IN THE SUPREME COURT OF FLORIDA

BRODERICK W. MONLYN,

Appellant,

vs.

Case No. SC02-1729
(Lower Case No. 92-147-CF)

STATE OF FLORIDA,

Appellee.
_____/

INITIAL BRIEF OF APPELLANT

ON DIRECT APPEAL FROM A FINAL ORDER OF THE THIRD JUDICIAL CIRCUIT IN AND FOR MADISON COUNTY, FLORIDA, DENYING APPELLANT'S AMENDED FLORIDA RULE OF CRIMINAL PROCEDURE 3.850 MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCES, INCLUDING A DEATH SENTENCE, AFTER AN EVIDENTIARY HEARING

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PRELIMINARY STATEMENT

Appellant Broderick W. Monlyn was the defendant in the lower tribunal. He will be referred to as "Monlyn" or the "defendant." Appellee, the State of Florida, was the plaintiff in the lower tribunal. It will be referred to as "the state."

The record on appeal is in ten volumes.

Volumes I through VI contain the pleadings filed in the Florida Rule of Criminal Procedure 3.850 proceedings in the lower tribunal.

Volumes VII through X contain various hearing transcripts relating to the amended Rule 3.850 motion. The index to these volumes is somewhat confusing in describing the matters contained therein. Thus, a more detailed description of the contents of each volume is provided below.

Volume VII contains the August 18, 1999 hearing transcript regarding the state's objections to the defendant's public records requests, and a portion of the April 19, 2002 evidentiary hearing transcript on the defendant's amended 3.850 motion.

Volume VIII contains the remainder of the April 19, 2002 evidentiary hearing transcript, a second copy of the August 18, 1999 hearing transcript on the objections to defendant's public records requests, the April 7, 2000 status

conference transcript, and the April 18, 2001 status conference transcript.

Volume IX contains the transcripts of the *Huff* hearing held on October 19, 2002, the November 20, 2001 hearing transcript regarding the trial court's inspection of sealed records, and a second copy of the March 19, 2002 evidentiary hearing transcript.

Volume X contains the transcript of the remaining (duplicate) copy of the March 19, 2002 evidentiary hearing.

References to the post conviction record ("PCR") will be by Volume number followed by the handwritten page number appearing at the bottom of each page as provided by the clerk. For example, page 1061 of volume seven will be cited as "(PCR-VII-1061)." References to the original record on appeal of Monlyn's judgments of convictions and sentences will be cited by the letters "OR" followed by a page number.

REQUEST FOR ORAL ARGUMENT

Monlyn has been sentenced to death. Therefore, oral argument is requested.

STATEMENT OF THE CASE AND THE FACTS

A. Nature of the Case:

This is a direct appeal to the Supreme Court of Florida of a June 24, 2002 Final Order (PCR-V-804-77) rendered by the trial court denying Monlyn's amended Florida Rule of Criminal Procedure motion to vacate and set aside his conviction and sentences, including a death sentence, filed pursuant to the provisions of Florida Rules of Criminal Procedure 3.850 and 3.851.

B. Course of the Proceedings:

On October 22, 1992, Monlyn was indicted by a Madison County, Florida grand jury and charged with murder in the first degree, robbery while armed with a deadly weapon and kidnapping while armed. (OR. 749-50) On October 15, 1993, after a jury trial, Monlyn was found guilty as charged on all three counts. (OR. 2205). A penalty phase trial was then held. On October 19, 1993, the jury returned a death recommendation by a vote of 12-0. (OR. 2370). The trial court, Hon. E. Vernon Douglas, Circuit Judge, sentenced Monlyn to death (OR. 2435-37). Written findings in support of the imposition of the death sentence were filed on November 2, 1993. (OR. 3047-48)

Monlyn took a direct appeal to this Court. (PCR-IV-572) He raised thirteen issues on direct appeal. (PCR-IV-573) Those claims, as summarized by this Court, were as follows:

(1) Error to allow the medical examiner's testimony that Watson was still alive and suffered more head blows after being bound and gagged;

(2) Error to overrule **Monlyn's** objection when he was asked on cross-examination about the inconsistency between his testimony that he bit the victim and the medical examiner's testimony that there were only blunt injuries to the victim;

(3) Error not to grant a mistrial after the state's questions as to why **Monlyn** had not told anyone about his fight with victim and whether he realized that the victim would die without medical attention;

(4) Error to admit the victim's wife's testimony that the victim usually carried $ 200.00 to $ 300.00 in cash with him;

(5) Error to deny a motion for mistrial during the state's guilt-phase closing argument;

(6) Error to admit Johnny Craddock's testimony regarding **Monlyn's** statements made weeks before the homicide;

(7) Error to refuse to give **Monlyn's** requested circumstantial evidence instructions;

(8) Error to give the standard reasonable doubt instruction;

(9) Error to give an unconstitutionally vague instruction on the cold, calculated, and premeditated aggravator;

(10) Error to find that the murder was cold, calculated, and premeditated (CCP);

(11) Error to give the standard heinous, atrocious, or cruel instruction;

(12) Error not to give **Monlyn's** requested mitigation instruction; and

(13) Error not to instruct against doubling the pecuniary gain and robbery aggravators.

Monlyn v. State, 705 So. 2d 1, 3-4 (Fla. 1997).[1] On October 9, 1999, Monlyn's convictions, judgments and sentences, including the death sentence, were affirmed by this Court. *Monlyn v. State*, 705 So. 2d 1 (Fla. 1997), rehearing denied on January 22, 1998. (PCR-IV-574)

Monlyn then sought collateral post conviction relief in the trial court. On June 25, 1999, he filed a Motion to Vacate Judgments and Sentences with a special request to amend per the provisions of Florida Rule of Criminal Procedure 3.850. (PCR-III-383-482) On July 31, 2001, he filed an Amended Motion to Vacate Judgments of Conviction and Sentence. (PCR-IV-571-592) The amended 3.850 motion included the following claims:

(1) Ineffective assistance of trial counsel for failure to challenge the testimony of Jerome Blackshear on the ground that Blackshear was incompetent to testify. (PCR-IV-574-575)

(2) Ineffective assistance of counsel for failure to object and preserve for appellate review the issue of Mrs. Watson's testimony that it was her husband's habit to carrying significant amounts of cash with him at all times. (PCR-IV-575-577)

(3) Ineffective assistance of counsel for failure to elicit testimony from the Florida Department of Law Enforcement agent who discovered $100.00 in Watson's wallet, in contravention of the state's argument that the wallet was found containing no money. (PCR-IV-577-578)

(4) Ineffective assistance of counsel for failure to object to the admission of DNA evidence because the PCR-DNA testing was not generally accepted in the scientific community at the time of Monlyn's trial, and failure to request a *Frye* hearing. (PCR-IV-578)

(5) Ineffective assistance of counsel for failure to call William E. Banks as a witness during the defense's case-in-chief to corroborate the testimony of

[1] In the opinion, the above listed issues were in paragraph form.

Monlyn. (PCR-IV-579)

(6) Ineffective assistance of counsel for failure to minimize the first aggravating circumstance relied on by the state by establishing that Monlyn did not commit a violent act during the alleged robbery, and denial of his right to an adversarial testing at the penalty phase of his trial. (PCR-IV-579)

(7) Denial of Monlyn's right to adversarial testing at the penalty phase of his capital trial in that the jury was allowed to consider the aggravating circumstance of pecuniary gain, which was not proven by the State. (PCR-IV-580-581)

(8) The death penalty imposed upon Monlyn is unconstitutional because the jury was allowed to consider alleged aggravating circumstances which were not defined with the specificity required by the state and federal constitutions. (PCR-IV-581-582)

(9) Monlyn was denied the right to adversarial testing and the effective assistance of counsel at the penalty phase of his trial because defense counsel failed to introduce evidence of Monlyn's remorse for causing Watson's death. (PCR-IV-582-83)

(10) Monlyn was denied the constitutional right to adduce mitigating evidence at the penalty phase trial by not being allowed by his counsel to testify in his own behalf. The trial court infringed on Monlyn's constitutional right to testify at the penalty phase of the trial by failing to conduct an inquiry of Monlyn as to whether he wished to testify or present mitigation. The trial court also failed to inquire of Monlyn as to whether he knowingly and voluntarily waived this right. (PCR-IV-583)

(11) Ineffective assistance of counsel for failure to properly advise Monlyn of his right to testify at the penalty phase of the trial. Had Monlyn testified at the penalty phase of his trial, there is a reasonable probability that the result of the proceeding would have been different. (PCR-IV-584)

(12) Monlyn was deprived his right to adversarial testing at the penalty phase his trial and therefore his death sentence is unreliable. In this claim, Monlyn raised several sub-claims identified in paragraphs (a) through (m). (PCR-IV-584-89)

On September 21, 2001, the state filed a Response to Defendant's Amended Motion to Vacate Judgments of Conviction and Sentence. (PCR-IV-631-51) After conducting a *Huff*[2] hearing, the trial court granted an evidentiary hearing as to claims 1 through 6, 9, 11, and 12(c) and (h). (PCR-IV-666-667) The trial court denied an evidentiary hearing as to claims 7, 8, 10, 12(a), (b), (d), (e) through (g), and (i) through (m).[3] On March

[2] *Huff v. State*, 622 So. 2d 982 (Fla. 1993)

[3] Monlyn and the state agreed that an evidentiary hearing was not required as to

19, 2002, the trial court presided over the post conviction evidentiary hearing as to the claims referenced above. (PCR-VII-1097-1224)

On June 11, 2002, the state filed its post evidentiary hearing memorandum. (PRC-IV-712-750) On June 18, 2002, Monlyn filed his Post Evidentiary Argument in Support of his Amended Motion to Vacate Judgment of Conviction and Sentence. (PCR-V-756-803)

C. Disposition in Lower Tribunal:

On June 20, 2002, the trial court rendered a final Order denying Monlyn's motion for post conviction relief. (PCR-V-804-08) On July 12, 2002, Monlyn filed a timely notice of appeal to this Court along with directions to the clerk and designations to the court reporter. (PCR-VI-964-65, 1055-58)

D. Statement on Jurisdiction:

This Court has jurisdiction to review the lower tribunal's denial of Monlyn's Florida Rule of Criminal Procedure 3.850 motion to vacate and set aside his judgments of conviction and sentences, including a death sentence, per the provisions of Article V, Section 3(b)(1), Florida Constitution, Florida Rule of Appellate Procedure 9.030(a)(1)(A)(I) and Florida Rule of Criminal Procedure 3.850(g).

E. Standard of Appellate Review:

This is a post conviction capital case involving mixed questions of law and fact. As such, the circuit court Order denying Monlyn's Florida Rule of Criminal Procedure 3.850 motion appealed from is subject to *de novo* review except that deference must be given to the trial court's findings of fact so long as there is competent and substantial evidence to support same. *Johnson v. Moore*, 789 So. 2d 262 (Fla. 2001); *Porter v. State*, 788 So. 2d 917 (Fla. 2001); *Rose v. State*, 675 So. 2d 567 (Fla. 1996).

F. Statement of the Facts:

The Facts Regarding the Homicide

The basic facts regarding the homicide are found in this Court's opinion in *Monlyn v. State*, 705 So. 2d 1 (Fla. 1997) and the record. Monlyn provides a synopsis of same below.

Monlyn had personally known Mr. Watson as he and his relatives lived across the road from the deceased and his family for years. (OR. 827; *Monlyn*, 705 So. 2d at 2) Monlyn would sometimes fish at a pond located on Watson's property. (OR. 1116) On one occasion in 1990, about 18 months before the homicide, Monlyn, a cousin (Jerome Blackshear) and a friend (John Craddock) trespassed on Watson's property and were fishing at the pond. Watson drove up telling the men to "[h]old it right there." He was brandishing a high-powered rifle. (OR. 1001,

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Claims 7 and 8.

1011) When Monlyn and the two other men had gone about 75 yards and were off Watson's land, Monlyn and Watson fired several gunshots, either up in the air or at one another. (OR. 1003, 1021)

Several months later, Monlyn and his cousin (Jerome Blackshear) were in prison together. One day while they were talking, the defendant told Blackshear that he was going to kill Watson. (OR-1009). Immediately before the homicide, Monlyn was in the Madison County Jail, and he told another inmate (John Craddock) that he wanted to be out of jail for his birthday. He also said that he would kill the first person he saw so he could get a ride. (OR. 1059, 1092) Monlyn never said, however, that that person would be Alton Watson. (OR-1116)

The next day, on October 6, 1992, Monlyn escaped from the Madison County Jail. (OR. 1093) During the next several days, he apparently went to his grandmother's house, broke into his own house to get some clothes and money (OR. 1452) and stole a shotgun from his uncle's truck to protect himself from animals. (OR. 1431) He spent one night in Watson's barn because he had been told that the police were looking for him and would be coming to his house. (OR. 1453, 1456). At trial, one of his cousins (Darrell Adams) related that Monlyn told him he was going to rob Watson of his truck and money and go to Mexico. (OR. 1106) Monlyn stated that he never planned to rob anyone. (OR. 1456)

Monlyn loitered about the area for a day and spent a second night in Watson's barn. Early on the morning of October 8, 1992, Watson came into the barn and surprised Monlyn as he was trying to leave. (OR. 1459) The shotgun was propped near a wall. Both men saw it and grabbed for it. (OR. 1461) Monlyn, by this time, had the barrel of the weapon and he began to swing it over his head, hitting Watson. (OR. 1468) The struggle continued into the yard while Monlyn tried to escape. By this time Watson was bleeding heavily and had ceased his attack on Monlyn. (OR. 1470) Monlyn then tied Watson's feet together, gagged him, dragged him into the barn, and left in Watson's truck. *Id.* When Watson's body was found, his wallet was located next to him. It was initially thought that there was no money in the wallet. (OR. 836) A Tallahassee, Florida crime laboratory agent subsequently reported that there was in fact $100.00 found in a hidden compartment of Watson's wallet. (PCR-IV-576)

The defendant took Watson's truck, drove through some fields, and finally got onto a road. (OR-835) He abandoned the truck in Lake City, Florida, bought a bike, and met a girl friend there. (OR. 1130, 1149) When asked how much money he had, Monlyn said he had to "improvise" and said that he had about $20.00. (OR. 1131) His friend let him stay at her trailer, but she called the police, who quickly responded. (OR. 1137) The law enforcement officers found Monlyn inside in the bathroom. (OR. 1160) When arrested he had $25.00 in his

possession. His hand was swollen, and he had a cut on his forehead. (OR. 1194)

Watson died as a result of wounds to his head.

Monlyn was charged with first-degree murder, robbery and kidnapping. At the conclusion of the trial, the jury found the defendant guilty as charged.

During the penalty phase portion of the trial, the state introduced evidence and argued that the following aggravating factors had been established: (1) Monlyn had previously been convicted of the commission of a prior violent felony (the robbery of Watson), (2) the capital felony was committed while the defendant was engaged in the commission of, or an attempt to commit, a robbery or kidnapping; (3) the capital felony was committed for pecuniary gain; (4) the capital felony was especially heinous, atrocious or cruel; and (5) the murder was cold, calculated, and premeditated. (OR. 2422)

Monlyn did not present any evidence as to the existence of any statutory mitigating factors. However, he did present a few non-statutory mitigating factors, which were: (1) Monlyn was an affectionate and considerate person toward his family; (2) he had been helpful to others; (3) during his stays in state prison, he had no record of disciplinary actions; and (4) he presented good behavior at trial. (OR. 2433)

The jury recommended death by a vote of 12-0.

At the conclusion of the penalty phase, the trial court determined that the state had proven beyond a reasonable doubt the five statutory aggravating factors referenced above. As to the mitigating factors, the trial court found that Monlyn did not argue nor establish any of the statutory mitigating factors contained in Section 921.141(6), Florida Statutes (1993). (OR. 3038) As to the non-statutory mitigating factors, the court found that Monlyn had established the four non-statutory mitigating factors referenced above. (OR. 3038-39) However, the trial court found that the non-statutory mitigating factors did not outweigh the aggravating factors. (OR. 3040) Therefore, the trial court accepted the jury's advisory recommendation and sentenced Monlyn to death. (OR. 3040)

The Rule 3.850 Hearing Testimony

The testimony and documentary evidence presented during the March 19, 2002, evidentiary hearing on Monlyn's amended 3.850 motion are summarized below.

The first witness called at the evidentiary hearing was Investigator Ben Steward of the Madison County Sheriff's Office. (PCR-VII-1107-21) Investigator Steward was the lead investigator regarding the homicide of Mr. Waston. (PCR-VII-1108) He testified that Mr. Watson's wallet was not found by law enforcement personnel at the crime scene. Instead, it was located the next day by Mr. Watson's son, who turned it over to him (Investigator Steward). (PCR-VII-1109-10) The investigator made a cursory check of the contents of the wallet by

opening it to see if there was any money, being careful not to handle it more than he had to, and then provided it to Agent Pfeil, who submitted it to the FDLE lab. (PCR-VII-1109-10). Detective Steward was later notified by an FDLE analyst that its crime lab found a folded $100.00 bill in a compartment in the wallet. (PCR-VII-1112-14) Investigator Steward prepared an affidavit confirming that the FDLE crime lab found the $100.00 and that the victim's wife stated that her husband kept $100.00 hidden in his wallet for emergencies. (PCR-VII-1113-14)

The second witness called at the evidentiary hearing was Jerome Blackshear. (PCR 1121-1169) He testified that he sustained four or five head injuries prior to Monlyn's trial. (PCR-VII-1128) As a result, he experienced dizzy spells, black outs and memory loss. (PCR-VII-1128-1132) Blackshear had testified at Monlyn's trial that Monlyn told him while they where incarcerated at Holmes Correctional Institutution that he was going to kill Watson. (PCR-VII-1137) Blackshear acknowledged that his head injuries affected his ability to accurately remember the conversation he had with Monlyn. (PCR-VII 1137-38) At the time of Monlyn's trial, Blackshear was taking Thorazine and Sinequan for his head injuries. (PCR-VII-1149). The Florida Department of Corrections kept a record of the drugs he was taking. (PCR-VII 1149)

Darrell LeShawn Adams testified next at the Rule 3.850 evidentiary hearing. (PCR-1175) He stated that he could not remember anything about the testimony he offered during Monlyn's trial. (PCR-VII-1179).

Duncan Jones was the next witness to testify at the evidentiary hearing. (PCR-VII-1180) He worked at the Public Defender's Office at the time of Monlyn's trial and assisted lead defense counsel, Jimmy Hunt. (PCR-VII-1180-81) Jones helped with matters related to the introduction of DNA evidence. (PCR-VII-1183-1202) In particular, Jones objected to the state's introduction of the testimony of expert Sue Livingston concerning the FDLE's use of new DNA testing procedures. (PCR-VII-1186-89) The basis for the objection was that at the time of Monlyn's trial there were no national standards concerning this new type of DNA testing, and there was only one lab using it. (PCR-VII-1187) Defense counsel did not attempt to exclude the DNA evidence prior to trial because he considered the evidence to be a minor issue and because Hunt and he both agreed that Monlyn was going to be found guilty regardless. (PCR-VII-1189-90) Therefore, according to Jones, their main focus of the case was to avoid the death penalty. (PCR-VII-1190)

Jones also objected at trial to Sue Livingston being accepted by the trial court as an expert because she had extremely limited experience with this new technology and because there was no objective peer review. (PCR-VII-1192-94) Jones indicated that he and Hunt were unaware of a debate in the scientific community at the time of the trial as to the validity of this new type of testing.

(PCR-VII-1195-96) They didn't think the DNA evidence would materially affect the case, and they therefore did not request a *Frye* hearing. (PCR-VII-1198-1201) Jones acknowledged on cross-examination that although the PCR/DQ-alpha methodology was not well known in the forensic community at the time, it was a well-documented methodology in a non-forensic setting. (PCR-VII-1213)

Jimmy Hunt was the next witness called at the evidentiary hearing. (PCR-VIII-1129). He testified that he was the lead trial counsel in the Monlyn case and Duncan Jones assisted him as co-counsel. (PCR-VIII-1230) Jones stated that he did not receive any information to the effect that Jerome Blackshear had a history of mental health problems as of the time of trial. (PCR-VIII-1241) He was not aware that Mr. Blackshear was taking medication during the trial, and did not know that Blackshear had a history of forgetfulness or memory loss and lapses resulting from head injuries he had sustained. (PCR-VIII-1241-43) Hunt could not recall whether he obtained Blackshear's Department of Corrections' medical records. (PCR-VIII-1242). Hunt did not ask Blackshear if he had any mental problems, nor did Blackshear advise him of that fact. (PCR-VIII-1243) Hunt did not observe any signs of Blackshear's mental illness or memory problems when he deposed him prior to trial. (PCR-VIII-1243)

Hunt stated that he did not object to the admission of the evidence that Watson always carried large amounts of cash in his wallet because he didn't see anything wrong with that evidence coming in. (PCR-VIII-1243-46) Although the state argued during closing argument that no money was found in Watson's wallet, Hunt testified at the evidentiary hearing that he was aware at the time of the trial that a $100.00 bill had in fact been found in Watson's wallet. (PCR-VIII-1247) Hunt felt this was an unimportant issue since Monlyn had stolen Watson's truck and guns, and the information alleged that he committed robbery by taking the vehicle and/or currency in the process. (PCR-VIII-1249-54) However, Hunt conceded that he probably overlooked objecting to the state's claim that the wallet was found without any money inside. (PCR-VIII-1255)

As to the admission of DNA evidence, Hunt testified that once he decided to have Monlyn testify, contesting the admission of the DNA evidence was not important because they were not denying the fact that the victim's blood was found on Monlyn's clothing and, thus, the DNA evidence was not inconsistent with his theory of the case. (PCR-VIII-1261-63)

As to the penalty phase issues, Hunt testified that he did not argue to the jury that Monlyn was remorseful because his strategy was to assert that Monlyn did not intend to kill Watson, and remorse was logically inferred. (PCR-VIII-1287) Hunt added that Monlyn made the choice not to testify at the penalty phase. (PCR-VIII-1288) Hunt felt that Monlyn's testimony regarding his remorse would not have been credible in the eyes of the jury because the state would have responded that

he left the victim in a helpless condition. (PCR-VIII-1291)

Monlyn testified at the evidentiary hearing that he did not know that he could testify at the penalty phase of his trial, and that he was never informed of this right by Hunt or Duncan Jones. (PCR-VIII-1335-1337).[4] Monlyn stated that he would have told the jury that he was remorseful as to Watson's death. (PCR-VIII-1337-38) His testimony would have been consistent with the letter he wrote Mrs. Watson in which he apologized and expressed his remorse. (PCR-VIII-1337).

SUMMARY OF THE ARGUMENT

Monlyn argues that his trial counsel rendered ineffective assistance of counsel during the guilt and penalty phases of his trial, causing the resulting convictions and death sentence to be constitutionally unreliable. In order to put these claims in context, a few matters warrant discussion.

At the Rule 3.850 evidentiary hearing, defense counsel maintained generally that because the evidence of Monlyn's guilt was overwhelming, their main concern and focus was to prevent Monlyn from being sentenced to death. (PCR-VII-1190; PCR-VII-1240) Defense counsel's contentions were self-serving and not supported by the record. This is so because well prior to trial, defense counsel attempted to develop mitigating factors for the anticipated penalty phase of the trial and found that little if any mitigation existed. (PCR-VII-1206) A review of the evidence introduced by defense counsel during the penalty phase supports the determination that the defense was hard pressed to be able to establish the existence of mitigating factors sufficient to justify a life recommendation.[5] In contrast, the quality and quantity

[4] The record on appeal incorrectly identifies page 1337 as 1437.

[5] During the penalty phase portion of the trial, defense counsel did not introduce any evidence in support of a statutory mitigating factor. Rather, defense counsel presented evidence and argued that Monlyn's life should be spared on the basis of four non-mitigating factors, which were (1) Monlyn was an affectionate and considerate

of the evidence introduced by the state during the penalty phase was, as the trial court found, "so clear and convincing that virtually no reasonable person could differ." (PRC-XX-3039) Reasonably effective defense counsel would have realized that if Monlyn were convicted as charged, the state would have little difficulty in establishing three statutory aggravating factors, which were (1) Monlyn was previously convicted of a violent crime, (2) the capital felony was committed while Monlyn was engaged in a robbery or kidnapping; and (3) the capital felony was committed for pecuniary gain. With that in mind, it becomes clear that there was only one course of action defense counsel could have undertaken that had a reasonable probability of saving Monlyn's life: That course of action would have been to challenge the state's case during the guilt phase.

Monlyn argues that defense counsel was ineffective for failing to object to prejudicial, inadmissible evidence introduced by the state to establish that Monlyn robbed Mr. Watson. According to Mrs. Watson, the state's witness, her husband's wallet should have contained some two to three hundred dollars on the day he was killed. The state argued that because no money was found in Mr. Watson's wallet, Monlyn must have taken it. Mrs. Watson did not know for a fact that he (Mr. Watson) had any money in his wallet on the day he was killed. Instead, her testimony was based on her belief that Mr. Watson always carried large sums of money on him. This evidence was inadmissible habit evidence.

Although Florida courts recognize that evidence of a person's habits is admissible under certain limited circumstances, Mrs. Watson's testimony fell significantly short of satisfying Florida's test for the admissibility of this kind of evidence. Her testimony was extremely damaging to Monlyn's case as it not only shored up the state's felony murder and robbery theory, it also established two aggravating factors. Defense counsel's failure to object to this testimony amounts to ineffective assistance of counsel. But for counsel's error in failing to object to this testimony, there is a reasonable probability that Monlyn would not have been convicted of first-degree murder or robbery and would not have been sentenced to death.

To make matters worse, the prosecutor aggressively argued to the jury that Monlyn was guilty of robbery because no money was found in Mr. Watson's wallet. This statement was false. Investigator Steward advised the prosecutor well prior to trial that a $100.00 bill was later found in Mr. Watson's wallet by the FDLE. Moreover, defense counsel knew that a $100.00 bill was found in the wallet, but did nothing to protect Monlyn. Defense counsel was duty bound to elicit the testimony of Investigator Steward in order to disprove the state's assertion that no money was found in the wallet. Defense counsel was also ineffective for failing to object to the prosecutor's false and misleading argument that there was no

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person toward his family; (2) Monlyn had been helpful to others; (3) during his stays in state prison he had no record of disciplinary actions; and (4) Monlyn presented good behavior during the trial. (OR. 3038-39)

money found in the wallet.

The state will surely argue that defense counsel was not ineffective because the state also presented evidence that Monlyn committed robbery by taking Mr. Watson's truck and guns (that were inside the truck). Such an argument would fail because there is strong evidence in the record that suggests that these acts were committed as an "afterthought." *Beasley v. State*, 774 So. 2d 649, 662 (Fla. 2000) (holding that "in those cases where the record discloses that, in committing the murder, the defendant was apparently motivated by some reason other than a desire to obtain the stolen valuable, a conviction for **robbery (or the robbery** aggravator) will not be upheld"). Moreover, the state will likely argue that there is no prejudice because the felony murder conviction can be sustained based on the kidnapping charge. This argument would also fail because the jury used a general verdict in finding Monlyn guilty of first-degree murder. *Fitzpatrick v. State*, 28 Fla. L. Weekly S 679 (Fla. September 11, 2003) (holding that where a jury convicts a defendant of first-degree murder using a general verdict, and the state presented multiple theories one of which is subsequently invalidated, the conviction must be reversed).

Monlyn also claims that counsel was ineffective for failing to advise him of his right to testify in the penalty phase portion of his trial. Had Monlyn been advised of this right by his counsel, he would have taken advantage of the opportunity and expressed his remorse for what happened.

Monlyn contends that defense counsel's ineffectiveness, when considered cumulatively, satisfy *Strickland's* prejudice prong.

Lastly, Monlyn contends that the trial court erred in failing to rule on Claims 7 and 8 of his amended 3.850 motion. Remand is required as to this issue as the defendant is entitled to a ruling by the trial court as to those claims.

ARGUMENT

Issue I: The trial court erred in denying Monlyn's claim that he was denied constitutionally effective assistance of counsel during the guilt/innocence and penalty phases of his trial.

A. Ineffectivness and the resulting prejudice generally.

Monlyn asserts that the record shows that he was denied constitutionally effective assistance of counsel at trial as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution, and Article I, Declaration of Rights, Sections 2, 9 and 16, Florida Constitution, and within the meaning of ineffective assistance of counsel in capital and other criminal cases as defined in *Strickland v. Washington*, 466 U.S. 668 (1984), *Williams v. Taylor*, 529 U.S. 362 (2000), *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995), *Roberts v. State*, 568 So. 2d 1225 (Fla. 1990), and *Williams v. State*, 673 So. 2d 960 (Fla. 1st DCA 1996). Monlyn contends that the omissions of his trial counsel as described in his post conviction motions and herein were more than negligent acts. Instead, these acts, omissions, errors and deficiencies were so serious and significant that defense counsel was not functioning as "counsel" as guaranteed by the Sixth Amendment to the United States Constitution as applied to the states by virtue of the due process clause of the Fourteenth Amendment. These deficiencies, errors, acts and omissions were instead well outside and significantly and measurably below the broad range of reasonable professional standards of competence for attorneys in

the Third Circuit, this State and the United States of America. Furthermore, the deficient performance of trial counsel was prejudicial and so affected the fairness and reliability of the proceedings that the confidence in the outcome was seriously undermined and eroded. *See Williams v. State*, 673 So. 2d 960 (Fla. 1st DCA 1996) and *Strickland v. Washington, supra*. The specific acts and/or omissions which evince constitutionally ineffective assistance of trial counsel (none of which can be justified as strategic) were fully explained with citations to the record in Monlyn's motions for post conviction relief.

B. Trial counsel's ineffectiveness for failing to object and preserve for appeal the issue of Mrs. Watson's testimony about her husband's habit of carrying a large amount of cash with him at all times.

At Monlyn's trial, the state's first witness was Mrs. Mattie Watson, the widow of Alton Watson. Mrs. Watson testified about the events on the morning of her husband's death. Mrs. Watson told the jury that her husband had always carried at least one hundred dollars, and often times several hundred dollars in cash in his wallet. In this regard, she stated:

Q. Do you know how much money Mr. Watson had in his wallet on October 8th?

A. I don't know exactly how much . . . and when he cashed a check, it was usually a check for two or three hundred dollars. And he always carried a hundred dollars, what he called mad money, in his wallet, because I'd take his mad money occasionally.

Q. And was that in a hidden place in his wallet?

A. Yes. It was always tucked hidden in his wallet.

Q. An as far as you know, was that hundred dollars still hidden in his wallet when the wallet was recovered?

A. I didn't see it just now.

Q. To the best of your knowledge and information and belief then, Mr. Watson would have somewhere between two and three hundred dollars with him at the time of his death?

A. Yes.

(OR. 791)

On direct appeal, Monlyn argued that Mrs. Watson's testimony was inadmissible and did not qualify as "routine practice" or "habit" evidence under Section 90.406, Florida Statutes (1993). This Court declined to reach the merits of the claim because defense counsel failed to preserve the issue for appellate review. *Monlyn v. State*, 705 So. 2d 1, 4 (Fla. 1998).

Monlyn argued in Claim II of his amended post conviction motion that his trial counsel was ineffective for failing to object to Mrs. Watson's testimony as to the amount of money Mr. Watson had in his wallet. (PCR-IV-575) Mrs. Watson's testimony was not based on her personal knowledge that Mr. Watson had a certain amount of money in his wallet. Instead, it was founded on her belief that Mr. Watson had a routine practice or habit of carrying some two to three hundred dollars in his wallet. It was introduced to prove that Monlyn must have stolen the

money because no money was found in the wallet when it was discovered. At the evidentiary hearing, defense counsel testified that he failed to object to the habit evidence by Mrs. Watson because he believed the evidence was admissible. (PCR-VIII-1246) Defense counsel testified, "If I am wrong, I am wrong. But I thought this to be admissible anyway." *Id.*

Monlyn contends that Mrs. Watson's testimony regarding her husband's "habit" of carrying large amounts of money was inadmissible under any theory recognized by the Florida's Evidence Code. It was inadmissible under Section 90.406, Florida Statutes (1993) for the reason that Mr. Watson is not an organization.[6] In fact, the only Florida cases sustaining the admissibility of "routine practice" evidence pursuant to Section 90.406, Florida Statutes involved organizations, not individuals. See *e.g.*, *State Farm Fire & Cas. Co. v. Higgins*, 788 So. 2d 992 (Fla. 4th DCA 2001); *Best Meridian Ins. Co. v. Tuaty*, 752 So. 2d 733 (Fla. 3d DCA 2000); *Liberty Mut. Ins. Co. v. Ledford*, 691 So. 2d 1164 (Fla. 2d DCA 1997).

It is acknowledged that Professor Ehrhardt believes that habit evidence of an individual is admissible under certain circumstances. See Charles W. Ehrhardt, Florida Evidence, § 406.1 at 246 (2001 ed.) ("Any mention in section 90.406 of

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[6] Section 90.406, Florida Statutes (1993) provides, "Evidence of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is admissible to prove that the conduct of the organization on a particular occasion was in conformity with the routine practice."

habit [of an individual] was deleted by the drafters of the Code because of their feeling that it should be left to the court to determine as a matter of circumstantial evidence whether there was sufficient probative value to allow the admission of habit evidence. This exclusion should not be interpreted as an intention to prohibit the introduction of all habit evidence.") But even under Professor Ehrhardt's interpretation of the statute, the evidence in the case was not admissible.

According to Professor Ehrhardt, in order to be admissible, the habit evidence must corroborate "other substantial evidence of the occurrence of the event." *Id.* Consistent with Professor Ehrhardt, Florida courts have allowed such evidence when it corroborates the event. *State v. Wadsworth*, 210 So. 2d 4, 6 (Fla. 1968) ("Evidence of the prior intemperate habits of a person is relevant to, and may be given as corroborating evidence on, the question of whether such person was intoxicated at any given time and place . . ."); *North Broward Hospital District v. Johnson by and through Johnson*, 538 So. 2d 871 (Fla. 4th DCA 1988) (evidence of the habit of using catheter during medical procedure was inadmissible because there was not sufficient evidence to corroborate allegation that a catheter was actually used during the procedure in question). In other words, in Florida evidence of person's habit to prove a pattern of behavior is admissible to corroborate other evidence that shows the behavior occurred at the relevant time, but is not admissible as direct evidence. Thus, habit evidence by itself cannot

prove that an event actually occurred. It can only support other proof establishing it. In the case at bar, the only evidence the state produced that Mr. Watson's wallet contained a large sum of money on the day he was killed was Mrs. Watson's testimony that he routinely kept between two and three hundred dollars therein. The state introduced no other evidence to corroborate this allegation. Therefore, Mrs. Watson's testimony could not corroborate anything. It follows that defense counsel was incorrect in concluding Mrs. Watson's testimony was admissible.

This habit evidence was also inadmissible because even if the state had presented corroborating evidence that Mr. Watson frequently possessed two to three hundred dollars in his wallet, such a fact would not be specific enough to qualify as a habitual practice. That is, "in order to establish that a habit existed, it is necessary that the conduct relate to a very specific factual situation. Evidence of general conduct by a person, e.g., 'she always drove fast,' is not habit and generally does not have sufficient probative value to be admitted." Ehrhardt, Florida Evidence, § 406.1 at 246 (2001 Ed.). Similarly, Mrs. Watson's testimony that her husband always carried cash with him is not a statement regarding specific conduct. Therefore her statement does not amount to admissible habit evidence.

That evidence was also inadmissible because its relevance was not admitted to show that Mr. Watson had money in his wallet, but to prove that because the police found none when they looked, Monlyn must have stolen it. That is, the

state's logic was as follows: Because Mr. Watson habitually carried at least one hundred dollars in his wallet, and sometimes carried two or three hundred dollars, he must have done so on the day he was killed. And, because no money was found, Monlyn must have taken it.[7] Thus, the habit evidence was not used to corroborate other evidence showing it was Mr. Watson's habit of carrying large amounts money in his wallet, but was admitted as direct evidence to establish same. Defense counsel, therefore, was ineffective in not objecting to the admission of the habit evidence.

The deficient performance of counsel in not objecting to the habit testimony of Mrs. Watson was prejudicial to Monlyn's case. In the guilt/innocence phase of the trial, this evidence was used to establish felony murder and the separate charge of robbery. In the penalty phase portion of the trial, the evidence was introduced to prove that the murder occurred for pecuniary gain and was committed during the course of robbery, establishing two aggravating factors supporting the imposition of the death penalty.[8] Thus, but for defense counsel's failure to object to this evidence, there is a reasonable probability that the Monlyn would not have been found guilty of first-degree murder and would not have been sentenced to death.

The state will contend that defense counsel's decision not to object to Mrs.

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[7] It is noted that although the state argued that no money was found in Mr. Watson's wallet, it is undisputed that the crime lab in Tallahassee found a $100.00 bill in a hidden compartment in the wallet. This issue forms the basis of Issue II on appeal and is examined more thoroughly herein.

[8] Although the state also presented evidence that Monlyn committed robbery for taking Mr. Watson's truck, there was strong evidence indicating that the taking of the truck was an afterthought.

Watson's testimony about her husband's habit of carrying large sums of cash in his wallet was a tactical one not subject to judicial review. That is incorrect. As Judge Shevin noted in his dissent in *Lanier v. State*, 709 So. 2d 112, 120 (Fla. 3d DCA 1998), "(w)hile an attorney's tactical and strategic decisions are entitled to deference, these decisions must originate from a basis of information, not ignorance." In the case at bar, defense counsel did not argue that his decision not to object was based on his research of the law nor trial strategy. He simply allowed that evidence to be introduced because he thought it was admissible. Defense counsel should have understood the law relating to the admissibility of such habit evidence. Had he done so, he would have realized that it was inadmissible. Thus, defense counsel's failure to object cannot be shielded from an ineffective claim on the basis that it was reasonable trial strategy.

C. Trial counsel's ineffectiveness for failing to elicit testimony that a Florida Department of Law Enforcement agent discovered $100.00 in Alton Watson's wallet.

In Claim III of Monlyn's amended post conviction motion, he alleged that an affidavit for a search warrant executed by Investigator Ben Steward of the Madison County Sheriff's Office provided in part that "I have been advised by an analyst with the Florida Department of law Enforcement Crime Lab in Tallahassee that a $100.00 bill was found hidden in one of the compartments of the victim's wallet that would not have been seen during normal handling of the wallet." (PCR-IV-616 *quoting* OR-2519) During the trial, much of the state's theory regarding the robbery and felony murder charges was predicated on the fact that no money was found in the wallet. (OR-2056-59) Defense counsel rendered ineffective assistance of counsel by failing to elicit testimony that would have established that money was in fact found in Mr. Watson's wallet. Furthermore, the state was guilty of misleading the jury with its argument that no money was found in the wallet,

when in fact the state knew $100.00 had been found. (OR-2057)

Steward, who at the time of the evidentiary hearing was a captain with the Madison County Sheriff's Office, testified at the evidentiary hearing. Steward was the lead investigator in the homicide investigation concerning the death of Alton Watson. (PCR-VII-1108) Steward recalled having been provided a wallet belonging to Mr. Watson the day after Mr. Watson's death. He remembered that the wallet had actually been found by Mr. Watson's stepson. Steward's concern at the time was to protect the wallet for latent prints, and he therefore conducted only a cursory search of the wallet. (PCR-VII-1111) During the time that the wallet was being processed for prints, Steward was contacted by a Florida Department of Law Enforcement analyst and advised that a $100.00 bill had been found in a compartment of the wallet. (PCR-VII-1112) The information concerning the $100.00 bill was included in an affidavit for the search warrant prepared by Steward. The affidavit was prepared with the assistance of Assistant State Attorney Ernest Page, one of the two state prosecutors at Monlyn's trial. (PCR-VII-1113, 1115-16)

As described above, a central fact argued by the state in support of the motive behind the murder, as well as the proof of the robbery charge, involved the "missing" money from Mr. Watson's wallet. The state's theory was that Watson carried between two and three hundred dollars in his wallet as well as emergency

or mad money at all times. Therefore, because money was not found in the wallet at the time it was discovered at the crime scene, Monlyn must have stolen it. However, money was found in Mr. Watson's wallet. It was ineffective assistance of counsel to not challenge the state's theory of prosecution on this point by eliciting testimony from Steward that money had in fact been found in Watson's wallet. At the evidentiary hearing, defense counsel acknowledged that the state had disclosed that a $100.00 bill was found in the wallet. (PCR-VIII-1246-47) Defense counsel also testified,

> I found some reports in which that was mentioned. I am confident I was aware of it because I have portions of one of those reports highlighted, so that means I went over that report with some care. So I am sure I was aware of it at the time.

(PCR-VIII-1247)

Defense counsel maintained that whether there was one-hundred dollars left in the wallet was irrelevant because the state could have nonetheless proven the charges based upon Monlyn's taking of Mr. Watson's truck and guns. (PCR-VIII-1249) Defense counsel simply fails to appreciate the significance of his omission. Because defense counsel failed to present this evidence to the jury, the state's evidence and argument that no money was found in Mr. Watson's wallet remained unchallenged.

At the evidentiary hearing, defense counsel was asked why he allowed the state to represent to the jury that no money was found in the wallet, when that

statement was not true. Defense counsel replied: "Now did I purposefully not use the information that there was $100 in the wallet? I don't think I did that. I may have overlooked that. I don't know at this point." (PCR-VIII-1251-52) Such an omission amounts to deficient performance and resulted in prejudice under *Strickland's* two-pronged test. Had the jury known that Mr. Watson's wallet contained a $100 bill, there is a reasonable probability it would not have found Monlyn guilty of robbery nor first-degree murder based on the state's felony murder theory.

Although the state also presented evidence that Monlyn had taken Mr. Watson's vehicle, there was strong evidence indicating that the taking of the vehicle was an afterthought. If the vehicle was taken as an afterthought, Monlyn was not guilty of felony murder or robbery. See *Francis v. State*, 808 So. 2d 110, 133 (Fla. 2001) (holding that "[w]hile the taking of property after the use of force can sometimes establish a robbery, we have held that the taking of property after a murder, where the motive for the murder was not the taking, does not support a robbery finding"); *Knowles v. State*, 632 So. 2d 62, 66 (Fla. 1993) (striking "during the course of a felony" (robbery) aggravator where evidence did not indicate that defendant who shot his father and drove off in father's truck intended to take the truck prior to the shooting, nor did it indicate that he shot his father in order to take the truck).

In this regard, at trial the state presented evidence and vigorously argued that Monlyn killed Mr. Watson because of an earlier dispute they had. See *Monlyn v. State*, 705 So. 2d 1, 3 (Fla. 1997) ("Monlyn lived across the road from the victim, Alton Watson. Monlyn had previously fished on Watson's property, and on one occasion Watson ordered him off the property with a rifle. Later, when Monlyn was in prison, he told an inmate that he was going to kill Watson."). Because there was evidence of another motive for the murder other than the robbery, the afterthought exception is applicable. *Beasley v. State*, 774 So. 2d 649, 662 (Fla. 2000) (holding that "in those cases where the record discloses that, in committing the murder, the defendant was apparently motivated by some reason other than a desire to obtain the stolen valuable, a conviction for **robbery (or the robbery** aggravator) will not be upheld"). This is particularly true as to the taking of the truck because Monlyn only used the truck to flee from Mr. Watson's property, drove a short distance and abandoned it. (OR-XI-1484-85) See *Perry v. State*, 801 So. 2d 78, 88 (Fla. 2001) (rejecting the afterthought exception to robbery and felony murder because the defendant did not abandon the stolen "truck after effecting a getaway"). Although there was clear evidence warranting a jury instruction on the afterthought exception, trial counsel failed to request such an instruction, and, thus, it was not given. See *Perkins v. State*, 814 So. 2d 1177, 1179 (Fla. 1st DCA 2002) (ruling that it was reversible error not to instruct the jury

on the afterthought exception because the standard jury instruction for felony murder with robbery as the underlying felony did not adequately explain the afterthought defense).

Because the jury in finding Monlyn guilty of first-degree murder used a general verdict, there is no way to determine which theory the verdict was based upon. Therefore, Monlyn's conviction must be reversed. In *Fitzpatrick v. State*, 28 Fla. L. Weekly S 679 (Fla. September 11, 2003), this Court held,

> Here, the question is whether reversal is required where the jury was instructed on **premeditated** murder and **felony murder, and where felony murder,** in turn, was based on alternate underlying felonies, one of which is legally insufficient. We hold that the extra analytical step required in the instant case does not alter the impact of the Yates rule. We have before us a multi-part theory of prosecution, one part of which is legally inadequate, and a general jury verdict. From this information, we cannot possibly discern whether the jury convicted Fitzpatrick based on the legally sufficient grounds of **premeditated** murder or **felony murder** based on robbery, or the inadequate charge of **felony murder** based on burglary. It is precisely this type of uncertainty that Yates rejects. We are therefore compelled to reverse Fitzpatrick's conviction, vacate his sentence, and remand the case for a new trial.

Likewise, in the case at bar, Monlyn's first-degree murder conviction, which was based on multiple alternative theories, must be reversed.

D. Trial counsel's ineffectiveness for failing to advise Monlyn of his right to testify at the penalty phase of the trial; Monlyn would have testified that had he known that he had the right to testify, he would have done so. Thus, he did not knowingly, intelligently, freely and voluntarily waive his right to testify.

At the Rule 3.850 evidentiary hearing, Monlyn testified that he was never

advised by his defense counsel of his right to testify at the penalty phase of his trial. (PCR-VIII-1336) Monlyn stated that he wanted to testify at the penalty phase, and if he had been so advised he would have testified consistent with the sentiments he expressed in the letter he wrote to Mrs. Watson introduced as Defense Exhibit 9. (PCR-VIII-1337)[9] Monlyn was never able to express his remorse for his involvement in the death of Mr. Watson during his guilt phase testimony, as the prosecutor objected when Monlyn attempted to explain his feelings. (PCR-VIII-1339) In response to this claim, defense counsel testified that he "always" explained to his clients that they had a right to testify. (PCR-VIII-1288) However, counsel could not specifically recall having done so in this case. (PCR-VIII-1288) Defense counsel could not produce notes that reflected whether such advice was given to Monlyn, and there was no on-the-record waiver of Monlyn's right to testify during the penalty phase hearing.

To obtain post conviction relief, a defendant claiming ineffective assistance of counsel based on counsel's interference with his right to testify must demonstrate both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Oisorio v. State*, 676 So. 2d 1363, 1364 (Fla. 1996); *United States v. Teague*, 953 F.2d 1525 (11th Cir. 1992). The defendant in a criminal case has a fundamental constitutional right to testify in his own behalf at trial. *Teague*, *supra*; *Gallego v. United States*, 174 F.3d 1196 (11th Cir. 1999). This right cannot be waived by defense counsel. *Id.* Defense counsel, in fact, is

[9] The Post Conviction Record on Appeal incorrectly identified this page as "1437."

primarily responsible for advising the defendant of his right to testify, thereby ensuring the protection of that right. *Id.* Monlyn submits that he satisfied the first prong of the *Strickland* analysis by establishing that he was not advised of his right to testify at the penalty phase. Monlyn's testimony was not sufficiently rebutted by defense counsel because even though defense counsel testified that he "always" advised the client about his right to testify, he could not actually recall having done so in this case. Prejudice exists because Monlyn was never able to express his remorse for his involvement in the death of Mr. Watson to the jury. Remorse is a valid nonstatutory mitigating circumstance which could not be established in this case because Monlyn did not testify. Monlyn attempted to express his remorse during his guilt phase testimony, however, he was prohibited from doing so by successful and persistent objection by the state. (OR-1636; PCR-VIII-1339) Had Monlyn testified as to his remorse for causing the death of Mr. Watson, there is a reasonable probability that the jury would not have returned an advisory recommendation of death.

E. The cumulative effect of defense counsel's deficient performance as described herein satisfies *Strickland's* prejudice prong.

Defense counsel committed a host of errors and omissions as described above, all of which constituted ineffective assistance of counsel. When the errors are considered in their entirety and the cumulative effect of all of them together, as well as individually, the relief sought by the defendant must be granted. See *Harvey v. Dugger*, 656 So. 2d 1253 (Fla. 1995) (holding that although a number of the defendant's ineffective assistance of counsel claims "do not appear to be such

as would warrant relief under the prejudice prong of *Strickland*, . . . the cumulative effect of such claims, if proven, might bear on the ultimate determination of the effectiveness of Harvey's counsel").

Issue II: The trial court erred by not ruling on claims 7 and 8 of Monlyn's amended motion for post conviction relief.

In Claim 7, Monlyn asserted a denial of his right to adversarial testing at the penalty phase of his capital trial in that the jury was allowed to consider the aggravating circumstance of pecuniary gain, which was not proven by the State. (PCR-IV-580-581) In Claim 8, Monlyn charged that the death penalty imposed upon him is unconstitutional because the jury was allowed to consider alleged aggravating circumstances, which were not defined with the specificity required by the state and federal constitutions. (PCR-IV-581-82)

At the *Huff* hearing, the parties agreed that claims 7 and 8 did not require an evidentiary hearing and that the court could rule on those claims based only on the allegations and arguments contained in the post conviction pleadings. (PCR IX 1432-1433) The order entered by the trial court after the *Huff* hearing evinces this fact. In this regard, the trial court's order provides:

> [n]o evidentiary hearing will be held on the issues raised in Section C, paragraphs [claims] 7 and 8 by agreement of the parties as the issues may be determined without the necessity of an evidentiary hearing.

(PCR-IV-666) (emphasis supplied).[10] After the evidentiary hearing, the trial court entered

[10] In addition, the trial court denied an evidentiary hearing as to claims 10, 12(a), (b), (d), (e) through (g), and (i) through (m). However, in doing so the trial court specifically provided an evidentiary hearing was not required for these claims "for the reasons set out in the state's response." (PCR-IV-666-667) The state argued in its response that the trial court should summarily deny these claims. (PCR-IV-648-651)

an order on June 20, 2002 denying the remaining claims. (PCR-IV-804-807.) Again, the trial court failed to rule on claims 7 and 8.[11] Thus, this Court is required to reverse the trial court's order, remanding the same so that the trial court may address the merits of these claims. See *Ottensen v. State*, 2003 Fla. App. LEXIS 14179 (Fla. 2d DCA September 19, 2003) (ruling that where the trial court failed to address various claims in its order of denial, the reviewing court was required to "reverse and remand for the trial court to consider the merits of the claims pursuant to the procedures set forth in rule 3.850"); *Morrison v. State*, 842 So. 2d 1071 (Fla. 4th DCA 2003) (same); *Rentschler v. State*, 838 So. 2d 1212 (Fla. 2d DCA 2003) (same); *Gonzalez v. State*, 829 So. 2d 323 (Fla. 2d DCA 2002) (same). Likewise, in the case at bar, Monlyn is entitled to have the trial court rule upon each claim presented in his amended 3.850 motion, including claims 7 and 8.

CONCLUSION

For the reasons set forth above, the Court is requested to:

1. Reverse the June 20, 2002 Order of the trial court denying Monlyn's amended Florida Rule of Criminal Procedure 3.850 motion for post conviction relief.

2. Remand the cause to the trial court, requiring it to consider and rule upon claims 7 and 8 for the reasons set for herein.

3. Order the trial court to grant Monlyn's amended Rule 3.850 motion and

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Thus, by referencing the state's response, the trial court adopted the state's argument that these claims were without merit and denied the same. But the trial court did not rule on claims 7 and 8 at all.

[11] After the evidentiary hearing, Monlyn's collateral counsel filed "Defendant's Post Evidentiary Argument in Support of Amended Motion to Vacate Judgment of Conviction and Sentence," in which Monlyn provided written argument as to the claims that remained pending, including Claims 7 and 8. (PCR-V-21-28)

set aside his judgment of guilt and semtemces including the death sentence.

4. Grant Monlyn a new trial and such other relief as deemed appropriate in the premises.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing initial brief of appellant has been provided to Barbara Yates, Assistant Attorney General, Florida Department of Legal Affairs, 400 South Monroe Street, Tallahassee, Florida 32399-1050, by United States mail delivery, this _____ day of October, 2003.

CERTIFICATE OF COMPLIANCE

I certify that this initial brief of appellant has been prepared using a Times New Roman 14 point font not proportionally spaced in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

_____

Baya Harrison, III, Esq.