IN THE SUPREME COURT OF FLORIDA

CASE NO. 03-633

FRANK A. WALLS,

APPELLANT,

v.

STATE OF FLORIDA,

APPELLEE.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR OKALOOSA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant appeals the lower court's denial of his Motion for Postconviction Relief prosecuted pursuant to Rule 3.850/3.851, Florida Rules of Criminal Procedure. Record references to the previous proceedings will be referred to as follows:

"R___"- trial record from 1992 trial;

"PR___"- trial record from previous 1998 trial;

"PCR. ___"- record of postconviction proceeding; and

"Def. Ex. ___"- exhibits from postconviction proceeding.

REQUEST FOR ORAL ARGUMENT

Because of the seriousness of the claims at issue and because of the sanction of death being sought, Appellant, a death-sentenced inmate at Union Correctional Institution, urges this Court to order that oral argument be held on the issues raised by this appeal.

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STATEMENT OF THE CASE AND FACTS

A. PROCEDURAL HISTORY

The circuit court of the First Judicial Circuit, Okaloosa County, entered the judgments of conviction and sentences which are now under consideration before this Court.

On August 10, 1987, an Okaloosa County grand jury returned a ten-count indictment charging Frank Walls with two counts of first-degree murder and related offenses. (PR. 2)

After a jury trial, Mr. Walls was found guilty of felony murder for the death of Edward Alger and of premeditated and felony murder for the death of Ann Peterson. (PR. 1391-1393) Thereafter, the jury recommended a life sentence for the death of Mr. Alger and, by a seven to five vote, a death sentence for the murder of Ms. Peterson. (PR. 1572-1574)

The trial court followed the recommendations of the jury and sentenced Mr. Walls to life for the murder of Mr. Alger and to death for the murder of Ms. Peterson. (PR. 2116-2119)

On April 11, 1991, this Court vacated Mr. Walls' death sentence and remanded the case for a new trial. Walls v. State, 580 So. 2d 131 (Fla. 1991).

The state re-tried Mr. Walls on seven counts of the indictment. Upon re-trial, venue was changed to Jackson County because of pretrial publicity concerns.

On June 18, 1992, the jury sitting in Jackson County found Mr. Walls guilty of first-degree, felony murder for the death of Mr. Alger and of first-degree, felony murder and

premeditated murder for the death of Ms. Peterson. (R. 1127-1129)

A penalty phase was conducted for the purpose of securing a jury recommendation regarding sentencing for the death of Ms. Peterson, and, on June 19, 1992, the jury recommended a sentence of death. (R. 1120) Subsequently, the trial court sentenced Mr. Walls to life imprisonment for the death of Mr. Alger and to death for the murder of Ms. Peterson.

On July 7, 1994, this Court affirmed the trial court's sentences. Walls v. State, 641 So. 2d 381 (Fla. 1994). Thereafter, on January 23, 1995, the United States Supreme Court denied Mr. Walls' Petition for Writ of Certiorari. Walls v. Florida, 513 U.S. 1130, 115 S. CT. 943, 139 L.Ed. 2d 87 (1995).

On March 17, 1997, Mr. Walls filed a "Motion To Vacate Judgements of Conviction and Sentence With Special Request For Leave To Amend." That Motion was amended on April 21, 1997, and "Defendant's Second Amended Motion To Vacate Judgment of Conviction and Sentence," which is the subject of the instant appeal, was filed on March 19, 2001. (PCR. 199)

On May 20, 2002, a hearing was held pursuant to the provisions of Huff v State, 622 So. 2d 982 (Fla. 1993). (PCR. 312) Subsequently, on June 22, 2002, the lower court issued its "Order On Hearing Conducted Pursuant To *Huff v. State* And Rule 3.851, Florida Rules Of Criminal Procedure." (PCR. 312)

In its Order, the lower court granted Mr. Walls a hearing on Claim I(2), I(3), I(4), I(5), on Claim II's allegations of ineffective assistance of counsel, and on Claim III's allegations
of ineffective assistance of counsel in the penalty phase, except for the claims regarding the failure to present mitigating evidence, failure to call a pharmacologist to testify, failure to investigate "blood-spatter" expert's credentials, failure to call mental-health experts, and failure to retain an expert who could testify to the effects of Ritilin. (PCR. 313)

As to the expert on the effects of Ritilin, the court denied a hearing on this claim on the ground that Mr. Walls failed to establish prejudice but indicated that the court would reconsider if Mr. Walls' counsel presented established prejudice to the appellant.

The lower court also summarily denied Mr. Walls an evidentiary hearing on Claim IV (Ake v. Oklahoma) on the ground that it was procedurally barred, on Claim V (mental retardation) on the ground that Florida Statutes 921.137 (2002) does not apply retroactively, on Claim VI (sentencing court failed to independently weigh aggravating and mitigating circumstances) on the ground that it is procedurally barred, on Claim VII (victim impact evidence) on the ground that it is procedurally barred and is refuted by the record, on Claim VIII (unconstitutional instructions and comments and argument

thereon; no harmless error analysis) on the ground that it is procedurally barred, and on Claim IX (cumulative error), although the Order does not specify the ground for denying the claim, except as to the public records portion, regarding the cumulative effect of alleged errors and constitutional violations. (PCR. 312-314)

On July 19, 2002, Mr. Walls filed a "Motion For Leave To Conduct Medical Testing" on the ground that the court granted an evidentiary hearing on Claim III(C), in which Mr. Walls averred that trial counsel rendered deficient performance at trial in that counsel was aware that Mr. Walls suffered from brain damage but failed to have Mr. Walls' brain damage "medically diagnosed", as the court noted and emphasized in its sentencing order.

Mr. Walls contended that, in order to present evidentiary proof sufficient to sustain the averments of Claim III(C), he needed leave to have medical testing performed and that, without such opportunity to present the results of medical testing (a PET scan), an evidentiary hearing on his claim that counsel should have presented the results of such testing would be unfair. (PCR. 316-318)

The state filed an "Objection To Defendant (*sic)* Motion for Leave To Conduct Medical Testing," citing Rogers v. State, 783 So. 2d 980 (Fla. 2002) and Bottoson v. State, 813 So. 2d 31 (Fla. 2002) and contending that Mr. Walls had failed to establish a basis that said testing was necessary.

On October 11, 2002, Mr. Walls filed a "Supplement To Defendant's Motion to Vacate." (PCR. 349-360) This supplement, which presented to the court the report of Dr. Peter R. Breggin, was submitted in support of Mr. Walls' request for an evidentiary hearing on Claim III and pursuant to the court's indication that it would reconsider the claim regarding a Ritilin expert if counsel presented additional evidence or testimony to establish prejudice to the defendant. (PCR. 313)

On October 18, 2002, the state filed "State's Answer To Defendants *(sic)* Motion To Vacate." (PCR. 362-363) Essentially, the state contended that Dr. Breggin's opinion would be cumulative and does not, in any case, contradict the trial testimony that defense counsel placed before the jury.

Finally, on January 6, 2003, the appellant filed a "Notice Of Filing," by which he presented to the court this Court's December 3, 2002 Order in Burns v. State, SC01-166, and Adkins v. Virginia, 122 S. Ct. 2242 (2002) as additonal authority regarding the court's holding on Claim V of appellant's 3850 Motion (that the Florida mental retardation statute is not retroactive.)

On January 9, 2003, at the evidentiary hearing, the court heard argument on Mr. Walls' motion to present expert testimony (Dr. Breggin's) on the effects of Ritilin on Mr. Walls, on appellant's request to conduct medical testing, a PET scan, to establish prejudice on his claim that counsel

should have had an expert conduct medical testing to show the jury medical evidence of Mr. Walls' brain damage, and on appellant's claim that he is mentally retarded and that the Florida retardation statute, the Florida Constitution, and the U.S. Constitution under *Adkins* forbid the imposition of the death penalty in his case.

Ultimately, the court denied the Motion to present Dr. Breggin as an expert on the effects of Ritilin (PCR. 595-600) Further, the court denied the request to conduct a PET scan (PCR. 598-600; 723-724) to support the prejudice prong of *Strickland's* two-pronged ineffectiveness standard, and the court denied the appellant's claim regarding mental retardation on the ground that the Florida statute is not retroactive and that jury heard the issue and evidence of retardation apparently did not influence the death recommendation. (PCR. 6-12)

Further, on January 9, 2003, the lower court heard testimony at an evidentiary hearing consistent with its Order on the *Huff* hearing and subsequent rulings on outstanding motions. (PCR. 312-314)

Thereafter, on January 27, 2003, the lower court issued its "Order On Defendant's Second Amended Motion To Vacate Judgment of Conviction And Sentence," denying Mr. Walls relief. (PCR. 448-459)

B. STATEMENT OF THE FACTS: TESTIMONY

Testimony of Attorney Loveless

At the evidentiary hearing, Earl D. Loveless, Chief Assistant Public Defender for the First Judicial Circuit, testified that he represented Mr. Walls at both of Mr. Walls' trials. (PCR. 603) He handled the guilt phase of both trials. (PCR. 604)

Mr. Loveless testified that there was no change in strategy between the first and second trials. (PCR. 605) The strategy employed was, he maintained, the only strategy available. Id.

Mr. Loveless testified that he talked to Mr. Walls about strategy but indicated that Mr. Walls did not always understand him. (PCR. 605-606) He based this opinion regarding Mr. Walls' level of comprehension on his experience and Mr. Walls' general demeanor. (PCR. 606)

Mr. Loveless did not, however, have any specific memories of speaking with Mr. Walls before trial, except for one instance in 1987, which did not involve strategy. (PCR. 607) Mr. Loveless had, he said, "overall memory" of discussions with Mr. Walls "about the case, about the facts of the case, about what the evidence was going to be...." (PCR. 607)

As to the second trial, Mr. Loveless would have had a discussion with Mr. Walls about the evidence that was going to be presented, but he would not have reviewed his opening statement with Mr. Walls. (PCR. 608) Mr. Walls would not have heard his opening or closing statements before they were made to the jury. (PCR. 608-609)

Initially, Mr. Loveless did not recall that Mr. Walls was very responsive during the second trial. (PCR. 609) Sometimes he thought Mr. Walls understood him and other times he felt Mr. Walls didn't. (PCR. 609-610) Mr. Loveless was concerned about Mr. Walls' competence. (PCR. 610)

Regarding the issue of sexual battery, Mr. Loveless did remember that, prior to the first trial, the state had conceded that there was no evidence of sexual battery and that "it" was not going to come in to evidence. (PCR. 610)

He did remember but did not dispute the authenticity of a July 1, 1988 letter (PCR. 410-411; Def. Ex. 1) to him from the prosecutor in the first trial, Drew Pinkerton ("the Pinkerton letter"), regarding the inadmissibility of questions concerning "Gygi murder" and an old rape investigation (PCR. 410-411).

It was Mr. Loveless's understanding that there was going to be no evidence of sexual battery in the case. (PCR. 611)

Mr. Loveless explained that the defense did not seek to redact the portion of law enforcement's taped statement of Mr. Walls in which the police ask numerous questions about and make numerous references to a sexual battery on Ms. Peterson (R. 668-689) by Mr. Walls because "I simply felt it was better to give the impression to the jury that we weren't trying to hide anything... and that Frank, during his discussions, was being truthful..." (PCR. 611)

Mr. Loveless maintained that there was no evidence that a sexual battery or rape was either intended or was actually completed. Id.

Mr. Loveless further testified that the defense did not move to redact questions from the tape by the interrogators such as, *you raped her, Frank, didn't you?...,* because Mr. Loveless was convinced that the jury would see clearly that there was no rape planned or rape or sexual battery which actually occurred. (PCR. 613)

Mr. Loveless also recalled that investigator Vinson asked Mr. Walls on the tape that was played to the jury: "did you ever see-- peep in, see them nude that you can remember? Did you ever peep in and see them making love or having sex or whatever they do? Okay, you're shaking your head no." (R. 680; PCR. 614) Vinson continued: You knew these people, didn't you? Had you ever seen them before? Had you seen them making love from Animal's trailer? Had you ever peeked in their window?

Loveless didn't believe he objected to these questions (PCR. 615)

Mr. Loveless did, however, state that he would have filed a pretrial motion to keep the statements out of evidence rather than objecting at trial. Id. He admitted that he knew the contents of the tape and conceded that, as a general matter, he would not want the jury to hear evidence of a crime which his client was not charged with. (PCR. 616)

Despite his comments that he generally wouldn't want the jury to hear about a sexual battery which his was not charged with, Mr. Loveless contended that the fact that investigator Vinson asked Mr. Walls whether he had sex with that girl would not be "a problem" as long as Mr. Walls denied having sex with her.

Apparently Mr. Loveless considered that Mr. Walls' response- I can't tell you, I don't know- was a denial (PCR. 617) Regardless, Mr. Loveless felt like the "overall tone" constituted a denial by Mr. Walls that Mr. Walls committed sexual battery. Id.

Asked to explain why he did not challenge other sexual battery language placed before the jury, Mr. Loveless initially stated that he had no strategy reasons for not objecting to technician Julios Borio's testimony that he used a "sexual battery kit" in the investigation. (PCR. 617)

Basically, Mr. Loveless explained, he lets an investigator say what he did in the investigation. (PCR. 617-618) Further, he felt that the sexual battery statements were acceptable because evidence was going to come in that a sexual battery never occurred.

Mr. Loveless was nonplused by the fact that, prior to either trial, one investigator, Robbie Hughes, had testified in his deposition that he thought a sexual battery had, in fact, occurred. (PCR. 618; 621-622)

However, despite Hughes' unambiguous deposition testimony

that he believed a sexual battery had occurred, Mr. Loveless speculated that the evidence was clear to both sides at the time of both trials that "no sexual battery ever occurred." (PCR. 619) In sum, Mr. Loveless concurred that the defense knew about the sexual battery issue, but contended that Mr. Walls' counsel did nothing to keep the issue from the jury because the defense did not want the jurors to feel like counsel was keeping anything from them. (PCR. 619-623)

Mr. Loveless could not recall if he objected to any of the prosecutor's closing argument in the guilt-phase of the trial. (PCR. 624-625) Nor did he initially remember a specific defense trial strategy except to say that "the strategy for the trial was to save Mr. Walls' life." (PCR. 625)

He did not recall not objecting to the prosecutor's comments on Mr. Walls' lack of remorse or on the contention that Mr. Walls would have killed witness Amy Touchton had he known she was there. (PCR. 623-624)

Mr. Loveless also did not recall whether or not he had a strategy regarding objecting to, or not objecting to, the prosecutor's arguments on Mr. Walls' alleged lack of remorse or speculative witness-elimination. (PCR. 624)

Discussing his concessions of felony murder and aggravating circumstances in theopening statement, Mr. Loveless testified that the defense did not perceive any defense that would have resulted Mr. Walls being acquitted.

Mr. Loveless did not dispute that he conceded Mr. Walls' guilt of some charges in the opening statement. (PCR. 625)

Regarding the fact that one of the charges Mr. Loveless conceded was the charge of felony murder, he admitted that he told the jury in opening that Mr. Walls committed a burglary and that, as a result of the burglary, two people died. Id.

He recognized that he was, in effect, conceding guilt on first-degree felony murder and was, in fact, not contesting the charge of felony murder or holding the state to its probative burdens. (PCR. 625-626) Mr. Loveless also knew that he was

conceding at least two aggravating factors for penalty-phase consideration. (PCR. 627)

Mr. Loveless did not have a specific recollection at the time of the evidentiary hearing of when he discussed the opening statement concessions with his client, but he was certain that he discussed the concession of guilt and of aggravating circumstances with Mr. Walls, although he didn't know if Mr. Walls understood him or not. (PCR. 626)

Initially, Mr. Loveless did not have a specific recollection of Mr. Walls actually agreeing to the concession of felony murder and aggravating circumstances (PCR. 631)

Moreover, Mr. Loveless admitted that, after making the concessions, he had no strategy for holding the prosecution to its burden of proof regarding the felony-murder charge. (PCR. 627-628)

On the issue of medical testing, Mr. Loveless stated that, at the time of trial in 1992, he was well schooled in the technology and evidentiary use of the PET scan and that he knew where a PET scan could have been performed and who could have performed such a medical test. (PCR. 629)

A PET scan, testified Mr. Loveless, was a medical test available to him at the time of trial. Id. Further, Mr. Loveless was cognizant of the fact that Mr. Walls had been diagnosed with indications of brain damage and mental retardation. (PCR. 629-630)

Mr. Loveless testified that, based on statements made to him by psychologists Larson and Hagerott, he simply elected not to have a PET scan done. (PCR. 630) Further, although he was using the guilt phase "to save Frank's life," as he characterized the defense's strategy, he did not see a way to use the testimony of medical experts in the guilt-phase of the trial. (PCR. 630)

Consistent with his knowledge of the PET scan and his "strategy" to use the guilt-phase to save Mr. Walls' life, Mr. Loveless acknowledged that, if a PET scan had shown brain damage, that evidence could have been utilized at trial to rebut the prosecutor's argument (and the court's finding) that psychologists don't really understand, from a medical perspective, the workings of the brain. (PCR. 631)

Regarding his strategy considerations, Mr. Loveless stated that he believed there was a possible self-defense argument available to Mr. Walls regarding the death of Mr. Alger. (PCR. 661) He acknowledged, of course, that this defense would be very hard to convincingly establish and was not a good defense in this case. (PCR. 661-662)

Mr. Loveless also understood that in every case a viable defense is to hold the state to its burdens of proof. (PCR. 662)

After lunch, Mr. Loveless reversed himself and testified that Mr. Walls was more active in the second trial than in the

first trial because of medication and “things like that,” although he dis not recall whether or not Mr. Walls was, in fact, on medication at either trial. (PCR. 663)

Before the first trial, Mr. Loveless stated that he discussed the insanity defense with Mr. Walls, but suggested that the defense may not have “gone back to it” for the second trial as it was not viable. (PCR. 663)

It was part of his strategy, according to Mr. Loveless, to establish the two statutory mental-health mitigating factors, but he indicated that, as a general matter, it is very difficult to obtain medical testimony in support of the statutory mitigators so, again speaking generally, he said that he tries to establish the non-statutory mitigation of *disturbance* when, for example, he cannot establish *extreme* emotional disturbance required by the language of the statute. (PCR. 664)

Mr. Loveless doubted that, in Mr. Walls’ case, he had obtained evidence to support the applicability of the statutory mental-health mitigators, because, according to Mr. Loveless, doctors do not normally provide that testimony. (PCR. 665)

Again discussing the strategy of Mr. Walls’ trial counsel, Mr. Loveless initially agreed that the defense did not have a specific strategy to let evidence of sexual battery be admitted into evidence and then to argue to the jury that a sexual battery didn’t occur. (PCR. 666)

Rather, he stated, he was probably aware that evidence of a sexual battery investigation was coming into evidence but, considering the way the case was going and what was going to be explained to the jury, determined that it was better to let the jury know what the scope of the investigation actually was "because it's going to be clear that it (sexual battery) didn't occur." (PCR. 666)

Mr. Loveless did acknowledge that, if the defense doesn't make a motion *in limine* and the jury hears a piece of evidence and is then instructed to disregard it, the result, from a defense stand-point, is not as good as the result the defense obtains by preventing the jury from hearing the piece of evidence in the first place. (PCR. 667)

Mr. Loveless contended that only statements of the investigation of sexual battery came into evidence and distinguished that situation from the situation when evidence of actual sexual battery is being admitted into evidence. (PCR. 667-668)

Nevertheless, he had no recollection of ever discussing that distinction with Mr. Walls except that, possibly, Mr. Loveless said to Mr. Walls something to the effect that the evidence was going to be that it, the sexual battery, didn't happen. (PCR. 667-668)

Mr. Loveless concurred with hearing counsel that objecting to the state's propounding of a non-statutory aggravating factor is a better response than the response of

simply letting it go. (PCR. 668)

Further, he confirmed that lack of remorse, future dangerousness, and failure to attend church are non-statutory aggravating factors which are improper. (PCR. 668)

Finally, addressing his concessions of felony murder and aggravating factors again, Mr. Loveless testified that he could not recall a specific conversation with Mr. Walls wherein Mr. Walls agreed to the strategy of concession that the defense utilized. (PCR. 668)

The Pinkerton Letter

After Mr. Loveless concluded his testimony and before Mr. Sewell testified, the court opined that, in its interpretation of the Pinkerton letter, references to the Gygi murder, an uncharged murder investigation, should have been redacted and reference to an old rape investigation should have been deleted. (PCR. 670)

"Those, obviously, would have been improper comments or matters to be presented to the jury," the court remarked. (PCR. 670-680)

Testimony of Attorney James Sewell

James Sewell, co-counsel with Mr. Loveless during Mr. Walls' second trial, testified that was, in 1992, an assistant public defender in Okaloosa County. (PCR. 682) Mr. Loveless was "lead counsel," and Mr. Sewell was assigned to do the penalty-phase. Id. At that time, he had only tried one previous penalty-phase through to a jury recommendation.

(PCR. 682-683)

Mr. Sewell indicated that, upon review of the transcript of the previous trial, he noted the testimony regarding sexual battery. (PCR. 684)

In contrast to the initial testimony of Mr. Loveless, Mr. Sewell stated that the taped statement Mr. Walls gave to investigators was a "huge part" of the guilt-phase, as well as of the penalty-phase, strategy, because of the remorse reflected, which, Mr. Sewell suggested, supported the theory that the crime was not planned but that, rather, it was a "burglary-gone-awry," during which the fight with Mr. Alger elevated the begign burglary to a life-and-death situation. (PCR. 684-685)

Thus, Mr. Sewell testified, the defense was to attack the intent element of the crimes charged. (PCR. 685)

In Mr. Sewell's opinion, the sexual battery was not an issue because there was no question that Mr. Walls did not commit sexual battery upon Ms. Peterson. Id.

However, Mr. Sewell did acknowledge that Mr. Walls responded to investigator Vinson's interrogation regarding sexual battery by saying that he didn't know (if a sexual battery had occurred.) (PCR. 696)

Mr. Sewell argued to the jury that Mr. Walls' response was evidence of his confusion and emotional distress and that his confusion and remorse were indicative of remorse, which, in turn, was part of the presentation of mitigation in the

penalty-phase. (PCR. 687)

Further, in addition to being evidence of remorse, the taped statement to Mr. Vinson, on which Mr. Walls said that he didn't know if he had committed sexual battery on the murdered woman, reflected, in Mr. Sewall's view, Mr. Walls' confusion and his mental status as it related to problems that he had his whole life. (PCR. 688)

Mr. Sewell did agree that a defendant's lack of remorse is not a valid statutory aggravator or proper prosecutorial argument. (PCR. 691) Also, he testified that he does not believe that the prosecutor's argument regarding the speculative elimination of witness, Amy Touchstone, was a valid argument.
(PCR. 692)

Mr. Sewell recalled meeting with Mr. Walls often when Mr. Walls was in the county jail. (PCR. 101-102) Mr. Loveless had briefed Mr. Sewell about talking to Frank and about helping Frank understand issues. (PCR. 103)

Mr. Sewell testified that, working within the evidence, he had "to go toward" mitigation aspects of Mr. Walls' prior illness or his meningitis, his problems in school, the Ritilin, and bipolar illness. (PCR. 697)

While Mr. Sewell considered having medical testing done and had talked to Mr. Loveless about obtaining medical tests, they concluded, according to Mr. Sewell, that they didn't have a sufficient basis and didn't need a PET scan. (PCR. 698)

Further, Dr Hageroot felt that her test results were sufficiently conclusive evidence that Frank was impaired to present to the jury. Id.

Mr. Sewell also felt the evidence from Dr. Hageroot was strong. (PCR. 699) He also thought that the defense had established a basis for the psychologist's testimony, despite the court's finding that there was no medical support to support her opinion. (PCR. 699)

Mr. Sewell did not recall if he presented evidence establishing the statutory mental-health mitigators, but agreed with Mr. Loveless's assessment that they are difficult to establish because doctors have trouble grappling with the word "extreme." (PCR. 700)

Future dangerousness and church-attendance habits would be objectionable prosecutorial comment or argument, according to Mr. Sewell. (PCR. 701) Similarly, the assertion that a defendant lacked the will to be a good person would also be objectionable. (PCR. 701)

Fianlly, Mr. Sewell considered that his argument to the jury that there was no rape constituted mitigation and was part of the argument that Mr. Walls did not intend harm to anyone. (PCR. 707)

The Testimony of Frank Walls

Mr. Walls testified that, to the best of his knowledge, he never agreed to his attorneys' concession of guilt or to any aggravating factors. (PCR. 715; 715-716) He has, he

said, a hard time understanding and comprehending things, but understands bits and pieces. (PCR. 716)

Further, he never did understand the strategy or know too much of a strategy by his attorneys. (PCR. 717) However, he did not think his counsel would consent to guilt or to aggravating factors. (PCR. 718)

There was hardly any strategy talk, according to Mr. Walls. (PCR. 718) “They have not once sat down two or three hours and go over the case and give me all their theories...” (PCR. 718)

In fact, he thought he was going on the defense of whether he was insane at the time and thought that that was why he was seeing a psychiatrist. (PCR. 720)

C. THE LOWER COURT’S ORDERS

1. The Lower Court’s Order After “Huff” Hearing

On June 25, 2002, the lower court entered an “ORDER ON HEARING CONDUCTED PURSUANT TO HUFF V. STATE AND RULE 3.851, FLORIDA RULES OF CRIMINAL PROCEDURE.” (PCR. 312-314)

The court granted Mr. Walls a hearing on Claim I, subsections (2), (3), (4), and (5), on Claim II, and on Claim III, except as to the allegations of ineffective assistance of counsel for failure to present mitigating evidence in the penalty phase, failure to call a pharmacologist to testify, on the failure to investigate Jan Johnson’s credentials, and on claim that defendant was prevented from calling mental health-experts_upon remand for a new trial. (PCR. 312-313)

Regarding Claim III, the court denied Mr. Walls a hearing on his claim that counsel was ineffective for failing to retain an expert on the effects of Ritilin, but indicated the court would re-consider this claim if Mr. Walls presented further evidence of prejudice. (PCR. 313) Mr. Walls subsequently submitted the report of Dr. Peter Breggin in support of this claim, but the court ultimately denied him a hearing on this issue. (PCR. 595-600)

The court also denied from the bench at the evidentiary hearing Mr. Walls' "MOTION FOR LEAVE TO CONDUCT MEDICAL TESTING" (PCR. 319-321; PCR. 724) and re-consideration of his Adkins claim based upon this Court's Order in Burns. (PCR. 600-602)

The lower court summarily denied the remainder of Mr. Walls' claims. (PCR. 314)

2. The Lower Court's Order After Evidentiary Hearing

On January 25, 2003, the lower court entered its "ORDER ON DEFENDANT'S SECOND AMENDED MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE, denying Mr. Walls relief. (PCR. 448-459)

The lower court denied Mr. Walls' claim that his counsel was ineffective under the standard of Strickland v. Washington, 466 U.S. 668 (1984) for failing to exclude and/or object to evidence of sexual battery on the ground that, regarding the testimony of Technician Boros that he utilized a

Sexual Battery Kit, the jury was well aware of the purpose of the kit and could not have inferred that Mr. Walls' committed sexual battery from Boros's testimony. Regarding the taped statement, the court found that counsel had tactical reasons for not keeping this evidence out or objecting to it. (PCR. 451-453) Thus, the court held that Mr. Walls did not establish a violation of the performance prong of the Strickland test. (PCR. 453)

Regarding counsel's failure to object to prosecutorial comments and argument regarding Mr. Walls' alleged lack of remorse and speculation that he would have killed Amy Touchton because she was a witness, the court held that lack of remorse was a response invited by the defense argument that Mr. Walls demeanor on the tape showed that he was remorseful and that failure to object to the Touchton comment was part of Mr. Loveless's "low-key defense." (PCR. 453-454) The court also found that there was no prejudice on the Touchton issue even if failure to object constituted deficient performance. (PCR. 454)

Regarding concession of guilt and concession of aggravating circumstances, the lower court found that the defendant was advised of, understood, and consented to counsel's strategy to concede to felony murder and statutory aggravators, which made him death-eligible. (PCR. 455-456)

Regarding the claim that counsel was ineffective for not

objecting to prosecutorial comment and argument (Claim III), the lower court found that the future-danger statement was, in fact, a comment on testimony; that the church-comment was not objectionable as a comment on the presentation of mitigators; that the comment that the jury would "have to" find the prior violent murder applicable because this was a double-murder, was, in-fact objected to; that the prosecutor's characterization of Mr. Walls' bipolar disorder as "mood swings" was not objectionable as it was the prosecutor's recollection of testimony; and that the claim that prosecutor's argument that defendant should be executed because he's mentally ill or lacks the will to be a good person misconstrues the prosecutor's remarks. (PCR. 456-458)

Thus the lower court denied Mr. Walls' Motion for post-conviction relief. (PCR. 458)

SUMMARY OF ARGUMENTS

1. The lower court erred in holding that Mr. Walls did not receive ineffective assistance of counsel on his claim that counsel failed to exclude from evidence or object to the introduction of evidence regarding sexual battery. Appellant contends that the lower court's order fails to evaluate this issue in the light of the facts of the entire case and that the lower court's finding of ineffectiveness is not supported by the record. Counsel's testimony regarding the alleged strategy decisions are not credible, and the court's conclusion that there was actually a strategy for the defense

to prove an uncharged sexual battery did not occur and, thus, win the jury's approval for honesty overlooks the prejudicial power of the evidence that was unnecessarily admitted into evidence, and the record does not support the explanation that this evidence was part of a tactical plan to present mitigation.

2. The lower court erred in holding that counsel's failure to object to the lack-of-remorse comment by the prosecutor and the argument that witness Touchton would have been killed do not constitute prejudicial ineffectiveness of counsel. The lower court's findings of fact regarding the comments and arguments are not supported by the record.

3. The lower court erred in finding that Mr. Walls knowingly consented to defense counsel's concessions in opening statements, that the appellant was guilty of first-degree felony-murder and that the state has established, prior to the presentation of any evidence, that the appellant was death-eligible; further, the conclusion of law that counsel's concessions did not constitute Constitutional ineffectiveness of counsel *per se* conflicts with this Court's holdings in *Harvey* and *Nixon* and with *Cronic.* Counsel's testimony regarding strategy is not credible, and the lower court findings regarding their testimony on concessions and the appellant's knowing consent thereto are not supported by the record.

4. The lower court's findings regarding the content

and impact on the jury of the prosecutor's comments on future dangerousness, on church attendance, on a requirement that the jury find the aggravator, prior violent felony, on the characterization of bipolar disorder as "mood swings;" on the demonization of Mr. Walls as lacking the will to be a good person, and on the contention that Mr. Walls should be executed because of mental illness are not supported by the record; further, the lower court erroneously has failed to consider the cumulative impact of such statements to the jury on its ultimate verdict and sentencing recommendation.

5. The lower court erred in failing to grant Mr. Walls a hearing on his claim (Claim III (c-h) that counsel was ineffective under Strickland for failing to retain an expert on the effects of Ritilin, to retain a pharmacologist to testify regarding the effects of drugs and alcohol, to obtain an adequate mental-health evaluation of Mr. Walls, or to present the testimony of lay witnesses to the abundance of previously unpresented non-statutory mitigation as alleged in Mr. Walls 3.850 motion and unrebutted by the record; further, the lower court erred in denying Mr. Walls' motion to conduct medical testing, as his allegations and subsequent evidentiary proffer established that he has met his burden of showing that Constitutionally effective counsel would have presented such testimony and undertaken said testing to support with medical evidence the opinions of experts that Mr. Walls suffers from bipolar disorder, brain damage, mental illness, and

retardation. If a new trial is not ordered or a life sentence imposed as relief on other grounds, this case should be remanded so that Mr. Walls' can conduct the necessary testing and present the results in a fair hearing.

6. The lower court erred in failing to grant Mr. Walls' a hearing on his claim (Claim V) that the record shows that he is mentally retarded and that his execution and death sentence are barred by the Florida constitution, Florida statute, and the Eighth and Fourteenth Amendments' prohibition on the execution of the mentally retarded; further, the lower court also erred in holding the Florida statute not retroactive (921.137) (2002).

ARGUMENT I:

THE LOWER COURT'S ORDER AFTER THE EVIDENTIARY HEARING ERRONEOUSLY DENIED APPELLANT RELIEF

1. Standard of Review And Applicable Law

At the evidentiary hearing, Mr. Walls presented evidence substantiating his claims regarding ineffectiveness of counsel's performance and prejudice resulting therefrom under the *Strickland* test and, as to the claim regarding concessions of guilt and aggravating factors making Mr. Walls death-eligible, under *Nixon* and *Harvey* and under *Cronic*.

The standard of review of the lower court's order under these arguments is set forth by this Court as follows:

> Generally, our standard of review following the denial of a 3.850 claim after holding an evidentiary hearing affords deference to the trial court's factual findings. "As long as the trial court's

> findings are supported by competent substantial evidence, this Court "will not substitute its judgment for that of the trial court on questions of fact, likewise of the credibility of the witnesses as well as to the weight to be given to the evidence by the trial court. McAllen v. State, 827 So. 2d 948, 954 (Fla. 2002) (quoting Blanco v. State, 702 So. 2d 948, 954 n.4 (Fla. 1997)).

Nixon v. State, SC92006 p.7 (Fla. 2003).

Under the Strickland v. Washington, 466 U.S. 668 (1984) standard, which normally applies to ineffective assistance of counsel claims, the defendant must demonstrate (1) deficient performance by counsel and (2) prejudice to the defendant. Id. at 687. However, there are instances when the rule announced in United States v. Cronic, 466 U.S. 648 (1984), applies to the decisions of the trial court.

In Cronic, "the Supreme Court created an exception to the Strickland standard for ineffective assistance of counsel and acknowledged that certain circumstances are so egregiouly prejudicial that ineffective assistance of counsel well be presumed." Stano v. Dugger, 921 F. 2d 1125, 1152 (11th Cir. 1991) (en banc).

The Florida Supreme Court has stated:

> Moreover, because we presume that a lawyer is competent to provide the guiding hand that the defendant needs, *see* Michel v. Louisiana, 350 US 91, 100-101 (1955) the burden rests on the accused to demonstrate a constitutional violation. There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their particular effect is unjustified.
>
> Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us that a trial is unfair if the accused is denied counsel at a

> critical stage of his trial. *Similarly, if counsel entirely fails to subject the prosecutions' case to meaningful adversarial testing, then there has been a denial of sixth amendment rights that makes the adversary process itself presumptively unreliable.*

Harvey v. State, 28 Fla. L. Weekly S513 (Fla. 2003), citing Davis v. Alaska, 415 U.S. 308 (1974) (denial of right to cross-examination would be constitutional error of the first magnitude and no amount of showing want of prejudice would cure it); Smith v. Illinois, 390 U.S. 129, 131 (1968); and Brookhart v. Janis, 384 U.S. 1,3 (1966); see also *Cronic, 466 U.S.* at 558-559.

As this Court wrote in *Nixon I,* "Thus, *Cronic* applies only to the narrow spectrum of cases where the defendant was completely denied effective assistance of counsel." Nixon v. Singletary, 758 So. 2d 618, 622 (Fla. 2000); *Harvey, supra.*

As in the instant case, in *Harvey,* the court found that Mr. Harvey had a low IQ and poor educational and social skills. *Harvey* at S513. Ultimately, the Court only analyzed the claim on appeal that trial counsel was ineffective for admitting Havrvey's guilt in opening statement. Id.

Much as in the above-cited cases, the ineffectiveness of Mr. Walls' trial counsel satisfies both the *Cronic* and *Strickland* standards.

2. Failure to object to and/or exclude inadmissible testimony and evidence regarding sexual battery, for which the appellant was not charged.

Mr. Walls contends that trial counsel provided ineffective assistance of counsel for counsels' failure to exclude evidence of a sexual battery for which Mr. Walls was not charged but regarding which he was investigated.

No evidence was found connecting Mr. Walls to the sexual battery of victim Ms. Petersen. Nevertheless, counsel permitted questions regarding sexual battery to permeate Mr. Walls' trial. It would be difficult to conceive a more harmful prejudicial evidence to admit into an already bad murder trial. The last thing defense counsel should want is for the jury to conclude that investigators suspected that a sexual battery had occurred.

There is no more scurrilous, damaging evidence to allow the jury, making a life and death decision, to hear when such evidence could have easily been kept out of evidence. According to Mr. Pinkerton's letter (Def. Ex. 1), the state even invited counsel to respond with further deletions or redactions from the tape.

Further, the lower court did not find that this evidence shouldn't have been excludable but rather somehow concluded that the jury didn't consider it, with no way of knowing what the jury considered and didn't consider. There was certainly no evidence as to what the jury considered and the sexual battery evidence was indiputably before the jury when it did not have to be.

Importantly, this evidence could easily have been kept

out evidence by redaction of the tape and an order for Borio not to mention the Sexual Battery Kit.

The lower court found, without, explication or evidence in the record, that the jurors concluded that Mr. Walls did not sexually batter the victim, but there is nothing in the record to support this conclusion.

To the contrary, the juror's unnecessarily heard evidence that the crime technician utilized a Sexual Battery Kit in the investigation and they heard the repeated questions about sexual battery and rape put to Mr. Walls by interrogators. (R. 668-669)

Counsel admitted that they were aware of the sexual battery issue. Further, at the hearing Mr. Walls presented evidence that the State, prior to the first trial, was making an effort to keep evidence about other crimes out of evidence.

Further, Investigator Robbie Hughes testified in his deposition that he thought that a sexual battery had been perpetrated by Mr. Walls. (Def. Ex. 2)

So it is clear that both counsel and the state were aware of the sexual battery issue, and, further, that the state would not object to its removal and even thought such evidence should be removed. Nevertheless, counsel made no effort to keep sexual battery out of Mr. Walls' trial, although both lawyers for Mr. Walls testified that generally they would move to keep such evidence out.

However, in this case, at the hearing, Mr. Loveless stated that his strategy didn't change from the first trial. (PCR. 605) The strategy, according to Mr. Loveless, was to save Mr. Walls' life. (PCR. 625) Nevertheless, Mr. Loveless conceded guilt to felony murder and conceded aggravators in his opening statement, making Mr. Walls' death-eligible.

Further, although he admitted that he knew about the sexual battery issue and that he would not generally permit the introduction of such evidence, and although he admitted that the prosecution had written him offering to keep such extraneous, prejudicial evidence from the jury and inviting him to make deletions, Mr. Loveless did nothing to seek the exclusion of such evidence or even object to its introduction.

Mr. Sewell, Loveless's co-counsel, stated he actually tried to fashion a strategy to explicate counsels' inaction. He
thought that the jury would award Mr. Walls' some points as mitigation if it concluded a rape did not occur.

Considering the nature of the crime and the fact the Mr. Walls' denials might be construed as questionable and despite the fact that the defense was permitting the jury to hear remarks about sexual battery, it is far-fetched to believe that such evidence could be seen as mitigation.

Weighing the slight chance that a juror would say, well at least he didn't rape her, against the substantial chance that the jury would conclude that, given the details of the

terrible crime, he probably did rape her, reasonable counsel, facing no challenge from the state on keeping such evidence out, would take the necessary steps to exclude it. Counsel simply did not need to add even speculation about sexual battery or rape to the mix in order to make its "burglary-gone-awry" argument. The sexual battery innuendo in no way compliments that strategy.

For defense counsel to claim that it was their strategy to allow suggestions and innuendo regarding a rape of a woman about to be murdered or even murdered to infect the jurors consideration of the crimes for which Mr. Walls was actually charged neither makes it a viable strategy nor does it invoke much respect for counsel's credibility. Calling an action a strategy does not make it credible. As the *Harvey* Court wrote:

> We are aware that *Nixon* did not involve a confession. However, even in cases involving a confession, the jury is free to give as much or as little weight to the confession as it wishes. As explained in Nixon: "In every criminal case, a defense attorney can, at the very least, hold the state to its burden of proof by clearly articulating to the jury... or fact-finder that the state must establish each element of the crime charged and that a conviction can only be based upon proof beyond a reasonable doubt." 758 So. 2d at 625. In other words, trial counsel cannot be excused for conceding guilt and, under the facts of this case, failing to subject the prosecution's case to a meaningful adversarial testing just because Harvey confessed to the crime charged. We made it very clear in *Nixon* that a defendant must give an "affirmative, explicit acceptance" of counsel's strategy to concede guilt because conceding guilt is the functional equivalent of a guilty plea. *Id.* at 624; *see also Atwater,* 788 So.

> 2d at 231 ("Thus, in *Nixon* we held that unless the defendant had expressly consented to this strategy, or in effect knowing and voluntarily consented to decline meaningful adversarial testing of the prosecution's case, then prejudice to the defendant is presumed and counsel is thus per se ineffective.") Here Harvey pled not guilty to the charges against him, including to first degree murder. Trial counsel's concessions, however, rendered that not guilty plea a nullity.
>
> Harvey v. State, 28 Fla. L. Weekly at S514.

As will be discussed in a subsequent claim, Mr. Walls' counsel pled him guilty to first degree felony murder and also allowed highly inflammatory evidence suggesting sexual battery on the murdered victim to be introduced as evidence.

Both actions, considered with those hereinafter discussed, surely deprived Mr. Walls of the reliable adversarial testing which is cornerstone of *Strickland* and *Cronic* analysis.

3. Failure to object to the state's closing argument regarding lack of remorse and regarding the contention that witness would have been killed had she been discovered.

Mr. Walls contends that counsel was ineffective for failing to object to the prosecutor's argument regarding lack of remorse. The lower court held that the lack of remorse response was a response to prosecution's argument regarding remorse bad therefore counsel was not ineffective.

However, the lower court fails to consider whether the right of the defendant to present mitigation, which is very

broad, and the prosecution's limitations to argue constitutional factors can be analyzed in such a fashion.

Further, the vehemence of the prosecutor's remarks suggest that this is more than a mere response.

Here is what the prosecutor says, "Yeah, this ruined Frank's whole life. Did you hear him say anything about Ann Petersen or Ed Alger?" (R. 731)

Then, later, the prosecutor comments again, "He did not care about those victims. He did what he had to do, and he never once said he was sorry about them."

Thus, the prosecutor's remarks exhude venom and clearly cross the line into improper inflammatory comments on lack-of-remorse.

The State should not be entitled to use the scope of mitigation permitted to vastly expand the scope of aggravators permitted and carefully circumscribed by statute. On the premise that the defense sought to show the jury Mr. Walls pain and confusion, the prosecutor extended the boundaries of its closing into realms and arguments that are clearly not permitted.

Further, the prosecutor told the jury:

> You got to believe that he might be the kind of person to say
> "No, I don't want any witnesses. I'm going to kill them."
> Just think about Amy Touchton, remember Amy Touchton.
> She said she almost went over there and knocked on the door.
> Maybe she would have been a witness. Frank

wasn’t going to have any witnesses.

(R. 731-32)

This is demagogic demonization at its worst. Mr. would have killed Ms. Touchton to eliminate a witness. There is nothing in the record to support this argument, but the lower court simply held that there was no showing of prejudice. However, the lower court has failed to consider these obviously improper arguments with counsel’s error in conceding guilt and aggravators, with counsel’s error in allowing unnecessary, inadmissible evidence regarding a sexual battery to be placed before the jury, and with counsel’s other errors.

Such blatantly inflammatory argument cannot be harmless or not be prejudicial when the Court considers the full facts of the case.

For now, in addition to putting evidence of sexual battery before the jury, in telling the jury in opening that Mr. Walls is guilty of First-degree felony murder and of several aggravating circumstances, the state is being permitted to argue that Mr. Walls is not remorseful, that he doesn’t care about the victims, that he wanted to kill all witnesses, and that he would have killed Ms. Touchton.

The jury should not heard any of the above, yet it did.

It is difficult to conceive that such a mass of improprieties could be harmless. The prosecutor didn’t think they were harmless or, perhaps, he would have restrained

himself.

For the most part defense counsel just sat there, perhaps hoping that their strategy, which seemed to be that since they allowed inadmissible evidence suggestive of rape, or even some worse deviance, into evidence, they could counter the prosecutions' arguments by contending that there is no evidence Frank raped the female victim and that this is mitigation.

4. Defense counsel improperly conceded guilt and aggravators, making Mr. Walls Death-eligible in opening statements and without knowing consent

The lower court held that Mr. Walls was advised of, understood, and consented to counsel's plan to concede felony murder and aggravators, making him death-eligible from the very first moments of the trial. R. 370)

Counsel further told the jury, "we're not asking you to forgive him or anything like that. That's not the point here. What we're asking you to do is convict him of what he did (R. 372)... You're going to find out that Frank Walls broke into that trailer and two people died as a result of that." (R. 371)

Counsel conceded that Mr. Walls committed felony murder, that at the time of Ms. Petersen's death Mr. Walls had committed a prior violent crime, that the murder was committed during a burglary, and that the murder was committed for pecuniary gain.

After the opening, the State had nothing left to prove.

In his brief testimony, which may also be instructive on the lack of speed with which Mr. Walls absorbs and processes uestions about legal information, Mr. Walls states that he thought he was getting an insanity defense and that was way he was seeing the doctors. (PCR. 720)

According to Mr. Walls, there was hardly any strategy talk and he never once sat down with counsel for 2 or 3 hours to discuss the case.

Mr. Loveless did not remember any specifics of what he told Mr. Walls. At first, Mr. Loveless said Mr. Walls didn't comprehend much at the second trial.

Finally, there is no evidence of a knowing consent, and it's difficult to imagine that any defendant would give their consent to a strategy that concedes both guilt and death-eligibility in opening statement, lets in evidence of a sexual battery, so counsel can claim it wasn't proven and is thus mitigation, and which finds counsel letting the prosecutor make numerous improper arguments while standing mute, as part of a "low-key" defense.

Mr. Walls trial rendered an unfair result under *Chronic, Strickland, Nixon, and Harvey.* Prejudice has been proven and is presumed.

5. Counsel's failure to object to improper penalty-phase comments

Finally, Mr. Walls Counsel permitted the prosecution to

improperly demonize him through a series of claims and remarks which were made without objection.

When considered cumulatively, these remarks continue a pattern of demonization of Mr. Walls by the state with the acquiescence of his counsel,

First, The prosecutor argued that Mr. Walls was a future danger to society and there was no objection. (R. 989)

Secondly, when the prosecutor argued that the defense didn't put on proper mitigating evidence because the defense didn't prove that Mr. Walls went to church, there was no objection.

Thirdly, when the prosecutor argued that solely because this was a double-murder the jury would "have to" find that the prior violent felony aggravator should be applied, no objection was made, with counsel again conceding this statutory aggravator.

Fourthly, when the prosecutor misled the jury to believe that bipolar disorder is not a genuine psychiatric condition but merely mood swings, there was no objection.

Fifthly, when the prosecutor argued that Walls should be executed just because he allegedly lacks the will "to be productive, and to be a good person, to have values and to live by them (R.989) there was no objection that there was nothing in the record to support such an allegation and that the prosecutor was arguing non-statutory aggravation

prohibited by Florida law. Elldridge v. State, 346 so. 2d 998 (Fla. 1977).

Finally, when the prosecutor argued that Mr. Walls should be executed because of his mental illness, in violation of the state and federal constitutions, and because he lacked the will to be a good person, to have values and to live by them and he was a bad person (R. 989) there was no objection despite the fact that there is no su[pporting evidence in the record.

When the prosecutor argued Mr. Walls lack of remorse, there was objection or motion for mistrial.

The introduction of such a series of non-statutory aggravators, without the dissent taking action, and allowing the jury to hear such a long list of improper comments surely prejudiced Mr. Walls. The effect of this barrage was to dehumanize him so he would be easier to sentence to death.

The fact that counsel let this evidence be admitted constitutes ineffective assistance of counsel.

6. Consideration of Cumulative Evidence and Conclusion

Mr. Wall has set forth four claims of ineffective assistance of counsel. The first, the unnecessary introduction of the issue of sexual battery into the case constituted ineffective assistance of counsel, possibly per se; the second, failing to object to obviously improper and inflammatory remarks by the prosecution regarding remorse and

speculative witness-killing; the third, improperly conceding felony murder_and aggravating circumstances, which constitute ineffective assistance of counsel per se; and, the fourth, failing to object to improper prosecutorial remarks in the penalty phase, which allowed the prosecution to freely charge numerous non-statutory aggravators.

Each one of these sections alone should entitle Mr. Walls to relief, but when they are considered cumulatively there can be no doubt that Mr. Walls did not receive a fair trial.

ARGUMENT II:

THE LOWER COURT ERRONEOUSLY DENIED APPELLANT A HEARING ON THE FOLLOWING MERITORIOUS CLAIMS

After the *Huff* hearing, the lower court erred in failing to grant the appellant a hearing on two meritorious claims.

First, a hearing should have been granted on claims involving counsel's failure to investigate and present available lay and expert witnesses, failure to object or move for mis-trial or the imposition of a life sentence when counsel was not allowed to present certain expert testimony solely because of prosecutorial misconduct, failure to retain expert witnesses to conduct medical testing, and failure to present lay testimony to a wealth of mitigation heretofore kept from the jury and court.

Secondly, the lower court erred in failing to grant Mr. Walls a hearing on his claim that the Eighth and Fourteenth Amendments, the Florida constitution, and Florida law forbid his death sentence as he is retarded. The lowercourt erred in holding that the statute is not retroactive.

1. The lower court erred in failing to grant the appellant a hearing on Claims III (C), (D), (E), (F), and (H)-- that he was prejudiced by counsel's failure to utilize an expert on the effects of Ritilin, to utilize a pharmacologist to testify on the effects of drugs and alcohol, to obtain an adequate mental-health evaluation of Mr. Walls so that a mental-health expert could present testimony in support of the

statutory mental-health mitigating factors as well as non-statutory mitigation, to obtain medical testing of Mr. Walls to substantiate diagnoses of mental illness, brain damage, and mental retardation, and to present lay witnesses to testify to the extensive previously available and powerful non-statutory mitigation alleged in his 3.850 Motion and unrebutted by the record; further, the lower court erred in denying Mr. Walls' Motion For Leave To Obtain Medical Testing or alternatively to impose a life sentence on the ground that prosecutorial misconduct prevented Mr., Walls from presenting a medical expert who had testified at the first trial but was barred from testifying at the new trial, and counsel was ineffective for failing to raise this issue or proffer such testimony.

a. The lower court failed to grant Mr. Walls a hearing on his claim that counsel was prejudicially ineffective for failing to retain an expert on the effects of ritilin.

At the court's request the defendant tendered the report of Dr. Breggin (PCR. 352-360) Breggins' report concluded:

> Clinicians have long noted a association between mild cerebral dysfunction and the perpetration of extreme violence. Several research studies have confirmed the association. Usually these studies and evaluations are retrospective. Rarely, as in Frank's case, do we have the benefit of a prior history of repeated neuropsychiatric evaluations confirming cerebral dysfunction before the actual episode of violence. Because the evaluations were made prior to the violent acts, Frank Walls' diagnosis of mild cerebral dysfunction, as well as the diagnosis of Bipolar disorder, carry special weight.
>
> I was initially very sceptical when asked to

> evaluate this case because the data presented to my did not include the salient fact that Frank Walls had suffered a viral meningoencephalitis as a twelve year old. I discovered this in the record. Nor did the initial; data include the fact that Frank had been diagnosed_with brain dysfunction and Bipolar Disorder at the age of sixteen before he displayed any violence. In short, I was surprised to find out that Frank Walls_suffered from well documented neuropsychiatric disabilities that clearly disposed him to violence. Indeed, the most extensive evaluation of him, carried out when he was fifteen years old, predicted that he would need a structured institution to help him control his impulses.
>
> Due to a combination of brain dysfunction and manic tendencies caused in part by a viral meningoencephalitis at the age of twelve, Frank Walls was very vulnerable to committing violence as he became increasingly unable to handle adult responsibilities and demands. I hope the court will take these medical facts into consideration in regard to mitigation.

(PCR. 352-360)

At the evidentiary hearing the lower court found that he had researched Dr. Breggin and reviewed his credentials and found him a qualified expert.

The Court noted that Breggin opined that the ritilin use had compounded the meinigitis and that Dr. Chandler didn't place sufficient emphasis on the Ritilin use and the resulting effect that it had on the brain dysfunction. However, because he didn't disagree with the final diagnosis of the other doctors, Chandler, Valentine, and Hageroot, Walls was denied a hearing on his claim.

The conclusion that Dr. Breggin should not be allowed to testify at the hearing so the court could properly evaluate

his testimony is erroneous. He clearly has new information which connects the ritilin use to the meningitis to the violence. No other doctor made this connection.

The trial court erred in finding his proposed testimony cumulative. Denying this claim at the Huff stage is reversible error as defendant made the requisite showing required at this embryonic stage of the proceedings. Nothing in the record refutes this claim.

b. Mr. Walls was erroneously denied a hearing on his claim that counsel failed to investigate and present lay testimony regarding his life.

Similarly, the extensive factual history a of Mr. Walls (PRC 213-221) brings to light reveals important facts regarding Mr. Walls' early life and regarding the full story of the afflictions and illnesses he suffered. Many of the facts had not been presented to the jury before, particularly regarding Mr. Walls early life, sexual abuse, and legal and illegal drug us and drinking. Counsel was ineffective for failing to bring these facts before the jury and to furnish them to the the doctors. Had counsel done so the doctors would have found the applicability of the statutory mental-health mitigators and the jury would have heard a wealth of mitigation helping them understand the true nature of mental illness, brain damage, and mental retardation which afflicted the defendant. Nothing in the record refutes this claim.

c. Mr. Walls was erroneously denied a hearing on his

claim that counsel was ineffective for failing to utilize and expert pharmacologist.

The Court also denied Mr. Walls a hearing on his claim that his counsel were ineffective for failing to obtain an expert on the effects of Ritilin and a pharmacologist to instruct the jury on the effect on Mr. Walls the multi-toxic substance abuse, including drinking, would have on a person with his myriad mental problems disorders, brain damage, and full history, including his early years in Germany, and the meningitis he suffered at twelve, which caused violence when Mr. Walls ritilin background is considered.

A parmacologist, Mr. Walls alleged, could have instructed the jury on the effects on the brain of the legal and illegal drugs Mr. Walls ingested his whole life and shown the jury how violence can be caused by the effects of such drug use. Nothing in the record refutes this claim.

d. The Lower Court Erred if failing to allow Mr. Walls to conduct medical Testing.

Further, the court denied Mr. Walls a hearing on his claim that counsel and experts failed to have adequate medical testing done, despite the record is unrefuted that Mr. Walls is brain damaged, and suffers from long and well documented history of mental problems.

Mr. Walls filed a motion to conduct medical testing and indicated to the court that he wanted to have a PET SCAN conducted , and in fact he needed to have such testing done to

establish the prejudice prong of claims which he did get a hearing on.

Further, the medical testing was important and probative because the court explicitly found that it could give no or

little weight to expert testimony at trial because it was not supported by just such testing.

Finally, there is no issue or contention in the record that A PET scan was not available in 1992 and the record is clear that counsel was aware of the option but inexplicably failed to take action. Nothing in the record refutes this claim.

Mr. Walls contended in his Motion that counsel was ineffective on the ground that they did not have adequate medical testing performed. The failure to do so is evidenced by the fact that the trial judge discounts the expert testimony on the ground that no such testing was performed in its sentencing order. Thus, the lower court erred when it denied Mr. Walls Motion for Leave to Perform Medical Testing, as this would be the only way he could satisfy the prejudice prong of ***Strickland.***

e. Failure to move for life sentence, to object, to move for mistrial, or otherwise seek to have the testimony of doctors tainted by prosecutorial misconduct at first trial.

Further, as part of its claim that counsel failed to have adequate testing done, including medical testing, since there was evidence of brain damage, drug abuse, alcohol abuse, and meningitis (plus, in postconviction, new records and information regarding Mr. Walls early years in Germany and disturbing conduct from birth), counsel failed to call doctors who had testified favorably in the first trial but, because of

prosecutorial misconduct, were not allowed to testify at the second trial.

Thus, the state prevented Mr. Walls from utilizing the doctors of his choice. Counsel failed to object to this, to proffer the testimony being excluded, or otherwise preserve that issue for appeal. Mr. Walls did not get a hearing on this claim, in which his fundamental rights to due process were violated because of the prosecutions actions.

Citing the analogy to double jeopardy analysis, counsel should have moved for the imposition of a life sentence on the ground that the remand was sole caused by the prosecution's obviously improper conduct. Counsel failed to challenge the court or take the steps to preserve that issue for appeal. Massiah v United States, 327 U.S. 201 (1964); Haliburton v State, 514 So. 2d 1088, 1090 (Fla. 1987); Art. 1, Sec 9, Fla. Constitution.

f. Conclusion

Counsel has a duty to investigate a defendant's background in order to assist mental health experts reach reliable conclusions on defendant's condition. Counsel knew that a medical test would be required to show the jury Mr. Walls Brain damage.

Counsel failed to obtain experts to support the statutory mental-health mitigators, because they of the opinion that doctors would not provide that testimony due to statutory

language.

Mr. Walls, in post-conviction, wanted to present testimony that would have supported those important mitigators, but was not allowed a hearing. See, Rose v. State, 657 So. 2d 567, 573; Ake v. Oklahoma, 470 U.S. 68 (1985); Blake v. Kemp, 758 F. 2d 529; State v. Sireci, 502 So 2d 1221, 1224 (Fla. 1987); Mason v. State, 489 So. 2d 734 (Fla. 1984); O'Callaghan v. State, 4612 So. 2d 1354, 1355-56 (Fla. 1984); United States v. Fessel, 531 F. 2d 1278, 1279 (5th Cir. 1979); and Maudlin v. Wainwright, 723 F. 2d 799 (11th Cir. 1984).

Mr. Walls alleged that a properly investigated penalty phase should and would have included expert testimony and lay testimony that Mr. Walls' mental illness was more severe than the evidence presented at trial indicated, that both mental-health statutory mitigators could have been established, that Walls was and is mentally retarded, that medical testing would have proven and demonstrated the extent of his brain damage and mental retardation, so that the jury and court could not have discounted the expert testimony and penalty phase evidence as they did at trial.

Mr. Walls' 3.850 allegations regarding the penalty phase entitled him to a hearing and, ultimately, to relief. Further, counsel's concession of aggravators constituted ineffective assistance of counsel *per se.* Harvey v State, 28 Fla. L. Weekly S513 (Fla. 2003); Nixon v. Singletary, 758 So.

2d 618, 622 (Fla. 2000); Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995); United States v. Cronic, 466 U.S. 648 (1984); Stano v. Dugger, 921 F. 2d 1125,1152 (11th Cir. 1991); Davis v Alaska, 415 U.S. 308 (1974); Smith v. Illinois, 390 U.S. 129, 131 (1968); Brookhart v. Janis, 384 U.S. 1,3 (1966); Wiggins v Smith, 16 Fla. L. Weekly Fed. S459 (2003); and Nixon v Florida, Nixon v Crosby, Nixon v Florida, Nos. SC92006, SC93192 & SC01-2486 pp. 1-33 (Fla. 2003).

2. Mr.Walls was erroneously denied a hearing on his claim that his death sentence violates equal protection and the due process clauses of the Eighth and Fourteenth Amendments and the Florida Constitution and Florida Law.

Mr. Walls alleged in his Motion that "A prisoner under a sentence of death remains a living person and consequently has an interest in his life," Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 288 (19998) (O'Conner, J., concurring)

Mr. Walls is such a prisoner with such an interest. He has further been found to be mentally retarded individual, and therefore with in the scope of this individuals protected by Sect 921.137.

"Liberty interests protected by the Fourteenth Amendment may arise from two sources-- the Due Process Clause and the laws of the states. Hewitt v. Helms, 459 U.S. 460, 466 (1983).

The Florida Legislature and the Governor have determined that a mentally retarded person like Mr. Walls have a

substantive right not to be executed. The lower court has barred Mr. Walls' claim that he cannot be executed because he is mentally retarded on the ground that the Florida statute is not retroactive.

However, although the legislature does have the power to enact substantive laws, Allen v. Butterworth, 756 So. 2d 52, 59 (Fla. 2000), it is equally undisputed that the courts must determine whether the state's positive law has created a liberty interest and whether its procedures are adequate to protect that interest from arbitrary deprivation. Ford v. Wainwright, 477 U.S. at 430-431.

Mr. Walls, thus, alleges that the lower court's holding that the Florida statute on mental retardation is not retroactive and does not protect him is un- constitutional in that it arbitrarily deprives him of his constitutional rights.

As Justice O'Conner determined in Ford v. Wainwright, 477 U.S. at 430, Florida's procedures do not satisfy even the minimal requirements of due process to the extent that the legislation seeks to allow the execution of persons who are mentally retarded up to the date of the legislation but bar the same level of mentally retarded persons from being executed.

Mr. Walls supplemented the allegations of his Motion on this claim with a Notice of Filing on January 6, 2003, providing the court with the text of Adkins v. Virginia, 122 S. Ct. 2242 (2002), and this Court's Order in Burns v State,

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which indicated that this Court may substantively rule on the issue Mr. Walls' claim concerns. Importantly, at least one medical expert found that Mr. Walls is mentally retarded.

The Lower court erred by denying Mr. Walls a hearing on this issue on the ground that the mental retardation statute is not retroactive. Interestingly, at the Huff hearing, which Mr. Walls attended by phone, the court made a sua sponte finding that Mr. was not retarded, without hearing any evidence, but did not include that off-the-cuff remark in its order denying Mr. Walls a hearing. (PCR. 555)

Mr. Walls is entitled to a hearing on his claim that his sentence of death is unconstitutional under the eighth and fourteenth amendments. See, Weems v. U.S., 217 U.S. 349 (1910); McClesky v. Kemp, 481 U.S. 279 (1987); Enmund v. Florida, 458 U.S. 782 (1982); Penry v. Lynaugh, 492 U.S. 302 (1989).

Mr. Walls allegation, unrebutted on the record, that he is mentally retarded entitles him to, if not absolute relief from his death sentence, at a minimum, a hearing on the claim, which the lower court erroneously denied.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, Mr. Walls respectfully prays that this Court reverse the lower court and vacate his sentences and conviction, order a new trial, impose a life sentence, remand the case for further evidentiary development, or

otherwise grant such relief as the Court deems proper.

CERTIFICATE OF FONT SIZE AND SERVICE

The below-signed counsel of record hereby certifies that a true copy of the foregoing Initial Brief of Appellant has been reproduced in a 12-point Courier type, a font that is not proportionally spaced; further, a true copy has been furnished by first class mail to Ms. Charmaine Millsaps, Assistant Attorney

General, Office of Attorney General, Tallahassee, Florida on _____, 2003.

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