IN THE SUPREME COURT OF FLORIDA

RICHARD TODD ROBARDS,	:	
Appellant,	:	
vs.	:	Case No. SC11-0425
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

This reply brief is directed to Issue I. Appellant will rely on his initial brief as to Issues II, III and IV.

The state's answer brief will be referred to herein as "SB".

STATEMENT OF THE CASE AND FACTS

In its Statement of the Case and Facts, the state sets forth that the prosecution in the second Spencer hearing "also introduced voice messages left on a lady's phone, Frankie, one of Appellant's personal training clients. After hearing the voice messages, Appellant denied that it was his voice leaving the messages. (V22:3401-14)" [SB 30]. In Issue I, the state says that the prosecution "presented voice-mail phone messages Appellant left on a woman's phone that vividly represented his anger, rage, and 'explosive discontrol'" [SB 45]. Not mentioned in the state's brief is the fact that, after hearing the proffered voice messages, the trial judge sustained the defense's relevancy objection and excluded them from his consideration (22/3411, see 3403-05).

[ISSUE I] APPELLANT WAS DENIED HIS RIGHTS, GUARANTEED BY THE UNITED STATES AND FLORIDA CONSTITUTIONS, TO A RELIABLE JURY PENALTY PROCEEDING AND TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AND UNDER THE UNIQUE CIRCUMSTANCES SHOWN ON THIS RECORD RELIEF CAN AND SHOULD BE AFFORDED ON DIRECT APPEAL.

A. Relief Now or Later

To prevail on direct appeal on a claim that he was denied his Sixth Amendment right to the effective assistance of counsel, a defendant must show that both prongs of the Strickland[1] test - - deficient performance and prejudice - - are shown on the face of the record. It takes a unique set of circumstances to establish this, and attorney Richard Watts' remarkable mea culpa at the conclusion of the second Spencer hearing, in conjunction with numerous other occurrences and statements before and after the penalty phase, demonstrates just such a unique set of circumstances in this case. The state's position in this appeal is that this Court should affirm on this issue without prejudice to raise it in a Rule 3.851 postconviction motion [SB 38,40]. Appellant's position is that both prongs of Strickland are met on the face of this record; that a death sentence imposed pursuant to such an unreliable jury penalty phase can never constitutionally be carried out; and that the interests of justice and conservation

[1] Strickland v. Washington, 446 U.S. 668 (1984).

of resources would be better served by reversal now.

Even though everyone knew up front that mental health mitigation would be critical to this case, even though Mr. Watts expressed reservations about being fully prepared for the jury penalty phase due to "some good mental mitigation" which would require more time, even though the judge (expressing only mild reluctance) made it clear that he would allow a continuance of the penalty phase (in the form of a gap between the guilt and penalty phases) if necessary, Mr. Watts never even attempted to secure the time he needed. Instead he announced that the defense did not intend to present any mental health testimony at the penalty phase, and he proceeded to present to the jury only a very superficial (and, as it turns out, affirmatively misleading) "benign conception" of Robards' family and upbringing [see Rompilla v. Beard, 545 U.S. 374, 391 (2005); Anderson v. Sirmons, 476 F.3d 1131, 1148 (10th Cir. 2007)], along with some positive character testimony from a personal training client and a couple of podmates at the jail. Only after the jury returned a 7-5 death recommendation did Mr. Watts learn the actual results (as opposed to a preliminary report indicating abnormalities) of the PET scan. As he admitted in the second Spencer hearing, he had no idea how good the PET scan evidence would be (23/3523). And only after the jury returned its 7-5 death recommendation did Mr. Watts even begin his consultation with the neuropharmacologist, Dr. Lipman, whose area of expertise related to the long-term effects of Robards' decades of anabolic steroid abuse and the short-term

effects of his withdrawal from steroids.

In assessing the degree of Robards' moral culpability, and whether the balance of the aggravating and mitigating factors demanded a death sentence or could be satisfied by life imprisonment without parole, the jury had no knowledge of Robards' organic brain damage (in three different areas of the brain as shown by the PET scan), his delusional thinking, the toxic effects of many years of steroid abuse, or the effects of withdrawal. This was not the product of an informed strategic decision by Mr. Watts; instead it amounted to an "abdication of advocacy" [see Harries v. Bell, 417 F.3d 631, 638-39 (6th Cir. 2005); State v. Lenkart, 262 P.3d 1, 8 and n.22 (Utah 2011)], and it resulted in an unreliable jury penalty proceeding and a fatally flawed 7-5 death recommendation, in violation of the Sixth, Eighth, and Fourteenth Amendments.

In Butler v. State, 2012 WL 2848844 (Fla., July 22, 2012), Mr. Watts established an unenviable "track record"[2] of failing to provide competent or zealous representation in jury death penalty proceedings. In contrast to Butler, or at least in contrast to the 4-3 majority's view in that case, the mitigating evidence which Mr. Watts was unprepared to present to the jury in the instant case was neither minor nor cumulative, and the jury's death recommendation was by a single vote margin (not 11-1 as in

[2] See Brooks v. State, 782 So.2d 879, 905 (Fla. 2000), in which this Court considered the prosecutor's "track record" of misconduct in closing argument, and found harmful error especially in light of the jury's 7-5 death recommendation.

Butler). This Court cannot determine with confidence that the presentation of mental mitigating evidence (or evidence of Robards' traumatic upbringing) would not have changed the outcome. Nor - - if this case were to be affirmed without prejudice to postconviction litigation of the ineffective assistance claim as the state suggests - - could the trial court properly make such a determination. Deficient performance and prejudice are palpable on the face of this record, and no good purpose would be served by delaying the inevitable.

B. Deficient Performance

The state's main argument as to the deficient performance prong is that Mr. Watts made a strategic decision not to present mental mitigating evidence to the jury (SB 44). The state makes essentially the same argument as to the prejudice prong, contending that Watts' "decision not to present mental mitigation evidence to the jury . . . was a sound strategic decision as the State would have elicited extremely damaging testimony from the mental health experts (as was done at the Spencer hearings)", as well as other rebuttal evidence such as the Frankie voice-mail phone messages and "more detailed information" regarding Robards' attempted escape from the Florida State Hospital (SB 45-46).

However, Florida and federal case law rejects the notion that a so-called "strategic" decision can be reasonable "when the attorney has failed to investigate his options and make a reasona-

ble choice between them." Rose v. State, 675 So.2d 567, 572-73 (Fla. 1996), quoting Horton v. Zant, 941 F.2d 1449,1462 (11th Cir. 1991). "The deference owed to counsel's strategic decisions is dependent upon the adequacy of the investigation underlying such decisions. . . . The question is not whether counsel's failure to call an expert witness was unreasonable, but whether the investigation supporting the decision not to call an expert witness was itself reasonable." Bucio v. Sutherland, 674 F.Supp 882,941 (S.D. Ohio 2009), citing Wiggins v. Smith, 539 U.S. 510, 521, 523 (2003). In other words, when there is reason to believe a capital defendant has significant mental health problems, counsel must first obtain mental evaluations and "then [make] the decision [whether] their presentation would be more harmful than helpful." Hurst v. State, 18 So.3d 975, 1012 (Fla. 2009)(emphasis supplied).

In the instant case, the record shows that no reasoned or informed strategic decision was made to forgo the presentation of mental mitigation to the jury; whether based on fear of rebuttal or anything else. See Douglas v. State, 2012 WL 16745 (Fla., Jan. 5, 2012), p.8-10. At the end of the second Spencer hearing Mr. Watts stated to Judge Bulone, "[W]hen 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" (23/3523). While Mr. Watts was now of the opinion that there "are compelling circumstances from the objective evidence that Mr. Robards suffers from extreme mental and emotional conditions that were present at the time of the

killing" (23/3519-20), none of the evidence of Robards' multiple areas of brain damage, or his delusional thinking, or the effects of anabolic steroids (or withdrawal therefrom) was presented to the jury. Why not? As Mr. Watts explained, "[W]e knew when we came on to this case that we wouldn't be able to marshal the mental health materials in time to present to the jury" (23/3520-21).

That is not a strategic decision based upon a constitutionally adequate investigation; it is at best a post-hoc rationalization [see, e.g. Wiggins v. Smith, 539 U.S. at 526-27] and at worst an abdication of advocacy [see, e.g. Harries v. Bell, 417 F.3d at 638-39]. Even after stating on the record at an April 16, 2010 pretrial hearing that he had reservations about being fully prepared for the penalty phase due to "some good mental mitigation that may have yet to be done that would require some more time" (SR 1233-34), Mr. Watts never requested additional time, even after the judge made it clear that he would grant it if necessary (see SR 1235-36). Instead, Watts went ahead with the jury penalty phase, presenting only very brief "good character" testimonials (some by videotape) from Robards' mother, sister, grandfather, an ex-girlfriend, a pre-school teacher, a personal training client, and two pod-mates from the jail. Then, after the jury recommended by the margin of a single vote that Robards be put to death, Mr. Watts was in the position of fighting an uphill battle the rest of the way. By the time he was finally able to marshal the mental health evidence to present at the second Spencer hearing (as well

as the evidence of Robards' traumatic childhood at the third Spencer hearing) he was faced with the formidable obstacle of overcoming a jury death recommendation to which the trial judge was required by law to accord great weight.

As Mr. Watts made clear on the record, his failure to present any evidence of mental mitigating circumstances to the jury was motivated not by informed strategy but simply by expediency. He put "respect to the system" over his duty of advocacy for and loyalty to his client, and that is why the jury heard nothing at all about what Mr. Watts himself considered "compelling circumstances from the objective evidence that Mr. Robards suffers from extreme mental and emotional conditions that were present at the time of the killing" (23/3519-20, 3523).

C. The State's Overlapping Strategy and Prejudice Arguments

The state also contends that Mr. Watts' conduct of the jury penalty phase resulted in no prejudice to Robards because presentation by the defense of mental mitigating evidence would have "opened the door" to certain areas of cross-examination of the defense experts or the introduction or rebuttal testimony [SB 45-46]. The state's prejudice argument thus overlaps with its "strategy" argument on the deficient performance prong:

> As the prosecutor noted when defense counsel indicated that he made the strategic decision not to present mental mitigation evidence to the jury, this was a sound strategic decision as the State would have elicited extremely damaging testimony from the mental health experts (as was done at the Spencer hearings). When Appellant presented Drs. Wu, Lipman, and Berland

> at the Spencer hearing, the prosecutor elicited testimony that Appellant's five ex-girlfriends were terrified of him and had obtained restraining orders against him. The State presented voice-mail phone messages Appellant left on a woman's phone that vividly represented his anger, rage, and "explosive discontrol." In addition to this prejudicial information, the presentation of any mental mitigating evidence to the jury would have resulted in the State being able to elicit further damaging testimony about Appellant's behavior. The State would have undoubtedly presented more detailed information regarding Appellant's escape attempt from the Florida State Hospital and, like was done during the competency hearings, would have presented evidence from mental health experts that Appellant was malingering and had an antisocial personality disorder.

[State's Answer Brief, p. 45-46]

The state's argument is wrong for a variety of reasons. First, Mr. Watts could not make an informed or "sound" strategic decision whether the presentation of mental mitigating evidence would be helpful or harmful until he knew what the mental mitigating evidence was. Hurst, 18 So.3d at 1012. He has already stated on the record that he had no idea how good the PET Scan evidence would turn out to be (23/3523), and "I had trepidation at the time of the Spencer Hearing that I wished I had it all to lay out to the jury or make the decision to lay out to the jury" (23/3521). When Mr. Watts acknowledged on the record that withholding the mental mitigating evidence from the jury was a potential strategy "but I didn't have the ability to make the complete decision at the time", Judge Bulone agreed "Right. You couldn't do it anyway . . .", but noted that he might have made the same decision even if he had been in a position to present the mental mitigation (23/3521-22). That is a classic example of post-hoc rationaliza-

tion of an attorney's conduct, which is not an acceptable substitute for an informed strategic choice based on a constitutionally adequate investigation. Wiggins v. Smith, 539 U.S. 510, 526-27 (2003).

An example of a true strategic decision as to whether or how to present mental mitigating evidence in the face of potentially damaging rebuttal evidence can be found in Sexton v. State, 997 So.2d 1073, 1082-85 (Fla. 2008). The existence of organic brain damage has been recognized as a significant mitigating factor in deciding whether a death sentence is appropriate in a particular case. Crook v. State, 813 So. 3d 68, 75 (Fla. 2002); see also Hurst v. State, supra, 18 So.3d at 1011; Larkins v. State, 739 So. 3d 90, 93 (Fla. 1999); DeAngelo v. State, 616 So.2d 440, 443 (Fla. 1993). In Sexton, trial counsel chose to focus on brain damage rather than other aspects of Sexton's mental condition for the following well thought out reason:

> Penalty phase counsel explained his theory of the defense was that Sexton had clearly demonstrable brain damage as was documented by the PET scan. The mental mitigation was channeled in this fashion because in his experience actual brain damage was usually a very persuasive mitigator. Also significant to counsel's decision was the fact that, prior to the first trial, Sexton was examined by Dr. Michael Maher, a forensic psychiatrist, who concluded that Sexton was a "sadistic sexual psychopath." [Trial counsel] Fraser explained that Dr. Maher said that Sexton's history of bizarre sexual and criminal behavior might in some way indicate a mental illness, but the details of that behavior would be so inflammatory to a jury that it would counteract any possible mitigation. Dr. Maher further informed Fraser by letter that he had "examined Mr. Sexton thoroughly with regard to possible mental health defenses and found none that would be even remotely possible." Fraser explained that Dr. Maher's description of Sexton as a sadistic sexual psychopath, if

> heard by the jury, would be “tantamount to stipulating to death.”

997 So.2d at 1083-84 (footnote omitted).

In addition, if Sexton’s attorney had put on additional mental health evidence it would have opened the door to extremely damaging rebuttal evidence from the state’s expert, Dr. Stein, which would have informed the jury, among other things, that Sexton had raped his sister-in-law and had sex with his own children.

Consequently, in the jury penalty phase, Sexton’s attorney chose to focus on actual brain damage as mental mitigation, and he presented two psychologists to testify about Sexton’s brain dysfunction, which was discovered after a PET scan was administered. The jury also heard substantial evidence of Sexton’s childhood and background, his low IQ, and his medical problems including multiple sclerosis. 997 So. 2d at 1077. [Contrast the instant case, in which Robards’ jury heard nothing about brain damage or the PET scan, nothing about any other mental health problems, and nothing much about his background other than some brief misleading snippets of testimony which enabled the prosecutor to argue inaccurately that he had a normal childhood with a loving family and he was not the victim of abuse or violence (20/3178-79, 3188; see 23/3505-06)].

In view of the initial unfavorable report which Sexton’s trial counsel received from Dr. Maher, and in view of the risk of opening the door to devastating rebuttal evidence if he went any

further, this Court found that counsel made an informed and reasonable strategic decision to focus on actual brain damage as statutory mental mitigation. Also, this Court found no deficiency by counsel "in any respect in investigating or presenting Sexton's childhood and background mitigation or mental mitigation." 997 So.2d at 1085.

The contrast between the trial attorney's conduct in Sexton and Mr. Watts' conduct in the instant case couldn't be clearer. If Watts had completed his investigation of mental mitigation - - and if he had even begun his investigation of the effects of Robards' decades-long steroid use - - he may or may not have chosen a similar strategy as Sexton's attorney chose. He might have limited his presentation of mental mitigation to actual brain damage, and introduced the results of the PET scan (showing three different areas of traumatic and/or toxic brain injury) and the explanatory testimony of Dr. Wu, without opening the door to the rebuttal evidence referred to in the state's brief. Or he might have concluded that the rebuttal evidence, while in some ways harmful, was nowhere near as devastating as the potential rebuttal evidence in Sexton or Wong v. Belmontes, __ U.S. __, 130 S.Ct. 383 (2009), and that some aspects of what Robards' ex-girlfriends told Dr. Berland might even be helpful in establishing the mental mitigating circumstances. See Part E of this reply brief. But, as Mr. Watts and Judge Bulone both acknowledged, at the time of the jury penalty phase Watts didn't have the ability to make a strategic decision of this kind. The only "decision" Watts made

about presenting mental mitigating evidence is that out of respect to the system he and co-counsel Hoffman had agreed to move forward as fast as they could, and he knew when he came on the case that he wouldn't be able to marshal the mental health materials in time to present to the jury. Despite his own opinion expressed at the second Spencer hearing that the evidence was compelling that Robards suffers from extreme mental or emotional conditions that were present at the time of the crime - - and despite his state-ment made in open court a month before trial the he was having reservations about being fully prepared for the penalty phase due to some good mental mitigation that had yet to be done - - Mr. Watts ended up presenting only a skeleton case in mitigation.

D. Prejudice (Mitigating Evidence)

To establish prejudice under Strickland in a capital penalty phase, a defendant must show that but for counsel's deficiency there is a reasonable probability that he would have received a different sentence. That standard does not require the defendant to show that counsel's deficient conduct "more likely than not" altered the outcome, but only that he establish a probability sufficient to undermine confidence in the outcome. Douglas v. State, 2012 WL 16745, p.5 (Fla., Jan. 5, 2012); Walker v. State, 2012 WL 1345408, p.3 (Fla., April 19, 2012); Porter v. McCollum ___ U.S. ___, 130 S.Ct 447, 455-56 (2009).

In Rompilla v. Beard, 545 U.S. 374, 392-93 (2005), where

trial counsel's deficient preparation resulted in the jury's never hearing the extensive mitigation (including organic brain damage and a terrible childhood), the United States Supreme Court applied the Strickland prejudice test, and held that Pennsylvania must either retry the case on penalty or stipulate to a life sentence:

> . . . [A]lthough we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Rompilla's] culpability," Wiggins v. Smith 539 U.S. at 538, 123 S.Ct 2527 (quoting Williams v. Taylor, 529 U.S., at 398, 120 S.Ct 1495), and the likelihood of a different result if the evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing, Strickland, 466 U.S., at 694, 104 S.Ct. 2052

Organic brain damage (which could have been introduced without opening the door to any of the potential rebuttal evidence which the state refers to in its brief) is a significant mitigating factor [see Sexton; Crook; Hurst] which would have materially altered the sentencing profile which was presented to the jury, and might well have influenced the jurors' appraisal of Robards' moral culpability for his actions. See Wiggins v. Smith, 539 U.S. at 538. At the very least, it could easily have persuaded one more juror that justice could be satisfied by a sentence of life imprisonment without parole, and that switch of a single vote would have resulted in a life recommendation which could not lawfully be overridden by the trial judge under the Tedder[3]

[3] Tedder v. State, 322 So.2d 908 (Fla. 1975)

standard.

If Mr. Watts had presented Dr. Lipman's and Dr. Berland's findings in addition to Dr. Wu and the PET scan results, it would have altered the sentencing profile even more. This Court "[has] recognized that severe mental disturbance is a mitigating factor of the most weighty order, and the failure to present it in the penalty phase may constitute prejudicial ineffectiveness." Hurst, 18 So.2d at 1014.

In the instant case, the mental mitigation which the jury never heard included Dr. Lipman's testimony that anabolic steroids can absolutely produce psychotic symptoms including paranoia, delusional thinking and visual hallucinations; that these psychotic symptoms would not necessarily subside when the drug is stopped; but, on top of that, withdrawal causes severe depression and agitation (21/3171-72, 3374-75). Regular use of steroids - - and Robards used them for two decades - - would permanently aggravate any existing brain injuries (21/3378-79). Nor did the jury hear Dr. Berland's testimony that Robards is psychotic; that his biologically-based mental illness revolves around delusional, paranoid thinking; that Robards' test results indicate "a substantial psychotic disturbance", and are consistent with the profiles of people whose mental illness is at least in part a result of brain injury; and that his family history suggests a genetic predisposition toward mental illness (22/3416, 3419, 3422-24, 3431). In Dr. Berland's opinion, Robards met the criteria for the two statutory mental mitigating circumstances; he was under

extreme mental or emotional disturbance at the time of the homicides, and his capacity to conform his conduct to the requirements of law was substantially impaired as a consequence of his mental illness (22/3433-37).

This Court's decisions indicate that whether trial counsel's failure to present mental mitigating evidence entitles a defendant to a new penalty phase depends in large part on whether "the additional mitigation is minor or cumulative" [Butler v. State, supra, 2012 WL 2848844, p. 23] or whether it is of such significance that its absence has resulted in an unreliable sentencing proceeding. Examples of the former include Butler; Tanzi v. State, 2012 WL 1345479 (Fla., April 19, 2012); Douglas v. State, 2012 WL 16745 (Fla., Jan. 5, 2012); Dufour v. State, 905 So.2d 42, 61 (Fla. 2005); and Atwater v. State, 788 S.2d 233, 234 (Fla. 2001), while examples of the latter include Hurst v. State, 18 So.3d 975, 1013-15 (Fla. 2009); Parker v. State, 3 So.3d 974, 983-86 (Fla. 2009); Blackwood v. State, 946 So.2d 960, 971-76 (Fla. 2006); Rose v. State, 675 So.3d 567 (Fla. 1996); Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995); and Phillips v. State, 608 So.2d 778 (Fla. 1992).

When the jury's death recommendation was unanimous or nearly unanimous, that is a factor which may tend to show a lack of prejudice, thought it is not conclusive on that question. See Butler (11-1 death recommendation; majority opinion concludes that there is no reasonable probability that the additional mitigating evidence, characterized as weak and largely cumulative, would have

convinced five jurors to change their votes from death to life imprisonment); see also Tanzi (unanimous death recommendation); Douglas (11-1). But see Hildwin (in view of substantial mental mitigating evidence, prejudice was shown notwithstanding unanimous death recommendation).

Conversely, when the jury's death recommendation was by a narrow margin, that indicates a likelihood that the mitigating evidence which was not presented to the jury may well have been enough to change the outcome. See Phillips, 608 So.2d at 783 (7-5 death recommendation; prejudice was found where strong mental mitigation was not presented to the jury; "The swaying of the vote of only one juror would have made a critical difference here. Accordingly, we find that there is a reasonable probability that but for counsel's deficient performance in failing to present mitigating evidence the vote of one juror would have been different, thereby changing the jury's vote to six to six and resulting in a recommendation of life reasonably supported by mitigating evidence"). See Outten v. Kearney, 464 F.3d 401, 422-23 (3rd Cir. 2006) ("Because the jury recommended death by the narrow margin of 7 to 5, persuading even one juror to vote for life imprisonment could have made all the difference. This without doubt satisfies Strickland's prejudice prong"); see also Parker v. State, supra (8-4); Walker v. State, 2012 WL 1345408 (Fla., April 19, 2012)(7-5). In Hawk v. State, 718 So.2d 159, 163 (Fla. 1998), a proportionality reversal, this Court noted that "four jurors voted for a life sentence despite the fact that the jury did not have the

benefit of Dr. Berland's testimony which was vastly mitigating", including brain damage, delusional thinking, and hallucinations.

While a 7-5 jury vote was not sufficient to establish prejudice in Stewart v. State, 37 So.3d 243, 253 (Fla. 2010), that is because this Court found that - - in contrast with cases like Phillips and Rose - - "Stewart's case, however, is not one in which the defendant nearly received a life recommendation despite defense counsel doing little investigation and wholly failing to present mental health mitigation in the penalty phase." In the instant case, in contrast, Robards' trial attorney wholly failed to present any mental health mitigation to the jury, and consequently the jury was not even instructed on the two statutory mental mitigators, nor was it able to consider brain damage as a nonstatutory mitigator. See Parker, 3 So.3d at 985 (experts found that Parker "has some type of neuropsychological impairment that affects his executive brain functions. This was never presented at the penalty phase and would qualify as nonstatutory mitigation"). Nor did the jury hear any evidence of Robards' traumatic childhood, his dysfunctional and paranoid family background, or the physical and emotional abuse he was subjected to by his older stepbrothers. See Porter v. McCollum, 588 U.S. ___, 130 S.Ct 447 (2009); Parker, 3 So.3d at 983-86. As in Porter, "there exists too much mitigating evidence that was not presented to now be ignored." Unlike the majority's view in Butler, the mental mitigating evidence which the jury did not hear in Robards' penalty phase was neither minor nor cumulative; it included three

different areas of traumatic and/or toxic brain injury, delusional and paranoid thinking, psychotic symptoms associated with anabolic steroid use, and the opinion expressed by Dr. Berland that Robards met the criteria for both statutory mental mitigating circumstances.

E. Prejudice (Potential Rebuttal Evidence)

The state argues, both as to strategy and prejudice, that the introduction of mental mitigating evidence would have "opened the door" to damaging rebuttal [SB 45-46]. As to strategy, both Douglas v. State, 2012 WL 16745 (Fla., Jan. 5, 2012), p. 8-10, and Mr. Watts' own admissions make it clear that no informed strategic decision was made. As to prejudice, it should first be re-emphasized that, at the very least, the results of the PET scan and Dr. Wu's explanatory testimony establishing Robards' brain damage could have been introduced without opening the door to any of the potential rebuttal evidence referred to by the state. Sexton. So could the evidence of Robards' traumatic childhood.

As for the testimony of Drs. Lipman and Berland, that would likely have opened the door to much of the cross-examination and rebuttal evidence cited by the state, but that counter-evidence was nowhere near as damaging as the state implies, and in some ways would actually have been helpful to substantiate Robards' mental health problems and to refute the state's "malingering" claims.

The state first observes that "[w]hen Appellant presented Drs. Wu, Lipman, and Berland at the Spencer hearing, the prosecutor elicited testimony that Appellant's five ex-girlfriends were terrified of him and had obtained restraining orders against him", and the same matters could have been brought out to the jury if the mental mitigation had been introduced then [SB 45]. While it is certainly true that the ex-girlfriends were afraid of Robards (22/3448-52), Dr. Berland testified on direct that that is why they were important people to interview in order to corroborate Robards' mental illness, and the fact that he was exhibiting psychotic and delusional behavior prior to the commission of the charged homicides. In Dr. Berland's experience "people who particularly do not like the person or are afraid of them" are often more reliable and more credible observers than relatives (who are motivated to help their family members) or co-workers (because most people hide their mental illness, and co-workers don't have enough intimate contact with them to have seen their symptoms in action). All seven lay witnesses interviewed by Dr. Berland (including five ex-girlfriends identified by name) described "prominent and commonly observed delusional paranoid beliefs by [Robards]" (22/3426, see 3427-28). Some of them observed mood disturbance, particularly episodes of depression, and some saw actions which were typical of someone who is experiencing auditory hallucinations (22/3426). Two of the girlfriends, Faye and Tara, identified significant worsening of Robards' symptoms after separate motorcycle accidents which resulted in

head impact. According to Faye, Robards' behavior changed dramatically; she used to have him around her kids, but afterwards he became so aggressive and difficult to deal with that she would no longer have him around the kids, and they soon broke up (22/3426-28). Tara described significant changes in Robards as well (22/3428). He displayed irrational jealousy (22/3451-52) and paranoid thinking. He believed that people were trying to set him up or kill him. He would put boards over the doors of his room to protect himself and whoever was with him from being shot at, and he would tear the room apart, convinced that someone had been there, even though "there was no evidence, according to the witness, that any of that was real" (22/3438).

So, on the one hand, the ex-girlfriends were afraid of Robards and that would have indicated to jurors that he was a scary guy. On the other hand, as Dr. Berland explained, the observations of these five women who were not motivated to help Robards in his court case, strongly corroborated that he was paranoid and delusional during the period of time preceding the homicides, and also colorfully illustrated the behavioral effects of Robards' head injuries, providing a real world component to the PET Scan evidence showing that he did in fact suffer from organic brain injury. Finally, the girlfriends' observations of Robards' increasingly bizarre thinking and behavior prior to the commission of the crimes strongly tends to refute the state's contention that Robards is not mentally ill at all, but merely a malingerer trying to delay the trial and avoid conviction and a death sentence [see

SB 46].

What else does the state claim on appeal that the introduction of mental mitigation before the jury would have opened the door to? "The State presented [in the Spencer hearing] voice mail messages Appellant left on a woman's phone that vividly represented his anger, rage, and 'explosive discontrol'" [SB 45]. However, the state fails to mention that after hearing the proffered voice messages (much of which were unintelligible, with the rest sounding like a Mel Gibson rant), the judge sustained the defense's relevancy objection (22/3405-07, 3411). If the state had tried to introduce the "Frankie" tape as purported rebuttal to mental mitigation in a jury penalty phase, it might well have been excludable under a 90.403 prejudice vs. probative value analysis (as well as simple relevancy), and in any event it in no way rebuts Robards' paranoia or his brain damage.

The state also says that it would have presented "more detailed" information regarding Robards' escape attempt from the Florida State Hospital, and evidence from the state experts who testified at the competency hearing that Robards was malingering and had an antisocial personality disorder [SB 46]. However, any additional "rebuttal" testimony regarding the escape attempt would have added little or nothing to the state's side of the sentencing calculus since the jury already knew the details of the escape attempt through the guilt-phase testimony of the security supervisor who discovered it (32/1126-37). And as far as malingering: (1) how do you malinger a PET scan?; (2) how do you explain the

ex-girlfriends' observations of delusional and paranoid thinking and behavior before the crime occurred?; (3) even the state's competency experts agreed that a person can be genuinely psychotic and still be capable of goal directed or uncooperative behavior (SR 496, 504; see SR 391-92); and (4) Dr. Berland's testimony that Robards has a strong desire not to be labeled as mentally ill (22/3418) was echoed by state competency expert Dr. Rothschild, who noted in 2007 that Robards does not believe he has a mental illness and was afraid "they're going to pump him full of Thorazine" (SR 195-196, see 229). [Dr. Rothschild also indicated that a diagnosis of antisocial personality disorder was considered in this case, but Robards did not meet the criteria due to his apparent lack of a conduct disorder as a child or adolescent (SR 190)].

All in all, the rebuttal evidence which the state says it would have introduced if Mr. Watts had presented any mental mitigating evidence (or any mental mitigating evidence beyond brain damage) was either weak, cumulative, irrelevant, unintelligible, or (in the case of the ex-girlfriends) in many ways helpful to the defense. It was nowhere near as damaging as the potential rebuttal evidence in Wong v. Belmontes, U.S. 130 S.Ct 383 (2009) or Douglas v. State, 2012 WL 16745 (each finding that the Strickland prejudice prong was not established), and not even as damaging as the potential rebuttal evidence in Williams v. Taylor, 529 U.S. 362 (2000) or Harries v. Bell, 417 F.3d 631, 640-41 (6th Cir. 2005)(both finding that the Strickland prejudice prong was estab-

lished notwithstanding the existence of "bad" rebuttal evidence). See also Wiggins v. Smith, 539 U.S. at 537 and Outten v. Kearney, 464 F.3d at 422, both discussing Williams v. Taylor.

In Wong v. Belmontes, (a decision relied on by this Court in Douglas, 2012 WL 16745, p. 11), the U.S. Supreme Court emphasized that:

> The challenge confronting Belmontes' lawyer . . . was very specific. Substantial evidence indicated that Belmontes had committed a prior murder, and the prosecution was eager to introduce that evidence during the penalty phase of the McConnell trial. The evidence of the prior murder was extensive, including eyewitness testimony, Belmontes' own admissions, and Belmontes' possession of the murder weapon and the same type of ammunition used to kill the victim.

130 S.Ct. at 385.

Under California evidentiary rules, the evidence of the prior murder was excludable from the state's penalty phase case in chief, but would come in as rebuttal if defense counsel opened the door. Belmontes' lawyer "understood the gravity of this aggravating evidence, and he built his mitigation strategy around the overwhelming need to exclude it", carefully structuring his mitigation witnesses and arguments to limit this possibility. 130 S.Ct. at 385.

In addressing the issue of prejudice under Strickland, the U.S. Supreme Court stated that it is necessary to consider all the relevant evidence the jury would have had if Belmontes' lawyer had pursued a different path; the additional mitigation which would have been presented, but also the evidence of the prior murder that almost certainly would have come in with it. 130 S.Ct. at

386. The Supreme Court began by analyzing the mitigating evidence which Belmontes' lawyer did present during the jury sentencing phase, and said "That evidence was substantial". 130 S.Ct. at 386-87. The attorney presented nine witnesses over a two day span, and elicited a range of testimony on Belmontes' behalf, including his "terrible" childhood in a "chicken coop" of a one-bedroom house, with an alcoholic and extremely abusive father, and the tragic deaths of his grandmother and baby sister.

The Ninth Circuit Court of Appeals, in Belmontes' federal habeas corpus appeal, concluded that trial lawyer should have introduced more mitigating evidence to "humanize" Belmontes, including expert testimony "to make connections between the various themes in the mitigation case and explain to the jury how they could have contributed to Belmontes' involvement in criminal activity." The Ninth Circuit further found that the lawyer's failure to put on this evidence prejudiced Belmontes. The United States Supreme Court disagreed:

> There are two problems with [the Ninth Circuit's] conclusion: Some of the evidence was merely cumulative of the humanizing evidence Schick [the trial lawyer] actually presented; adding it to what was already there would have made little difference. Other evidence proposed by the Ninth Circuit would have put into play aspects of Belmontes' character that would have triggered admission of the powerful Howard [prior murder] evidence in rebuttal. This evidence would have made a difference, but in the wrong direction for Belmontes. In either event, Belmontes cannot establish Strickland prejudice.

130 S.Ct. at 387-88.

Emphasizing that trial counsel "did put on substantial

mitigating evidence, much of it targeting the same "humanizing" theme the Ninth Circuit highlighted, the Supreme Court said the sentencing jury was well acquainted with Belmontes' background and potential humanizing features, and "[a]dditional evidence on these points would have offered an insignificant benefit, if any at all." 130 S.Ct. at 388. And as far as expert testimony explaining the "humanizing" evidence, the Supreme Court wrote, "the body of mitigating evidence that the Ninth Circuit would have required [trial counsel] to present was neither complex nor technical. It required only that the jury make logical connections of the kind a layperson is well equipped to make. The jury simply did not need expert testimony to understand "humanizing" evidence; it could use its common sense or own sense of mercy." 130 S.Ct. at 388.

The prejudice analysis in the instant case is the opposite of Wong v. Belmontes in every respect. (1) The evidence which counsel did present to the jury was substantial in Belmontes, while in the instant case it was sparse, superficial, and even (with regard to Robards' childhood) misleading. (2) The mitigating evidence which was not presented in Belmontes was the result of a sound strategic decision, while in the instant case counsel simply decided to move the case forward as quickly as possible even though he had not completed his mitigation investigation. (3) The mitigating evidence which was not presented in Belmontes was largely cumulative, while in the instant case no evidence of mental mitigating circumstances was presented to the jury. (4) Expert testimony was unnecessary in Belmontes because the "human-

izing" evidence was neither complex nor technical, while in the instant case the unpresented mitigating evidence included a PET Scan showing three areas of brain injury, a neuropharmacologist who would have explained to the jury that the long term use of anabolic steroids can cause psychotic delusions and permanently aggravate any brain injuries, and a forensic psychologist who would have expressed to the jury his opinion that Robards met the criteria for both statutory mental mitigators. (5) The potential rebuttal in Belmontes, when added to the sentencing calculus, would have been absolutely devastating, while much of the rebuttal evidence cited by the state in the instant case was weak (malingering), cumulative (escape attempt), of doubtful relevance or admissibility ("Frankie" tape), or even helpful to substantiate Robards' mental illness, and the fact that it pre-existed any plausible motive to fabricate (ex-girlfriends). (6) In the instant case, unlike Belmontes, a significant portion of the unpresented mitigating evidence (actual brain damage) could have been introduced without opening the door to any of the rebuttal evidence referred to by the state. On the issue of prejudice this case is similar to Porter v. McCollum, ___ U.S. ___, 130 S.Ct. 447 (2009) and nothing at all like Wong v. Belmontes.

F. Conclusion

The remedy, when deficient performance and prejudice are established by the record, is "a new penalty phase proceeding

where a jury is presented with the available mitigating evidence and weighs it in the sentencing calculus." Parker v. State, 3 So.3d at 986; see Blackwood v. State, 946 So.2d at 976. This can happen sooner or it can happen later, but the State of Florida cannot execute Richard Robards unless and until he is afforded a reliable jury penalty proceeding with the assistance of competent and loyal counsel; anything less violates the Sixth and Eighth Amendments. Since it is glaringly apparent on this record that Robards did not receive effective representation, and since there is more than a reasonable probability that the outcome would have been different if he had received effective representation, there is no good reason for this Court to require him to file a postconviction claim, thereby "generat[ing] years of unnecessary litigation . . . [which] would lead to the entirely avoidable expenditure of additional time and resources." Sims v. State, 998 So.2d 494, 502 (Fla. 2008). This Court can afford relief on direct appeal, and should exercise its discretion to do so.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Assistant Attorney General Stephen D. Ake, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of August, 2012.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

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