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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

STEVEN L. BOLOTIN
Assistant Public Defender
FLORIDA BAR NUMBER O236365

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

A. Pretrial

Appellant, RICHARD TODD ROBARDS, was charged by indictment in Pinellas County with first degree murder of Linda Deluca (Count One) and Frank Deluca (Count Two). Appellant was a personal trainer and the Delucas - - a married couple age 59 and 60 - - were clients whom he had trained in their home. The prosecution theory was that appellant had entered the Delucas' Clearwater residence on July 31 or August 1, 2006 with the intention of stealing a safe which was kept in a spare bedroom, and during the course of events stabbed the Delucas to death (1/12-13,see 3-6).

The defense filed a suggestion of incompetency to proceed (1/14-16), and a competency hearing was held on August 10, 2007. Dr. Robert Berland, a forensic psychologist, expressed the opinion that appellant suffers from "a biologically determined mental illness, a psychotic disturbance" involving hallucinations, mood disturbance, and delusional paranoid thinking (SR104-05,see 106-09,117). Dr. Michael Maher, a clinical and forensic psychiatrist, concluded that "there is substantial evidence that [appellant] suffers from a delusional disorder of a chronic nature which includes chronic symptoms of psychosis and irrational thinking processes" (SR157-58) Both Dr. Berland and Dr. Maher believed that brain injury as a result of a series of head traumas, and abuse of anabolic steroids, were significant causative factors in appellant's psychotic mental state (SR107-08,159-60). While Berland and Maher both acknowledged that appellant is manipulative and has

sociopathic attributes (which are not inconsistent with the underlying psychosis) (SR149,151,164), both doctors were also of the opinion that appellant was presently incompetent to stand trial due to his mental illness (SR116-19,151,158-161). Dr. Maher believed that appellant "is likely to require specific court order or other forced treatment of medications in order to address his illness, and I suspect he will consistently and stubbornly resist treatment" (SR162). Dr. Maher thought it was likely that appellant's competency could be restored (at least to the realistic and genuine satisfaction of some examiners) by using medications, though it was somewhat speculative how much his underlying mental state would improve (SR162).

Drs. Berland and Maher were asked about appellant's belief (shared by organized fringe groups) that he is a "sovereign man" and therefore not subject to the jurisdiction of the court. Dr. Berland replied, "I would be more concerned with whether it was solely the result of his mental illness or in part the result of manipulativeness"; the existence of a large group that shares these beliefs does not necessarily mean that they aren't mentally ill beliefs "either in all cases or certainly in his case" (SR119-20). Dr. Maher was asked whether appellant's pro se filings on the issue of sovereignty could be interpreted as litigiousness; he replied, "well, that and a good dose of mania, which is what you see as a by-product of psychosis related to steroids. They may become paranoids and they become manics most commonly" (SR147). The hyper-religious themes, including being visited in his cell by Yahweh and "Yeshiva" (sic)[this may be an error by counsel or the

court reporter; appellant may have been referring to Yeshua, a Hebrew name for Jesus] “at least [raise] the possibility of some sort of visual and auditory hallucinations” (SR147).

Dr. Berland and Dr. Maher were each asked on cross about appellant’s efforts to obtain a private attorney to represent him, in the “unlikely prospect” (as Berland put it) that his mother could raise the needed funds (SR137-38,168,171-72).

> MR. SCHAUB (prosecutor): And are you aware that in this particular case he has attempted to do everything possible, whether it’s unrealistic or not, but he’s done everything possible to get his mom motivated to raise money to hire a private lawyer?
>
> DR. MAHER: I am aware of that.
>
> Q: Okay. Don’t you think then he understands at least in his mind that he needs the biggest - - and we’re talking about - - we’re talking about in this case Barry Cohen, John Fitzgibbons, Mr. Kuske - - that he believes that in order to do well in this adversarial process you have to spend money and have a hired gun to represent you?
>
> A: Yes, I think he believes that.
>
> Q: Okay. That’s not an unfair belief it you listen to the media, correct?
>
> A: I wouldn’t consider that an unfair or irrational belief. (SR171-72)

Dr. Darren Rothschild, a forensic psychiatrist, was court-appointed and called by the state (SR179-81). Dr. Rothschild acknowledged that appellant had some paranoid thoughts, and there was “some possibility that...he’s psychotic or he’s delusional, but I can’t say that with certainty” (SR202). Dr. Rothschild suspected that appellant was competent to stand trial, but he could not reach that conclusion with reasonable medical certainty (SR181,211,230-32). Appellant was largely uncommunicative with Dr.

Rothschild, threatening him with a trademark violation if he used his given name, and insisting that he instead be called “secured party creditor” (SR183,191-92,204-05,226). Appellant espoused an extreme separatist, anti-government, anti-tax, evangelical Christian-based ideology (SR184-89). After listening to audiotapes in which appellant urged his mother to read materials on a website promoting those views, Dr. Rothschild obtained a document called “The Redemption Manual”; essentially a “how-to” guide for implementing their beliefs (SR184-85,188,249;see14/2198-2314,2316).

While appellant was preoccupied by his separatist ideology, Dr. Rothschild did not think his beliefs were delusional, but more likely a perceived way to deal with his legal problems (SR208, 210). According to the doctor, appellant wanted a high-powered private attorney “who would spend a lot of money on experts and try and prove he didn’t do this”, and when that wasn’t forthcoming “is when he diverted towards this redemption process” (SR209,see 184,206-09). Appellant was contemptuous and angry toward his public defenders; he provided them with a document which “disavowed him from any involvement or affiliations with” the United States, Florida, and Pinellas County governments as well as the State Attorney, Public Defender, and judges (SR184).

Appellant’s mother provided some limited background information from his childhood; he was picked on and bullied by his older half-brothers, and then he got involved with bodybuilding and steroids (SR189-90). His mother also talked about his having sustained multiple head injuries, most recently in 2003, but she did not observe any major behavioral changes following those

injuries (SR190)

Dr. Rothschild testified that appellant's defense attorneys had raised the question of mental illness with him, and appellant made it very clear that he does not believe he is mentally ill; he does not want to be "found crazy"; and above all he does not want to be medicated; "He's afraid they're going to pump him full of Thorazine" (SR195-96,213,229). Appellant "personally is not bothered by any of the purported things that people think he has in terms of delusional thinking or hallucinations" (SR196). His only complaints to physicians in the jail were of sleeplessness and depression; he never reported hearing voices nor made any outlandish claims (SR196). However, Dr. Rothschild wanted to make it clear that "when someone says they're not mentally ill doesn't mean that they're not - - people with delusions [or] psychosis often have no insight into the fact that they're psychotic or delusional" (SR196).

The trial judge, Joseph A. Bulone, found appellant incompetent to proceed due to his mental illness, and committed him for mental health treatment. (1/93-95;see SR 274).

Six months later the state hospital reported that appellant was now competent to proceed and no longer met the criteria for continued involuntary commitment (SR274). On April 10, May 8, and May 16, 2008 a trifurcated competency hearing was held. Kimberly McCollum, a psychological resident[1] at the hospital, made the determination (in combination with her supervisor Dr. D'Agostino)

[1] Ms. McCollum had completed the requirements for a doctorate but had not yet received the degree (SR348,386).

that appellant was malingering and he was competent to stand trial (SR345-49,367-72,382-83,389,422-23,425). This conclusion was based in part on appellant's escape attempt (in which he enlisted the aid of a hospital employee), and the fact that he was uncooperative, or selectively uncooperative, with the staff (SR355-68). Appellant would attend weightlifting class, work out in his room, and interact appropriately with other patients, but he didn't want to talk about his charges or communicate with the treatment team (SR355-62,368,370-71,382). He deflected inquiries by making what Ms. McCollum considered vague statements about God and sovereignty (SR351,353,391,424).

Neither she nor the hospital psychiatrists observed any overt psychosis, hallucinations, or delusional ideation on appellant's part, so they concluded that medication was unnecessary and unwarranted (SR383,390-91). Ms. McCollum was asked on cross whether psychotic individuals always demonstrate overt psychosis; she answered. "No. there can be psychosis occurring that is not observable" (SR390,see 392). Moreover, a person can have a bona fide Axis I diagnosis and still engage in malingering or manipulative behavior (SR391-92).

Just before the second segment of the hearing on May 8 appellant started singing "Amazing Grace", and continued to do so after being asked - - then ordered on threat of being gagged - - to stop. He was removed from the courtroom and "the bailiffs have informed me that they have put a mask on the defendant which is really designed to prevent...biting or spitting, and it's not really designed to prevent singing, and I've been told that he is

still singing back there with the mask." The hearing commenced with appellant in the mask, but it was removed after half an hour without further incident (SR447-49,454-55,462,482;see SR1022; 23/3603-04,3631-36).

Doctor Jill Poorman was the Adult Court Psychologist in the Pinellas County Criminal Justice Center (SR464). Dr. Poorman attempted unsuccessfully to evaluate appellant, who was upset with her because she wouldn't acknowledge whether or not she was a believer; he wouldn't talk to her if she wasn't a believer (SR469,494-95). She spent about five minutes with him and most of what he said was about Jesus (SR470,495).

Dr. Poorman reviewed the reports from the state hospital, and based on that and her own observations she formed the opinion that appellant was malingering, and that he was competent if he chose to be (SR471-72,480-484-85). In reaching this conclusion she found the reported escape attempt significant, as was appellant's participation in weight training and his interaction with staff (SR471-77,496-502,507-08). She noted that no psychotropic medications were prescribed for appellant, either in the hospital or the county jail, because the doctors there had concluded that he was not psychotic (SR4787-78,500,508). Dr. Poorman was aware of appellant's long-term steroid abuse, which can have permanent effects and can contribute to mental illness (SR477-78,487-88). Also, head injuries (which she was also satisfied had happened to appellant) can cause mental problems, and in fact is one of the main causes (SR488). It was fair to say that appellant was religiously preoccupied, which is "absolutely" sometimes seen with

people that are mentally ill (SR495-96). Dr. Poorman acknowledged that people who are genuinely psychotic do not necessarily look psychotic to the naked eye (SR496). Also, a person can be genuinely psychotic and still engage in goal-directed behavior, including exaggeration of symptoms (SR496,504). However, when asked by state hospital staff, appellant denied having any hallucinations and denied hearing voices (SR496).

Dr. Robert Berland (who had expressed the opinion in the 2007 competency hearing that appellant was psychotic, delusional, and incompetent to stand trial) interviewed two lay witnesses during the intervening months "just to confirm that his mental illness has a genuine basis" (SR521). While neither of them observed any hallucinations, both "gave me very clear descriptions of actions and statements by [appellant] that indicated delusional paranoid thinking" (SR521). [Both of these witnesses hated appellant and did not want to say anything that would help him, but their answers to Dr. Berland's questions revealed "a variety of paranoid delusional beliefs on [appellant's] part" (SR569)]. It was also significant in terms of brain functioning and mental illness that the witnesses talked about appellant's extensive drug use, including steroids, amphetamines, and pain killers (SR521). Research has shown that anabolic steroids and amphetamines each can cause permanent changes in the brain which can be associated with delusional paranoid thinking (SR521-22). Moreover, steroid use can exacerbate any pre-existing brain damage from head trauma (SR522). Appellant also had a blunted affect, which is a typical accompaniment to psychosis, and he displayed religious preoccupation

(SR550-57). It can be difficult to distinguish between someone who is just sincerely and extremely religious and someone who is mentally ill and experiencing religious delusions, but Dr. Berland thought that some of appellant's stated beliefs (such as that God's plan included him getting a murder charge and sitting in jail so he would have time to read the Bible forward and backward) were a sign of his irrationality (SR551-54). Based on all of these factors as well as the psychological testing he'd done earlier, it continued to be Dr. Berland's opinion that appellant "has a genuine biological mental illness regardless of whatever manipulations he might make subsequent to that" (SR568-69). "[O]nce you have that kind of mental illness, you basically have it for life"; it may wax and wane some, or be temporarily brought under control with medication, but it doesn't go away (SR569).

As was acknowledged by Ms. McCollum and Dr. Poorman (SR391-92,504), Dr. Berland explained "[m]entally ill people can be very manipulative. There is no incompatibility there" (SR554-55). He agreed with the state's experts that appellant was an exaggerator but disagreed that he was a malingerer. For example, there were some exaggerated behaviors (such as the singing) which Dr. Berland thought appellant had to ability to control, but "I don't think it precludes the fact that underneath that disingenuous behavior is some genuine craziness" (SR548).

Dr. Berland was of the opinion that the same mental illness which led him to believe that appellant was incompetent before he went to the hospital was still present, and since "there's been nothing done to change that" he remained incompetent to proceed

(SR567,570). When he gave his opinion in 2007, Dr. Berland believed (and he continued to believe) that appellant could be restored to competency if his delusional thinking were brought under control by psychotropic medication (SR 522-24,546-47,570). In his experience, you cannot talk somebody out of delusional thinking (SR524,546-47). It is not unusual for the state hospital to force an involuntarily committed patient to take medication if he refuses to do it willingly (SR527-28,570). In this case, the doctors and staff at the state hospital concluded (incorrectly in Dr. Berland's opinion) that appellant was not psychotic, and therefore no medications were prescribed or given (SR525,545,574). The failure to medicate appellant was, in Berland's view, "the primary contributing factor" to his continued incompetence to proceed" (SR546). Moreover, medication would have been diagnostic as well as therapeutic; it would have shed light on the question of whether he was psychotic, delusional, and manipulative (as Berland believed) or whether he was entirely faking. If he responded favorably to psychotropic medication that would strongly tend to confirm that he had a genuine mental illness. Conversely, "[r]egular people who are given even minuscule doses of antipsychotic medication are laid out flat by them" (SR561-62).

Judge Bulone, based on the testimony of Ms. McCollum and Dr. Poorman, found that appellant was competent to stand trial (SR634-39;1/105). At the same time, the Public Defender was allowed to withdraw as counsel, based on conflict of interest due to his representation of several potential witnesses (including Shane Harper, who became a key state witness at trial)(1/104;2/106-

08;SR639-44,648-49,657,662). Regional conflict counsel (John Thor White and Stephen Fisher) were then appointed (1/104;2/109; SR648,748). Judge Bulone commented to Mr. White, "So, obviously you're going to have to deal with [appellant's] mental health issues for the potential of a penalty phase" (SR664, see 665).

On October 2, 2008, appellant (as he had done all along and continued to do thereafter) asserted that he was a sovereign private man and challenged the trial court's jurisdiction (and attempted to fire him)(SR712-14,718). Appellant also requested removal of his appointed attorney on the ground that "[h]e's ineffective and refuses to represent me in my private capacity" (SR714-15). After a Nelson inquiry, the judge ruled that Mr. White was providing competent representation and would remain on the case (SR714-18). Two months later, Mr. White moved to withdraw on the ground that appellant's insistence on his sovereignty claim had become "a total barrier to productive attorney-client communications" (3/304-05;see SR749, 756-59). The trial judge denied this motion as well (3/304;SR765). On February 20, 2009, appellant (claiming that it was counsel who was refusing to represent him in any capacity) requested again to dismiss counsel, and to allow self-representation; "[Mr. White] refuses to communicate with me, so...I'm being forced under the Hobson's choice to proceed pro se" (4/489-90, see 499-500). The judge conducted another brief Nelson hearing (4/506-10,see 600-01)[2] and a Faretta inquiry (4/490-

[2] Nelson v. State, 274 So.2d 256 (Fla. 4th DCA 1973), approved in Hardwick v. State, 521 So.2d 1071,1074-75 (Fla. 1988).

98,510-37).[3] Although appellant indicated that he would prefer a different lawyer and felt like he was being forced to go pro se, he also stated unequivocally that he chose to represent himself if the only alternative was Mr. White (4/510,534-35,585,600,603,630-31).

The judge appointed Dr. Poorman to assist him in determining whether appellant was mentally competent to decide to waive counsel (as opposed to whether he had the ability to conduct an adequate defense, which the judge recognized is not the proper inquiry)(4/544-48,575-77,603-05,611). Based on Dr. Poorman's testimony, Judge Bulone ruled that appellant does not suffer from a mental illness and was therefore competent to make a knowing and intelligent waiver of his right to counsel (4/569,612-18,631). Self-representation was granted, and Mr. White and Mr. Fisher were appointed over appellant's objection as standby counsel (4/569,631-33).

From February to December 2009 appellant was his own attorney. On December 4 a notice of appearance was filed by a Brooksville private lawyer, Larry Hoffman (7/229;SR1095). Appellant's mother had borrowed $10,000 in order to hire him (7/1229;SR1150-51,1189,1200-01). Since that was all the money that was likely to be forthcoming, Mr. Hoffman requested that Richard Watts, a St. Petersburg lawyer, be appointed at public expense to handle the penalty phase (7/1232,1256;SR1095-96,1101,1109,see 1159). Mr. Hoffman told Judge Bulone "[A]t this point we're ready to go on the 16th of March trial date", and that he had called the prosecu-

[3] Faretta v. California, 422 U.S. 806 (1975).

tor who “indicated that he would not be totally opposed to a little continuance if we need to” (SR1096). The judge said, “[W]hatever trial date we have, whether it’s March the 16th or whether it’s a couple weeks after that, we’re going to have a trial on that day. Now I realize you’re just on it, but we all have to realize that this is an ’06 case, and there have been a lot of different variables in this case which has - -”

> MR. SCHAUB (prosecutor): I have seen Mr. Watts prepare for a trial overnight.
>
> THE COURT: Yeah.
>
> MR. HOFFMAN: That’s why I want him.

(SR1101-02)

The Justice Administration Commission (JAC) promptly objected to the proposed appointment of Mr. Watts, contending that there is no statutory authority for the appointment of co-counsel at public expense where a capital defendant has retained private counsel (7/1252-55;SR1121-31,1148-54). After telephonic hearings on January 14 and 21, 2010, in which Mr. Watts participated, the Chief Judge (J. Thomas McGrady) decided instead to appoint regional counsel to handle the penalty phase, although John Thor White (who had been standby counsel up to this point) made it clear that he did not want to be appointed (7/1257;SR1151-54, see 1121-31,1148-51). A week later, regional counsel moved to withdraw based on conflict of interest (8/1309). The motion was granted and Richard Watts was appointed on January 28 (8/1310;SR1159).

On February 5, 2010, Mr. Hoffman requested a two month continuance of the trial until the week of May 17. The prosecutor

did not object but noted that the Deluca family members would like to have the case tried. The judge observed that this was a potential death penalty case, “[a]nd as far as all the continuances... this is an ’06 case and he was declared to be incompetent for a while. But if we’re careful on the front end, it can save a whole lot of anxiety and time on the back end.” “So it seems like a legitimate request under all the circumstances, but we really have to be ready on that day” (SR1169-71). Judge Bulone confirmed that Mr. Watts was appointed as second chair to help out on the penalty phase (SR1171-72). The judge asked counsel if they had any idea how much mitigation there might be in terms of number of witnesses and length of presentation. Mr. Hoffman said from his experience it would be three quarters of a day at most, “so if we start at 10:00 in the morning, we’re done by the end of the day” (SR1172-73).

Meanwhile, the JAC continued to object to paying Richard Watts, and Mr. Watts moved to withdraw if he was not going to be paid (8/1234-26,1346;SR1181-92,1198-1201). Mr. Watts pointed out to the Chief Judge that he was not financially equipped to handle the case pro bono, “[a]nd it’s set for trial and it’s an old case and I know the court is - - the trial court’s anxious to get it done, so I put it on the calendar without thinking it all the way through” (SR1182-83). Mr. Watts further stated, “...I don’t want to leave the case without the preparation stages. We need a mitigation expert. We need a mental health expert however the case is going to proceed.” (SR1188). Mr. Watts argued that constitutional standards of equal protection and effective assistance of

counsel required a death-qualified lawyer such as himself (SR1199). Chief Judge McGrady agreed, noting that there is a saying that death is different, "[a]nd having competent, death-qualified counsel, particularly for the penalty phase" is in the best interest of society and something that is constitutionally required or at least implied" (SR1201). Accordingly, on February 25, 2010, the issue of compensation was resolved in Mr. Watts' favor, and the JAC was required to pay his fees under the prevailing standards (SR1201, see 8/1376). [Ultimately, after sentencing, the Chief Judge approved Mr. Watts' fee request of $62,760 (more than quadruple the standard JAC rate), based in part on Watts' "extraordinary and unusual" efforts with regard to the various mental health experts in three different Spencer hearings (SR1435, see 1431-36)].

In a status hearing on March 12, 2010, the judge said the trial was set for May 18, and asked if everyone thought that was going to be enough time. Mr. Watts said "Yes, sir" (SR1218).

But by the time of the next status check on April 16 - - a month before the scheduled trial - - Mr. Watts wasn't so sure; "...I am having some reservations about being fully prepared for the penalty phase" based on discussions with the Public Defender's Office "about some good mental mitigation that may have yet to be done that would require some more time" (SR1233-34). When he had advised the prosecutor of this development, "[t]he response that Mr. Schaub had was maybe we would make a gap between Phase One and Phase Two. I prefer not to do that. But I'd also - - and tell the Court that we want to try the case as scheduled, and that's our

goal or we wouldn't be manufacturing anything" (SR1234). Mr. Watts said he would keep the judge posted. Judge Bulone replied:

> Well, if there is anything the Court can do to help move things along, let me know. We are going to at least have the guilt phase on the date that it is scheduled. I believe that this is an '06 case, and obviously we need to move things along. I agree with the Defense that it is much preferable to have the penalty phase, if there is one, immediately thereafter as opposed to having a gap. So please do whatever you can do to make sure you are ready which I am sure that you are doing. And if you need any assistance at all from the Court, I am more than wiling to help out there. (SR1235)

Mr. Watts said he appreciated the offer of assistance "and we'll work together to get it done" (SR1235). The judge said he was "going to assume that everything is a go" and that the penalty phase would follow right after the guilt phase "unless you come in and tell me differently" (SR1236). Mr. Watts replied, "Fair enough, Judge" (SR1236).

On April 21, Mr. Watts filed a motion to approve neuropsychiatric testing, asserting that appellant "was rendered unconscious in two separate motor vehicle accidents and is believed to have suffered traumatic brain injury" and that PET/CAT or similar diagnostic testing was necessary to determine the extent of the damage for possible mitigation (8/1430; see SR1245-46). Counsel also sought funding for a neuropsychiatrist. Dr. Maher would arrange the testing, and the results would be interpreted by Dr. Wu from California, within the allotted time frame if possible (8/1430,SR1246-48). The judge granted the motion and ordered a $5000 cap (per test) for the PET/CAT scan and an $8000 cap for Dr. Maher (8/1433;SR1250). [A motion to modify this order was served

on May 18 (the first day of trial) and filed on May 24 (the day before the penalty phase), stating that other qualified experts than Dr. Maher may be required to interpret the PET/CAT test results. Counsel did not ask to increase the cap, only that the total might include more than one expert (9/1529;see SR1279-80,11-1830)].

On May 14, four days before jury selection began, Mr. Watts requested disclosure of the aggravating circumstances, and "since I'm asking to have the State give us their aggravators, I went ahead and listed our non-mental health mitigators. We don't intend at this moment to present any mental health mitigation in phase two" (9/1493,see 1480). Mr. Watts reiterated "we're waiving - - at least presently we don't have any mental health that we intend to present in phase two." (9/1496). Instead, he would present nonstatutory factors of family background, employment, good Pinellas County jail record, and religious practices (9/1480,1496). When the judge said he would not be precluded from adding other mitigators if they came up, Mr. Watts said:

> And in that vein, Judge, we just had a PET/CAT scan for possible brain damage. Again, we know that we're coming into this, but we don't have those results yet. We'll have them before phase two. And we will certainly tell the State if we're going anywhere. (9/1497)

B. Trial – Guilt Phase

The evidence presented by the state is summarized as follows: The bodies of Frank and Linda Deluca, a married couple age 60 and 59, were found by a neighbor in their Clearwater residence on August 2, 2006. An autopsy later established that both had died of

multiple sharp force injuries. Frank had sustained five stab wounds, as well as defensive wounds to his left hand. Linda had sustained three stab wounds and an incised wound across her neck. The injuries were consistent with having been inflicted with a knife, although no knife connected to the homicides was recovered. (27/395-401,414-16,422,431-32,468-71;28/560-82;29/608-24;32/1186).

A fire had been set in the house, using a flammable fluid as an accelerant. However, because the windows and doors were closed, the fire eventually was snuffed out for lack of oxygen. At the end of the hallway, right next to the office where the bodies were discovered, there was a pile of burnt newspapers (dated August 1) and cloth towels. (27/413-17;420-23,468;28/521-46,547-50,559; 29/641-43).

It was obvious to investigators early on that an item - - a large antique safe which the Delucas' kept in the spare (south-east) bedroom - - was missing from the house. (27/402,476-77;29/675,697-98). According to their son Chris Deluca, Frank was "an entrepreneur of sorts" and had recently "flipped" (bought, fixed, and resold) the house next door. When Chris was in high school, Frank had done some time for selling marijuana out of the house. Linda and Chris had both been aware of this activity. (28/502;29/696,714-15,718-19).

In the spare bedroom investigators found another piece of newspaper (from the July 31 St. Petersburg Times). Three finger-prints were obtained from this newspaper, and were matched to appellant. (27/483;28/506;29/645-52,665-70,673-74).

Appellant was a personal trainer who had been hired by the

Delucas to teach them how to exercise in their home and to work with them on their health issues. Chris believed that it had been at least six months before their deaths since appellant had last trained them. However, Chris himself had moved out of the house in May, and after that he came over to visit only about once a week. (29/674,703-10,718;30/873).

Investigators learned that appellant was renting storage facilities in Largo. After reviewing images from the surveillance camera located at the entrance, which showed a vehicle associated with appellant coming and going, they obtained a search warrant. A high powered scope rifle was found, which Chris Deluca identified as belonging to himself. The rifle was kept in his parents' bedroom next to the night table. According to Chris, the rifle had sentimental value and his father would never have sold it or given it away. (29/674-85,701-05,708,715,720).

On or about August 8, 2006, a city of Clearwater sanitation employee was watching a truck dump out a load of recyclable cardboard when he saw what appeared to be a wallet falling out of a purse. He picked these items up and saw that they contained identification and credit cards. Somebody recognized the name Linda Deluca as being a homicide victim, so the police were called and the items were turned over to them. (29/729-32,30/769-79).

Later a detective returned to search the recycling bin. In the area near where the purse had been found, she found an extra-large Dimmitt Auto T-shirt, which she believed had evidentiary value because appellant had worked as a detailer for Dimmitt for about a month from late May until late June of 2006. (30/784-

89,798-802). [Later in the investigation four extra-large Dimmitt T-shirts were found in the trunk of appellant's car and one in his motel room at the Motel 6 (where he stayed from August 6-8, 2006). (31/1032-35,1039-43,1049-50)].

Fingernail clippings from Frank Deluca were collected and analyzed. Clippings from nine fingers were packaged together, so the FDLE analyst (Esposito) could not differentiate what came from which fingers. [Clippings from one finger were packaged separately, but the profile from that one was not a mixture, and it was consistent with Frank Deluca's own DNA]. From the nail clippings which were combined, Esposito found a DNA mixture. This "can make it more difficult to determine who could or could not be a contributor to that mixture." (31/1080). The mixed DNA from Frank's clippings enabled Esposito to determine that appellant and Linda Deluca "are included as possible contributors to the mixture" at 9 of the 13 loci. (31/1082). The statistics on this mixture for unrelated individuals would be 1 in 860 Caucasions, 1 in 1900 African-Americans, or 1 in 760 Southeast Hispanics. (31/1083). According to Esposito, there is no way to tell how many contributors might be present in a mixture; all he could say here is that there were at least two. (29/653-55;31/1051-56,1062-63,1067-68,1074-94).

Shane Harper, a five-time convicted felon, testified that in late April or early May of 2006 appellant approached him in a restaurant and explained that somebody owed him money, so he wanted to break into their house and steal a safe. He asked Harper to be his getaway driver. Appellant did not mention any names but

he drove by and showed him the house. Harper declined to participate. Several months later, in early August, appellant came to Harper's apartment with a cooler containing marijuana, and a scale. He wanted Harper to sell the marijuana, and he left the items with him. Harper eventually gave the scale to law enforcement, and he also pointed out the house (the Deluca house at 1502 Murray Avenue) which appellant had shown him. [Investigators subsequently determined that the serial number on the scale matched the serial number on an empty scale box in the room where the Delucas' bodies had been found]. (30/812-23,836-45,853).

In mid-July, 2006, appellant, who was in the Pinellas County Jail on unrelated charges, made the acquaintance of Robert Kenney, who was incarcerated for violation of a domestic violence injunction. While Kenney was on the phone with his lawyer, Bora Kayan, appellant asked to speak with the attorney. Appellant inquired about hiring Mr. Kayan, and told him he had money in a safe, but he had lost the combination. In a subsequent phone call to bail bondsman John Brown, appellant said he had the $3000 he needed to bond out, but it was in a safe and he couldn't get to it until he was released. Robert Kenney posted bond on July 22. Kenney, accompanied by a friend of appellant's named Amy who provided the money, then went to another bondsman and posted appellant's bond. (30/867-76;31/950;32/1111-18,1123-25).

Robert Kenney testified that in the morning of August 1, 2006 he loaned appellant his SUV to move some personal belongings. Appellant came back around lunchtime telling Kenney he needed his help, and that they were going to move a safe. Appellant drove to

a house in Clearwater where he said he had been living with some friends he'd been training; they weren't getting along and appellant wanted to get his stuff. After they backed into the driveway appellant rolled the safe (which was on wheels) from the carport down the driveway (Kenney noticed some indentations on the driveway which he surmised were from previous efforts), but the two of them were unable to lift the safe into the vehicle. Eventually they had to go and rent a "low boy" trailer from Nations Rent in order to hoist the safe into the SUV. They drove it to the home of Kenney's girlfriend Jessica Ridpath (with whom Kenney was staying in violation of a court order), and stored it in the back of the garage under a tarp. (30/881-901,904-05,910,918;31/976-78,1048). [Rental documents from U-Haul and Nations Rent were introduced to corroborate those portions of Kenney's testimony (31/991-1008)].

After Kenney learned that appellant was back in jail, he contacted a locksmith to try to open the safe, but soon thought better of it. (30/905-06,909;31/943,949). In mid-August the police came to Jessica's house; Kenney thought it was about the injunction so he ran. Later he and Jessica gave them consent to search and they took, among other things, the safe (30/910-14;31/975-78). [The safe turned out to contain about $88,700, much of it in loose or bound 20, 50, and 100 dollar bills, as well as documents and jewelry (29/698;32/1169-70,1177)].

Late in August, when Robert Kenney was preparing to go on a business trip, he opened a suitcase which he kept in Jessica Ridpath's garage, and in the top compartment he found a handgun (which neither he nor Jessica recognized) wrapped in a white

towel. They turned it over to police. The Delucas' daughter Debbie told Detective Precious that Linda Deluca owned a handgun; she had a concealed weapons permit and she usually carried it in her purse. However, Debbie could not identify the handgun found in Robert Kenney's suitcase as being her mother's gun. No handgun was found in the Deluca house during the investigation (30/919-21;31/952,956-57,979-80,1008-11,1043-46).

Investigators found blood on the door handle of appellant's motel room at the Clearwater Inn, where he stayed from July 22 through August 3, 2006. DNA testing matched this blood to appellant's profile at 12 of 13 loci (31/1011-16,1024-30,1071-74,1094). At the time of his arrest appellant had some scratches and scrapes on the top of his hands, at the knuckles and near the wrist and forearm areas (32/1165-66,1175).

The state also introduced, without defense objection, evidence of an escape attempt by appellant from the Florida State Hospital in Chattahoochee in February 2008 (32/1126-37), and evidence that on August 15, 2006, shortly after his arrest, appellant left a message on Detective Monte's answering machine saying "Listen, if you can come down here and talk to me, and you guys are ready to make a deal, come in and talk to me, all right?" (32/1172-74).

The defense called no witnesses, put on no evidence, and appellant did not testify. (See 32/1185,1188,1190-92). Defense counsel argued reasonable doubt, and suggested that appellant had been set up. (See 26/357,359,365-66;33/1281,1284-87,1302-03,1311-12,1314-17).

The jury returned verdicts finding appellant guilty of first degree murder as charged on both counts. (33/1356).

C. Trial – Penalty Phase

After the jury returned its verdicts, the judge asked Mr. Watts how long he thought his penalty phase presentation would take. He replied, "An hour, approximately. I could go an hour and a half at the high end" (33/1358).

The only testimony presented by the state in the May 25, 2010 jury penalty phase was victim impact witness Caryl Dennis, Linda Deluca's sister (20/3126-35).

The defense called Shane Harper, who had testified for the state at trial. Harper stated that when appellant talked to him about the robbery plan, nobody was supposed to be in the house, and nobody was intended to be hurt (20/3143-45).

The defense very briefly presented six witnesses via video-tape (20/3141-43,3145-52). [Appellant's given first name is Richard; his family members usually called him by his middle name Todd; and his employers and clients knew him as Damian, the name he used professionally. He is referred to in the record by all three names]. Lynn Whited-Triplett was appellant's high school sweetheart, and after that she maintained a friendship with him which continued to the present time. She considered him the love of her life. Her daughter (whose biological father died when she was two) knows appellant as a second father. Ms. Whited-Triplett described appellant as warm, loving, considerate, kind, and full of potential (20/3141-43). On one occasion years before appellant had accompanied her to a week-long camp where she was a counselor.

The camp had an anti-drug theme, and provided high adventure activities. They took the kids rappelling, hiking, and caving. The kids really looked up to appellant and he did a wonderful job with them, counseling them about how drugs would ruin their lives (20/3148).

Helen Miller was appellant's preschool teacher when he was five. She recalled that he was quiet, shy, respectful and well-behaved, clean and neat, and never caused any problems (20/3145-46).

Gerry Robards from Shepherdsville, Kentucky is appellant's mother. In elementary school he was good in some subjects and struggled in others. He was "always trying to find his way, where he fit in and what he was good at". He seemed to get along well with the other kids. Within the family, appellant seemed to connect with his youngest sister Tanya; they were "kind of always hanging around together and cutting up..." (20/3146-47).

Richard Johnson, appellant's grandfather, described him as a smiling, happy-go-lucky kid who got along with everyone and was respectful to his elders (20/3147).

Appellant's sister Tanya Robards recalled when she and their mother were really having a rough time, and they didn't have reliable cars. Appellant was doing well with his personal training, and he invited them to come down to Florida to visit. When they arrived he gave his own red Mustang to his mother, and he also gave Tanya a car, leaving him with only his little motorcycle. He was worried about them driving back to Kentucky separately, so he bought them prepaid cell phones and two-way global

radios so they could talk back and forth on the way. Both Tanya and their mother still drive the cars appellant gave them (20/3145,3148-49).

Mindy Bickey was one of appellant's personal training clients. He was the only trainer she ever had who really cared about his clients and whether they were making progress, not just about the money. Appellant became a personal friend of hers. He came to her home on Thanksgiving and many other times, and he knew her kids. When Ms. Bickey's mother broke her hip appellant visited her at the rehab facility. He brought eight pizzas and passed them out to all the patients. He just wanted to make everybody happy. She would "never forget the care and the love that he had for my mother" (20/3149-51). After the videotape was shown, Ms. Bickey was called to the stand for live testimony. She reiterated that appellant was an outstanding and devoted personal trainer who got her in phenomenal shape. She used to watch him train a man who had Parkinson's or MS, and he worked with him to make him a physically better person. Ms. Bickey considered appellant a part of her family and he was always welcome in her home. She knew him as a wonderful caring man. She did not, in her experience with him, know the violence which led to the crimes he was convicted of, but she felt that appellant had much to offer other prisoners if he were sentenced to life imprisonment (20/3152-56).

The defense next called Mark Cognatti, a shift supervisor in the classifications section of the Pinellas County Jail. He was shown four disciplinary reports (Def. Exh. 1-4) which showed a total of two infractions (DRs) by appellant since March 19, 2008.

The first was a failure to respond to count; “the staff needed to recount three times due to Inmate Robards attempting to hide in his cell. The second was disruptive conduct, in that appellant used the law library to compose personal letters” (20/3159-62). On cross, the prosecutor brought out that Cognatti was only requested by the defense to look for appellant’s disciplinary reports “from 3/19/2008 to present” (20/3162-63). Consequently, he did not look at any reports from 2006 or 2007 (20/3163-64). Nor was he aware that appellant had tried to escape from the state hospital, or that the bailiffs had indicated that he had a razor blade in a court appearance (20/3162-63).

Henry Holiness, an inmate under a life sentence (and currently facing further prosecution by Mr. Schaub) was a POD mate of appellant in the jail. Holiness said he had about 8 felony convictions; on cross it was brought out and stipulated that the actual number was 15. Holiness described appellant as a very humble guy, very disciplined, dedicated to his workout and his religion and to helping other people. He is a role model to several people, and has been a good dude and a friend to Holiness (20/3166-69).

Another POD mate, Carl Galbraith, testified that jail was a scary place and he’d never been in trouble before. Appellant reached out to him and helped him through some tough times (20/3171).

Appellant’s mother Gerry Robards took the stand and said she loved her son and would always love him. He is her only biological son and they are very close. Appellant is kind and is always helping people, and his life is worth something. Ms. Robards

expressed her prayers for the Delucas, and she begged the jury for mercy and compassion for appellant (20/3172-73).

After the defense rested, the state appeared ready to recall the jail classifications officer Cognatti as a rebuttal witness (20/3174-76,see 3164-65). Defense counsel stated it wasn't his intention to get "a partial record from classification. I don't know how to tell the jury that" (20/3175). The judge suggested a stipulation, and the prosecutor said, "I think you can ask him when I put him on again" (20/3175-76). Defense counsel asked the state to reconsider going into that, and the prosecutor agreed not to recall the witness (20/3176;see 23/3577). [Subsequently, in the second Spencer hearing, defense counsel indicated that there existed a thick stack of other conduct write-ups for the pre-3/19/2008 period, not necessarily amounting to DRs but mostly for refusal to eat. Defense counsel stated that he would not have made the presentation to the jury if he'd know about the other reports. "It was not my intention to put on a partial", so he was now withdrawing any reliance on a good jail behavior mitigator (22/3470-75). Then in the third Spencer hearing, defense counsel withdrew the withdrawal and reasserted the mitigating circumstances (23/3575-78)].

In his closing statement to the jury the prosecutor argued:

> I'm going to talk a little bit about the mitigation that we have heard. We saw that Richard Robards led a normal childhood. He had a loving mother, brothers, sisters, a normal childhood. He wasn't the victim of abuse. He wasn't the victim of poverty. He wasn't the victim of, you know, violence in the family, a normal childhood.

> How does that mitigate what happened? How does that mitigate? He led a normal childhood. He wasn't left on the streets. He wasn't - - you know, had parents that were in jail and on drugs and beat him or sexually molested him. He led the normal childhood. (20/3178-79,see 3188)

Defense counsel gave a very brief closing argument in which he noted that Ms. Bickey, Ms. Triplett, family members, and fellow inmates had all stated that appellant had good and positive qualities. "The death penalty is reserved for the worst of the worst, and this is not that. There is some good in Richard Robards. Please consider that when you make your decision" (20/3191-92).

In the charge conference, defense counsel agreed that he was not proceeding on any statutory mitigators other than the catch-all (20/3205-06). Accordingly, the jury was instructed on the nonstatutory factors of family background, employment, and good jail record, and "any circumstances of the offense that would mitigate against the imposition of the death penalty" (20/3231; 11/1778). The jury returned a recommendation of death on each count by a 7-5 vote (11/1783-84;20/3243)

D. Three Spencer Hearings

Two days later, in a May 27, 2010 hearing before Chief Judge McGrady, defense counsel Watts said, "I would tell the Court that we had developed some mental health. We didn't present it to the jury. We did have PET scans done and the PET scans show abnormalities, and we're going to be presenting that to Judge Bulone at the Spencer hearing" (SR1280). On June 24, the defense filed a motion to appoint a neuropharmacology expert, asserting:

1. That a jury recommended death sentence on May 25, 2010.
2. That a Spencer hearing is set for July 13, 2010.
3. That the defense requires testimony of an expert forensic neuropharmacologist.
4. A diligent search was conducted for a Forensic Neurophamacologist and Dr. Johnathan Lipman is the closest expert that has the credentials and ability required. (11/1837,see 1863)

Mr. Watts explained to the chief judge that Dr. Lipman was located in Tennessee, and he charged a little above the normal rate. The JAC objected, and suggested that more effort be made to find a local or in-state expert (SR1287-90). Mr. Watts explained:

> I had engaged, with the Court's order, Dr. Robert Berland as a mental health expert to help us in phase two. One of the things that we did was get a PET scan and that has - - we've had a preliminary report that there are abnormalities.
>
> The history of Richard Robards is lots of different types of steroids were taken by prescription and otherwise, perhaps. The abnormalities and the use of - - and there were two traumatic brain injuries as well that we've documented. So the effects of steroids on the brain injuries is an important factor for us, and this particular doctor, neuropharmacologist, is the only type that we know of that can comment on the effects of steroids. (SR1289)

Mr. Watts said an internet search had not turned up any closer expert, and the only other thing he could think of would be to ask Dr. Lipman if he knew of a colleague in the area. The JAC's representative said she was satisfied, and a $5600 cap was agreed on (SR1290-92;11/1847). Mr. Watts noted that Dr. Lipman would need to travel to Florida to examine appellant, an analysis which could take as much as eight hours, but his testimony could possibly be done by videoconference (SR1291-92).

The defense moved to continue the Spencer hearing set for July 13, 2010 due to the unavailability of an expert witness

(11/1836). Instead the Spencer hearing was bifurcated (and eventually trifurcated), with Part One taking place as scheduled on July 13, Part Two on August 24, and Part Three on October 10.

In the first segment, the state presented a crime scene analyst from the Sheriff's office, who testified regarding blood spatter, and a DNA expert from the Pinellas County Forensic Lab, who testified as to whether certain bloodstains indicated a male or female profile and whether they were consistent with Frank or Linda's DNA profile (21/3264,3272-3325). [This testimony was offered by the state in support of its contention that the HAC aggravating factor applied (21/3328-31)].

On July 21, defense counsel moved to approve travel and lodging costs for Dr. Lipman from July 26-28 "to interview Defendant for Part II of Spencer Hearing" (11/1854,SR1317; motion granted 11/1858).

In a hearing before Circuit Judge Quesada on August 12 regarding videoconferencing costs, Mr. Watts stated that "the purpose of [Dr. Lipman's] testimony is Spencer hearing, to talk about the effects of steroids and the combination of brain damage with the defendant. So he's already had a death recommendation and that was seven to five, so we're working hard to try and reverse that situation" (SR1331). On August 19, before Chief Judge McGrady, Mr. Watts said, "We have a Spencer hearing on Tuesday. Judge, the jury recommendation was seven to five. There's an outstanding amount of metal health that we're going through" (SR1353). Mr. Watts added, "We've engaged several experts, but the pivot man is a local psychologist, Dr. Berland." Counsel and Dr. Berland had

been putting in a lot of work and corresponding with the out-of-state experts, and “we’re down to the wire” (SR1353).

In the second part of the Spencer hearing on August 24, 2010, the defense called Dr. Joseph Wu, a psychiatrist employed as clinical director and associate professor at the University of California, Irvine, College of Medicine, Ray Imaging Center (21/3344). Dr. Wu was qualified as an expert, without objection or voir dire by the state (21/3347). He explained that a PET (positron emission tomography) Scan enables an examiner to determine whether there are injuries or abnormalities in brain functioning by tracing the amount of sugar which is being consumed in different regions of the brain (21/3345-46).

In May of 2010 Dr. Wu received appellant’s PET Scan in digital form, and was requested to analyze it (21/3345). Using PowerPoint, Dr. Wu displayed the image of appellant’s PET Scan side-by-side for comparison purposes with that of an age and gender matched control subject (21/3347-49). Appellant’s PET Scan showed that the back of his brain - - known as the “parietal cortex” - - is much less active than the front of his brain (21/3349-50). There was an observable green section in the image in the midline of appellant’s brain (21/3349). The normal control subject, in contrast, did not show this degree of disparity, nor did it show a green line (21/3350). “Now this green line is an area of significantly decreased activity in the back of [appellant’s] head. This is the kind of abnormal activity which we see in Mr. Robards that would be consistent with his history of having been in multiple car accidents” resulting in traumatic brain

injury (21/3350). This type of injury can increase the risk of developing psychosis by two to fourfold (21/3353).

In addition to the trauma injury to the back of his brain, appellant's PET Scan showed two other significant abnormalities. In the region called the "posterior cingulate" (which Dr. Wu referred to as the emotional area of the brain) there was an abnormal increase in activity as compared to the normal control (21/3350-51). This, according to Dr. Wu, is commonly seen in individuals with some kind of toxic chemical exposure (21/3351-54). Also, appellant's scan showed an overactive region in the middle back portion of his brain called the "lateral occipital cortex" relative to the frontal lobe and compared to a normal controlled subject (21/3252-53) In a normal subject the frontal lobe is more active than the occipital cortex toward the back (21/3352-53). "And in patients with psychoses such as schizophrenia they tend to show that the back of the brain here is much more active than it should be" (21/3352-53,see 3354).

So altogether appellant's PET Scan showed three different areas of brain damage, one likely resulting from traumatic injury, the second from toxic chemical exposure, and the third from a combination of the factors resulting in a condition of "schizophrenic-like paranoia" (21/3353-54). Dr. Wu testified that the presence of multiple brain abnormalities, as here, would increase the risk of behavioral problems to a greater extent than would a single injury (21/3354).

On cross-examination, Dr. Wu agreed that the toxic chemical injury could have been caused by drug use, including cocaine,

marijuana, or huffing organic solvents (21/3353-56). Corticosteriods, used for medical purposes, are anti-inflammatory and can actually tend to protect the brain, but anabolic steroids (used for nonmedical, performance enhancement purposes) such as testosterone are a different class of steroids and would not serve the same function (21/3356-57,3360-61). The effects of long-term use of steroids has not been well-studied (21/3357).

Dr. Wu agreed on cross that a number of former NFL football players have sustained multiple concussions. While the study in which Dr. Wu is co-author does show that the subjects may have "some difficulty regulating aggressive impulse off the field especially those individuals who have sustained brain injury", none of the players involved in the study have committed a double homicide (21/3358-60). On the other hand, there have been NFL players involved in homicide, but they weren't part of the study (21/3360).

Dr. Jonathan Lipman testified via teleconference (21/3361-63). He is a neuropharmacologist and clinical associate professor at East Tennessee State University (21/3364). Neuropharmacology, in which he holds a Ph.D., is the science which "deals with the effects of drugs and chemicals on nerve, brain, and behavior" (21/3364,3383). He was qualified as an expert in that field, without objection by the state (21/3365).

Referring to Dr. Wu's testimony about the medical uses of steroids, Dr. Lipman made it clear that the steroids we are talking about in terms of Richard Robards are anabolic steroids, which are quite different from the corticosteroids that are used

to reduce inflammation (21/3366). Normal levels of natural anabolic steroids, which are produced by the body, are not dangerous. Elevated levels, on the other hand, “trigger what is called the ‘apoptosis pathway’ in nerve cells that have been damaged and cause them to self-destruct” (21/3366-67). Therefore, if you had a preexisting brain injury and then took anabolic steroids by injection, that would be harmful and aggravate the brain injury (21/3367). [Dr. Lipman acknowledged that the effect of anabolic steroids on an intact human brain is not as well-studied as their toxic effect on nerve cells in the laboratory (21/3383-84)].

Dr. Lipman came to Pinellas County and interviewed appellant from 9:00 a.m. until 6:00 p.m. on July 28, 2010; it was “a very long and intense day” (21/3365,3367). Prior to the interview, Dr. Lipman reviewed numerous records related to appellant’s medical, psychiatric, and psychological history, and consulted with the psychologist (Dr. Berland) who had evaluated him (21/3365). Dr. Lipman elicited appellant’s life story and his history of drug use, both recreational and anabolic, and examined him for physical manifestations of steroid use (21/3367-68). The acne scars on his back, and the cartilage of his ears and nose and the bony growth of his jaw were characteristic (though not diagnostic) of androgenic steroid abuse (21/3368). Also, “anabolic steroid abuse apoptosis very typically causes gynecomastia, the growth of breasts in males” (21/3369). Examination of appellant revealed surgical scars where he had had his breast removed (21/3369). Appellant’s medical history also included a doctor’s diagnosis of an enlarged heart and cardiac abnormalities (a common result of

anabolic steroid abuse), and the spontaneous rupture of a ligament in his knee (21/3369). When Dr. Lipman reviewed the surgical notes, the doctor had observed disintegration of the bones in the knee joint. This condition - - anterior cruciate rupture - - is a common anabolic steroid injury (21/3369).

All of Dr. Lipman's physical findings were consistent with prolonged, chronic steroid use (21/3370). Appellant also sometimes used stimulant drugs, which would exacerbate any effects of the steroids (21/3370).

Dr. Lipman testified that among the symptoms of chronic high dose use of anabolic steroids are irritability, low frustration tolerance, grandiosity, and a predilection toward uncontrolled temper, rage, and paranoia; yet it also produces a kind of euphoria (21/3371). Psychotic symptoms are associated with the taking of the steroids, and those psychotic symptoms do not go away when the drug is stopped (21/3371-72). However, "when anabolic steroid use stops, the effects of going into a withdrawal syndrome is very, very depressing on mood. They are sleepless. They are agitated. They despair." (21/3371). The persistence of the withdrawal syndrome can vary from "as little as ten days and as long as four months" (21/3371-72). On the other hand, the psychosis associated with the abuse of anabolic steroids can in some cases be permanent (21/3372).

Appellant was introduced to steroids at the age of 15, in a basement gym called "the dungeon" that his mother took him to (21/3375-76). "[I]t was patronized by body builders with enormous muscles, and he decided then that he wanted to be like those

people” (21/3376). Initially appellant would take the steroids in cycles of several weeks long prior to a competition or contest (21/3375-76). In this early stage he was feeling confident, happy, and potent, but he was also starting to feel some aggression, and he spent more time in the gym because of this positive feedback drive (21/3376).

Appellant’s middle phase of steroid use in the 1990s “involved what is called ‘stacking’, taking several different anabolic steroids and supplements and drugs and hormones in succession with one another” (21/3376). Finally in the later phase, around 2000, he stopped using the drugs in cycles and he just used them continuously (21/3377). That was when the major personality changes, described by his girlfriends to Dr. Berland, took place (21/3377).

According to Dr. Lipman, appellant did not seem to have any insight into the effects of the steroids on his personality or behavior; a mental blindness called “anosognosia” (21/3373-74,3377,3392). “He doesn’t see his irritability or his impulsive violence as being something coming from within himself. He projects it as something that’s happening to him” (21/3373-74). When Dr. Lipman reviewed Dr. Berland’s notes, he found that appellant’s ex-girlfriends and other friends described a person who was violent, destructive, combative, fractious, “someone they had to take out protection orders against”; but this is not how appellant sees himself (21/3374). Dr. Lipman believed that appellant’s anosognosia could be related to his paranoia (a characteristic of anabolic steroid use) and could well be organic

(21/3374-75). Steroids can “absolutely” cause psychosis, and appellant described symptoms which are consistent with psychotic delusions, fears, and visual hallucinations (21/3375).

Dr. Lipman was aware of appellant’s history of head injuries from a series of automobile and motorcycle accidents, and he was “loosely familiar” with Dr. Wu’s findings of brain abnormalities (21/3377-78). Regular use of anabolic steroids would permanently aggravate any brain injuries (21/3378).

Defense counsel asked Dr. Lipman if appellant would likely have been in steroid withdrawal syndrome at the time of the homicides, shortly after his release from the county jail (where he had been held on unrelated charges). Dr. Lipman answered, “Yes and probably for some weeks after that” (21/3378). When appellant was returned to the jail after the homicides, he experienced diarrhea, vomiting, anxiety, depression, and lack of energy; these symptoms are consistent with the withdrawal syndrome (though also consistent with being a reaction to his legal situation) (21/3378-79,3387-88). The crime scene - - described as “disorganized, chaotic, excessively violent” - - was consistent with “roid rage” which Dr. Lipman explained would be present both while steroids are being used and during the withdrawal period (21/3379-80,3389).

Dr. Lipman acknowledged on cross that a lot of his information about appellant’s steroid use was based on what appellant told him (21/3384). Lipman had been told appellant was a body builder; he had no independent knowledge of his career (21/3385). The prosecutor stated, “[I]t’s pretty obvious that he was on a performance-enhancing drug based upon some of his body building

photos and things of that nature" (21/3385). Dr. Lipman agreed with the prosecutor that appellant's use of steroids dating back to age 15 in Kentucky was voluntary, but with the caveat that "anabolic steroids are addictive, and there is a withdrawal syndrome in the absence of it" (21/3385). The prosecutor pointed out that athletes today in many sports - - from Barry Bonds to the high school level - - excessively use steroids. Dr. Lipman agreed with this statement, but also pointed out that body builders, as compared to other athletes tend to be the highest dose users of all (21/3390). The drug produces megorexia, a drive toward increasing bulk (21/3390-91). Dr. Lipman agreed that not all people who take steroids kill (21/3391).

Appellant took the stand and prayed for forgiveness, mercy, and healing (22/3400-01,3413-14). He testified that he doesn't remember the killings, and "[i]t's incomprehensible to me that that would be in me" (22/3401-02,3414). In the process of preparing for the penalty phase, he got some insight into a side of himself that he'd never been able to look at before, but even after that it was "hard for me to think that I'm mentally ill because I function just like everybody else" (22/3411-12; see also 23/3599-3601,3627-28 from third Spencer hearing).

Forensic psychologist Dr. Robert Berland was qualified as an expert without objection (22/3415). Dr. Berland expressed the opinion that appellant is psychotic, and in particular his biologically-based mental illness revolves around delusional paranoid thinking (22/3416,3422-23). In addition to Dr. Berland's interactions with and observations of appellant, the 2006 MMPI results

indicate “a substantial psychotic disturbance” (22/3319,3324). Moreover, while the MMPI does not specifically measure brain injury, appellant’s profile contains elements which - - in Dr. Berland’s observation - - are typical of people whose mental illness is at least in part a result of brain injury (22/3424).

Asked about the opinions regarding malingering expressed in 2007 by Ms. McCollum and the doctors at the state hospital in Chattahoochee, Dr. Berland emphasized that genuinely psychotic people can also be manipulative, and that is what he believed was occurring at that time and place (22/3416-18). According to Dr. Berland, it was appellant’s strong desire not to be labeled as mentally ill (22/3418):

> And, in fact, when he and I at various points recently have discussed the fact that I believe him to be psychotic, he has steadfastly denied that, and we finally agreed to disagree. I believe in the truthfulness of what I’m saying, and he believes in the truthfulness of what he is saying about that issue. But we don’t see it the same way. (22/3418)

The fact that a person “can talk coherently and negotiate the real world to some degree does not mean that they’re not psychotic” (22/3433).

Dr. Berland interviewed lay witnesses, two of whom were family members and five ex-girlfriends (22/3425-28). In his experience, ex-wives and ex-girlfriends are usually hostile to the defendant, and therefore are often more reliable observers than relatives (who are motivated to help their family member) or co-workers (because most people hide their mental illness, and co-workers don’t have enough intimate contact with them to have seen these things)(22/3425).

All of the lay witnesses interviewed by Dr. Berland "admitted to prominent and commonly observed delusional paranoid beliefs by [appellant]" (22/3426). 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). At least two of the lay witnesses identified a significant worsening of appellant's symptoms after two motorcycle accidents which resulted in head impact; one a collision with a car and the other a collision with a dumpster (22/3426-28). Appellant's behavior changed dramatically after the accidents; one girlfriend, Faye, 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 (22/3428). Another ex-girlfriend, Tara, also described significant changes in appellant (22/3428). He displayed irrational jealousy, and his girlfriends were afraid of him (22/3448-49,3451-52). Appellant thought 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 (22/3438). There was no evidence, according to the observer, that any of appellant's perceptions were real (22/3438).

Dr. Berland was also aware of earlier accidents which occurred when appellant was in his late teens; once when he totaled a Mustang and the other when he was walking across a parking lot and was hit by a speeder (22/3429). Dr. Berland did not know the medical extent of those injuries, "[b]ut what you need to know is

that head trauma and brain injury, even if it is subclinical, is cumulative" and can add up to a very significant change (22/3429). Based on all of the information he had obtained, Dr. Berland recommended a PET Scan, which was done and was interpreted by Dr. Wu, whose findings included both traumatic and toxic brain abnormalities (22/3429-30,3469). The bottom line, according to Berland, is that appellant "is psychotic and it's been worsened by at least two of the five or six major head traumas that I have been aware of" (22/3431).

Additionally, appellant's family history suggested that there was a genetic predisposition toward mental illness, which is "the most common scenario among people who are brain injured and become mentally ill or psychotic" (22/3431). Whenever Dr. Berland would ask a family member about a symptom, he would get back a response that a number of people within the family had that symptom (22/3431). Appellant's father, in particular, was prone to explosive outbursts arising from minimal provocation (22/3431).

Defense counsel asked whether appellant met the criteria for the two statutory mental mitigating circumstances. Dr. Berland answered that in his opinion appellant was under extreme mental or emotional disturbance at the time of the homicides, and that (while he probably could appreciate the criminality of his conduct) his capacity to conform his conduct to the requirements of law was substantially impaired as a result of his mental illness (22/3433-37).

The defense introduced into evidence the videotape which was shown to the jury in the penalty phase back in May, as well as a

notebook of photographs and correspondence prepared by appellant's mother for the second Spencer hearing (22/3476-78;see 20/3136, 3145-52;18/2818-2977).

At the end of the second Spencer hearing, each side was allowed to make a closing argument (23/3497-98,3498-3516,3516-25). The prosecutor did not dispute that appellant was on steroids: "[Y]ou could look at [his body building] pictures and tell this guy was on steroids. It doesn't take a doctorate to tell this guy has been abusing steroids" (23/3506). Also, the prosecutor agreed that "it doesn't take a rocket scientist" to figure out that steroids make you violent" (23/3507). But, the prosecutor asserted, appellant took steroids voluntarily, and not everyone who takes steroids kills (23/3506-07). Nor did the prosecutor dispute that appellant has brain damage: "[I]t's kind of like, Richard Robards, this is your life. This is who you are. ...You know, mental health issues and those types of things, Dr. Wu's testimony about the brain damage, you know, a lot of people have brain injury or brain trauma. There is a lot of people that walk around in this world with brain trauma, football players with concussions, just people in general that have wrestled in high school, whatever. People walk around with trauma to their brain. It doesn't make them murderers where they go out and they take the life of two human beings. It just doesn't" (23/3513). It was the prosecutor's firm belief that "we're sometimes predisposed"; some people are just mean and nasty and no normal family life can change that" (23/3515).

The prosecutor further argued that appellant had enjoyed a

typical childhood, and asked the judge, “How is that mitigation?” (23/3505). He was given love. He was nurtured. He was given everything (23/3505). “I mean, this guy had a normal childhood, sisters, and pictures of him and his sister with kittens. ...He is not the kid that is economically depressed, you know, and has to live on the street and doesn’t come home to food on the table and those types of things or beatings and that type of thing. We haven’t heard any of that” (23/3505-06).

In the defense closing argument, Mr. Watts began by recapitulating the testimony had had presented in the jury penalty phase:

> On the 25th of May we presented evidence of positive relationships that Mr. Robards had. Mindy Bickey came in and testified and her husband on the videotape to what a positive influence he was in their lives. We had a couple inmates come in and testify that he was good towards them. The little guy said that he was - - had never been locked up before, and Richard Robards came over and took the fear out of the first days and shared his commissary.
>
> The family background that we heard about from Ms. Whited-Triplett and from the folks in Kentucky on the video show that he is a good person or he was a good person when he was a child. (23/3516)

Next Mr. Watts summarized the Spencer hearing testimony of Drs. Wu, Lipman, and Berland regarding the PET Scan, the motor vehicle accidents, traumatic brain damage, toxic brain damage from the use of steroids, paranoia, and psychosis (23/3516-18). Mr. Watts noted that the jury’s death recommendation was by a 7-5 vote, and “I’m asking the Court to consider exercising [the override power] based on the mental health circumstances that the jury didn’t hear” (23/3519):

> Those 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.

*** ***

So hopefully with an understanding of the psychology and mental health that was at work biological and psychological in Mr. Robards the Court will consider an override to a capital life sentence, meaning, of course, that Mr. Robards would die in the State prison.

And I ask the Court to consider we 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 and ask the Court to consider that factor that the jury didn't hear the mental health explanations of Mr. Robards' behavior when you are making your decision. Thank you, Your Honor.

THE COURT: Well, at life over death conferences defense attorneys even go over the strategy of saving some evidence for the Spencer Hearing. And I don't know if that was part of your strategy at all, but that's an actual strategy that defense attorneys try to employ in order to give the Judge a reason to override the jury just in case the jury comes back with death. So was that part of your strategy to have evidence that would be presented at the Spencer Hearing that may not be presented during the penalty phase?

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

THE COURT: Right. You couldn't do it anyway, but even if you could have done it by then, you may have just done it the way you actually did it because the theory is, first of all, that many of the arguments that you're making about mental health issues may be more persuasive for judge than it would be for a jury. And then, as I said before, the thinking is that if the jury does come back with a death recommendation, that if there is additional evidence presented at a Spencer Hearing it in effect gives the Judge a logical reason to override.

And the only reason I'm bringing that up is I ha-

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

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

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

THE COURT: Okay. It does.

MR. WATTS: Yes, it was strategic. But still I want to appeal to the Court to consider how the jurors may have taken this. I had no idea how good it would be, the PET Scan. I knew there were abnormalities. I didn't know how profound they were, et cetera. So still I would likely have made the same decision. It was more of a putting the jury into it rather than my not presenting to them that I made that comment that what impact might this have had on the jury in a positive way to make it six, six.

THE COURT: Well, that's part of the arguments that they promote at the life over death conference or seminar is to make that argument. So I just wanted to make sure that what you're doing is strategic which I think it is and isn't based out of negligence or carelessness or anything.

MR. SCHAUB [prosecutor]: Just from a State perspective when I attend State functions on the death penalty, we enjoy when the jurors get to hear about the violence that someone might show towards women which the

> jurors weren't allowed to hear during the case but would have been once the doctors testified considering all the interviews they conducted with the women.
>
> THE COURT: Right. And there is general agreement that the mental health issues are probably more persuasive in front of the Judge than they are in front of the jury. So that's the consensus belief. Obviously we don't know whether it's actually true, but that's the consensus belief. I think we can all agree on that, right?
>
> MR. WATTS: We hope it's true. Thank you, Judge.

(23/3520-25)(emphasis supplied)

Sentencing was set for October 29, 2010 (23/3530). However, prior to that date Mr. Watts indicated that he was contemplating asking for a third Spencer hearing (SR1359,1366,1374-75,1379-80). One of the reasons for a third Spencer hearing was explained by Mr. Watts:

> When we closed out the last Spencer hearing, Mr. Schaub was commenting on the notebook that we put into evidence, family history, letters from friends, that kind of thing.
>
> THE COURT: Right.
>
> MR. WATTS: And Mr. Schaub talked about the rosy childhood. We didn't hear about the dark side of Mr. Robards' upbringing. His sister would be willing to testify about that through videoconference. (SR1393-94)

Spencer Hearing Three took place on October 7 (SR1398-99,23/3550). Appellant's sister, Tanya Robards testified by video that she and appellant were raised in a blended family with secrets (23/3556-59). Tanya and appellant have the same mother (Geraldine Robards) but different fathers (23/3556;see 20/3173). Tanya's father had one other daughter and two sons, Tommy and Gary (23/3557-58). Another boy, Doug, was not biologically related to Tanya's father; Doug was the son of Tanya's father's first wife,

but he got custody of all the children after the divorce (23/3550-51). As for appellant, “it was like his father was the mailman” (23/3558-59). [Geraldine Robards’ testimony in the jury penalty phase established that appellant is her first son and her only biological son (20/3173), so Tommy, Gary, and Doug - - all older than appellant (23/3558) - - were his stepbrothers].

According to Tanya, Tommy and Gary bonded because they shared the same father (23/3558). A phone call received by their other sister when Tanya was 5 or 6, from a woman who explained that she - - and not the lady who was living in the house with them - - was the sister’s real mother, disrupted the tenuous family dynamic, and nothing was the same afterwards (23/3557-59). It was like the older siblings blamed the younger ones for their family not still being intact (23/3559). Tanya at least shared a father with most her siblings, but appellant had no biological connection with any of them except her, and he was treated accordingly; as an outsider (23/3559).

Appellant was picked on and physically beaten up by Tommy and Gary, “and it wasn’t like it happened once every three or four months. It happened frequently” (23/3560). Tommy was the worst; he was a troublemaker who caused a lot of pain (23/3560). The step-brothers were considerably older (Tommy by 3 or 4 years, Gary by 5 or 6 years) and much taller than appellant, who “had a stomach on him” (23/3558,3660-61).

Tanya described what she saw as severe physical and emotional abuse, while the parents thought it was just sibling stuff (23/3561). “But when I look back on it, it was beyond sibling. I

often wondered how he made it through without hanging himself like many kids today" (23/3561). Appellant just endured the beatings without crying or fighting back; "it's just how like you sit there and take it when you're outnumbered and hope it stops" (23/3560). Asked whether it ever did stop, Tanya said not until appellant was a teenager and ran away from home (23/3560).

Tanya heard about (but did not see) one specific incident when the older brothers forced appellant at a young age to perform oral sex on another male in a neighbor's garage (23/3562,3569).

Later, when Tanya was in her 20s, she learned from her older sister that Doug, Gary, and Tommy had sexually abused her [the sister] from the time she was eight and continuing until she was a teenager (23/3561-62,3569).

Tanya's own childhood had caused her to become suicidal and to always want to hurt herself; in 1995 she OD'd on sleeping pills and spent some time in the hospital (23/3562). She was actually thankful for that incident, because it resulted in her getting therapy, which has "almost been a lifesaver" for her (23/3562-63). Appellant never had that kind of support or opportunity (23/3564), and his suffering was probably worse than Tanya's since, "I wasn't beat by my brothers on a regular basis, and I wasn't emotionally abused by them on a regular basis. I was just kind of there in the midst of it", while appellant was actually going through it (23/3563).

Things only changed for appellant when he was about 15 and signed up for football in school. That was the beginning of his steroid use (23/3563-64). "And that gave him a way to get bigger

and stronger, and it's like after that point nobody was going to kick his butt anymore. Nobody was going to hurt him anymore." (23/3564). That's where the stage name Damian came in, Tanya believed. "I think Damian became a way to protect Todd. Todd was painful. He didn't want to look back" (23/3564).

On cross, the prosecutor asked Tanya about "all this stuff about when he writes a letter, secured party creditor, Yahweh, all those sign my name in capital letters in black ink. Before he went into jail he never acted that way, did he?" (23/3589). Tanya said he didn't, but the way they were brought up "it wasn't that God was loving and forgiving. You were to fear him" (23/3589-90). They were also taught to fear the government. They "canned a lot because there was this fear that one day the government is going to know how much food you have, and people with guns are going to come and take your food" (23/3590). Any time they bought food or anything that came in a box they had to cut off the bar codes (23/3590). "I don't live my life like that today, but I suffered a lot from that" (23/3590).

The prosecutor commented to Tanya, "we did see a videotape with a family picture, a loving family, and horseback riding and pets and animals and the whole nine yards. I mean, I'm failing - - I am failing to see where the family unit failed Todd" (23/3571). Tanya said, "The family unit failed all of us" (23/3571). The prosecutor reiterated that he failed to see that, and said to Tanya "You appear to be getting along fine" (23/3571). She replied:

Your perception of it - - I have to go through therapy

> every week. I have to address issues because I want better for my son. And even though I want better for my son, I can do everything that I know and it's still - - why am I still depressed? Why was I suicidal for so many years? There was something that did not get addressed. It was like for Damian or Todd, I get angry because somebody should have saved him from that childhood. Somebody should have addressed that abuse. (23/3572)

E. Sentencing

On October 29, 2010 Judge Bulone sentenced appellant to death, giving great weight to the jury's death recommendation as urged by the state and provided by Florida law (13/2143-44;23/3665;see 12/2054). He found as aggravating factors (1) prior conviction of another capital felony based on the contemporaneous homicides; (2) pecuniary gain; and (3) HAC, each accorded great weight (13/2123-28,2143-44;23/3651-61,3655-56). The judge rejected both of the statutory mental mitigators, but considered appellant's mental health as a nonstatutory mitigating factor and gave it some weight (13/2129-37,2142-44;23/3661-62). He also found and gave some weight to nine other nonstatutory mitigating factors, including "family history, no plan to murder, general good conduct while in custody, capacity to form positive relationships, remorse and potential for rehabilitation, traumatic injury based on PET scan and PET scan brain image comparison, effect of steroids on brain injury and effect of steroids generally, use of prescribed steroids interacting with other prescribed drugs and withdrawal, ...[and] history of steady employment" (23/3662-63,see 13/2137-43).

SUMMARY OF THE ARGUMENT

Appellant was denied his state and federal constitutional rights to a reliable jury penalty proceeding and to the effective assistance of counsel. Under the unique and disturbing circumstances of this case, relief can and should be granted on direct appeal. This Court has recognized that the "ineffective assistance on the face of the record" exception applies when both prongs of Strickland v. Washington, 466 U.S. 668 (1984), deficient performance and prejudice, are met. Smith v. State, 998 So.2d 516,523 (Fla. 2008).

In the instant case, everyone - - defense counsel, predecessor defense counsel, the prosecutor, and the trial judge - - knew from the beginning that (if appellant were found guilty of first degree murder) his mental health issues would be paramount in the penalty determination. However, defense attorney Watts (who described the mental mitigating circumstances as compelling) presented none of it to the jury. Instead he put on a very superficial presentation of "good brother, son, trainer, and jail inmate" nonstatutory mitigation. The jury recommended death by a 7-5 vote. Mr. Watts then presented the evidence of appellant's traumatic and toxic brain damage, his decades-long abuse of anabolic steroids, and his delusional and paranoid thought process to the trial judge in a series of Spencer hearings.

Toward the end of the second Spencer hearing, Mr. Watts asked the judge to consider that the jury didn't hear the mental mitigating evidence. What followed was a "post hoc rationalization" colloquy [see Wiggins v. Smith, 539 U.S. 510,526-27 (2003)] in

which Judge Bulone and the prosecutor Mr. Schaub supplied Mr. Watts with potential "strategic" justifications for his conduct. Mr. Watts vacillated between remorse and self-preservation (it is unlikely that Mr. Watts' fee request of $62,760 would have been approved by the chief judge if Watts had explicitly acknowledged that he had represented appellant ineffectively, and if a new attorney had to be appointed and a new jury impaneled), but Mr. Watts never deviated from his admissions (1) that he knew when he took on the case that he wouldn't be able to marshal the mental health materials in time to present to the jury; (2) that he and Mr. Hoffman (guilt phase trial counsel) had agreed "out of respect to the system" to move forward as fast as they could; (3) that (while claiming that he might have proceeded the same way anyway) he didn't have the ability to make a complete (i.e., informed) decision about the mental mitigating evidence at the time of the jury penalty phase; (4) that he had no idea at that time how good the PET scan results would be; (5) that when he was presenting the mental mitigating evidence to the judge at the Spencer hearing he wished he had had it all "to lay out to the jury or to make the decision to lay out to the jury."

As this Court has recognized, "[c]ase law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." Rose v. State, 675 So.2d 567,572-73 (Fla. 1996). Mr. Watts' deficient performance is obvious on the face of this record. And, as was the case in Phillips v. State, 608 So.2d 778,783 (Fla. 1992), the jury vote was 7-5, so "the swaying of the

vote of only one juror would have made a critical difference." See Outten v. Kearney, 464 F.3d 401 (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") [Issue I].

Since juror unanimity relates directly to the deliberative function of the jury, and since it encourages full and thoughtful deliberations and safeguards the reliability of the verdicts, Florida's death penalty procedure - - to the extent that it allows a death recommendation to be returned by a bare majority (7-5) vote - - is constitutionally invalid [Issue II].

Especially in a capital case, a trial judge's neutrality and impartiality must be, and must appear to be, beyond question. The judge must not enter the fray by giving "tips" to either side. Here, the trial judge violated this fundamental principle by prompting the state to pursue an additional aggravating factor which it had apparently overlooked [Issue III].

In the guilt phase, the prosecutor improperly commented on appellant's failure to testify, and compounded the prejudicial impact by telling the jurors that the state didn't even show them all of the evidence ("we would have been here forever"). [Issue IV]

[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.

Appellant was denied his rights, guaranteed by the Florida Constitution and by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, to a reliable jury penalty proceeding and to the effective assistance of counsel. Under the unique circumstances of this case - - where it is clear on the record that (1) appointed penalty phase counsel Richard Watts abdicated his duty to be an effective advocate for appellant's life due to Mr. Watts' misguided notion that his overriding obligation was to try the case as expeditiously as possible; (2) Mr. Watts made the decision to forego the presentation of any and all mental mitigation to the jury not based on legitimate strategic reasoning, but rather because he had not yet completed his investigation into appellant's organic brain damage, and he had not even begun his efforts to have appellant evaluated by a neuropharmacologist; (3) as a result, the jury heard only a very superficial presentation of nonstatutory mitigating evidence regarding good jail record (which backfired), positive family relationships, and employment; and (4) a shift of even a single vote toward life, if the jury had been aware of all or any part of the mental mitigating evidence, would have resulted in a life recommendation which could not have been overridden by the trial judge under the Tedder standard[4] - - relief can and should be

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

afforded on direct appeal.

"An attorney's obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated because this is an integral part of a capital case". State v. Pearce, 994 So.2d 1094, 1102 (Fla. 2008); see Coleman v. State, 64 So.3d 1210, 1222-23 (Fla. 2011); Lewis v. State, 838 So.2d 1102,1113 (Fla. 2003). Evidence of a defendant's mental health problems, which may establish one or both of the statutory "mental mitigating circumstances" as well as various nonstatutory mitigators, has been recognized as being especially weighty, and an attorney's failure to discover or present it can easily constitute deficient performances and prejudicial ineffectiveness (particularly when the mitigating evidence which was presented was insubstantial). See Hurst v. State, 18 So.3d 975,1014 (Fla. 2009); Blackwood v. State, 946 So.2d 960,974 (Fla. 2007); Rose v. State, 675 So.2d 567,573 (Fla. 1996); see also Santos v. State, 629 So.2d 838,840 (Fla. 1994)(two of the weightiest mitigating factors are "those establishing substantial mental imbalance and loss of psychological control"). Any "strategic" decision to forego the presentation of mitigating circumstances must be an informed strategic decision, made after sufficient investigation has taken place to enable counsel to make a reasonable choice among his available options. "Post-hoc rationalizations" of an attorney's conduct are not an acceptable substitute. See Wiggins v. Smith, 539 U.S. 510,526-27 (2003); Rose v. State, 675 So.2d 567,572-73 (Fla. 1996); Armstrong v. State, 862 So.2d 705,723 (Fla. 2003)(Anstead, J., joined by Pariente, J., specially concurring); Marcrum v. Luebbers, 509 F.3d

489,503 (8th Cir. 2008); Anderson v. Sirmons, 476 F.3d 1131,1145-46 (10th Cir. 2007); Cosio v. United States, 927 A.2d 1106,1131 (D.C. Ct. of Appeals 2007); Commonwealth v. Sattazahn, 952 A.2d 640,655-56 (Pa. 2008); Malone v. State, 168 P.3d 185, 224 and n.192 (Okla. Crim. App. 2007); Whitehead v. State, 955 So.2d 448 (Ala. Crim. App. 2006); Murphy v. State, 139 P.3d 741,749 (Idaho 2006). "Although defense counsel is entitled to make strategic decisions about what mitigating evidence to focus upon, decisions made without adequate investigation of potential mitigating evidence cannot be justified merely by invoking the mantra of 'strategy'". Malone, 168 P.3d at 224.

In the overwhelming majority of cases, claims of ineffective assistance of counsel must be raised by postconviction motion under Rule 3.851 (in capital cases) or Rule 3.850 (in noncapital cases), because evidentiary development is needed, and counsel must be afforded an opportunity to explain his or her decision making process. However, this Court has recognized that "[t]here are rare exceptions where appellate counsel may successfully raise the issue on direct appeal because the ineffectiveness is apparent on the face of the record and it would be a waste of judicial resources to require the trial court to address the issue". Smith v. State, 998 So.2d 516,522-23 (Fla. 2008); quoting Blanco v. Wainwright, 507 So.2d 1377,1384 (Fla. 1987); see also Sims v. State, 998 So.2d 494,502 (Fla. 2008) ("We could certainly [require Sims to file a postconviction claim] and generate years of unnecessary litigation, which, in turn, would lead to the entirely avoidable expenditure of additional time and resources. However,

this unnecessary delay in favor of a collateral proceeding would constitute both a waste of judicial resources and amount to legal churning").

The ineffective assistance on the face of the record exception applies when both prongs of Strickland v. Washington, 466 U.S. 668 (1984) - - deficient performance and prejudice - - are manifest in the record. Smith v. State, 998 So.2d at 523. [If the reviewing court is unable to conclude that the facts demonstrating counsel's ineffectiveness are apparent on the face of the record (and assuming that the issue is not mooted by reversal on another ground), the court should decline to address the claim and affirm without prejudice to raising it by postconviction motion. See, e.g., Smith, 998 So.2d at 523; Boyd v. State, 45 So.3d 557,560 (Fla. 4th DCA 2010); Jean v. State, 41 So.3d 1078, 1080-81 (Fla. 4th DCA 2010); Davis v. State, 25 So.3d 1282 (Fla. 3d DCA 2010); Wilson v. State, 18 So.3d 709 (Fla. 4th DCA 2009)]. In the instant case, we already know that a month before the jury penalty phase attorney Watts was expressing in open court his reservations about being fully prepared for the penalty phase due to some good mental mitigation which had yet to be developed. We already know that, despite the judge's and the prosecutor's expressed willingness to allow a time lapse between the guilt phase and penalty phase, Mr. Watts never requested this, nor did he move for a continuance of the entire trial. See Blackwood v. State, 946 So.2d 960,971 (Fla. 2006). Instead he abandoned the presentation of any mental mitigating circumstances in the jury penalty proceeding (putting on only an hour to an hour and a half presentation, much of it by

videoconference, of nonstatutory factors consisting of positive family and work relationships, and lack of DRs during a portion of appellant's time in county jail), thereby putting himself (and more importantly appellant) in the position of playing a futile game of "catch-up" in a series of Spencer hearings after the jury recommended death (see SR 1331) [Again, see Blackwood, 946 So.2d at 971-76].

We know that while Mr. Watts may have received at the last moment a preliminary report that the PET Scan showed some abnormalities, by his own admission he did not know how strong the evidence of organic brain damage was until after the jury returned its 7-5 death recommendation. We know that Mr. Watts did not even begin his investigation into the effects of anabolic steroids on appellant's damaged brain until after the jury penalty phase. (Watts' motion to appoint a neuropharmacology expert was filed a month after the jury penalty phase, and Dr. Lipman's day-long evaluation of appellant took place two months after the penalty phase).

Mr. Watts was appointed to represent appellant in the penalty proceedings shortly after attorney Larry Hoffman was retained (with $10,000 borrowed by appellant's mother) to handle the guilt phase. The scheduled trial date was approaching, but the prosecutor observed "I have seen Mr. Watts prepare for a trial overnight", Judge Bulone said "Yeah", and Mr. Hoffman said "That's why I want him". (SR1101-02).

There is no need to go through the delay and additional expense of a postconviction proceeding to afford Mr. Watts an

opportunity to explain his decision to forego the presentation of mental mitigating circumstances to the jury, because he has already explained it. He stated on the record to Judge Bulone, "[W]hen I agreed to get on this 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)(emphasis supplied). 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), he asked Judge Bulone to consider "[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).

Nor is there any need for further expenditure of judicial resources to require Judge Bulone to address the issue of Mr. Watts' ineffectiveness. After Watts made these stunning admissions, what followed was a thorough post-hoc rationalization (or series of rationalizations) in which the judge and the prosecutor supplied Mr. Watts with possible strategic justifications for his failure to present any mental mitigating evidence to the jury (which Watts had already said was because he didn't have time to assemble it, and he knew that going in). In response to the judge's questioning, Watts vacillated between remorse and self-preservation (23/3521-25). The judge was of the opinion that "saving some evidence for the Spencer Hearing" was a known defense strategy, and he asked Watts if that was part of his strategy. Watts - -

apparently referring to other cases - - said it had been his strategy “from time to time”, but in appellant’s case, at the time he was presenting the expert testimony on mental mitigation to the judge in the Spencer hearing[s], “I wished I had it all to lay out to the jury or to make the decision to lay out to the jury” (23/3521)(emphasis supplied). While Watts had been informed that there were preliminary findings of brain abnormalities, “I want to appeal to the Court to consider how the jurors may have taken this. I had no idea how good it would be, the PET Scan. I knew there were abnormalities. I didn’t know how profound they were...” (23/3523, see 3521).

Mr. Watts described withholding the mental mitigation as “a potential strategy, but I didn’t have the ability to make the complete decision at the time...” (23/3521). Judge Bulone replied “Right. You couldn’t do it anyway, but even if you could have done it by then, you may have just done it the way you actually did it...” (23/3522) (emphasis supplied). The judge wanted to make sure that the reason the mental mitigation was presented only at the Spencer hearings and not in the jury penalty phase “was for a strategic reason and not for a negligent reason. Do you understand what I’m getting at?” (23/3522). This is where Mr. Watts stated that when he came on the case he had agreed with Mr. Hoffman to move forward as quickly as possible “out of respect to the system” (23/3523). In the past it has been Mr. Watts strategy to “take a high road approach” (whatever that means) and “save mental health” (23/3523). “Still and all when it came down to the day of I wished I had had a full scope of it. We still may have made the same

decision. I trust that we would have...” (23/3523).

This textbook example of a “post-hoc rationalization” colloquy, condemned in Wiggins v. Smith, 539 U.S. at 526-27 and its progeny, concluded harmoniously with the prosecution offering another hypothetical strategic consideration (possible cross-examination or rebuttal evidence concerning violent behavior toward ex-girlfriends, if a doctor who interviewed those women had testified before the jury); the judge adding that there is a “general consensus” that mental health issues are probably more persuasive before a judge than a jury (“I think we can call agree on that, right?”); and Mr. Watts saying “We hope it’s true” (23/3524-25).

As this Court recognized in Rose v. State, 675 So.2d at 572-73, quoting Horton v. Zant, 941 F.2d 1449,1462 (11th Cir. 1991) “[c]ase law rejects the notion that a ‘strategic’ decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them”. Counsel’s purportedly “strategic” decisions must be evaluated as of the time they are made; not by hindsight. Rompilla v. Beard, 545 U.S. 374,380-81 (2005); Marcum v. Leubbers, 509 F.3d 489,503 (8th Cir. 2008). As explained in Bucio v. Sutherland, 674 F. Supp. 2d 882, 941 (S.D. Ohio 2009):

> The deference owed to counsel’s strategic decisions is dependent upon the adequacy of the investigation underlying such decisions. Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). 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. Wiggins, 539 U.S. at 523, 123

S.Ct. 2527.

See Armstrong v. State, 862 So.2d 705,725 (Fla. 2003) (Anstead, J., joined by Pariente, J., specially concurring) (expressing hope that judges and lawyers will heed the message of Wiggins; "[i]n order to avoid uneven dispensation of the death sentence, it is essential for counsel to fully investigate the available mitigation so that any decision on whether or not to present such information is made on a reasonable basis").

In the instant case Judge Bulone, understandably hoping to avoid the delay and expense of appointing a new defense attorney and empaneling another penalty phase jury, focused not upon whether Mr. Watts had adequately investigated the mental mitigating evidence and made a reasoned strategic decision not to present it to the jury ("Right. You couldn't do it anyway..."), but instead focused only upon whether Watts might have made the same decision anyway even if he had completed his investigation ("...but even if you could have done it by then, you may have done it the way you actually did it..."). Watts, backpedaling throughout the inquiry, never equivocated from his crucial admissions that (1) he and Hoffman knew when they took the case that they wouldn't be able to marshal the mental health materials in time to present to the jury; (2) nevertheless, "out of respect to the system", he and Hoffman agreed to move forward as fast as they could; and (3) at the time of the jury penalty phase, he had no idea how good the PET Scan results would be, or how profound appellant's brain damage was. Every time Mr. Watts would seem to agree with Judge Bulone that he might have employed the same

"strategy" anyway, he would temper that with wistful comments to the effect that once he knew what he had "I wished I had it all to lay out to the jury or to make the decision to lay out to the jury".

In Jean v. State, 41 So.3d 1078, 1080 (Fla. 4th DCA 2010) the appellate court said it was troubled by the issues regarding trial counsel's performance; "[h]owever without trial counsel's input, we remain hesitant to find from the face of the record alone that trial counsel's actions 'fell below an objective standard of reasonableness'", so the court affirmed without prejudice to raising the matter on a motion for postconviction relief under Rule 3.850.

In the instant case, in contrast, Mr. Watts' input is already on the record. A defense attorney has an overarching duty of loyalty to his client to advocate the defendant's cause and "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland v. Washington, 466 U.S. 668,688 (1984). See State v. Davidson, 335 S.E. 2d 518, 546 (N.C. 1985). While counsel of course has an obligation to conduct himself in an ethical, professional, and honorable manner, he does not have a duty of loyalty to "the system" to bring a case to trial as quickly as possible, without completing his investigation of mitigating circumstances and at the expense of his client's opportunity to present mental mitigating evidence (which counsel himself described as compelling) to the jury. See Rose v. State, 675 So.2d at 572 (counsel who failed to conduct reasonable investigation into mitigating evidence "felt restricted by the

limited time (79 days) he had to prepare for sentencing, during a part of which counsel was married and went away on a ten-day honeymoon"); Wilson v. Sirmons, 536 F.3d 1064, 1092-93 (10th Cir. 2008) (counsel's self-imposed "time crunch prevented [him] from providing the expert relevant information that could have corrected flaws in the testing and from conducting further investigation based on leads the expert developed"; "The failure to present the expert's full mental health diagnosis to the jury does not appear to be strategic, and the State does not claim that it was. This performance, taken as a whole, falls short of the standard set by the Supreme Court in Williams [v. Taylor, 529 U.S. 372 (2000)], Wiggins, and Rompilla").

In Ex Parte Briggs, 187 S.W.3d 458, 467 (Tex. Crim. App. 2005) the Texas Court of Criminal Appeals wrote:

> Here, appellant's claim stems from counsel's decision not to fully investigate Daniel's medical records or consult with experts until he had been paid an additional $2500-$7500 in expert fees. This was not a "strategic" decision, it was an economic one. There is no suggestion that trial counsel declined to fully investigate Daniel's medical records because he made a strategic decision that such an investigation was unnecessary or likely to be fruitless or counterproductive. But counsel has an absolute duty "to conduct a prompt investigation of the circumstances of the case and to explore all avenues likely to lead to facts relevant to the merits of the case." The decision was made because he had not been paid for experts. Counsel is most assuredly not required to pay expert witness fees or the costs of investigation out of his own pocket, but a reasonably competent attorney—regardless of whether he is retained or appointed—must seek to advance his client's best defense in a reasonably competent manner. [footnotes omitted].

In the instant case, Mr. Watts was appointed on January 28, 2010. The JAC objected to paying him and Mr. Watts understandably

moved to withdraw if he wasn't going to be paid. Mr. Watts pointed out to the Chief Judge that he was not financially equipped to handle the case pro bono, "[a]nd it's set for trial and it's an old case and I know the court is - - the trial court's anxious to get it done, so I put it on the calendar without thinking it all the way through" (SR1182-83). Mr. Watts further stated, "...I don't want to leave the case without the preparation stages. We need a mitigation expert. We need a mental health expert however the case is going to proceed." (SR1188). Mr. Watts argued that constitutional standards of equal protection and effective assistance of counsel required a death-qualified lawyer such as himself (SR1199). The chief judge agreed, noting that there is a saying that death is different, "[a]nd having competent, death-qualified counsel, particularly for the penalty phase" is in the best interest of society and something that is constitutionally required or at least implied" (SR1201). Accordingly, on February 25, 2010, the issue of compensation was resolved in Mr. Watts' favor, and the JAC was required to pay his fees under the prevailing standards (SR1201, see 8/1376). [Ultimately, after sentencing, the Chief Judge approved Mr. Watts' fee request of $62,760 (more than quadruple the standard JAC rate), based in part on Watts' "extraordinary and unusual" efforts with regard to the various mental health experts in three different Spencer hearings (SR1435, see 1431-36)].

In a status hearing on March 12, 2010, the judge said the trial was set for May 18, and asked if everyone thought that was going to be enough time. Mr. Watts said "Yes, sir" (SR1218).

But by the time of the next status check on April 16 - - a month before the scheduled trial - - Mr. Watts wasn't so sure; "...I am having some reservations about being fully prepared for the penalty phase" based on discussions with the Public Defender's Office "about some good mental mitigation that may have yet to be done that would require some more time" (SR1233-34). Both the prosecutor and the trial judge indicated that they would be amenable, if necessary, to a gap between the guilt phase and penalty phase. [See Blackwood v. State, supra, 946 So.2d at 964, in which the jury penalty phase commenced seven weeks after the guilt phase]. Mr. Watts said he appreciated the offer of assistance "and we'll work together to get it done" (SR1235). The judge said he was "going to assume that everything is a go" and that the penalty phase would follow right after the guilt phase "unless you come in and tell me differently" (SR1236). Mr. Watts replied, "Fair enough, Judge" (SR1236).

Mr. Watts motion to approve neuropsychiatric (PET Scan) testing was filed on April 21, 2010. On May 14, four days before jury selection, Watts informed the judge "we're waiving - - at least presently we don't have any mental health that we intend to present in phase two" (9/1496). He acknowledged that he did not yet have the results of the PET Scan (9/1497), but he did not request a continuance of the penalty phase. See Blackwood v. State, 946 So.2d at 971; Bigelow v. Williams, 367 F.3d 562, 573 (6th Cir. 2004); Bucio v. Sutherland, 674 F.Supp.2d 882, 942 (S.D. Ohio 2009); Murphy v. State, 139 P.3d 741, 749 (Idaho 2006). Instead, when the day came, he put on a short and superficial

presentation of “good brother, son, trainer, jail inmate” nonstatutory mitigation (the “good inmate” part backfired on him), somehow getting five of the twelve jurors to vote for life anyway. But close only counts in horseshoes and hand grenades. Appellant now had a jury death recommendation - - required by law to be given great weight by the trial judge - - to overcome (see SR1331).

While Mr. Watts had apparently been informed by the time of the penalty phase that the PET Scan showed some abnormalities, by his own admission the full results were not available to be presented to the jury, and Mr. Watts did not know how profound appellant’s brain damage was. (Dr. Wu testified that the PET Scan showed three different areas of brain damage, one likely resulting from traumatic injury, the second from toxic chemical exposure, and the third from a combination of the factors which could result in a condition of “schizophrenic-like paranoia” (21/3349-54). The presence of multiple brain abnormalities would increase the risk of behavioral problems to a greater extent than would a single injury (21/3354)). [Note that if Mr. Watts had completed his investigation into mental mitigating circumstances, he would have had sufficient information to make a truly “strategic” decision whether to (1) present all of it to the jury and let the chips fall where they may, or (2) limit his presentation to Dr. Wu’s testimony regarding actual brain damage, which would not have “opened the door” for the state to bring in any prior acts involving appellant’s ex-girlfriends. See Sexton v. State, 997 So.2d 1073, 1082-85 (Fla. 2008)]. As for the testimony of Dr. Lipman,

the neuropharmacologist, who testified inter alia that appellant's chronic decades-long use of anabolic steroids would permanently aggravate his brain injuries, Mr. Watts did not even begin this avenue of investigation until after the jury penalty phase.

In Blackwood v. State, 946 So.2d at 971-75, defense attorney Ullman "testified that he was left in a terrible position only two weeks prior to the scheduled commencement of the penalty proceeding; he had no mental health mitigation witnesses. Rather than ask for a continuance of the penalty phase proceedings or contact Dr. Block-Garfield or Dr. Spencer, this Court [the trial court in the postconviction hearing, in an order affirmed by this Court on appeal] finds that Mr. Ullman did nothing. He defended Mr. Blackwood at the penalty phase proceeding without further investigation and without any mental health witness to provide statutory or nonstatutory mitigation. This Court finds that Mr. Ullman's performance was deficient under Strickland, supra." 946 So.2d at 971 (emphasis in order). Citing Wiggins v. Smith, supra, the judge in Blackwood noted that "[c]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary", and found that "Mr. Ullman's decision to do absolutely nothing regarding mental health mitigation at the [jury] penalty phase was not reasonable under the facts and circumstances of this case". 946 So.2d at 972. [Blackwood's jury recommended death by a 9-3 vote. Similarly to the instant case, Dr. Block-Garfield testified on Blackwood's behalf at the subsequent Spencer hearing. 946 So.2d at 964-65].

The second prong of the Strickland test is prejudice. In

Daniels v. Woodford, 428 F.3d 1181, 1210 (9th Cir. 2005), the appellate court wrote, "While the trial court's refusal to grant a continuance hampered Daniels' penalty phase presentation, [defense attorney] Jordon's failure to investigate, to seek funding for mental health expert testimony until a week before the penalty phase began, or to otherwise prepare for this stage of the trial, clearly prejudiced Daniels. As a consequence, the jury considering Daniels' sentence was never exposed to meaningful mitigation evidence that may have meant the difference between a life or death sentence."

In the instant case, Judge Bulone never refused to grant a continuance; instead, when Mr. Watts expressed his reservations about being fully prepared for the penalty phase due to some good mental mitigation that would require some more time, the judge made it clear that he would work with the defense and if necessary allow a time lapse between the guilt phase and penalty phase. It was Mr. Watts and (according to Watts) Mr. Hoffman who took it upon themselves to put their "respect to the system" above their duties of loyalty to and advocacy for appellant. Knowing from the beginning that he wouldn't be able to marshal the mental health materials in time to present to the jury, Watts "agreed with Mr. Hoffman to move forward as fast as we could." That - - not "strategy" - - is why the jury never heard any mitigating evidence about appellant's mental condition.

Because the death penalty is unique in both its severity and finality, the United States Supreme Court has recognized an acute need, grounded in the Eighth Amendment, for heightened reliability

in capital sentencing proceedings. Sumner v. Shuman, 483 U.S. 66, 71 (1987); Monge v. California, 524 U.S. 721,732 (1998). "[I]t is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to the imposition of a death sentence. Sumner v. Shuman, 483 U.S. at 71, quoting Gregg v. Georgia, 428 U.S. 153,189-90 n.38 (1976)(emphasis in Sumner opinion). Under Florida law, capital sentencing authority is split between the jury and the judge, who are described as "co-sentencers." Snelgrove v. State, 921 So.2d 560,571 (Fla. 2006); see Espinosa v. Florida, 505 U.S. 1079,1082 (1992); Lambrix v. Singletary, 520 U.S. 518,528 (1997). As this Court recognized in Blackwood, 946 So.2d at 975:

> It cannot be overlooked that a court's imposition of the sentence must originate in the recommendation of the jury. See Tedder v. State, 322 So.2d 908,910 (Fla. 1975) (stating that under Florida's death penalty statute the jury recommendation should be given great weight); Cooper v. State, 336 So.2d 1133,1140 (Fla. 1976) ("The Legislature intended that the trial judge determine the sentence with advice and guidance provided by a jury, the one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors.")

In the instant case, a shift of even a single juror's vote in favor of life imprisonment would have resulted in a life recommendation. See Phillips v. State, 608 So.2d 778,783 (Fla. 1992) (finding that Phillips demonstrated both deficient performance and prejudice under Strickland; regarding prejudice "[t]he jury vote...was seven to five in favor of a death recommendation. The swaying of the vote of only one juror would have made a critical

difference here").

In Snelgrove v. State, 921 So.2d at 571, this Court recognized that the jury's vote breakdown can be a useful consideration in determining harm.

Florida is an "outlier" in even allowing a death recommendation to be returned by a bare majority 7-5 vote. See State v. Steele, 921 So.2d 538 (Fla. 2006) and Issue II, infra. Another of the very few jurisdictions which permits this is Delaware. Outten v. Kearney, 464 F.3d 401 (3d Cir. 2006) is a federal habeas corpus appeal involving a Delaware death sentence. After finding that Outten's counsel failed to adequately investigate mitigating evidence, the Third Circuit concluded on the issue of prejudice that a reasonable probability existed that at least one juror, if not more, would have struck a different balance had the jury heard the mitigating evidence. Citing Wiggins v. Smith, supra, the court in Outten wrote: "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." 464 F.3d at 422-23.

The test is whether the mitigating evidence which defense counsel failed to discover (or, as in this case, didn't feel like he had time to marshal), taken as a whole, might have influenced the jury's appraisal of the defendant's culpability. Wiggins v. Smith, 539 U.S. at 538; Rompilla v. Beard, 545 U.S. at 393; see Dickerson v. Bagley, 453 F.3d 690,697-98 (6th Cir. 2006); Council v. State, 670 S.E. 2d 356,365 (S.C. 2008). Certainly a reasonable juror could conclude that a brain damaged or mentally ill defen-

dant is less culpable than a mentally normal defendant. Mr. Watts' failure to present any mental mitigating evidence - - based not on a considered strategic evaluation after his investigation provided him with sufficient information to make such a decision, but rather on his own self-imposed time deadline - - deprived appellant's jury of an opportunity to weigh these significant factors.

In assessing prejudice, it is also important to note that if there had been a one-vote swing (or a more-than-one-vote swing) a jury life recommendation based on evidence of mental mitigating circumstances or brain damage would have a reasonable basis to support it, and could not have been overridden by the trial judge under the Tedder standard. Coleman v. State, 64 So.3d 1210,1225 (Fla. 2011); see, e.g., Hegwood v. State, 575 So.2d 170,173 (Fla. 1991); Hansborough v. State, 509 So.2d 1081,1086-87 (Fla. 1987); Amazon v. State, 487 So.2d 8,13 (Fla. 1986); Cannady v. State, 427 So.2d 723,731-32 (Fla. 1983).

On top of everything else, just before closing arguments in the jury penalty phase, Judge Bulone cautioned the prosecutor, "And, of course, the other thing that you can't do because it seems like the natural thing to do is when his [appellant's] mom asked for compassion, you can't argue to show him the same sort of compassion that he showed the victims." The prosecutor said he understood (20/3176-77). And Mr. Schaub did not exactly make a "same mercy" argument [see, e.g., Thomas v. State, 748 So.2d 970,985 n.10 (Fla. 1999)]; what he did was much worse. At the outset, he said to the jury, "We saw a videotape up here of Richard Robards, "This Is Your Life." The only videotape the

victims have before you is brought to you by Richard Robards, and it's "Frank and Linda DeLuca, This Is Your Death" (20/3177). Shortly afterwards, after stating that Frank was a father, a grandfather, and a brother; Linda was a mother, a grandmother, a sister, and a daughter; and the victim impact witness (Linda's sister Caryl) had testified about how special they were, Mr. Schaub said to the jury "And in August of 2006 he took that special person from them. He was their judge, their jury, and their executioner. He didn't afford them the weighing of aggravating and mitigating circumstances" (20/3180-81).

The weighing of aggravating and mitigating circumstances is the essence of the jury's job in its penalty deliberations. And, as this Court emphasized in Bertolotti v. State, 476 So.2d 130,134 (Fla. 1985):

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

The prosecutor's tactic in this case was blatantly improper for at least four related reasons: (1) it disparaged mitigating circumstances; (2) it denigrated appellant's exercise of a constitutionally protected right; (3) it misused the victim impact evidence; and (4) it sought from the jury an emotional reaction of sympathy for the victims.

Despite the flagrant impropriety and prejudicial nature of these comments, defense counsel Watts failed to object, failed to

move for a mistrial, failed to request a curative instruction and admonishment. See Bertolotti, 476 So.2d at 134. This failure - - especially when considered in conjunction with Mr. Watts' lack of preparation to present (or make an informed and reasoned decision whether to present) mental mitigating evidence - - fell below any standard of reasonable professional assistance. See Eure v. State, 764 So.2d 798 (Fla. 2d DCA 2000); Ross v. State, 726 So.2d 317 (Fla. 2d DCA 1999); see also Burns v. Gammons, 260 F.3d 892,895-98 (8th Cir. 2001). And, again, the fact that the jury's death verdict was by a single vote margin demonstrates prejudice. See also Hill v. State, 477 So.2d 533,556-57 (Fla. 1985).

Under the unique and disturbing circumstances of this case, both prongs of Strickland - - deficient performance and prejudice - - are manifest in the record, and therefore this Court can address appellant's ineffectiveness claim on direct appeal. Smith, 998 So.2d at 523. The question remains, should it? As discussed in Sims, 998 So.2d at 502, requiring appellant to file a postconviction claim could generate years of state litigation and potentially even federal lititgation, and would lead to further delay and the entirely avoidable expenditure of additional time and resources.

Undersigned counsel believes that more than enough has been shown on the face of this record to warrant this Court exercising its power and discretion to grant relief on direct appeal. In the event, however, that this Court declines to address the issue on direct appeal, then any affirmance of the death sentence should be without prejudice to raising it by postconviction motion. Smith,

998 So.2d at 523; see Boyd, 45 So.3d at 560; Jean, 41 So.3d at 1080-81; Davis, 25 So.3d at 1283, Wilson, 18 So.3d at 709-10. In that regard, counsel would note that - - while he believes that the record on its face sufficiently establishes both prongs of the Strickland test - - there are still other aspects of Mr. Watts' ineffectiveness which would require further evidentiary development to substantiate.

In the jury penalty phase, Mr. Watts presented the following evidence about appellant's childhood:

From his mother: In elementary school he was good in some subjects and struggled in others. He was "always trying to find his way, where he fit in and what he was good at". He seemed to get along well with the other kids. Within the family, appellant seemed to connect with his youngest sister Tanya; they were "kind of always hanging around together and cutting up..." (20/3146-47).

From his grandfather: he was a smiling, happy-go-lucky kid who got along with everyone and was respectful to his elders (20/3147).

From his preschool teacher: he was quiet, shy, respectful and well-behaved, and never caused any problems (20/3145-46).

Up to the age of fifteen and half, that was all the jury heard about appellant's life. Lynn Whited-Triplett, an ex-girlfriend, did not meet him until he was in high school (20/3141-43,3148). From appellant's sister Tanya, Mr. Watts presented nothing concerning appellant's upbringing; only a very short videotaped statement relating a time when appellant (as an adult) was doing well as a personal trainer, and he invited her and their

mother to visit him in Florida. They were having a rough time and didn't have reliable cars. When they arrived appellant gave his own red Mustang to his mother and he also give Tanya a car, leaving him with only his little motorcycle. Because he was worried about them driving back to Kentucky separately, he also bought them prepaid cell phones and two-way global radios so they could talk back and forth on the way (20/3148-49).

This sparse presentation enabled the prosecutor to argue to the jury:

> I'm going to talk a little bit about the mitigation that we have heard. We saw that Richard Robards led a normal childhood. He had a loving mother, brothers, sisters, a normal childhood. He wasn't the victim of abuse. He wasn't the victim of poverty. He wasn't the victim of, you know, violence in the family, a normal childhood.
>
> How does that mitigate what happened? How does that mitigate? He led a normal childhood. He wasn't left on the streets. He wasn't - - you know, had parents that were in jail and on drugs and beat him or sexually molested him. He led the normal childhood. (20/3178-79)
>
> *** ***
>
> Listen carefully to what the Defense has presented to you. Listen carefully to the mitigation they presented, and I submit to you that you saw a young man who grew up in a normal home and didn't face the plight that some people do in their lives. (20/3188)

This "benign conception" of appellant's upbringing [see Rompilla v. Beard, 545 U.S. at 391] left the jury with an incomplete picture. See Anderson v. Sirmons, 476 F.3d 1131,1148 (10th Cir. 2007)(absence of available mitigation evidence left the jury with a "pitifully incomplete" picture of the defendant; "[h]ad the jury been presented a complete picture of Anderson's background and history, there is a reasonable probability that at least one

juror would have struck a different balance between the mitigating and aggravating factors").

As it turns out in the instant case the "benign conception" of appellant's childhood was not just incomplete; it was completely inaccurate. There was evidence that appellant was the victim of constant abuse by his older, bigger stepbrothers; physical, emotional, and on at least one occasion sexual. There was chronic violence and dysfunction within his disastrously "blended" family, and his childhood was anything but normal. Appellant was beaten up frequently, and he just endured the beatings without crying or fighting back. His sister Tanya often wondered, in retrospect, how appellant made it through "without hanging himself like many kids today." While the physical abuse was inflicted by Tommy and Gary, the parents raised their children to fear an unloving and unforgiving God, and also to fear the government (which was keeping track of how much food you had, and people with guns are going to come and take your food). Any time family members bought food or anything that comes in a box, they had to cut off the bar codes. [This may provide some background information relevant to appellant's paranoia and also to his "sovereign citizen" obsession]. Tanya herself has been emotionally scarred and suicidal because of her childhood experiences, but according to her appellant's suffering was much worse. It was only when he was about 15 and started playing football in high school that things started changing for appellant. That was the beginning of his steroid use. It gave him a way to get bigger and stronger and nobody was going to kick his butt or hurt him any more. Eventually, Damian (the

name he used in bodybuilding and personal training) became a way to protect Todd (the name his family knew him by) from painful memories he could not face.

The jury never heard any of this testimony; it was all presented in the third Spencer hearing (23/3555-93). The prosecutor was still unconvinced that appellant's childhood was anything other than idyllic. Referring to the "Kentucky videotape" which was shown to the jury, as well as the notebook of photographs and correspondence prepared by appellant's mother for the second Spencer hearing (see 20/3136,3145-52;22/3476-78), Mr. Schaub commented to Tanya "we did see a videotape with a family picture, a loving family, and horseback riding and pets and animals and the whole nine yards. I mean, I'm failing - - I am failing to see where the family until failed Todd." Tanya said, "The family unit failed all of us." Mr. Schaub reiterated that he failed to see that, and said to Tanya, "You appear to be getting along fine." She replied:

> Your perception of it - - I have to go through therapy every week. I have to address issues because I want better for my son. And even though I want better for my son, I can do everything that I know and it's still - - why am I still depressed? Why was I suicidal for so many years? There was something that did not get addressed. It was like for Damian or Todd, I get angry because somebody should have saved him from that childhood. Somebody should have addressed that abuse. (23/3571-72)

In the matter of his failure to present to the jury any evidence of mental mitigating circumstances, Mr. Watts has already acknowledged on the record that he and Hoffman knew when they took the case that they wouldn't be able to assemble the mental health

materials in time to present to the jury, and they decided “out of respect to the system” to move forward as fast as they could. Mr. Watts has also acknowledged that he didn’t have the complete results of the PET Scan at the time of the jury penalty phase; he had no idea how good it was going to be or how profound the abnormalities were; by the time of the second Spencer hearing “I wished I had it all to lay out to the jury or to make the decision to lay out to the jury” but “I didn’t have the ability to make that decision at that time.” Judge Bulone recognized that “You couldn’t do it anyway”, but he improperly focused on whether Mr. Watts would have, or might have, made the same decision even if he had sufficient information available to him; a classic post-hoc rationalization of the kind found unacceptable by the U.S. Supreme Court in Wiggins v. Smith. As for the expert testimony of the neuropharmacologist, Dr. Lipman, regarding the effects of appellant’s steroid abuse on his brain function and behavior, it is clear from the record that Mr. Watts had not even begun that line of investigation at the time of the jury penalty phase. Mr. Watts’ expressed concern a month before the scheduled jury trial that he was having reservations about being fully prepared for the penalty phase due to some good mental mitigation that would require some more time was well-founded, and the record proves as much.

Mr. Watts’ failure to present to the jury any evidence of appellant’s traumatic childhood experiences (which could have humanized a person who might otherwise come off as a musclebound, roid-raging bully) is a different matter, in that the record does not establish why this evidence was not presented in the penalty

phase.

All things considered, there is enough information on this record for this Court to determine (1) that appellant was denied his constitutional right to effective assistance of counsel (deficient performance and prejudice); (2) that the adversary process which underlies Strickland was irreparably compromised because Mr. Watts was more concerned about the interests of "the system" than advocating for appellant's life; (3) that the Eighth Amendment's requirement of heightened reliability in capital sentencing has not been met, and (4) that confidence in the outcome of this life-or-death decision is undermined by a jury death verdict obtained under these circumstances (where the judge was required to accord great weight to the jury's death recommendation, and where a shift of even one vote based on mental mitigation would have resulted in an override-proof life recommendation). Admittedly, there are some aspects of Mr. Watts' performance - - notably, but not limited to, his failure to present a meaningful life history to the jury - - which would require further evidentiary development, and this Court can certainly choose to affirm on the entire ineffective assistance issue without prejudice to raising it by postconviction motion under Rule 3.851. But under the totality of the unique circumstances manifest on the record, it is clear that appellant's death sentence can never constitutionally be carried out unless and until he is afforded an opportunity to present his case in mitigation to a jury, with the advocacy of a competent, loyal attorney as guaranteed by the Sixth, Eighth, and Fourteenth Amendments. This

Court can and should use the "ineffective assistance on the face of the record" exception, reverse appellant's death sentences, and remand for a new jury penalty trial.

[ISSUE II] TO THE EXTENT THAT FLORIDA'S CAPITAL SENTENCING SCHEME ALLOWS A DEATH RECOMMENDATION TO BE RETURNED BY A BARE MAJORITY (7-5) VOTE OF THE JURORS, IT IS CONSTITUTIONALLY INVALID.

Florida's capital sentencing scheme, which allows a jury death verdict to be reached by a bare majority (7-5) vote, compromises the deliberative process, impairs the reliability of the life-or-death decision, and therefore violates the Sixth, Eighth, and Fourteenth Amendments.[5] (See 8/1350-52,1354). Since the jury's death recommendation (given, as required by Florida law, great weight by the trial judge) was reached by a 7-5 vote, appellant's death sentences cannot constitutionally be sustained or carried out.

Under Florida's statutory procedure, the penalty phase jury is a co-sentencer. Snelgrove v. State, 921 So.2d 560,571 (Fla. 2005); Kormondy v. State, 845 So.2d 41,54 (Fla. 2003); see Espinosa v. Florida, 505 U.S. 1079 (1992). The jury's recommenda-tion is "an integral part of the death sentencing process", and "[i]f the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire

[5] Undersigned counsel recognizes that this Court has previously rejected challenges to the provision allowing non-unanimous jury death recommendations [e.g., Aguirre-Jarquin v. State, 9 So.3d 593,601 n.8 (Fla. 2009); Franklin v. State, 965 So.2d at 79,101 (Fla. 2007); Perez v. State, 919 So.2d 347,367 (Fla. 2005)]; he urges this Court to reconsider based on the constitutional arguments herein.

sentencing process necessarily is tainted by that procedure." Riley v. Wainwright, 517 So.2d 656,657 and 659 (Fla. 1987). The jury's recommendation, whether it be for death or life imprisonment, must be given great weight. Grossman v. State, 525 So.2d 833,839 n.1 and 845 (Fla. 1988). A Florida penalty phase is comparable to a trial for double jeopardy purposes, and when the jury reasonably chooses not to recommend a death sentence, it amounts to an acquittal of the death penalty within the meaning of the state's double jeopardy clause. Wright v. State, 586 So.2d 1024,1032 (Fla. 1991). In the overwhelming majority of capital trials in this state, the jury's recommendation determines the sentence which is ultimately imposed. See Sochor v. Florida, 504 U.S. 527,551 (1992)(Stevens, J., joined by Blackmun, J., concurring in part and dissenting in part).

The United States Supreme Court has repeatedly recognized that the Eighth and Fourteenth Amendments require a heightened degree of reliability when a death sentence is imposed. Lockett v. Ohio, 438 U.S. 586,604 (1978); Zant v. Stephens, 462 U.S. 862,884-85 (1983); Caldwell v. Mississippi, 472 U.S. 320,329-330 (1985); Sumner v. Shuman, 483 U.S. 66,72 (1987). [See State v. Daniels, 542 A.2d 306,314-15 (Conn. 1988); People v. Durre, 690 P.2d 165,172-73 (Colo. 1984); and State v. Hochstein, 632 N.W. 2d 273,281-83 (Neb. 2001), discussing the principle of heightened reliability in the context of jury unanimity in capital sentencing]. Florida's procedure, by permitting bare majority death recommendations, works in the opposite direction. The importance of unanimity as a safeguard of reliability was recognized by the

Supreme Court of Connecticut in Daniels, 542 A.2d at 314-15, which held that jury verdicts in the penalty phase of a capital case must comport with the guidelines that govern the validity of jury verdicts generally, including the requirement of unanimity. Rejecting the state's argument to the contrary, the court wrote:

> Two principal reasons compel us to disagree with the state. We first are persuaded that the functions performed by guilt and penalty phase juries are sufficiently similar so as to warrant the application of the unanimous verdict rule to the latter. Each jury receives evidence at an adversarial hearing where the chief engine of truth-seeking, the power to cross-examine witnesses, is fully present. At the close of the evidence, each jury is instructed on the law by the court. Finally, in returning a verdict, each jury has the power to "acquit": in the guilt phase, of criminal liability, and in the penalty phase, of the death sentence.
>
> Second, we perceive a special need for jury unanimity in capital sentencing. Under ordinary circumstances, the requirement of unanimity induces a jury to deliberate thoroughly and helps to assure the reliability of the ultimate verdict. A. Spinella, Connecticut Criminal Procedure (1985) pp. 690-92. The "heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate"; Sumner v. Shuman, 483 U.S. 66,107 S.Ct. 2716,2720, 97 L.Ed.2d 56 (1987); convinces us that jury unanimity is an especially important safeguard at a capital sentencing hearing. In its death penalty decisions since the mid-1970s, the United States Supreme Court has emphasized the importance of ensuring reliable and informed judgments. Beck v. Alabama, 447 U.S. 625,637-39, 100 S.Ct. 2382,2388-90, 65 L.Ed.2d 392 (1980); Lockett v. Ohio, 438 U.S. 586,604-05, 98 S.Ct. 2954,2964-65, 57 L.Ed.2d 973 (1978); Gardner v. Florida, 430 U.S. 349,359-60, 97 S.Ct. 1197,1205, 51 L.Ed.2d 393 (1977); Woodson v. North Carolina, supra, 428 So.2d at 304-306, 96 S.Ct. at 2990-91. These cases stand for the general proposition that the "reliability" of death sentences depends on adhering to guided procedures that promote a reasoned judgment by the trier of fact. The requirement of a unanimous verdict can only assist the capital sentencing jury in reaching such a reasoned decision.

This Court in State v. Steele, 921 So.2d 538, 549 (Fla. 2006) stated that "[m]any courts and scholars have recognized the value

of unanimous verdicts", and quoted the Connecticut Supreme Court's opinion in Daniels. This Court, aware that the constitutionality of Florida's scheme is not a foregone conclusion, said:

> The bottom line is that Florida is now the only state in the country that allows the death penalty to be imposed even though the penalty-phase jury may determine by a mere majority vote both whether aggravators exist and whether to recommend the death penalty. Assuming that our system continues to withstand constitutional scrutiny, we ask the Legislature to revisit it to decide whether it wants Florida to remain the outlier state.

921 So.2d at 550 (emphasis in opinion).

[In the ten years since Ring v. Arizona, 536 U.S. 584 (2002) and in the six years since Steele, the Legislature has done nothing to address the constitutional deficiencies in the Florida capital sentencing scheme; therefore this state remains the "outlier". See Burch v. Louisiana, 441 U.S. 130,138 (1979)("We think that the near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not"].

See also former Chief Justice Anstead's opinion, concurring in result only, in Bottoson v. Moore, 833 So.2d 693,710 (Fla. 2002), in which he wrote:

> Of course, Florida has long required unanimous verdicts in all criminal cases including capital cases. Florida Rule of Criminal Procedure 3.440 states that no jury verdict may be rendered unless all jurors agree. Furthermore, in Jones v. State, 92 So.2d 261 (Fla. 1956), this Court held that any interference with the right to a unanimous verdict denies the defendant a fair trial. However, in Florida, the jury's advisory recommendation in a capital case is not statutorily required to be by unanimous vote. The jury's advisory recommendation may be by mere majority vote. This would appear to constitute another visible constitutional flaw in Florida's

scheme when the Sixth Amendment right to a jury trial is applied as it was in Apprendi and Ring.

Unlike the historical accident of jury size, the requirement of unanimity "relates directly [to] the deliberative function of the jury". United States v. Scalzitti, 578 F.2d 507,512 (3d Cir. 1978); see McKoy v. North Carolina, 494 U.S. 433,452 (1990) (Kennedy, J., concurring)(jury unanimity "is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community"); State v. McCarver, 462 S.E.2d 25,39 (N.C. 1995) ("[t]houghtful and full deliberation in an effort to achieve unanimity has only a salutary effect on our judicial system: [i]t tends to prevent arbitrary and capricious sentence recommendations"); State v. Anthony, 555 S.E.2d 557,604 (N.C. 2001); People v. Durre, 690 P.2d 165,173 (Colo. 1984).

Finally, even assuming arguendo that a state could constitutionally provide for a non-unanimous "supermajority" jury death penalty verdict without violating the Sixth, Eighth, and Fourteenth Amendments, a bare majority 7-5 death verdict is simply too tenuous and arbitrary to withstand constitutional scrutiny, or to meaningfully reflect the conscience of the community. A review of United States Supreme Court decisions strongly suggests as much. In Duncan v. Louisiana, 391 U.S. 145 (1968), the Court (in holding that the Fourteenth Amendment guarantees a state criminal defendant the right to a jury trial in any case which, if tried in a federal court, would require a jury trial under the Sixth Amendment) observed that the penalty authorized for a particular crime

may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment. 391 U.S. at 159. The Court noted that only two states, Oregon and Louisiana, permitted a less-than-unanimous jury to convict for an offense with a maximum penalty greater than one year. 391 U.S. at 158 n. 30.

In Williams v. Florida, 399 U.S. 78 (1970), the Supreme Court held that a state statute providing for a jury of fewer than twelve persons in non-capital cases is not violative of the Sixth and Fourteenth Amendments. The Court noted that no state provided for fewer than twelve jurors in capital cases – "a fact that suggests implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty." 399 U.S. at 103.

The Supreme Court next decided the companion cases of Johnson v. Louisiana, 406 U.S. 356 (1972) and Apodaca v. Oregon, 406 U.S. 404 (1972). In Johnson, the Court concluded that a Louisiana statute which allowed a less-than-unanimous verdict (9-3) in non-capital cases [406 U.S. at 357, n.1] did not violate the due process clause for failure to satisfy the reasonable doubt standard. Justice White, writing for the Court, noted that the Louisiana statute required that nine jurors - - "a substantial majority of the jury" - - be convinced by the evidence. 406 U.S. at 362. In Apodaca, the Court decided that an Oregon statute allowing a less-than-unanimous verdict (10-2) in non-capital cases [406 U.S. at 406, n.1] did not violate the right to jury trial secured by the Sixth and Fourteenth Amendments. Johnson and Apodaca were 5-4 decisions. Justices Blackmun and Powell were the swing votes, and

each wrote a concurring opinion emphasizing the narrow scope of the Court's holdings. Justice Blackmun wrote:

> I do not hesitate to say...that a system employing a 7-5 standard, rather than a 9-3 or 75% minimum, would afford me great difficulty. As Mr. Justice White points out,... "a substantial majority of the jury" are to be convinced. That is all that is before us in these cases.

406 U.S. at 366 (opinion in Johnson, also applying to Apodaca).

Similarly, Justice Powell recognized that the Court's approval of the Oregon statute permitting 10-2 verdicts in non-capital cases "does not compel acceptance of all other majority-verdict alternatives. Due process and its mandate of basic fairness often require the drawing of difficult lines." 406 U.S. at 377, n.21 (opinion in Johnson, also applying to Apodaca).

Some of those lines were drawn in Ballew v. Georgia, 435 U.S. 223 (1978) and Burch v. Louisiana, 441 U.S. 130 (1979). In Ballew, the Supreme Court held that conviction of a non-petty offense by a five person jury, impaneled pursuant to Georgia statute, violated the defendant's right to jury trial guaranteed by the Sixth and Fourteenth Amendments. In Burch, the Court determined that conviction of non-petty offense by a non-unanimous six-person jury, as authorized by Louisiana law, abridged the defendant's federal constitutional rights. The Burch Court wrote:

> We are buttressed in this view by the current jury practices of the several States. It appears that of those States that utilize six-member juries in trials of nonpetty offenses, only two [Louisiana and Oklahoma] also allow nonunanimous verdicts [footnote omitted]. We think that this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not.

Nothing in the development of this case law remotely suggests that a bare majority 7-5 verdict would be permissible in either the guilt phase or penalty phase of a capital trial. See State v. Daniels, supra, 542 A.2d at 314-15 ("the functions performed by guilt and penalty phase juries are sufficiently similar so as to warrant the application of the unanimous verdict rule to the latter").

Arguably, allowing a jury to return a death penalty verdict by a 10-2 or 11-1 vote might serve a legitimate purpose by preventing a rogue juror or "nullifier" from hanging the jury or blocking a death sentence based on his or her inability to follow the law. [Note, however, that the state already has the ability to exclude such jurors for cause, assuming they honestly express their beliefs in voir dire. See, e.g. Wainwright v. Witt, 469 U.S. 412 (1985); Rodgers v. State, 948 So.2d 655,662 (Fla. 2006)]. Holdout jurors can happen in noncapital trials and capital guilt phases as well. This possibility in no way justifies a bare majority 7-5 death verdict, or an 8-4 death verdict, in which not even a substantial majority of the jury needs to be convinced that death is the appropriate sentence. See Johnson v. Louisiana, 406 U.S. at 362, and Justice Blackmun's concurring opinion at 366.

Appellant's death sentences, predicated upon 7-5 jury votes, are constitutionally invalid under the Sixth, Eighth, and Fourteenth Amendment principles regarding the need for heightened reliability in capital sentencing, and the importance of unanimity to the deliberative function of the jury. This Court should reverse for a life sentence, or at the very least for a new jury

penalty trial in which unanimity will be required to return a death verdict.

> [ISSUE III] THE TRIAL JUDGE DEPARTED FROM JUDICIAL NEUTRALITY AND COMMITTED FUNDAMENTAL ERROR BY PROMPTING THE STATE TO ADD AN AGGRAVATING CIRCUMSTANCE WHICH IT HAD NOT LISTED IN ITS NOTICE.

Impartiality of the trial judge is a basic requirement of due process and a necessary component of a fair trial. Weiss v. United States, 510 U.S. 163,178 (1994); see Lyles v. State, 742 So.2d 842,843 (Fla. 2d DCA 1999). The impartiality of the adjudicator, whether judge or jury, goes to the very integrity of the legal system, and its infraction can never be treated as "harmless error". Gray v. Mississippi, 481 U.S. 648,668 (1987).

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process....The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law....At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," ...by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Sparks v. State, 740 So.2d 33,36 (Fla. 1st DCA 1999), quoting Marshall v. Jerrico, Inc., 446 U.S. 238,242 (1980) and Porter v. Singletary, 49 F.3d 1483,1487-88 (11th Cir. 1995)(citations omitted).

Accordingly, a trial judge should never assume the role of a prosecutor (or for that matter a defense attorney), nor lend the weight of his authority to the side of the government. Sparks, 740

So.2d at 37; see Padalla v. State, 895 So.2d 1251 (Fla. 2d DCA 2005); Lee v. State, 789 So.2d 1105 (Fla. 4th DCA 2001). "Obviously, the trial judge serves as the neutral arbiter in the proceedings and must not enter the fray by giving "tips" to either side." Chastine v. Broome, 629 So.2d 293,295 (Fla. 4th DCA 1993); see Seago v. State, 23 So.3d 1269,1271-72 (Fla. 2d DCA 2010); Williams v. State, 901 So.2d 357,359 (Fla. 2d DCA 2005); Evans v. State, 831 So.2d 808,811 (Fla. 4th DCA 2002); Asbury v. State, 765 So.2d 965 (Fla. 4th DCA 2000). Contrast McKenzie v. State, 29 So.3d 272, 279-80 (Fla. 2010)(distinguishing the above line of cases because "they involved situations where the trial judge prompted the prosecution to either present certain evidence or take certain actions", while the judge in McKenzie's case did no such thing).

When, on an important matter, the judge crosses the line and prompts the prosecutor to take actions which aid the state at the expense of the defendant, fundamental error occurs which can be raised for the first time on appeal. See Lyles v. State, 742 So.2d 842 (Fla. 2d DCA 1999); Padalla, 895 So.2d at 1252; Lee, 789 So.2d at 1106-07; Sparks, 740 So.2d at 33-34 and 35-37. The reviewing court must focus its inquiry not on the judge's perception of his own ability to be fair and impartial, but rather - - from the litigant's perspective - - whether the judge's impartiality could reasonably be questioned in light of his action benefitting the state. Chastine v. Broome, 629 So.2d at 294. This is particularly true in a capital case, in which "the reviewing court should be especially sensitive to the basis for the fear, as the defendant's life is literally at stake, and the judge's sentencing decision is

in fact a life or death matter." Chastine, 629 So.2d at 294.

In the instant case, after Judge Bulone granted the defense's motion to require each party to give notice of the aggravating and mitigating factors on which they intended to rely (9/1485-86,1593), the state filed a notice in which it listed the following aggravators: (1) capital felony committed during a robbery or burglary; (2) pecuniary gain; and (3) HAC (9/1482,1493-94). Defense counsel stated that he intended to present nonstatutory mitigators consisting of family background, religious practices, employment, and good jail record (9/1496). The judge (correctly under State v. Steele, 921 So.2d 538,542-44 (Fla. 2006)) pointed out that the parties were not totally bound by these, and if something else were to come up they should let the court and opposing counsel know (9/1496-97). Then Judge Bulone said this:

> And then the only other question that I had - - I really don't want to give the State or defense or anyone any additional ideas. But after I went through the affidavit and the case law on that I thought that another prior aggravating factor may be previous conviction of capital or violent felony because of the alleged contemporaneous murder of the other person.
>
> Are you going to be asking for that or not?
>
> MR. SCHAUB [prosecutor]: I don't know yet.
>
> THE COURT: All right.
>
> MR. SCHAUB: I'll let you know on that.
>
> THE COURT: All right. And I'm not saying that you should. I'm just saying that, you know, I went through everything, and I was trying to think of what the possible aggravating circumstances and mitigating circumstances would be. (9/1498-99)

The judge's comments were made on Friday, May 14, 2010, four days before trial. On Monday the 17th, the state filed a new

notice of aggravating circumstances, in which it added a fourth aggravator - - the one the trial judge had suggested - - previous conviction of another capital felony (based on the contemporaneous homicides) (9/1508-09;see 24/13).

There are only two possibilities here, both of them bad. Either the prosecutor had overlooked the fact that contemporaneous homicides could be used to establish the prior violent felony aggravator (which means that but for the trial judge's "tip" he might have continued to overlook it) or else the prosecutor was aware of the aggravator but was genuinely undecided about whether or not to pursue it ("Are you going to be asking for that or not?" "I don't know yet"). If the latter, then the trial judge's suggestion could easily have persuaded the prosecutor to go for it.

Either way, the trial judge departed from judicial neutrality and entered the fray by giving the prosecutor a "tip", which immediately prompted the state to add a fourth aggravating circumstance. Especially in a death penalty case, where the judge must first instruct the jury on the aggravating and mitigating circumstances asserted by the state and defense, and must then (giving great weight to the jury's recommendation) find and weigh the aggravators and mitigators himself, such conduct is unacceptable [Chastine] and constitutes fundamental error [Lyles, Padalla, Sparks]. The judge knew he was treading onto dangerous territory ("I really don't want to give the State or the defense or anyone any additional ideas..."), and then he went ahead and did it anyway.

Appellant's death sentences should be reversed for a new jury

penalty phase because the record affirmatively shows that he did not receive effective assistance of counsel or a reliable jury penalty recommendation [Issue I]. Because of the trial judge's "tip" to the prosecutor which resulted in the addition of an aggravating circumstance, appellant was also denied his right to an impartial adjudicator; this stands as yet another reason why he should receive a new penalty trial.

> [ISSUE IV] THE COMBINED IMPACT OF HIGHLY IMPROPER ARGUMENT IN WHICH THE PROSECUTOR COMMENTED ON APPELLANT'S FAILURE TO TESTIFY AND SHIFTED THE BURDEN OF PROOF, AND TOLD THE JURORS THAT THE STATE DIDN'T EVEN SHOW THEM ALL OF THE EVIDENCE ("WE WOULD HAVE BEEN HERE FOREVER"), VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL.

Part of the defense's theory of the case was that the fingerprints on the unburnt newspaper found in a spare bedroom of the Deluca house (away from where the bodies were found and the fire was set) were planted by someone in order to frame appellant (26/357,364-65;33/1286-87). Defense counsel argued:

> One of the things that should bother you, and I submit it's reasonable doubt, is the newspaper. ...[Y]ou saw a picture of it kind of crumpled up in that southeast bedroom with Mr. Robards' three fingerprints on it.
>
> It was the day before the fire. And the fire was clearly set with newspapers from August 1st. Clearly set. I mean, you saw a picture of it, and you'll have that. And they matched it up. And it all was August 1st. So it was clearly set with that paper. Not anything from July 31st. And that's bothered us and it should bother you. Why would crumpled up newspaper be thrown in another room?
>
> Now, Mr. Schaub's theory is that Mr. Robards is so stupid that he would put his fingerprints on a newspaper, throw it in a room to be found, and then set the fire and hope everything burned upon including his fingerprints.

> Well, our job is not to tell you who did it or, as they like to say, who done it. That's not our job. Our job is to raise any reasonable doubt. (33/1286)

In his rebuttal, the prosecutor started off right but soon got really wrong:

> Now, they don't have to prove anything to you. What did they say they were going to do, raise reasonable doubt, raise reasonable doubt. Well, that newspaper, that newspaper dated the day before this crime, they're going to raise reasonable doubt. Don't you think if someone saw - - someone gives him a newspaper to read the day before you would hear that testimony? You haven't heard that testimony because it doesn't exist.

(33/1320)(emphasis supplied)

This was not merely a burden-shifting comment; it was a full-blown comment on appellant's failure to testify, since the only way the jury could hear testimony that somebody planted appellant's fingerprints on the newspaper would be for appellant to take the witness stand and say so. See e.g. Rodriguez v. State, 753 So.2d 29,38 (Fla. 2000); Smith v. State, 843 So.2d 1010 (Fla. 1st DCA 2003); Durrant v. State, 839 So.2d 821,823-24 (Fla. 4th DCA 2003); Dean v. State, 690 So.2d 720,724 (Fla. 4th DCA 1997); Rigsby v. State, 639 So.2d 132 (Fla. 2d DCA 1994). [The only other possibility is the implausible one in which the person who framed appellant would now admit on the stand that he did so].

The trial judge denied defense counsel's motion for mistrial (made on dual grounds of commenting on appellant's failure to take the stand, and shifting the burden of proof), but he gave the jury an instruction - - insufficient to "cure" the comment on appellant's failure to testify - - that the burden of proof beyond a reasonable doubt is solely on the state, and the defense doesn't

have to prove anything (33/1320-21). The prosecutor apologized to the jury and said "the burden of proof is on us. Not the defense at all. But Mr. Hoffman keeps indicating that they were going to raise reasonable doubt. What he's doing is wanting you to speculate and some of it is atrocious" (33/1321).

After this personal swipe at defense counsel, the prosecutor did the same thing as before:

> The defense wants you to believe that somebody planted that newspaper. There's no evidence of that. There's no evidence whatsoever that somebody gave him a newspaper the day before and said, Put your fingerprints on here so I can plant evidence on you. (33/1321-22)

Defense counsel objected again (33/1322). The judge initially sustained the objection and told the prosecutor "you may continue", whereupon the prosecutor repeated "There's no evidence of that. No evidence at all" (33/1322) Defense counsel objected again, pointing out that "I thought you sustained it" (33/1322). The judge now changed his mind and overruled the defense objection, concluding that the argument which the prosecutor had made earlier (suggesting that if any of this evidence existed the defense would have put it on) was improper, but that the prosecutor could argue that there was no evidence to back up the defense's argument (33/1322-23). The prosecutor replied "Yes, your Honor. That's all I'm doing." (33/1323). He then argued to the jury:

> There's no evidence of that. Recall the evidence in this case. The evidence comes from the witness stand and the evidence comes from the evidence that's been submitted during the course of this trial. There's no evidence that someone planted evidence in this case, i.e., the newspaper. (33/1323)

The prosecutor's later remarks, while phrased a little more artfully, could only have had the effect of reinforcing and re-emphasizing his earlier comments on the absence of testimony from the witness stand that someone had planted the newspaper. Any prosecutorial argument which is fairly susceptible of being interpreted by the jury as a comment on the defendant's failure to testify is improper, and is a "high risk" error which requires reversal unless the state can meet its heavy burden of showing beyond a reasonable doubt that it could not have affected the jury's deliberations or verdict. State v. DiGuilio, 491 So.2d 1129,1135-36 (Fla. 1986); Rigsby v. State, 639 So.2d at 133. A serious error of this nature cannot be dismissed as "harmless" based solely on the perceived strength of the state's evidence. Cooper v. State, 43 So.2d 42 (Fla. 2010). As the prosecutor acknowledged, the evidence introduced in this trial to support the state's contention that appellant was the person who committed the charged homicides was circumstantial (32/1263). See Zecchino v. State, 691 So.2d 1197,1198 (Fla. 4th DCA 1997)("in this circumstantial evidence case where identity was at issue", erroneous introduction of witness opinion evidence cannot be found harmless); see also Senterfitt v. State, 837 So.2d 599,601 (Fla. 1st DCA 2003); James v. State, 765 So.2d 763,766 (Fla. 1st DCA 2000).

Moreover, in determining whether prosecutorial misconduct in closing argument to the jury violated a defendant's right to a fair trial, this Court considers the cumulative effect of objected-to and unobjected-to comments. Merck v. State, 975 So.2d 1054,1061 (Fla. 2007); Ruiz v. State, 743 So.2d 1,7 (Fla. 1999);

Pope v. Wainwright, 496 So.2d 798,801 n.1 (Fla. 1986). In this trial, toward the beginning of his initial closing argument, the prosecutor made the following egregious and inexcusable comment:

> MR. SCHAUB: Now, Mr. Hoffman would make it sound like who committed - - the person who committed this crime had to be the world's craziest, dumbest individual. Let me introduce you to the world's dumbest individual, Richard T. Robards, because he committed this crime in Clearwater, and the Clearwater Police Department did one heck of a job. They truly, truly, truly did.
>
> Think about it, all the evidence, all the work that they did during this investigation. And we didn't even show you all of it. We would have been here forever. You know how hard they worked this case. And it was their hard work and their evidence and their efforts that found all of this evidence and put this case together.
>
> Heck they build the plane. We only fly it. And that's the easy part. They put this case together. And he committed this crime in their backyard. And they worked it and worked it and worked it, and they found evidence and evidence and evidence.

(32/1232-33)(emphasis supplied)

"[T]rial attorneys must avoid improper argument if the system is to work properly. If attorneys do not recognize improper argument, they should not be in a courtroom. If trial attorneys recognize improper argument and persist in its use, they should not be members of the Florida Bar." Duncan v. State, 776 So.2d 287,290 (Fla. 2d DCA 2000), quoting Judge Blue's well-known admonition specially concurring in Luce v. State, 642 So.2d 4 (Fla. 2d DCA 1994). Prosecutorial argument stating (or even implying) that there is additional evidence of a defendant's guilt that was not presented during the trial is highly improper and prejudicial, and has been recognized as such by Florida appellate

courts for at least 35 years. See Peterka v. State, 890 So.2d 219,235 (Fla. 2004); Thompson v. State, 318 So.2d 549 (Fla. 4th DCA 1975); Richardson v. State, 335 So.2d 835 (Fla. 4th DCA 1976); Libertucci v. State, 395 So.2d 1223,1226 n.5 (Fla. 3d DCA 1981); Williamson v. State, 459 So.2d 1125,1126-27 (Fla. 3d DCA 1984); Williams v. State, 548 So.2d 898 (Fla. 4th DCA 1989); Stewart v. State, 622 So.2d 51,56 (Fla. 5th DCA 1993); Tillman v. State, 647 So.2d 1015 (Fla. 4th DCA 1994); Hazelwood v. State, 658 So.2d 1241,1244 (Fla. 4th DCA 1995); Ford v. State, 702 So.2d 279,281 (Fla. 4th DCA 1997); Wilson v. State, 798 So.2d 836 (Fla. 3d DCA 2001).

"[T]he inquiry should be whether the prosecutor's expression might reasonably lead the jury to believe that there is other evidence, unknown or unavailable to the jury, on which the prosecutor was convinced of the accused's guilt." Thompson, 318 So.2d at 552 (quoting McMillan v. United States, 363 F.2d 165,169 (5th Cir. 1966)); Stewart, 622 So.2d at 56; Ford, 702 So.2d at 281. In Thompson - - reversing for a new trial notwithstanding the lack of an objection or motion by defense counsel below - - the appellate court said:

> Nothing as subtle as an expression of belief in guilt implying access to additional evidence occurred in the case at bar. Instead, the prosecutor here represented outright to the jury that he had additional evidence of appellant's guilt which he simply saw no need to present to them. This representation was highly improper and prejudicial, especially in the context of this case.

318 So.2d at 552, see 551.

The prosecutor's comment in the instant case - - the guilt

phase of a capital trial - - was equally flagrant. He told the jury in so many words that the Clearwater police did one heck of a job in compiling the evidence "[a]nd we didn't even show you all of it. We would have been here forever." "Forever" conveys not only that there was additional evidence of appellant's guilt, there was a whole lot of it. Defense counsel should have objected and moved for a mistrial [see Duncan v. State, 776 So.2d at 288-90], but the prosecutor should never have made such an outrageous (and universally condemned) remark. Moreover, trial judges have a "long-standing responsibility to protect jurors from improper closing arguments, even in the absence of a proper objection." Thomas v. State, 752 So.2d 679,686 (Fla. 1st DCA 2000). Since this Court considers the combined effect of objected-to and unobjected-to comments, defense counsel's failure to object does not preclude relief. Appellant's convictions and death sentences should be reversed for a new trial.

CONCLUSION

Appellant respectfully requests that this Court reverse his convictions and death sentences for a new trial [Issue IV], reverse his death sentences for a new jury penalty proceeding [Issues I, II, and III], and/or remand for a sentence of life imprisonment without parole [Issue II].

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 February, 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).

Respectfully submitted,

_____

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(863) 534-4200

STEVEN L. BOLOTIN
Assistant Public Defender
Florida Bar Number 0236365
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

SLB/tll