicide attempts. (PCR. v. 11, p. 286, v. 14, pp. 815-16, v. 15, pp. 892.) Mr. Harvey also described an occasion when he put a gun to his head, but for some reason failed to pull the trigger. (PCR. v. 11, p. 287.)

d. <u>Mr. Harvey's dependent relationships and behavior</u>

Mr. Harvey was highly dependent on everyone in his life. Mr. Harvey dearly loved his first real girlfriend, Sue Keener (PCR. v. 14, p. 816, v. 15, p. 887), but friends and family of Mr. Harvey described Ms. Keener as the clear dominating force in the relationship. (PCR. v. 15, pp. 888, 950.) One friend, Jimmy Maynard Lassiter, colorfully described the relationship as one in which Mr. Harvey would follow Ms. Keener around "like a lost pup." (PCR. v. 15, p. 950.) Ms. Keener ended the relationship with Mr. Harvey, and he was devastated. (PCR. v. 14, pp. 816-17.)

Later, Mr. Harvey married a woman named Karen Frank. (PCR. v. 14, p. 805.) The two married because Ms. Frank was pregnant; it does not appear that Mr. Harvey loved Ms. Frank or that he wanted to get married. (PCR. v. 12, p. 445.)

Friends noted that Ms. Frank was of "a higher social class" than Mr. Harvey, which was apparently a reference to the fact that Ms. Harvey was a college-educated schoolteacher who came from a middle-class family. (PCR. v. 15, p. 889.) Witnesses at the hearing testified that Ms. Frank dominated Mr. Harvey and constantly urged him to provide her with material items, such as a car, an improved double-wide mobile home, and new furniture. (PCR. v. 14, pp. 805, 817-18, v. 15, pp. 888-89.) Mr. Harvey attempted to satisfy his wife at all costs, including by working two jobs. (PCR. v. 14, pp. 817-18.) Ms. Frank chastised Mr. Harvey about his weight; Mr. Harvey lost 40 pounds within a matter of weeks as a result. (PCR. v. 14, pp. 805, 817-18, v. 15, pp. 888-89.) Ms. Frank refused to have sex with Mr. Harvey at any time after their wedding night. (PCR. v. 14, p. 806.) The couple produced a daughter, but Mr. Harvey has to this day never seen that daughter. (PCR. v. 15, p. 921.)

Finally, several witnesses testified to Mr. Harvey's relationship with his co-defendant, Scott Stiteler. Witnesses suggested that Mr. Stiteler was a "troublemaker." (PCR. v. 15, p. 951.) They testified that Mr. Stiteler was the dominant person in the relationship and that Mr. Harvey was, again, the quintessential "follower." (PCR. v. 14, p. 804, v. 15, pp. 891, 951.)

3. Expert Testimony That Attorney Watson's Failure To Investigate Mr. Harvey's Background Violated Reasonable Professional Norms.

Capital defense expert Andrea Lyon testified that professional standards in 1985-86 required attorneys to begin immediately to investigate both the guilt and penalty aspects of the case. (PCR. v. 13, p. 575.) In addition, Expert Lyon stressed that the investigation must be comprehensive enough to enable the

attorney to make legitimate strategic choices about the ways in which to defend the case. (PCR. v. 13, p. 577.) As she put it:

> [I]f you don't investigate and if you make the decision first and then try to find facts to fit it you're not rendering effective assistance of counsel which is what I believe occurred in this particular case.
>
> * * *
>
> You need to consider all possible theories of the case. That is, don't decide what the theory is until you really investigated the case and really thought about all the potential theories.

(PCR. v. 13, pp. 578, 580.)

Expert Lyon testified that Attorney Watson's investigation and presentation of statutory and non-statutory mitigating circumstances "fell far below" the applicable professional norms. (PCR. v. 13, p. 586.) Ms. Lyon noted that Attorney Watson developed almost no social history of Mr. Harvey and clearly chose a theory of mitigation without investigating any facts. For example, Expert Lyon testified that Attorney Watson's instruction to his investigator to find people who would say nice things about Mr. Harvey "indicates to me sort of putting the cart before the horse -- that is that Mr. Watson had decided that that was going to be his theory of mitigation and, therefore, didn't want to hear or wasn't interested in or didn't look for any other possible facts that were true about his client." (PCR. v. 13, p. 589.)

Finally, Expert Lyon testified that, in her opinion, a jury could have been persuaded to impose a life sentence "if the jury had known what they had a right to know, if they had understood what they had a right to understand, if they had recognized that Mr. Harvey had enormous problems, physical and

psychological problems." (PCR. v. 13, p. 611.) Drawing on her own experience, Expert Lyon observed:

> I have seen cases as egregious as this where the death penalty has been imposed and I've seen and tried cases as egregious or worse where the death penalty had not been imposed and the difference is understanding what mitigation is, understanding how to approach a jury, not confronting their belief systems, and understanding that the jury needs to know why this happened in order to have any chance of persuading them that the mitigation, which is not an excuse for anything, is just simply a reason to punish something less than death.

(PCR. v. 13, p. 612.)

C. ATTORNEY WATSON'S ARGUMENTS AND STATEMENTS TO THE JURY WERE UNCONSTITUTIONAL AND *PER SE* INEFFECTIVE.

Claim 1(f) in Mr. Harvey's Rule 3.850 motion, remanded by this Court, alleges ineffective assistance of counsel in the guilt phase of the trial because Attorney Watson conceded Mr. Harvey's guilt in his opening statement without Mr. Harvey's consent. This Court found merit to the allegation, noting that: "[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." 656 So. 2d at 1256.

The evidence developed at the evidentiary hearing concerning this issue, as well as Attorney Watson's other remarks to the jury, is set forth below.

1. Attorney Watson Conceded Mr. Harvey's Guilt to Murder In His Opening Statement Of The Guilt Phase.

Attorney Watson acknowledges that he conceded Mr. Harvey's guilt to murder. (PCR. v. 10, p. 105.) Because Attorney Watson felt that a jury would convict Mr. Harvey "of something," (PCR. v. 10, p. 107), he decided to "specifically say [Mr. Harvey's] guilty of murder." (PCR. v. 10, p. 105.) His

theory was to argue for second-degree murder because he believed he could "tiptoe through Florida case law" and make an argument for second-degree murder while still conceding Mr. Harvey's guilt. (PCR. v. 10, pp. 106-07.)

The trial in this case began on June 13, 1986. The Court instructed the jury that Mr. Harvey had entered a plea of "not guilty" and must be presumed innocent until proven guilty. The government opened its case. Attorney Watson then stood and addressed the jury. His first words were:

> Harold Lee Harvey is guilty of murder. If anything is established over the next week it will be that Harold Lee Harvey is guilty of murder. I have been doing defense work for some time. I've never said that in a court of law that my client is guilty of murder. But he is. (R. 1859-60.)

Attorney Watson continued his opening statement with more concessions. He told the jury, for example, that :

> The physical act that he [Mr. Harvey] committed was that he pulled the trigger on what was an automatic military weapon firing it into a room, discharging projectiles that hit human beings and killed them. (R. 1860.)
>
> * * *
>
> The evidence will show that this case is the story of a robbery, a robbery that went very badly. (R.1861.)
>
> * * *
>
> This is the story of how Harold Lee Harvey, Jr. killed Mr. and Mrs. Boyd. (R. 1861.)
>
> * * *
>
> The evidence will show that based upon Harold Lee Harvey, Jr.'s need for money he came into friendship with Scott Stiteler and the two of them put together a plan. (R. 1861.)
>
> * * *

> I believe that evidence will show that the combination of Scott Stiteler and Harold Lee Harvey was a little bit like a combination of gasoline and a lit match. (R. 1861.)
>
> * * *
>
> And then it [the murders] happened just about the way that Mr. Morgan [State's Attorney] said it did [in his opening statement]. (R. 1863.)
>
> * * *
>
> And they had this conversation and without question what was discussed during this conversation was whether or not to kill these two people. (R. 1864.)
>
> * * *
>
> When evil gets set in motion one thing leads to another. (R. 1864.)
>
> * * *
>
> Lee looked in, holding the gun, and these two people said, "what are you going to do with that?" And got up to run. At that point Lee fired the automatic weapon into the room spraying projectiles throughout the room, hitting a wall, hitting their bodies, hitting another wall. (R. 1865.)
>
> * * *
>
> And then they closed the door and they began to try to make a quick flight away from there. And then as part of the complete disintegration of this plan Lee went back inside to pick up the shells, the brass shells. (R. 1865.)
>
> * * *
>
> Lee committed the crime; Lee gave the police the evidence. (R. 1867.)

Attorney Watson made the same sorts of concessions to the jury during his guilt phase closing argument:

> The Boyds, Mr. and Mrs. Boyd are dead. Lee shot Mr. and Mrs. Boyd and killed them. (R. 2460.)
>
> * * *

> Lee did it with the weapon that was introduced into evidence here . . . and he did it in the way that he told the police he did it, in the long statement that he gave them. (R. 2460.)
>
> * * *
>
> Now, the State will say, well, if you don't buy the robbery we are going to tell you that there was a burglary going on there, and there may have been. I would say that burglary was committed there. The evidence would be that Lee entered their home without permission, with the intent to steal, and he did, in fact, steal. (R. 2469-70.)
>
> * * *
>
> It becomes important because the judge will instruct you that for felony murder it must be proved beyond a reasonable doubt that the person was either engaged in one of the felonies that he will describe, robbery, burglary, and kidnaping is the third one -- either engaged in it or escaping from it. (R. 2470.)
>
> * * *
>
> You may even say that they had decided to commit the murder at the time of the shooting. (R. 2472.)
>
> * * *
>
> Now, obviously Mr. and Mrs. Boyd were shot again after the robbery and after the initial shooting. I can only say at that point that the intent at that point was not so much to kill as it was to stop the killing. (R. 2473.)

2. Attorney Watson Misinterpreted The Law And Actually Conceded Mr. Harvey's Guilt To First-Degree Murder.

Although Attorney Watson testified that he conceded Mr. Harvey's guilt as part of an attempt to "tiptoe through Florida case law" on felony murder, the evidence shows that he misunderstood the law and conceded first-degree murder. (PCR. v. 13, pp. 640-42.)

Because Attorney Watson did not investigate or assess, he gave an opening statement that was, according to Expert Lyon, the functional equivalent of a plea to the crime charged of first-degree murder. (PCR. v. 13, pp. 609, 640.) As

Attorney Watson should have known, under Florida law at that time and now, first-degree, death-eligible murder includes a murder committed with premeditation or a murder committed while the defendant is engaged in, or escaping from, a felony, including burglary and robbery. (PCR. v. 13, pp. 640-42.) Attorney Watson conceded premeditation by stating -- without any factual basis -- that Mr. Harvey "had decided to commit the murder at the time of the shooting." (R. 2472.) He also conceded that Mr. Harvey shot the Boyds while escaping from his burglary or kidnaping. (PCR. v. 13, p. 640.) Expert Lyon testified that Watson's combined concession of the planned robbery or burglary and Mr. Harvey's participation in the murder of the Boyd's in conjunction with that robbery unequivocally established the elements of felony first-degree murder. (PCR. v. 13, p. 640.)

3. Mr. Harvey Did Not Consent To Attorney Watson's Statements And Was Not Informed Of Them.

The 1998 evidentiary hearing included evidence from four pertinent sources as to whether or not Mr. Harvey consented to Attorney Watson's decision to concede guilt to any type of murder (including second-degree murder) -- documents, and the testimony of Mr. Harvey, Attorney Watson, and psychiatrist Dr. Michael Norko. Taken together, that evidence supports the conclusion that Mr. Harvey did not consent to any admissions of guilt by Attorney Watson.

The documentary evidence is significant primarily for what it does *not* contain. Although Attorney Watson conceded Mr. Harvey's guilt to both first and second-degree murder, there is no on-the-record consent from Mr. Harvey to Attorney Watson's action. There is no affidavit from Mr. Harvey consenting to the admissions. (PCR. v. 10, p. 108.) Similarly, Attorney Watson's files do contain any memoranda, notes, or other documentation indicating that Attorney Watson

discussed with Mr. Harvey his plan to concede guilt or reflecting Mr. Harvey's consent to that action, (PCR. v. 10, p. 108), although Attorney Watson's files do contain other informal notes on subjects that Attorney Watson appeared to consider important, such as Dr. Petrilla's recommendation to retain a psychiatrist. (Def. Ex. 4, PCR. v. 10, p. 82.)

Mr. Harvey himself testified at the evidentiary hearing, stating that he did not consent to Attorney Watson's act of conceding his guilt. Mr. Harvey's unequivocal testimony is that he did not consent to any statement being made to the jury that he was guilty of first-degree murder, second-degree murder, or any murder. (PCR. v. 15, p. 931.) Indeed, Mr. Harvey testified that Attorney Watson did not even inform him of the strategy of arguing for second-degree murder. (PCR. v. 15, p. 933.)

Finally, Attorney Watson has testified twice on this issue, once during the 1993 evidentiary hearing and once during the 1998 evidentiary hearing. During the 1993 evidentiary hearing, Attorney Watson testified that he had absolutely no recollection of discussing his strategy with Mr. Harvey before he executed it on the first morning of trial. The 1993 transcript reflects the following:

Q: Do you recall asking your client, Mr. Harvey, whether he consented to your making the statement before you made it?

A: I don't know if I did or not.

Q: You don't recall?

A: I don't recall.

Q: But you have no independent recollection of going to him and asking him if you could make that statement or take that strategical path?

A: It would be my recollection today that I discussed with him whether I was going to argue not guilty or

a lesser included offense. I would be shocked to learn that we never communicated that. I doubt I went over the specific statements and the opening statement with him.

Q: So sitting here today you have no recollection regarding what you asked him in that respect?

A: That's correct.

(CR. 139.)

During the 1998 evidentiary hearing, Attorney Watson testified that he now thought he remembered leaning over to Mr. Harvey seconds before his opening statement and notifying Mr. Harvey of his intent to concede guilt so that Mr. Harvey would not have an adverse reaction in front of the jury when he heard the words, and that Mr. Harvey nodded. (PCR. v. 10, pp. 105-06.) In other words, Attorney Watson told Mr. Harvey what he planned to do in order to prevent an embarrassing reaction, not to obtain Mr. Harvey's consent. Attorney Watson also testified that he may have discussed with Mr. Harvey the "general landscape of the defense" prior to the day of trial, but Attorney Watson did not testify that he specifically informed Mr. Harvey of his plan to concede guilt nor did he testify that he requested or obtained Mr. Harvey's consent to that action. Instead, Attorney Watson testified that he found Mr. Harvey to be slow, submissive, and agreeable.
(PCR. v. 1, p. 87.)

Dr. Norko testified that Attorney Watson's ambush of Mr. Harvey on the morning of trial, seconds before opening statements would not have been sufficient to enable Mr. Harvey to consent knowingly and voluntarily to Attorney Watson's decision to concede his guilt to murder. (PCR. v. 12, p. 461.) In light of Mr. Harvey's organic brain damage and other mental illnesses, Dr. Norko testified that Mr. Harvey would have required a significant explanation of the issue and

needed to be an active participant in the decision-making process. (PCR. v. 12, pp. 461-62.) Dr. Norko testified that this frame of mind was consistent with Mr. Harvey's submissive and dependent personality style. (PCR. v. 12, p. 463.) Dr. Norko testified that, in his professional opinion, Mr. Harvey could not have knowingly conceded guilt unless Attorney Watson had painstakingly explained the decision to concede guilt -- including the penalties for second-degree murder -- and that Attorney Watson's explanation should have included the drawing of charts and graphs to illustrate the consequences of the concession of guilt. (PCR. v. 12, pp. 461-62.)

4. Attorney Watson's Opening Statement Destroyed His Credibility With The Jury.

At the 1998 evidentiary hearing, Attorney Watson tried to justify his trial strategy as an attempt to retain his credibility with the jury. Putting aside the fact that defense counsel's interest in maintaining credibility is no excuse for failing to conduct a meaningful life history investigation, or conceding guilt to first-degree murder without consent, or failing to follow up on a mental health professional's recommendation, it is clear that Attorney Watson's credibility was thoroughly and irrevocably compromised by the textbook errors he made during his opening statement.

The undisputed record reflects that Attorney Watson made numerous promises of evidence in his opening statement that he failed to deliver on, a fact emphasized to the jury again and again by the State in its closing argument. He told the jury, for example, that the evidence would show Mr. Harvey was "having a problem with the woman he loved in that he couldn't support her," that "this robbery was done due to a need for money" after "Mr. Harvey came into friendship

with Scott Stiteler," that Mr. Harvey "thought there was going to be a lot of money because anybody who has money in Okeechobee, it was commonly felt, has their money through drugs," and that Mr. Harvey "felt panic and fear at the time he was committing the robbery." All of these things, the State told the jury, "were said in the Defense's opening statement" and "have not been backed up by any of the evidence." (R. 2477-2481.)

The State's closing-argument theme was apparent from the outset. State's Attorney Colton highlighted each of Attorney Watson's deceptions, identifying more than *fourteen* separate, independent promises made by Attorney Watson in his opening statement as to "certain things that were going to be brought out" or that "Mr. Watson said he's going to show about the Defendant in this case," not one of which was fulfilled.

Eventually, even Attorney Watson had enough. He objected during the State's closing that the State was "striking at the Defendant by the back of his counsel" and that it "has essentially called me a liar." (R. 2485-86.) The court overruled the objection as having no legal basis. The State had successfully eviscerated Attorney Watson's credibility in the eyes of the jury.

Attorney Watson agreed during his testimony at the August 1998 hearing that a "cardinal rule" of lawyering is to avoid promising in opening statement more than you can ultimately deliver. (PCR. v. 12, p. 390.) After being confronted with several of his false promises, he conceded that he should not have promised evidence in the guilt phase opening statement that he could not prove "[b]ecause if you promise evidence that you're not going to deliver, it impacts your credibility." (PCR. v. 12, p. 390.) Notwithstanding these concessions, however, Attorney Watson again -- inconsistently -- tried to justify his mistakes by

dismissively stating that "I think that lawyers would care a lot more than jurors but I do agree with your proposition that you should only say in opening statement what you prove during that trial." (PCR. v. 12, p. 395.)

5. Attorney Watson's Penalty-Phase Closing Argument Distanced Himself From Mr. Harvey, Implied That He Had No Choice About Representing Mr. Harvey, And Again Conceded First-Degree Murder And Several Aggravating Factors.

In addition to conceding Mr. Harvey's guilt to first-degree murder and undermining his own credibility, Attorney Watson distanced himself from Mr. Harvey by expressing his own (and society's) revulsion at what Mr. Harvey had done. He began his guilt phase closing argument,

> Ladies and gentlemen, I've watched you during the presentation of the evidence this week and I've noticed during the presentation of that evidence your repulsion to the crime of murder. That is something for which you need not apologize. Murder is extremely repulsive to human beings. It is certainly repulsive to you 13 people. It is certainly repulsive to Lee's family. It is certainly repulsive to the Boyd family. It is certainly repulsive to all of us in this room. All murder is repulsive. (R. 2459.)

Attorney Watson then vouched for depravity of his client, and endorsed the significance of the State's key inflammatory evidence. He said, for example:

> Mr. and Mrs. Boyd are dead. Lee caused their deaths. He did so by an act that was imminently dangerous, being shooting an automatic weapon, and he evinced a depraved mind regardless of human life. If those photographs show anything, they show the result of a depraved mind regardless of human life. (R. 2528.)

Attorney Watson went on to help the jury find the presence of the aggravating factors the State sought to prove, to concede that he had lied in his earlier remarks to them, and to condone the police's treatment of his client:

> If [Lee's] electrocution could bring Mr. and Mrs. Boyd back for the Boyd family I would not stand here to oppose it. (R. 3026.)

* * *

Unfortunately, that's first degree murder. That's the problem that I had in giving a closing argument earlier this week. It's first degree murder. (R. 3027.)

* * *

And it did occur and I'll grant Mr. Colton a feather in his cap, it occurred during the course of a kidnaping. He sort of zeroed in on the burglary, but it did happen during the course of a kidnaping. It is felony robbery and felony murder. (R. 3027.)

* * *

Now, during Lee's statement he believed that it [the weapon] was in the semi [automatic] position. You've got to take that with a grain of salt. (R. 3028.)

* * *

The next one is whether it was especially wicked, atrocious, or cruel. That's a close one. That's a close one. (R. 3029.)

* * *

As far as cold, calculated and premeditated. Yes, premeditated. . . . The evidence supports a shooting with premeditation, with a conscious decision to kill. (R. 3030-3031.)

* * *

It is my opinion that if you point guns at police officers, you consent to being roughed up a bit and that's the way it should be. (R. 3033-3034.)

* * *

It snowballs to the point that I come to court and an enormous amount of evidence is introduced against my client. Enormous. I can't remember ever having a case where so much physical evidence was introduced against the client because of the entire sequence of events. (R. 3034.)

Finally, Attorney Watson reminded the jury he was only representing Mr. Harvey because he had to do so:

> Earlier in the case we talked about the fact that Judge Geiger appointed me to represent Lee. What that means essentially is that an awful lot of my work in this case is public service, it is my obligation to the people of the State of Florida. (R. 3021.)

D. ATTORNEY WATSON FAILED TO FIND AND USE IN HIS MOTION TO SUPPRESS A BOOKING SHEET INDICATING THAT MR. HARVEY REQUESTED COUNSEL PRIOR TO HIS CONFESSION.

Claim No. 1(a) in Mr. Harvey's Rule 3.850 motion alleges that Attorney Watson was ineffective for failing to introduce, in connection with his motion to suppress Mr. Harvey's confession, a booking sheet indicating that Mr. Harvey requested counsel prior to making incriminating statements. (R. 1076-1113.) This Court remanded Claim 1(a) for an evidentiary hearing, noting that the booking sheet, if authenticated, might bear on Mr. Harvey's claim of ineffective assistance in connection with the motion to suppress. 656 So.2d at 1256-57.

1. Booking Sheet Indicates Request for Counsel

Mr. Harvey was arrested at 6:15 a.m. on February 27, 1985. (PCR. v. 10, p. 53.) State's Ex. No. 1 is the two-page booking sheet arising from that arrest. (PCR. v. 13, p. 720.) The booking sheet reflects the initial charges of second degree murder and robbery. (State Ex. 1.) The first page of the booking sheet contains handwritten information including the arrest number, arrestee's name, street address, age, sex, race, name of the arresting officer, and charges. (PCR. v. 11, p. 161.) The first page also contains a checkmark by the answer "yes" in response to the question "Do you want a lawyer now?" (PCR. v. 11, p. 195.) The portion of the

booking sheet regarding an arrestee's signature in the event he does not want a lawyer is blank, as are the witness-to-waiver signatures. (State Ex. 1.)

Mr. Harvey's booking sheet was produced during his "booking process" at the Okeechobee County Jail. During the booking process, a booking officer searches the arrestee, fingerprints the subject, takes photographs, enters the subject's name on a roster, records the activity on a jail log, and prepares the arrestee for his first appearance before a judge. (PCR. v. 11, p. 241.) The officer also asks a series of questions, including the arrestee's name, address, telephone number, the offense for which he was arrested, bond information, and so on.

In addition to these ministerial functions, the booking officer is required by law to advise the arrestee of his right to counsel, and to have the arrestee execute a written waiver in the presence of witnesses in the event he elects not to use the service of the public defender or private attorney. The Okeechobee County Jail booking officers on duty February 27, 1985 had been trained to ask arrestees whether they wanted a lawyer. (PCR. v. 11, p. 158.)

Fla. R. Crim. P. 3.111 (c) sets forth the legal requirements that a booking officer must follow in advising an arrestee of his right to counsel once he is transported to jail or other state holding facility after arrest. It states that the booking officer "has the following *duties*."

> (1) The officer shall *immediately* advise the defendant:
>
> (A) of the right to counsel;
>
> (B) that if the defendant is unable to pay a lawyer, one will be provided immediately at no charge.

While asking the required questions, the booking officer completes a form known as a booking sheet, recording the arrestee's name, address, date of birth, offense, and whether the arrestee wants a lawyer.

Mr. Harvey made incriminating statements beginning at 3:07 p.m. on the date of his arrest, after his early morning booking. (PCR. v. 10, p. 63.) Although Attorney Watson made an original and amended motion to suppress based on other issues (PCR. v. 10, pp. 49-50, 62), he made no argument based on the unequivocal request for counsel on the booking sheet. (PCR. v. 10, p. 50.) Nor was that booking sheet offered into evidence by Attorney Watson or the State. On June 13, 1986, the trial court denied the motion to suppress. (R. 727.)

2. Mr. Harvey Was Booked at Approximately 6:20 a.m. Prior to Making Incriminating Statements.

There was considerable evidence introduced at the hearing before Judge Geiger showing that Mr. Harvey was booked when he was first brought to the jail shortly after his arrest at approximately 6:20 a.m. on February 27, 1985. The contemporaneous written documents relating to Mr. Harvey's arrest, introduced into evidence at the August 1998 hearing, established that Mr. Harvey was booked immediately upon arrival at the jail. For example, the Florida Department of Law Enforcement Investigative Report relating to Mr. Harvey's arrest states:

> On Wednesday, February 27, 1985, Okeechobee County Deputy Sheriff Sergeant Larry Miller arrested Harold Lee Harvey by capias, charging him with two counts of 2nd Degree Murder and one count of Robbery in the robbery and murder of William Boyd and Ruby Louise Boyd, victims in this case. *Harvey was transported to the Okeechobee County Jail and booked on these charges.* Bail was set at $3,000,000. The Florida Department of Law Enforcement Arrest Form was completed.

(Def. Ex. 24.)

Likewise, the Florida Department of Law Enforcement Arrest Report relating to Mr. Harvey's arrest likewise includes a specific and unequivocal entry relating to the time Mr. Harvey was booked. It states: *"45. Date/Time Booked: 2/27/85 at 06:45 hrs."* (Def. Ex. 18.)

In addition to this contemporaneous written evidence, there were sworn statements by Okeechobee Sheriff's department detectives that Mr. Harvey was booked immediately after his arrest upon arrival at the jail. On April 25, 1985, Attorney Watson took the deposition of Okeechobee County Sheriff's office agent Gary Hargraves, who, along with Agent Lanier, was one of the participants in Mr. Harvey's arrest. Detective Hargraves testified to the following facts surrounding Mr. Harvey's arrest and booking:

> Q. Did you take Harvey out of the vehicle, out of Miller's vehicle, or was he already in the jail by the time you got there?
>
> A. Sgt. Miller, (cough) excuse me, Sgt. Miller took him out of his vehicle. I'm assuming it's standard -- standard procedure that a jailer assist in that, however, I was parking on the other end of the building and I did not see him actually being taken into the jail.
>
> He was in the booking area -- my next contact with him from the time that he was taken to the jail was in the booking area of our jail.
>
> * * *
>
> Q. *Okay. Was Mr. Harvey booked into the Okeechobee County Jail at that time*?
>
> A. *That's correct.*

* * *

Q. Was he fingerprinted and mug shot then?

A. That's correct.

(Def. Ex. 28.)

The August 1998 evidentiary hearing testimony of the booking officers on duty that day support the timing. Okeechobee County Correctional Officer Virginia Alsdorf, who was on duty when Mr. Harvey was first brought to the jail, remembered preparing some of the information on the first page of the booking sheet, such as Mr. Harvey's name, address, and the charges against him. (PCR. v. 11, pp. 173, 183.) Although Alsdorf testified she took no other action and made no other writing regarding Harvey's booking, former Correctional Officer Rose Marie Bennett (the only witness called by the State at the hearing) *recognized Alsdorf's handwriting on the second page of the booking sheet, containing a reference to a bond for Mr. Harvey of $3,000,000.* (PCR. v. 13, p. 747.) She also recognized Alsdorf's handwriting on other documents relating to the booking, such as Def. Ex. 26, in evidence, which is the Classification Intake Screening Report. Alsdorf notarized the Arrest Affidavit and other forms, which state that Mr. Harvey was booked in the early morning of February 27, 1985. (Def. Ex. 22; PCR. v. 13, p. 752.)

Okeechobee County Correctional Officer Eddie Bishop was the other booking officer on duty with Alsdorf between midnight and 8:00 a.m.. (PCR. v. 11, pp. 238-39.) He first testified that he had no involvement with Mr. Harvey's booking, refusing to even acknowledge that his own name was handwritten in on some of the booking forms. (PCR. v. 11, pp. 235, 255-56.) When confronted with booking documents bearing his name and handwriting, however, he then conceded

that he might have at least "began" the booking procedure when Mr. Harvey arrived at the jail, and further that he had told collateral counsel a few days earlier that he did book Mr. Harvey when he first came to the Okeechobee jail around 6:30 a.m. on February 27, 1985. (PCR. v. 11, pp. 257-59.)

For her part, Okeechobee County Correctional Officer Rose Marie Bennett testified that she was on duty from 4:00 p.m. to midnight on February 27, 1985, and that she thought she had filled out the portions of the booking sheet relating to the request for counsel sometime after Mr. Harvey met with Assistant Public Defender Killer and before his first appearance. (PCR. v. 13, p. 716, 720, 722-23.) During cross-examination, however, Bennett acknowledged that she has no independent recollection of filling out that portion of the booking sheet for Harvey, but drew her conclusion solely from jail logs, introduced into evidence as Def. Ex. 20, that she was given to prompt her testimony, and the booking sheet. (PCR. v. 13, p. 739.)

But the jail logs do not support Ms. Bennett's "refreshed" recollection. The jail logs are prepared each day by the correctional officers on duty to record events taking place at the Okeechobee County jail during their shift, at the time those events occur. (PCR. v. 11, p. 160, v. 11, p. 170, v. 13, pp. 741-42.) The jail logs relied on by Bennett as the sole basis for her recollection show that the following events took place during her shift:

Time	**Event**
1750	Judge Connor and investigative reporters arrive at the jail.
	Public Defender Clyde Killer talking to Mr. Harvey in the booking room.
1800	Shirley Harvey, Harold Harvey in to see Mr. Harvey.

1810 Public Defender Killer out from booking area.

Judge Connor, Ed Miller, FDLE Investigators, Mr. & Mrs. Harvey for 1st appearance for Stiteler & Harvey.

1820 Judge Connor leaving jail - Mr. & Mrs. Harvey leaving jail. Sgt. Andrews, Rigsby return Harvey & Stiteler to cells.

(Def. Exs. 6, 7, 8, 20, & 25.)

Attorney Watson testified that the State's case against Mr. Harvey depended on his incriminating statements. (PCR. v. 10, p. 61.) With considerable understatement, Attorney Watson acknowledged that the booking sheet, had he known about it, would have "strengthened the motion to suppress." (PCR. v. 10, p. 62.)

3. Expert Testimony That Attorney Watson's Failure To Find And Use The Booking Sheet Indicating That Mr. Harvey Requested An Attorney Violated Reasonable Professional Norms.

Expert Lyon testified that Attorney Watson's investigation and presentation of the motion to suppress Mr. Harvey's incriminating statements fell below reasonable professional norms because he failed to use the booking sheet indicating a request for counsel. (PCR. v. 13, p. 607.) Given that the booking sheet contained an unambiguous request for counsel, Florida Rule of Criminal Procedure 3.111(c) required booking officers to advise a defendant of his or her right to counsel, and under the Edwards rule, Expert Lyon found Attorney Watson's failure to use the booking sheet to be "clearly ineffective." (PCR. v. 13, p. 607.)

In addition, Expert Lyon testified that regardless of the court's ultimate decision on the motion to suppress, the existence of the booking sheet would have given Attorney Watson leverage to attempt to negotiate a plea with the State for a life sentence. (PCR. v. 13, pp. 607-08.) As Expert Lyon observed, "Part of what

goes into negotiation . . . is people's view of the strength of their case and if the prosecution became concerned that there was a valid 6th [sic] amendment issue regarding this statement they might have been much more receptive of a life offer to Mr. Harvey." (PCR. v. 13, p. 608.)

IV.

STANDARD OF REVIEW

In reviewing an order denying post-conviction relief pursuant to Rule 3.850, this Court reviews the trial court's factual findings to determine whether those findings are supported by substantial competent evidence. See Stewart v. State, 481 So. 2d 1210, 1212 (Fla. 1985). The trial court's conclusions of law are accorded no weight and are reviewed de novo. See Thomas v. State, 616 So. 2d 1150, 1150 (Fla. 4th DCA 1993).

V.

SUMMARY OF ARGUMENT

The uncontroverted evidence introduced at the August 1998 evidentiary hearing shows that Attorney Watson failed in virtually every aspect of his investigation and presentation of Mr. Harvey's case. He sabotaged any meaningful assessment of Mr. Harvey's mental health and thwarted the investigation into Mr. Harvey's life and the circumstances of the offense. As a result, Attorney Watson shirked consideration of an array of strategic alternatives available both to defend against the State's charges, and in the penalty phase, and presented the jury with false evidence.

These investigative failures were exacerbated by Attorney Watson's misconduct at critical pre-trial hearings and at the trial itself. He failed to know of the existence of a booking sheet in his own files showing Mr. Harvey's unequivocal

request for counsel before making any incriminating statements to the police. As a result, Mr. Harvey's confession – the primary evidence against him – was not suppressed, and the ammunition necessary for a plea bargain never available. To make matters worse, Attorney Watson then presented an opening statement in which he conceded every element of both second and first-degree capital murder, and he did so without obtaining Mr. Harvey's knowing and voluntary consent.

Attorney Watson's opening statement effectively ended the case against Mr. Harvey. And by falsely promising the jury he would prove fourteen facts, Attorney Watson eviscerated his own credibility as well. By closing argument, Attorney Watson effectively threw in the towel, telling the jury that he was only representing Mr. Harvey because it was his public obligation to do so, that Mr. Harvey had a "depraved mind," that he could not remember a case with so much evidence against his client, and that he would not oppose Mr. Harvey's execution if it could bring the victims back.

Finally, Attorney Watson made a number of other errors. He failed to waive a mitigating factor that permitted graphic, prejudicial evidence to be admitted because he did not know the law at the time of trial. Later, after learning the law, Attorney Watson shrugged off his mistake because he believed that the Florida Supreme Court's rulings on the issue at the time were "wrong" and "I was right." He failed to make any argument whatsoever before Judge Geiger retired to consider sentencing. He failed to investigate or present substantial evidence (that was again in his own files) that the victims could not hear well, which would have undermined the heinous, atrocious, and cruel aggravator. He inexplicably encouraged the court, over the State's silence, to admit an unsubstantiated alleged hearsay statement by a jailhouse snitch to the effect that Mr. Harvey had killed twice, would kill again, and

had nothing to lose. Finally, Attorney Watson permitted the State to anticipatorily rebut with highly prejudicial jailhouse evidence the fact of Mr. Harvey's remorse, which Attorney Watson did not introduce.

Mr. Harvey was entitled to counsel who would not undermine his defense, and instead would make judgments about strategy based on the results of a reasonable investigation and trial effort. If Attorney Watson had conducted such that investigation, and if he had avoided the inexcusable trial errors that he made, the determination of guilt may have been affected and, at the very least, the balance of aggravating and mitigating factors would have been changed materially, sparing Mr. Harvey's life.

VI.

ARGUMENT

This Court evaluates claims of ineffective assistance of counsel under the two-pronged standard of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Riechmann, No. SC89564, 2000 WL 205094 (Fla. Feb. 24, 2000); Rutherford v. State, 727 So. 2d 216, 219 (Fla. 1998); State v. Lara, 581 So. 2d 1288, 1290 (Fla. 1991). Under Strickland, a movant must show that (1) his attorney's performance was deficient in that it fell below an objective standard of reasonableness and (2) that the movant was prejudiced by that deficient performance. Strickland, 466 U.S. at 688-96. When a defendant challenges a death sentence, the question is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death, id. at 695, and

whether counsel's errors deprived the defendant of a reliable penalty proceeding. Rutherford, 727 So. 2d at 220.

A. THE TRIAL COURT ERRED IN DENYING CLAIM 3 BECAUSE ATTORNEY WATSON FAILED TO CONDUCT A REASONABLE MENTAL HEALTH INVESTIGATION, CONSULT WITH A PSYCHIATRIST, AND ENSURE THAT MR. HARVEY HAD A COMPETENT MENTAL HEALTH EXAMINATION.

The trial court denied relief on Claim 3 on grounds that Attorney Watson's performance was not deficient under the first prong of Strickland. Although not discussing Claim 3 specifically, Judge Geiger's pertinent findings appear to be that (1) Attorney Watson made a strategic choice not to obtain a psychiatrist because he did not want to risk conflicting mental health opinions; (2) Dr. Petrilla's examination was adequate; (3) the mental health experts at the post-conviction hearing "concede[d] that there is no expert proof of any particular cause of brain damage"; and (4) additional mental health evidence risked undermining the "good person" defense Attorney Watson was pursuing. (Order at 12.) As demonstrated below, each of those findings is erroneous as a matter of law.

1. Capital Defense Counsel Has A Duty To Investigate Fully A Defendant's Mental Health For Mitigation Evidence.

A reasonable mitigation investigation includes an investigation into mitigating psychological evidence, particularly organic brain damage and professional opinion testimony as to the presence of statutory mitigating factors. See, e.g., Rose v. State, 675 So. 2d 567, 571-74 (Fla. 1996); Hildwin v. Dugger, 654 So. 2d 107, 109 (Fla. 1995). The United States Supreme Court has long recognized that when a defendant's mental condition is relevant to his guilt or punishment, "the assistance of a psychiatrist may well be crucial to the defendant's

ability to marshal his defense." Ake v. Oklahoma, 470 U.S. 68, 80 (1985). The Supreme Court explained:

> psychiatrists gather facts, through professional examination, interviews and elsewhere . . . analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question.

Id. at 80. Through this process of investigation, interpretation, and testimony, psychiatrists assist jurors in making a sensible and educated determination about the mental condition of the defendant at the time of the offense. Id. at 81.

Testimony "emanating from the depth and scope of specialized knowledge" by a psychiatrist "is very impressive to a jury." Id. at n. 7 (citing F. Bailey and H. Rothblatt, Investigation and Preparation of Criminal Cases § 175 (1970)). Indeed, "[t]he quality of representation at trial . . . may be excellent and yet valueless to the defendant if the defense requires the assistance of a psychiatrist . . . and no such services are available." Id. (citing ABA Standards for Criminal Justice 5 - 1.4 (2d ed. 1980)).

Florida law also recognizes the importance of mental illness as a mitigating factor. As the Court stated in Rose v. State, 675 So. 2d 567 (Fla. 1994), "we have consistently recognized that severe mental disturbance is a mitigating factor of the most weighty order, and the failure to present it may constitute prejudicial ineffectiveness." Id. at 573; see Larkins v. State, 739 So. 2d 90, 93-95 (Fla. 1999) (death disproportionate where defendant suffered from organic brain damage); DeAngelo v. State, 616 So. 2d 440, 443 (Fla. 1993) (mental disturbance dispositive in vacating death sentence); Hildwin v. Dugger, 654 So. 2d 107, 110 (Fla. 1995). Simply put, "[p]sychiatric mitigating evidence has the potential to

totally change the evidentiary picture." Rose, 675 So. 2d at 573; Baxter v. Thomas, 45 F.3d 1501, 1515 (11th Cir. 1995); Mitchell v. State, 595 So. 2d 938, 941-42 (Fla. 1992).

Accordingly, reasonable professional norms in Florida at the time of Mr. Harvey's trial required the investigation and presentation of mental health evidence in mitigation. Rose v. State, 675 So. 2d 567 (Fla. 1996), and Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995), each establish that capital defense counsel may be ineffective if he or she fails to investigate and present non-statutory mitigation evidence of organic brain damage, personality disorders, and alcoholism, as well as the presence of statutory mitigation factors. Expert Lyon echoed those standards, testifying that reasonable professional norms in Florida for the defense of capital cases required capital defense attorneys to investigate and present complete evidence regarding mental health, including looking for "red flags of organic brain damage," such as significant trauma involving the head. (PCR. v. 13, pp. 578, 591.)

2. Attorney Watson's Failure To Consult With A Psychiatrist Was Unreasonable And Violated Reasonable Professional Norms.

Attorney Watson's failure to hire a psychiatrist violated those professional norms for several reasons. First and foremost, Mr. Harvey's psychologist, Dr. Petrilla, repeatedly recommended to Attorney Watson that a psychiatrist be consulted. See State v. Hamilton, 699 So. 2d 29, 34 (La. 1997) (ordering new penalty phase in part because counsel failed to obtain full neurological examination after such an examination was recommended by another mental health professional).

Moreover, Attorney Watson should have recognized Dr. Petrilla's limitations as a grammar school psychologist for children, as well as the fact that he

did not have any forensic experience or understanding of the statutory and non-statutory mitigating factors at issue in a capital trial. (PCR. v. 13, p. 591.) As Expert Lyon noted, Dr. Petrilla's recommended therapy for Mr. Harvey of self-esteem counseling and assertiveness training was "patently ridiculous . . . [and] seems to indicate really no understanding of the purpose of this investigation or of his evaluation which is or should have been to determine the presence or absence of mitigating factors." (PCR. v. 13, p. 593.)

As the lawyer for a capital defendant, Attorney Watson also should have recognized red flags of organic brain damage even without being told of them by Dr. Petrilla. Attorney Watson knew, for example, that Mr. Harvey had been involved in a tragic car accident in 1979 that had critically injured Mr. Harvey, causing him loss of consciousness and amnesia. He knew that Mr. Harvey was suicidal and had attempted to hang himself, cut his wrists, and begged Miami Beach police to shoot him. Likewise, Attorney Watson knew that Dr. Petrilla had diagnosed Mr. Watson as anxious, immature, and depressed. And he noticed during trial preparations that Mr. Harvey was suicidal, slow to understand, tearful, and lost motivation. Expert Lyon concluded

> That [Attorney Watson] did violate professional norms. Here is every indication in the world including from the psychologist that you needed a neurological psychiatric examination for organic brain damage, that you needed these tests done, and I believe, Your Honor, that you did in fact approve funds for a psychiatrist and it's inexplicable why [Attorney Watson] wouldn't have followed-up on this and investigated and find out if it existed or didn't.

(PCR. v. 13, p. 597.)

Finally, it is clear that Attorney Watson knew he needed to hire a psychiatrist, because he *wrote memoranda reminding himself to hire a psychiatrist.*

He had access to psychiatric professionals, as his file contained three specific psychiatric recommendations – Dr. Desai, Dr. Ebalo, and Dr. Calde -- from Dr. Petrilla. There was also time to hire a psychiatrist, as the documents in Attorney Watson's own file show that he considered hiring a psychiatrist as early as February 26, 1986. (PCR. v. 10, p. 82.) Finally, the court authorized Attorney Watson to hire a psychiatrist and approved funds for it.

As demonstrated by the undisputed testimony of Dr. Norko, a psychiatric examination of Mr. Harvey would have produced invaluable mitigation evidence for the jury to consider. Dr. Norko would have testified that three statutory mitigating factors existed at the time of the crime, including (1) substantial duress or domination of another; (2) lack of capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law; and (3) commission of the offense under the influence of an extreme mental or emotional disturbance. See, e.g., Rose, 675 So. 2d at 574 (ordering new sentencing hearing in part because counsel failed to present evidence of statutory mitigating factors); Hildwin, 654 So. 2d at 109, 111 (same); Mitchell, 595 So. 2d at 942 (same). Attorney Watson did not even ask Dr. Petrilla to opine on statutory mitigating factors during the original trial. See Mitchell, 595 So. 2d at 942 (noting that counsel failed to ask his psychological expert to testify as to presence of statutory mitigating factors).

In addition, Dr. Norko would have told the jury that Mr. Harvey suffered from organic brain damage, major depressive disorder, post-traumatic stress disorder, and substance abuse disorders. He would have explained to the jury that Mr. Harvey's post-traumatic stress disorder would cause a hyper arousal phenomenon that could make him react poorly to sudden stimuli. He would have demonstrated how Mr. Harvey's mental illnesses were exacerbated by his ingestion

of a six-pack of beer and a line of cocaine only a few hours prior to the crime. See Shere v. State, 742 So. 2d 215, 224 (Fla. 1999) (noting importance of expert testimony of mental conditions supporting mitigation). Finally, Dr. Norko would have testified as to the existence of many non-statutory mitigating factors, including Mr. Harvey's physical and emotional abuse during his childhood, his exposure to toxic substances, his significant head traumas, periods of major depression, alcoholism and drug addiction, and suicide attempts.

3. Attorney Watson's Failure To Consult With A Psychiatrist Was Not A Strategic Decision.

Counsel has a duty either to make reasonable investigations or make a reasonable decision that an investigation is unnecessary. Strickland, 466 U.S. at 691. A "strategic" decision on the scope of investigation of mitigation evidence, or the presentation of that evidence, must "flow from an informed decision." Harris v. Dugger, 874 F.2d 756, 763 (11th Cir. 1989). A capital defense attorney must investigate the defendant's background and mental health history thoroughly, and then reflect on the actual results of that investigation before making any decision on whether to forego further investigation or presentation of any evidence developed as the result of the initial investigation. See, e.g., Dobbs, 142 F.3d at 1387; Rose, 675 So. 2d at 572-73; Harris v. Reed, 894 F.2d 871, 878 (7th Cir. 1990); Heiney v. State, 620 So. 2d 171, 173 (Fla. 1993) (finding that there could be no "strategic reasons" for not presenting mitigation evidence where defense counsel did not even know that the mitigation evidence existed); Middleton v. Dugger, 849 F.2d 491, 494 (11th Cir. 1988) (defense counsel's failure to present mitigation evidence could not be strategy where counsel failed to investigate).

Attorney Watson's failure to consult with a psychiatrist was not a strategic decision. To the contrary, Attorney Watson testified that *he would have presented the psychiatric evidence of organic brain dysfunction if he had known about it.* (PCR. v. 12, p. 389.) Not even Judge Geiger, in denying the motion for post-conviction relief, concluded that Attorney Watson made a strategic decision (or any conscious decision) to avoid a psychiatrist. (See generally Order at 10-13.)

Attorney Watson was put on repeated notice by a mental health professional that he needed to hire a psychiatrist. Dr. Petrilla pointedly told Attorney Watson to hire a psychiatrist because the preliminary tests given to Mr. Harvey indicated potential organic brain damage, and because Dr. Petrilla had no experience in neuropsychology and forensic examination. Instead of rejecting that advice, Attorney Watson requested and received authority to have a psychiatric evaluation from the court. The State concurred. Even Attorney Watson conceded at the evidentiary hearing that he had concerns about Mr. Harvey's competency. (PCR. v. 10, p. 87-88.) For inexplicable reasons, however, Attorney Watson failed to follow through.

In his factual finding, Judge Geiger stated that Attorney Watson did not employ a psychiatrist because he feared conflicting opinions if he had two mental health experts. (Order at 4.) Judge Geiger is wrong. Attorney Watson did not testify that he feared conflicting opinions. Instead, Attorney Watson responded to a *hypothetical question by the State* by agreeing to the State's suggestion that it might not make sense to use two mental health experts because they might contradict each other. (PCR. v. 10, p. 141.) See Kimmelman v. Morrison, 477 U.S. 365, 386-87 (1986) (reviewing court should not construct strategic defenses that counsel did not offer).

In any event, any concern about conflicting mental health opinions is unsupportable as a matter of law because Attorney Watson easily could have assured the confidentiality of a companion psychiatric examination. For example, Attorney Watson could have moved for a protective order or designated both of his mental health experts as consulting witnesses until he decided which one to use for testimony. (PCR. v. 12, p. 415); Lovette v. State, 636 So. 2d 1304, 1308 (Fla. 1994) (holding that state cannot elicit facts or information learned by confidential mental health expert unless defendant waives attorney/client privilege); Sanders v. State, 707 So. 2d 664, 668 (Fla. 1998) (state may not depose expert or call as witness where expert hired solely to assist the defense); State v. Hamilton, 448 So. 2d 1007, 1008 (Fla. 1984) (noting that Florida Rule of Criminal Procedure 3.216(a) provides for confidentiality of expert appointed to assess defendant's mental health); Sagar v. State, 727 So. 2d 1118, 1118 (Fla. 5th DCA 1999) (same). The State of Florida expressly agreed to such an approach for both Mr. Harvey and his co-defendant, Mr. Stiteler. (PCR. v. 12, p. 415.)

Judge Geiger also brushed off Attorney Watson's failure to hire a psychiatrist because "there is no expert proof of any particular *cause* of brain damage." (Order at 12; emphasis added.) Judge Geiger's reasoning is flawed in several respects. First, Attorney Watson did not testify that he failed to retain a psychiatrist for this reason. Second, the *cause* of brain damage is irrelevant. The relevant point is that Drs. Norko and Fisher, experienced and highly-accredited professionals, testified that Mr. Harvey does in fact suffer from organic brain damage, whatever the cause. See Robinson v. State, No. 91317, 1999 WL 628777, *6 (Fla. 1999) (suggesting medical tests for brain damage unnecessary where expert has already testified brain damage exists). They also testified as to a number of

possible causes of Mr. Harvey's organic brain damage, including genetics, exposure to toxic chemicals as a child, multiple closed head trauma such as the 1979 car accident that rendered him unconscious and being hit in the head with the brute force of a tire iron, and substance abuse. (PCR. v. 11, pp. 297-98, 303, 308, 321, 325, 337, v. 13, pp. 663-64.) Whether one of these traumas caused the brain damage or all of them contributed cumulatively to it, the fact is that Mr. Harvey suffers from brain damage and Attorney Watson would have known about it, or at least recognized the "red flags," if he had properly investigated the case.

Finally, Judge Geiger held that testimony by additional mental health experts would have "undermined the 'good person' defense" by exposing the jury to detrimental evidence about Mr. Harvey, such as the fact that he momentarily choked his sister as a child, played "chicken" in a car with his sister, and once shot at a streetlight. (Order at 12.) These facts, however, provide anecdotal support for the diagnoses of Mr. Harvey's mental illness. For example, Mr. Harvey's momentary choking of his sister as a teenager was followed by a mental "black out" in which he could not recall what he had just done -- a symptom of organic brain damage. Likewise, Dr. Norko interpreted Mr. Harvey's playing "chicken" (in which no one was injured) and shooting at a streetlight while drunk as evidence of his reckless behavior and impaired executive brain functions, both of which are consistent with organic brain damage and a malfunctioning frontal lobe and brain stem.[5] (PCR. v. 11, pp. 286-87, 308.)

[5]Judge Geiger's holding on this point also improperly assumes that Attorney Watson made a legitimate decision to pursue a "good person" defense after a reasonable investigation, which he did not do.

In short, there is no evidence that Attorney Watson's failure to hire a psychiatrist was a strategic choice. Instead, it was the result of neglect and inattention.

4. The Trial Court's Finding That Dr. Petrilla Provided An Adequate Mental Health Examination Is Error.

Finally, Judge Geiger held that Attorney Watson ensured a "competent mental health examination" because Dr. Petrilla examined Mr. Harvey, testified to various personality disorders, and testified that Mr. Harvey did not have organic brain damage. (Order at 12.) That holding ignores the evidence developed at the evidentiary hearing concerning Dr. Petrilla.

Dr. Petrilla admitted during the evidentiary hearing that he was wrong on his interpretations and scoring of Mr. Harvey's responses on the WAIS-R test, the Bender-Gestalt test, and several other tests. Although he made a passing and unsolicited comment at the 1986 trial (which was not in response to any question) that Mr. Harvey did not have organic brain damage, (R. 07256), Dr. Petrilla, who has now been trained in neuropsychology and become board certified, admits that he was wrong and that his comment in Mr. Harvey's suppression hearing on organic brain damage was based, in part, on "my lack of competence in that area." (PCR. v. 15, p. 972; see also PCR., v. 15, p. 990.) As Dr. Petrilla grudgingly concluded at the 1998 evidentiary hearing, "I don't like to get up here admit to this. I mean, this isn't one of my favorite times here." (PCR. v. 15, p. 994.) Indeed, at great risk to his current reputation and practice, Dr. Petrilla repeatedly testified that he was "incompetent" and "lacked experience" at the time he examined Mr. Harvey in 1985-86. (PCR. v. 15, pp. 963-64, 966, 968, 970, 972.)

Dr. Petrilla's remarkable self-evaluation was confirmed by other witnesses at the hearing. As Expert Lyon remarked, Dr. Petrilla's recommendation

that Mr. Harvey – a capital defendant facing a death sentence – receive self-esteem help and assertiveness training was "patently ridiculous" and irrelevant to whether any mitigating factors existed. (PCR. v. 13, p. 593.) On the technical side, Dr. Fisher reviewed the raw data given by Mr. Harvey in 1986 in response to Dr. Petrilla's personality evaluation and concluded that Dr. Petrilla made significant scoring errors that would have changed the neurological evaluation of Mr. Harvey, compelling a finding of organic brain damage. (PCR. v. 13, pp. 668, 675, 676, 678.)

Finally, although Dr. Petrilla was incompetent, Attorney Watson's conduct exacerbated the problems with Dr. Petrilla's mental health examination. Attorney Watson, for example, limited Dr. Petrilla's examination to a personality inquiry and did not request a neurological examination. He deprived Dr. Petrilla of access to Mr. Harvey's social, developmental, or life history, thereby ensuring that Mr. Harvey's mental health status would be assessed in a factual vacuum. He forbid Dr. Petrilla from discussing the circumstances of the offense with Mr. Harvey, thereby forfeiting any application of mental health concerns to the crime at issue. And he inexplicably ignored Dr. Petrilla's recommendations that he retain a psychiatrist to assist Dr. Petrilla.

5. Attorney Watson's Failure To Conduct A Reasonable Mental Health Investigation Prejudiced Mr. Harvey Because It Would Have Changed The Balance Of Aggravating And Mitigating Factors.

In sentencing Mr. Harvey to death, the trial court balanced four aggravating factors, no statutory mitigating factors, and only two comparably weak non-statutory mitigators (low IQ and poor social/educational skills). If Attorney Watson had consulted with Dr. Norko or Dr. Fisher, he could have credibly

established the presence of three statutory mitigating factors, a legion of non-statutory mitigating factors concerning Mr. Harvey's mental illnesses and troubled past, and helped the jury understand how the crime could have been committed by someone who, by all accounts, did not seem capable of such an act. See Heiney v. State, 620 So. 2d 171, 173 (Fla. 1993) (finding that if counsel had made proper investigation into defendant's background, mitigating evidence such as abuse, mental illness, and brain damage could have convinced judge to uphold jury's life recommendation). See also, Stephens v. Kemp, 846 F.2d 642, 653 (11th Cir. 1988) ("prejudice is clear" where attorney failed to present evidence that defendant spent time in mental hospital); Middleton, 849 F.2d 491, 495 (11th Cir. 1988) (defendant prejudiced by counsel's failure to present evidence of organic brain damage and noting that psychiatric mitigating evidence "has the potential to totally change the evidentiary picture"); Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992) (same).

B. THE TRIAL COURT ERRED IN DENYING CLAIM 2(a) BECAUSE ATTORNEY WATSON DID NOT INVESTIGATE AND PRESENT COMPELLING MITIGATION EVIDENCE FOUND IN MR. HARVEY'S TROUBLED AND VIOLENT PAST.

Evidence of family background and personal history may be considered in mitigation. Stevens v. State, 552 So. 2d 1082, 1086 (Fla. 1989). "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse." Penry v. Lynaugh, 492 U.S. 302, 319 (1989). Accordingly, capital defense counsel "has a duty to conduct a reasonable investigation, including an investigation of the defendant's background for possible mitigating evidence." Rose, 675 So. 2d at 571 (quoting

Porter v. Singletary, 14 F.3d 554, 557 (11th Cir. 1994)). The failure to conduct an investigation into a defendant's background "may render counsel's assistance ineffective." Bolender v. Singletary, 16 F.3d 1547, 1557 (11th Cir. 1994). Counsel may not forego an investigation of potential mitigating evidence simply because he has already "latched onto a strategy" for which he has determined that the potential mitigating evidence is unnecessary. See Rose, 675 So. 2d at 572.

Both Florida and the Eleventh Circuit recognize the compelling nature of background and personal history evidence discovered through investigation. In Rose, 675 So. 2d at 571-74, for example, this Court ordered a new penalty phase where the defendant's trial attorney had failed to present non-statutory mitigation evidence that defendant suffered from organic brain damage, had a personality disorder, was an alcoholic, grew up in poverty, was emotionally abused, and had suffered a traumatic injury that led to blackouts. Likewise, in Hildwin, 654 So. 2d at 109-10, the Court ordered a new penalty phase where trial counsel failed to present non-statutory evidence that defendant was abused as a child, had a history of substance abuse, showed signs of organic brain damage, and performed well in prison; see also Stevens v. State, 552 So. 2d 1082, 1085-86 (Fla. 1989) (same); Dobbs, 142 F.3d at 1390-91 (same); cf. Freeman v. State, No. 79651, 2000 WL 728622, *7 (Fla. June 8, 2000) (ordering evidentiary hearing upon allegations that counsel failed to present non-statutory evidence of abusive childhood and failed to provide expert with life history information).

Attorney Watson violated the prevailing professional norms because he conducted almost no investigation of Mr. Harvey's background -- and did not conduct *any* investigation that would be inconsistent with the "good person" defense that he had latched onto from the earliest days of the case.

Attorney Watson employed an investigator for only a short time during the pre-trial investigative period. He was had no outside investigative assistance for a critical eight-month period prior to trial. Moreover, even when he used an investigator, Attorney Watson rendered that investigation useless by limiting it to fit his preconceived "good person" theory of the case. As Attorney Watson's letter of instruction to Krumey makes clear, Attorney Watson directed Krumey to look only for people who would say that Mr. Harvey had socially-redeeming qualities, which means he avoided those who would discuss the truth of Mr. Harvey's difficult upbringing, his substance abuse, and his abusive environment.

Attorney Watson made no meaningful attempt to investigate Mr. Harvey's developmental background, his childhood, the characteristics of his family, his personality and affect, his psychological history, his physiological history, his relationship history, the background of his co-defendant, Scott Stiteler, or the community in which Mr. Harvey lived. Attorney Watson -- whether through inexperience, incompetence, inadvertence, or neglect -- never conducted an investigation that would have enabled him to make any meaningful strategic choices in his representation of Mr. Harvey.

A reasonable mitigation investigation into Mr. Harvey's background would have revealed a compelling picture of poverty, abuse, despair, violence, and trauma from beginning to end. That investigation would have produced evidence of Mr. Harvey's dysfunctional parents, including the fact that each came from a broken home replete with abuse and infidelity, that they married young and without education, that Mrs. Harvey ate poorly during her pregnancy with Mr. Harvey, and that Mr. Harvey was born with an odd-shaped head. It would also have revealed a

childhood in which Mr. Harvey was described as slow, fearful, afraid of abandonment. He was a classic follower.

An investigation would have produced evidence of the family's poverty, the necessity for Mr. Harvey to work in the fields as a teenager to earn a wage to feed his family, the lack of love or affection. It would have shown the physical and emotional abuse prevalent in the family, the beatings, the domestic fights with shotguns, and the alcoholism.

The investigation would have also revealed the details surrounding Mr. Harvey's tragic 1979 car accident that caused a major head injury. Attorney Watson would have learned about Mr. Harvey's dramatic behavior changes attributable to that accident, including violent mood swings, irritability, headaches, hearing difficulties, mumbling, unexplained blackouts, and involuntary shaking. Attorney Watson would have also learned about Mr. Harvey's dependence on anyone and everyone in his life, including girlfriends, his wife, and his co-defendant. Finally, Attorney Watson would have been aware of escalated drug and alcohol use following the accident, and his many suicide attempts.

Expert Lyon testified that Attorney Watson's investigation and preparation of mitigation evidence fell far below the applicable professional norms in 1985-86. (PCR. v. 13, pp. 584, 586, 589, 590-91, 597.) Expert Lyon opined that, in this case, Attorney Watson made the classic error of forming a theory and then making sure that the facts fit that theory. (PCR. v. 13, p. 584.) Because Attorney Watson directed his investigators to find people who would say "nice things" about the defendant, he "put the cart before the horse" by searching only for facts that would fit the theory he created for the case. (PCR. v. 13, p. 589.)

C. THE TRIAL COURT ERRED IN DENYING CLAIM 1(f) BECAUSE MR. HARVEY DID NOT GIVE HIS KNOWING AND VOLUNTARY CONSENT TO THE ADMISSIONS OF GUILT MADE BY ATTORNEY WATSON AT TRIAL.

Claim 1(f) in Mr. Harvey's Rule 3.850 Motion alleges ineffective assistance of counsel in the guilt phase of the trial because Attorney Watson conceded Mr. Harvey's guilt in his opening argument without Mr. Harvey's consent. The trial court denied relief, finding that (1) there was a "valid evidentiary basis" for an argument as to a lesser-included offense; (2) there was a "sufficient discussion" between Attorney Watson and Mr. Harvey before the opening statement; and (3) the concession of guilt was not an admission to first-degree murder. (PCR. v. 10, pp. 24-25.) All three reasons proffered by the trial court are wrong as a matter of law and reflect unfamiliarity with this Court's decisions on these issues and substantive Florida law on first-degree murder.

1. An Attorney's Admission Of His Client's Guilt Requires An Affirmative, Explicit Consent By The Client In Order To Protect The Fundamental Importance of a "Not Guilty" Plea.

Mr. Harvey pled "not guilty" to the charges against him. By pleading "not guilty," Mr. Harvey exercised his right to hold the State to strict proof beyond a reasonable doubt as to the offenses charged. Nixon v. Singletary, No. SC92006, 2000 WL 63415 (Fla. Jan. 27, 2000); see also Boykin v. Alabama, 395 U.S. 238, 243 (1969) (when a defendant enters a plea of "not guilty," he preserves his right to a fair trial under the Sixth Amendment and right to hold government to proof beyond a reasonable doubt); Wiley v. Sowders, 647 F.2d 642, 650 (6th Cir. 1981) (same). Because of the gravity of the consequences, a decision to plead guilty can only be made by the defendant and not by counsel. Nixon, 2000 WL 63415, at *6 ("[T]he Supreme Court has made it clear that the defendant, not the attorney, is the captain

of the ship. . . . [T]he ultimate choice as to which direction to sail is left up to the defendant").

This Court and others have recognized that an attorney's concession of his client's guilt during opening and closing statements violates the obligation to subject the State's case to meaningful adversarial testing. Nixon, 2000 WL 63415, at *4; United States v. Swanson, 943 F.2d 1070, 1074 (9th Cir. 1991) (statements conceding client's guilt lessened government's burden and constituted abandonment of client at critical stage of proceeding); Osborn v. Shillinger, 861 F.2d 612, 625 (10th Cir. 1988) (attorney who adopts belief that his client should be convicted fails to function as government's adversary).

This Court recently established standards for Florida on this issue in Nixon v. Singletary, 2000 WL 63415 (Fla. Jan. 27, 2000). There, it held that an attorney's concession of guilt without the defendant's consent is per se ineffective assistance of counsel. Nixon, 2000 WL 63415, at *4. In order to demonstrate a valid consent and waiver of Sixth Amendment rights, the evidence must show an "affirmative, explicit acceptance by [the defendant] of counsel's strategy. Silent acquiescence is not enough." Nixon, 2000 WL 63415, at *6; Koenig v. State, 597 So. 2d 256, 258 (Fla. 1992).[6] The Court also held that in the future, trial judges who suspect that a concession-of-guilt strategy is being employed by counsel should

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[6]See also Nixon v. State, 572 So. 2d 1336, 1339 (Fla. 1990) (discussing Florida's requirement that any concession of guilt by counsel be predicated on the knowing and voluntary consent of client); Wiley, 647 F.2d at 650 (petitioner was deprived of effective assistance of counsel when defense counsel admitted petitioner's guilt without first obtaining petitioner's consent to the strategy); People v. Hattery, 488 N.E.2d 513, 519 (Ill. 1985) (defense counsel is per se ineffective where counsel concedes defendant's guilt, unless the record shows that the defendant knowingly and intelligently consented to this strategy).

stop the proceedings and question the defendant on the record as to whether he or she consents. Nixon, 2000 WL 63415, at *7.

There are situations where counsel may make a tactical decision to admit guilt as the best strategy to spare the defendant's life. See Nixon, 2000 WL 63415, at *4. But because the decision to plead guilty is reserved to the defendant, defense counsel may not concede an offense without an on-the-record, knowing, intelligent waiver by the defendant of his Sixth Amendment rights. See Boykin, 395 U.S. at 243-44; Wiley, 647 F.2d at 649; Francis v. Spraggins, 720 F.2d 1190, 1194 (11th Cir. 1983).

2. Attorney Watson's Statements To The Jury Were The Functional Equivalent Of A Guilty Plea To *Both* Second-Degree Murder *And* First-Degree Murder.

Attorney Watson's opening and closing arguments admitted Mr. Harvey's guilt to all of the elements of both second-degree murder (which he was trying to do) and to first-degree murder (which he was not trying to do). Thus, Attorney Watson's "strategy" of conceding Mr. Harvey's guilt was improper in two ways. First, he did not obtain Mr. Harvey's consent to admit any murder, whether first or second-degree. (See infra pp. 74-76.) Second, he botched his planned strategy of conceding guilt to a lesser-included offense by admitting Mr. Harvey's guilt to all of the elements of first-degree murder.

Although he was trying to concede only second-degree murder, Attorney Watson argued that Mr. Harvey killed the Boyds both with premeditation and in the course of a burglary or robbery. His very first words to the jury were: "Harold Lee Harvey is guilty of murder. If anything is established over the next week it will be that Harold Lee Harvey is guilty of murder." (R. 1859.) He stated

that Mr. Harvey shot an automatic military weapon into a room "discharging projectiles that hit human beings and killed them." (R. 1860.)

As to premeditation, he told the jury that Mr. Harvey and Mr. Stiteler "put together a plan . . . that was going to be foolproof" and that they "had this conversation and without question what was discussed during this conversation was whether or not to kill these two people." He also noted that Mr. Harvey and Mr. Stiteler had formed the intent to kill when they "decided to commit the murder at the time of the shooting." (R. 2472.)

As to felony murder, Attorney Watson stated that the evidence would show that "this is the story of a robbery, a robbery that went very badly" and that "I would say that burglary was committed there." He then emphasized to the jury that the commission of those crimes was important because "the judge will instruct you that for felony murder it must be proved beyond a reasonable doubt that the person was either engaged in one of the felonies that he will describe, robbery, burglary, and kidnaping is the third one -- either engaged in it or escaping from it." (R. 2469-2470.) For good measure, he conceded that the State's Attorney's description of how Mr. Harvey killed the Boyds was correct.

This was not effective representation. Attorney Watson's statements conceded all of the necessary elements to second-degree murder, which was improper because he was not permitted to concede Mr. Harvey's guilt to any offense, including a lesser-included offense with attendant severe penalties such as second-degree murder, without Mr. Harvey's knowing and voluntary consent.

Even more egregious, however, is that Attorney Watson's statements conceded all of the elements to *first-degree murder*. (PCR. v. 10, pp. 106-07.) In Florida first-degree, death-eligible murder includes a murder committed either with

premeditation or in the course of a robbery or burglary, which includes a murder committed while the defendant is engaged in, or escaping from burglary and robbery. See Fla. St. § 782.04; Campbell v. State, 227 So. 2d 873, 878 (Fla. 1969) (commission of crime includes attempt to escape); Parker v. State, 641 So. 2d 369, 376 (Fla. 1994) (felony murder established where killing occurred during flight from commission of felony).

Capital defense expert Andrea Lyon testified that Attorney Watson's opening statement was the functional equivalent of a plea to the crime charged of first-degree murder. She stated that Attorney Watson's combined concession of the planned robbery or burglary and Mr. Harvey's participation in the murder of the Boyd's in conjunction with that robbery unequivocally established the elements of felony first degree murder. Expert Lyon's testimony is undisputed.

Nevertheless, Judge Geiger denied relief on this claim because he found that there was a "valid evidentiary basis" for Attorney Watson's statements. (Order at 11.) Judge Geiger's finding does not cite to any evidence, does not cite any case law, and is otherwise unclear. To the extent that Judge Geiger meant that there was a valid evidentiary basis for Mr. Harvey's guilt to first-degree murder, that finding is irrelevant to whether or not Attorney Watson could properly concede that guilt without Mr. Harvey's consent or concede that guilt when he was trying to concede only second-degree murder.

To the extent that Judge Geiger meant that there was some legal basis for Attorney Watson's attempt to "tiptoe" through Florida case law by admitting the murders were committed while escaping from a robbery, that finding is unsupported by law and Judge Geiger does not cite to any. There is no legal support for the position that a murder committed during, or as part of an escape from, a robbery is

not committed while the defendant is "engaged in the commission" of that felony. Judge Geiger's finding also does not explain Attorney Watson's concession of premeditation, which itself establishes first-degree murder.

Judge Geiger also held - - without explanation - - that Attorney Watson's statements were not an admission of guilt to first-degree murder. (Order at 11.) As demonstrated above, Attorney Watson conceded all of the elements for first-degree, death-eligible murder under Florida law. Simply put, defense counsel sent the jury the unmistakable signal that his client, who had pleaded "not guilty," was in fact unquestionably a first-degree murderer, that even his own lawyer thought so, and that everyone should move on to the real question for the jury to decide -- which was the penalty phase inquiry of whether Mr. Harvey should live or die.

3. Mr. Harvey Did Not Consent to Attorney Watson's Concessions Of Guilt.

Attorney Watson conceded Mr. Harvey's guilt to both second and first-degree murder. Judge Geiger recognized that Attorney Watson had conceded guilt to murder, but upheld his strategy because there was a "sufficient discussion." (Order at 11.) Judge Geiger's conclusion is wrong as a matter of law.

First, this Court has held that an attorney may admit his client's guilt only after an "affirmative, explicit acceptance" of counsel's strategy. Nixon, 2000 WL 63415, at *6. Contrary to Judge Geiger's opinion, the appropriate test is not "a sufficient discussion." In other words, the defendant must *consent,* and that consent must be explicit and affirmative on the record.

Second, the evidence does not support an inference that Mr. Harvey knowingly and voluntarily consented to the functional guilty plea to first-degree murder made in Attorney Watson's remarks to the jury. There is no on-the-record

consent from Mr. Harvey to Attorney Watson's action, no affidavit from Mr. Harvey consenting to the admissions, and no memoranda, notes, or other documentation indicating that Attorney Watson discussed with Mr. Harvey his plan to concede guilt or reflecting Mr. Harvey's consent to that action.

The remaining evidence comes from the testimony of Mr. Harvey and Attorney Watson. Mr. Harvey testified that he did *not* consent to Attorney Watson's act of conceding his guilt to first-degree murder, second-degree murder, or any murder. (PCR. v. 15, p. 931.) Indeed, Mr. Harvey testified that Attorney Watson did not even inform him of the strategy of arguing for second-degree murder. (PCR. v. 15, p. 933.)

Attorney Watson's testimony, on the other hand, is all over the map. In 1993, he testified under oath that he did not recall whether he asked Mr. Harvey to consent to his strategy of conceding guilt and that he had "no recollection" of reviewing with Mr. Harvey the specific statements admitting guilt. In 1998, however, Attorney Watson testified that he may have leaned over to Mr. Harvey seconds before his opening statement and told Mr. Harvey of his intent to concede guilt so that Mr. Harvey would not have an adverse reaction in front of the jury when he heard the words. (PCR. v. 10, pp. 105-06.) Attorney Watson also testified that he may have discussed with Mr. Harvey the "general landscape of the defense" prior to the day of trial.

Distilled to its essentials, Attorney Watson testified that it was possible that he (i) discussed the "general landscape" of the overall defense with Mr. Harvey prior to trial and (ii) that he leaned over to Mr. Harvey in the seconds before opening statements to warn Mr. Harvey not to flinch when Attorney Watson stood up and told the world that he was guilty of murder. The fact that Attorney Watson

believed it necessary to warn Mr. Harvey *so that he did not react in front of the jury indicates that Attorney Watson's "general landscape" discussions did not include discussion of admitting guilt.*

Moreover, even if it occurred, Attorney Watson's pre-opening statement warning to Mr. Harvey is best characterized as an ambush, not a proper and considered request for consent to a trial strategy. Dr. Norko testified that such an action by Attorney Watson on the morning of trial, seconds before opening statements, would not have been sufficient for Mr. Harvey to have been able to consent knowingly and voluntarily to Attorney Watson's decision to concede his guilt to murder. (PCR. v. 12, p. 461.) Instead, Mr. Harvey would have required a significant explanation of the issue. (PCR. v. 12, pp. 461-62.) Mr. Harvey could not have knowingly conceded guilt unless Attorney Watson had painstakingly explained the decision to concede guilt. (PCR. v. 12, pp. 461-62.)

There is no evidence that Attorney Watson specifically discussed his strategy of conceding guilt prior to trial. The record contains no evidence that Attorney Watson requested or received Mr. Harvey's consent (even in the pre-opening statement warning) to admit guilt to murder. And it certainly contains no evidence that Attorney Watson sought or received Mr. Harvey's consent to admit guilt to *first-degree* murder.[7]

[7]Attorney Watson's concession of Mr. Harvey's guilt without first obtaining Mr. Harvey's consent is *per se* ineffective assistance of counsel and requires a new trial. Nixon, 2000 WL 63415, at *4; Francis v. Spraggins, 720 F.2d 1190, 1194 (11th Cir. 1983).

D. THE TRIAL COURT ERRED IN DENYING CLAIM 1(a) BECAUSE ATTORNEY WATSON FAILED TO REALIZE THAT MR. HARVEY'S BOOKING SHEET INDICATED A REQUEST FOR COUNSEL PRIOR TO HIS INCRIMINATING STATEMENTS.

Claim No. 1(a) in Mr. Harvey's Rule 3.850 motion alleges that Attorney Watson was ineffective for failing to introduce a booking sheet containing a checkmark by the answer "Yes" in response to the question "Do you want a lawyer now?" in connection with his motion to suppress Mr. Harvey's confession.

1. Attorney Watson's Performance Was Deficient Because He Failed To Introduce The Booking Sheet, Which Would Have Resulted In The Suppression Of Mr. Harvey's Statements.

A lawyer is required to know and understand the legal significance of evidence in his own file. Smith v. Dugger, 911 F.2d 494, 498 (11th Cir. 1990) (defense counsel's ignorance of unsigned waiver form in his own files which would have provided "significant ammunition" in a motion to suppress, fell below scope of reasonable representation under Strickland); Young v. Zant, 677 F.2d 792, 798 (11th Cir. 1982) (defense counsel's failure to understand client's factual claims or the legal significance of those claims is representation below the acceptable range of competency expected of members of the criminal defense bar); see also Harrison v. State, 562 So. 2d 827, 828 (Fla. 2d DCA 1990); Hyman v. Aiken, 824 F.2d 1405, 1414-16 (4th Cir. 1987).

Attorney Watson did not introduce the booking sheet in connection with his motion to suppress Mr. Harvey's confession. He also did not make any argument based on the unequivocal request for counsel on the booking sheet, which was prepared when Mr. Harvey was first arrested and brought to the Okeechobee County jail. Although Attorney Watson claims that he did not know of the

existence of the booking sheet, the undisputed testimony of Steven Samilow at the August 1998 evidentiary hearing established that the booking sheet was in Attorney Watson's own file. (PCR. v. 11, p. 196.) It was also part of the file maintained by the Clerk of Court in the case charging Mr. Harvey with second-degree murder and robbery.

As capital defense expert Andrea Lyon testified, Attorney Watson did not meet the relevant professional requirements because he failed to know of the existence of the booking sheet, failed to conduct any investigation into the circumstances of the unequivocal request for counsel on that sheet, failed to proffer the booking sheet in support of his motion to suppress Harvey's confession, and failed to investigate or know pertinent sheriff's office procedure and law. Attorney Watson himself conceded that, had he known of the booking sheet, he would have introduced it in support of the motions that he filed to suppress Mr. Harvey's statements to police. (PCR. v. 10, p. 62.)

2. The Booking Sheet Indicates That Mr. Harvey Requested Counsel Prior To Making Incriminating Statements.

Judge Geiger denied Mr. Harvey relief on this claim. Conceding that Mr. Harvey was "partially booked" at 6:30 a.m. and that his booking sheet was partially completed at that time (Order at 1), Judge Geiger nevertheless held that the booking officers did not ask Mr. Harvey whether he wanted a lawyer until after Mr. Harvey's confession. (Order at 2, 10.) Judge Geiger's holding is flatly contradicted by the evidence adduced during the hearing,[8] which proves that the first page of

[8]Although this Court directed Judge Geiger to determine the authenticity of the booking sheet, Judge Geiger's opinion does not address that issue. It does not appear that the authenticity of the booking sheet, which was always located in the court file, is disputed.

booking sheet, including the request for counsel, was prepared when Mr. Harvey was first brought to the jail shortly after his arrest at approximately 6:20 a.m. on February 27, 1985.

At the outset, Florida public officials are presumed to perform their duties in accordance with the law. Hillsborough County Aviation Auth. v. Taller & Cooper, Inc., 245 So. 2d 100, 102 (Fla. 1971); cf. Provenzano v. State, 739 So. 2d 1150, 1153 (Fla. 1999) (presumption that law enforcement officers will properly perform duties in carrying out execution). Florida law requires that state correctional officers ask arrestees a series of booking questions -- including whether they want a lawyer --- immediately upon their transport to a jail. Fla. R. Crim. P. 3.111 (c) sets forth the legal requirements that a booking officer must follow. Testimony at the evidentiary hearing confirmed that it was the policy of the Okeechobee County Jail booking officers to advise a suspect of his or her right to an attorney immediately upon booking. (PCR. v. 12, p. 398-399.)

Second, the contemporaneous written documents relating to Mr. Harvey's arrest show that Mr. Harvey was booked immediately after he was transported to the Okeechobee County Jail at 6:30 a.m and held on $3,000,000 bond. For example, the Florida Department of Law Enforcement Investigative Report relating to Mr. Harvey's arrest, dictated shortly after that arrest, states that Mr. Harvey was booked at the jail and bail was set at $3,000,000. (Def. Ex. 24.) Likewise, the Florida Department of Law Enforcement Arrest Report relating to Mr. Harvey's arrest likewise includes a specific and unequivocal entry stating that Mr. Harvey was booked at 6:45 a.m. (Def. Ex. 18.)

Sworn statements by Okeechobee Sheriff's department detectives also indicate that Mr. Harvey was booked immediately after his arrest upon arrival at the

jail. For example, arresting officer Gary Hargraves testified at deposition that Mr. Harvey was arrested early in the morning, led by Sgt. Miller into the booking area, and booked at that time. Finally, the testimony of three Okeechobee Sheriff's Department correctional officers who were on duty on the day of Mr. Harvey's arrest, Virginia Alsdorf, Rose Bennett and Eddie Bishop, also support the fact that Mr. Harvey was booked at approximately 6:45 a.m., nine hours before Mr. Harvey's incriminating statements.

It is apparent that these officers, some of whom spoke with one another between their testimony, tried to cobble together a story in which they concede (as they must) that Ms. Alsdorf asked Mr. Harvey some booking questions in the morning and filled out the first page of the booking sheet, but that Ms. Bennett asked Mr. Harvey the remainder of the booking questions in the evening and completed the second page of the booking sheet then. The officers claim that Ms. Bennett asked the critical question about whether Mr. Harvey wanted an attorney in the evening (even though the question is on the first page of the booking sheet, which Ms. Alsdorf testified she filled out in the morning).

That testimony is not credible. It is plainly contradicted by the earlier sworn statements of Agent Lanier and Detective Hargraves, the contemporaneous reports introduced into evidence concerning the timing of Mr. Harvey's booking, the unequivocal requirement of Florida law and the Okeechobee Sheriff's Department that a new arrestee be immediately advised of his right to counsel during booking, and by common sense. Furthermore, as demonstrated below, each correctional officer's testimony was contradicted in some material way by the other, and unsupported by the very document that each witness purportedly relied on to prompt his or her recollection. Ms. Alsdorf was on duty when Mr. Harvey was

first brought to the jail. She admits to asking Mr. Harvey some questions, although her memory of precisely which questions she asked fluctuated during the hearing. Ms. Alsdorf remembered that she prepared at least some of the information on the first page of the booking sheet, such as Mr. Harvey's name, address, and the charges against him.

Although Ms. Alsdorf testified she took no other action and made no other writing whatsoever regarding Harvey's booking, other testimony and documents established that she did so. For example, former Correctional Officer Bennett recognized Alsdorf's handwriting on other documents relating to the booking, such as Def. Ex. No. 26, in evidence, the Classification Intake Screening Report, and even on the second page of the booking sheet itself, containing a reference to a bond for Mr. Harvey of $3,000,000. (PCR. v. 13, pp. 747-748.) Alsdorf also notarized the Arrest Affidavit and other forms. (Def. Ex. 22; PCR. v. 13, p. 752.)

Correctional officer Eddie Bishop's testimony was similarly inconsistent. Bishop, who also was on duty with Alsdorf between midnight and 8:00 a.m., at first testified that he had no involvement with Mr. Harvey's booking, refusing to even acknowledge that his own name was handwritten in on some of the booking forms. Bishop then conceded that he might have at least searched Mr. Harvey when he arrived at the jail, and further that he had told collateral counsel a few days earlier that he did book Mr. Harvey when he first came to the Okeechobee jail around 6:30 a.m. on February 27, 1985, including advising him of his right to counsel.

Finally, correctional officer Rose Bennett testified that she was on duty from 4:00 p.m. to midnight on February 27, 1985. Although testifying over 13 years

after the event, Ms. Bennett testified that she recalled filling out only certain portions of the booking sheet, including those portions relating to the request for counsel sometime after Mr. Harvey met with Assistant Public Defender Killer and before his first appearance. During cross-examination, however, Bennett acknowledged that she had no independent recollection of filling out that portion of the booking sheet for Harvey, and claimed she drew her conclusion solely from jail logs, introduced into evidence as Def. Ex. 20, that she was given to prompt her testimony.

The logs do not support Bennett's recollection in any way. Even though the logs to reflect all significant events at the jail, there is no reference whatsoever to her sitting down with Mr. Harvey and asking him whether he wanted the assistance of counsel, and particularly Assistant Public Defender Killer, as Bennett testified she recalled doing during the August 1998 evidentiary hearing. More importantly, the logs show that *there was no time for her to have done what she claimed she did.* The logs show that Mr. Harvey's first appearance occurred immediately after the meeting with Mr. Killer. (R. 526-28.)

To the contrary, the jail logs actually support the inference that the booking took place, as it should have, upon Mr. Harvey's first arrival at the jail. The jail logs for that morning reflect an unexplained 30 minute time period when Mr. Harvey was in the booking area of the jail, and before he was taken away by Detective Hargraves for interrogation. The logs state:

Time	Event
0635	Sgt. Miller in w/10-15 w/m Harold Harvey, Jr. 85-0310.
0705	Det. Hargraves out in Det. off. w/10-15 H. Harvey.

What happened during the 30 minutes Mr. Harvey was in the booking area at the Okeechobee County jail after his arrest in the early morning of February 27, 1985? Not one of the correctional officers who testified at the August 1998 evidentiary hearing offered any explanation as to what happened during this gap in time. Based on a review of the evidence and law, it is clear that Mr. Harvey was booked at that time, including completion of the statutorily required inquiry as to whether he "wants to have a lawyer now," as to which Mr. Harvey responded "Yes."

Finally, the court file in this case shows that Judge Connor entered an Order at 3:38 p.m. on February 27 denying Harvey's bail. Yet the booking sheet, which Ms. Bennett claims she prepared some three hours later at approximately 6:10 p.m. (after Mr. Killer completed his initial interview of Mr. Harvey), *shows a bond of $3,000,000*. The change from $3,000,000 bond to no bail was duly reflected in a handwritten change on the Okeechobee Sheriff's Office Arrest Report (Def. Ex. 22) and would have been recorded on the booking sheet had if it had been prepared at the time claimed by Bennett.

3. The Impact of Defense Counsel Failures Was Clearly Prejudicial.

The booking sheet request for counsel would almost certainly have resulted in the suppression of Mr. Harvey's confession under the exclusionary rule of Miranda v. Arizona, 384 U.S. 436 (1966), as applied in Edwards v. Arizona, 451 U.S. 477, 484-85 (1981). Under Edwards, once a suspect under custodial interrogation requests an attorney, interrogation must stop. Edwards, 451 U.S. at 484-85. If it does not, any subsequent response to police-initiated conversation is inadmissible under the exclusionary rule. Id. This is a "bright-line rule." Smith v. Illinois, 469 U.S. 91, 99 (1984). Significantly, the Eleventh Circuit held that a

successful showing of prejudice under Strickland did not require Smith to show that he would have won the motion to suppress but only that counsel had overlooked "significant ammunition" to rebut the State's argument that the confession was voluntary. Smith v. Dugger, 911 F.2d 494, 498-99 (11th Cir. 1990)

In this case, the evidence overlooked by counsel would almost certainly have resulted in the *successful* suppression of evidence under the "bright-line" rule of Edwards. By the State's own admission, suppression of the Harvey confession might well have resulted not only in acquittal of the defendant, but, possibly, the dismissal of the charges against him in the first instance. (R. 00153.) Clearly, prejudice is far clearer in this case than it was in Smith.

Finally, whether or not Mr. Harvey's statement was ultimately suppressed there is a reasonable probability that Attorney Watson's failure to raise the issue of this request for counsel in this booking sheet materially impeded Watson's ability to have a meaningful plea negotiation with the State and potentially avoid a trial and sentence of death. As Expert Lyon testified, the ability to obtain a plea is directly related to the State's perception of the weaknesses in its case. If Attorney Watson had known about the booking sheet, he could have created significant concern for the State that Mr. Harvey's confession might be suppressed.

E. THE CUMULATIVE EFFECT OF ATTORNEY WATSON'S OTHER ERRORS CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

In its opinion, this Court asked Judge Geiger to determine the cumulative effect of claims 2(a), 2(b), 2(c), 2(d), 2(e), 2(f), 2(g), 3 and 16 in Mr. Harvey's Rule 3.850 Motion. Courts have recognized that, under Strickland, errors, although harmless when viewed individually and out of their context at trial, may by their combined effect have rendered the trial unfair. Prejudice has been found in such cases. United States v. Preciado-Cordobas, 981 F.2d 1206, 1215 n.8 (11th Cir. 1993); United States v. Pearson, 746 F.2d 787, 796 (11th Cir. 1984); Nowitzke v. State, 572 So. 2d 1346, 1356 (Fla. 1990).

The combination of Attorney Watson's errors -- from his lack of meaningful pretrial investigation, to his inept and incomplete efforts to suppress Mr. Harvey's statements to police, to his failure to retain a psychiatrist in the face of his own mental health professional's request that he do so, to his unauthorized concession of guilt, to his refusal to engage in simple allocution on Mr. Harvey's behalf in the sentencing portion of the trial before this Court -- resulted in a complete and unconstitutional breakdown of the adversarial process for Mr. Harvey.

Several examples of these errors, as addressed during the August 1998 evidentiary hearing, are described below.

1. Defense Counsel's Failed Effort to Maintain Credibility

Counsel's ability to create and sustain credibility with the jury depends in large measure on supporting representations made during opening statement with evidence at trial. Thomas A. Mauet, Fundamentals of Trial Techniques 47 (8th ed.

1990) ("Nothing is more damaging than to overstate the facts in your opening statement. The jury will remember it and resent your misrepresentation.") The failure of counsel to produce evidence that he promised the jury during his opening statement that he would produce is such a damaging failure that it can be, in and of itself, sufficient to support a finding of ineffectiveness of counsel. See, e.g., Harris v. Reed, 894 F.2d 871, 879 (7th Cir. 1990) (Sixth Amendment violation where counsel failed to call witnesses who he claimed in opening statement would support defense version of shooting); Anderson v. Butler, 858 F. 2d 16, 17-19 (1st Cir. 1988) (Sixth Amendment violation where defense counsel fails to present promised testimony that defendant had acted without cognizance of, or feeling for, actions); see also McAleese v. Mazurkiewicz, 1 F.3d 159, 166 (3d Cir. 1993); Honors v. State, 752 So. 2d 1234, 1236 (Fla. DCA 2d 2000).

At the 1998 evidentiary hearing, Attorney Watson explained many of his omissions and failings as an attempt to retain his credibility with the jury. Nevertheless, it is clear that his credibility was thoroughly and irrevocably compromised by textbook errors he made during his opening statement. The record shows that Attorney Watson made numerous promises of evidence in his opening statement that he failed to deliver on, a fact emphasized to the jury again and again by the State in its closing argument. Indeed, the State highlighted each of Attorney Watson's deceptions, identifying more than *fourteen* separate, independent promises made by Attorney Watson in his opening statement as to "certain things that were going to be brought out" or that "Mr. Watson said he's going to show about the Defendant in this case," not one of which was fulfilled.

Attorney Watson's opening remarks to the jury are a textbook example of how defense counsel, who has given too little thought to his opening statement,

the evidence to be presented at trial, and the Rules of Criminal Procedure, can destroy his credibility and undermine his client's defense by making false promises to a jury. And to the extent that Attorney Watson's plan was to slip through the guilt phase with his credibility intact, he utterly failed in its implementation, undercutting any opportunity he might have had to make a compelling plea for mercy on Mr. Harvey's behalf.

2. Other Examples of Penalty Phase Errors

Attorney Watson's penalty phase errors did not only result from failed implementation of his "maintain my own credibility" approach, they also were the product of his inexperience, ignorance, failed investigation, and his apparent lack of belief in his own client's cause.

a. Defense Counsel's Failure to Know the Law Relating to the Mitigating Factor of No Significant History of Prior Criminal Activity Was Ineffective (Claim 2(d)).

Claim 2(d) of Mr. Harvey's Rule 3.850 motion asserts that Attorney Watson was ineffective for failing to waive consideration and application of the mitigating circumstance concerning no significant history of prior criminal activity, simply because he did not know what the rule of law was or its potential effect on the penalty phase. This Court directed that evidence be taken on this issue, finding that Attorney Watson's failures in this area may affect the ultimate determination of his effectiveness.

In Ruffin v. State, 397 So.2d 277 (Fla. 1981), a case decided before Mr. Harvey's trial, the Florida Supreme Court held that in determining the existence or absence of the mitigating circumstance of no significant prior criminal activity, "prior" means prior to the sentencing of the defendant and does not mean prior to

the commission of the murder for which he is being sentenced. Id. at 283. Because Ruffin was the law at the time of Mr. Harvey's trial, the State was permitted to introduce evidence of Mr. Harvey's escape from jail and other matters if Attorney Watson insisted on trying to prove the mitigating factor of no significant prior criminal history. The Court later receded from Ruffin in Scull v. State, 533 So. 2d 1137 (Fla. 1988), but did not do so until long after Mr. Harvey's trial.

As the following exchange demonstrates, however, Attorney Watson did not know about Ruffin even though both the court and the State's Attorney repeatedly highlighted the issue for him and pointed out the consequences of his refusal to waive the mitigating factor:

MR. MORGAN:	I was wondering if the Defendant is going to waive any of the mitigating circumstances.
MR. WATSON:	Are we going to waive any of the mitigating circumstances? I don't know what you mean by that.
MR. MORGAN:	Well, if certain of the mitigating circumstances are not waived the State can proceed up front with evidence as opposed to waiting for the rebuttal portion.
MR. WATSON:	Why is that?
MR. MORGAN:	It is just the law.
MR. WATSON:	To disprove the --
MR. MORGAN:	Right. Unless you waive it. Specifically I'm speaking of no significant history of prior criminal activity.
MR. WATSON:	Well, I'm not going to waive.
THE COURT:	So that will be an issue and the state will have an opportunity to prove criminal history for that purpose only.

Two days later, Assistant State's Attorney Morgan again flagged the issue for Attorney Watson, stating in open court that "I want to be sure we are all clear on this before we start" and noting that the State intended to rely on Mr. Harvey's escape from jail, his theft of two cars during that escape, and his fighting with a police officer upon being captured -- all of which occurred after the crime. Attorney Watson again objected that "[t]he word 'prior' means before [the date of the offense]." The court again overruled the objection.

Because Attorney Watson refused to waive the mitigating circumstance, the State was able to argue in the penalty phase that Mr. Harvey had escaped from jail; stolen two vehicles and a gun; later pointed the gun at a police officer; committed a burglary and committed battery on several police officers; and resisted arrest with violence. (R. 2604.) Each of these factors was bound to inflame the jury that had just found Mr. Harvey guilty of two counts of first-degree murder.

Even though he did not know the law at the time of trial, today Attorney Watson arrogantly shrugs off his error because he believes that the Court's decision in Scull v. State, 533 So. 2d 1137 (Fla. 1988), shows that it was wrong in its interpretation of the law in Ruffin and that he was right (even though Ruffin was good law in Florida at the time of Mr. Harvey's trial). At the 1998 evidentiary hearing, in response to a question from the State as to whether he was familiar with aggravating and mitigating circumstances, Attorney Watson replied, "No, I think at that particular moment I had a better handle on it than the Supreme Court because they eventually agreed with my position on that one mitigating circumstance." (PCR. v. 10, p.140.) Pro bono counsel followed up on Attorney Watson's answer during re-direct, which produced this exchange:

Q: Was part of your trial strategy in this case to hope that Judge Geiger didn't follow the law of the Supreme Court?

A: No. That wasn't part of my trial strategy, no, sir.

Q: Well, what I'm trying to get at is failure to waive the mitigating circumstance of no history of criminal activity, and the point you tried to make with Mr. Mirman was, I was right. Three years later the Supreme Court receded in their view of that?

A: I was right.

* * *

Q: . . . When you were making those statement to the court [refusing to waive the mitigating circumstance] were you thinking to yourself, gee, I know about the Ruffin case and I know what it says and I figure a few years down the road the Supreme Court is going to change its mind?

A: No.

Q: Okay. You just didn't know what it was at that point and time. Isn't that right? That's why you make these statements to the court?

A: I was using my common sense, which the Florida Supreme Court eventually did also, in Skull v. Tate [sic].

Q: But at the time of this trial when you were representing this individual, sir, you didn't know what the law was on this point?

A: I did not have Ruffin versus State as well as several thousand other cases right in front of me.

(PCR. v. 12, pp. 403-04.)

Attorney Watson's ignorance of the law enabled the state to reemphasize the parade of horribles that occurred during Mr. Harvey's escape. Little could have had a more devastating impact on a sentencing jury than the knowledge that the man they have just found guilty of two counts of first-degree

murder, and whose fate was in their hands, was an escape risk with a propensity for violence.

b. Defense Counsel Improperly Attacked His Own Client And Conceded Several Aggravating Factors (Claim 2(c)).

Attorney Watson also improperly attempted to distance himself from his client in his arguments to the jury, a textbook example of ineffectiveness condemned by this Court in Clark v. State, 690 So. 2d 1280 (Fla. 1997); King v. Strickland, 714 F.2d 1481, 1491 (11th Cir. 1983) (finding counsel ineffective where he distanced himself from client during argument to jury, failed to present mitigation evidence, unnecessarily stressed horrors of crime, and told jury he reluctantly represented the defendant), adhered to after remand by King v. Strickland, 748 F.2d 1462, 1462 (11th Cir. 1984).

The defendant in Clark was charged with first-degree murder and received a death sentence. 690 So. 2d at 1280. This Court found that defense counsel "completely abdicated his responsibility [to the defendant]" in a closing argument hauntingly reminiscent of Attorney Watson's remarks to the jury here. Id. at 1283. Finding that these statements actually "prejudiced [the defendant] rather than assist[ing] him," this Court found the Strickland test satisfied.

As the chart below demonstrates, Attorney Watson distanced himself from Mr. Harvey by expressing his own (and society's) revulsion at what Mr. Harvey had done. His statements are much more egregious than those found to warrant a new trial in Clark, as they essentially encouraged the jury to find aggravating factors and recommend a sentence of death.

Improper Statements of Counsel Requiring New Sentencing Hearing in Clark v. State, 690 So. 2d 1280 (Fla. 1997)	**Attorney Watson's Statements at Mr. Harvey's Trial**
"In the years I have been practicing law in Florida, this is the fourth time I have argued for a person's life. I must confess to you, this is the most difficult case I have ever had in terms of making the argument on the death penalty." Clark, 690 So. 2d at 1282.	"It snowballs to a point that I come to court and an enormous amount of evidence is introduced against my client. Enormous. I can't remember ever having a case where so much physical evidence was introduced against the client because of the entire sequence of events." (R. 3034.) "Harold Lee Harvey is guilty of murder. . . . I have been doing defense work for some time. I've never said that in a court of law that my client is guilty of murder. But he is." (R. 1859-60.)
"Now, I hope I do not seem to you to be a gouhl [sic], but I have no choice." Id.	"Earlier in the case we talked about the fact that Judge Geiger appointed me to represent Lee. What that means essentially is that an awful lot of my work in this case is public service, it is my obligation to the people of the State of Florida." (R. 3021.)
"[Clark] therefore is far from being a good person, and, therefore, must be classified as a bad person." Id.	"Mr. and Mrs. Boyd are dead. Lee caused their deaths. He did so by an act that was imminently dangerous, being shooting an automatic weapon, and he evinced a depraved mind regardless of human life. If those photographs show anything, they show the result of a depraved mind regardless of human life." (R. 2528.) "When evil gets set in motion one thing leads to another." (R. 1864.) "The next one is whether it was especially wicked, atrocious, or cruel. That's a close one. That's a close one." (R. 3029.)

Improper Statements of Counsel Requiring New Sentencing Hearing in Clark v. State, 690 So. 2d 1280 (Fla. 1997)	**Attorney Watson's Statements at Mr. Harvey's Trial**
"Now, in arguing the death penalty in this fashion, as I am required to do, sometimes I just speak about subjects which I wouldn't normally speak about." Id. "I am not condoning [Clark's] activities or actions. I, myself, certainly appreciate the seriousness of the offense, and I, myself, certainly feel the horror that a death has occurred." Id. at 1283.	"Ladies and gentlemen, I've watched you during the presentation of the evidence this week and I've noticed during the presentation of that evidence your repulsion to the crime of murder. That is something for which you need not apologize. Murder is extremely repulsive to human beings. It is certainly repulsive to you 13 people. It is certainly repulsive to Lee's family. It is certainly repulsive to the Boyd family. It is certainly repulsive to all of us in this room. All murder is repulsive." (R. 2459.)
"I agree that people like Mr. Clark should be stopped." Id. at 1282.	"If [Mr. Harvey's] electrocution could bring Mr. and Mrs. Boyd back for the Boyd family I would not stand here and oppose it." (R. 3026.) "It is my opinion that if you point guns at police officers, you consent to being roughed up a bit and that's the way it should be." (R. 3033-3034.)
"Don't ask me, because I have no answer. What possesses anyone to go into a place of business with a firearm to steal one hundred dollars, and apparently prepared to use the firearms to steal one hundred dollars. I don't know the answer. . . . The problem is that it happens all the time with these type of people. . . ." Id. at 1283.	"Unfortunately, that's first degree murder. That's the problem I had in giving a closing argument earlier this week. It's first degree murder." (R. 3027.) "And it did occur and I'll grant [State's Attorney] Mr. Colton a feather in his cap, it occurred during the course of a kidnaping. He sort of zeroed in on the burglary, but it did happen during the course of a kidnaping. It is felony robbery and felony murder." (R. 3027.)

Improper Statements of Counsel Requiring New Sentencing Hearing in Clark v. State, 690 So. 2d 1280 (Fla. 1997)	Attorney Watson's Statements at Mr. Harvey's Trial
"[Clark] is one of those people from the underbelly of society who, for whatever reason of background and upbringing, is unable to fully abide by the laws that the rest of us abide by." Id.	"Now, during Lee's statement he believed that [the weapon] was in the semi[automatic] position. You've got to take that with a grain of salt." (R. 3028.) "I believe the evidence will show that the combination of Scott Stiteler and Harold Lee Harvey was a little bit like a combination of gasoline and a lit match." (R. 1861.) "As far as cold, calculated and premeditated. Yes, premeditated. . . . The evidence supports a shooting with premeditation, with a conscious decision to kill." (R. 3030-3031.)

At bottom, Attorney Watson's closing remarks to the jury, whether through inadvertence or maliciousness, essentially encouraged the jury to impose a sentence of death.

c. Attorney Watson's Failure to Investigate Potential Aggravating And Mitigating Factors Constituted Ineffective Assistance Of Counsel (Claims 2(b) & 2(g)).

The court found that the State proved the existence of the heinous, atrocious, and cruel aggravating factor. It based its finding on the State's argument that each victim "faced the prospect of [his/her] murder as defendant and the co-defendant discussed the necessity of the impending death of Mr. and Mrs. Boyd within earshot of both victims." This Court affirmed the finding of this aggravating factor, stating that the victims "became aware of their impending deaths when Harvey and Stiteler discussed the necessity of disposing of witnesses." Harvey, 529 So. 2d at 1087.

Attorney Watson, however, failed to investigate evidence concerning the heinous, atrocious or cruel aggravating circumstance, and simply assumed

without any investigation that the Boyds had in fact heard the conversation. If Attorney Watson had not simply laid down the sword, he could have presented and argued evidence creating a reasonable doubt the Boyds probably could not have heard Mr. Harvey's conversation with Stiteler. See Way v. State, No. 78640, 2000 WL 422869, *14 (Fla. Apr. 20, 2000) (HAC aggravator requires evidence that victim was aware of impending death).

First, Attorney Watson's own files contained notes that he made during interviews with Mr. Harvey -- notes about which he apparently forgot -- that indicated that the Boyds could not possibly have heard any discussions between Mr. Harvey and Stiteler. Attorney Watson's handwritten notes state "they probably couldn't hear; car too loud." (Def. Ex. 5.) Stiteler's confession, also in Attorney Watson's files, indicates that the conversation relied on by the State, this Court, and the trial court took place well outside the Boyds' presence at Mr. Harvey's loudly idling car. (PCR. v. 10, p. 96.)

Second, pro bono collateral counsel conducted an investigation that produced evidence -- which was available to Attorney Watson -- that both Mr. and Mrs. Boyd had serious hearing problems. Their maid, Dora Hinchman, provided an affidavit (admitted into evidence at the August 1998 hearing for a separate purpose) in which she states:

> Both Mr. and Mrs. Boyd had hearing problems. Mrs. Boyd had a hearing aid that she needed to wear, although she didn't most of the time. Mr. Boyd suffered from significant hearing loss as well. When Mr. and Mrs. Boyd watched television, they always had it up very loud.

(PCR. v. 15, p. 953) (affidavit admitted).[9]

Finally, Attorney Watson overlooked the fact that the victim's brother, Clay Boyd, testified at Mr. Harvey's trial that when he came to the Boyds' house and discovered the bodies, he could hear loud music, which he thought was coming from the television, that Mrs. Boyd was "hard of hearing," and that the Boyds routinely played the television very loudly. (R. 1946-47.)

In addition to failing to understand or address the State's aggravating factors, Attorney Watson also overlooked mitigating factors. For example, it is well-established that a defendant's domination by another is a material statutory mitigating factor which the court and the jury should be apprized of in making penalty determinations. Bassett v. State, 541 So. 2d 596, 597 (Fla. 1989). In Bassett, defense counsel failed to present mitigating evidence to the sentencing jury that the defendant had acted under the domination of his co-defendant, and that the co-defendant was more intelligent and older than the defendant. Id. at 597. This Court held that defense counsel's failure to present available evidence that the defendant had acted under the domination of his co-defendant constituted ineffective assistance of counsel and required that the defendant's sentence be vacated, stating

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[9]During the 1998 hearing, Judge Geiger erred in denying pro bono counsel's motion to introduce Ms. Hinchman's affidavit as substantive evidence even though Ms. Hinchman refused to come to court after being served with a subpoena by pro bono counsel. (PCR. v. 15, p. 944.) In light of the lower evidentiary threshold at the penalty phase, Ms. Hinchman's affidavit would have been admissible as substantive evidence at the original penalty phase. See West's F.S.A. 921.141(1); Garcia v. State, 622 So. 2d 1325, 1329 (Fla. 1993). The court, therefore, should have admitted Ms. Hinchman's Affidavit as substantive evidence. The trial court did admit Ms. Hinchman's affidavit to show that Attorney Watson could have discovered and presented this evidence at the time of Mr. Harvey's original trial to defeat the heinous, atrocious and cruel aggravating factor.

that the evidence of domination "raise[d] a reasonable probability that the jury recommendation would have been different." Id. (citing Strickland v. Washington, 466 U.S. 668 (1984) and Bertolotti v. State, 534 So. 2d 386 (Fla. 1988)).

Here, Attorney Watson not only did not present evidence of domination of Mr. Harvey by his co-defendant, Mr. Stiteler, which Dr. Norko and Dr. Fisher would have established in their testimony, he also failed to look for background and educational information which would have supported a theory that Stiteler dominated Mr. Harvey. Had defense counsel conducted even a modicum of investigation he would have discovered compelling evidence that Stiteler not only planned the robbery at issue here, but dominated every facet of his relationship with Mr. Harvey.

d. Mr. Watson Inexplicably Encouraged The Introduction Of Irrelevant And Highly Prejudicial Testimony Against Mr. Harvey (Claim 16).

The last prosecution witness during the guilt phase was Nathan Platt, Jr., a guard at the Okeechobee County Jail. The court required the State to proffer Mr. Platt's testimony outside the presence of the jury. Mr. Platt proffered that Mr. Harvey had engaged in an argument with another inmate, Marvin Davis, and had told Davis (1) that he had "killed twice" and (2) that he would kill Mr. Davis, if he got the chance, because he had nothing left to lose. (R. 02432-37.) The court ruled that the first part of Mr. Platt's testimony – that Mr. Harvey had "killed twice" – would be admitted . (R. 02438-39.)

After this ruling, the State did not seek admission of the second part of Mr. Platt's statement. Attorney Watson, however, told the court that, in light of the court's prior ruling, the entire statement should be admitted. (R. 02437-39.) Accordingly, because of Attorney Watson's advocacy, the jury in the guilt phase

heard that Mr. Harvey had said that he not only had killed twice, but that he would kill again because he had nothing to lose. (R. 02440-46.) Attorney Watson admitted that he should have objected on grounds of relevancy, (PCR. v. 10, p. 100), and that the admission of Officer Platt's testimony was "highly prejudicial." (Def. Ex. 10; PCR. v. 12, p. 402.)

Attorney Watson's error caused the admission of highly prejudicial Williams Rule evidence that was inadmissible.[10] See Jackson v. State, 451 So. 2d 458, 461 (Fla. 1984) (reversing conviction and death sentence on grounds that witness testimony that defendant pointed a gun at him and boasted that he was a "thoroughbred killer" was forbidden by the Williams Rule, which excludes evidence that "has no relevancy except as to the character and propensity of the defendant to commit the crime charged") (quoting Paul v. State, 340 So. 2d 1249, 1250 (Fla. 3d DCA 1976)); Delgado v. State, 573 So. 2d 83, 85 (Fla. 2d DCA 1990). Here, as in Jackson, Mr. Platt's testimony that Mr. Harvey had threatened to kill Mr. Davis was not relevant to any issue in the case. Rather, the prosecution presented it to show jurors that Mr. Harvey was a bad person who would not hesitate to kill again. Mr. Watson's insistence that the jury hear Mr. Platt testify that Mr. Harvey had threatened to kill again could not have been a tactical decision.

[10]The Williams Rule was enunciated by this Court in Williams v. State, 110 So. 2d 654, 658 (Fla. 1959). It is now codified by statute. See Fla. Stat. § 90.404(2)(a).

e. Attorney Watson Was Ineffective For Allowing The State To Anticipatorily Rebut the Nonstatutory Mitigating Circumstance Of Remorse When The Defense Did Not Argue That Such A Mitigating Circumstance Existed (Claim 2(e)).

During the penalty phase, the State is limited to introducing evidence that proves an aggravating circumstance or rebuts a mitigating circumstance argued by the defendant. Randolph v. State, 562 So. 2d 331 (Fla. 1990). The State's first penalty phase witness was Hubert Bernard Griffin, a jailhouse informant. Griffin testified that Mr. Harvey tacitly admitted to him that he drew a picture on a jail cell wall depicting a man with a machine gun shooting a person in the back. Beneath the drawing was the inscription, "If I can't kill it it's already dead." The word "Lee" was written below that. (R. 2661).

Griffin's testimony about the drawing and inscription did not address any of the statutorily enumerated aggravating circumstances. See § 921.141(5), Fla. Stat. (1985). The only plausible rationale for Griffin's testimony was that would rebut any argument Mr. Harvey could make that he was remorseful. Because Attorney Watson did not argue leniency for Mr. Harvey because of remorse, it was error for the State to anticipatorily rebut that mitigating circumstance. See Fitzpatrick v. Wainwright, 490 So.2d 938 (Fla. 1986) (appellate counsel ineffective for failing to argue that the court erred in allowing the state to present evidence rebutting the existence of statutory mitigating circumstance after defendant had declined to present evidence of that mitigating circumstance).

f. Defense Counsel's Failure to Present Evidence or Make Argument at Sentencing Was Inadequate (Claim 2(f)).

Mr. Harvey's sentencing occurred two hours after the jury returned their advisory verdicts. The only words uttered by Attorney Watson during the

entire sentencing procedure were, "We know of no legal cause for non-sentencing." He called no witnesses and made no argument that the court should spare his client's life.

This Court has recognized the importance of effective assistance of counsel at the sentencing phase of Florida's trifurcated system. See Gaskin v. State, 737 So. 2d 509, 514 n.11 (Fla. 1999) (counsel must zealously represent death penalty defendants "at every level"). Florida law vests the trial court with discretion to impose either the death penalty or life imprisonment even if the jury recommends to the contrary. Swan v. State, 322 So. 2d 485, 489 (Fla. 1975). In Stevens v. State, 552 So.2d 1082 (Fla. 1989), this Court vacated a death sentence where "trial counsel elected to make no arguments to the judge on behalf of" a capital defendant at sentencing. Id. at 1085. "Trial counsel essentially abandoned the representation of his client during sentencing." Id. at 1087.

Sentencing in a capital case is a critical stage of the proceedings. As a result, a defendant is entitled to the effective assistance of counsel at that time. Gagnon v. Scarpelli, 411 U.S. 778 (1973). At the third phase of Mr. Harvey's capital trial, the judge sentencing portion, Mr. Harvey was, in effect, completely unrepresented. Attorney Watson simply gave up. Defense counsel did not merely function poorly at sentencing -- he did not function at all.

3. The Cumulative Prejudicial Impact of Defense Counsel's Errors Satisfied the *Strickland* Test For Ineffective Assistance of Counsel.

The Court need not express an opinion as to whether each of these factors, standing alone, is sufficient to establish prejudice. That is because the cumulative effect of these and the other errors by defense counsel identified in this

Brief show beyond question the constitutional unreliability of Mr. Harvey's entire criminal trial.

VII.

CONCLUSION

For the foregoing reasons, and for the reasons cited in Mr. Harvey's Rule 3.850 Motion and the other briefs filed in connection with this post-conviction proceeding, this Court should vacate the existing judgment and sentence of death, and remand this case for a new trial on both guilt/innocence and penalty issues as soon as practicable.

Respectfully submitted,

By:_____

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