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IN THE SUPREME COURT OF FLORIDA

MICHAEL HERNANDEZ, JR.,

Appellant,

v. Case No. SC13-718

STATE OF FLORIDA,

Appellee.

_____/

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

REPLY BRIEF OF APPELLANT

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REPLY TO ISSUES RAISED BY THE STATE FOR THE FIRST TIME IN ITS ANSWER BRIEF

A. Subclaims. In footnote 10 of its Answer Brief, the State, noting that this Court is considering an amendment to Rule 3.851 to prohibit subclaims, urges this Court to prohibit subclaims not only in 3.851 motions, but also on direct appeal. Answer Brief at 14. Counsel for the State acknowledges having "missed an entire subclaim" in her written closing argument below, but blames defense counsel, who, she says, "intentionally designed to cause the State and the trial court to miss one of the subclaims." She says she "would not be surprised to discover she missed a subclaim yet again in her answer brief." *Id*.

Initially, Appellant has to wonder why the State's counsel is raising this issue, since she paid no price for having failed to address one of the defense claims below: the postconviction court denied all relief sought by the defendant. However, in response to the accusation that defense counsel deliberately tried to confuse the State's counsel, Appellant would note that his written closing argument below included a *Table of Contents* that defense counsel provided as a courtesy to court and counsel (5R 902-04). Notably, the table of contents specifically lists, inter alia, the very argument somehow overlooked by the State: "Stokes was unprepared for the guilt phase of the trial [. . . . .] Page 140" (5R 904) In addition, defense counsel explicitly identified in its arguments which subclaims in the 3.851 motion were being addressed (5R 994, 1000; 6R 1014, 1019, 1032, 1036).

In contrast to this clear identification of the issues, the State for some reason chose to obscure which issues the State was addressing. As the defendant noted in its reply below (7R 1266), the State's written argument ostensibly addressed Claims I through VI, and then addressed a second Claim II. But the 3.851 motion contains only two numbered claims (1R 179 - 2R 230). There was no Claim III or IV or V or VI, or a second claim II. In addition, the State insisted on restating every claim or argument in its own words, making it difficult to determine which defense claim or argument the State was trying to address. In short, if anyone was guilty of obfuscation, it was counsel for the State.[1]

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[1] The State's obfuscation continues on appeal. The Table of Contents in Appellant's Initial Brief lists and shows the location of each of the sub-issues of Appellant's ineffective assistance of counsel claim. By contrast, the Table of Contents in the Answer Brief omits *any reference* to any of the subclaims. The State's argument as to Claim I - ineffective assistance of counsel - spans 83 pages. Without any tabulation of the location of the State's argument as to any subclaim, one has to leaf through the entire 83 pages of argument to find where the State addresses any subclaims and to figure out what subclaims the State addresses.

But that is not all. In addition, the State does not cite to the record on appeal correctly. At the direction of this Court, the Clerk of the Santa Rosa County Clerk of Court re-numbered the volumes of the record on appeal to comport with this Court's rules. The record, as revised, now consists of 47 consecutively-numbered volumes. The State claims in its Preliminary Statement that it will "refer to a volume according to its respective designation within the Index to the Record on Appeal," as required by Rule 9.210(b), Fla.R.App.P., but in reality the State totally ignores how the various volumes of the record are numbered on appeal. For example, the State insists on citing to the evidentiary hearing transcripts by the volume number originally assigned to them by the court reporter, e.g., citing to "Ev. H Vol. IX at 1035" (Answer Brief at 60), instead of to Volume 40 (or XL) of the Record on Appeal, which is where the ninth volume of the January 2012

Insofar as Appellant can tell, the State is not suggesting that Appellant should be prohibited from raising or arguing "subclaims" in this appeal, or that the subclaims in his 3.851 motion should be retroactively struck. As for whether this Court should prospectively disallow subclaims in 3.851 motions or on appeal, Appellant is not at all sure that this is the time or place to address the issue; however, since the State has brought it up, Appellant will respond briefly.

Appellant's primary claim in this case is that his trial counsel were ineffective. By making such a claim, of course, appellant is, of legal necessity, claiming that trial counsels' performance (a) was deficient and (b) that deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984). Thus, at the outset, we have a claim that, by law, has two subclaims: deficient performance and prejudice. Does the State want to force a defendant to make separate claims of deficient performance and prejudice? Appellant would guess not, but the State's argument provides no basis for saying it should be permissible to assert deficient performance and prejudice in a single claim.

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evidentiary hearing transcript can be found. The May and July volumes of the evidentiary hearing were numbered separately by the court reporter from the January volumes; the State does at least refer to these volumes by date, e.g., "Ev. H May 25, 2012 at 8" (Answer Brief at 61). Nevertheless, one cannot simply take the State's record citations and go directly to the record on appeal, but must first translate the State's citation to the actual appellate record citation. It can be done, but the State unnecessarily makes the task more difficult.

Appellant supported his claim of ineffectiveness with what he regards as overwhelming evidence of numerous omissions and failures, strategic and tactical, which permeated the entirety of trial counsels' representation. In Appellant's view, the many shortcomings in trial counsels' performance, and the prejudice those shortcomings engendered, are all interwoven and interrelated, and cannot and should not be evaluated independently.

For example, trial counsels' shortcomings in their investigation and presentation of mental health mitigation include their failure to adequately investigate Appellant's background and to locate and talk to potential lay mitigation witnesses who, collectively, would have assisted the experts' diagnoses, and greatly enhanced the credibility of their diagnoses. Must these two aspects of counsels' deficient performance - finding and presenting background witnesses on the one hand, and prepping the expert witnesses on the other - be pled in separate claims, when one clearly impacted the other? If so, why?

And the deficiencies in the investigation and presentation of mental mitigation were not restricted to the failure of counsel to provide historical background information to their expert witnesses, but include numerous other failures/shortcomings, including, *inter alia*: their failure to alert the defense experts to testimony that would be presented by the State about the facts of the crime; their failure to adequately discuss the case with the defense experts or to plan strategy;

their failure to pursue possible brain damage to a conclusion; and their failure to explain why and how the brain damage that they suspected was mitigating in this case. To what extent must all these separate manifestations of deficient performance as to mental mitigation be pled as separate claims? The State does not say, and Appellant has no idea.

It is Appellant's contention that asserting ineffectiveness of counsel as one claim and then setting out all the reasons why counsel were ineffective in that one claim makes sense, given how claims of ineffectiveness - including, perhaps especially, the prejudice component of an IAC claim - are analyzed and evaluated. The claim of ineffectiveness is plenary; typically - but certainly in this case, at least - it is not a question of just one or two separate, unrelated acts or omissions, but the entirety of counsel's performance that is at issue. Appellant does not see how barring subclaims will clarify the issue of ineffective assistance of counsel; indeed, it is Appellant's opinion that it would have the opposite effect. In addition, such a ban would give rise to confusion and continual litigation over what constitutes a subclaim, to what avail is not readily apparent.

Appellant would suggest that if a defensive pleading is confusing or fails to state its claims clearly, that can better be dealt with in an individual case by appropriate motion by the State than by a mechanistic rule that creates more

problems than it solves. This Court should reject the State's suggestion that subclaims be barred in 3.851 motions and on appeal.

B. Attorney files. At page 41 of the Answer Brief, the State cites Rollo's testimony that the copy of his file returned to him by postconviction counsel was "incomplete," because legal-sized pages of his trial notes were copied in letter size. At page 87, the State argues that "Stokes could not recall the details of this case [because] he never got his file back from postconviction counsel." In a footnote, the State claims this is a "recurring problem," and urges this Court to amend current rules to require trial counsel to retain their original files and only give copies to postconviction counsel.

Postconviction counsel originally contacted all trial counsel by letter dated July 10, 2009 (1R 28), asking them to comply with Rule 3.851(c)(4), Fla.R.Crim.P, which requires trial counsel - within 45 days of the appointment of postconviction counsel - to furnish postconviction counsel with "all information pertaining to the defendant's capital case which was obtained during the representation of the defendant." Trial counsel ignored postconviction counsel's written request. As a consequence, postconviction counsel was forced to file a Motion to Compel Production of Documents (1R 24). Rollo was the only trial attorney who attended the hearing, and he objected to having to make copies himself, because of the cost (28R 1-17). The court granted the motion to compel (1R 36-7), explicitly

providing that "[t]rial counsel may provide the original documents or complete, legible copies of same."

Rollo chose to send his original files to postconviction counsel for copying. Postconviction counsel had several copies made and returned one copy to Rollo.

Stokes - who not only ignored postconviction counsel's written demand, but did not bother to attend the hearing on the motion to compel - elected to provide postconviction counsel with his original file. Unlike Rollo, he never asked postconviction counsel to make him a copy (37R 681).

For the first time on appeal, the State accuses postconviction counsel of "failing to return counsel's files" and "misplacing parts of the file" and argues that it is "unreasonable to find counsel's performance deficient based on a lack of strategy when counsel does not even have his notes to review before his testimony at the evidentiary hearing" (Answer Brief at 87-88, fn. 21).

Trial counsel gave their files to postconviction counsel more than two years before the evidentiary hearing commenced in January of 2012. At no time prior to the hearing did Stokes inform postconviction counsel that he had not already made his own copy of his file before providing it to postconviction counsel, or ask postconviction counsel to make a copy, and at no time prior to the hearing did

Rollo inform postconviction counsel that his copy was incomplete in any way.[2] If either attorney had any issue about their trial files, they should have let postconviction counsel know before the evidentiary hearing began. They did not. If the State had any problem with their lack of preparation for the hearing, it should have raised the issue below. It certainly had the time to do so; Stokes and Rollo testified at the first week of the evidentiary hearing, in January of 2012; the hearing did not conclude until July. It is improper for the State to make such arguments and allegations for the first time on appeal.

I. INEFFECTIVE ASSISTANCE OF COUNSEL ISSUES

A. Reply to State's argument entitled "Ineffectiveness for not impeaching Tammy Hartman"

Appellant's argument was not simply that Stokes failed to impeach Tammy Hartman, but that he failed "to investigate and develop any meaningful challenge" to her testimony. Initial Brief at 50. By its restatement of the issue, the State omits much of what Appellant was actually complaining about. Then the State mostly limits its argument to saying that Stokes did not need to impeach Tammy about her inconsistencies because there were so many inconsistencies in her trial testimony that he did not need to highlight inconsistencies in her pretrial statements and

[2] Counsel for Appellant will state in his place that the extra (work) copy of Rollo's file in his possession contains legal size copies of Rollo's notes. He sees no reason why Rollo's copy would have only letter size copies of legal size papers in his file, since all the copies (one for postconviction counsel, one for his investigator, and one for Rollo) were made at the same time by Office Depot here in Tallahassee.

testimony. Answer brief at 26. The State does not address Stokes' confusion about whether Tammy's inconsistencies or her motivation was his primary concern. See Initial Brief at 53. The State relegates to a footnote one of the most significant objections to Tammy's testimony - that it was largely and in its most critical aspects inadmissible hearsay that also violated Appellant's constitutional right to confront the witnesses against him. Answer Brief at 27 (fn. 11). Addressing (by footnote) the defense argument that any testimony by Tammy reporting any statement made to her by Shawn Arnold would have been inadmissible under Florida's hearsay rule and under the Confrontation Clause, the State says:

> There is no valid Confrontation Clause objection to [Tammy] Hartman's testimony. *Crawford v. Washington*, 541 U.W. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." [Id.] . . . . But Hartman testified at trial. Moreover, *Crawford* does not apply to statements that are admissible under the admission-by-a-party-opponent hearsay exception.

Appellant agrees that "*Crawford* does not apply to statements that are admissible under the admission-by-a-party-opponent hearsay exception." The defense has consistently acknowledged that Tammy could testify about out-of-court statements made to her by Michael Hernandez. The problem was that she testified about statements that were made to her by Shawn Arnold. The State's argument that, as to the latter, there was no Confrontation Clause violation because

Tammy testified subject to cross-examination borders on the ridiculous. If the State really believes that, then the State does not understand the Confrontation Clause (or hearsay) at all. The "testimonial statements" at issue were made to Tammy by Shawn Arnold. **Shawn Arnold** is the testimonial witness "who did not appear at trial." *Crawford*. Tammy was merely the in-court reporter of those statements. Through her testimony, the State was able to introduce out-of-court statements by co-defendant Shawn Arnold that were not subject to cross-examination. This is the very definition of hearsay and was a clear violation of the Confrontation Clause. *Bruton v. United States*, 391 U.S. 123 (1968). Stokes should not have let this testimony go unchallenged.

Additionally, the State does not acknowledge that, when Tammy was confronted with an actual cross-examination by postconviction counsel about her prior inconsistent statements and testimony, the most incriminating aspects of her trial testimony evaporated. Initial Brief at 54. Not does the State acknowledge postconviction testimony from Shawn Arnold, Dr. Riddick and Deana Merritt that effectively refuted her testimony and her credibility.

Finally, the State argues that Tammy's testimony was not prejudicial, because the evidence - including Appellant's own statements - shows that Appellant was the one who "snapped" Mrs. Everett's neck and cut her throat.

As to the latter, there is no real dispute about who cut Mrs. Everett's throat. But there was and is a significant dispute about why he did so and whether or not she was still alive at the time. These were crucial questions, but Stokes utterly failed to challenge the State's evidentiary presentation. Appellant addressed these matters at length in his Initial Brief and need not regurgitate them here, especially since the State makes no attempt to address the defense arguments in this regard.

As for the broken neck, the contrast between Michael's taped statement and Tammy's testimony is that Michael described *accidentally* dropping Mrs. Everett and hearing her "head crack[]" (8R 59, 64), while Tammy described Michael *deliberately* breaking Mrs. Everett's neck with a spinning or twisting motion. There is a huge difference in culpability between these two scenarios, but Stokes did nothing to challenge or rebut Tammy's testimony when it clearly could have been rebutted conclusively by readily available evidence. Dr. Riddick's testimony - unrefuted by any testimony or evidence presented at the postconviction hearing *or* at trial - established that Mrs. Everett's neck simply could not have been broken in the manner described by Tammy.

Dr. Riddick also addressed the cracking noise Michael said he heard when he accidentally dropped Mrs. Everett. In his opinion, her neck most likely broken while Shawn Arnold was trying to smother her by forcing her face back with a pillow, with enough force to leave bruises in all the recesses of her face.

However, her already-broken neck could well have made a cracking noise when she was accidentally dropped while being transported from her chair to the couch (38R 762-63). Once again, evidence was readily available to challenge the State's theory of how Mrs. Everett's neck was broken, but Stokes' challenge to the State's theory was minimal.[3]

Finally, the State makes the same mistake that Stokes did: thinking that the only possible prejudice from Tammy's testimony would have occurred at the guilt phase, and that her testimony, no matter how objectionable, did not matter because the evidence overwhelmingly showed that Michael was a party to murder. The evidence, however, did *not* overwhelmingly show that Michael was guilty of *first degree* murder. Because Tammy's testimony was important to any finding of first degree murder, her testimony was prejudicial even at the guilt phase. But Tammy's testimony did not merely impact the guilt phase; for the reasons discussed in Appellant's Initial Brief, it was devastating to the defendant's case at the penalty

[3] It is Appellant's contention that the evidence presented at postconviction (which could and should have been presented at trial) is sufficient to carry any burden of proof as to how, and by whose action, Mrs. Everett died. However, at trial the defendant would not have had to actually prove by some standard its theory of events; if the defense had merely cast significant doubt on the State's theory of events, there is a reasonable probability that the result of the trial would have been different, and that reasonable probability of a different result is all that a defendant must prove in claim of ineffectiveness of counsel. *Strickland*. See also, *Terry v. State*, 668 So.2d 954, 965 (Fla. 1996) (finding that death sentence was disproportionate where the circumstances surrounding the murder were unclear).

phase, as it established several aggravators and, as well, was critical to any evaluation of relative culpability. In addition to her testimony about how Mrs. Everett's neck was broken, her confusion about the timing of Arnold's attempt to calm Mrs. Everett by getting her to breathe into a bag was especially damning. This act, described by Tammy as having occurred *after* Arnold had smothered Mrs. Everett with a pillow, was portrayed by the State as an attempted withdrawal from the crime by Arnold because it came *after* he had tried to smother Mrs. Everett. On appeal, this Court accepted that portrayal and attributed great significance to it in its review of the appropriateness of Appellant's death sentence. *Hernandez v. State*, 4 So.3d 642, 671 (Fla. 2009). Arnold's testimony, however - in both his pretrial deposition (8R 19-21) and at the postconviction evidentiary hearing (35R 407-10, 435-36) - was that he had tried to calm Mrs. Everett immediately after their entry into her home, *before* he went to the back of the house to retrieve the pillow he used to smother her. Why? So she could be calm enough to answer his questions? So she would remain in her chair while he went to the back? Whatever the reason, it was most certainly not the withdrawal from murder that the State portrayed it based on this and other instances of Tammy's testimony discussed in the Initial Brief. The State utterly fails to address this and other prejudicial impacts of Tammy's testimony as to the sentence.[4]

[4] As noted above (Initial Brief at pp 1-6), counsel for the State predicted that she

B. Reply to State's argument entitled, "Ineffectiveness for not challenging aggravation"

1. The inmate battery. Addressing the prior conviction for battery on a detainee first, the State acknowledges the trial court did not address deficient performance, only prejudice. Answer Brief at 28-29. Nevertheless, the State cites Rollo's opinion that he had "no good-faith basis" to exclude Deputy Bartley's sentencing-phase testimony that he saw Michael "on top of Mr. Arnold squeezing his throat . . . trying to hurt him bad" (15TT 2041), without acknowledging that Rollo, by his own admission, did not attend the inmate battery trial, did not read a transcript of the inmate battery trial, and did not talk to any of the witnesses who testified at the inmate battery trial. Of course Rollo had no "good-faith" basis to challenge Bartley's testimony in any way: he was completely unprepared to do so.[5]

As for prejudice, the State argues that Rollo's failure to object to a judgment of conviction prominently displaying a charge of attempted first degree murder in a manner that a reasonable juror could have interpreted as a judgment of conviction

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might miss a "subclaim" on appeal. Indeed, she has failed to address many defense arguments on appeal, but that failure is not because of what she describes as "intentional obfuscation" by Appellant's counsel; it is because, time and again, the State simply has no answer to defense arguments.

[5] Although the State does not mention this, Mr. Elmore did provide to Rollo a copy of deputy Bartley's report (39R 887). However, it does not appear that deputy Bartley was ever deposed and it is clear that Rollo never talked to him and that he was unaware that evidence was available to contradict deputy Bartley's testimony.

for that offense was not prejudicial because the prosecutor "made it clear" to the jury that the conviction was for battery on a detainee and did not claim the conviction was for an attempted murder. Answer Brief at 29-30. It is true that the prosecutor did not specifically argue that Michael had been convicted of attempted first degree murder, and Appellant has never contended otherwise. But the prosecutor also never expressly informed the jury that Michael had *not* been convicted of attempted first degree murder. Regardless, the judgment of conviction plainly showed that Michael had been charged with attempted first degree murder, as the prosecutor himself recognized at trial.[6] For reasons explained in the Initial Brief, this attempted first degree murder charge should never have been presented to the jury even if it had been clear that he had not been convicted on that charge. Moreover, as discussed in the Initial Brief, the manner in which the attempted murder charge was displayed could well have led a reasonable juror to conclude that Michael had been convicted of that charge, especially given the introduction of deputy Bartley's testimony about strangulation.

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[6] Elmore moved to introduce the judgment *and* the verdict because the judgment showed "the nol-pros count" (i.e., the charge of attempted murder), which Elmore described as something he had "never seen done before," and the verdict would show that "there was a hung jury on" that count (15TT 2048-49). Although the verdict would have shown that there was no conviction on the attempted murder count, Rollo objected to the verdict coming in, without objecting to the judgment showing the attempted murder charge. In other words, it is not just that Rollo "missed that" as he himself conceded (38R 854-55), but that he "missed that" despite the prosecutor having expressly brought it to his attention in open court.

The State makes two other arguments as to prejudice. First, the State notes that the prior violent felony aggravator would have been found even if all references to the attempted murder charge and to the allegation of strangulation had been excluded - a fact that Appellant has never disputed. Exclusion of that evidence would have greatly affected the weight of the aggravator, however - a matter which the State does not acknowledge or address.

Second, the State argues that it was entirely proper for the jury in this case to hear all of deputy Bartley's testimony because "the details of any prior violent felony" assist "the jury in determining what weight to give to the prior violent felony aggravator." Answer Brief at 31. Of course whatever details are admitted can affect - perhaps greatly - the weight the jury assigns to the prior violent felony aggravator. That is precisely why **in**admissible details should not be admitted. The State addresses double jeopardy and collateral estoppel, albeit in a footnote (Answer Brief at 31, fn. 12), but fails to acknowledge that aside from the scope of either, this Court has forbidden the presentation of "unduly prejudicial" evidence in fleshing out the details of a prior violent felony conviction. *Finney v. State*, 660 So.2d 674, 684 (Fla. 1995). Here, it was *not* necessary to present evidence of strangulation to flesh out the details of the battery that Michael concededly had committed on his co-defendant, and it was "unduly prejudicial" to present evidence of an attempted murder for which Michael had never been convicted.

Finally, the State also fails to address the defense argument that, even if Rollo could not successfully have excluded all or part of deputy Bartley's testimony, he could and should have presented and argued readily-available rebuttal evidence, including medical records and Shawn Arnold's testimony.

2. The LEO battery. The State's argument here essentially is that the failure of trial counsel to object to the judgment of conviction for battery on a law enforcement officer was not prejudicially deficient performance even though, contrary to the LEO battery jury's explicit finding that deputy Jarvis had suffered '"slight injury," the judgment of conviction recited that Michael had inflicted "great bodily harm" on deputy Jarvis. The State says, well, the prosecutor never contended that Jarvis suffered great bodily harm, and, anyway, Michael was still guilty of battery on a law officer under some theory, even if not the one that was presented to the capital sentencing jury. The State also contends that Rollo was aware of the facts of the case because he was the one who had sent Michael to Dr. Larson, and cites Rollo's testimony about "the difficulty" that Rollo would have faced in making an issue of the extent of injury. Answer Brief at 32.

Initially, Appellant would note that Ted Stokes, not Michael Rollo, was the attorney who cross-examined deputy Jarvis and who allowed the judgment of conviction in evidence without objection (15TT 2079, 2080-2084; 37R 679). Moreover, although Rollo certainly was aware that the battery had occurred,

neither he nor Stokes attended the LEO battery trial or read a transcript of that trial. Neither attorney was aware of the jury's actual verdict reciting that deputy Jarvis had suffered only "minor injuries." The State simply cannot say with a straight face that either defense attorney was prepared to raise any issue about the LEO battery judgment or verdict.[7]

While trial prosecutor Bobby Elmore suggested in his cross-examination of Rollo at the postconviction hearing that the evidence presented by the State at sentencing showed that deputy Jarvis was "only slightly injured" (39R 889), the capital murder trial transcript shows that Elmore had elicited testimony from Jarvis that he had "a big knot on my head" (15TT 2076), and had been cut on his face and chest by the sharp edges of broken porcelain (15TT 2084-85). Depending on the severity of the wounds, *which no one fleshed out at sentencing*, these injuries could well have resulted in "great bodily harm." At no time during the capital sentencing proceedings did anyone expressly testify that these injuries were minor, and the capital sentencing jury never learned that the LEO battery jury had expressly found that the injuries were "slight."

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[7] Stokes expressly admitted that he did not "know what the verdict actually was" (37R 679). Rollo testified that he had "a recollection" of having talked to attorney Spiro Kypreos about the progress of the LEO battery trial (39R 888). His billing records show *one* twelve-minute conversation with Kypreos on May 24, 2006 (12R 817) - three months before the August 2006 trial in that case (10R 472 et seq). Rollo obviously could not have learned about the LEO battery jury's verdict from his pre-trial conversation with Kypreos.

As for any "difficulty" Rollo or Stokes might have faced in "making an issue" about the severity of the injuries, the response is they did not have to "make an issue" of it; they simply had to object to the State's proffer of a judgment of conviction that did not accurately portray the jury's verdict, and then proffer the verdict. With the verdict in evidence, they could have argued to the jury that Jarvis was only slightly injured. What was the State going to do in response? Accuse the LEO battery jury of lying?[8]

Basically, the State is forced to say that there is no significant difference between an express finding of "slight" injury - which is what the LEO battery jury actually found - and an express finding of "great bodily harm," which the judgment of conviction recites. But latter finding clearly is significantly more aggravating than the former. The deficient performance here, considered by itself, or certainly in conjunction with the many other deficiencies in trial counsels' performance, was prejudicial under the *Strickland* standard.

3. Stephanie's testimony and the marital privilege. Appellant need not add much to what he said in his Initial Brief. The State does not address its inability to demonstrate that anyone other than Stephanie heard the statement at issue, and

[8] Besides that, the State is really talking out of both sides of its mouth here. On the one side, the State argues the erroneous judgment was no big deal because the State itself clearly conveyed to the jury that Jarvis' injuries were only minor; on the other it argues that Rollo would have had great difficulty in making an issue about how severe the injuries were.

does not attempt to distinguish or even mention the cases cited by Appellant. In a lengthy footnote, the State explains that the marital privilege does not preclude a spouse from testifying about non-communicative acts. Appellant's reply: Testimony about non-communicative acts is not involved here.

C. Reply to State's argument entitled "Ineffectiveness for failing to present additional lay mitigation evidence"

The State at least impliedly argues that Rollo's failure to retain an investigator or mitigation specialist was justified, despite his expressed concern before trial that there was a "ton" of potential mitigation and he was not sure he was up to developing it, because there were no "decent" investigators or mitigation specialists in the circuit. Answer Brief at 39-40, 54. Neither Rollo nor the State has ever explained why Rollo could not simply have retained an investigator or mitigation specialist from outside the circuit. Nor has the State explained how a lack of qualified investigative assistance in the circuit would any more excuse Rollo's obligation to conduct a "diligent and thorough" investigation of his client's background than a lack of qualified attorneys in the circuit would justify a failure to provide a defendant with effective assistance of counsel.

The State also cites Rollo's testimony he had a "hard time" getting background information from Michael, Initial Brief at 39, without acknowledging that Rollo waited some six months after his appointment as counsel in this case even to mail Michael a forensic assessment form and then let him fill it out,

unassisted, or that, by Rollo's own admission, the reason Michael had difficulty filling out the form (besides the failure of his trial counsel to assist him in any way) was a lack of writing material and a "non-cooperative attitude on the part of the correction folks" (38R 779). Nor does the State address Rollo's failure to talk to any of the family members identified by Michael when he did complete the form.

The State says Rollo could not say who he did and did not talk to because he did not have a complete copy of his trial file. Initial Brief at 41. As discussed above (pp. 7-9 of this Reply), Appellant disputes any claim that Rollo was not provided a complete copy of his file, but even if he was not, he and the State had plenty of time before the evidentiary hearing began to complain about and remedy any deficiencies in the copy he had. The State cannot raise this issue for the first time on appeal. Furthermore, the State ignores Rollo's affirmative testimony about who he did and did not talk to (38R 787-90, 800, 836, 853), and also ignores his testimony that his billing records accurately show who Rollo did and did not talk to, and when and for how long he talked to each (40R 1012-13).[9]

[9] The State also refers to Rollo's experience as having handled six or seven capital cases before being appointed in this case. Answer Brief at 38. But he had only been involved in two prior capital sentencing hearings (40R 1007), and in one of those the defendant had waived mitigation. *Grim v. State*, 871 So.2d 85 (Fla. 2007). Interestingly, the State attempts to enhance Rollo's credibility by highlighting his capital experience, but wants the Court to ignore Stokes' history of failing to adequately investigate his cases and defend his clients, and the recent finding by this Court that he delivered ineffective assistance of counsel in a death penalty case.

The State argues that although Rollo could have done more, his limited investigation was reasonable, citing *Bobby v. Van Hook*, 558 U.S. 4 (2009), for the proposition that "there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties." Answer Brief at 55. Appellant, of course, does not disagree with this observation in *Van Hook*, which makes basically the same point as *Williams v. Head*, 185 F.3d 1223, 1237 (11th Circ. 1999), *cited by Appellant in the Initial Brief at 48*, that counsel is not constitutionally required to "pursue every path until it bears fruit or until all hope withers." But while the scope of a reasonable investigation is not infinite, it is not negligible, either. A claim of deficient performance is not refuted by any amount of investigation above zero. *Wiggins v. Smith*, 539 U.S. 510 (2003). For the reasons set out at length in the Initial Brief, Rollo's investigation was constitutionally inadequate. He did not have enough information to make a reasonable judgment about the likelihood that he would develop no significant additional mitigation if he had continued further.

The State also does not address the unreasonableness and inconsistency of the "strategic decisions" that Rollo was alleged to have made. For reasons discussed in the Initial Brief (70-73), his alleged "strategic decisions" (which were largely provided to him by Bobby Elmore on cross-examination) were neither reasonable nor consistent.

Finally, the State argues that there was no prejudice because the additional mitigation was "largely cumulative." Answer Brief at 57. The State provides no analysis of the evidence in this case, restricting its argument to citation and brief discussion of several cases in which this Court found no prejudice because the new evidence was cumulative. Of course, any evidence that is presented on postconviction is "cumulative" in at least some sense. And because this is so, the State will always argue "cumulative," especially if it has nothing else to argue. But the State utterly fails to address Appellant's lengthy discussion and analysis of why the evidence presented below was not merely "cumulative" to the evidence presented at sentencing. Initial Brief at 73-79.

The State nowhere responds to Appellant's contention that, even to the extent that the postconviction evidence showed the same things as the original sentencing evidence, the postconviction evidence came from numerous friends and family rather than simply from the defendant himself, and, therefore, massively corroborated and dramatically enhanced the credibility of the history presented at sentencing - a history based largely on Michael's self-reporting, and discredited by the prosecutor on the ground that Michael was not a reliable witness. Additionally, the State fails to acknowledge the great extent to which the evidence and testimony presented at the evidentiary hearing demonstrated just how little of Michael's history Rollo actually learned from his minimal investigation and preparation.

Rollo never learned (or presented to the sentencer) that Michael's mother had consumed large quantities of alcohol and drugs while she was pregnant with Michael; that Michael had undergone surgery soon after birth for pyloric stenosis; that Michael got into a bag of methamphetamine when he was a year old; that, when he was only two years old, his mother had left him alone in a room over a bar, surrounded by drug paraphernalia, without food, and needing a change of diapers, while she left with more than half a dozen men; that Michael's bicycle/car accident was bad enough that he was rendered unconscious and was life-flighted to a hospital, where he remained for several days; that his own father had given him a cocaine-laced eight ball for his ninth or tenth birthday; that Michael was abused not only by Dan and Leola Estabrook, but by their two sons, by other students at school, and (perhaps most seriously) by motorcycle gang members in whose custody his mother had left him; that, despite his mistreatment, Michael was described by everyone who had ever known him as nonviolent and as a follower who would never initiate anything on his own, but was easily led; that Michael was surrounded by drugs his entire life; that he had tried studying the Bible and going to church in an effort to better himself; that he had tried several times to quit drugs but was unable to stay away from them for long; that he had extremely low self esteem and considered himself a failure; that he had nightmares about his terrible childhood; and that, despite everything, he was a generous person and a hard

worker. This evidence, by itself, would have helped the jury answer the "moral and normative choice - does he deserve to die?" John H. Blume, et al, *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 Hofstra L. Rev. 1035, 1035 (2008). In addition, it would have tied together and supported the mental mitigation, explaining and supporting the diagnoses of PTSD, drug addiction, and brain damage. As elaborated in the Initial Brief, this testimony, coupled with the expert testimony developed and elaborated upon at the postconviction evidentiary hearing, would have helped the jury to understand why this timid, nonviolent follower could have become involved in a murder and other violent acts subsequent to the murder - acts which shocked everyone who had known him because they were so out of character and so contrary to his behavior up to that point.[10]

It would have helped if Rollo had understood that mitigation was something other than an "excuse," and had recognized that good character evidence can indeed "overcome the facts of guilt that the jury has already accepted as being

[10] The State argues that some of this evidence "had a downside," citing the testimony of Michael's step-grandmother Barbara Hernandez Walker. Answer Brief at 56. Of course, she was but one witness among many. But her testimony was consistent with other evidence establishing Michael's difficulty with drugs. She also confirmed Michael's "genetic load" for drug and alcohol abuse; his father, grandfather and uncles all had abuse problems. Finally, much of her testimony was directed at Rollo's investigatory shortcomings and his defeatist attitude about Michael's chances. Like almost all of the very few witnesses Rollo did talk to, Mrs. Walker knew very little about Michael's background and had spent little time with him. If what she knew was not all that helpful, that was kind of the point.

proven beyond all reasonable doubt" (40R 1045-46). Mitigation is not, as Rollo believed, an excuse; it is, rather, "the empathy-evoking evidence that attempts to humanize the accused killer in death penalty cases" having the "transformative capacity to enable jurors to feel human kinship with someone whom they have just convicted of an often monstrous crime." Russell Stetler, *The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing*, 11 U. Pa. J. L. & Soc. Change 237, 237 (2008). Stetler elaborates:

> Mitigation is not a defense to prosecution. It is not an excuse for the crime. It is not a reason the client should "get away with it." Instead, mitigation is a means of introducing evidence of a disability or condition which inspires compassion, but which offers neither justification nor excuse for the capital crime. . . .
>
> Mitigation proves the biography of mental disability. It explains the influences that converged in the years, days, hours, minutes, and seconds leading up to the capital crime, and how information was processed in a damaged brain. It is a basis for compassion - not an excuse.

Id. at 261-62. Rollo's investigation, preparation and presentation fell well short of constitutional minimums. There is not only a reasonable probability, but, in Appellant's view, a high probability of a different sentence if Rollo had performed in a constitutionally adequate manner.

D. Reply to State's argument entitled, "Ineffectiveness for not presenting QEEG mitigation"

Preliminarily, the State argues that, regardless of the admissibility of QEEG in 2007 or now, Rollo cannot be found ineffective for failing to present QEEG

because such evidence had not been found admissible under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) at the time of Appellant's trial, citing *Mendoza v. State*, 87 So.3d 644, 666 (Fla. 2011).[11] To the extent that *Mendoza* implies that trial counsel can *never* be ineffective for failing to present scientific evidence that had not yet been specifically approved under *Frye*, such implication is dicta. See P. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1256 (2006) ("A dictum is an assertion in a court's opinion of a proposition of law which does not explain why the court's judgment goes in favor of the winner. If the court's judgment and the reasoning which supports it would remain unchanged, regardless of the proposition in question, that proposition plays no role in explaining why the judgment goes for the winner.").

It is one thing to argue, as the State did in *Mendoza*, that Mendoza's trial counsel could not have been ineffective in **1992** for failing to secure a QEEG evaluation. It is another matter altogether to argue, as the State now does, that Rollo could not have been ineffective in **2007** for failing to pursue the issue of brain damage, by QEEG or whatever. The evidence presented below demonstrates that QEEG was widely used to diagnose traumatic brain injury by the time of

[11] Actually, by the time of Appellant's trial, at least one appellate court had found QEEG admissible over a *Frye* objection, albeit not in Florida. *Valdez v. State*, 46 P.3d 703, 706 (Court of Criminal Appeals of Oklahoma 2002). See, also, *U.S. v. Sandoval*, 472 F.3d 645 (9th Cir. 2006) (*Daubert* error to exclude functional neuroimaging evidence).

Appellant's 2007 trial, in sharp contrast to the state of affairs at the time of Mendoza's 1992 trial.

The State also argues that there can be no prejudice because it was Appellant's own fault that Rollo was unable to secure a diagnosis of brain damage, arguing, "Hernandez may not refuse to cooperate in testing to determine brain damage and then raise a claim of ineffectiveness for not doing additional testing for brain damage." Answer Brief at 74. In making this argument, the State ignores evidence presented at the postconviction evidentiary hearing that Michael did not willfully refuse to cooperate, including Dr. Turner's testimony that the invalid scale on the MMPI administered to Michael could have been caused by fatigue, impulsiveness, or his frontal lobe impairment itself (31R 54), and Dr. Mash's testimony that it is common for "MMPI's in substance abusing populations [to] come back with invalid measurements" (25R 64-5, 71). Moreover, even if Michael was malingering, why would it surprise anyone that this unsophisticated, easily-led, brain-damaged defendant, in serious trouble for the first time in his life, with an attorney who would barely communicate with him, might listen to jail-house "experts" telling him his only chance was to act crazy?

In support of its argument that Rollo's deficient performance should be excused because of Appellant's own allegedly contumacious conduct, the State cites two cases applying the stringent standards of the AEDPA to a state capital

defendant's right to hearing or relief in federal courts, e.g., *Schriro v. Landrigan*, 550 U.S. 465 (2007) and *Morton v. Sec'y Fla Dept. of Corr*., 684 F.3d 1157 (11th. Cir. 2012). The stringent AEDPA standards are not applicable here. In contrast to those cases, the issue in this case is not whether the State's position is complete nonsense; it is whether it is correct. Moreover, neither of those cases hold that a disagreeable or uncooperative defendant can never establish prejudice. In *Landrigan*, the U.S. Supreme Court found that it was not unreasonable for the state court to have concluded *from the record developed at the state court postconviction proceedings* "that regardless of what [additional] information counsel might have uncovered in his investigation, Landrigan would have . . . refused to allow his counsel to present any such evidence." 550 U.S. at 477. In *Morton*, the 11th Circuit found it not unreasonable for the state court to have concluded that the decision of trial counsel not to seek more testing was the result of "Morton's adamant response that 'he didn't want any more testing.'" In short, those cases merely apply a long-accepted principle - that the defendant himself retains the ultimate decision whether or not to present mitigation - to factual determinations that additional investigation by trial counsel would not have changed the defendant's decision.

In contrast to those two cases, Hernandez has never affirmatively insisted that his counsel present no mitigation, or refused additional testing. There is no

reason to conclude from this record that - especially if Rollo had made more than the barest minimal effort to meet with, reassure and counsel his client - Hernandez would have refused to cooperate if Rollo had pursued QEEG.

The State's argument that the evidence "established that QEEG is not widely accepted," Answer Brief at 68, ignores the defense expert witnesses and the many peer-reviewed scientific articles submitted by the defense. Its entire argument rests upon one "scientific" writing and the testimony of one "expert" witness. Neither credibly rebuts the extensive evidence presented by the defense establishing the general acceptance by mental health professionals and the reliability of QEEG as a clinical diagnostic tool that can confirm suspected brain damage and to clarify uncertainties left open by other diagnostic tests or clinical observations.

At the hearing below, the State offered a 1997 article by Marc Nuwer, Md, PhD, entitled "*Assessment of digital EEG, quantitative EEG and EEG brain mapping: Report of the American Academy of Neurology and the American Clinical Neurophysiology Society*" (hereafter, "*Nuwer*") It was admitted in evidence as State's Exhibit 17, over the objection by postconviction counsel that the article was not peer-reviewed and also that it was too out-of-date to be relevant (30R 24-27). Although the State's argument on appeal relies on *Nuwer*, the State provides no record citation to the article itself, and Appellant is unable to find a copy of it in the record. However, it may be found online at

http://users.phhp.ufl.edu/rbauer/forensic_neuropsychology/Nuwer_1997_QEEG_review_AAN.pdf

The State argues that *Nuwer* was not merely Dr. Nuwer's personal opinion, but was written by a "panel of experts" who reviewed "the relevant literature." Answer Brief at 71. However, nowhere does *Nuwer* say that the article was written by anyone other than Dr. Nuwer, or even identify who might have *reviewed* any "relevant literature." Additionally, *Nuwer* concededly does "not attempt to cite all the QEEG literature comprehensively." *Nuwer* at 278. *Nuwer* is vague in other ways, too. For example, *Nuwer* acknowledges that several published studies (which he cites in a footnote) have confirmed that abnormalities in patients who had suffered traumatic brain injury will show up on QEEG, and that the "authors were able to replicate their findings with good sensitivity and specificity." *Nuwer* at 283. But, *Nuwer* states, "[o]thers have commented that this technique is predisposed to false-positive 'abnormalities' in normal subjects due to mild drowsiness or other problems." *Nuwer* does not identify these "others," or provide any citation to any studies reaching such a conclusion. In fact, *Nuwer* cites not a single study finding that QEEG is neither reliable nor valid. And *Nuwer* ignores numerous peer-reviewed studies that existed even in 1997 showing exceptional QEEG reliability. For these reasons and others, *Nuwer* has been criticized in the literature (9R 1782). See also, e.g., *Limitations of the American Academy of Neurology and American Clinical Neurophysiology Society Paper on QEEG*, The

Journal of Neuropsychiatry and Clinical Neurosciences 1999;11:401-407 (hereafter, "*Limitations*"). Interestingly, *Limitations* notes that Dr. Nuwer had authored a previous QEEG position paper in 1989 stating that QEEG had *no* clinical value, while his 1997 paper expressly approves using QEEG to diagnose epilepsy, stroke, and dementia, and for intra-operative monitoring, while continuing to disapprove of using QEEG to diagnose traumatic brain injury and psychiatric disorders, or allowing QEEG evidence for any purpose in "civil or criminal judicial proceedings." Id. at 401; *Nuwer* at 284-85. *Limitations* criticizes *Nuwer* for failing to offer any valid scientific basis for accepting some clinical use for QEEG while rejecting other clinical uses:

> The basis on which the "positively recommended" group was selected in comparison to the "negatively recommended" group is not evident in the AAN/ACNS report, and this dichotomous classification lacks a serious scientific foundation. For example, the criterion of prospective verification was not equally applied to the "accepted" QEEG applications and the "rejected" applications. Indeed, the report appears incomplete in that it misrepresents the literature and omits citations that support scientific opposing views concerning the "clinically rejected" categories.

Limitations at 401-02. In short, not only is the 1997 Nuwer article seriously out of date today, but was methodologically suspect even in 1997.[12]

[12] Since 1997, there has been an "extraordinary growth in the amount of legal scholarship, legal practice, and public policy at the intersection of law and neuroscience." Francis X. Shen, *The Law and Neuroscience Bibliography: Navigating the Emerging Field of Neurolaw*, 38 Int'l J. Legal Info. 352 (2010). A bibliography is attached to this article (pp. 361-399); an updated version of the

As for Dr. Kaplan, the State offers the conclusory statement that he is "more credible" than the defense witnesses, without saying why. The State fails to acknowledge Dr. Kaplan's complete lack of experience with QEEG, his lack of any knowledge about the extent to which QEEG is used clinically and diagnostically by mental health professionals, universities, and the military, or about the qualifications of the persons who conducted QEEG in this case.

The State could have presented someone who has actual experience with QEEG and with its use by mental health professionals, but did not. The State could have presented a witness who had actually reviewed the QEEG conducted in this case and could tell us whether or not in her opinion the QEEG conducted in this case was unreliable and, if so, why, but the State did not. The State also fails to realize that its own evidence contradicts any claim that QEEG is novel scientific evidence and that it is unreliable, given *Nuwer*'s express approval of clinical uses of QEEG almost twenty years ago and Dr. Kaplan's concession that a properly conducted QEEG was "computational" and could not be faulted (30R 43-44, 51-52). Finally, the State nowhere acknowledges that *Appellant's raw EEG showed serious abnormalities* (multiple misfirings and phase reversals) before any quantitative analysis was conducted, and these abnormalities were strong evidence of brain damage (25R 142-43, 26R 222-24). The State does not and cannot

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bibliography is maintained at http://www.lawneuro.org /bibliography.php. The State ignores this extensive, more recent literature.

contend that the raw EEG, and expert testimony explaining the significance of it, would have been inadmissible for any reason.

As for prejudice, the State contends that Dr. Turner did not recommend additional testing to Rollo. Answer Brief at 73. In fact, Dr. Turner remembered having a discussion with Rollo about the possibility of additional testing, but does not recall the outcome of that discussion (31R 78). The State further contends that Rollo's failure to obtain a firm diagnosis of brain damage was not prejudicial because the experts testified that Michael "was normal when he was not taking drugs" and he only had "mild" brain injury. Answer Brief at 75. This is a complete misrepresentation of the testimony of the defense experts. First, Dr. Turner explained to the court that "mild brain injury" does not mean mild impairment. The medical terminology has "nothing to do with legal terms." "Mild brain injury actually can equate to *substantial impairment*" (31R 80-81). Second, Michael is never "normal." He can function in a minimally adequate way in a "consistent" environment with "pretty much the same routine every day" (31R 87),[13] but any deviation from a calm routine will cause him to perform "poorly" and do things that "make no sense." Further, a combination of stress, novelty and drugs would have a compound effect (e.g., 26R 253; 25R 37-39, 44-45, 94-95; 31R 87).

[13] Notably, in the structured environment of death row, Michael's behavior has been exemplary; he has had not a single disciplinary report at UCI (17R 1931-32).

Proof - as opposed to mere suspicion - that Appellant was brain damaged, coupled with expert explanation of how that brain damage would have impaired Appellant's judgment and performance throughout his life and, in particular, on the day of the murder of Mrs. Everett, would have made a huge difference in the sentencing calculus in this case. Rollo's performance was prejudicial under both the *Strickland* standard and the newly-discovered-evidence standard.

E. Reply to State's argument entitled, "Ineffectiveness for not presenting mental mitigation"

The State argues here that Rollo's performance was not deficient because he retained two mental health experts and "this ends the matter." Answer Brief at 80. The State ignores the evidence presented below that, while Rollo retained these experts, he spent minimal time with them and failed to adequately inform or prepare them. Dr. Turner testified that, although Rollo did talk to him once or twice, "there was not a lot of on-going preparation or anything" and he did not "feel as prepared as I would have liked" (31R 67). As recounted in the Initial Brief, Rollo's lack of investigation and preparation adversely affected the preparedness and credibility of his expert witnesses, who not only were given minimal background information, but also were not alerted to evidence the State would present about the circumstances of the crime. The State cites no authority for the proposition that the retention of two mental health experts is *per se* adequate performance, no matter how poorly the defense attorney prepares and

uses those experts, and Appellant can think of no reason why the presence of two experts, without more, would "end the matter."

F. Reply to the State's argument entitled, "Ineffectiveness for not presenting a different defense"

Appellant's claim was that Stokes failed to develop a "*coherent*" defense and also that he failed to coordinate his guilt phase case with Rollo's penalty phase case. Initial Brief at 91. The State not only misstates the defense claim, but fails to address Stokes' failure to coordinate his case with Rollo's. Nor does the State address in any way the closing argument that Stokes made to the jury or Stokes' erroneous belief that he was precluded from conceding guilt to any lesser offense.

What the State does argue is that the only "credible" defense would have been a guilty plea. Answer Brief at 88. But Michael refused to plead guilty.[14] Given that refusal, Stokes was obliged to "strive at the guilt phase to avoid a counterproductive course." *Florida v. Nixon*, 543 U.S. 175, 191 (2006). Stokes could reasonably have conceded guilt to second degree murder. Not only would that have been a plausible defense that the jury might well have accepted (at least if Stokes had more vigorously challenged the State's evidence, including,

[14] Moreover, "pleading guilty without a guarantee that the prosecution will recommend a life sentence holds little if any benefit for the defendant." *Florida v. Nixon*, 543 U.S. 175, 191 (fn. 6) (2006). "Pleading guilty not only relinquishes trial rights, it increases the likelihood that the State will introduce aggressive evidence of guilt during the sentencing phase, so that the gruesome details of the crime are fresh in the jurors' minds as they deliberate on the sentence." *Id*.

particularly, that of Tammy Hartman), but it would not have damaged the defense credibility at the penalty phase if the jury had rejected it and convicted him of first degree murder. But Stokes attempted to deny Appellant's guilt of *any* offense at all despite his recognition that the jury clearly was going to find him guilty of something. Putting on a "he didn't do anything" defense at the guilt phase, coupled with an "I'm sorry I did it" defense at the penalty phase just does not work. *Nixon*, 543 U.S. at 191.[15] The lesson of *Nixon* is not merely that capital counsel is not constitutionally prohibited from conceding guilt when the evidence is overwhelming, but also that ill-considered attacks on unassailable evidence of guilt can themselves constitute ineffective assistance of counsel as to sentence.

G. Reply to the State's argument entitled, "The trial court's failure to consider Bar records"

The State's argument here is, basically, that Stokes' disciplinary history is irrelevant, and that, anyway, Appellant had two attorneys and so he was adequately represented even if one of them performed inadequately. The State nowhere

[15] "See Lyon, *Defending the Death Penalty Case: What Makes Death Different*? 42 Mercer L. Rev. 695, 708 (1991) ("It is not good to put on a `he didn't do it' defense and a `he is sorry he did it' mitigation. This just does not work. The jury will give the death penalty to the client and, in essence, the attorney."); Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 Cornell L. Rev. 1557, 1589-1591 (1998) (interviews of jurors in capital trials indicate that juries approach the sentencing phase "cynically" where counsel's sentencing-phase presentation is logically inconsistent with the guilt-phase defense); id., at 1597 (in capital cases, a "run-of-the-mill strategy of challenging the prosecution's case for failing to prove guilt beyond a reasonable doubt" can have dire implications for the sentencing phase)." *Nixon*, 543 U.S. at 191.

acknowledges Appellant's contention that Rollo opened the door to an inquiry about Stokes' prior performance when he testified that he relied on Stokes to do his part based on Rollo's knowledge of Stokes' extensive experience. The State also fails to acknowledge that Rollo's testimony about his allegedly "routine discussions" with Stokes is rebutted by Rollo's own time records, which show minimal discussions between the two until after the trial began (12R 826-837).[16] Clearly, Rollo did, as he testified, rely on Stokes to handle the guilt phase of the case without significant input or guidance from Rollo (who was in any event, only the second chair in this case). Stokes' bar disciplinary history and history of failing to provide adequate representation of his clients was relevant to Rollo's own conduct and therefore, to the adequacy of his own performance. If, as the State suggests, a competent attorney can sometimes compensate for the inadequacies of co-counsel, that did not happen in this case.

H. Reply to State's argument entitled, "Ineffectiveness for not objecting to victim impact testimony"

The State contends in a footnote that Rollo preserved any objection to victim impact by filing a pre-trial objection to victim impact evidence and did not have to

[16] Stokes was appointed on October 11, 2006. Rollo had two brief (i.e., less than twenty minute) discussions with Stokes in October, one in November, and none at all in December. In January, he had two brief discussions, plus one 60 minute and one 30 minute discussion with Stokes (the last one occurring three days before trial). These limited discussions would not have been adequate to map out or coordinate strategy in any significant way.

renew that objection at trial. Answer Brief at 98 (fn. 23). This was addressed by Appellant below, and also in his Initial Brief, at 96. Rollo moved pre-trial to exclude all victim impact evidence from the jury, but raised no specific objection to any victim impact testimony. Once again, as it did below, the State refuses to address *Wheeler v. State*, 4 So.3d 599, 606 (Fla. 2009), or its holding that a general pretrial objection to all victim impact evidence is insufficient to preserve for appeal objections to specific portions of such testimony.

The State also argues that Appellant raised this issue below as a claim that Rollo did not preserve the issue for appeal, and argues that the focus of an IAC claim must be "on the trial," not on the appeal. But Appellant did not merely contend below that Rollo had failed to preserve issues for appeal, but also that he had failed to raise issues and to object to improper testimony, including victim impact, and also that Rollo caused additional prejudice by eliciting improper victim impact evidence on cross-examination. See Defendant's written closing argument below (6R 131, 137-40). Appellant's Initial Brief fully addresses the impact of the improper victim impact evidence at trial. Initial Brief at 94-97. No additional argument is necessary.

II. THE GIGLIO ISSUE

Appellant will stand on his argument in his Initial Brief on this Issue.

Respectfully submitted,

/s/_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Charmaine Millsaps, Assistant Attorney General, Office of the Attorney General, the Capitol, Tallahassee, FL 32399-1050, by electronic mail sent to capapp@myfloridalegal.com, this 28th day of April, 2013.

/s/_____
CURTIS M. FRENCH

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated brief is filed in Times New Roman 14-point font in compliance with Rule 9.210 (a) (2), Fla.R.App.P.

/s/_____
CURTIS M. FRENCH