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 Reply Brief

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ORAL ARGUMENT REQUESTED

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The State's defense of Attorney Watson's performance is untenable under this Court's precedents. Watson's failure to investigate Mr. Harvey's background and to hire a psychiatrist after being told to do so requires a new trial under Rose v. State, 675 So. 2d 567 (Fla. 1996). Watson's concession of Mr. Harvey's guilt was *per se* ineffective under Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000). And his attack on Mr. Harvey during penalty phase closing statements, including telling the jury that his defense of Mr. Harvey was "public service," is constitutionally ineffective under Clark v. State, 690 So. 2d 1280 (Fla. 1997).

These and other errors, taken together or separately, constitute profound violations of Mr. Harvey's constitutional rights. The trial court's judgment and sentence should be vacated and this case remanded for a new and constitutional trial.

I. MR. HARVEY HAS DEMONSTRATED THAT WATSON FAILED TO INVESTIGATE AND UNDERSTAND HIS OPTIONS FOR THE PENALTY PHASE.

The State argues that Attorney Watson pursued a reasonable penalty-phase strategy and that, consistent with that strategy, he elected to forego investigation and presentation of virtually all mitigation evidence. The State also contends that even if that evidence had been presented, it would not have affected Mr. Harvey's sentence.

The State is wrong on both counts. Watson committed textbook errors of capital defense preparation and advocacy. His limited efforts to investigate adversely affected both the guilt and penalty phases and are, viewed in context, deficient under any reasonable standard. Though the State devotes pages to those efforts (mostly recycling the same two or three facts), the State cannot escape the fact that, when the dust settles, Watson's efforts missed:

- Uncontroverted evidence of three (3) statutory mitigating factors;
- Uncontroverted psychiatric evidence of organic brain damage, major depressive disorder, dependent personality disorder, post-traumatic stress disorder, and substance abuse disorders;
- Uncontroverted evidence of non-statutory mitigating factors, such as abject poverty, a dysfunctional family, exposure to toxic pesticides, rampant abuse, alcoholism and drug abuse, and a traumatic and debilitating car accident in 1979 that led to behavioral changes; and
- Uncontroverted evidence connecting these mental illnesses and non-statutory mitigating factors to the crime, such as Dr. Norko's opinion of how Mr. Harvey's hyperarousal phenomenon could explain the crime as a reflexive, non-thinking shooting act.

A. Watson Failed To Make A Reasonable Investigation Of Mr. Harvey's Mental Health.

The State does not dispute that Watson failed to investigate available psychiatric mitigating evidence. As a result, Watson did not understand the mental health mitigation options available to him, which included evidence of three statutory mitigating factors, organic brain damage, major depressive disorder, post-traumatic stress disorder, substance abuse, and dependent personality disorders.

Watson's failures are presumptively deficient because a reasonable mitigation investigation includes an investigation into psychological evidence. See, e.g., Rose, 675 So. 2d at 571-74; Hildwin v. Dugger, 654 So. 2d 107, 109 (Fla. 1995). Indeed, "severe mental disturbance is a mitigating factor of the most weighty order, and the failure to present it may constitute prejudicial ineffectiveness." Rose, 675 So. 2d at 573 (citations omitted); see also Williams v. Taylor, 120 S. Ct. 1495, 1500 (2000) (capital defense attorney ineffective for failing

to introduce mitigating evidence that included evidence of organic mental impairments).

The State tries to rebut that presumption, and to justify Watson's failures, by arguing that (i) Watson's failure to hire a psychiatrist was reasonable and/or strategic (State's Resp. at 5-6); (ii) Watson's efforts were good enough because he hired a psychologist (id. at 26-27); (iii) Watson did not know he needed to hire a psychiatrist (id. at 12-13, 14-15); (iv) the psychological testimony at trial was similar to the psychiatric testimony at the post-conviction hearing, except for organic brain damage (id. at 25); (v) psychiatric testimony would have opened the door to alleged bad acts from Mr. Harvey's past (id. at 26); and (vi) Dr. Norko's psychiatric opinions were "not unassailed." (Id. at 26). All of those arguments are unsupported by the record.

1. Watson's failure to hire a psychiatrist was not strategic.

Watson did not testify that he was following any strategy in failing to hire a psychiatrist. To the contrary, Watson testified that he *would have presented* psychiatric evidence of organic brain dysfunction if he had known about it. (PCR. v. 12, p. 389.) Even the State's Response concedes that "[h]ad there been any significant evidence of organic brain damage or other mental health diagnosis, it would not have been ignored. *Indeed the penalty phase theme may well have been different.*" (State's Resp. at 11-12.)

The State's atypical acknowledgment, and Watson's frank admission, are sufficient to require a new sentencing hearing if Watson's failure to consult with a psychiatrist was unreasonable under the circumstances. Although the State's Response is silent as to why Watson failed to hire a psychiatrist, the record is not. The record shows that Watson's failure was the product of malfeasance.

After examining Mr. Harvey, Dr. Petrilla concluded that Mr. Harvey needed a psychiatric evaluation. (PCR. v. 15, p. 972-75.) Dr. Petrilla told Watson, repeatedly, to obtain a psychiatric consultation, and he provided Watson with the names of three specific psychiatrists. (Def. Ex. 4; PCR. v. 10, pp. 81-82.) There is no doubt Watson agreed. Indeed, Watson deemed the issue so important that he wrote memoranda reminding himself to hire a psychiatrist:

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

(Def. Ex. 4.) Watson then went to the trial court, represented twice to the court that he planned to hire a psychiatrist, and obtained public funds to do so.[1] But he didn't follow through, for unknown reasons.

The State's Response appears to concede that Watson could have consulted confidentially with a psychiatrist without risking a conflicting mental health opinion.[2] As Mr. Harvey has noted, there is no evidence that Watson was concerned about a conflicting opinion in a consultation. In all events, Watson could have maintained the confidentiality of the psychiatric opinion by obtaining a protective order or designating the psychiatrist as a consulting expert until he

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[1]The State cites the fact that Watson "obtained funds necessary to hire a psychiatrist" as one of his efforts during his pretrial investigation. (State's Resp. at 9.) That argument misses the point: Attorney Watson inexplicably *did not use those funds* and, in failing to do so, deprived himself of a reasonable understanding of his options in mitigation.

[2]The trial court speculated that Watson may have decided not to hire a psychiatrist to avoid a conflict in mental health opinions between his two experts, even though Watson never specifically stated that was his strategy in Mr. Harvey's case and even though Mr. Harvey's co-defendant obtained a protective order and used two mental health experts, including a psychiatrist. (Order at 4.) The State properly does not defend the trial court's finding. (See State's Resp. 5.)

decided to present the psychiatrist's testimony. See Lovette v. State, 636 So. 2d 1304, 1308 (Fla. 1994).

2. Because Dr. Petrilla recommended a psychiatric evaluation, it was unreasonable for Watson to stop his mental health investigation without consulting a psychiatrist.

The State next contends that Watson's mental health investigation was sufficient -- that is, good enough -- because Watson had Mr. Harvey evaluated by a psychologist, Dr. Petrilla. (State's Resp. at 5-6; 26-27.) The State's position is misplaced, for several reasons.

First, although Watson had Mr. Harvey examined by a psychologist, that examination was insufficient, indeed incomplete, because the psychologist himself told Watson that Mr. Harvey needed to be examined by a psychiatrist. Because Dr. Petrilla told Watson that Mr. Harvey needed a psychiatrist, Watson had an investigatory obligation to consult with a psychiatrist and could not reasonably decide to stop his mental health investigation until obtaining that consultation.

Second, Dr. Petrilla was not qualified to score the tests he administered or to appreciate their importance from a neurological perspective. Dr. Petrilla admitted to critical mistakes in interpreting the tests, including misinterpreting Mr. Harvey's 12-point differential on the WAIS-R test, his scores on the Digit Symbol subtest, and his responses on the Bender-Gestalt examination. (PCR. v. 15, pp. 965-70.) All of those scores indicated organic brain damage. (Id.) Dr. Petrilla then recommended that Mr. Harvey be given "assertiveness training," which Expert Lyon found "patently ridiculous" because it "seems to

indicate really no understanding of the purpose . . . of his evaluation."[3] (PCR v. 13, p. 593.) Dr. Petrilla attributed his errors to his "incompetence" at the time, calling himself incompetent (or something similar) 12 times during the evidentiary hearing.

Third, Watson short circuited Dr. Petrilla's evaluation. Watson directed Dr. Petrilla to limit his examination to a personality assessment, as opposed to a forensic mental health evaluation. (PCR. v. 12, p. 389, v. 15, pp. 959-60, 963.) Watson also refused to permit Dr. Petrilla to discuss the crime with Mr. Harvey, thereby eliminating the possibility that Dr. Petrilla could relate his findings to the offense or to the statutory mitigation categories. (PCR. v. 15, p. 975.) Despite Dr. Petrilla's requests, Watson refused to provide any meaningful information on Mr. Harvey's social, developmental, and life history. (Id. at 963.)

3. Watson was on notice of the need to hire a psychiatrist.

The State also tries to portray Watson as a layman who did not realize that he needed to hire a psychiatrist. Thus, the State contends that Dr. Petrilla did not tell Watson about his inability to assess brain damage. (State Resp. at 13 n.11.) But there is no evidence in the record -- either way -- as to what Dr. Petrilla told

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[3]The State's assertion that Expert Lyon's testimony is irrelevant is misplaced. (State's Resp. 4 n.1.) First, Ms. Lyon provided *factual* testimony as to the professional norms for capital defense counsel in Florida at the time of Mr. Harvey's trial. Second, although Ms. Lyon also offered an opinion that Watson was ineffective, Florida courts recognize the value of such expert opinions and have held that it is not error to consider them. See, e.g., J.B. Parker v. State, 542 So. 2d 356, 357 (Fla. 1989); Davis v. State, 499 So. 2d 24, 26 (Fla. 4th DCA 1986). At least two other state supreme courts have relied on Ms. Lyon's opinions in determining constitutional effectiveness. Illinois v. Perez, 592 N.E.2d 984, 991 (Ill. 1992) (relying on testimony of Ms. Lyon in holding trial counsel to be ineffective); Burris v. Indiana, 558 N.E.2d 1067, 1074 (Ind. 1990) (same).

Watson about his qualifications or ability to diagnose organicity. Moreover, the State's argument ignores Dr. Petrilla's repeated recommendations to Watson to get a psychiatrist. (Def. Ex. 4; PCR. v. 10, pp. 81-82). Dr. Petrilla testified that he was "concerned" about the indications of his preliminary findings and believed a psychiatrist would be much "more thorough with regard to the likelihood of diagnosing organicity than I would." (PCR. v.15, pp. 973-74.)[4]

The State also claims that Watson did not observe any abnormal behavior on the part of Mr. Harvey. (State's Resp. at 12.) The record shows otherwise. Watson testified that he thought Mr. Harvey "was a borderline operator where the distinction between reality and nonreality was not always clear." (PCR. v. 12, p. 417.) Watson knew that Mr. Harvey had attempted suicide *repeatedly* since he had been arrested -- attempting to hang himself, cut his wrists, and begging Miami Beach police officers to shoot him -- as well as had a series of suicide attempts prior to his arrest, including putting a loaded pistol to his head. (PCR. v. 11, pp. 287-88.) Dr. Petrilla had diagnosed Mr. Harvey as anxious, immature, and depressed. (Def. Ex. 11.) And Watson himself considered Mr. Harvey suicidal, slow to understand, tearful, and without motivation. (PCR. v. 10, pp. 86-87.)

Further, with proper investigation, Watson would have been familiar with Mr. Harvey's background, which included a serious car accident in 1979 that

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[4]In a short footnote, its only comment on the issue, the State acknowledges that Dr. Petrilla told Watson to get a psychiatrist. (State's Resp. at 12 n.11.) The State, however, mischaracterizes the request as being made "simply because such an expert would more through *[sic]* and would offer a second opinion." Dr. Petrilla's complete testimony is that he recommended a psychiatrist because he or she "would be much more thorough *with regard to the likelihood of diagnosing organicity* than I would. And or also give a second opinion as to my results." (PCR. v. 15, pp. 973-74, emphasis added.)

had critically injured Mr. Harvey, causing head trauma, loss of consciousness, and amnesia. (PCR. v. 11, pp. 298-99.) Watson also would have known about Mr. Harvey's being beaten with a tire iron in the back of the head, (PCR. v. 13, pp. 663-64), exposure to toxic chemicals (PCR. v. 14, pp. 798-99; 913-15), familial history of psychological disorders (PCR. v. 11, p. 321), and significant personality change after suffering the head traumas. (Id. at 306.)

4. Dr. Norko's testimony was qualitatively and substantively different than Dr. Petrilla's testimony at the original trial.

The State next contends that Mr. Harvey is not entitled to relief because he now has had "good fortune in finding mental health professionals who will opine that he suffers from organic brain damage." (State's Resp. at 8.) The State misses the point. This is *not* a case in which mental health experts simply disagree with one another. (Id. at 25.) Instead, this is a case where significant mental health mitigation evidence was never investigated because Watson did not heed his psychologist's original advice to hire a psychiatrist, did not commission a forensic evaluation, and did not provide adequate background materials.[5]

[5]The State's references to Cherry v. State, No. 90511, 2000 WL 1424537 (Fla. Sep. 28, 2000) and Asay v. State, 769 So. 2d 974 (Fla. 2000), are inapposite for several reasons. In Cherry, unlike in this case, counsel hired a psychiatrist who testified at trial that the defendant was borderline retarded. The psychiatrist in Cherry had conducted an extensive review of the defendant's life history, yet continued to maintain in the 3.850 proceedings that no statutory mitigating factors were present. In addition, unlike Mr. Harvey in this case, the defendant in Cherry refused to cooperate with counsel's mitigation investigation. Likewise, in Asay the defendant also had the benefit of a psychiatric examination for his original trial, although it found no cognitive or emotional disturbance. Moreover, unlike Watson, counsel in Asay *knew* of mitigating evidence in the defendant's background, but simply made a strategic choice not to present it. Here, Watson was unaware of available mitigating evidence.

The State claims that even if Watson did err, his errors were inconsequential because Dr. Norko's testimony was essentially identical to the testimony of Dr. Petrilla at the original trial. (State's Resp. at 18.) The State is wrong. To begin with, Watson did not ask Dr. Petrilla to consider, testify about, or provide evidence relevant to, the statutory mitigating factors. Dr. Norko, in contrast, testified that his psychiatric evaluation supported application of three statutory mitigating factors at the time of the crime. (PCR. v. 12, pp. 434, 435-59; PCR. v. 11, p. 292.)

Further, Dr. Petrilla made a gratuitous comment during his testimony that Mr. Harvey did not have organic brain damage. (R. 2756.) That turned out to be very wrong. Dr. Norko testified that Mr. Harvey met objective diagnostic criteria for five mental disorders: (i) organic brain damage; (ii) major depressive disorder; (iii) post-traumatic stress disorder; (iv) dependent personality disorder; and (v) substance abuse disorders. (PCR. v. 11, p. 290.) Dr. Norko supported his diagnoses with DSM-IIIR criteria, psychological test results and clinical observations, such as Mr. Harvey's significant personality change following his car accident, loss of consciousness, amnesia, headaches, memory loss, emotional changes, depression, insomnia, involuntary shaking, and incoherent mumbling. (PCR. v. 11, pp. 298-303; 310; 315-17; 323-24; 326-27; 328-30; 334; 337-40.)

Dr. Petrilla testified in generalities that Mr. Harvey was highstrung, insecure, dependent, lacked self-esteem and self-confidence, was immature and sad, indecisive, depressed and was guilty. (R. 2744-47.) Dr. Norko, on the other hand, testified that Mr. Harvey suffered from five mental illnesses and explained how those illnesses impaired his executive functions and short circuited his decision making, insight and foresight. Mr. Harvey also demonstrated amnesia, affective lability (PCR. v. 11, pp. 304-05), sudden mood changes (id. at pp. 304,

306), apathy (id. at pp. 307-08), a reckless attitude (id.), suicidal ideations (id. at p. 323), excessive interpersonal withdrawal (id. at 307), intolerance of touching (id. at 306), drug and alcohol abuse (id. at 308), anorexia (id. at 323), nightmares (id. at 326-27), and debilitating depression (id. at 307).

Dr. Petrilla did not relate Mr. Harvey's mental health issues to the crime, instead explaining that "I'm just here to explain the test results." (R. at 2769.) But Dr. Norko would have explained to the jury that Mr. Harvey's post-traumatic stress disorder caused a hyperarousal syndrome that resulted in exaggerated reactions to sudden stimuli, which probably explained how the victims were shot in this case. (PCR. v. 11, p. 328.) Dr. Norko also found that Mr. Harvey's mental illnesses were exacerbated by his alcohol and cocaine abuse on the day of the crime. (Id. at 340.)

Finally, Dr. Petrilla did not testify to any mitigating circumstances found in Mr. Harvey's background or life history. Dr. Norko, however, testified as to the existence of many non-statutory mitigating factors, including Mr. Harvey's childhood abuse, exposure to toxic substances, significant head traumas, periods of major depression, alcoholism and drug addiction, and suicide attempts.

5. Dr. Norko's testimony would not have opened the door to any bad aspects of Mr. Harvey's past.

The State asserts that Dr. Norko's testimony would have opened the door for violent or reckless aspects of Mr. Harvey's past to be introduced to the jury. (State's Resp. at 22.) But the most the State can show is that Mr. Harvey once shot at a streetlight, once briefly choked his sister during a sibling spat, and once drove recklessly with his sister. (State's Resp. at 22.) Those incidents produced no injuries. Dr. Norko introduced the incidents in his testimony as clinical support for his findings and diagnoses. Dr. Norko viewed Mr. Harvey's

teenaged act of shooting at a streetlight as an impulsive, reckless act, characteristic of one whose executive functions are impaired and who suffers from hyperarousal syndrome. (PCR. v. 11, p. 308.) Dr. Norko interpreted the reckless driving as unusual reckless behavior, which was consistent with impaired executive functions, frontal lobe injury, and suicidal ideation. (PCR. v. 11, pp. 286-87, 308.) Mr. Harvey's momentary choking of his sister as a teen during a sibling dispute seems noteworthy only because Mr. Harvey blacked out -- a symptom of organic brain damage -- immediately after the incident.

Even if Mr. Harvey's acts could be considered negatively, the effect of those acts would be outweighed by the mitigating aspects of Dr. Norko's testimony. See Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 1514 (2000) (holding that negative evidence in post-conviction testimony of three convictions would be outweighed by the "comparatively voluminous" mitigation evidence that could have been presented). Moreover, the acts ascribed to Mr. Harvey are much less severe than those the Court has found significant in other cases.[6]

6. The State's criticisms of Dr. Norko's uncontroverted opinions are without merit.

Finally, the State takes some shots at Dr. Norko's conclusions. Those criticisms *ab initio* ring hollow because the State proffered no mental health expert of its own. Dr. Norko's psychiatric testimony is uncontroverted.[7]

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[6]See, e.g., Haliburton v. State, 691 So. 2d 466, 471 (Fla. 1997) (defendant would kill again); Asay v. State, 769 So. 2d 974 (Fla. 2000) (defendant threatened to kill his brother's father-in-law and had stabbed his brother's dog); Breedlove v. State, 692 So. 2d 874, 877-78 (Fla. 1997) (defendant burglarized home of 63-year-old woman and killed her).

[7]Dr. Norko's qualifications are impeccable: a board-certified psychiatrist, a professor at Yale Medical School, the former chief of the Whiting Forensic Institute

The State contends that Dr. Norko's findings are only "indicative" of brain damage and that no physical testing, such as an MRI or EEG, was done to confirm those diagnoses. (State's Resp. at 15.) But Dr. Norko himself rejected the State's argument. He explained that organic brain damage is diagnosed to a medical certainty without the use of an MRI or similar test. (PCR. v. 12, p. 465.) The psychological tests administered to Mr. Harvey, coupled with the objective diagnostic criteria of DSM-IIIR, Dr. Norko's personal interviews of Mr. Harvey and those who knew him, his review of Mr. Harvey's life history, and his observations of Mr. Harvey's personality changes, blackouts and involuntary shaking after his 1979 car accident, are reliable grounds on which to diagnose an organic dysfunction. (Id. at 465-70.)

The State next criticizes Dr. Norko's opinion that Mr. Harvey was under the substantial domination of his co-defendant because the co-defendant was younger and Mr. Harvey confessed to firing the shots. (State's Resp. at 20.) Dr. Norko, however, testified that age is irrelevant to domination. (PCR. v. 12, p. 440.) Moreover, Mr. Harvey's confession shows that Stiteler successfully dominated Mr. Harvey by *forcing him to participate* in the robbery and shoot the victims. Stiteler induced Mr. Harvey to participate in the crime, drove Mr. Harvey's car to the scene, knocked on the door to set things in motion, rummaged through the house while Mr. Harvey waited, and told Mr. Harvey to shoot when Mr. Harvey asked Stiteler what he should do. (Def. Ex. 14.) That scenario is consistent with Dr. Norko's clinical interviews of Mr. Harvey and of the individuals who had observed the dynamics of the defendants' relationship. (PCR. v. 12, p. 448.)

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in Connecticut, and a prolific author. He has testified twice in his career, once for the state.

The State also challenges Dr. Norko's conclusion that Mr. Harvey was unable to appreciate the criminality of his conduct or conform his conduct to the requirements of law because the defendants prepared for the burglary by cutting the phone lines, bringing masks, and trying to get away. (State's Resp. at 21.) Dr. Norko, however, testified that those facts were consistent with his opinion because his evaluation determined that Mr. Harvey did not have "the appreciation quality, the cognitive and affective components of understanding that are part of appreciating." (PCR. v. 12, pp. 535-37.) Dr. Norko noted that some of the facts cited by the State in its response -- such as bringing masks to the house but failing to put them on even after ringing the doorbell -- supported his conclusion that Mr. Harvey had impaired executive functions and exhibited poor planning consistent with a frontal lobe injury. (Id. at 536.) Dr. Norko also explained that Mr. Harvey's hyperarousal and organic syndromes likely caused the reflexive act of shooting upon the victims' sudden movement, rendering Mr. Harvey unable to conform his conduct to the of law. (Id.)

B. Watson Failed To Investigate Mitigating Factors In Mr. Harvey's Background And Life History.

In addition to failing to reasonably pursue psychiatric mitigating evidence, Watson conducted almost no investigation of Mr. Harvey's background. As a result, Watson did not know his options in mitigation and could not, as a matter of law, have made reasonable strategic choices about which mitigation theory to pursue or what evidence to present.

1. Watson did not understand his mitigation options because he did not investigate Mr. Harvey's background.

Just as there is no dispute that Watson missed psychiatric mitigating evidence, there is also no dispute that Watson largely failed to investigate Mr. Harvey's background and life history for mitigating evidence. The State shrugs that off, however, contending that Attorney Watson "[s]imply . . . did not uncover evidence of alleged organic brain damage, alleged unloving family, or alleged intoxication" during his pre-trial preparations. (State's Resp. at 8.)

Watson did not uncover that evidence because he failed to look for it. Ignoring his "strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence," State v. Reichmann, Nos. SC 89564 & 93236, 2000 WL 205094, *4 (Fla. Feb. 24, 2000), Watson committed himself to a theory of defense -- the "good person" defense -- and targeted his investigation narrowly to finding evidence to support that theory. There is no evidence that Watson considered any other theory of mitigation. He did not investigate, or seem to recognize the importance of, other aspects of Mr. Harvey's life, such as his abusive childhood (PCR. v. 12, pp. 483-84), exposure to toxic chemicals (PCR. v. 14, pp. 798-99), alcohol and substance dependencies (PCR. v. 12, p. 467), dependent relationships (PCR. v. 13, pp. 467-68), exposure to violence and poverty (PCR. v. 12, pp. 466-69), or traumatic events.[8] (Id. at 440-443.)

[8] Although the State asserts that Mr. Harvey did not tell Watson that Mr. Harvey was intoxicated on the day of the crime or that he came from an unloving family (State's Resp. at 11 & n.7), that argument begs the question because the record shows that Watson *never bothered to investigate* whether Mr. Harvey was intoxicated or Mr. Harvey's life history. There is no suggestion that Mr. Harvey or his family were uncooperative in Watson's attempt to investigate.

For these reasons, Mr. Harvey's case is analogous to Rose and Hildwin v. State, 654 So. 2d 107 (Fla. 1995). In Rose, counsel investigated and presented some evidence in mitigation, but failed to uncover evidence of organic brain damage, personality disorder, two statutory mitigating factors, and non-statutory mitigating evidence that included poverty, emotional abuse, learning difficulties, and a previous head injury. See Rose, 675 So. 2d at 571. Likewise, in Hildwin, counsel also conducted some investigation for the penalty phase, but failed to uncover mental health mitigation evidence that would have supported application of two statutory mitigating factors, as well as non-statutory mitigating evidence of abuse, substance abuse, and organic brain damage. Hildwin, 654 So. 2d at 110. Here, Watson failed to uncover evidence supporting *three* statutory mitigating factors, along with non-statutory mitigating evidence such as poverty, abuse, violence, substance abuse, personality disorder, a traumatic car accident that caused blackouts and involuntary shaking, and organic brain damage.

2. Because Watson failed to investigate, his mitigation strategy -- the "good person" defense -- was unreasonable as a matter of law.

The State contends that Watson's "good person" mitigation strategy was reasonable because Watson "discovered" that Mr. Harvey came from a positive loving family. (State's Resp. at 9.) Although that implies that Watson developed his theory after a proper investigation, the State's implication is unsupported by the record.

Watson did not testify that he developed his "good person" mitigation theory after an investigation. (PCR. v. 10, pp. 133-36.) Instead, the record shows that Watson latched onto the "good person" theory *before* beginning his investigation, made limited efforts to locate evidence to support that theory, and did not investigate anything else. (Id.) One illustration of Watson's approach is the

initial letter he sent to his investigator defining the scope of the investigation, which directed his investigator to limit his investigation to finding individuals who would testify that Mr. Harvey had "redeeming social qualities." (PCR. v. 13, p. 759.)

As this Court has recognized repeatedly, counsel may not "latch onto a strategy" for which he has determined that potential mitigating evidence is unnecessary. See, e.g., Rose, 675 So. 2d at 572. Instead, counsel must investigate his or her options and make a reasonable choice between them. Jackson v. Herring, 42 F.3d 1350, 1367 (11th Cir. 1995). Counsel must gather enough knowledge of the potential mitigating evidence to make an informed strategic decision. Id.

The State notes that the penalty phase "mirrored" Watson's "good person" theory. (State's Resp. at 13.) That may be true, but it does not help the State because Watson only made investigative efforts to support that theory and he literally told his penalty phase witnesses what to say on the stand. (PCR. v. 14, pp. 789-90, 819-20, 894, 921.) With those fixes in, one would be surprised if the penalty phase did not "mirror" Attorney Watson's theory.

The State also suggests that Watson tried to present a mitigation theory that the murders were the result of a panicked reaction by Mr. Harvey and that Mr. Harvey was remorseful about the murders. (State's Resp. at 9-10.) But the record contradicts the State, showing that during the penalty phase, Watson did not argue that the murders were the result of a panicked reaction or that Mr. Harvey was remorseful. (R. 3020-38.) Moreover, Watson did not testify at the evidentiary hearing that he actually executed that strategy during the penalty phase.

3. The available mitigation evidence was fundamentally different from the "good person" evidence presented at trial.

As with the psychiatric evidence missed by Watson, the State contends that relief should be denied because the life history mitigation evidence presented by *pro bono* counsel at the evidentiary hearing was "virtually identical" to the evidence presented by Watson during the penalty phase. (State's Resp. at 25.) The State is wrong.[9]

A few examples comparing the non-psychological evidence Watson presented at the penalty phase with the evidence presented at the post-conviction hearing demonstrates that the State's argument is meritless. At the penalty phase, Watson told witnesses what to say, and those witnesses stated that Mr. Harvey liked to play football, was well-mannered around the ladies, was "polite," "dressed nice," "smelled good," and that his childhood was "normal." (R. 02827, 02881, 02918.)

At the 3.850 hearing, witnesses testified accurately. Harold Lee Harvey, Sr. testified that Mr. Harvey swam in canals with pesticides as a child, causing headaches and diarrhea. (PCR. v. 14, p. 798.) Laura Palmer testified that the family was so poor that it could not afford food consistently and that the Harvey children were too poor to do things that other kids could do, even in that rural area. (Id. at 812-13.) Jenny Hudson testified that Mr. Harvey was forced to work in the fields as a child to help support his family, did not receive medical care,

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[9]This Court appears to have already rejected this argument. In its opinion remanding for an evidentiary hearing, Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995), the Court necessarily rejected an argument made by the State that the proposed mitigation evidence was cumulative. (See State's April 23, 1994 Answer Brief On Appeal From Denial Of Evidentiary Hearing at 13).

and had low self-esteem. (Id. at 880-83.) Jimmy Lassiter testified that Mr. Harvey began to drink heavily at the age of 14. (Id. at 947.) Jenny Hudson testified that Mr. Harvey abused substances on a daily basis. (PCR. v. 15, p. 886.)

At the penalty phase, several witnesses suggested, again consistent with Watson's instructions, that the Harveys were a loving family. (See, e.g., R. 2884, 2909, 2912-13.) At the 3.850 hearing, in contrast, Harold Lee Harvey, Sr., testified that he drank incessantly, used the family's grocery money to buy alcohol, would hit Mr. Harvey in the head with a board, and would beat up his wife. (PCR. v. 14, pp. 799-801.) Mr. Harvey's grandfather, to whom Mr. Harvey was very close, was an alcoholic and provided alcohol to Mr. Harvey at an early age. (Id. at 801.) Laura Palmer and Jenny Hudson, Mr. Harvey's sisters, stated that the Harvey's were a physically abusive and dysfunctional family, never hugging or saying "I love you," and never affectionate. (See id. at 816, PCR. v. 15, pp. 881-82.)

At the penalty phase, there was incidental testimony that Mr. Harvey had been in a car accident without providing any details of the accident. (See, e.g., R. 2820, 2936.) During the 3.850 hearing, in contrast, several witnesses testified to the horror of the accident. For example, Shirley Harvey testified that Mr. Harvey's companion was killed and that, when they went to the hospital, Mr. Harvey looked as if he were dead, with glass protruding from his scalpel lacerations and blood running out of his ears and down his face. (PCR. v. 15, p. 919.)

More importantly, almost every witness confirmed the strange changes in Mr. Harvey following the accident. Mr. Harvey's father testified that Mr. Harvey suddenly experienced nightmares and headaches, and would stare into space. (PCR. v. 14, pp. 802-03.) Laura Palmer found that he became moody, depressed, and would have sudden mood swings. (Id. at 815.) Patricia Storey and Jenny

Hudson testified that he had blackouts. (Id. at 830, PCR. v. 15, p. 885.) David Woodall, a friend of Mr. Harvey's and a former corrections officer, testified that Mr. Harvey had memory loss, blackouts, and involuntary shaking and trembling. (PCR. v. 14, pp. 857, 860.) Jenny Hudson noticed that her brother began to use drugs daily after the accident. (PCR. v. 15, p. 886.) Shirley Harvey testified that Mr. Harvey experienced involuntary leg shaking and violent mood swings after the accident. (Id. at 920-21.)

C. Watson's Failure To Investigate And Present Available Mitigating Evidence Prejudiced Mr. Harvey.

The State contends that even if Watson's performance was deficient, "Harvey would still not be entitled to relief." (State's Resp. at 27-28.) Although this Court could remand to the trial court for a prejudice determination because the trial court denied relief solely on the *first prong* of Strickland, (Order at 10), Mr. Harvey respectfully suggests that the record already contains ample evidence of prejudice.

Under Strickland, prejudice results when there is "a reasonable probability that, absent the errors, the sentencer . . . to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Robinson v. State, 770 So. 2d 1167, 1172 (Fla. 2000) (Anstead, J., concurring); Rose v. State, 617 So. 2d 291 (Fla. 1993).

In the original trial, the trial court, and presumably the jury, weighed four statutory aggravating factors against no statutory mitigating factors. Because of Watson's mistakes, the jury also heard *nonstatutory aggravating* evidence -- lack of remorse and post-crime criminal conduct -- along with a weak nonstatutory mitigating circumstance of low educational and social skills.

That balance would have shifted markedly if Watson had done a proper investigation. Mr. Harvey could have established reasonable doubt on all but one statutory aggravating factor (murder committed during commission of a burglary).[10]

On the other hand, the jury would have found uncontroverted expert evidence of three statutory mitigating factors: Mr. Harvey lacked the ability to conform his conduct to the requirements of law, he acted under the substantial domination of another, and he committed the offense under the influence of extreme mental or emotional disturbance, namely his organic brain damage. The jury also would have found non-statutory mitigating factors of family dysfunction, poverty, abuse, head traumas, suicide attempts, and substance abuse. It would not have considered non-statutory aggravating evidence. Further, if this Court ordered a new penalty phase for the reasons set forth in this 3.850 motion and Mr. Harvey's re-sentencing were held under today's law, Mr. Harvey could establish the additional statutory mitigating circumstance of "no significant history of prior criminal activity" because of the 1988 change in the Florida law announced in

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[10]Reasonable doubt would exist on the HAC aggravator because Mr. Harvey could present evidence that the victims were, by all accounts, very hard of hearing and the conversation about them took place well out of earshot and amidst a running car engine. (See infra at pp. 33.) Reasonable doubt would exist on the CCP aggravator based in part on Dr. Norko's medical testimony that the crimes were not premeditated, but were instead the product of a snap, even accidental, reaction caused by the confluence of Mr. Harvey's hyperarousal syndrome with the victims' sudden attempt to run. (PCR v. 12, p. 440.) Similarly, because the shooting was a non-thinking, reflexive act, Mr. Harvey could also raise reasonable doubt on the factor that the murders were committed to prevent lawful arrest.

Scull v. State, 533 So. 2d 1137 (Fla. 1988).[11] Accordingly, the new balance would be one statutory aggravating factor against four statutory mitigating factors and many non-statutory mitigating factors.

II. MR. HARVEY HAS DEMONSTRATED THAT HE DID NOT CONSENT TO WATSON'S CONCESSION OF HIS GUILT, AND THAT WATSON CONCEDED GUILT TO FIRST-DEGREE MURDER.

The State defends Watson's concession of Mr. Harvey's guilt in two ways. First, it contends that a lawyer may reasonably concede guilt to a lesser-included offense to avoid conviction of the charged offense. (State's Resp. at 31-32.) Second, the State argues that, in this case, Watson followed reasonable strategy by conceding Mr. Harvey's guilt to second-degree murder in the hope of avoiding a conviction on death-eligible, first-degree murder. (State's Resp. at 32.)

The State is half right on the law, but omits a critical qualification. Under Nixon v. Singletary, 758 So. 2d 618, 623 (Fla. 2000), an attorney may concede guilt to a lesser included offense *provided, however, that the defendant consents to the strategy.* That caveat is dispositive in this case: There is no evidence that Mr. Harvey consented to Watson's strategy.[12]

The State is also only half right on the facts. Although Watson attempted to concede guilt to second-degree murder only, he also conceded all the

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[11] Although Florida law today also has an additional statutory aggravating factor, (see Fla. St. § 921.141(5)(m)), the State could not use that factor against Mr. Harvey in a re-sentencing. State v. Hootman, 709 So. 2d 1357, 1359 (Fla. 1998), abrog'd on other grounds, State v. Matute-Chirinos, 713 So. 2d 1006 (Fla. 1998).

[12] The State relies on Brown v. State, 755 So. 2d 616 (Fla. 2000) for the proposition that counsel may admit guilt to a lesser charge *when his client consents*. That's true. But in Brown, unlike in this case, the defendant did not testify and there was evidence showing that he consented.

elements to first-degree murder. Mr. Harvey's jury had to look no further than Watson's opening and closing statements in the guilt phase to find admissions as to all the elements necessary to find first-degree murder on either a premeditation or felony murder theory.

Under the law of this Court, those errors make Watson's performance per se ineffective and entitle Mr. Harvey to a new trial. Nixon, 758 So. 2d at 623.

A. Mr. Harvey Did Not Consent To Watson's Strategy Of Conceding Guilt.

The State begins by asserting that a defendant's consent "may not even be required" if his attorney concedes guilt to a lesser-included offense. (State's Resp. at 31-32.) The State is wrong. As recently as last year, this Court held that concession of guilt -- to any murder -- is per se ineffective assistance of counsel if the defendant does not consent to that strategy. Nixon, 758 So. 2d at 623; see also United States v. Swanson, 943 F.2d 1070, 1074 (9th Cir. 1991).

The State next asserts that the trial court correctly determined that "Watson's strategy was discussed with and approved by Harvey." (State's Resp. at 32.) The State's assertion is meritless.

To establish consent to a concession of guilt, the record must contain evidence of an "affirmative, explicit acceptance by [the defendant] of counsel's strategy. Silent acquiescence is not enough."[13] Nixon, 758 So. 2d at 624. Here, there is no evidence in the record that Mr. Harvey consented to Watson's strategy

[13]The State's assertion that Nixon applies only prospectively is wrong. (State's Resp. at 30-31.) Although Nixon establishes a prospective procedure for on-the-record waiver, it makes clear that concession of guilt without consent is per se ineffective assistance of counsel based on the Sixth Amendment and Due Process Clause. Nixon, 758 So. 2d at 624. Affirmative evidence of consent must be found in the appellate record.

of conceding guilt. To the contrary, the record contains affirmative evidence that Mr. Harvey did *not* consent. At the evidentiary hearing, for example, Mr. Harvey directly testified that he did not consent. Cf. Brown, 755 So. 2d at 630 (declining to find counsel ineffective for concession because the defendant did not testify and there was no other evidence that defendant did not consent). Mr. Harvey also testified that he had never even been consulted about Attorney Watson's strategy of admitting guilt. (PCR. v. 15, p. 931.)

The State insists that Watson's concession was appropriate because Mr. Harvey knew the jury would hear his confession. (State's Resp. at 32.) But the relevant standard is *consent.* The fact that Mr. Harvey knew the jury would hear his confession does not establish consent. In addition, Mr. Harvey did not know that the jury would hear his confession until the first day of trial.[14] It cannot be reasonable to ambush a defendant on the morning of trial with a strategy to concede guilt, especially where, as here, the defendant suffers from mental deficits.

The State next argues that Watson could not think of any other strategy to use at trial because Mr. Harvey's confession foreclosed any reasonable possibility of acquittal. (State's Resp. at 33.) That argument was rejected in Nixon; the consent requirement is so basic and fundamental that it is required even where there is overwhelming evidence of guilt. Nixon, 758 So. 2d at 625. The fact that Watson could not develop an alternative defense, or that he thought the concession-of-guilt defense was best, does not excuse his failure to obtain Mr. Harvey's consent to pursue that defense. Id.

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[14]The trial court denied Mr. Harvey's motion to suppress on the first day of trial, June 13, 1986, thereby permitting the confession to be introduced as evidence.

The State asserts that Watson had a "series of consultations with Harvey related to the defense and what could be argued." (State's Resp. at 32.) Again, the standard is *consent*, not a "discussion" or a "series of consultations." Even if Watson had discussions with Mr. Harvey, that does not establish Mr. Harvey's consent to the strategy.

The record does not, in any event, support the State's claim that Watson discussed this strategy with Mr. Harvey. When Watson was first asked about this issue in 1993, he testified that he had no recollection of whether or not he consulted Mr. Harvey. (CR. 139.) Five years later, in 1998, Watson changed his story and testified that he discussed the "general landscape" of possible defenses with Mr. Harvey, and that he leaned over to Mr. Harvey moments before opening arguments to warn him not to react in front of the jury during the opening statement. (PCR. v. 10, pp. 105-06.)

Watson's changing testimony does not establish consent. Actually, it does not even establish that Watson discussed specifically the concession-of-guilt strategy with Mr. Harvey. It also proves too much. The fact that Watson found it necessary to warn Mr. Harvey not to react in front of the jury proves that Watson had not, prior to trial, informed Mr. Harvey of his strategy of admitting guilt.

Finally, the State argues that "at no time did Mr. Harvey disagree" with Watson's strategy. (State's Resp. at 33.) But "[s]ilent acquiescence is not enough" to establish consent. Nixon, 758 So. 2d at 624. There is no indication that Attorney Watson ever *asked* Mr. Harvey to consent to the strategy, and there is no evidence that Mr. Harvey ever *gave* his consent.

B. Attorney Watson Conceded Mr. Harvey's Guilt To First-Degree Murder.

The State devotes several pages trying to establish that Watson did not concede guilt to first-degree murder, contending that he "carefully navigated through the felony murder case law and refused to draw any tangible link between the murder and the underlying felony." (State's Resp. at 34.) The State's efforts miss the point, however, because Nixon holds that consent is required regardless of whether guilt is conceded to the charged offense, a lesser-included offense, or any offense. If the defendant does not consent, counsel is ineffective.

But the State is wrong anyhow. Watson admitted all necessary elements to first-degree murder in at least two ways. First, under Florida law, felony murder includes a murder committed while the defendant is engaged in, *or escaping from*, burglary and robbery. See Parker v. State, 641 So. 2d 369, 376 (Fla. 1994); Campbell v. State, 227 So. 2d 873, 878 (Fla. 1969). At Mr. Harvey's trial, the court instructed the jury accordingly:

> Before you can find the Defendant guilty of first degree felony murder, the State must prove that . . .the death occurred as a consequence of and while Harold Lee Harvey, Jr., or an accomplice *was escaping from* the *immediate scene* of a robbery, burglary or kidnaping.

(R. at 2535-36, emphasis added.)

Although Watson argued that the essential elements of the underlying felonies had been completed, he ignored that felony murder is established if the murder was committed during an escape.[15] Watson conceded that the murder was

[15]Watson knew that the "escaping from" prong was a problem. In his closing argument, Watson twice told the jury that the judge would instruct them that felony murder included murder during escape. At one point, he stated "we will talk about that [escaping from a felony] in a few minutes." (R. 2469.) But he never did.

committed during an escape when, in telling his story of the robbery, *Watson* admitted that Mr. Harvey and his co-defendant robbed the Boyds, stood in the doorway discussing what to do, shot them in the process of leaving the house, and then returned:

> At that point Lee fired that automatic weapon . . . hitting a wall, hitting their bodies, hitting another wall. . . . And then they closed the door and they began to try to make a *quick flight* away from there. And then . . . Lee went back inside to pick up the shells, the brass shells. . . . Picked up the rest shells and heard Mrs. Boyd moaning. . . . He then took whatever life was left in her.

(Id. at 1865-66, emphasis added.)

First-degree murder also includes murder done with premeditation. See Fla. St. § 782.04. Although Watson argued that Mr. Harvey did not have a "fixed and settled purpose," he did not support that argument with evidence. Instead, Watson admitted that the jury could conclude that they "had decided to commit the murder at the time of the shooting." See Hernandez v. State, 273 So. 2d 130, 133 (Fla. 1st DCA 1973) (premeditation may occur a moment before the act). Watson also admitted and highlighted the fact that Mrs. Boyd was shot after the initial shooting, after the defendants had left and returned, because she was moaning. Watson stated: "I can only say at that point that the intent . . . was not so much to kill as it was to stop the killing." He also admitted that Mr. Harvey and his co-defendant discussed whether to kill the Boyds because the Boyds saw them. Watson told the jury:

> And they continued the discussion about what was going to happen. At that point Scott said to Lee, "Well, we're going to have to kill them because they have seen you. They know you." And at that time Mr. and Mrs. Boyd got up to run and Lee depressed the trigger on that weapon and bullets flew throughout the room.

(R. 2464.)

III. MR. HARVEY HAS ESTABLISHED THAT HE REQUESTED COUNSEL BEFORE MAKING INCRIMINATING STATEMENTS.

The State does not dispute that Mr. Harvey's booking sheet contains a request for counsel, that it is authentic, that the booking process began minutes after Mr. Harvey's arrest at 6:30 a.m., and that Mr. Harvey's first incriminating statement was made in the afternoon. The State also does not dispute that Mr. Harvey's request for counsel, if made during the booking process on the morning of his arrest, would have resulted in the suppression of Mr. Harvey's confession. See Edwards v. Arizona, 451 U.S. 477, 484-85 (1981).

Instead, the State defends the trial court's finding that Mr. Harvey was "partially booked" on the morning of his arrest and "partially booked" in the afternoon, and that the request for counsel was made in the afternoon following his confession. (State's Resp. at 43-45.) Although a trial court's factual findings are entitled to deference, they should be overturned if they are not supported by substantial evidence. Stephens v. State, 748 So. 2d 1028, 1032 (Fla. 1999); Puccio v. State, 701 So. 2d 858, 860 (Fla. 1997). In this case, the trial court's findings are not appropriate.

The trial court, and the State, rely primarily on two witnesses, Virginia Alsdorf and Rose Bennett. Alsdorf testified that she began booking Mr. Harvey just after his arrest at 6:30 a.m., but that she asked him only his name and address. Alsdorf stated that she did not check the box on the first page of the booking sheet indicating whether Mr. Harvey invoked his right to an attorney. (State's Resp. at 44.)

Although Alsdorf maintained steadfastly during the beginning of her testimony that she only "took his name down" (PCR. v. 11, p. 173), she later admitted -- after being confronted with her own handwriting on the booking sheet --

that she had asked Mr. Harvey other questions and wrote down the charges against him, "second degree murder and robbery." (Id. at 183.) Later, Alsdorf admitted to writing "everything that's written on the first page." (Id. at 185.) Although the crucial check mark indicating Mr. Harvey's request for an attorney is on the first page, Alsdorf denied making that mark because "I didn't even know what the charges were." (Id. at 185.) However, Alsdorf *did know* what the charges were -- second degree murder and robbery -- because she admitted writing them on the booking sheet. (Id. at 183.)

Just as importantly, the undisputed evidence shows that Alsdorf also wrote in Mr. Harvey's bond amount of "$3,000,000" on the booking sheet. (PCR. v. 13, p. 747.) The bond amount is located on the *second* page of the booking sheet. (Id.) The $3,000,000 bond amount was the amount on the bond schedule for Mr. Harvey's original charges of second-degree murder. It was the only bond amount known to the officers on the morning shift because a judge issued an order canceling the $3,000,000 bond at 3:38 p.m. on that day (before Bennett came on for the day). (PCR. v. 14, pp. 868-69; Def. Ex. O.) Accordingly, Alsdorf must have written in the notation for $3,000,000 bond, which means that she filled out the entire first page and continued into the second page. It is clear, then, that Alsdorf did more than fill out the portions of the booking sheet for Mr. Harvey's name and address. In fact, Ms. Alsdorf filled out the front side of the booking sheet (PCR. v. 11, p. 173), part of the back side (PCR. v. 13, p. 747), a separate arrest affidavit (PCR. v. 13, p. 752), and a separate Classification Intake Screening Report. (Def. Ex. 26.) (PCR. v. 13, pp. 747-48.)

The State's other witness was Rose Bennett, a booking officer on duty in the afternoon on the day of Mr. Harvey's arrest. Bennett testified that she asked Mr. Harvey whether he wanted an attorney and made the relevant check mark on

the first page of the booking sheet. (State's Resp. at 44.) On cross-examination, however, Bennett backed off, admitting that she had no independent recollection of filling out the booking sheet. (PCR. v. 13, p. 739.) She stated that she drew her conclusion solely from the jail logs, introduced into evidence as Def. Ex. 20, that she had been given to prompt her testimony.

Those logs, however, contradict her recollection. The logs, which record all significant events at the jail, do not show Bennett booking Mr. Harvey or asking him if he wanted an attorney. To the contrary, the logs show that Bennett literally did not have any time to book Mr. Harvey when she said she did, *not even one minute*. Bennett testified that she asked Mr. Harvey if he wanted an attorney *after* he met with Assistant Public Defender Clyde Killer,[16] and *before* the first appearance. (PCR. v. 13, pp. 722-23.) The logs show that Mr. Killer finished his interview of Mr. Harvey at 6:10 p.m. (Def. Ex. 20.) The logs then show that Mr. Harvey's first appearance began immediately, at that same time, 6:10 p.m. (Id.) There is no time for Bennett to have completed Mr. Harvey's booking, as she testified.

The trial court abused its discretion by relying on the testimony of these witnesses. "Evidence which is entirely incredible and which fails to accord with logic and reason cannot constitute competent substantial evidence." Paul H. Cowart/ Bld'g Specialty v. Cowart, 481 So. 2d 83, 85 (Fla. 1st DCA 1986).

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[16]This fact also exposes flaws in Bennett's testimony. Bennett testified that she asked Mr. Harvey whether he wanted a lawyer *after* Mr. Harvey met with an attorney, Public Defender Killer. But it does not make sense that Bennett would permit Mr. Harvey to meet with an attorney *before* asking Mr. Harvey whether he wanted an attorney.

In order to find that the check mark indicating a request for counsel was made in the evening, the trial court would have to believe that Alsdorf filled out the entire first page and continued on to the second page of the booking sheet, but that she conveniently skipped over the questions about whether Mr. Harvey wanted a lawyer. It would have to believe that she ignored Florida Rule of Criminal Procedure 3.111(c) and Okeechobee County Jail policy requiring intake officers to ask immediately whether an arrestee wants a lawyer. (PCR. v. 11, pp. 156-59.) It would have to believe that Alsdorf's memory 13 years after the fact about whether she made a check mark is more accurate than contemporaneous documents generated at the time of the incident (which Alsdorf notarized), which state that Mr. Harvey was booked immediately after his arrest at 6:30 a.m.

The trial court would also have to rely on Ms. Bennett's testimony, even though Bennett conceded that she did not recall what actions, if any, she took with respect to Mr. Harvey. And because Ms. Bennett testified that she relied on the jail logs to refresh her recollection, the court would have to believe that Ms. Bennett completed the booking process of Mr. Harvey between his meeting with Mr. Killer that ended at 6:10 p.m. and Mr. Harvey's first appearance at 6:10 p.m., and that Ms. Bennett then for some reason asked Mr. Harvey whether he wanted a lawyer after he had already met with a lawyer in her presence.

The testimony of these witnesses is incredible. It does not make sense. The events could not have happened in the way they testified. The only reasonable reading of the record -- supported by the contemporaneous documents -- is that Mr. Harvey made a request for counsel at 6:30 a.m.[17]

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[17] Arresting officer Gary Hardgraves testified at deposition that Mr. Harvey was arrested early in the morning and booked at that time. Detective Hardgraves's

IV. WATSON ABANDONED MR. HARVEY AND MADE PREJUDICIAL COMMENTS DURING HIS PENALTY PHASE CLOSING STATEMENT.

As illustrated by the chart in Mr. Harvey's Amended Initial Brief, Watson's statements to the jury were more prejudicial than the statements that this Court held to be improper and constitutionally ineffective in Clark v. State, 690 So. 2d 1280 (Fla. 1997). Nevertheless, the State claims that Watson's "comments were proper" because the crime involved sympathetic victims and because the police had a confession. (State's Resp. at 48-50.) The State's argument is without merit.

Bad facts do not permit an attorney to throw in the towel and abandon his client, especially not during the most critical part of the trial. In Clark, this Court held that counsel fails to act as counsel required by the Sixth Amendment when he or she indicates their own doubts or distaste for the case, tells the jury it is their most difficult case, attacks their client's character, or emphasizes the seriousness of the crime. Clark, 690 So. 2d at 1283. Moreover, "reminding a jury that the undertaking is not by choice, but in service to the public, effectively stacks the odds against the accused." Goodwin v. Balkcom, 684 F.2d 794, 804 (11th Cir. 1982).[18]

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testimony is confirmed by contemporaneous written reports from the FDLE. Both the FDLE Investigative Report (Def. Ex. 24.) and Arrest Report (Def. Ex. 18.) indicate that Mr. Harvey was booked between 6:30 a.m. and 7:00 a.m.

[18]The two cases cited by the State, Stewart v. State, 877 F.2d 851 (11th Cir. 1989), and Zamora v. Dugger, 834 F.2d 956, 960 (11th Cir. 1988), are inapposite. Neither case involves the type of statements by counsel that were at issue in Clark and that were offered by Watson in this case.

Watson did all that, and more. In this case, as in Clark, Watson essentially told the jury that he did not want to be there, admitted the elements of several aggravating factors, and stated that he believed that Mr. Harvey had committed first-degree murder even though he had told the jury during the guilt phase that the elements had not been proven. Watson stated that his representation of Mr. Harvey was "public service" and his "obligation to the people of the State of Florida." (R. 3021.) He stated that he personally could not "remember ever having a case where so much physical evidence was introduced against the client." (R. 3034.) Contrary to his arguments during the guilt phase, Watson stated that the "evidence supports a shooting with premeditation, with a conscious decision to kill" and that "[i]t is felony robbery and felony murder." (R. 3027; 3031.) Watson also stated that Mr. Harvey's statement in his confession that he believed the gun was in a semi-automatic position, instead of automatic, should be taken "with a grain of salt." (R. 3028.) Watson did not even ask the jury to find that the statutory mitigating factors applied.

Watson abdicated his adversarial role during this critical part of the trial. He did not function as the type of counsel contemplated by the Sixth Amendment. His comments only helped the State portray Mr. Harvey as a cold-blooded killer, undeserving of sympathy.

V. THE CUMULATIVE EFFECT OF WATSON'S ERRORS CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

Watson's Failed Effort To Maintain Credibility: The State does not respond to Watson's failed attempt to maintain credibility, except to state that Mr. Harvey "fails to allege or state with any particularity what specific promises were made and broken." (State's Resp. at 46.) Watson's broken promises are contained in his opening statement and are identified specifically in the State's

closing argument, both of which are in the appellate record. (R. 1860-67; 2479-2518). They include that Mr. Harvey's family was hard-working (R. 01860); that he was immature and of low intelligence (R. 01860); that he was having problems with his wife, could not support her, and was depressed about it (R. 01860); that he experienced panic, fear and depression that led to the murders (R. 01861); and that he was a willing, cooperative, truthful, remorseful person (R. 01867.)

Watson also destroyed his credibility in the penalty phase. There, he admitted to the jurors that he essentially had tried to fool them during the guilt phase by telling them that the crime was not first-degree murder. During the penalty phase, Watson described the crime and told the jury that "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.) Watson also stated, contrary to his guilt phase representations, that the prosecutor's description of the crime had been correct all along and that it was felony murder. (R. 3027.) Watson also sold out his credibility by telling the jury that he represented Mr. Harvey as a "public service." (R. 3021.)

Watson Should Have Waived "No Significant Prior History":

The State suggests that the Watson's refusal to waive the mitigating factor of "no significant prior history" was reasonable because that evidence had already been admitted in the guilt phase. (State's Resp. at 46-47.) But Watson did *not* testify that he refused to waive the factor because he recognized that the evidence had been admitted during the guilt phase. See Kimmelman v. Morrison, 477 U.S. 365, 386-87 (1986) (cannot create a strategy for counsel in hindsight).

When Watson was asked what he was thinking *at the time of trial*, he essentially agreed that he refused to waive the mitigating factor because he did not know that this Court's law at the time, Ruffin v. State, 397 So. 2d 277 (Fla. 1981),

would permit the State to rebut that factor by emphasizing Mr. Harvey's post-crime temporary escape from jail. (PCR. v. 12, pp. 403-04.) Watson admitted he erred. (Id. at 405.) In fact, Watson testified that he refused to waive the factor, not because it was strategic or because Mr. Harvey would benefit from it, but rather because Watson believed that this Court was wrong and he was right.[19]

The State is also wrong to suggest that the harm from Watson's error was minimal because evidence of the escape had been admitted during the guilt phase. (State's Resp. 48.) Although the evidence had been admitted, Watson's mistake of law permitted the State to do something that it otherwise could not: hammer home during penalty phase closing arguments evidence of Mr. Harvey's post-murder conduct, including escaping from jail. In light of the fact that the jury asked a question during deliberations whether Mr. Harvey would ever be eligible for parole (R. 3044-45), this evidence certainly was prejudicial.

Watson Could Have Raised Doubt On Aggravating Factors:
Although it is undisputed that the victims were hard of hearing, the State asserts that Watson's failure to introduce that evidence to counter the HAC aggravator was reasonable, even though the trial court found HAC based on the victims' supposed ability to hear a conversation about them. (State's Resp. at 52.)

Watson should have known that he could establish reasonable doubt as to HAC. Watson failed to make that argument because he apparently did not realize that his own notes indicated that Mr. Harvey had told him during interviews that the Boyds could not hear the discussion between Mr. Harvey and Mr. Stiteler; the discussion took place outside near a car with its engine running. (Def. Ex. 5.) His

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[19]As Watson testified, "I was using my common sense, which the Florida Supreme Court eventually did also, in [Scull v. State]." (PCR. v. 12, p. 404.)

argument would have been buttressed by Mr. Stiteler's confession, which also indicated that the conversation between him and Mr. Harvey took place well outside the Boyds' presence. (PCR. v. 10, p. 96.) In addition, there were two witnesses, Dora Hinchman and Clay Boyd, who both knew of the Boyds' serious hearing problems. (PCR. v. 15, p. 944; R. 1946-47.)

If Watson had remembered his notes, he would have introduced this evidence and argued it. Indeed, near the end of his testimony at the evidentiary hearing, Watson admitted that, in light of all the evidence, Mr. Harvey was "probably not sure whether they heard him or not. Probably nobody will be." (PCR. v. 10, p. 130.) That is reasonable doubt.

Watson Failed To Argue Substantial Domination: The State also claims that Watson made a reasonable decision not to present evidence of the co-defendant's domination over Mr. Harvey because the "evidence just was not there." (State's Resp. at 53.) Watson's strategy was objectively unreasonable, however, because he would have had evidence of substantial domination if he had conducted a proper investigation. Dr. Norko and Dr. Fisher both concluded that Mr. Harvey was under the substantial domination of his co-defendant at the time of the crime, (see supra at 12), and their conclusions are supported by Mr. Harvey's confession and by his co-defendant's assertive acts of leadership during the crime. (Def. Ex. 14.)

Watson Encouraged Admission Of Future Dangerousness Evidence: In its response, the State notes that Watson objected to the testimony of Nathan Platt, Jr. (State's Resp. at 54.) Watson's objection is not the problem. The problem is that, after the objection was overruled, Watson affirmatively asked the court to admit the *second* part of the statement, to the effect that Mr. Harvey would kill again. (R. 2439.) At the post-conviction hearing, Watson admitted he that did

not adequately object and that Mr. Platt's testimony was prejudicial. (PCR. v. 12, pp. 401-02.)

Watson Permitted Non-Statutory Aggravating Evidence of Lack Of Remorse: Although "lack of remorse should have no place in the consideration of aggravating factors," Colina v. State, 570 So. 2d 929, 933 (Fla. 1990) (quoting Pope v. State, 441 So. 2d 1073, 1078 (Fla. 1983)), Watson permitted it to come in. The State argues that Watson reasonably failed to object to the State's evidence of lack of remorse because Watson himself argued remorse as a mitigator during the penalty phase. (State's Resp. at 55.) That mischaracterizes the record, however, because there was no evidence in the penalty phase that Mr. Harvey was remorseful for the victims' deaths. Although Dr. Petrilla made passing comments that Mr. Harvey's MMPI and other test scores indicated remorse, he did not testify that Mr. Harvey was remorseful about the crime -- nor could he, because Watson did not permit him to discuss the crime with Mr. Harvey. Nor did Watson argue remorse in his closing argument. Watson's failure to object was prejudicial error. See Fitzpatrick v. Wainwright, 490 So. 2d 938 (Fla. 1986).

Watson Failed To Make A Sentencing Argument: The State asserts for the first time that this claim is improperly pled. (State's Resp. at 55.) The basis for the claim is Watson's lack of effort before final sentencing. (R. 03051.) Watson did not argue for leniency or mercy; he abandoned his theory that Mr. Harvey was a good person who found himself in a bad situation and reacted in an uncharacteristic way; nor did he reference the devastation a death sentence would impose on Mr. Harvey's family and friends. Mr. Watson just gave up.

CONCLUSION

For the foregoing reasons, and for the reasons cited in Mr. Harvey's Rule 3.850 Motion and Amended Initial Brief, 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.

Respectfully submitted,

HAROLD LEE HARVEY, JR.

By:_____
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Pro bono counsel for
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