IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1364

RICHARD TODD ROBARDS,

Appellant

v.

STATE OF FLORIDA

Appellee.

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

REPLY BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

The Appellant, Richard Todd Robards ("Robards"), relies on his Initial Brief for all purposes, and offers the following reply to the Answer Brief of Appellee dated April 13, 2016. While the Appellant will not reply to every issue and argument raised by the Appellee as they have been briefed in his Initial Brief, he expressly does not abandon the issues and claims not specifically replied to herein.

As in the Initial Brief of the Appellant, 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.

ARGUMENT AND CITATIONS OF AUTHORITY

(A) ARGUMENT IN REPLY TO ISSUE I OF THE APPELLEE'S ANSWER BRIEF.

The Appellee and the lower court have mischaracterized Watts' testimony at post-conviction to recreate Watts' actions as strategy claiming that he was *generally aware* of the mental mitigation at the time of the penalty phase and he made a decision not to present mitigation to the jury because he was concerned about the State's ability to cross-examine the defense mental health experts. General awareness is the same "rudimentary knowledge of [a client's] history from a narrow set of sources" that is considered unreasonable investigation in *Wiggins v. Smith*. 539 U.S. 510, 524, 123 S. Ct. 2527 (2003); *see also Williams, v. Taylor*, 529 U.S. 362, 395, 120 S. Ct. 1495 (2000); *see Cooper v. Sec'y, Dep't of Corr.*, 646 F.3D 1328, 1352-52 (11th Cir. 2011). There is no set of circumstances or case law that permits general awareness to be the foundation of reasonable decision-making by trial counsel when determining how to save his client's life. In capital sentencing, it is clear that the Eighth and Fourteenth Amendments require "individualized consideration of mitigating factors." *Lockett v. Ohio*, 438 U.S. 586, 606, 98 S. Ct. 2954 (1978). In order to give this rule effect, "it is unquestioned that under the prevailing professional norms at the time of [Robards'] trial, [Watts] had an 'obligation to conduct a thorough investigation of [Robards'] background.'" *Porter v. McCollum*, 558 U.S. 30, 39, 130 S. Ct. 447 (2009) (quoting *Williams v. Taylor*,

529 U.S. 362, 396, 120 S. Ct. 1495 (2000)); *accord Rompilla v. Beard*, 545 U.S. 374, 385-86, 125 S. Ct. 2456 (2005); *see Sears v. Upton*, 561 U.S. 945, 130 S. Ct. 3259 (2010).

The Appellee states that this is not a case where trial counsel timely failed to investigate and discover available mitigation prior to making a decision as to strategy. *Answer Brief at 30*. This contention is false because the evidence clearly shows that Watts did all of his mental health mitigation after the penalty phase recommendation of death and through the course of not one, not two, but three *Spencer* hearings. The Appellant will reiterate a number of Watts's statements that clearly show that he had not completed a constitutional mitigation investigation. In talking about "drawing fire," Watts testified to his analyses with regard to Robards' case.[1] He first testified:

> I didn't want to draw fire. I can tell you that my goal in working with Richard Robards, and ***I wasn't able to accomplish it before the Spencer hearing***, was - - at the end was for Mr. Robards to express remorse, to take responsibility and express remorse.
> . . .
> And he did. ***But it took all of the summer of 2010 and all the experts and all the effort for him to come to that realization***. That to me, was the most compelling mitigation of all. ***Unfortunately, it came too little, too late, according to the way the cosmos works***.
> . . .

[1] These statements are contradictory to Watts' re-cross-examination agreement that he was ready to go to trial because no matter what mental mitigation information he got, he was never intending to present it to the jury because of the fire he could draw. P3/360.

> [I]f it could be understood why the killings occurred, steroid withdrawal rage, and if the defendant takes responsibility and says he - - and expresses remorse, ***then that is the formula in my mind for a life recommendation, without drawing the fire*** of
>
> . . .
>
> The bad things that he had done towards women in his life.

P3/331-2 (emphasis added).

Watts went on to testify

> ***But I didn't know everything***. It's true. I didn't have the PET scan. I didn't have Dr. Lipman. And, Dr. Berland, he developed those witnesses, and Dr. Berland had been telling me the story of Richard Robards as we went along, but, no . . . I didn't have the benefit of Dr. Wu, who I thought was ***powerful information***. And Dr. Lipman made a ***great change in the relationship that Richard Robards had to the penalty phase of the case***, and his acceptance of responsibility began with Dr. Lipman, and all that, of course, is after the verdict and the recommendation.

P3/336-7 (emphasis added).

He acknowledged that he gained a better understanding of Robards' story in preparing for the *Spencer* hearings:

> I did become wiser after that [Peterson case]. So the thing is the - - I may not have presented any of the mental health mitigation, *per se*, that I developed with Richard Robards ***after the verdict***. But the story also developed. The story of Robards and the counter to this - - the rosy childhood part of the story was developed as a result of the *Spencer* hearings and the mental health investigation continuing with the emotional heat of a jury recommendation for death.
>
> So the heat was up. The information was coming in. The story got better. ***My ability to tell the story got better***. ***My interpretation of the story continues to get better as I learn, even recently, about putting on a shield for abuse and steroids being the shield***.

P3/337 (emphasis added).

He further testified:

> The focus of the mental health investigation ***over the summer of 2010*** was to understand - - for us to understand why Mr. Robards committed this crime. And so the competency - - we were familiar with the stormy relationship with women, the violent relationships with women, also didn't believe there were any other dead bodies.
> This was something that happened that - - the killings that happened were the result of not the lifestyle that he had up until then, but that key answer came that it was the ***steroid withdrawal***, which is ***a whole different thing***. And I mentioned that to Mr. Schaub, that that's the difference that I see. All these women and the violence before, nothing like the night at the Delucas' house when they were killed and the fire was set. That was a different person.
> On the other hand, I don't want to draw that distinction in front of the jury necessarily. What I would have attempted to do, ***from looking back*** and what would I have done with that information, was to carefully tell Mr. Robards' story so that the jury could understand why this happened and hope - - and with the intention of not drawing the fire from the bad relations that he had with women.

P3/339-340 (emphasis added). Finally, he admitted that some 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 (emphasis added).

This case is a clear example of failure to investigate. It is well established that

"strategic choices made [by trial counsel] after ***thorough*** investigation of law and facts relevant to plausible options are virtually unchallengeable, [but] strategic choices made ***after less than*** complete investigation are reasonably precisely to the extent that reasonable professional judgement support the limitations on investigation." *Strickland v. Washington*, 466 U.S. 668, 690-91, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984) (emphasis added). This means that "counsel has a ***duty*** to make ***reasonable investigations*** or to make a ***reasonable decision*** that makes particular investigations unnecessary." *Id*. At 691. The *Strickland* Court and this Court never created a "general awareness" standard that would take the place of a reasoned mitigation investigation and decision based on that investigation. *See Rose v. State*, 675 So. 2d 567, 572-573 (Fla. 1996),[2] *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 975, 1012 (Fla. 2009); *Orme v. State*, 896 So. 2d 725, 736 (Fla. 2005); *Parker v. State*, 3 So. 3d 974, 984 (Fla. 2009); *Simmons v. State*, 105 So. 3d 475, 510 (Fla. 2012).

The Appellee focuses on what Watts was "aware" of because that is all they can argue. The Appellant submits to this Court that what Watts actually knew at the

[2] There is no notion that capital counsel should prepare for jury overrides. Capital counsel's first hurdle is to overcome the guilt phase; then to present a fully investigated and reasoned penalty phase to the jury if there is a guilty verdict; and then to convince the court to override, if the jury recommendation is death.

time of the trial is what is imperative in its review of the lower court's incorrect decision. The procedural history of Watts' statements throughout the trial about his work speaks volumes as to what Watts knew. It was before this Court on direct appeal and again presented in post-conviction. The Appellee unequivocally states that "trial counsel was aware of the type of mental mitigation that could be presented to the jury, namely, brain damage and steroid/drug abuse, but counsel made a valid and sound strategic decision not to present this evidence to the jury" without citing to the record. *Answer Brief at 31*. Watts reiterated several times that he had not learned Robards' "story" until after Drs. Robert Berland, Joseph Chong-Sang Wu and Jonathan Lipman in concert 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. During closing arguments after the second *Spencer* hearing, Watts admitted "that [they] knew when [they] came on to this case that we wouldn't be able to marshal the mental health materials in time to present to the jury." R23/3520-3521. Noting his grave error, Watts asked this Court to consider "that the jury didn't hear the mental health explanations of Mr. Robards' behavior." R23/3520-3521. Watts' performance was deficient because he "never attempted to meaningfully investigate mitigation" prior to the penalty phase proceedings even though there was substantial mitigation that could have been presented. *Asay v. State*, 769 So. 2d 974, 985 (Fla. 2000); *see Shellito v. State*, 121 So. 3d 445, 454

(Fla. 2013). Watts' forgoing statements clearly show just how unprepared he was at handling his client's life story and mental health background.

The Appellee goes on to assert that "counsel was aware" of the State's rebuttal evidence if he had presented the mental mitigation evidence. *Answer Brief at 31-32*. As presented in direct appeal and in this post-conviction appeal, Watts could not anticipate the State's rebuttal if he did not know what he had in terms of mental health information, which could have been gained only after a competent mental health investigation. *Initial Brief at 21*. Watts simply could not have made any decision regarding his penalty phase mental health because he had not done the work and any notions or generalizations he had prior to the penalty phase about Robards' mental health problems are just that - notions and nothing more. The lower court and the Appellee are simply making excuses for Watts' failures by bringing up all the bad evidence available to the State without even showing that the State could realistically have developed and presented it. In *Sears v. Upton*, 561 U.S. 945, 130 S. Ct. 3259, 3264, 177 L.Ed.2d 1025 (2010), the Supreme Court of the United States found that the fact that collateral counsel uncovered some apparently adverse evidence is unsurprising, "given that [trial] counsel's initial mitigation investigation was constitutionally inadequate." Furthermore, the *Sears* Court 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. It emerged only during state postconviction relief.

Id. (internal citations omitted; emphasis in original); *see also Porter*, 555 U.S. 30 (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). It is not rare for records to contain good and bad information and bad information does not automatically render the records useless. Regardless, what is important for this Court is that the case law is clear that a reviewing court cannot do a hindsight or *post hoc* analysis. *See Wiggins*, 539 U.S. at 526-527.

The Appellant has addressed the potential bad evidence that the State purported to be able to present at trial in rebuttal in his Initial Brief on pages 20-22; 37-45. Watts was past the competency hearings, which included Dr. Susan Murray's report, and had zero bearing on his mental mitigation investigation. There is no diagnosis termed "malingering" which came from the competency hearings. The State failed to actually present at the hearing any testimony from the women in Robards' life, the prosecutor simply relied on hearsay statements from hearsay reports during cross-examination at the hearing[3]. Finally, the evidence of the escape

[3] 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. The lower court failed to put the State's evidence through the

from the Florida State Hospital was clearly presented during the guilt phase and not a secret to the jury. The Appellant will again point out to this Court the falsity of one of the excuses that the Appellee tries to attribute to Watts' decision not to present mental mitigation in front of the jury. The Appellee argues that the "State would not subject lay witnesses to intense cross-examination in front of a jury." *Answer Brief at 35*. However, Assistant State Attorney Fred Schaub clearly showed the intensity of his cross-examination during the post-conviction hearing when he attacked Mrs. Bonnie Ruggles, a cancer survivor who was aided by Robards, ruthlessly during cross-examination with non-relevant questions. P5/591; P4/452-458; *Initial Brief at 37-38*.

Robards' former counsel, Ronald Eide, gave the correct analysis regarding the importance of doing the mitigation investigation prior to the penalty phase and addressing bad rebuttal in the following questioning:

> Q. All right, let me ask you, would you have presented that information about the violence of Mr. Robards to a jury who was deciding his fate in regards to life and death?
> . . .
> THE WITNESS [EIDE]: Well, I can't really answer that kind of in a vacuum here, because I have been faced with this type of scenario many times, and sometimes I have decided if we could avoid putting on prejudicial testimony that would inflame the jury in a negative fashion towards the defendant, that we would save it for *Spencer*, and sometimes we need it when our experts testifies to certain behavior that

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same evidentiary analysis as it did for the Appellant and simply took the State's version of the rebuttal evidence at its word.

was a result of a mental illness.

So there are times that you have to grit your teeth as a defense attorney and put on testimony that you know could be perceived poorly by a jury about your client's behavior if you're trying to educate them on the nature of the psychosis or schizophrenia or bipolar or whatever the issue is that the expert's testifying to.

So sometimes you put it on and you, like I said, grit your teeth, because it's necessary to explain more fully the psychological makeup of the defendant, and sometimes you try to reduce the impact on a jury by not putting on that type of information.

Or if you have - - you only put on enough to illustrate your point with your experts as far as his mental condition and kind of not put on other witnesses that would just be piling on.

Q. Okay. So you make a strategic decision based upon the information you have, correct?

A. That's correct.

P2/178-179.

Eide's testimony displays why it is important to do the investigation ahead and learn about the client's life prior to making a decision regarding how to present the information in the penalty phase proceedings or *Spencer* hearings. P2/184. It comes down to the quality of the investigation because reasonable and competent counsel cannot make strategic decisions in a vacuum. P2/178-179; 184-187. Just because Robards had some negative information in his history, the *Strickland* deficiency and prejudice analysis is not foreclosed.

The Appellee argues that "counsel wanted to utilize the mental mitigation at the *Spencer* hearing to 'tip the scales' and argue for the judge to override the jury's recommendation." *Answer Brief at 36*. Trial counsel's own statements during the

Spencer hearing rebut any argument that trial counsel made a reasonable strategic decision not to present mental mitigation to the jury. In the closing arguments at part two of three of the *Spencer* hearing, Watts asked the trial court to consider that the defense was not "able to marshal the mental health materials in time to present to the jury" and asked "the Court to consider that factor that the jury didn't hear the mental health explanations of Mr. Robards' behavior" in making its decision. R23/3520-21. In response, the trial court, apparently with post-conviction in mind, asked Watts whether it was his strategy to save some evidence for the *Spencer* hearing, and the following exchange took place:

> THE COURT: Well, at life over death conferences defense attorneys even go over the strategy of saving some evidence for the Spencer Hearing. And I don't know if that was part of your strategy at all, but that's an actual strategy that defense attorneys try to employ in order to give the Judge a reason to override the jury just in case the jury comes back with death. So was that part of your strategy to have evidence that would be presented at the Spencer Hearing that may not be presented during the penalty phase?
>
> MR. WATTS- 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 it 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 but –
>
> THE COURT: Right. You couldn't do it anyway, but even if you could have done it by then, you may have just done it the way you actually did it because the theory is first of all, that many of the arguments that you're making about mental issues may be more persuasive for a Judge than it would be for a jury. And the, as I said before, the thinking is

that if the jury does come back with a death recommendation, that if there is additional evidence presented at a Spencer Hearing it in effect gives the Judge a logical reason to override.

And the only reason I'm bringing that up is I haven't made up my mind about this at all. I'm not going to make up my mind until I review everything, and that includes all the memorandums that haven't been presented yet. But, as you know, I could either impose the death penalty or life in prison. And if I do impose the death penalty, then every single thing that you do is going to be reviewed in the future. So I just want to make sure that the reason that you have presented these things at the Spencer Hearing was for a strategic reason and not for a negligent reason. Do you understand what I'm getting at?

MR. WATTS: Yes, sir. We were mindful. First of all, I would say that when I agreed to get on the case with Mr. Hoffman, we knew the case was over. And out of respect to the system, we agreed and I agreed with Mr. Hoffman to move forward as fast as we could.

In the past my strategy has been and in the very recent past to save mental health and take a high road approach in the – so, yes, I'm addressing that for the record. Still in all when it came down to the day of I wished I had a full scope of it. We still may have may have made the same decision. I trust that we would have, and I discussed that with Mr. Hoffman, and I discussed it with predecessor counsel. And yes, we made a considered decision to go forward at that time if that answers your question.

THE COURT: Okay. It does.

MR. WATTS: Yes, it was strategic. But still I want to appeal to the Court to consider how the jurors may have taken this. I had no idea how good it would be, the PET Scan. I knew there were abnormalities. I didn't know how profound they were, et cetera. So still I would likely have made the same decision . . .

R23/3521-23.

As Watts stated, when he went forward with the penalty phase trial, although he had a general idea that there were abnormalities, he had no idea how good the

PET scan would be. Although it was a potential strategy to save the mental mitigation for the *Spencer* hearing, he did not have the ability to make the decision at the time because he was not aware of the full extent of the mitigation. With a possible death sentence for Robards and the threat of being deemed ineffective in postconviction proceedings, Watts stated that he **may have** made the same decision regarding what mitigation to put before the jury if he had been aware of the full scope of the mitigation at the time of the penalty phase. Still, Watts could not say, as the Appellee asserts, that he made a strategic decision to save the mental mitigation for the *Spencer* hearing to argue for the judge to override the jury's recommendation. Any rationalization about what Watts would have done had he known about the mitigation is clouded by hindsight. *See Strickland*, 466 U.S. 668 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.") Additionally, it is important to keep in mind that this exchange took place before the third part of the *Spencer* hearing, where Robards' sister, Tanya Robards, testified about the physical and emotional abuse Robards suffered at the hands of his brothers, and that even at this point, three months after the jury returned their recommendation of death, Watt's investigation into mitigation was ongoing.

Additionally, even if trial counsel's decision regarding which mitigation to put before the jury and which mitigation to save for the *Spencer* hearing was made after a complete penalty phase investigation, which it was not, such a strategy would not be reasonable. This Court, in *Tedder*, held that a jury recommendation should be given great weight. *Tedder v. State*, 322 So. 2d 908 (Fla. 1975).[4] As such, death to life overrides are rare, with only 91 total between 1974 and 2011, which works out to approximately 2.45 per year. Michael L. Radelet, *Overriding Jury Sentencing Recommendations in Florida Capital Cases: An Update and Possible Half-Reqiuem*, 2011 MICH. ST. L. REV. 793, 820-21 (2011). Of the 36 cases where the jury's vote was known, two thirds had death recommendations of either seven-to-five or eight-to-four. *Id.* at 813. In hindsight, where we know that the jury's recommendation in Robards' case was seven-to-five in favor of death, it might seem reasonable for counsel to save mental mitigation for the *Spencer* hearing and argue for the judge to override the jury's recommendation. However, it is important to remember that trial counsel in this case did not know what the jury's recommendation would be when

[4] On January 12, 2016, the United States Supreme Court in *Hurst v. Florida*, No. 14-7505, 2016 WL 112683 (Jan. 12, 2016) held that Florida's capital sentencing scheme violated the Sixth Amendment right to a jury trial in light of *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed. 2d 556 (2002). While *Tedder* was abrogated by *Hurst*, it was good law at the time of Robards' trial. Although *Hurst* is not the subject of the instant appeal, Robards anticipates that, especially in light of the seven to five jury recommendation in his case, he is entitled to relief under both the instant appeal as well as *Hurst*, and that *Hurst* may give rise to future litigation in this case.

they proceeded to the penalty phase jury trial without having completed their penalty phase investigation. Given the rarity of jury overrides and the requirement that the court give great weight to the jury's recommendation, the defendant's best chance at a life sentence is a jury recommendation of life. If a jury recommends death and trial counsel decides to put on additional mitigation in a "Hail Mary" attempt to save his client's life, at that point he has nothing to lose and, in most cases that would be considered zealous advocacy. In the case at hand, to make a strategic decision not to present mental mitigation, which this Court has recognized as compelling, to the jury when counsel does not yet even know what that mental mitigation is, constitutes deficient performance. *See Rogers v. State*, 948 So. 2d 655 (Fla. 2006) ("We have consistently recognized mental mitigation as among the most compelling.").

Watts' failure is the definition of what is deemed ineffective assistance of counsel, and it deprived Robards of his rights afforded by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and of his corresponding rights pursuant to the Declaration of Rights under the Constitution of the State of Florida. The fact that "death is different" cannot be emphasized enough in this case. *See Gregg v. Georgia*, 428 U.S. 153, 188, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (plurality opinion). Watts, for no reason at all, failed to adhere to his strict duty to investigate and prepare for Robards' penalty phase. As a result, the jury, which by a single vote recommended death, did not hear compelling evidence

of mental health mitigation, childhood abuse, or the good Robards did in the community.

It is clear that there was substantial mitigating evidence which was available but undiscovered due to Robards' counsel's failure. It is "[u]ltimately, the focus of our inquiry is the fundamental fairness of the sentencing proceeding." *Hardwick v. Sec'y, Fla. Dept. of Corr.*, 803 F.3d 541, 556 (11th Cir. 2015) *citing Strickland*, 466 U.S. at 696. Robards' case was a precipitation of a complete breakdown in the adversarial process, thus rendering his sentencing unreliable. *See Strickland*, 466 U.S. at 696; *see Hardwick*, 803 F.3d at 556; *see Collier v. Turpin*, 177 F. 3d 1184, 1203-04 (11th Cir. 2013) ("In evaluating the probability that Collier's jury would have rejected the death penalty, we must not forget to balance the aggravating and mitigating factors that would have been before the jury in the absence of his counsels' errors."). Counsel's deficiency in failing to investigate and present the foregoing mitigation deprived Robards of a reliable penalty proceeding such that this Court's confidence in the outcome must be undermined. 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, there is *reasonable probability* that Robards would have received a life recommendation and sentence. *See Porter*, 558 U.S. at 41 & *Strickland*, 466 U.S. at 694. There is a probability that is sufficient to

undermine confidence in the outcome of the penalty phase when you look at the power mental mitigation that was discovered late. The new mitigating evidence discussed above greatly altered the sentencing profile of Robards that was presented to the decision-maker and provided a powerful, sorrowful, and compelling story of his childhood, youth, and the severity of his mental illness. *See Sears*, 561 U.S. at 954; *see Hardwick*, 803 F. 3d at 564; *see Daniel v. Comm'r, Alabama Dept. of Corr*., 14-12558, 2016 WL 2849481 (11th Cir. 2016).

To affirm Watts' lack of investigative conduct into his client's life would deem the Sixth Amendment right to effective assistance of counsel moot in post-conviction cases. A trial counsel can simply hide behind a general awareness of a client's mental or historical background as an excuse to not investigate prior to a penalty phase. A trial counsel will never have to do any mitigation work into mental health investigation prior to a jury recommendation because he or she will have a blanket authorization to never present mental mitigation without more. This is not what *Strickland*, *Wiggins*, and the Sixth Amendment stand for. They stand for the important constitutional prospect that trial counsel must reasonably do their homework before he can make a decision as to what to present and to present mitigation to save his client's life. Trial counsel cannot make such decisions blindly or on a whim after a rudimentary investigation. The Court must reverse and grant Robards a new sentencing phase.

(B) ARGUMENT IN REPLY TO ISSUE II OF THE APPELLEE'S ANSWER BRIEF.

The Appellee argues that "Robards' unilateral, unsolicited statements were not inadmissible as part of 'plea negotiations.'" *Answer Brief at 61-64*. Like the cases cited by the circuit court in its order denying relief, the cases cited by the Appellee as being similar to the case at hand are all distinguishable. Unlike Robards, whose sole objective in speaking with Detective Monte was to work out a deal, the defendants in the cases cited by the Appellee did not have a reasonable, subjective belief that they were engaging in plea negotiations. *Cf. Schoenwetter v. State*, 46 So. 3d 535, 546-48 (Fla. 2010) (rejecting a claim of ineffective assistance of counsel for failing to object to statements made in connection with an offer to plead guilty where it was clear from the record that the defendant was not attempting to negotiate a plea bargain, and the defendant's belief that he was negotiating a plea bargain was unreasonable because the prosecutor previously stated in open court that the State would not offer a plea deal); *Owen v. State*, 986 So. 2d 534, 545 (Fla. 2008) (holding that counsel was not ineffective for failing to argue that defendant's confession should be suppressed because it was made during plea negotiations where the defendant's "own testimony refutes the claim that he had a reasonable, subjective belief that he was negotiating a plea at the time of the confession"); *Serrano v. State*, 15 So. 3d 629, 638 (Fla. 1st DCA 2009) (finding no error in trial court's refusal to keep defendant's letter from the jury where there was nothing in the letter or in the

record to suggest an attempt to plea-bargain or "that it was written under circumstances suggesting plea negotiations had begun or would begin"); *Melendez v. State*, 747 So. 2d 1011 (Fla. 2d DCA 1999) (holding that defendant's statement to law enforcement was admissible where 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 a plea, and that the defendant's statement was nothing more than an "unsolicited, unilateral offer"). In contrast, when Robards contacted Detective Monte, he explicitly stated that he wanted to make a deal. R32/1180. While the Appellee argues that "Robards could not have had a reasonable subjective expectation to negotiate a plea on a double homicide case when he had not even been arrested for those murders at the time of the phone call", Robards was aware that he was a suspect in the homicide case because Detective Monte had already told Robards that he was being investigated for the death of Frank and Linda Deluca. R10/1181. At that point, he had no reason to believe that a plea deal on either the drug case that he was in custody for or the looming homicide case was not a possibility, and as soon as Detective Monte informed him that he was not in a position to make deals, Robards ended the discussion. R32/1180.

Furthermore, as Robards argued in his Initial Brief, offers to plead guilty and any related statements are inadmissible even in cases where the defendant's attempt to negotiate a plea is unsolicited, and even in cases where the defendant's offer to

plead is not in response to a State offer. *Calabro v. State*, 995 So. 2d 307 (Fla. 2008) (rejecting the Third District's holding that "Calabro's second statement relating to his admission of guilt was an unsolicited, unilateral utterance not made in connection with any plea negotiation and is, therefore, admissible."). This makes sense, as any plea discussion must be initiated by one side or the other. *See Calabro*, 995 So. 2d at 317 (recognizing that an offer from either party is often the first step in plea negotiations). Neither Section 90.410, Florida Statutes nor Fla. R.Crim. P. 3.172(i) make exceptions for "unilateral" or "unsolicited" offers to plead guilty. *See Calabro*, 995 So. 2d at 317 ("[I]t is apparent that neither 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.") As this Court has explained, section 90.410 and rule 3.172(i) were adopted to promote plea negotiations:

> [S]ection 90.410 and rule 3.172(i) were "adopted to promote plea bargaining by allowing a defendant to negotiate without waiving fifth amendment protection." *Groover v. State*, 458 So.2d 226, 228 (Fla.1984). We further noted that these provisions were intended to promote "free and open discussion" between the defense and the State "*during attempts to reach a compromise.*" *Id.* at 228 (quoting *United States v. Davis*, 617 F.2d 677, 683 (D.C.Cir.1979)).

Calabro, 995 So. 2d at 313. In order to encourage plea bargaining, it is essential that statements made by either side during plea negotiations be inadmissible in court, regardless of which side initiated the discussions. *See United States v. Verdoorn*,

528 F.2d 103, 107 (8th Cir. 1976) ("Meaningful dialogue between the parties would, as a practical matter, be impossible if either party had to assume the risk that plea offers would be admissible in evidence."). Admitting into evidence unsolicited or unilateral offers by defendants to enter into plea negotiations would clearly be contrary to the intent of section 90.410 and rule 3.172(i).

(C) ARGUMENT IN REPLY TO ISSUE III OF THE APPELLEE'S ANSWER BRIEF.

Robards has fully argued and litigated these claims in the arguments in his Initial Brief from pages 96 to 100.

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 23rd day of May, 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 23rd day of May, 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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