**IN THE SUPREME COURT OF FLORIDA**

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**CASE NO. SC15-1364**

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**RICHARD TODD ROBARDS,**

**Appellant**

**v.**

**STATE OF FLORIDA**

**Appellee.**

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**ON APPEAL FROM THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY,**
**STATE OF FLORIDA**
**Lower Tribunal No. 522006CF018453XXXXNO**

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# INITIAL BRIEF OF THE APPELLANT

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## PRELIMINARY STATEMENT

This is an appeal of a final order by the Circuit Court of the Sixth Judicial Circuit, in and for Pinellas County denying the Appellant, Richard Todd Robards' ("Robards") Motion to Vacate Judgment of Conviction and Sentence of Death Pursuant to Florida Rule of Criminal Procedure 3.851 ("Motion"). Page references to the record on appeal are designated with R[volume number]/[page number]. Page references to the supplemental record on appeal are designated with RS[volume number]/[page number]. Page references to the post-conviction record on appeal are designated with P[volume number]/[page number]. Page references to the supplemental post-conviction record on appeal are designated with PS[volume number]/[page number]. All other references will be self-explanatory or otherwise explained.

## REQUEST FOR ORAL ARGUMENT

Robards is incarcerated at Union Correctional Institution, Raiford, Florida, under a sentence of death. The resolution of these appellate issues will determine whether he lives or dies. This Court has allowed oral argument in other capital cases. A full opportunity to air the issues would be appropriate given the seriousness of the claims involved and the fact that a life is at stake. Robards accordingly requests that this Honorable Court permit an oral argument.

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## STATEMENT OF THE CASE

### (I) Procedural history of the trial proceedings

Robards was charged by indictment with two counts of first-degree murder on August 22, 2006. R1/12-13. Robards was represented at trial by Larry Hoffman and Richard Watts ("Hoffman" and "Watts"). Jury selection took place on May 18, 2010. The guilt/innocence phase took place on May 18-21, 2010. On May 21, 2010, the jury found Robards guilty on both counts. The penalty phase occurred on May 25, 2010. The jury recommended a death sentence on each count by a vote of 7-5. *Spencer*[1] hearings were conducted on July 13, 2010, August 24, 2010, and October 7, 2010. On October 29, 2010 the trial court sentenced Robards to death for both murders. R13/2123-44.

The trial court found the following statutory aggravating circumstances as to each count, and assigned each one of them great weight: (1) The Defendant was previously convicted of another capital felony; (2) The capital felony was committed for pecuniary gain; and (3) The capital felony was especially heinous, atrocious, or cruel. R13/2124-28. The trial court found that no statutory mitigating circumstances had been established. R13/2129-37. The trial court found that the following ten non-statutory mitigating circumstances were established and gave each of them some weight: (1) family history; (2) no plan to murder; (3) good general conduct while in

[1] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

custody; (4) capacity to form positive relationships; (5) remorse and potential for rehabilitation; (6) traumatic brain injury based on PET scan and PET scan brain image comparison; (7) effect of steroids on brain injury and effect of steroids generally; (8) use of prescribed steroids, interactions with other prescription drugs, and withdrawal; (9) mental health issues; and (10) history of steady employment. R13/2137-43.

## (II) Procedural history of the appellate proceedings

The issues raised by Robards in his direct appeal were as follows:

1. Appellant was denied his rights, guaranteed by the United States and Florida Constitutions, to a reliable jury penalty proceeding and to the effective assistance of counsel, and under the unique circumstances shown on this record relief can and should be afforded on direct appeal[2].
2. To the extent that Florida's capital sentencing scheme allows a death recommendation to be returned by a bare majority (7-5) vote of the jurors, it is constitutionally invalid.
3. The trial judge departed from judicial neutrality and committed fundamental error by prompting the State to add an aggravating circumstance which it had not listed in its notice.
4. The combined impact of highly improper argument in which the prosecutor commented on appellant's failure to testify and shifted the burden of proof, and told the jurors that the State didn't even show them all off the evidence ("We would have been here forever") violated appellant's right to a fair trial.

This Court denied all of the above claims. *See Robards v. State*, 112 So. 3d 1256, 1259 (Fla. 2013). Robards did not file a petition for writ of certiorari to the Supreme Court of the United States.

[2] This issue is once again before this Court under Argument I.

**(III) Procedural history of the post-conviction proceedings**

Collateral counsel was appointed to represent Robards in his post-conviction proceedings on May 16, 2013. Numerous additional public records requests were litigated. PS1/150-213; PS2/325-35. Robards filed his Motion on June 18, 2014. P1/1-71. The State filed its Answer Motion on August 15, 2015. P4/161-203. At the case management conference, the lower court granted a hearing as to Claims One and Two. P1/84-85; P6/728-738. The hearing was held on March 24, 2015, and both parties submitted written closing arguments. P3; P4; P5/531-577. The lower court issued a Final Order Denying Defendant's Motion on June 18, 2015. P5/578-602.

## STATEMENT OF THE FACTS

**(I) Summary of the facts of the trial proceedings**

Argument I was first raised by Assistant Public Defender Steven Bolotin in the direct appeal, under Issue I[3]. The direct appeal Initial Brief provided a comprehensive statement of facts with regard to Watts' conduct during the trial proceedings. The statement of facts from the direct appeal as to Argument I is reiterated in Robards' Motion under Claim Two and is important for this Court's *Strickland*[4] analysis as to Watts' conduct with regard to the penalty phase. P3/19-41.

[3] Appellant was denied his rights, guaranteed by the United States and Florida Constitutions, to a reliable jury penalty proceeding and to the effective assistance of counsel, and under the unique circumstances shown on this record relief can and should be afforded on direct appeal.

[4] *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

All relevant facts from the trial proceedings will be incorporated in the argument sections below to prevent redundancy. This Court summarized the evidence at guilt phase in its direct appeal opinion. *See Robards*, 112 So. 3d at 1259-62.

The relevant penalty phase and *Spencer* hearings were summarized as follows:

> On May 21, 2010, the jury returned verdicts finding Robards guilty of the first-degree murders of Linda and Frank Deluca. The trial proceeded to the penalty phase the following week. Robards' penalty phase was held on May 25, 2010. The State presented one penalty phase witness, Linda Deluca's sister. The defense presented several witnesses, most of whom were Robards' family members, friends, fellow inmates, or former clients. Most of the defense's presentation consisted of character evidence about aspects of Robards' personal life and professional life. Additionally, Shane Harper testified that Robards initially planned to rob the Delucas' home while they were on vacation and did not intend that anyone would be at home when the robbery took place.
>
> For each of the murders, the jury was instructed to consider four aggravating circumstances: (1) prior conviction of another capital felony (based on the contemporaneous murder of the second victim); (2) murder committed during the commission of a robbery; (3) murder committed for pecuniary gain; and (4) the murder was especially heinous, atrocious, or cruel (HAC). No statutory mitigation was presented during the penalty phase, but the jury was instructed to consider the following nonstatutory mitigating circumstances: (1) Robards' family background, employment, and good Pinellas County jail record; and (2) any circumstances of the offense that would mitigate against the imposition of the death penalty. For each murder, by a seven-to-five vote, the jury recommended that Robards receive the death penalty.
>
> Prior to sentencing, the trial court conducted a three-part *Spencer* hearing on three dates in July, August, and October 2010. The State presented two witnesses, both of whom testified about the blood splatter found in the Delucas' home and provided additional context to the injuries that the victims suffered. There were significant stains of aspirated blood about four feet high on the hallway bathroom door.

Another pattern of blood spatter on the door leading into the room where the bodies were found indicated that not all of the injuries were sustained in a single room in the Delucas' home. Another source of blood found in the hallway a few feet away from the bathroom revealed that one of the victims was on the floor at one point and bled significantly; however, at some point, the victim moved or was moved to another area and someone stepped in the pool of blood and created significant blood splatter. Because of the severe fire damage to the Delucas' home, the blood evidence that was available for testing was very limited. However, a blood-stained blanket and two swabs of what was believed to be blood were submitted for testing. The results from the blanket and one of the swabs were consistent with the DNA profile of Linda Deluca.

Although mental health mitigation was not presented to the jury during the penalty phase, the defense presented three mental health expert witnesses during the *Spencer* hearing to support the existence of statutory mental mitigating circumstances: Dr. Joseph Charles Wu, Dr. Jonathan Lipman, and Dr. Robert Berland. Robards and his sister Tanya also testified at the hearing.

Dr. Wu interpreted the results of a Positron Emission Tomography (PET) scan that was administered to Robards before trial. The doctor concluded that the scan showed evidence of three types of brain damage: traumatic brain injury, toxic brain exposure, and a combination of traumatic injury and toxic exposure. Dr. Wu found decreased activity in the back of Robards' brain and observed that it "would be consistent with [Robards'] history of having been in multiple car accidents...." Dr. Wu also observed increased activity in Robards' posterior cingulate which he associated with toxic brain exposure. Robards' overactive occipital cortex, Dr. Wu opined, was consistent with some forms of psychosis. Dr. Wu testified that the traumatic brain injury found in Robards' PET scan represented a fourfold increase (from one percent to four percent) of the chance of developing a psychosis, and he noted that additional damage evident on the scan appeared to be caused by a combination of toxic exposure and traumatic injury.

Between the first and second phases of the *Spencer* hearing, Robards was evaluated by Dr. Lipman. Dr. Lipman testified that Robards

displayed a number of physical manifestations of anabolic steroid use, including acne scarification, distinct features of Robards' ear and nose cartilage, and the bony growth of Robards' jaw. Robards also had scars from the removal of large breasts that developed due to his steroid use. Robards began using steroids around age fifteen and graduated from using them in cycles to using them on a continuous basis. Dr. Lipman testified that Robards' withdrawal from steroids could have lasted from ten days to four months and concluded that Robards would have been experiencing steroid withdrawal at the time of the homicides and possibly for weeks afterward because he did not have any steroids when he got out of jail just days before the murders.

Dr. Lipman interviewed people who knew Robards, and he described Robards as violent, destructive, combative, irritable, and fractious, such that protective orders had to be taken against Robards. When Dr. Lipman confronted Robards with these descriptions, Robards "had any number of explanations for why [Dr. Lipman's] view of him was incorrect." He described Robards as paranoid in very subtle ways and testified that Robards reported symptoms consistent with psychotic hallucinations and delusions and paranoid fears. Dr. Lipman conceded that Robards' steroid use was not a determinative justification for Robards' acts of murder and agreed that Robards' attempted escape from the State hospital in 2008 occurred long after Robards' withdrawal symptoms would have passed.

Dr. Berland was hired by the Public Defender's Office as Robards' mental health expert. He administered the Minnesota Multiphasic Personality Inventory (MMPI) aloud to Robards in October 2006, and he scored the test himself. Dr. Berland concluded that the results reflected a substantial psychotic disturbance and that although the MMPI does not measure brain injury, Robards' configuration of scores is consistent with people who "at least in part have their psychosis caused by brain injury."

Dr. Berland interviewed seven people who knew Robards, including five former girlfriends and two family members. Each of them recalled various events involving Robards. Based on the interviewees' accounts, Dr. Berland concluded that Robards exhibited behaviors that were consistent with a person who suffered from depression, experienced auditory hallucinations, and possessed prominent delusional paranoid

beliefs.

> During Robards' testimony, he denied having any memory of the murders or the events surrounding them, and he insisted that his sophisticated attempt to escape from the State hospital in 2008 was simply an effort to get to the roof of the building to stargaze and pray. Although Robards said during the second phase of the hearing that he prayed for forgiveness, he refused to acknowledge that he murdered the Delucas and would not specify what he sought forgiveness for. However, during the third phase, where the Deluca family was not present, Robards apologized for murdering the Delucas. Robards' sister Tanya testified that Robards was often the subject of physical abuse at the hands of their brothers and that she heard that Robards was once sexually abused as a child.

*Id.* at 1263-65 (internal footnotes omitted).

**(II) Summary of the facts of the post-conviction proceedings**

As the issues before this Court rely heavily on the facts presented during the trial and post-conviction proceedings, the relevant evidence is incorporated into the Argument sections below to prevent redundancy and allow clarity as to the arguments presented. Robards will present here a brief outline of the post-conviction proceedings' evidence.

Watts was the main witness as to Argument I and part of Argument II. P4/257-367. The evidence pertaining to what little Watts knew or did with regard to mitigation is central to this Court's *Strickland* analysis and is found in the direct appeal and post-conviction records on appeal. Robards also presented the testimony of his former counsel, Assistant Public Defender Ronald Eide ("Eide"), who pushed Watts to investigate mitigation evidence. P5/402-33. Hoffman testified primarily in

relation to Argument II; he had almost no involvement in the penalty phase proceedings. P5/425-32.

Robards also presented the live testimonies and invoices from Drs. Robert Berland ("Dr. Berland") and Joseph Chong-Sang Wu ("Dr. Wu); the stipulated invoices from Dr. Jonathan Lipman ("Dr. Lipman"); and the invoices and a letter from defense investigator Carol Springer's ("Springer") to Watts. P4/373-401; P1/144-51; P5/615-59. This evidence established a timeline of the mental mitigation investigation and showed unequivocally that the investigation was done after the jury recommendation and in the course of three *Spencer* hearings. P4/373-401; P1/144-51; P5/615-59. It also provided evidence of Watts' delayed knowledge of Robards' life. P4/373-401; P1/144-51; P5/615-59. Finally, Robards introduced the testimonies of witnesses who would have been available at trial, Mr. William Jonassen ("Mr. Jonassen") and Mrs. Bonnie Ruggles ("Mrs. Ruggles). P4/434-60. They were clients of Robards and provided compelling testimony as to Robards' character prior to the murders.

## SUMMARY OF THE ARGUMENTS

**Argument I**: The lower court erred in denying Claim Two of Robards' Motion, which argued that trial counsel Watts rendered ineffective assistance of counsel in violation of *Strickland*, whereby he failed to perform his strict duty of performing a reasonable, competent, and diligent investigation into Robards' background prior to the trial proceedings. This failure robbed Robards' jury, whose recommendation weighs heavily on the trial court, of compelling mental mitigation and also an accurate portrayal of Robards' childhood and life. Robards' jury recommended death by a vote of 7-5. This issue was raised before this Court in Robards' direct appeal proceedings because Watts' deficiency was so egregious as to warrant relief on the face of the record; however this Court denied relief, requiring further evidentiary development. It is clear from the trial and post-conviction proceedings records on appeal that Watts, due to his fault, did his mitigation investigation throughout three *Spencer* hearings. In denying the claim, the lower court committed improper hindsight analysis and *post hoc* rationalization. Watts' deficiency led to an unreliable penalty phase. The compelling mental mitigation and accurate history of Robards' life certainly undermines the confidence in the outcome of the proceeding and the death sentence, especially where there is a single sway of a vote in favor of life.

**Argument II**: The lower court erred in denying Claim One of Robards' Motion, which argued that trial counsel provided prejudicial ineffective assistance under *Strickland* when they failed to in any way object or attempt to suppress testimony, evidence, or prosecutorial argument regarding Robards' offer to make a deal with Detective Anthony Monte and any related statements. Robards' offer to plea and subsequent statements to Detective Monte were clearly inadmissible under Fla. Stat. Ann. § 90.410 and Fla. R. Crim. P. 3.172(i) and, if objected to, would have constituted reversible error on appeal. The prosecutor, in both his opening statement and closing argument, exploited Robards' offer to plea. Trial counsel's deficient performance prejudiced Robards and deprived him of a fair trial.

**Argument III**: The lower court erred in denying Claim Four of Robards' Motion, that the cumulative effect of counsel's errors deprived him of the effective assistance of counsel guaranteed by the 6th Amendment. To the extent that a claim of cumulative error requires each contributing error, standing alone, to meet the *Strickland* prejudice standard, a defendant alleging such a claim is deprived of the rights afforded to him by the 6th Amendment according to *Strickland.*

## ARGUMENT AND CITATIONS OF AUTHORITY

### ARGUMENT I

### THE LOWER COURT ERRED IN DENYING ROBARDS' CLAIM THAT TRIAL COUNSEL FAILED TO DILIGENTLY, TIMELY, AND REASONABLY INVESTIGATE THE MITIGATION EVIDENCE AND MAKE AN ADEQUATE PENALTY PHASE PRESENTATION TO THE JURY.

This is a case where trial counsel gambled with his client's life and lost. Robards was represented at trial by Watts and Hoffman, but Watts[5] was the only penalty phase lawyer, and Hoffman was the guilt phase lawyer[6]. P3/259-60, 293; P4/428. Watts made all decisions regarding the penalty phase. P3/261; 55; P4/428.

This Court's concerns about Watts began on direct appeal. *See Robards*, 112 So. 3d at 1266. This Court had questions during oral argument regarding the benefit of any strategy that involves saving mitigation evidence to be presented only to the judge during the *Spencer* hearing.[7] Justice Lewis observed:

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[5] Watts admitted that he "was surprised to find there was a statute that specifically prohibited a hybrid situation of private and court appointed." P3/259. He stated that after litigating the appointment, "[d]ue process prevailed over the statute." P3/259. This is incorrect. The lower court, specifically the Honorable Chief Judge J. Thomas McGrady, denied trial counsel Watts' due process argument. Only when, on January 28, 2010, the Office of the Criminal and Civil Conflict Regional Counsel moved to withdraw due to a conflict did the court appoint trial counsel Watts. R7/1257; R8/1309-1310; SR8/1156-1161.

[6] Watts aided Hoffman with some of the guilt phase responsibilities when Hoffman's wife passed away. P3/261; SR9/1167-1177.

[7] *See* Transcript of Oral Argument in Richard Todd Robards v. State of Florida, SC11-425 (November 8, 2012), http://www.wfsu.org/gavel2gavel/transcript/pdfs/11-425.pdf (last visited February

> This almost appears, I mean, right on the edge of a set-up. I'm a defense counsel, I've got some stuff, let me roll the bones. But it's very clear that I've not used anything that's in my, in my arsenal. I'm going to hit it later. . . . Is this going to go on another 20 years? . . . I've been doing this now . . . 14 years, hearing the arguments, and I don't believe I've ever heard one where a lawyer just takes off and goes to trial on something, and he's got information in his hand ***just for convenience***.

Transcript of Oral Argument, pp. 22-23.

However, this Court held that the claim required further evidentiary development. *See Robards*, 112 So. 3d at 1267; *see also id.* at 1274 (Pariente, J., concurring) (highlighting the fact that the jury's 7-5 recommendation was "close" and agreeing with the majority that further factual development was required to determine "why defense counsel deferred presenting mental health mitigation until the *Spencer* hearing"). Trial counsel cannot have reasonable strategy if he did not know what mental mitigation existed prior to trial.

The post-conviction proceedings clearly demonstrated that there was no reasonable explanation for Watts' failures. At the time of trial, he never made an informed decision to defer the mental health mitigation presentation because he failed to do an effective and competent mental health investigation. The mental health mitigation investigation occurred after the penalty phase. This Court is faced with a trial counsel who gravely ignored his constitutional duty to his client with no

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2, 2016); Oral Argument in Richard Todd Robards v. State of Florida, SC11-425 (November 8, 2012), http://wfsu.org/gavel2gavel/viewcase.php?eid=374 (last visited February 2, 2016).

excuse, and now Robards sits on death row. *See Porter v. Singletary,* 14 F. 3d 554, 557 (11th Cir.1994) ("An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence."). In light of *Strickland*, *Wiggins*[8], *Williams*[9], and *Porter*[10], the lower court erred in denying Robards relief, thus violating his rights under the 5th, 6th, 8th, and 14th Amendments to the Constitutions of the United States and the corresponding rights pursuant to the Florida Constitution.

The 6th Amendment guarantees a criminal defendant the right to the effective assistance of counsel, and claims of ineffective assistance of counsel ("IAC") are governed by the two-prong test (deficient performance and prejudice) set forth in *Strickland*, 466 U.S. at 686-88. A defendant has satisfied the first prong if he shows that counsel's conduct was "outside the broad range of reasonably competent performance under prevailing professional standards." *Simmons v. State*, 105 So. 3d 475 (Fla. 2012). He has satisfied the second if he shows that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 487-88 (*quoting Strickland*, 466 U.S. at 694). This does not require the defendant to show that counsel's deficient performance "more likely than not altered the outcome" of his proceeding, but rather that there is "a

[8] *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).
[9] *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d (2000).
[10] *Porter v. McCollum*, 558 U.S. 30, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009).

probability sufficient to undermine confidence" in the outcome. *Id.* (*quoting Strickland*, 466 U.S. at 693-94). This Court applies a mixed standard of review to *Strickland* claims because the performance and prejudice prongs both "present mixed questions of law and fact." *Sochor v. State*, 883 So. 2d 766, 771 (Fla. 2004). The lower court's findings of fact, credibility determinations, and assignments of weight to the evidence presented must be supported by competent, substantial evidence. *Blanco v. State*, 702 So. 2d 1250, 1252 (Fla. 1997).

The *Strickland* standard applies to IAC claims concerning counsel's performance in preparing for the sentencing phase of a capital trial, "when defense counsel's job is to counter the State's evidence of aggravated culpability with evidence in mitigation." *Rompilla v. Beard*, 545 U.S. 374, 380-81, 125 S. Ct. 374, 162 L.Ed.2d 360 (2005). Capital counsel's "obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated because this is an integral part of a capital case." *State v. Pearce*, 994 So. 2d 1094, 1102 (Fla. 2008); *see Ponticelli v. State*, 941 So. 2d 1073, 1095-1096 (Fla. 2006); *Coleman v. State*, 64 So. 3d 1210, 1222-1223 (Fla. 2011). The duty to investigate pretrial is "perhaps, the most critical stage of a lawyer's preparation." *House v. Balkcom*, 725 F.2d 608, 618 (11th Cir. 1984) (*citing Von Moltke v. Gillies*, 332 U.S. 708, 721–23, 68 S. Ct. 316, 92 L. Ed. 309 (1948) and *Powell v. Alabama*, 287 U.S. 45, 57, 53 S. Ct. 55, 77 L. Ed. 158 (1932)). "The right to present, and to have the sentencer consider, any and

all mitigating evidence means little if defense counsel fails to look for mitigating evidence or fails to present a case in mitigation at the capital sentencing hearing." *Strickland*, 466 U.S. at 706 (Brennan, J., concurring in part and dissenting in part) (*quoting* Helen Gredd, *Washington v. Strickland: Defining Effective Assistance of Counsel at Capital Sentencing*, 83 Colum. L. Rev. 1544, 1549 (1983)). Therefore, "counsel's general duty to investigate takes on supreme importance to a defendant in the context of developing mitigating evidence to present to a judge or jury considering the sentence of death; claims of ineffective assistance in the performance of that duty should therefore be considered with commensurate care." *Id*.

The Supreme Court of the United States clearly held that "*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy." *Wiggins*, 539 U.S. at 527. Moreover,

> [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

*Id*. at 522 (*quoting Strickland*, 466 U.S. at 690-91).

Mitigation investigation "should comprise efforts to discover ***all reasonably available*** mitigating evidence and evidence to rebut any aggravating evidence that

may be introduced by the prosecutor." *Id.* at 524. "An attorney is not obligated to present mitigation evidence if, ***after reasonable investigation***, he or she determines that such evidence may do more harm than good." *Harris v. Dugger*, 874 F.2d 756, 763 (11th Cir. 1989) (*citing Smith v. Dugger*, 840 F.2d 787, 795 (11th Cir. 1988)). In the sentencing phase of a capital case, "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." *Strickland*, 466 U.S. at 705 (*quoting Jurek v. Texas*, 428 U.S. 262, 276, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976)). The issue before this Court "is not whether counsel should have presented a mitigation case. Rather, [the] focus [should be] on whether the ***investigation supporting counsel's decision to not introduce mitigating evidence … was itself reasonable***." *Wiggins*, 539 U.S. at 523. Meaningful assistance of counsel in capital cases requires that counsel pursue and investigate all reasonably available mitigating evidence, including brain damage and mental illness. *See Hurst v. State*, 18 So. 3d 975, 1012 (Fla. 2009); *see Frazier v. Huffman*, 343 F.3d 780 (6th Cir. 2003), *opinion supplemented on denial of reh'g*, 348 F.3d 174 (6th Cir. 2003); *see Armstrong v. Dugger*, 833 F. 2d 1430, 1432-34 (11th Cir. 1987) (defendant prejudiced by counsel's failure to uncover mitigating evidence showing that defendant was "mentally retarded and had organic brain damage").

Watts clearly rendered ineffective assistance according to the standard set

forth in *Strickland, Wiggins, Williams*, and *Porter*.[11] During his closing argument at the second *Spencer* hearing, he asked the court to exercise the "override" power in light of the 7-5 recommendation[12] and to consider the fact that he knew when he came onto the case that he would not be able to "marshal the mental health materials in time to present to the jury." R23/1519-21. The court attempted to provide Watts with a reason for this failure, suggesting that defense attorneys are taught the strategy of "saving some evidence for the *Spencer* hearing so that the judge has a reason to override the jury "just in case the jury comes back with death." R23/3521. Setting aside for a moment that this is not a reasonable strategy in light of the "great weight" a sentencing judge must give a jury's recommendation,[13] Watts' next statement unequivocally showed that it was not his strategy at all:

> That's a fair comment, Judge. It's been my strategy from time to time. I can't – and I have to say that I had trepidation at the time of the *Spencer* hearing that I wished I had it all to lay out to the jury or to ***make the decision to lay out to the jury***. I had heard from Dr. Wu. I knew there were brain abnormalities. And, yes, to be perfectly honest it was a potential strategy, but ***I didn't have the ability to make the complete decision at the time.***

R23/3521.

Watts plainly admitted that he had not conducted the investigation required

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[11] 558 U.S. at 40 (determining that IAC existed where counsel "ignored pertinent avenues for investigation of which he should have been aware").

[12] As Robards' appellate counsel argued previously, this has not been done in 20 years. A death recommendation equals a death sentence. *See* Transcript of Oral Argument, p. 11, n. 7, *supra.*

[13] *See Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975) and n.12, *supra*.

by *Wiggins* and related cases to justify any tactical decision not to present the subsequently-developed mental mitigation evidence. Any statements he made to the contrary during post-conviction proceedings and any findings the lower court made in its order denying relief are in conflict and do not provide competent, substantial evidence that *any* tactical decision was made, much less a ***reasonable*** one.

Watts did not begin his work until he was appointed on January 28, 2010, which was a mere 3 months and 21 days before the start of the guilt/innocence phase (May 18, 2010). P3/260. Hoffman did not have a recollection of "spending a lot of time talking to" Watts about the penalty phase decisions or strategies. P4/428-29. It is clear that there was ***no*** aid from Hoffman for the penalty phase. P4/428. Robards' trial counsels were a divided team. Further, the Office of the Public Defender, which previously represented Robards on the case and which was primarily involved in the competency hearings, had not done the mental mitigation investigation. P3/338. Unlike the Robert Clark case, to which the State attempted to make a comparison, Robards' case "was not a fully formed case by any means" when Watts was appointed. P3/295-97, 338. Watts admitted to the trial court that when he agreed to get on the case with Hoffman, that they "knew the case was over." R23/3523. From the beginning of the case, Robards' counsel had abandoned their adversarial duties.

Despite the evidence to the contrary, the lower court denied Robards' claim, and in doing so made the following disconcerting findings regarding the deficiency

prong of *Strickland:*

> The Court finds credible Mr. Watts' testimony that, *prior to trial*, he was *generally aware of the mental mitigation that he would be developing and the cross-examination and rebuttal evidence that the State would present in response*. In light of this, the Court finds that Mr. Watts made an *informed, strategic decision under the circumstances of this case* to put a "humanizing" presentation before the penalty phase jury through lay witness testimony and to defer the presentation of mental mitigation until the *Spencer* hearing. *The fact that counsel had not completed his development of the mental mitigation prior to the commencement of the penalty phase does not equate to a finding that his penalty phase decision-making was uninformed*. *See Jennings v. State*, 123 So. 3d 1101, 1113 (Fla. 2013) (quoting *Wiggins*, 539 U.S. at 523) ("The focus of review should be 'whether the investigation supporting counsel's decision not to introduce mitigating evidence . . . *was itself reasonable*.'")

P5/592. The lower court's conclusion is fraught with error and is not supported by competent and substantial evidence

The lower court cited to *Jennings v. State*, 123 So. 3d 1101, 1113 (Fla. 2013), to support the proposition that "[t]he fact that counsel [Watts] had not completed his development of the mental mitigation prior to commencement of the penalty phase does not equate to a finding that his penalty phase decision-making was uninformed." P5/592. *Jennings* does not stand for this proposition. In *Jennings*, the trial counsel's decision to not present mental mitigation to the jury occurred ***after*** he had two competent mental health experts evaluate the defendant and provide reports indicating a history of head injuries and drug and alcohol abuse. *See* 123 So. 3d at 1114-1115. The crux of the post-conviction appeal on this issue "attributes the deficiencies in the presentation of mental health mitigation to the experts and not to

counsel." *Id.* at 1116. *Jennings* is clearly distinguishable from Robards' case. Watts never made a strategic decision as to the presentation of mental mitigation nor did he consider alternative courses because he failed to ***conduct a reasonable investigation*** of Robards' background. *See Strickland*, 466 U.S. at 691, 706.

The lower court suggests that Watts simply had a few things left to do to finish his mitigation investigation, but that he knew enough to reasonably conclude he did not want to present the mental health mitigation to the jury. P5/590; 591. This is frankly not supported by the record, either at trial or during the post-conviction proceedings. It is not that Watts just *had not completed* his development of the mental mitigation; when the penalty phase trial began, the investigation into Robards' mental mitigation had *also* just begun and, over the course of a three-part *Spencer* hearing, it would lead him in a number of different directions. This Court emphasized that "the obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated." *Sexton v. State*, 97 So. 2d 1073, 1079 (Fla. 2008) (*quoting State v. Lewis*, 838 So. 2d 1102, 1113 (Fla. 2002)). Watts' conduct can never be deemed reasonable under *Strickland, Wiggins, Williams, Porter* or this Court's precedent applying those decisions to Florida's capital punishment system.

The lower court further erroneously found that

> Mr. Watts ***considered and rejected*** the possibility of presenting mental mitigation to the jury through expert testimony because he knew that the State would then elicit detrimental testimony regarding Robards' history of violence while not experiencing steroid withdrawal

> syndrome, the fact that a number of mental health professionals previously found him to be malingering, and the details of his convoluted escape attempt from the Florida State Hospital.

P5/592.

This finding is also not supported by competent, substantial evidence and stems from an improper hindsight analysis by the lower court. *See Wiggins*, 539 U.S. at 526-527. The record evidence and testimony at the evidentiary hearing demonstrated that Watts did not have the mental mitigation evidence at hand when he determined, as he testified during the post-conviction proceedings, that his penalty phase strategy would consist solely of an attempt to "humanize" Robards in front of the jury. P3/350. Watts could not have possibly made a strategic decision taking into account the rebuttal evidence the State might have offered ***when he did not know what evidence he had available to present.*** R23/3521 (***"I wished I had it all to lay out to the jury or to make the decision to lay out to the jury."***) The lower court's finding that Watts was "generally aware of the mental mitigation that he would be developing" is not sufficient to support a conclusion that Watts acted as reasonably competent counsel. General awareness is not sufficient for a strategic decision because it does not equate to knowledge of the client's particular circumstances. *See Parker v. State*, 3 So. 3d 974, 984 (Fla. 2009) (This Court reversed for a new sentencing where counsel presented only "bare bones" mitigation). Any attorney defending a capital case could be said to have "general awareness" that his or her client *might* have mental mitigation evidence that could be presented to the jury.

Unless an investigation leads to the conclusion that no such evidence exists or that presentation of the evidence will be detrimental to the client, that decision cannot be made. The record must be clarified to show what Watts knew about Robards' steroid abuse and brain damage and when he came to know it.

Watts clearly admitted that, prior to the penalty phase, all that was done in terms of mental mitigation was a PET scan.[14] P3/263. Watts further admitted that prior to the penalty phase he ***had not finished*** his mental health mitigation investigation. P3/263-64. The PET scan was conducted on May 13, 2010. P4/376. Watts agreed that he had filed a notice, ***stating his intent not to present any mental mitigation on May 12, 2010, even before the PET scan was conducted***. P3/263; R9/1480. Dr. Wu interpreted the PET scan, but he was not the expert who wrote the prescription nor was he present at the PET scan administration. P4/376. Watts testified that he learned from Dr. Berland prior to trial that there were brain abnormalities, but he was not sure how Dr. Berland knew about them. P3/265.

Drs. Berland and Wu's testimonies at the post-conviction hearing indicate that Watts' memory was not accurate. P4/375-82, 394. Dr. Wu testified that he was contacted by Dr. Berland to do a preliminary review before he was officially appointed. P4/376-78. This was not a "full-fledged" analysis, but he told Dr. Berland

[14] The PET Scan was done only because of Eide's encouragement, which occurred after he was no longer involved with the case. P5/408-10.

by phone that the "scans *appear* to be abnormal." P4/377-78. Dr. Wu testified that he "eyeballed", or gave a preliminary read of the DICOM images of Robards' brain for about ten minutes after May 25, 2010[15], or at least toward the very end of May, 2010. P4/377-78. Dr. Berland testified that he cannot read PET scans. P4/394. Therefore, Watts' memory conflicts with the experts' accounts. There is absolutely no possible way that "Watts knew that he would have an interpretation of an abnormal PET scan and evidence of a history of accidents and steroid abuse to present," as the lower court found, when he decided to present mental health mitigation only to the judge. P5/591.

The lower court's finding that "prior to the trial, Watts had obtained a PET scan of Robards' brain at the suggestion of Dr. Berland, and that Dr. Berland informed him that there were abnormalities" is not supported by the record. P5/590. As noted above, Dr. Berland testified that he cannot read PET scans. P4/394. Watts testified that "he had some insights from Dr. Berland" "about mental health issues, but nothing that ***was formed up***, nothing to present to the jury." P3/264. Watts learned ***after*** the jury recommendation that "the PET scan[16] revealed three abnormalities in the frontal portion of the brain: Toxicity, steroid, psychosis, and - - potentially, and then the third cause would have been a motorcycle accident."

[15] The date of the penalty phase proceedings. R20/3086.
[16] The PET scan imaging was formally read and assessed by Dr. Wu on *June 21, 2010*, after the 7-5 jury recommendation.

P3/264-65. After obtaining positive PET scan imaging indicating frontal lobe abnormalities, Dr. Berland recommended Dr. Lipman. P3/29-30. Watts learned the following new information *after* Dr. Lipman became involved:

> Dr. Lipman spent the day - - I want to say a nine-hour nonstop day with Mr. Robards and talked about his life, intake of drugs, particularly with respect to the steroids, and discussed the actual - - the defense of the effect that the steroids would have had on Mr. Robards' ability to even recall the events of the homicide.
> . . .
> ***So the story starts to come out, more of Mr. Robards' story about his steroid dependence, and the beginning of that comes from Dr. Lipman's visit which had a profound effect on Robards***.
>
> And I was in and out of that visit, but by the end of that day, those two gentleman in that long marathon meeting had come to a pretty good understanding of what had happened to Mr. Robards' life, and the notion of steroid withdrawal rage came up. Dr. Lipman went back to his office, did some more research, and found some articles on steroid withdrawal rage,[17] and it seemed to tell us what had happened to Mr. Robards and what was operating on him that day of the homicide.

P3/30-31.

Watts came to the aforementioned realization after the jury recommendation because of his failure to complete the mental investigation ahead of the penalty phase proceedings. P3/268.

[17] As discussed further, *infra*, pp. 38-40, "steroid withdrawal rage" is a misnomer and demonstrates that Watts *even at the post-conviction proceedings* failed to have a full grasp of the mitigation evidence he did not present to the jury. However, the important point here is that it was not until Dr. Lipman became involved that Watts even could have understood the full scope of the mental mitigation evidence he would have been able to present, had he taken the time and hired the experts needed to develop it prior to the penalty phase proceedings.

Watts admitted that his mental health mitigation was still pending after the jury recommendation and into ***three*** *Spencer* hearings. P3/262-63. Watts reiterated several times that he had not learned Robards' "story" until after Drs. Berland, Wu, and Lipman became involved. P3/298, 336-40; P4/381-82. Watts testified that "it took the summer of the *Spencer* preparation to realize the essence of [Robards'] story. P3/273. The evidence from the trial proceedings and post-conviction proceedings demonstrate that Watts failed to be even "generally aware" of his client's background prior to the penalty phase proceedings; he learned it after the penalty phase and through the course of three *Spencer* hearings. P3/273, 298, 336-40; P4/381-82.

Watts was clearly ineffective for failing to see the value in timely and diligently conducting a mitigation investigation. Former Assistant Public Defender Eide, who represented Robards prior to Hoffman and Watts, also testified at the post-conviction evidentiary hearing. P4/402-05. Eide testified that outside of the competency issue, the "main thing that [they] were looking at from the beginning was the potential for organic brain damage based on his lifetime use of anabolic steroids and his history of head trauma" and that it was their "plan eventually when he would start cooperating with us and become competent, to do a PET Scan." P4/407. Eide spoke to Watts about the PET scan, traumatic brain injury, a steroid study on NFL players, and other mitigation concerns. P4/409-10; P3/276-78. Eide

confirmed that he had offered for Watts to come to his office and "pick his brains" on these issues. P4/409-10. Eide also testified that, during the "J" calendar *on the Friday before Robards' trial*, he asked Watts about the PET scan. P4/408-09. Watts told him that the PET scan was done and that he did not have the results. P4/409. Eide asked about a continuance, to which Watts responded, "no," claiming that he and Hoffman wanted to "get it over with" and indicating that they did not want to annoy the judge. P4/409. Eide also testified that after the verdict, he spoke to Watts, who admitted "words to the effect that they should have continued the case and that he would admit this deficiency … when it came time for that." P4/410-11. Watts confirmed the above conversations with Eide and he did not contradict Eide's statements. P3/276-78. The lower court is wrong in asserting that "Watts had also *consulted* with Robards' former counsel, Assistant Public Defender Ronald Eide regarding mitigation in this case." P5/590. The foregoing testimony confirmed by both Watts and Eide showed that that it was Eide who approached Watts the Friday before Robards' trial. There was no "meeting of the minds" spear-headed by Watts as the lower court incorrectly inferred. The foregoing evidence supports the fact that Watts, due to his gross negligence, did not realize the importance of the brain damage and steroid information in terms of mitigation, until much later. Watts even admitted that "[he] had no idea how good it would be, the PET Scan. [He] knew there were abnormalities. [He] didn't know how profound they were et cetera."

R23/3523. Watts' actions prevented him from learning his client's story before he went forth with the penalty phase.

Additional statements and actions of Watts during the trial proceedings confirmed Eide's testimony and also confirmed that Watts did not heed Eide's advice regarding the potential mitigating evidence that he needed to uncover before trial. Watts filed a Motion to Approve Neuro/Psychiatric Testing and Appointment of Psychiatrist on April 21, 2010, less than a month before trial. R8/1430-1431. A hearing was conducted before Chief Judge J. Thomas McGrady on April 22, 2010. SR9/1241. Watts asked for funds for an expert for "possible brain damage" at this hearing and stated the following in support of his motion:

> MR. WATTS: . . .Well, we're looking to interpret the PET scan for loss of function and - - ***is what I'm told***. And, Judge, ***my getting on to the case is recent***. ***I had a caucus with the public defender that had previously represented***. ***He pointed out the head injuries and they had set the case aside when the defendant was declared incompetent and sent to Chattahoochee***. But due diligence says I should get this testing done***. It's already been thought of by predecessor counsel***, so I need to follow through is my belief. Upon learning this and the inevitability of doing it and with the trial date looming in 28 days, 27 days, I had called Dr. Mayer[18] (phonetic), a psychiatrist in Tampa that I had worked with previously, and I asked him if he could possibly get it all done within the time allotted. And he said he would do that if he could - -
> . . .
> he would make sure the tests got conducted and arrange for the interpretation and be ready to testify if need be.
> …

[18] Watts testified that Dr. Michael Maher was probably retained in April or May of 2010, "to write the prescription" for the PET scan, and that was the extent of his retention. P3/270.

> MR. WATTS: Well he or he would arrange to get it interpreted.
> THE COURT: Okay.
> MR. WATTS: ***There's a gentleman named Dr. Woo (phonetic) in California, I'm told. And this is all new to me. I'm finding out and having to get it done quickly but -- that does the interpretation. Apparently a radiologist is not what exactly we want, I was told a psychiatrist was necessary to get the testing done and to arrange for the interpretation so***.
> . . .
> MR. WATTS: Yes, sir, and ***it may be that Dr. Woo's a radiologist, but his name came up as I was going around the horn***."

SR9/1246-1248.

It is evident that Watts had no idea about the potential brain damage on his own; he learned it from predecessor counsel. Watts' comments show a lack of understanding and appreciation of brain damage as an important mental mitigator requiring investigation. Watts did not even know that Dr. Wu was a doctor/psychiatrist. This was "all new" to Watts. S9/1247.

A reasonable and competent attorney, upon learning about the possibility of brain damage or abnormalities, would have asked for a continuance of at least the penalty phase proceedings and completed his investigation before going forward. Watts admitted that he failed to ask for a continuance[19] in Robards' case to allow more time to develop the mental mitigation investigation. P3/270-71. The lower court made the following findings regarding Watts' failure to ask for a continuance:

When asked why he did not request a continuance either prior to trial

[19] Continuances were requested based on Watts' "difficulty getting appointed" and Hoffman's wife passing away. P3/270-71; SR9/1167-1177; P4/429. These had nothing to do with mental mitigation investigation. P3/271; SR9/1167-1177.

> or prior to the penalty phase to finish developing the mental mitigation. Mr. Watts testified that he did not need one because ***he was ready to proceed*** and ***knew he did not want to present mental mitigation to the penalty phase jury***. Though, Mr. Watts stated that he was certain that he would have been granted a continuance had he asked for one ***in order to develop mental mitigation if it had been his intention to present mental mitigation to the penalty phase jury***. Mr. Watts further testified that it was strategy to not request a continuance ***in order to gain a tactical advantage by maintaining the momentum*** that developed in the weeks leading up to trial and proceeding from the guilt phase to the penalty phase.

P5/591.

These findings are incomplete and unsupported by the direct and post-conviction records on appeal. Once again as discussed throughout, Watts' knowledge that he did not intend to present mental mitigation is not relevant as he had barely an indicia of knowledge as to what mental mitigation existed prior to the penalty phase, as it was developed in the course of three *Spencer* hearings. Watts' reasoning for failing to ask for a continuance is inexplicable and unreasonable considering his client's life lay in the balance. P3/271-72. Watts reasoned his decision not to ask for a continuance first as follows:

> When I first came on the case, there was - - the case was old, and Mr. Hoffman came to me and said, we need to get this case tried. I've agreed with the court - - I've agree with - - so it was my understanding, and I was quite willing to do it, is to get ready for the - - the trial, both phases, in about six months.
>
> That's the speedy trial time. I've done that before. The compression of the time is - - it sort of turbocharges the preparation of the case. I like to do that, and I was happy to do it, sort of a supporting thing with Hoffman.

> And in deference to the Court, the Court said, This case is old. We're gonna get it tried. ***But I have to say that had I wanted a continuance, I knew I could get one for mental health purposes. So I was wanting to - - caught momentum. There is a higher road that can be taken in a case and where it's a serving justice in an expeditious fashion and believing that we can get it done***. So - - and so that's where we were going, and working with Mr. Hoffman is refreshing like that. He's willing to get up and go, and we spent many hours getting ready.

P3/271-72.

Watts agreed that Robards was not under the speedy trial clock, but claimed it was the "time frame" for Robards' case and that he has "worked within it a few times" with "good results." P3/272. During his closing remarks after the second *Spencer* hearing, Watts stated to the court that "***out of respect to the system, we agreed and I agreed with Mr. Hoffman to move forward as fast as we could.***" R23/3523. Watts was preoccupied with getting to the finish line instead of making sure that he had done his constitutional duty to investigate his client's life. Watts admitted that "the Court gave [him] all the time that [he] needed to develop the mental health mitigation and some family background information that came out that was - - that tied together with the mental health mitigation, and the story became better ***as a result of the summary (sic) of 2010***." P3/276.[20]

[20] It is clear that the lower court did not push Robards' attorneys to trial, in fact the court cautioned to be "***careful on the front end, it can save a whole lot of anxiety and time on the back end***." S9/1171. The lower court gave Watts all the time from the jury recommendation through the three *Spencer* hearings to do his continuous mitigation investigation.

On cross-examination, Watts talked about not wanting to split the guilt and penalty phases as a strategic reason for not asking for a continuance. P3/305-06, 345. However, he agreed that he could have asked for a continuance of the entire trial proceedings and that they "believed that [they] could get a continuance of the trial or the penalty phase separated." P3/307, 345-47, 348. That would have eliminated any of his concerns regarding the jury having to come back after a delay. P3/346-47. Later, Watts testified that *a week before trial* there was this sense of "momentum," "the buildup to it, the atmosphere of the case," that "it felt right" and so they did not ask for a continuance of the entire proceedings, despite not having completed their mitigation investigation. P3/347-48. Watts called it "serving justice." P3/347. Watts further testified as follows regarding not continuing the trial proceedings:

> And I've asked on the eve of trial when we knew they were going to go and said we're just not ready. ***We don't feel it. And we felt it, and I really didn't get that pit of the stomach, scary feeling until it was apparent that we weren't going to be able to finish***.
> . . .
> We were ready. We were ready to go in the space of time that was set aside for the trial, and my vision was that we would be completed by Friday evening, and that we would have the jury recommendation of life by Friday evening, and it didn't turn out that way. We only got the guilty verdict Friday.

P3/111-112.

Watts' explanations for not asking for a continuance do not constitute "serving justice" to his client. *See Blackwood v. State*, 946 So. 2d 960, 973-976 (Fla. 2006) (finding IAC where counsel engaged the services of an expert but proceeded to the

penalty phase after learning the expert was unavailable). Watts went forward to trial based on a gut feeling, a feeling of momentum, and an imaginary need to appease the Court; these were self-imposed unnecessary time constraints. *See Rose v. State*, 675 So. 2d 567, 572 (Fla. 1996). Based on Eide's and Watts' testimonies, Watts regretted not asking for a continuance. P3/278; P4/410-11. He admitted in his closing remarks after the second *Spencer* hearing that "[he] had trepidation at the time of the *Spencer* hearing that [he] wished [he] had it all to lay out to the jury or ***to make the decision to lay out to the jury***. . . [he] didn't have the ability to make the complete decision at the time." R23/3521.

Watts' failure to ask for a continuance in Robards' case could never be a reasonable strategic judgment. Watts in effect ceased being counsel for Robards because he was unreasonably occupied with pushing the case forward due to its age and getting it done within a certain timespan, rather than taking steps to ensure he had done all the investigation necessary for an effort to save his client's life prior to the trial proceedings. Watts even testified that he may have agreed with Eide that he should have asked for a continuance after the verdict. P3/278. Watts' failure to request to continue the penalty phase proceedings was not due to reasoned strategic judgment but due to his lack of diligence and inattention to the need to expand his mitigation investigation. *See Wiggins*, 539 U.S. at 526. There was no informed strategic decision; Watts just kept going along with no idea that the mental health

mitigation which was uncovered much later would be so compelling. His actions in failing to move for a continuance can absolutely not "be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (*quoting Michel v. State of La.*, 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)). His failure to finish his mitigation investigation prior to the penalty phase or to ask for a continuance for that purpose constitutes deficient performance. *See Strickland*, 466 U.S. at 686-687.

This Court previously determined that "[c]ase law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." *Rose v. State*, 675 So. 2d at 572-573 (*quoting Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991), *cert. denied*, 503 U.S. 952, 112 S. Ct. 1516, 117 L.Ed.2d 652 (1992)); *see also, e.g., Hurst v. State*, 18 So. 3d at 1012; *Orme v. State*, 896 So. 2d 725, 736 (Fla. 2005); *Parker*, 3 So. 3d at 984; *Simmons*, 105 So. 3d at 510. Furthermore, the Supreme Court of the United States held in *Williams v. Taylor* 'that counsel's failure to uncover and present voluminous mitigating evidence at sentencing ***could not be justified as a tactical decision to focus on Williams' voluntary confessions, because counsel had not 'fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background***.'' *Wiggins*, 539 U.S. at 522 (*quoting Williams*, 529 U.S. 362 at 396).

Watts put on what he had at the time before the jury; he did not make an informed strategic decision to put on "humanizing" evidence before the jury and to

save the mental mitigation for the *Spencer* hearings. However, even if the lower court had correctly determined that Watts had enough information to make an informed decision, the idea that counsel should reserve evidence that could in no way be detrimental to the defense for the express purpose of presenting it to the judge and arguing for an override cannot stand. *See* n. 12, *supra* ("And it would be grotesquely ineffective advice particularly in Florida now where there's no such thing as an override. It's been 18 years since a life override was affirmed.").

It is clear from the testimony at the evidentiary hearing and during the trial proceedings that Watts wrongfully believed that there was no substantial or compelling mental mitigation in Robards' case, and that is why he did not aggressively pursue it prior to the penalty phase. However, Watts also testified that, regardless of what he found, he was not going to put mental mitigation in front of the jury because he has been burned in the past, citing the *Peterson*[21] case. P3/337, 341, 360. Specifically, on recross-examination, Watts agreed with the State that he was ready to go to trial when he did because, no matter what mental mitigation information he discovered, he was never intending to present it to the jury because of the "fire" he could draw. P3/360. This unreasonable conduct is the very conduct that is deemed unconstitutional by the Supreme Court of the United States because it does not constitute sound, informed and intelligent decision-making; it flies in the

[21] *Peterson v. State*¸ 2 So. 3d 146 (Fla. 2009).

face of *Strickland*, *Wiggins*, and *Williams*. *See Strickland*, 466 U.S. at 689; *Wiggins*, 539 U.S. at 536; *Williams*, 529 U.S. at 396. Furthermore, Watts agreed that Charles Peterson's case, in which he drew "terrible fire" from the State in response to the mental health testimony, was unlike Robards' because in that case he had completed his mental health mitigation investigation prior to the penalty phase. P3/293-94, 335-37.

The lower court attempted to infer that there was decision making regarding mitigation because Watts "testified that he had reviewed *various* reports from the experts involved in the pretrial competency proceedings." P5/590. With regard to "mental health mitigating evidence, [the Eleventh Circuit Court of Appeals] has distinguished between its use during the guilt phase to establish competency to stand trial and presenting mental health mitigating evidence at the penalty phase:

> [T]here is a great difference between failing to present evidence sufficient to establish incompetency at trial and failing to pursue mental health mitigating evidence at all. One can be competent to stand trial and yet suffer from mental health problems that the sentencing jury and judge should have had an opportunity to consider."

*Hardwick v. Crosby*, 320 F.3d 1127, 1163 (11th Cir. 2003) (*quoting Blanco v. Singletary*, 943 F.2d 1477, 1503 (11th Cir. 1991)). Moreover, "[p]sychiatric mitigation evidence not only can act in mitigation, it also could significantly weaken the aggravating factors." *Elledge v. Dugger*, 823 F .2d 1439, 1447 (11th Cir.), *withdrawn in part on denial of rehearing en banc*, 833 F .2d 250 (11th Cir.1987)

(withdrawing only unrelated Part III of the opinion). Regardless, Watts clearly dismissed the competency issues as not a "***real thing***." P3/262; *see Wiggins,* 539 U.S. at 527 (In assessing the reasonableness of counsel's investigation and decision not to obtain a mental health evaluation in this case, the Court "must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further."). Watts later clarified that he had read the reports from the competency doctors, but it is clear that he did not speak to any of the experts except for Dr. Berland and that the competency proceedings meant nothing to him. P3/339. Watts was past the competency issue when he was appointed; thus, he believed that any information from the competency proceedings was of no value to him. P3/298, 339. Therefore, at the time of the trial proceedings, Watts clearly failed to even recognize the red flags regarding potential mitigation investigation. The competency evaluations were not considered by Watts. Watts clearly admitted that ***he never read the competency hearing transcripts***[22] in preparation for Robards' case. P3/261-62. He admitted ***he never listened to all of the tapes, voicemails, and jail visitation videos that were in discovery***. P3/355-56. Watts testified that because he did not personally see any competency issues, "the records from Chattahoochee ***weren't so important*** to [him] because [he] didn't see

[22] Robards was represented by Assistant Public Defenders Eide and Violet Assaid during the competency proceedings, which were conducted from April 9, 2007 to May 16, 2008. P4/405-407; R1/15, 105.

that at all, any way, shape or form." P3/261-62. Watts' failure to even recognize the potential mental health issues red flags, in light of the competency hearings and Robards' stay at Florida State Hospital, is inexplicable. *See Jones v. State*, 998 So. 2d 573, 583 (Fla. 2008) ("Where available information indicates that the defendant could have mental health problems, 'such an evaluation is 'fundamental in defending against the death penalty.'"" (*citing Arbelaez v. State*, 898 So. 2d 25, 34 (Fla. 2005) (*quoting Bruno v. State*, 807 So. 2d 55, 74 (Fla. 2001))); *see Hurst v. State*, 18 So. 3d at 1010. Based on the competency proceedings alone, competent counsel would have investigated further to see what mental health issues were present in Robards' history. *See Wiggins*, 539 U.S. at 521-523; *see Hardwick v. Sec'y, Fla. Dept. of Corr.*, 803 F.3d 541, 551-52 (11th Cir. 2015); *see Strickland*, 466 U.S. at 690. Therefore, the importance the lower court wants to give to Watts' purported reading of some competency reports is completely undermined by Watts' testimony that he was not concerned with what happened in the competency hearings and that he was past it. P3/262; 339.

The lower court's order continued to excuse Watts' deficiency by stating that Watts did not present the mental mitigation (that he did not know about prior to the penalty phase) because he would draw fire or elicit detrimental testimony about Robards' history of violence, malingering, or prison escapes. P5/591-293[23]. While it

[23] The lower court noted that Watts knew that the State would not subject lay

was improper for the court to engage in a hindsight analysis concerning the State's possible rebuttal evidence and cross-examination strategies, whether the State would have been able to offer rebuttal evidence concerning Robards' history of violence, depends on whether Dr. Lipman was going to testify that the fact that Robards was going through steroid withdrawal caused him to be excessively violent. Dr. Lipman, who did not even come on the case until after the penalty phase was over, did not provide any such testimony even during the *Spencer* hearing. Furthermore, even if he had, without knowing Dr. Lipman's opinion before the penalty phase, Watts could not possibly have factored in the State's rebuttal evidence in making his decision not to present the evidence in question to the jury. A review of Dr. Lipman's testimony is nonetheless warranted to show that, even if Watts had presented his testimony, the State would not have been able to offer testimony as to Robards' alleged prior violent acts to rebut it.

Dr. Lipman did not claim to know for sure whether Robards was on steroids on the day of the crime. According to the lower court's order, "He testified that if Robards did not have any steroids upon his release from jail on the drug charge he

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witnesses to intense cross-examination in front of the jury. P5/591. This is clearly not true as evidenced by the brutal, non-relevant and simply un-called for cross-examination during the post-conviction proceedings of the lay witness Mrs. Ruggles, who has been diagnosed with cancer. P4/452-458. The State at the post-conviction hearing showed his lack of restraint towards a lay witness, so Watts is quite mistaken in his assumption of his opposing counsel. P4/454-458.

would have been experiencing steroid withdrawal syndrome at the time of the homicides and for some weeks thereafter." P5/587; *see also* R21/3369-72; 3378-79. But at the same time, he explained that the disorganized, chaotic and excessively violent crime scene supports the conclusion that Robards was in a state of steroid rage when he committed the murders." P5/588. Dr. Lipman testified that ***steroid rage*** can occur when a person is currently taking steroids or when going through withdrawal; ***it is not present because of the withdrawal*** but because of the long duration of the effects that ***steroid use*** has on the body. R21/3379-80. ***Steroid withdrawal syndrome***, on the other hand, manifests as depressed mood, sleeplessness, despair, and agitation. R21/3371-72; 3379.

The steroid withdrawal theory presented by Dr. Lipman was misconstrued by the lower court when it held that, "Had counsel called his experts to testify during the penalty phase and argued that Robards' violent behavior was a result of steroid withdrawal, the State would have elicited testimony regarding Robards' history of violence and threats of violence towards women while not experiencing steroid withdrawal symptoms." P5/592. It was not the violence that would have been the result of steroid withdrawal but the depression, agitation, and despair that perhaps contributed to the pecuniary motive for the crime. Evidence of past violence had nothing to do with the withdrawal syndrome but would be relevant only to the effects that steroid ***use*** had on Robards' brain – the aggravation of his existing brain injuries.

Any past violence that existed would have therefore supported the defense's theory and could not have been offered by the State ***in rebuttal.*** The only argument the State could offer in rebuttal would be an argument that steroid use is voluntary – an argument that Tanya Robards' testimony regarding Robards' traumatic childhood strongly contradicted. Furthermore, whether the State could have cross-examined any witness in a way that would be detrimental to Robards depends upon which witness would have testified, a decision Watts would have needed to make ***after considering the complete results of his investigation.***

The State also relied on the competency report of Dr. Susan Lindley Murray, M.D. ("Dr. Murray"), which was entered as State's Exhibit 2. P3/128; P5/663-71. Dr. Murray reported that women who had been in relationships with Robards said he was violent and that they were afraid of him. P3/78-82. From her report, it is clear that Dr. Murray did not personally interview Kim Gaines, Elizabeth Sandoz, Frankie Jo Styles, or Deifdre Voniatis, the women she mentioned.[24] P5/663-71. Dr. Murray was relying on "criminal reports for the charges" from the charging documents and not on direct witness statements.[25] P5/663-71. On top of the relevance issues, the State failed to establish at the evidentiary hearing how it would have been able to

[24] There is evidence that Robards was on steroids during these incidents. The State in closing remarks after the second *Spencer* hearing admitted that steroids ***probably do make you violent***. R23/3567.

[25] Eide correctly recognized that inappropriate, threatening, or uncooperative behavior of a client can be "ascribed to mental health." P4/182.

introduce the hearsay and hearsay-within-hearsay witness statements through Dr. Murray[26] or any other state witness. This Court has clearly held:

> In Florida, a court may take judicial notice of various matters including "[r]ecords of any court of this state or of any court of record of the United States or of any state, territory, or jurisdiction of the United States." § 90.202(6), Fla. Stat. (2007). However, the fact that a record may be judicially noticed does not render all that is in the record admissible. *See Allstate Ins. Co. v. Greyhound Rent–A–Car, Inc.*, 586 So. 2d 482, 483 (Fla. 4th DCA 1991). For instance, the court's authority to take judicial notice of records cannot be used to justify the wholesale admission of hearsay statements within those court files, such as through police reports or letters. *See Stoll v. State*, 762 So. 2d 870, 876 (Fla. 2000) ("We have never held that such otherwise inadmissible documents are automatically admissible just because they were included in a judicially noticed court file."). In *Stoll*, we held that "documents contained in a court file, even if that entire court file is judicially noticed, are still subject to the same rules of evidence to which all evidence must adhere." *Id.* at 877. In so holding, we noted the observations of another appellate court that there has been a
>
> > seemingly widespread but mistaken notion that an item is judicially noticeable merely because it is part of the "court file." Court files are often replete with letters, affidavits, legal briefs, privileged or confidential data, *in camera* materials, fingerprint records, probation reports, as well as depositions that may contain unredacted gossip and all manner of hearsay and opinion.
>
> *Ptasznik v. Schultz*, 247 A.D.2d 197, 679 N.Y.S.2d 665, 666–67 (1998) (citations omitted). "[N]one of these [items] are rendered admissible merely because they are part of the court file." *Stoll*, 762 So. 2d at 877 (citing *Ptasznik*, 679 N.Y.S.2d at 667). Thus, while the court may take judicial notice of documents in a court file that were properly placed there, this notice would not make the contents of the documents

[26] The State in its question also acknowledged that the Ms. Voniatis' allegation that Robards "bragged about killing other people" "would have probably not have been relevant." P3/319.

> admissible if they were subject to challenge, such as when a document is protected by privilege or constituted hearsay. In addition, taking judicial notice of an entire prior proceeding may be expeditious for the current proceedings, but it does not allow the substance of the underlying materials to be entered into evidence without compliance with the rules of evidence.

*Dufour v. State*, 69 So. 3d 235, 253-54 (Fla. 2011), *as revised on denial of reh'g* (Aug. 25, 2011). The competency report entered by the State, which is part of the post-conviction record on appeal, is also inadmissible hearsay and the State failed to establish how it would have been able to introduce the hearsay reports in cross-examination at the penalty phase. Experts cannot be used as conduits for inadmissible hearsay evidence at penalty phase. *See Dufour*, 69 So. 3d at 255; *Linn v. Fossum*, 946 So. 2d 1032, 1037 (Fla. 2006); *Mendoza v. State*, 87 So. 3d 644, 666 (Fla. 2011). The lower court cannot just speculate that evidence of Robards' courtroom disruptions, opinions of malingering from the competency hearings[27], and hearsay testimony of uncharged hearsay allegations by other women would be relevant and admissible through pure cross-examination. P5/591-592. This very lower court, prior to the penalty phase proceedings, put all the parties on notice regarding admissibility of hearsay, whereby the State is limited due to *Crawford v.*

[27] Watts was past the competency hearings and did not care about competency; it is doubtful he considered any information from the competency hearings as he did not even read the transcripts from the hearings. P3/261-62; 298; 339. Furthermore, any expert opinion that Robards was "malingering" occurred before the PET scan was conducted and would therefore be subject to question and re-evaluation in light of his ***confirmed brain damage***.

*Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). R29/742-743. Furthermore, it is clear from Dr. Berland's testimony that the negative incidents with the women were symptomatic of brain damage and mental illness from that brain damage. P4/162-163. Dr. Berland agreed that those incidents lent support for his diagnoses of Robards. P4/400-401. Therefore, even assuming the State would have been able to present information about the incidents to the jury, it is not a foregone conclusion that the jury would have drawn negative inferences from it.

Furthermore, a capital attorney charged with saving the life of his client cannot be afraid of the prosecutor.[28] The underlying purpose of a defendant's right to effective assistance of counsel pursuant to the 6th Amendment to the Constitution of the United States is to permit "the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland*, 466 U.S. at 685 (*quoting Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 275-276, 63 S. Ct. 236, 87 L. Ed. 268 (1942)). In death penalty cases, the ABA

[28] In guilt phase closing arguments, Hoffman opened by complimenting the State and stating that the prosecutor is the best attorney around; he went on to denigrate his own abilities, and in effect his defense team, in comparison. R33/1280-1281.

Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases reflect the conduct attributed to constitutionally effective counsel. *See Wiggins*, 539 U.S. at 524; *Williams*, 529 U.S. at 396. Since 1989, the Guidelines have directed counsel to investigate "*all reasonably available* mitigating evidence," as well as "evidence to rebut any aggravating evidence that may be introduced by the prosecutor."[29] *Wiggins*, 539 U.S. at 524 (*quoting* Guidelines, § 11.4.1(C) (1989)).

The "double-edge sword" cross-examination argument did not excuse Watts' failure to investigate. *See Williams*, 529 U.S. at 363-64, 396 ("Although not all of the additional evidence was favorable to Williams, the failure to introduce the comparatively voluminous amount of favorable evidence was not justified by a tactical decision and clearly demonstrates that counsel did not fulfill their ethical obligation to conduct a thorough investigation of Williams' background. Moreover, counsel's unprofessional service prejudiced Williams within *Strickland's* meaning."). This Court has disregarded this exact argument and stated as follows:

> The State argues that we should not find that Larzelere was prejudiced because this 'mitigation' evidence would have been more harmful than helpful to her case. … While we agree the State could have presented rebuttal evidence during the penalty phase, this does not change our conclusion that Larzelere was prejudiced by counsel's penalty-phase performance."

*State v. Larzelere*, 979 So. 2d 195, 207 (Fla. 2008).

[29] Eide testified that "you've got to know" the bad stuff because "you don't know what necessarily is gonna come in against your guy, good or bad." P4/421.

Just because Robards had some negative information in his history, the *Strickland* deficiency and prejudice analysis is not foreclosed. The lower court in citing to several Florida cases failed to recognize the stark fact that the evidence presented in the post-conviction hearing and direct appeal record on appeal clearly demonstrated that Watts ***could not make a decision*** as to his presentation of mental mitigation because he had not developed any of it and that general awareness is not sufficient to make a decision in accordance with his 6th Amendment duty as effective counsel. P5/593.

The Supreme Court of the United States in *Sears v. Upton*, 561 U.S. 945, 130 S.Ct. 3259, 3264, 177 L.Ed.2d 1025 (2010), held that

> [c]ompetent counsel should have been able to turn some of the adverse evidence into a positive-perhaps in support of a cognitive deficiency mitigation theory. . . This evidence might not have made Sears any more likable to the jury, but it might well have helped the jury understand Sears, and his horrendous acts-especially in light of his purportedly stable upbringing. Because they failed to conduct an adequate mitigation investigation, ***none*** of this evidence was known to Sears' trial counsel.

561 U.S. at 951, (internal citations omitted; emphasis in original); *see Porter*, 558 U.S. at 453 (holding that evidence that defendant was AWOL was consistent with defendant's theory of mitigation and did not diminish the evidence of his military service); *see Robinson v. State*, 95 So. 3d 171 (Fla. 2012) (Testimony from defendant's father that he was cruel, mean, and aggressive; seemed to enjoy fighting; got into the most trouble of all his children; and shot at a vehicle with his siblings

inside would have been tempered by consistent accounts that his father was cruel, mean, and abusive). In Robards' case Watts did not learn that Robards began using steroids because he was abused as a child until after the penalty phase. P3/52-53. It is not rare for records to contain good and bad information, and just because there is bad information, the records are not automatically rendered useless. Watts even agreed that mental health mitigation can be considered a "double-edged sword mitigator" and that it is the death-qualified attorney's job to figure out what to do with that information. P3/115. It was Watts' duty to conduct the mental mitigation investigation ***prior*** to the penalty phase and to determine how to present the information obtained so as to limit "drawing fire."

Watts admitted that an explanation to the jury of Robards' "story," which he gained only after the investigation was complete, would have been better than having the jury perceive Robards as having a happy childhood:

> And so ***I don't know*** that I would have put on any psychologicals to draw the Dr. Gamache, the State's experts. ***But the story was so much clearer in August of 2010***. Better to tell the story that would have painted the dark picture rather than the rosy picture of Richard Robards growing up, the ***better for the jury to understand how this happened***.

P3/340.

Due process requires competent mental health assistance to ensure fundamental fairness and reliability in the adversarial process. *See State v. Sireci*, 536 So. 2d 231, 233-234 (Fla. 1988). The above-quoted testimony from Watts demonstrates the strategic reasoning in which Watts could not engage at trial because

he failed to do an adequate mental mitigation investigation beforehand. *See Rose*, 675 So. 2d at 572-573; *see Wiggins*, 539 U.S. at 521. Watts recognized that "Mr. Robards had a lot of baggage that [made] it difficult to tell the story without" drawing fire, but he also realized the "***thoughtful thing that [had] to be done with the information that we gathered over the summer***." P3/104-105. Watts admitted during the second *Spencer* hearing that "when it came down to the day, [he] wished [he] had had a full scope of it." R23/3523.

Moreover, with regard to the "double-edge sword argument," the State cross-examined Watts on Robards' "elaborate plan" of escape from the Florida State Hospital. P3/326-27. Watts correctly noted that the details the State brought up during its cross-examination about the escape attempt was presented to the jury during the guilt phase. P3/327-28. However, both Watts and the State were wrong in stating it was presented in a limited capacity. P3/325-27.The jury was quite aware of the escape attempt's details due to the guilt phase testimony of State witness Eddie White. R32/1126-1137. Eddie White's testimony included information that two patients escaped to the roof, that dummies were fabricated, that the security screens were sawed with bi-metal cutting sawzall blades, that a deal was brokered with two staff members, and that the escapees wore several layers of clothing. R32/1131-1135. So, the escape attempt was a feature at the trial and not limited as asserted by the State and Watts at the evidentiary hearing. P3/326-28. The State even argued that

the escape attempt indicated consciousness of guilt during its guilt phase closing remarks. R32/1259-1260. The State again brought it up to the jury in its penalty phase closing remarks. R20/3179. Therefore, there is no "double-edge sword" effect stemming from the possibility of the jury learning about the escape attempt because the jury already knew the details about it from the guilt phase testimony. Therefore, the lower court's finding that any expert would have been rebutted by Robards' "convoluted escape attempt from the Florida State Hospital" is inconsequential because the jury already knew about the escape in detail. Furthermore, the State has to establish relevance in order to rebut or contradict the experts. The State cannot just cross-examine with any factual assertion without establishing relevancy and admissibility. The State had no witnesses to contradict Robards' experts during the *Spencer* hearings and it is pure and improper hindsight to now say what the State may or may not have done. *See Bradley v. State*, 33 So. 3d 664, 671 (Fla. 2010) ("[T]he test when assessing the actions of trial counsel ***is not how, in hindsight***, present counsel would have proceeded.").

At the evidentiary hearing, the State also entered into evidence as State's Exhibits 1A-B, non-relevant body building pictures, attempting to show in hindsight potential negative information about Robards' voluntary election to abuse steroids in order to become a champion bodybuilder. P3/362-64; P5/661-62. However, the State had presented the obvious evidence to the jury throughout the guilt phase and

also in the penalty phase, and stated in penalty phase closing remarks, "He was a personal trainer. He was a competitive body builder, all those things." R20/3179. The jury was well aware of Robards' body-building and training background at the penalty phase proceedings. The State was able to make negative arguments about Robards' escape attempt and bodybuilding endeavors during the entire trial proceedings, and what remains undeniable is that the jury's death recommendation still came by a single vote. This would have been nothing new to the jury.

With regard to the steroid abuse, the testimonies of Drs. Berland, Wu, and Lipman, and of Tanya Robards[30], gave a background history as to how Robards became involved with steroids and what led to his abuse and addiction; the State vigorously cross-examined these witnesses on that information during the *Spencer* hearings. The State asked Dr. Lipman about the voluntariness of the steroid abuse. R21/3384-3386. Watts was able to rehabilitate the witness during his re-direct examination. R21/3392. Dr. Lipman testified that Robards was "blind to the adverse effects" of the steroids on his mental health as opposed to the positive effects on his body. R21/3392. This is a prime example of how trial counsel can take a potential negative and show that it is actually evidence of mental health problems and

[30] Ms. Robards' first name is spelled as "Tonya" and "Tanya" in the record on appeal and as "Tanya" in the post-conviction record on appeal. R20; R23; P3; P4. The correct spelling is "Tonya." However, since the record on appeal refers to her as "Tanya," this pleading will continue to refer to her as "Tanya" for consistency.

addiction. There is no reason why Watts could not have done the same before the jury as he did before the Court at the *Spencer* hearing.

The State also cross-examined Drs. Berland, Wu, and Lipman during the *Spencer* proceedings regarding the steroid withdrawal issues, the NFL players' brain damage issues, and the two girlfriends that Dr. Berland spoke to. R21/3355-3360; 3383-3392; 3439-3469. The State also challenged Tanya's testimony at the last *Spencer* hearing, attempting to bring out negative aspects of Robards' life. R23/3565-3590. The most riveting testimony occurred when the State commented to Tanya, "we did see a videotape with a family picture, a loving family, and horseback riding and pets and animals and the whole nine yards. I mean, I'm failing - - I am failing to see where the family unit failed Todd." R23/3571. Tanya replied, "The family unit failed all of us." R23/3571. The prosecutor reiterated that he failed to see that, and said to Tanya "You appear to be getting along fine." R23/3571. She replied:

> Your perception of it - - I have to go through therapy every week. I have to address issues because I want better for my son. And even though I want better for my son, I can do everything that I know and it's still-- why am I still depressed? Why was I suicidal for so many years? There was something that did not get addressed. It was like for Damian or Todd, I get angry because somebody should have saved him from that childhood. Somebody should have addressed that abuse.

R23/3572. Despite the vigorous cross-examination, Tanya's story about how their upbringing affected their lives and mental health, and how her brother went from

Todd to Damian,[31] was very compelling. R23/3554-3592. The testimonies of Drs. Lipman, Wu, and Berland withstood the State's challenges and led to the lower court finding, among other non-statutory mitigating circumstances: "family history," "traumatic injury based on PET scan and PET scan brain image comparison," "effect of steroids on brain injury and effect of steroids generally," "use of prescribed steroids, interactions with other prescribed drugs, and withdrawal," and "mental health issues." *Robards*, 112 So. 3d at 1266. This Court gave each of these mitigating circumstances some weight. *Id.* The State cannot show that, had these witnesses' testimonies been presented to the jury, the State's challenges would have been such that the testimony would have been met with such negative information that it would have been better for the jury not to have heard it at all. The *Strickland* standard for effective assistance of counsel requires that counsel do his or her homework before making a decision that will affect a client's life. *See Larzelere*, 979 So. 2d at 207; *Sears*, 561 U.S. at 951. Capital counsel cannot forgo his strict duty of mitigation investigation because there *may be* negative information that could be exploited by the State; in fact that is exactly why counsel must do the investigation. Counsel must be aware of the potential negative information so that is a better advocate for his client. *See id.*

Trial counsel cannot excuse the failure to even investigate mental mitigation

[31] *See infra*, p. 63.

before the penalty phase by claiming he is "gun shy" or afraid of "awful fire." P3/100, 104-105. If this Court finds that Watts' aforementioned blanket rule to never put mental mitigation in front of a jury is a reasonable strategy excusing the failure to do a mitigation investigation, then the particularized sentencing which is constitutionally required will never occur. *See Gregg v. Georgia*, 428 U.S. 153, 206, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (plurality opinion). There would be no need to hire mental mitigation experts ahead of the penalty phase, and there would be no need for capital counsel to do any work on mental mitigation ahead of the penalty phase. Under Watts' explanation, a capital defendant's life does not require counsel to do any mental mitigation investigation until after a jury has recommended death. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, or on the failure to properly investigate or prepare. *See Kimmelman v. Morrison*, 477 U.S. 365, 386, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); *Wiggins*, 539 U.S. at 536. Watts' stance is unconstitutional and the conduct he condones is an example of gross deficiency.

Watts had no idea what evidence he had available and just wanted to be done with the case. Later, after the jury returned a 7-5 death recommendation, he clearly regretted this decision. It should be noted that the lower court completely ignored Watts' statements from the trial proceedings in its order denying relief. *See, e.g.*, R23/3521 (***"I wished I had it all to lay out to the jury or to make the decision to lay***

***out to the jury."***) This statement is more reliable than anything Watts said during the post-conviction proceedings as it reflected the circumstances from his perspective *at the time.* P5/582 (*citing Downs v. State*, 453 So. 2d 1102, 1106-07 (Fla. 1984)) ("Additionally, the evaluation of an attorney's performance requires a consideration of all the circumstances from the attorney's perspective at the time."). Such a statement, unlike post-conviction hearing testimony, cannot be infected by inappropriate hindsight analysis. Watts also contradicted himself several times as to whether, if he had completed his investigation, he would have put on any mental mitigation testimony before the jury, rendering his post-conviction testimony unreliable. P3/331-32; 336-37; 339-40.

The lower court cited *Rutherford v. State*, 727 So. 2d 216 (Fla. 1998) a case "affirming the trial court's finding that counsel was aware of the possible mental mitigation, but made a strategic decision to present mental mitigation to the court only in favor of a humanization presentation through lay witness testimony because it would be *partially detrimental to the defense.* P5/593. In *Rutherford*, counsel had available to him competency evaluations that he decided not to present to the jury because the evaluations contained information that his client had episodes of violence in the past. 727 So. 2d at 222. Unlike Robards, this client had been found competent throughout the proceedings. *Id.* Furthermore, it was not the potential *mental mitigation* that the attorney in that case decided to present to the judge only,

but the competency evaluations themselves. *Id.* As for mental mitigation, the attorney was aware through the competency evaluations that his client had "an anxiety disorder resulting from his combat experiences in Vietnam" and that he was alcohol-dependent. This was the extent of the information that counsel could have presented, not an indication that he needed to investigate further as in Robards' case. Therefore, the counsel in *Rutherford*, unlike Watts, ***had enough information to make an informed decision.***

The lower court also cited *Dufour v. State*, 905 So. 2d 42, 57 (Fla. 2005) and *Gaskin v. State*, 822 So. 2d 1243, 1248 (Fla. 2002) for the proposition that counsel cannot be deficient for making a reasonable strategic decision to not present mental mitigation testimony during the penalty phase "because it could open the door to other damaging testimony." *Dufour*, 905 So. 2d at 57; *Gaskin*, 822 So. 2d at 1248. As discussed thoroughly, *supra*, Watts did not know what testimony he had to present at the time he made the decision, and even if he had, in no way could this testimony have *opened the door* to other damaging testimony. Neither of these cases involve a trial counsel who did not have his investigation done before making the decision about what evidence to present.

The overwhelming and undeniable evidence from the direct appeal and post-conviction records on appeal demonstrate that Watts just put in front of the jury whatever he could in the timespan that he unreasonably limited himself to. Watts'

failure to do the mental mitigation investigation prior to the penalty phase meant that all he could provide to the jury was presentation that admitted to them was "trite and superficial." R20/3140. The act of introducing a video instead of live testimony from certain witnesses who appeared on it was not the result of a strategic decision, calculated to prevent the State from cross-examination. P3/304, 310-11, 324-25, 358. ***Watts admitted that the inability of the State to cross-examine the video presentation of Lynn Whited-Triplett,[32] a long-time friend of Robards, "was an advantage that [he] hadn't thought of."*** P3/310-11. This statement clearly contradicts the lower court's finding that Watts "stated that the benefit of such a strategy [presenting a video compilation] was that there would be no cross-examination" of the lay witnesses. P5/590. Watts clearly never considered this strategy because the State did not object to it (except for the pastor who was edited out by the defense). R29/741-743. Robards' mother, Geraldine Robards, who was on the video, also testified in person in front of the jury and was open to cross-examination. R20/3172-3173; P3/355-56. It was also not a strategic decision based on what happened in the Harry Butler case, as the State attempted to suggest, to videotape the witnesses. P3/358-59. Springer[33], and not Watts, came up with the idea

[32] It should be noted that Ms. Whited-Triplett was present to testify in person, but because Watts mistakenly believed that they would be done sooner with the guilt phase, he had to videotape her testimony. P3/273; 310; 347-49.

[33] Springer's main purpose was to go to Kentucky to make the video presentation and her interview process concluded with her work in Kentucky. P3/349-50.

of making the video after going to a seminar where she learned the technology. P3/286, 366. Furthermore, the State did object to the DVD of the video presentation; specifically the State had two objections to presentation of Robards' pastor, which Watts later edited out due to the objection. R29/741-743. Therefore, it is clear that Watts did not make the decision to present the video based on the State's inability to cross-examine the information it contained. The video was also not the result of a complete investigation; it was inaccurate. It showed Robards to have a rosy and normal childhood. P3/286-87. This was clearly not the case as was explained by the experts and through Tanya's compelling *Spencer* hearing testimony. R23/3554-3592.

When asked about Tanya, Watts testified that he "only vaguely" recalled her. P3/283. Watts spoke to her on the telephone and then questioned her by video conference at the last *Spencer* hearing. P3/283-84, 289. Watts acknowledged that when he first spoke to collateral counsel, he did not recall having any information regarding the physical and sexual abuse subjected upon Robards prior to the penalty phase. P3/287. However, Watts further acknowledged, after being shown Springer's report dated April 27, 2010, that he had detailed information from Tanya about the sexual and physical abuse prior to the penalty phase. P3/287-89; P5/657-59. Watts testified that he did not recall reading the report around April 27, 2010, but he did recall reading it. P3/289.

Watts testified that Tanya's testimony about Robards' past "was not part of the case that [they] were going to present" and that Tanya's information was later helpful to the experts to show that Robards was introduced to steroids at age 15 and he never stopped using them. P3/289-90. Watts had not "put together the whole of the steroids being the armor against sexual abuse until later," after the jury recommendation. P3/290. Watts' reasoning for not putting Tanya's[34] compelling testimony before the jury does not make sense considering the trial events. Despite having Springer's report, Watts presented a video and penalty phase that inaccurately portrayed Robards as a child with a good and normal upbringing. It is clear from Tanya's *Spencer* hearing testimony and Springer's report that Robards' life was far from normal. P5/657-59.

At a September 27, 2010[35], status conference, the following discussion occurred:

> MR. WATTS: Judge, I'm mindful that we have a sentencing for him [Robards] in October.
> THE COURT: Right.
> MR. WATTS: And I have a need for a couple of hours to finalize the *Spencer* presentation with videoconferencing from a family member to - - when we closed out the last *Spencer* hearing, Mr. Schaub was

[34] Tanya was on the videotape and freely provided Springer with all of the details in P5/657-59. She testified via videoconference at the *Spencer* hearing. It is clear that Tanya could have testified by videoconferencing at the penalty phase, but she was not asked to testify in person at the penalty phase. P3/323.

[35] At this point, a sentencing date was already set for October 29, 2010. This Court approved a third *Spencer* hearing in the interim, which was held October 7, 2010. SR11/1399.

> commenting on the notebook that we put in evidence, family history letters from friend, that kind of thing.
> THE COURT: Right.
> MR. WATTS: And Mr. Schaub talked about the rosy childhood. We didn't hear about the dark side of Mr. Robards' upbringing. His sister would be willing to testify about that through videoconference.

SR11/1393-1394.

Thus, it was only after two *Spencer* hearings and a status conference that Watts, for the first time, brought up Tanya's testimony as a counter to the inaccurate rosy childhood portrayal. Had Watts been aware of Tanya's insights prior to the penalty phase, he would not have been able, in good conscience, to inaccurately portray Robards' childhood to the jury as normal and rosy. The fact that Watts did not introduce Tanya's testimony until a third *Spencer* hearing shows that he was ignorant to the information in Springer's report and did it realize its content as to the physical and sexual abuse until September of 2010. ***It is undeniable that Watts did not make any strategic decision not to have Tanya as "part of the case that [they] were going to present" before the jury.*** P3/289-91. Watts was the cause of the inaccurate portrayal of the particularized characteristics of Robards' life. This inaccurate portrayal occurred because Watts simply was not aware of the information that Tanya could provide, despite the fact that his investigator had made it available to him. P3/287-89. Watts' failure deprived the jury of the powerful, gut-wrenching, and compelling testimony of Tanya about Robards' childhood. R23/3556-3573. Tanya's *Spencer* hearing testimony portrayed the true horrors that the Robards children faced

growing up. Due to Watts' errors, the jury never learned about the harrowing emotional, physical and sexual abuse suffered by Robards. Watts failed to focus on the true particularized story of Robards' life and present it to the jury. *See Gregg*, 428 U.S. at 206; *Roberts v. Louisiana*, 428 U.S. 325, 333-334, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

It is well settled that all of the aforementioned evidence – the mental health issues, addiction, brain damage, and traumatic childhood – represent valid mitigation evidence, sometimes referred to as non-statutory mitigation. *See, e.g., Rose*, 675 So. 2d at 571 (childhood abuse and neglect, head trauma, and mental illness included in mitigating factors counsel was ineffective for failing to uncover); *Holsworth v. State*, 522 So. 2d 348, 354 (Fla. 1988) (childhood trauma recognized as a mitigating factor); *Parker v. State*, 643 So. 2d 1032, 1035 (Fla. 1994) (long-term drug and alcohol abuse is reasonably considered as valid mitigation); *Ragsdale v. State*, 798 So. 2d 713, 718-19 (Fla. 2001) (counsel was ineffective for failing to present evidence of head trauma and drug and alcohol abuse); *Power v. State*, 886 So. 2d 952, 959 (Fla. 2004) (family background and personal history are validly considered mitigation). It is also clear that the jury never heard it because Watts failed his duty to do a thorough mitigation investigation prior to the penalty phase. With the cursory mitigation that was presented, the jury vote was still only 7-5. Should this Court affirm the lower court's decision, then it is opening a floodgate that permits capital

counsel to not do a competent mitigation investigation prior to making a decision regarding presentation. This would undermine the need for effective assistance of counsel, particularly in capital cases. It is consistently preached that death is different for the very reason that the punishment permanently concludes the life of a person. *See Gregg*, 428 U.S. at 188. To allow capital counsel a "pass" because they are ***generally aware*** of potential mitigation without any further information or investigation to support or justify their decision regarding how to present mitigation to a jury (whose decision holds greatly upon a judge) renders the 6th Amendment right to effective assistance of counsel moot. *See Ault v. State*, 53 So. 3d 175, 200 (Fla. 2010); *Tedder*, 322 So. 2d at 910 (Fla. 1975) (*abrogated by Hurst v. Florida*, 136 S. Ct. 616 (2016)).

> The lower court made the following findings as to the prejudice prong:
>
> Moreover, the Court finds that Robards cannot demonstrate that he was prejudiced by counsel's decision[36] to defer presentation of mental mitigation to the *Spencer* hearing and failure to present Tanya Robards' third *Spencer* hearing testimony and the testimonies of William Jonassen and Bonnie Ruggles to the jury during the penalty phase.
> . . .
> With respect to the mental mitigation, counsel [Watts] reasoned[37], the detrimental effect of presenting the mental mitigation expert testimony to the jury would have almost certainly outweighed any benefit of such testimony.
> . . .
> Robards asserts that had counsel presented the cited mitigation evidence to the jury during the penalty phase there is a reasonable

[36] Robards continues to reiterate that there was no such reasoned decision by Watts.
[37] No such reasoning was done. This was impermissible hindsight analysis.

> probability that it would have caused at least one more juror to recommend a life sentence. However, speculation as to the possibility that the jury's seven-to-five death recommendation would have differed is insufficient to undermine confidence in Robards' death sentences.

P5/593-596.

Robards has clearly demonstrated that Robards was prejudiced by Watts' failures, so much so that even the lower court found the mental health mitigators to exist and afforded them some weight. *See Robards*, 112 So. 3d at 1266; *see Hurst v. State*, 18 So. 3d 975 (Fla. 2009). The State was able to exploit Watts' deficiency in investigation. The State presented to Robards' jury an inaccurate portrayal of a normal and un-mitigating childhood. As Watts learned much later, this was far from the truth. Watts earned the complete and compelling story of Robards' life after the penalty phase. R20/3178-3179; 3188.

During Robards' penalty phase trial, the prosecutor began his closing argument with the following statement: "We saw a videotape up here of Richard Robards, "This Is Your Life." The only videotape the victims have before you is brought to you by Richard Robards, and it's 'Frank and Linda DeLuca, This Is Your Death.'" R20/3177. The prosecutor went on to argue to the members of the jury that nothing was presented to them that mitigated the sentence that Robards should receive for the crimes they had just found him guilty of.

> We saw that Richard Robards led a normal childhood. He had a loving mother, brothers, sisters, a normal childhood. He wasn't the victim of abuse. He wasn't the victim of poverty. He wasn't the victim of, you know, violence in the family. A normal childhood. How does that

mitigate what happened?
R20/3177-78.

The prosecutor's assessment of the mitigation evidence presented during the penalty phase was accurate, and a majority of the jury apparently agreed with the prosecutor that it did not mitigate the sentence. The jury recommended a death sentence by a 7-5 vote. The problem Robards faced during the penalty phase was not, however, that his life story did not contain facts compelling in terms of mitigation. The problem was that, as a result of the ineffective assistance of Robards' trial counsel, the jury did not hear those facts. The jury heard a story that was unforgivably misleading, rather than the real Richard Todd "Damian" Robards story.[38]

That story begins with a little boy who did not fit in, even with his family unit, because his stepbrothers considered him an outsider. R23/3556-59. That little boy was severely beaten by his stepbrothers, sustaining head injuries as a result, and quickly learned that it was easier not to fight back because that meant the beatings would end sooner; he was also sexually abused. R23/3560-69; R21/3377-78. There would seem to be no end to the suffering until, at the age of 15, Todd, as his family called him, was introduced to a gym called "The Dungeon," full of bodybuilders

[38] An accurate portrayal of Robards' life, which included the substantial amount of information not presented to the jury was summarized on pp. 29-51 of Robards' Initial Brief on direct appeal and was provided in Robards' Motion. P3/19-41.

who were big and strong, bodybuilders who would never endure the abuse he did because they were able to fight back. R23/3375-77. Bodybuilders who, in order to maintain their impressive size, used anabolic steroids. R23/3376.

Todd began bodybuilding and playing football, and he put his former life behind him. R23/3564. He too became able to fight back and would never again suffer the agonizing abuse to which his stepbrothers subjected him. R23/3564. He distanced himself so far from his former life that he even took a different name: "Damian." R23/3564. He began training others in bodybuilding and nutrition and, in fact, helped many clients achieve their personal fitness goals. R20/3149-51. Unfortunately, he had also begun using steroids, and this began a cycle of addiction that he was unable to break until it was broken for him, during the time he was arrested and resided in the Pinellas County Jail shortly before the crimes that occurred in this case. R23/3563-64; R21/3378, R21/3385.

Robards' steroid addiction alone led to personality changes and brain damage. R21/3372-78. But the story does not end there. As a result of the abuse he endured during his childhood and a series of automobile and motorcycle accidents, Robards had brain damage that was worsened by his steroid abuse, to the point where a PET scan revealed damage in three different regions. R21/3353-54; R21/3377-78. In one region, Robards had damage from traumatic injury, in another there was damage from toxic chemical exposure, and in the third damage was present from a

combination of those factors. R21/3353-54. Multiple brain abnormalities increase the risk of behavioral problems to a greater extent than a single injury. R21/3354. During the *Spencer* proceedings in this case, Dr. Berland opined that Robards suffered from a biologically-based psychosis and that, during the time of the crime he met the criteria for the two statutory mitigating circumstances found in Fla. Stat. § 921.141(6)(b) and (f) – he was under the influence of an extreme mental or emotional disturbance and his ability to conform his conduct to the requirements of the law was substantially impaired. R23/3416-24; R23/3433-37. The jury never heard this evidence; it was only presented to the judge during a series of *Spencer* hearings after the jury had recommended a death sentence by a 7-5 vote. It was this bare majority vote that the trial judge had to give "great weight." *Tedder*, 322 So. 2d at 910.

The fact that Robards' jury never heard the substantial and compelling mitigation evidence described here is disturbing in and of itself, and this failure alone shows that he was deprived during his penalty phase trial of the effective assistance of counsel guaranteed by the 6th Amendment. However, to add insult to injury, Robards' trial counsel presented a false depiction of Robards' childhood which was shown to be, in the words of the prosecutor, "normal," with "loving" siblings, free from abuse and violence, free from sexual molestation. R20/3178-79. The majority of this evidence came from a videotape, on which six family members and friends

testified as to Robards' good qualities, including a kind nature, and on which the family witnesses only mentioned positive interactions with other family members. R20/3141-52. The difference between Robards' true story, as described above, and the story the jury heard defies rational explanation.

Counsel's entire penalty phase presentation to the jury took approximately half a day. R20/3211. In addition to the video, Robards' counsel presented to the jury the testimony of Shane Harper, which indicated that Robards did not plan to murder the two victims, only to rob them. R20/3143-45. The jury also heard from Pinellas County Jail supervisor Mark Cognatti, who was intended to provide testimony showing Robards had exhibited good behavior in custody but who, during cross-examination testified that Robards tried to escape from the State hospital and that bailiffs indicated Robards had a razor blade during a court appearance. R20/3159-63.

Mindy Bickey, one of Robards' former personal training clients, testified that he had become a personal friend of hers, that he cared about his clients, and that he had much to offer other prisoners if sentenced to life imprisonment. R20/3152-56. She also shared a personal story detailing Robards' kindness to her and her mother, as well as other patients at the rehab facility where her mother recovered after breaking her hip. R20/3149-50. The jury also heard from two Pinellas County Jail inmates, who testified as to Robards' good qualities including a dedication to helping

others, and from Robards' mother, Gerry Robards, who begged the jury for mercy and compassion. R20/3166-73.

Even from counsel's cursory presentation to the jury, it is clear that Robards is a person with many positive qualities, and indeed, counsel stated their strategy during the penalty phase was to "humanize" Robards in front of the jury and save the mental health mitigation evidence for the judge. P3/350. However, the story told was misleading in terms of Robards' childhood, and failed to include the portions of Robards' life most compelling in terms of mitigation. Robards' childhood left him addicted and brain damaged, and despite those struggles, he managed to maintain good qualities which were observed by many people. The evidence that counsel did not present would not have conflicted with their strategy to "humanize" their client; in fact, it would have supported that strategy and shown the jury that Robards was a person who, despite his traumatic experiences, unfortunate addiction, and brain damage, had positive attributes and something of value to offer those around him. Had counsel done a reasonable investigation before the penalty phase, the story would have been accurate and complete, and the jury would not have been in the position of having to reconcile the rosy picture of Robards' life that trial counsel painted for them with the details of the crimes. It is quite telling that the jury, even after hearing this inaccurate and incomplete presentation, made a recommendation of death by the barest majority allowed by law anywhere in the United States, a vote

of 7-5 in favor.

Prejudice for purposes of a *Strickland* IAC analysis is defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *see Hardwick v. Crosby*, 320 F.3d at 1165-66 ("'Florida is a weighing State; the death penalty may be imposed only where specified aggravating circumstances outweigh *all* mitigating circumstances.' *Parker v. Dugger,* 498 U.S. 308, 318, 111 S.Ct. 731, 738, 112 L.Ed.2d 812 (1991) (citing Fla. Stat. § 921.141(3) (1985)) (emphasis added). '[T]he Supreme Court and this Court ... have repeatedly emphasized the constitutional right of a defendant facing the death penalty to present any relevant evidence of mitigating circumstances.' *Brownlee,* 306 F.3d at 1070. '[T]he question is whether there is a reasonable probability that, absent the errors, the sentencer-including an appellate court ... would have concluded that the balancing of aggravating and mitigating circumstances did not warrant death.' *Strickland,* 466 U.S. at 695, 104 S.Ct. at 2069. 'The appropriate analysis of the prejudice prong of *Strickland* requires an evaluation of 'the totality of the available mitigation evidence-both that adduced at trial, and the evidence adduced in the habeas proceeding-in reweighing it against the evidence in aggravation.'' *Bottoson v. Moore,* 234 F.3d 526, 534 (11th Cir. 2000) (quoting *Williams,* 529 U.S. at 397-98, 120 S.Ct. at 1515); *see Clemons v. Mississippi,* 494

U.S. 738, 752, 110 S.Ct. 1441, 1450, 108 L.Ed.2d 725 (1990) (vacating state supreme court's upholding death sentence because it was not apparent that the appellate reweighing of the aggravating and mitigating factors accorded 'defendant[ ] the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances' or 'that the [state appellate] court fully heeded our cases emphasizing the importance of the sentencer's consideration of a defendant's mitigating evidence' required in a weighing state" (footnotes omitted)).

In order to make a prejudice determination, a court must look at counsel's omissions and errors and determine if these undermine its confidence in the outcome, which in the penalty phase setting, means whether there is a reasonable probability of a different sentence. In this case, where the jury vote for death was only 7-5, omissions and evidence sufficient to undermine confidence that ***even one juror*** may have changed his or her vote in favor of death constitutes the reasonable probability that prejudice occurred. *See Porter*, 558 U.S. at 42-44; *see Ferrell v. State*, 29 So. 3d 959, 985 (Fla. 2010) (affirming a finding of prejudice because "there was substantial mitigating evidence which was available but undiscovered") (*quoting Pearce*, 994 So. 2d at 1103). Given the fact that the only mitigation presented to the jury was the presentation described above, which Watts himself admitted was "trite and superficial," it is abundantly clear that the additional

information that Watts could have presented after a thorough investigation was reasonably likely to have swayed at least one juror in favor of a life sentence.

Jury recommendations are entitled to great deference by the trial court. *Ault*, 53 So. 3d at 200; *Tedder*, 322 So. 2d at 910. This is why it is completely unreasonable for counsel not to know what mitigation evidence is available to present before conducting the penalty phase in front of the jury. Watts' negligence and carelessness during the penalty phase rendered the entire process unconstitutional. Watts was clear on the record that he regretted the investigation not being done beforehand. R23/3519-3523. The prejudice prong is satisfied in this case because "there is a reasonable probability that at least one juror would have struck a different balance" especially after assessing all of the mental mitigation. *Porter,* 558 U.S. at 42 (*quoting Wiggins*, 539 U.S. at 537); *see Robards*, 112 So. 3d at 45-46 (Pariente, J., concurring, recognizing the close 7-5 jury recommendation).

The fact that "death is different" cannot be emphasized enough in this case. *Gregg*, 428 U.S. at 188. Watts recognized too late the importance of a "particularized sentencing." The Supreme Court of the United States emphasized the importance of focusing the sentencer's attention on "***the particularized characteristics of the individual defendant***." *Gregg*, 428 U.S. at 206; *see Roberts*, 428 U.S. at 333-334. It cannot be emphasized enough that an attorney has a "strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating

evidence." *State v. Riechmann*, 777 So. 2d 342, 350 (Fla. 2000) (*citing Rose*, 675 So. 2d at 571); *see Wiggins*, 539 U.S. at 521-523. This is not a case where alternative avenues were considered and rejected by trial counsel. *See, e.g., Sliney v. State*, 944 So. 2d 270, 283 (Fla. 2006).

The lower court identified the penalty phase prejudice standard as "measured by whether the error of trial counsel undermines this Court's confidence in the sentence of death when viewed in the context of the penalty phase evidence and the mitigators and aggravators found by the trial court." P5/593 (*quoting Douglas v. State*, 141 So. 3d 107, 117 (Fla. 2012)). The lower court then concluded that its own confidence in the death sentence was not undermined, citing to the aggravating circumstances it found in its sentencing order and determining that two of them "are among the weightiest aggravators in Florida's statutory scheme." P5/594 (*quoting Gonzalez v. State*, 136 So. 3d 1125, 1167 (Fla. 2014)).

The lower court's function in determining the sentence is distinct from its function as a post-conviction factfinder. When the lower court sentences a person to death, it has in front of it all of the information presented in terms of aggravating and mitigating circumstances as well as the jury's recommendation, which must be given great weight." *Tedder*, 322 So. 2d at 910. When the lower court, on post-conviction review, determines whether the information with which it is now confronted had a reasonable probability of changing the outcome, as is required by

the prejudice prong of the *Strickland* analysis, it cannot ignore the jury's role and rely only on its own findings as memorialized in the sentencing order. To do so would deny the defendant the benefit of the *Strickland* prejudice analysis, and that is exactly what occurred below in this case.

The lower court found that it

> was presented with and considered all of the mitigation evidence cited in Robards' motion, with the exception of the cumulative testimony of Mr. Jonassen and Mrs. Ruggles, prior to sentencing Robards to death for both murders. With respect to the mental mitigation, the Court found that the evidence was insufficient to establish the statutory mitigators, but assigned it "some weight" as nonstatutory mitigation. . . . The Court considered Robards' family history, including the testimony of Tanya Robards regarding the discord in the family and the physical and sexual abuse that Robards suffered. The court found that the non-statutory mitigator had been established and assigned it "some weight," nothing that the evidence was inconsistent and that Tanya Robards' testimony regarding the sexual abuse and some incidents of physical abuse was based on hearsay.

P5/595-96.

The lower court further determined, "This is not case where defense counsel failed to develop mitigation at trial and presented significant additional mitigation at the post-conviction evidentiary hearing." P5/596 (*citing Merck v. State*, 124 So. 3d 785, 798 (Fla. 2013)).

This fact, though the lower court used it as a rationale for denying Robards relief, is simply illustrative of the difference between Robards' case and many others, and does not stand for the proposition that Robards does not deserve relief while other defendants do. In other cases, the deficiencies of trial counsel are simply

not revealed until the post-conviction proceedings. Here, Watts revealed his own deficiencies to the trial court throughout the *Spencer* proceedings. ***Instead of providing Watts with a strategic reason for failing to present the relevant information to the jury,***[39] the lower court should have been questioning, as this Court did during the direct appeal proceedings, ***why Watts did not do so.*** The lower court erroneously concluded that just because it heard most of the evidence before, there can be no prejudice stemming from counsel's failure to present the evidence to the jury. However, this overlooks the fact that, had the jury not recommended death, the lower court never would have made the findings it now uses to justify Robards' death sentence.

The lower court disposed of that argument as well, however, and in doing so, committed a grave error:

> Robards asserts that had counsel presented the cited mitigation evidence to the jury during the penalty phase there is a reasonable probability that it would have caused at least one more juror to recommend a life sentence. However speculation as to the possibility that the jury's seven-to-five death recommendation would have differed is insufficient to undermine confidence in Robards' death sentences.

P5/596.

The lower court relies on *Derrick v. State*, 983 So. 2d 443, 462 (Fla. 2008), to dismiss Robards' prejudice argument, as both cases involved a 7-5 death recommendation. There are two problems with the lower court's reliance. First, the

[39] R23/3521; *see supra*, p. 17.

facts in *Derrick* are distinguishable. In *Derrick*, the case was brought before this Court on the appeal of a resentencing where the trial attorney, unlike Watts, made a ***reasoned decision*** regarding mental health presentation. *See id*. at 460-461 ("Although a psychological evaluation was initially obtained before the first penalty phase, mental health evidence was not presented at the first penalty phase. Resentencing counsel reviewed Dr. Nancy Simons' report of Derrick's psychological evaluation, in which he was *diagnosed with antisocial personality disorder*, and felt it was more harmful than helpful because it conflicted with testimony of Derrick's kind nature."). Moreover, in *Derrick*, the defendant bragged about the brutal murder to his friend after the robbery. *See id*. at 461. In that case, counsel and the courts had the benefit of seeing the effect of mitigation from a prior sentencing.

Second, to compare Robards' case to *Derrick* is to deny Robards the benefit of the *Strickland* prejudice analysis, where the hurdle to be overcome is merely a showing that there is a "reasonable probability" of a different outcome. When, as in Robards' case, the defendant is sentenced by a judge who must rely heavily on a jury's recommendation – whether it is a 7-5, 8-4, 9-3, 10-2, 11-1, or even 12-0 recommendation – if the jury recommends death by a 7-5 vote and counsel failed to present them with the ***most compelling evidence that exists in mitigation***, then to deny the claim because it is "speculative" renders the *Strickland* prejudice analysis meaningless. *See Phillips v. State*, 608 So. 2d 778, 783 (Fla. 1992) (This Court

vacated the death sentence and remanded the case for a new trial. This Court found that "[t]he jury vote in this case was seven to five in favor of a death recommendation. The swaying of the vote of only one juror would have made a critical difference here. Accordingly, we find that there is a reasonable probability that but for counsel's deficient performance in failing to present mitigating evidence the vote of one juror would have been different, thereby changing the jury's vote to six to six and resulting in a recommendation of life reasonably supported by mitigating evidence."); *see Rose*, 675 So. 2d at 574; *see Cooper v. Sec'y, Dep't of Corr.*, 646 F.3d 1328, 1356 (11th Cir. 2011) ("Given that some jurors nonetheless 'were inclined to mercy even with[ ] having been presented with [so little] mitigating evidence and that a great deal of mitigating evidence was available to [Cooper's] attorneys had they more thoroughly investigated,' it is possible that, if additional mitigating evidence had been presented, more jurors would have voted for life.).

Robards' jury was instructed as to the ***exact*** same four aggravators[40] that the trial court found, and recommended death by a bare majority. R11/1773-76; P5/593-94. Due to Watts' deficiency, the jury only heard evidence as two sets of mitigators[41].

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[40] The trial court merged the pecuniary gain aggravator into the commission of a capital crime during the commission of a robbery aggravator. R13/2124-25; P5/594. So, the trial court found three aggravators, while Robards' jury was exposed to four aggravators.

[41] 1. The existence of any factors in the defendant's character, background or life, including but not limited to the following:
a. The defendant's family background

It was in the course of three *Spencer* hearings that only the trial court heard and later found several other mitigators. S13/2129-43. Certainly if the trial court found evidence of mitigators that were not presented to the jury due to counsel's deficiency, it is reasonable and clear evidence that one juror would have found those same mitigators and voted for a life sentence. At sentencing, the trial court found and gave some weight to eleven mitigators: ***(1) the mental health non-statutory mitigator***; ***(2) Robards' family history***; (3) no plan to murder; (4) good general conduct while in custody; (5) capacity to form positive relationships; (6) remorse and potential for rehabilitation; ***(7) traumatic injury based on PET scan and PET scan brain image comparison***; ***(8) effect of steroids on brain injury and effect of steroids generally***; ***(9) use of prescribed steroids, interactions with other prescribed drugs, and withdrawal***; ***(10) mental health issues***; and (11) history of steady employment. *See Robards*, 112 So. 3d at 1266. Not just a few, but six of the above mitigators, as highlighted, were found by the trial court due to evidence presented during the *Spencer* hearings. There is a reasonable probability that at least one juror would have found the same mitigators as this Court did and voted for a life sentence, if the jury had been presented with the full scope of the substantial mitigation that

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b. The defendant's employment
c. The defendant's good Pinellas County Jail record

2. Any circumstances of the offense that would mitigate against the imposition of the death penalty.

R11/1777-78.

existed but was undiscovered by Watts. *See Walker*, 88 So. 3d at 141-142 (a troubled history is "at minimum relevant in assessing [a defendant's] moral culpability); *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) ("Evidence 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 . . . may be less culpable than defendants who have no such excuse.") (*quoting California v. Brown*, 479 U.S. 538, 545, 107 S. Ct. 837, 93 L .Ed. 2d 934 (1987) (O'Connor, J., concurring)); *Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S.Ct. 869, 71 L. Ed. 2d 1 (1982) (noting that consideration of the capital defendant's background is "a constitutionally indispensable part of the process of inflicting the penalty of death") (*quoting Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S. Ct. 2978, 49 L .Ed. 2d 944 (1976)). It is clear that the jury was confronted like the trial court of the aggravators that the lower court quoted as the "weightiest aggravators" and the facts supporting those aggravators, and they were one vote from a life sentence. P5/594. What the jury did not know was the accuracy of Robards' life and upbringing, and the extent of his mental illness, steroid abuse, and organic brain damage. All these mitigators were uncontroverted by any prosecution experts to contradict or question even though they now proclaim without evidence in *hindsight* that they could have used competency experts and hearsay reports to overcome them. The swaying of only one

juror's vote, in the face of Robards' strong mental mitigation and his complete compelling life history, would have made a "critical difference." *Phillips*, 608 So. 2d at 783.

A capital attorney's presentation to the jury is extremely important as it is clear that their recommendations holds great weigh in a trial court's decision to sentence a person to life or death[42]. This Court has "consistently recognized that severe mental disturbance is a mitigating factor of the ***most weighty order***, and the failure to present it in penalty phase may constitute prejudicial ineffectiveness." *Rose*, 675 So. 2d at 576 (internal citations omitted) (*citing Hildwin v. Dugger*, 645 So. 2d 107, 110 (Fla. 1995) and *Santos v. State*, 629 So. 2d 838, 840 (Fla. 1994)). The effect of the aforementioned compelling mitigation on Robards' minor majority jury cannot be undermined by simply referring to solely the trial court's findings as to the aggravators and mitigators. Under Robards' sentencing scheme, it is the premise of the jury to make the recommendations as to whether an individual lives or dies that weigh heavily upon the sentencing court and therefore, the effect on the

[42] The trial court instructed on the importance of Robards jury's recommendation to the court's final decision as follows:

> Although the recommendation of the jury as to penalty is advisory in nature and is not binding, the jury recommendation ***must be given great weight and deference*** by the Court in determining which punishment to impose.

R11/1767.

juror is what constitutionally matters. *See Hurst v. Florida*, 136 S. Ct. 616 (2016); (This recent Supreme Court of the United States decision reminds us of the importance of the role of the jury).

"'The primary purpose of the penalty phase is to insure that the sentence is individualized by focusing [on] the particularized characteristics of the defendant. By failing to provide such evidence to the jury, though readily available, trial counsel's deficient performance prejudice [s a petitioner's] ability to receive an individualized sentence.'" *See Hardwick v. Crosby*, 320 F.3d at 1162 (*citing Brownlee,* 306 F.3d at 1074 (alterations in original) (*quoting Cunningham v. Zant,* 928 F.2d 1006, 1019 (11th Cir.1991))); *see Armstrong v. Dugger,* 833 F. 2d 1430, 1433 (11th Cir. 1987) (same); *Thomas v. Kemp,* 796 F.2d 1322, 1325 (11th Cir.1986) (same); *see Hardwick v. Sec'y,* 803 F.3d at 563-64 ("'The purpose of a sentencing hearing is to provide the jury with the information necessary for it to render an individualized sentencing determination based upon the character and record of the individualized offender and the circumstances of the particular offense.' *Collier*, 177 F.3d at 1203[43] (alterations omitted) (*quoting Dobbs v. Turpin,* 142 F.3d 1383, 1386–87 (11th Cir.1998)). Here, 'counsel's absolute failure to investigate, obtain, or present any evidence, let alone the powerful, concrete, and specific mitigating evidence that was available, prevented the jurors from hearing anything at all about

[43] *Collier v. Turpin,* 177 F.3d 1184, 1203 (11th Cir. 2013).

the defendant before them. An individualized sentence, as required by the law, was therefore impossible.' *Brownlee,* 306 F.3d at 1074."). It is clear that "there was substantial mitigating evidence which was available but undiscovered" due to counsel's failure. *State v. Pearce*, 994 So. 2d 1094, 1103 (Fla. 2008); *see Deaton v. Dugger*, 635 So. 2d 4, 9 (Fla. 1993)("In view of [the testimony of counsel] and other substantial evidence presented at the post-conviction hearing, including the testimony of two mental health experts, we believe that counsel's shortcomings were sufficiently serious to have deprived Deaton of a reliable penalty phase proceeding."). Watts' deficiency in failing to reasonably investigate and learn Robards' background prior to the penalty phase deprived Robards of a reliable penalty proceeding such that this Court's confidence in the outcome must be undermined. *See Henry v. State*, 937 So. 2d 563, 569 (Fla. 2006). But for counsel's deficiency in their investigation, there is a reasonable probability that when considering the totality of the available mitigation adduced at trial and at post-conviction and reweighing it against the aggravators, Robards would have received a life recommendation and sentence. *See Porter*, 558 U.S. at 41; *Strickland,* 466 U.S. at 694. This Court in looking at Watts' wavering testimonies from the direct and post-conviction records on appeal will find evidence that Watts' deficient performance, resulting in a recommendation of death by just one jury vote, prejudiced Robards and ultimately deprived him of a fair trial with a reliable result.

To affirm Watts' conduct as not deficient and non-prejudicial would permit future capital counsel from ignoring their strict duty to do a reasonable mitigation investigation prior to making a decision. Also, it would permit a hindsight analysis in post-conviction cases whereby a reviewing court would just have to find negative aspects to contradict the mitigation. This is not what *Strickland* and its progeny permit. This Court must, under these facts, vacate the sentence of death and remand the case for a new penalty phase proceedings.

## ARGUMENT II

**THE LOWER COURT ERRED IN DENYING ROBARDS' CLAIM THAT TRIAL COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE WHEN THEY FAILED TO OBJECT OR ATTEMPT TO SUPPRESS THE TESTIMONY, EVIDENCE, OR PROSECUTORIAL ARGUMENT REGARDING ROBARDS' OFFER TO MAKE A DEAL AND ANY RELATED STATEMENTS.**

Robards argued in claim one of his Motion that trial counsel provided prejudicial ineffective assistance under *Strickland* when they failed to in any way object or attempt to suppress testimony, evidence, or prosecutorial argument regarding Robards' offer to make a deal with Detective Anthony Monte and any related statements. P1/7. Following an evidentiary hearing, the lower court denied the claim, finding that Robards failed to establish either deficient performance or prejudice. P5/583-86. Robards seeks review of these findings.

In the State's opening statement in the guilt phase trial, the prosecutor told the jury that they would hear a tape of a telephone message Robards left for a detective

who was assigned to his case:

> And you're going to hear from Anthony Monte who is one of the detectives and Christopher Precious. And they're going to – as a matter of fact, we have a tape. There was a phone message that was kept that the Defendant made and the Defendant made this to Detective Monte at the Clearwater Police Department.
> And we have that tape for you and you're going to listen to it. You're going to hear it's his voice. And he's arrested for this crime. And he calls up Monte and says, I'm ready to meet with you. I'm ready to meet with you. I want to make a deal.
> Guess what, police department, they're not Monty Hall. It's not let's make a deal. They don't make deals. Listen carefully to that phone message, and we're going to present it to you. It's him and he wants to make a deal.

R26/353-54.

There was no objection from defense counsel.

The State's last witness during the guilt phase trial was Detective Anthony Monte, who testified about the telephone message he received from Robards on August 15, 2006. R32/1173. Detective Monte had previously spoken with Robards about the Frank and Linda Deluca homicide case. R32/1178. A recording of the message was played for the jury:

> UNIDENTIFIED SPEAKER 1: This is Detective Monte of the Clearwater Police Department. Today's date is August 15, 2006. The current time is 5:33 p.m. The following is going to be a recorded message that was left by Damien Robards. This is in reference to Clearwater Police Case Number 2006-19146. It's a homicide investigation, and said location is 1502 Murray Avenue. The recording is the following.
> Unidentified SPEAKER 2: Message one from phone number 532-0150 received today at 2:40 p.m.
> To play the message, press two. To go to the next message, press six.
> UNIDENTIFIED SPEAKER 3: Detective Monte, this is Damien

> Robards. I'm down here at the Pinellas County Jail. It's about two o'clock. Listen, if you can come here and talk to me, and you guys are ready to make a deal, come in and talk to me, all right? Thanks.
> UNIDENIFIED SPEAKER 2: End of message.

R32/1173-74.

There was no objection from defense counsel.

Detective Monte testified on cross examination that he went to see Robards in response to Robards' telephone message. R32/1180. According to Detective Monte, the following exchange took place:

> He made reference to who was in [sic] involved. He said he wanted to make a deal. I told him I wasn't in a position to offer him a deal. I don't have the power to do that. And he spoke no further of it.

R32/1180.

On redirect examination, Detective Monte provided additional details regarding his conversation with Robards:

> Q. And as a matter of fact, he told you specifically, didn't he, that he was involved?
> A. He did.
> Q. He had said he was involved?
> A. Correct.
> Q. But he wanted to – he wanted to say, It was – it's bigger than me. It's a drug ring and stuff like that, correct?
> A. That's correct.
> Q. And you looked into that?
> A. One of our detectives did, correct.
> Q. And nothing, correct?
> A. Nothing matched up to anything we were working.
> Q. But – so when he called you, all right, when he called you and said, Let's make a deal, you did go down to see him then?
> A. I did, that's correct.
> Q. And it was limited what he said?
> A. Correct.

> Q. I mean, it was short, sweet, and that was it. And it was, I'm involved and there are – it's bigger than me, and there's drug dealers involved and all that, correct?
> A. He referenced it to a drug case in Orange County.
> Q. Right. And you-all looked into that?
> A. Correct.
> Q. And it completely eliminated that as a possibility?
> A. Yes.

R32/1182-83.

Finally, the prosecutor mocked Robards' offer to make a deal in the State's closing argument:

> The man – Detective Monte was Monte Hall. The man that said, Let's make a deal. And Anthony Monte said, No, sir, we don't make deals. See you in court. And that's where we are today. We don't make deals. What does he want to make a deal for if he has nothing to do with it. He told Detective Monte he was involved. And then he tries, you know, It's bigger than me. It's a drug deal. They looked into all of those things. Bull, he's involved and only he.

R32/1260.

Once again, there was no objection from defense counsel.

Fla. Stat. § 90.410 (2010) states:

> Evidence of a plea of guilty, later withdrawn; a plea of nolo contendere; or an offer to plead guilty or nolo contendere to the crime charged or any other crime is inadmissible in any civil or criminal proceeding. Evidence of statements made in connection with any of the pleas or offers is inadmissible, except when such statements are offered in a prosecution under chapter 837.

Similarly, Fla. R. Crim. P. 3.172(i) (2010) states:

> Except as otherwise provided in this rule, evidence of an offer or a plea of guilty or nolo contendere, later withdrawn, or of statements made in connection therewith, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

A similar prohibition exists in federal court. Fed. R. Evid. 410.

The courts have repeatedly held that offers to plead guilty and any related statements are inadmissible at trial. *See, e.g.*, *United States v. Harris*, 657 F.Supp. 2d 1267, 1274 (N.D. Fla. 2009); *Calabro v. State*, 995 So. 2d 307, 314 (Fla. 2008); *Richardson v. State*, 706 So. 2d 1349 (Fla. 1998). In *United States v. Robertson*, 582 F.2d 1356 (5th Cir. 1978), the Fifth Circuit Court of Appeals applied a two-tiered analysis in determining whether a discussion should be characterized as a plea discussion. *Harris*, 657 F. Supp. 2d 1267. First, the trial court must determine "whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion." *Robertson*, 582 F.2d at 1366. Second, the trial court must determine "whether the accused's expectation was reasonable given the totality of the objective circumstances." *Id.* at 1366. In analyzing whether a defendant's statements are inadmissible under Fla. Stat. Ann. § 90.410 and Fla. R. Crim. P. 3.172(i), this Court first applies the plain meaning of the statute and rule, and if that analysis does not resolve the issue, then this Court applies the analysis in *Robertson*, 582 F.2d at 1356. *Calabro*, 995 So. 2d at 314. The protection applies to statements made to law enforcement officers, as well as prosecutors, regardless of whether the law enforcement officer has actual authority to negotiate a plea. *See Harris*, 657 F.Supp. 2d 1267; *Richardson*, 706 So. 2d 1349. Furthermore, the protection applies in cases where the defendant's attempt to negotiate a plea is unsolicited. *See*

*Calabro*, 995 So. 2d 307. "[N]either the statute nor the rule contains any requirement that a defendant's offer to plead must be in response to a State offer before it will receive the protection of exclusion from evidence." *Calabro*, 995 So. 2d at 317.

In the case at hand, under both the plain meaning of Fla. Stat. Ann. § 90.410 and Fla. R. Crim. P. 3.172(i) and the two-pronged analysis laid out in *Robertson*, 582 F.2d 1356, the telephone message Robards left for Detective Monte and the subsequent conversation Robards had with Detective Monte should be characterized as an inadmissible plea discussion. The first prong of *Robertson* is satisfied, as Robards was clear in the telephone message he left for Detective Monte that his expectation in speaking with the detective was to negotiate a plea deal. R32/1173-74. In response to Robards' message, Detective Monte went to the jail to meet with Robards. R32/1179-80. Again, Robards told Detective Monte that he wanted to make a deal. R32/1180. When Detective Monte informed Robards that he did not have the power to make a deal with Robards, the conversation ended, confirming that Robards' only purpose in speaking with Detective Monte was to attempt to work out a plea deal. R32/1180. *Cf. Robertson*, 582 F.2d at 1371 (holding that the co-defendants' only purpose in confessing to law enforcement was to exonerate their wife and "lady friend"). The second prong of *Robertson* is also satisfied, as it was objectively reasonable for Robards to believe that Detective Monte, who had previously spoken with him about the Delucas' murders, would be able to negotiate

a plea deal with him. R32/1178. There is no evidence that Robards was informed that a plea deal was not a possibility prior to the telephone message he left for Detective Monte on August 15, 2006. *Cf. Schoenwetter v. State*, 46 So. 3d 535, 546-48 (Fla. 2010) (holding that the defendant's belief that he was negotiating a plea bargain was unreasonable where the prosecutor previously stated in open court that the State would not offer a plea deal).

"One of the most fundamental duties of an attorney defending a capital case at trial is the preservation of any and all conceivable errors for each stage of appellate and post-conviction review." Stephen B. Bright, *Preserving Error at Capital Trials*, THE CHAMPION, Apr. 1997, at 42-43. Guideline 10.8 of the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases outlines the duty of trial counsel to assert legal claims on behalf of their clients. Failure to assert a legal claim is a valid basis for an IAC claim. *Kimmelman*, 477 U.S. 365 (holding that defendant received IAC where counsel was late in filing a motion to suppress); *Smith v. Dugger*, 911 F.2d 494 (11th Cir. 1990) (habeas petition granted where trial counsel provided ineffective assistance by unreasonably failing to file a motion to suppress confessions).

In the case at hand, Hoffman was responsible for the guilt phase trial, and he made the decisions regarding the guilt phase. P4/428-29. He testified as follows regarding Robards' phone call and subsequent interview with Detective Monte:

> Q. Okay. Do you recall whether you considered filing a motion to suppress [Detective Monte's] testimony?
> A. I would say I didn't.
> Q. Okay. And do you recall whether you considered objecting to his testimony?
> A. The way I handled it on cross was to try to make light of it. I'm sure the fact that he made this phone call three days before he was arrested for the murder he was in jail for the drugs, and I think if you read the cross, it pretty much to me indicated that I was attacking him from the point of view that Detective Monte had no idea what he was talking about, whether he was talking about the drug case, whatever. Unfortunately, I think Mr. Schaub rehabilitated him on redirect. So that's what happened.

P4/430-31.

On cross-examination, Hoffman further testified that he did not object because he did not feel that it was objectionable:

> Q. Did you not object to it because you did not feel it was objectionable?
> A. I don't think I actually thought about it because I didn't – I didn't think it was objectionable. He initiated it three days before he was arrested for the murder. What he said is what he said, and he wanted him to talk to him about helping him out, making a deal of some kind, and reflecting on it now, I think I thought it was about the drug case.

P4/431-32.

Trial counsel's failure to in any way object to or attempt to suppress testimony, evidence, or prosecutorial argument regarding Robards' offer to make a deal with the State and any related statements fell outside the range of reasonably competent performance under established norms and deprived Robards of the "counsel" guaranteed by the 6th Amendment. *Strickland*, 466 U.S. at 687. As Robards established above, the statements in question constitute inadmissible plea

discussions. The lower court agreed with Hoffman's testimony that there was no legal basis to object to this evidence and erroneously found that "[a]ny subjective expectation to negotiate a plea for the murder charges when Robards left the voicemail for Detective Monte would not have been reasonable when considering the totality of the circumstances." P5/584. The lower court's finding that Robards' attempt to negotiate a deal with Detective Monte was an "unsolicited, unilateral offer from which Robards could have had no reasonable subjective expectation of negotiating a plea" (P5/584-85) is in conflict with current case law.

As this Court explained, unilateral offers made by a defendant to plead guilty in exchange for some government concession are not admissible, even when they are completely ignored by the government:

> As the federal court cautioned in *Robertson*, courts should take care "to distinguish between those discussions in which the accused was merely making an admission and those discussions in which the accused was seeking to negotiate a plea agreement." 582 F.2d at 1367. Further, as noted by Judge Smith, the *Robertson* opinion expressly notes that under its analysis a unilateral offer by a defendant to plead guilty in exchange for some government concession would *not* be admissible. 614 So. 2d at 610-11. Finally, we note that the *Robertson* court also emphasized that while no "magic words" were necessary, virtually all statements made by a defendant that are preceded by an explicit request for plea negotiations should be excluded from evidence. The *Robertson* opinion explains: "[W]hen such a preamble *is* delivered, it cannot be ignored. Indeed, even when such nascent overtures are completely ignored by the government, such express unilateral offers ought to be held inadmissible, if the context is consistent." 582 F.2d at 1367. The *Robertson* court's statements are especially relevant here since the arraignment transcript contains Calabro's initial expression of a desire for a "plea agreement" *before* he makes the statements admitting his

guilt.

*Calabro*, 995 So. 2d at 317-318.The cases cited by the lower court are distinguishable from the case at hand. Unlike Robards, whose sole objective in speaking with Detective Monte was to work out a deal, the defendants in the cases cited by the lower court did not have a reasonable, subjective belief that they were engaging in plea negotiations. *Cf. Bottoson v. State*, 443 So. 2d 962, 965 (Fla. 1983)(holding that defendant's expectation that he was engaging in plea negotiations was not reasonable where the ministers he spoke with were not agents of the state, nor did they pretend to be); *Melendez v. State*, 747 So. 2d 1011, 1014 (Fla. 2d DCA 1999)(holding that the defendant's statement to law enforcement was admissible where the defendant in his testimony at the hearing on his motion to suppress did not mention any effort to negotiate a plea or admit to any statements he made in furtherance of the plea). Trial counsel's failure to file a motion to suppress or to object was not a reasonable trial strategy, but rather was based on a misunderstanding of the law. *See Lamb v. State*, 124 So. 3d 953 (Fla. 2d DCA 2013) (finding ineffective assistance where trial counsel's decision to forego a motion for new trial was not reasonable trial strategy because counsel's explanation for failing to file the motion revealed a misunderstanding of the difference between a motion for judgement of acquittal and a motion for new trial); *Lawhorn v. Allen*, 519 F.3d 1272 (11th Cir. 2008)(finding that counsel provided ineffective assistance where his

decision not to make a closing argument during sentencing was based on a misunderstanding of the law); *Hinton v. Alabama*, 134 S. Ct. 1081, 188 L. Ed. 2d 1 (2014)(finding deficient performance where trial counsel, due to a mistake of law, failed to understand the resources that state law made available to him to hire an expert). Although, as the lower court pointed out, Hoffman testified that he believed Robards was trying to make a deal on the drug case, at trial Detective Monte testified on cross-examination that he believed Robards was contacting him about the homicide case, and that is the impression that the jury was left with:

> Q. And he didn't say he wanted to make a deal about any kind of homicide, anything like that, did he?
> A. He was aware that I was a homicide detective, and I had spoken with him already about the Frank and Linda Deluca Homicide case. So I'm not a vice or narcotics detective.
> Q. So if his intent was to talk about the homicide and make a deal about his marijuana case, you can't say which case he was talking about? In other words, if he had knowledge about somebody and wanted to trade that for leverage on his marijuana case, you can't say that's not true?
> A. During my contacts with him, I spoke with him about the Linda and Frank Deluca homicide case. I didn't speak with him about the drug case. So if he's contacting me, I would believe that about the homicide case.

R10/1178.

In finding that Robards' subjective expectation of negotiating a plea was not reasonable under the totality of the circumstances, the lower court found relevant the fact that Robards made the call three days before he was arrested for the murders and the fact that the offer was made on a voicemail message rather than during a face-to-face conversation. P5/584. Regarding the timing of the phone call, if Robards

could not reasonably expect to engage in plea discussions before being arrested for the homicides, then the prosecutor also could not reasonably argue that same point to the jury as he did during his opening statement and closing argument. R26/353-54; R32/1260.[44] Either it was reasonable for Robards to expect the detective, ***with whom he had previously spoken about the homicides***, to understand that he was referring to the homicides in offering to "make a deal" or it was unreasonable for the prosecutor to argue that Robards was talking about the homicides to the 12 members of Robards' jury. Either Hoffman rendered deficient performance when he failed to object to the prosecutor's mischaracterization of the evidence in the opening statement and closing argument, or he rendered deficient performance when he failed to move for the statement's suppression.

Regardless of whether Robards' offer to plea and subsequent statements to Detective Monte were concerning the murder case or the drug case, they were clearly inadmissible under Fla. Stat. Ann. § 90.410 and Fla. R. Crim. P. 3.172(i) and, if objected to, would have constituted reversible error. There is no double-edged sword here, and no justification for the deficiency on the basis of "trial strategy." Trial counsel made no attempt to spin these statements in favor of the defense, nor did

[44] In fact, the prosecutor appears to have misrepresented the timing of the phone call to the jury in his opening remarks: "And we have that tape for you and you're going to listen to it. You're going to hear it's his voice. ***And he's arrested for this crime***. And he calls up Monte and says, I'm ready to meet with you. I'm ready to meet with you. I want to make a deal." R26/353-54.

they even address the statements in their closing arguments. In fact, in making no attempt to prevent the jury from hearing these statements and failing to object or even address the prosecution's characterizations of the statements as the attempt of a man intent on avoiding responsibility for a heinous crime, trial counsel went against their own stated trial strategy of "humanizing" Robards. This highlights the *post hoc* rationalization that occurred at the evidentiary hearing whereby counsel testified on one hand that they chose not to put on the brain damage evidence described under Argument I because their focus for penalty phase was to humanize their client but on the other hand failed to object to the prosecution's egregious attempt to paint their client in the most negative light possible starting from the guilt phase opening statements and carrying throughout the entire proceedings.

Trial counsel's deficient performance prejudiced Robards and deprived him of a fair trial. *See Strickland*, 466 U.S. at 687. "The result of the proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id*. at 694; *see Smith*, 911 F.2d at 497 (holding that the proper standard for determining prejudice under *Strickland* "is whether the failure to investigate and make the motion to suppress rendered the proceeding itself unfair, even if 'such failure cannot be shown by a preponderance of the evidence to have determined the outcome'"). As a result of counsel's deficient performance, the State's case was not

subjected to the meaningful adversarial testing that is required by the United States Constitution, and Robards was prejudiced in both the guilt and penalty phases.

The lower court found that Robards failed to establish prejudice in either the guilt phase or the penalty phase, specifically noting that this Court on direct appeal characterized the evidence of Robards' guilt as "overwhelming" and "compelling". P5/585-86. The lower court did not consider the jury's recommendation in its prejudice analysis. While Robards maintains that this evidence rendered the guilt phase trial an unreliable proceeding in that Robards offered to plead guilty to a crime that defense counsel argued he did not commit, the prejudice in penalty phase is even greater. Despite the court's finding of four aggravating circumstances, the jury voted 7-5 in favor of death. There is a reasonable probability that but for the jury learning about Robards' offer to plea, at least one more juror would have voted in favor of a life sentence, thus changing the jury recommendation from death to life.

The prosecutor, in both his opening statement and closing argument, poked fun at Robards' offer to plea. He took advantage of the detective's last name, referencing Monte Hall and the game show "Let's Make a Deal", and stating, "We don't make deals." R26/353-54; R32/1260. According to Detective Monte, when he went to the jail to speak with Robards, Robards told him that he was somehow involved in the murders. R32/1260. In contrast, defense counsel informed the jury during opening statements that "Robards never confessed to anything." R26/357.

The introduction of Robards' statements coupled with the State's argument about Robards' efforts to negotiate a plea deal with Detective Monte misled the jury into believing that there was something improper about a defendant seeking to negotiate a favorable plea deal, when in fact plea bargaining is "central to the administration of the criminal justice system." *Missouri v. Frye*, 132 S. Ct. 1399, 1407, 182 L. Ed. 2d 379 (2012). This unfairly painted Robards in a negative light, as a person who was attempting to manipulate the system to save himself. There is a reasonable probability that it influenced at least one juror to vote for death as opposed to life.

In its order denying relief, the lower court determined that to demonstrate prejudice in the penalty phase, Robards had to "show that, absent the errors, there is a reasonable probability that the ***balance of aggravating and mitigating circumstances would have been different*** and that there is a reasonable probability that he would have received a different sentence." P5/586 (*citing Simmons*, 105 So. 3d at 503). The lower court found that Robards did not satisfy this standard, reasoning only that the "make a deal" statements failed to support any of the four aggravators found by the court.

The lower court's analysis fails to appreciate the effect the prosecutor's negative mischaracterization of Robards' actions had on the jury, whose 7-5 death recommendation carried "great weight" with the court. Because trial counsel failed in their duty to prevent this inadmissible evidence from being heard by the jury, the

prosecutor was able to seize the opportunity and exploit the statement, painting a picture of a man who seeks to negotiate a plea in order to avoid the full repercussions of his actions. While we cannot know what circumstances the jury found mitigating or their relative weight in comparison to the aggravating circumstances, we do know that the defense's presentation to the jury was limited to a few live witnesses and a video-tape presentation, as discussed thoroughly under Argument I, *supra*.

Watts testified that it was his "strategy" to "humanize" Robards before the jury during the penalty phase. If this was the goal, and this strategy's result was that five jurors, ***one less than would have been needed to change the recommendation to life***, determined that Robards did not deserve the death penalty, then surely it cannot be that Robards was not prejudiced by the prosecutor's attempt to cast him as a self-interested man offering to plead guilty in order to avoid all of the repercussions of his actions.

Furthermore, trial counsel's deficient performance prejudiced Robards in his direct appeal. In its order denying relief, the lower court did not address Robards' prejudice on direct appeal. By failing to object to the introduction of these statements, trial counsel failed to preserve the issue for direct appeal. As a result, appellate counsel's only option regarding this claim was to argue fundamental error, a standard that imposes a heavy burden on the defendant to establish that the error in question undermined the fairness of the judicial process, as opposed to a

conventional harmless error analysis, which places a heavy burden on the State to prove beyond a reasonable doubt that the error in question did not contribute to the verdict. *See Hodges v. State*, 885 So. 2d 338, 368 (Fla. 2004) (Pariente, J., dissenting); *United States v. Mezzanatto*, 998 F.2d 1452, 1456 (9th Cir. 1993) *rev'd*, 513 U.S. 196, 115 S. Ct. 797, 130 L. Ed. 2d 697 (1995) (applying the harmless error standard to the inadmissibility of pleas, plea discussions, and related statements at trial). As noted above, the lower court's analysis was faulty and serves to deprive Robards of his right to a fair trial and penalty phase proceeding. Robards is entitled to relief.

## ARGUMENT III

## THE LOWER COURT ERRED IN DENYING ROBARDS' CLAIM THAT THE CUMULATIVE EFFECT OF COUNSEL'S ERRORS DEPRIVED HIM OF A FAIR TRIAL.

Robards argued below that the cumulative effect of counsel's errors deprived him of a fair trial. The errors discussed under Arguments I and II undoubtedly show that counsel's performance fell far below the standard required by the 6th Amendment, and Robards was prejudiced by each error such that there is a reasonable probability that in its absence, the outcome of the proceedings would have been different. When the errors are considered as a whole, however, the probability that the outcome would have been different increases beyond reasonable – the errors committed by trial counsel were so serious that, as a whole, they virtually

dictated a sentence of death.

The lower court determined, however, that neither of the errors argued under Arguments I and II met the *Strickland* standard and, further, that Robards had not established a claim of cumulative error, citing *Israel v. State*, 985 So. 2d 510, 520 (Fla. 2008).

The lower court quoted *Israel* as follows: "[W]here the individual claims of error alleged are either procedurally barred or without merit, the claim of cumulative error also necessarily fails." *Id.* (*quoting Parker v. State*, 904 So. 2d 370, 380 (Fla. 2005)). The quote in question comes directly from *Parker*, a case in which each of the defendant's claims were ***summarily denied***. 904 So. 2d at 375. In *Parker,* this Court cited *Downs v. State*, 740 So. 2d 506, 509 n. 5 (Fla. 1999) to deny the defendant's cumulative error claim. In *Downs,* this Court determined, "Claim (14), which alleges cumulative error, is without merit because we have considered all of the errors alleged by Downs and find ***none of them sufficient to warrant an evidentiary hearing in this case***.").[45]

These cases demonstrate that *Israel* represented an expansion of a holding, applied previously only in cases in which this Court determined that individual IAC

[45] *Israel* also cites *Griffin v. State*, 866 So. 2d. 1, 22 (Fla. 2003), a case in which most of the claims were summarily denied, leaving only a claim of IAC and a claim regarding improper *ex parte* communication for evidentiary development. *Griffin,* 866 So. 2d at 5. This is also a different situation than that presented by Robards' case.

claims were not sufficient even to warrant an evidentiary hearing, to all cases in which a defendant alleges that the cumulative effect of multiple errors identified at the trial level served to deprive him of a fair trial. It was in the previous context, where it was determined that ***no factual dispute existed requiring the lower court's resolution,*** that the holding that if all errors alleged are plainly meritless, no cumulative error claim can survive, was grounded. It is a far different scenario, one that is well-represented by Robards' case, where the lower court determined that an evidentiary hearing was warranted but determined that no claim of the IAC ultimately met the *Strickland* standard. As discussed in Arguments I and II, it is Robards' position that the lower court erred in denying each of his IAC claims. However, if this Court finds that neither claim on its own quite satisfied the *Strickland* standard and therefore affirms the lower court, there still exists a substantial probability that trial counsel's errors deprived Robards of a fair trial.

In denying Robards' claim regarding counsel's inadequate investigation and presentation of the mental health mitigation, the lower court determined that counsel made a decision to attempt to "humanize" Robards to the jury during the penalty phase and did not want to risk that strategy by presenting mental mitigation. *See* Argument I, *supra*; R5/590. In denying Robards' claim regarding counsel's failure to limit the introduction of and argument about Robards' attempt to "make a deal" with Detective Monte, the lower court determined that Robards was not prejudiced

in the penalty phase because the court had found that weighty aggravators applied. *See* Argument II, *supra*; R5/586. It is Robards' position that the lower court made erroneous legal and factual determinations as to both claims when considering the deficiency prong of the *Strickland* analysis. Furthermore, counsel's failure to limit the "make a deal" evidence and argument meant that, when the penalty phase began the jury had already heard during the guilt phase that Robards was interested in "making a deal" and that doing so was improper and the mark of a self-interested individual. Watts' subsequent decision to only present evidence aimed at "humanizing" his client is ***even less reasonable*** given this context. The inconsistency in the jury's perception of Robards as a result of Hoffman's failure to limit the "make a deal" evidence and argument and Watts' alleged decision to rely only on a penalty phase "humanization" strategy had the effect of ***depriving Robards of any benefit he could have gained*** from such a strategy. Thus, counsel's errors had the cumulative effect of depriving Robards of a fair trial such that, at the *very least* the *Strickland* standard of a reasonable probability of a different outcome absent the errors is satisfied.

In the direct appeal context, this Court in *Evans v. State*, 177 So. 3d 1219, 1238-39 (Fla. 2015), recognized that the cumulative effect of preserved and unpreserved constitutional errors could serve to deprive a defendant of a fair trial, and in that case, ordered that the defendant be provided a new trial. The denial of the

effective assistance of counsel is a constitutional error most grave - a criminal defendant is entitled to the counsel guaranteed by the 6th Amendment. *Strickland*, 466 U.S. at 687. To the extent that the holding in *Israel* limits a defendant's ability to show the cumulative effect of counsel's errors at trial deprived him of his right to effective assistance, that holding deprives him of the benefit of the *Strickland* decision. This Court should clarify its precedent and reverse the lower court's denial of relief on Robards' cumulative error claim.

## CONCLUSION

Based on the arguments and the records on appeal, the lower court improperly denied Robards post-conviction relief. Robards requests that this Court reverse the court's order denying relief, vacate his conviction and grant him a new trial; or grant such other relief as this Court deems just and proper.

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that the PDF document of the foregoing has been transmitted to this Court through the Florida Courts E-Filing Portal on this 3rd day of February, 2016.

**I HEREBY FURTHER CERTIFY** that a copy of this pleading was served via electronic mail to **Stephen D. Ake**, Assistant Attorney General, Office of the Attorney General, Concourse Center 4, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607-7013, at stephen.ake@myfloridalegal.com and at capapp@myfloridalegal.com on this 3rd day of February, 2016.

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## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Fla.R.App.P. 9.210, that the foregoing was generated in Times New Roman 14 point font.

Respectfully submitted,

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