

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-404

**HARREL FRANKLIN BRADDY,
Petitioner,**

v.

**JULIE L. JONES, Secretary,
Florida Department of Corrections,
Respondent.**

**ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT, IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the circuit court's summary denial of relief without evidentiary hearing on the Appellant's motion for postconviction relief filed under Rule 3.851.

The following symbols will be used to designate references to the record in this appeal:

"R" – record on direct appeal to this Court;

"S.R." – supplemental record on direct appeal to this Court;

"T" – transcripts on direct appeal to this Court;

"PCR" – record on postconviction appeal.

"Supp. PCR" – supplemental record on postconviction appeal

REQUEST FOR ORAL ARGUMENT

Braddy requests oral argument on the claims asserted in the present petition.

TABLE OF CONTENTS

PRELIMINARY STATEMENT ii

REQUEST FOR ORAL ARGUMENT ii

STANDARD OF REVIEW xi

STATEMENT OF CASE AND FACTS 1

 Pretrial, Trial, and Direct Appeal..... 1

 Postconviction..... 3

ARGUMENT I..... 26

THE DENIAL OF THE MOTION TO WITHDRAW AND/OR THE MOTION(S)
TO DISCHARGE CCRC VIOLATED BRADDY’S STATUTORY AND/OR
CONSTITUTIONAL RIGHTS TO CONFLICT-FREE COUNSEL AND HIS
RIGHTS TO DUE PROCESS AND EQUAL PROTECTION..... 26

 A. CCRC has a continuing conflict of interest such that CCRC cannot ethically
 represent Braddy 26

 B. Brady is entitled to conflict-free counsel 28

ARGUMENT II 37

FLORIDA STATUTE § 119.19 AND RULE 3.852 ARE UNCONSTITUTIONAL
AS APPLIED, AND VIOLATE ART. I, § 24 OF THE FLORIDA CONSTITUTION
..... 37

 A. Florida has one of the broadest public records law in the country..... 37

 B. The denial of records that were claimed exempt was in error as a matter of law
 39

 C. The denial of records under rule 3.852 was an abuse of discretion 44

ARGUMENT III..... 46

BRADDY WAS DENIED ADVERSARIAL TESTING AT THE PENALTY
PHASE OF HIS TRIAL DUE TO THE INEFFECTIVE ASSISTANCE OF
COUNSEL AND/OR STATE MISCONDUCT IN VIOLATION OF THE SIXTH,

EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.	46
A. Deficient Performance	48
i. Failure to investigate before deciding on a strategy.....	48
ii. There was no record waiver of mitigation	54
B. Prejudice	56
ARGUMENT IV	68
TRIAL COUNSEL’S FAILURE TO PRESERVE A CONSTITUTIONAL CHALLENGE TO THE PROSECUTOR’S IMPROPER ARGUMENTS DEPRIVED BRADDY OF HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.....	68
ARGUMENT V	76
BRADDY WAS DEPRIVED OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION	76
ARGUMENT VI.....	82
BRADDY WAS DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL AND/OR THE STATE'S FAILURE TO DISCLOSE CRITICAL EXCULPATORY EVIDENCE AND IMPROPER PROSECUTORIAL AND JUDICIAL MISCONDUCT, IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE US CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION	82
A. The defendant has a right to the effective assistance of counsel.....	82
B. Trial Counsel was ineffective for not hiring an expert to assist in challenging the voluntariness of Braddy’s statements and/or failing to impeach the State’s witnesses.	83
C. Crime scene and forensic evidence	93

D. Failure to consult with and/or present a forensic pathologist98

E. Prejudice100

CONCLUSION100

CERTIFICATES OF SERVICE AND FONT102

TABLE OF AUTHORITIES

Cases

<i>Allen v. Butterworth</i> , 756 So. 2d 52 (Fla. 2000).....	29
<i>Arizona v. Fulminante</i> , 499 U.S. 279 (1991).....	85
<i>Banks v. Dretke</i> , 540 U.S 668 (2004)	42
<i>Beck v. Alabama</i> , 477 U.S. 625 (1980).....	83
<i>Boyer v. State</i> , 825 So. 2d 418 (Fla. 1st DCA 2002)	86
<i>Boykin v. Alabama</i> , 395 U.S. 238 (1969)	55
<i>Braddy v. Florida</i> , 134 S. Ct. 275 (2013).....	4
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	42
<i>Butler v. City of Hallandale Beach</i> , 68 So. 3d 278 (Fla. Dist. Ct. App. 2011)	43
<i>Caldwell v. Mississippi</i> , 472 U.S. 320 (1985)	68
<i>Cardona v. State</i> , 2016 WL 636048 at *1 (Fla. 2016)	69, 76
<i>Cardona v. State</i> , 826 So. 2d 968 (Fla. 2002)	43
<i>Chester v. State</i> , 737 So. 2d 557 (Fla. 1999)	78, 79
<i>Coleman v. Austin</i> , 521 So. 2d 247 (Fla. 1st DCA 1998).....	41
<i>Conaway v. Polk</i> , 453 F.3d 567 (4th Cir. 2006)	77
<i>Cooper v. State</i> , 856 So. 2d 969 (Fla. 2003).....	27, 34
<i>Crane v. Kentucky</i> , 476 U.S. 683 (1986)	85
<i>Cuyler v. Sullivan</i> , 446 U.S. 335 (1980).....	32
<i>Darden v. Wainwright</i> , 477 U.S. 168 (1986).....	68
<i>De La Rosa v. Zequeira</i> , 659 So. 2d 239 (Fla. 1995)	79
<i>Donnelly v. DeChristoforo</i> , 416 U.S. 637 (1974).....	68
<i>Douglas v. Woodford</i> , 316 F.3d 1079 (9th Cir. 2003).....	53
<i>Endress v. Coe</i> , 433 So. 2d 1280 (Fla. 2nd DCA 1983).....	33
<i>Faretta v. California</i> , 422 U.S. 806 (1975)	7

<i>Finney v. Jones</i> , 171 So. 3d 116 (Fla. 2015)	22
<i>Fogarty v. State</i> , 513 S.E.2d 493 (1999)	35
<i>Freeman v. Georgia</i> , 559 F.2d 65 (5th Cir. 1979).....	81
<i>Frye v. United States</i> , 293 F. 1013 (D.C. Cir. 1923)	93
<i>Garcia v. State</i> , 622 So. 2d 1325 (Fla. 1993)	37
<i>Glock v. Moore</i> , 776 So. 2d 243 (Fla. 2001)	44
<i>Gorham v. State</i> , 597 So. 2d 782 (Fla. 1992)	37
<i>Graham v. State</i> , 372 So. 2d 1363 (Fla. 1979)	29
<i>Green v. State</i> , 133 So. 3d 597 (Fla. 2d DCA 2014)	36
<i>Gregg v. Georgia</i> , 428 U.S. 153 (1976)	54, 67
<i>Grim v. State</i> , 971 So. 2d 85 (Fla. 2007)	55
<i>Hardwick v. State</i> , 521 So. 2d 1071 (Fla. 1988).....	36
<i>Hill v. State</i> , 921 So. 2d 579 (2006).....	46
<i>Indiana v. Edwards</i> , 554 U.S. 164 (2008)	51
<i>Irvin v. Dowd</i> , 366 U.S. 717 (1961).....	76
<i>Johnson v. State</i> , 44 So. 3d 51 (Fla. 2010)	37, 43
<i>Johnson v. Zerbst</i> , 304 U.S. 458 (1938)	55
<i>Koon v. Dugger</i> , 619 So. 2d 246 (Fla 1993).....	54
<i>Koon v. Dugger</i> , 619 So. 2d 246 (Fla. 1993).....	55
<i>Kyles v. Whitely</i> , 514 U.S. 419 (1994).....	81
<i>Kyles v. Whitley</i> , 514 U.S. 419 (1995).....	56
<i>Lightbourne v. McCollum</i> , 969 So. 2d 326 (Fla. 2007).....	41
<i>Lonchar v. Thomas</i> , 517 U.S. 314 (1996).....	55
<i>Lowrey v. State</i> , 705 So. 2d 1367 (Fla. 1998).....	82
<i>Marquardt v. State</i> , 156 So. 3d 464 (Fla. 2015)	54
<i>McDonough Power Equip., Inc. v. Greenwood</i> , 464 U.S. 548 (1984).....	77
<i>Merck v. State</i> , 975 So. 2d 1054 (Fla. 2007)	74

<i>Miami-Dade County v. Jones</i> , 793 So. 2d 902 (Fla. 2001)	9
<i>Mills v. State</i> , 786 So. 2d 547 (Fla. 2001)	44
<i>Miranda v. Arizona</i> , 394 U.S. 436 (1966)	83, 84
<i>Muhammad v. State</i> , 782 So. 2d 343 (Fla. 2001).....	54
<i>Nelson v. State</i> , 274 So. 2d 256 (Fla. 4th DCA 1973).....	36
<i>Olive v. Maas</i> , 811 So. 2d 644 (Fla. 2002)	29
<i>Orange Cnty. v. Capital Collateral Reg'l Counsel</i> , 796 So. 2d 530 (Fla. 2001).....	9
<i>Orange County. v. Florida Land Co.</i> , 450 So. 2d 341 (Fla. Dist. Ct. App. 1984) ..	41
<i>Ornelas v. U.S.</i> , 517 U.S. 690 (1996)	x
<i>Owens v. United States</i> , 387 F.3d 607 (7th Cir. 2004)	93
<i>People v. Abar</i> , 786 N.E.2d 1255 (NY 2003).....	32
<i>Phillips v. State</i> , 894 So. 2d 28 (Fla. 2004)	67, 76
<i>Porter v. McCollum</i> , 130 S. Ct. 447 (2009).....	56
<i>Pyle v. Kansas</i> , 317 U.S. 213 (1942)	81
<i>Ramirez v. State</i> , 651 So. 2d 1164 (Fla. 1995)	93
<i>Ramirez v. State</i> , 739 So. 2d 568 (Fla. 1999)	87
<i>Ring v. Arizona</i> , 536 U.S. 584 (2002).....	3
<i>Rodriguez v. State</i> , 684 So. 2d 833 (Fla. 3rd DCA 1996)	34
<i>Roger v. State</i> , 800 So. 2d 174 (Fla. 2001).....	37
<i>Roman v. State</i> , 528 So. 2d 1169 (Fla. 1988)	37
<i>Rompilla v. Beard</i> , 545 U.S. 374 (2005)	47, 48, 51
<i>Sears v. Upton</i> , 130 S. Ct. 3266 (2010)	56
<i>Sims v. State</i> , 753 So. 2d 66 (Fla. 2000)	39
<i>Smith v. Zant</i> , 887 F.2d 1407 (11th Cir. 1989)	93
<i>Spalding v. Dugger</i> , 526 So. 2d 71 (Fla. 1988)	28
<i>State v. Gunsby</i> , 670 So. 2d 920 (Fla. 1996)	82
<i>State v. Kokal</i> , 562 So. 2d 324 (Fla. 1990)	37, 41

<i>State v. Lewis</i> , 838 So. 2d 1102 (Fla. 2002)	53
<i>State v. Roche</i> , 114 Wash. App. 424 (2002)	45
<i>Stephens v. State</i> , 748 So. 2d 1028 (Fla. 1999)	x
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	46, 47, 74, 82
<i>Tellas v. State</i> , 811 So. 2d 756 (Fla. 1st DCA 2002).....	24
<i>Thomas v. Kemp</i> , 796 F.2d 1322 (11th Cir. 1986)	67
<i>Thompson v. Wainwright</i> , 787 F.2d 1447 (11th Cir. 1986).....	53
<i>Traylor v. State</i> , 596 So. 2d 957 (Fla. 1992)	84
<i>United States v. Bagley</i> , 473 U.S. 667 (1985)	81, 82
<i>United States v. Cronin</i> , 466 U.S. 648 (1984)	37
<i>United States v. Hall</i> , 93 F.3d 1337 (7th Cir. 1996).....	86
<i>United States v. Perkins</i> , 748 F.2d 1519 (11th Cir. 1984).....	77
<i>United States v. Woody</i> , No. CR-13-08093-001-PCT, 2015 WL 1530552, at *6 (D. Ariz. Apr. 6, 2015).....	60
<i>Wheat v. United States</i> , 486 U.S. 153 (1988)	31
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003).....	47, 48, 100
<i>Williams v. Taylor</i> , 529 U.S. 362 (2000)	47
<i>Worthen v. State</i> , 711 P.2d 943 (Ok. 1985)	33
<i>Young v. State</i> , 720 So. 2d 1101 (Fla. 3d DCA) 1998.....	82
<i>Young v. State</i> , 739 So. 2d 553 (Fla. 1999)	37, 43
Statutes	
Fla. Stat. § 119.071(1)(d)(1)	39, 40
Fla. Stat. § 27.7001	29
Fla. Stat. § 27.703(1).....	passim
Fla. Stat. § 916.115(2).....	9
Fla. Stat. § 921.141	55, 66, 74
Fla. Stat. § 921.141(b).....	66

Other Authorities

<i>American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases</i> , 31 Hofstra L. Rev. 913, 1005 (2003)..	31, 47, 49, 75
Bradley A. MacLean, <i>Effective Capital Defense Representation and the Difficult Client</i> , 76 Tenn. L. Rev. 661 (2009)	50
Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, <i>Strengthening Forensic Science in the United States: A Path Forward</i> (2009)	45
Craig Haney, <i>Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death</i> , 49 Stan. L. Rev. 1447 (1997).....	48
D. Rodenhiser and M. Mann, <i>Epigenetics and human disease: translating basic biology into clinical applications</i> , Canadian Med. Assn. J. 174(3): 341–48 (2006)	59
<i>In re: Amendment to Florida Rules of Criminal Procedure-Capital Postconviction Public Records Production</i> , 683 So. 2d 475 (Fla. 1996).....	38
Joy Degruy Leary, <i>Post Traumatic Slave Syndrome: America’s Legacy of Enduring Injury and Healing</i> , Uptone Press (2005).....	59
Sean D. O'Brien, <i>When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases</i> , 36 Hofstra L. Rev. 693 (2008)	49
Tori Rodriguez, <i>Descendants of Holocaust Survivors Have Altered Stress Hormones</i> , Scientific American, Vol. 26, Issue 2 (Feb. 12, 2015).....	60

Rules

Fla. R. Crim. P. 3.851(b)(6)	12
Fla. R. Crim. P. 3.852(b)(2)	30
Fla. R. Crim. P. 3.852(d)(1)	30
Fla. R. Crim. P. 3.852(e)	30
Fla. R. Crim. P. 3.852(e)(3)	42
Fla. R. Crim. P. 3.852(f)	42

STANDARD OF REVIEW

The claims presented in this appeal are constitutional issues involving questions of law and fact. There was no evidentiary development permitted in circuit court. The circuit court's legal analysis is subject to *de novo* review by the Court. *See Ornelas v. U.S.*, 517 U.S. 690 (1996); *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999).

STATEMENT OF CASE AND FACTS

Pretrial, Trial, and Direct Appeal

The Appellant, Harrel Braddy, was taken into custody on November 7, 1998, and interrogated after receiving a report that he had kidnapped Shandelle Maycock and her five-year-old daughter, Quatisha Maycock. Quatisha's body was found in a canal near Alligator Alley by two fisherman on November 9, 1998.

On November 25, 1998, Braddy was indicted on the following charges: (1) first degree murder; (2) attempted first degree murder; (3) two counts of kidnapping; (4) burglary of a dwelling with an assault or battery therein; (5) child neglect causing great bodily harm; and (6) attempted escape. (R. 70-77.)

Prior to trial, Braddy filed a motion to suppress all statements he made to the police following his arrest on November 7, 1998 pursuant to *Miranda v. Arizona*. The motion was denied. Braddy's trial commenced on June 25, 2007. On July 17, 2007 the jury returned a verdict of guilty on all counts. The penalty phase was conducted on August 28–31, 2007. The jury recommended a sentence of death by a vote of 11-to-1. After conducting a separate hearing, the Honorable Judge Leonard Glick sentenced Braddy to death on October 15, 2007.

This Court upheld both the judgments of conviction and sentence of death on direct appeal. *Braddy v. State*, 111 So. 3d 810, 822 (Fla. 2012). Two members of

this Court would have remanded for a new trial due to Fifth Amendment violations. *Braddy v. State*, 111 So. 3d at 863, 874-881.

This Court also rejected the challenge based on the prosecutor's inappropriate comments during both the guilt and penalty phases primarily because trial counsel repeatedly failed to object to the improper comments. *Braddy* at 843, 846, 847, 855. Again, two members of this Court would have remanded for a new trial due to the prosecutorial misconduct. Justice Pariente wrote in dissent:

Below is a list of just *some* of the prosecutor's most flagrant violations of this Court's prior admonitions in our death penalty jurisprudence:

- (1) creating an imaginary script and engaging in golden rule arguments by putting words in the five-year-old victim's mouth—"Where's mommy? Where's mommy?"—and asking the jurors to go back to the deliberation room, sit for five minutes, and "think of the fear" the victim experienced;
- (2) cloaking the State's case with legitimacy by commenting that the State only brings cases in which the death penalty is justified;
- (3) impugning the integrity of defense counsel by stating that counsel was going to get up and "scream" about the State's aggravating circumstances because by screaming "loud enough," counsel could "drown out the shouts" of the aggravators "written in stone";
- (4) denigrating the defense and implying that mitigation should be used as aggravation, including rhetorically asking the jurors, "Why [were] those 13 people brought in to you? One or two would have done it," and labeling the defense's cross-examination of a State witness as an "attack";
- (5) characterizing the defendant as being "violent ... since birth" in order to establish aggravation despite a lack of evidence drawing such a connection; and

(6) asserting that recommending a life sentence would essentially be an easy way out. This already lengthy tabulation of improper commentary alone was enough to warrant reversal. Yet, the list goes on.

Braddy, 111 So. 3d at 863. This Court also rejected *Braddy*'s properly preserved Sixth Amendment challenge to Florida's death penalty scheme based on *Ring v. Arizona*, 536 U.S. 584 (2002). *Braddy* at 860.

Postconviction

Upon issuance of the mandate on April 26, 2013, this Court appointed the Office of the Capital Collateral Regional Counsel-South ("CCRC") to represent *Braddy* in his postconviction proceedings. (PCR. 81.)¹

A status hearing was held before the Honorable Ariana Fajardo Orshan on June 20, 2013. The lower court admitted, "I am not sure what we're supposed to do in these, other than we've got to do them periodically." (PCR. 2162.) The court asked collateral counsel, Paul Kalil, if he would inform the court what additional records might be needed by the next status hearing set for September 13, 2013. When collateral counsel explained that he had 240 days to file additional demands under Florida Rule of Criminal Procedure 3.852(g), the court said, "So, then, I guess, you, you know, the rules better than I do. I have to look at them every time this stuff

¹ On May 22, 2013, CCRC—South Litigation Director, William M. Hennis, III, filed the notice of appearance. (PCR. 226-228.) Assistant CCRC Paul Kalil subsequently filed a pleading as the designated lead attorney pursuant to Florida Statute § 27.704 on June 17, 2013. (PCR. 241-242.)

comes up, so I trust that you guys are doing what you are supposed to be doing.”
(PCR. 2165-66.)

A second status hearing was held on September 13, 2013, at which time collateral counsel informed the court that records had not been produced by Miami-Dade Police, Palm Beach County Sheriff, Florida Highway Patrol, or the Broward County Sheriff. (PCR. 2717-18.) On October 7, 2013, Braddy’s petition for writ of certiorari was denied, rendering the convictions and death sentence final. *Braddy v. Florida*, 134 S. Ct. 275 (2013).

On November 28, 2013, Assistant CCRC Kalil was injured in a hiking accident while visiting his native South Africa. Kalil suffered injuries to his arms, shoulder, and multiple fractures to his right leg. After four nights in two Cape Town hospitals, Kalil was deemed fit to return to the United States with medical accommodations provided by the airlines. Upon his return to Florida on December 3, 2013, Kalil was immediately transported to the hospital where he was admitted for a short time and released later that night. (PCR. 1576.)

Chief Assistant CCRC Suzanne Keffer appeared at the next status hearing on December 6, 2013 and asked for an extension of time for filing the 3.852(g) demands due to Kalil’s absence from work. (PCR. 2726.) Because of the severity of Kalil’s injuries, doctors were unable to perform necessary surgery to repair his fractures until December 12, 2013. The surgery involved inserting a plate, screws, and wires

into Kalil's right leg. Although Kalil returned to work in January 2014, it was some time before he could fully attend to his case load. He was unable to walk or drive a car for nearly four months during which he was entirely dependent on others for transportation. Additionally, Kalil had to undergo months of intensive physical therapy which further reduced his ability to work. Due to the foregoing, Kalil reduced his hours at work and Assistant CCRC Roseanne Eckert assumed the duties of designated counsel for Braddy in late February. (PCR. 1577.)²

On March 7, 2014, CCRC filed a motion to withdraw pursuant to Florida Statute § 27.703(1) due to a then-recently discovered actual conflict of interest alleging in relevant part:

Capital Collateral Regional Counsel-South, Neal A. Dupree, acting in his capacity as a supervising State Attorney in and for Broward County, was a direct supervisor of the prosecutors who signed off on Braddy's guilty plea in Broward County Case No.: 84-11922-CF. In that case, Braddy pled guilty to charges of burglary, kidnapping, and escape. That prior was used as an aggravator in the instant case ultimately resulting in a judgment of death. Braddy has been made aware of these circumstances and has informed undersigned counsel that it is his wish for CCRC to withdraw from further representation due to an irreconcilable conflict. (footnote omitted).

(PCR. 355-359.)

² Ms. Eckert filed a formal notice of appearance on April 1, 2014. (PCR. 462-463.)

At the hearing on the motion to withdraw, the court erroneously informed Braddy that the circuit court could extend the time for filing his motion for postconviction relief. This was corrected by the State. (PCR. 2582-85.) Neal A. Dupree, the appointed CCRC, informed the court that he was a Broward County prosecutor from 1983 through 1987 and that he supervised the division in which Braddy was prosecuted on the prior violent felony. Dupree explained that he was required to sign off on the plea agreement in Braddy's case as it was a life felony, "Frankly, it was my decision that would allow that plea agreement . . . to go forward or not." (PCR. 2586.) Dupree is often in Tallahassee rather than in the Ft. Lauderdale office so he was not aware that Braddy had been prosecuted in Broward in 1984. It was a letter from Braddy about the case that prompted him to look into the matter. (PCR. 2585-86.) The lower court denied CCRC's motion to withdraw on March 21, 2014. (PCR. 391-395.) The court held a public records hearing on April 4, 2014 with numerous agencies present. Special Assistant CCRC Todd Scher³ and staff attorney Jessica Houston appeared on behalf of Braddy. The Department of Corrections ("DOC") informed the Court that Braddy's probation and parole records were destroyed in 2004. (PCR. 2606.) Broward prosecutor Joel Silvershein informed the court that he would submit the records from the Broward County prior convictions

³ The transcript incorrectly refers to CCRC South attorneys Todd Scher and Jessica Houston as "Assistant Regional Counsel."

to the state repository. (PCR. 2630.)⁴ Thereafter, Braddy filed a *pro se* motion seeking to discharge counsel and represent himself pursuant to *Faretta v. California*, 422 U.S. 806 (1975) on April 8, 2014. (PCR. 486-489.)

On April 17, 2014, CCRC filed a motion for competency evaluation. (PCR. 499-503.) At a hearing held on April 25, 2014, the lower court conducted a *Farretta* inquiry with Braddy who appeared by telephone. (PCR. 2174-2210.) Over Braddy's objection, the court agreed to appoint two mental health professionals to evaluate him before ruling on the *Farretta* motion:

My obligation is to make sure you are fully competent to represent yourself. I am not a doctor. I am not a psychologist, psychiatrist, or anything of the sort, so you will see these two doctors. . . . If you wish to engage in self-representation I need these two doctor to tell me you are perfectly fine to do that. . .

(PCR. 2215-2218.) Each party provided three names to the court: the State suggested Dr. Greg Pritchard, Alan Waldman, or Tanya Warner while CCRC suggested Dr. Michael Brannon, Salvatore Blandino, or Dr. Jethro Toomer. (PCR. 2211-2215.) The court indicated that an order appointing Drs. Brannon and Prichard would be forthcoming.

⁴ Instead of issuing a written order, the court simply ratified the transcript in an order dated September 9, 2014. (PCR. 864-948.)

Following the hearing, there was communication between the court and the parties raising issues concerning the possibility that the proceedings may be delayed due to the evaluations, the source of payment for the evaluations, the scope of the evaluations, and the choice of experts. (Supp. PCR. 1190-91.) The court indicated by electronic mail on April 29, 2014 that Drs. Brannon and Pritchard would be willing to conduct a “Full Mental Health Evaluation” described by the court as a “general competency and more in-depth analysis and testing to determine if he is paranoid or suffering from any mental illness.” The court then directed, via electronic mail, CCRC to “enter into contracts with both doctors. . .” (*Id.*) CCRC responded with an objection via electronic mail: “This is a court-ordered evaluation so CCRC would not be authorized to hire the doctors or pay for the examination.” (*Id.*) The court responded on April 30, 2014: **“I was doing the evaluations at the request of CCRC pursuant to the motion filed.** I will see if I can do what CCRC is requesting on the Court budget.” (*Id.*) (emphasis added).

A phone hearing was set for May 13, 2014 following the email exchange regarding payment for experts. The court announced that Tonya Warner and Alan Waldman—both of whom were suggested by the State—would conduct the evaluations. CCRC objected and asked for time to find out more about the proposed psychiatrists. The court responded:

Well, here’s the thing, CCRC, because I’m not sure who’s speaking to me. I will tell you this, I gave you the

opportunity to select and pick doctors and you said you want court appointed to be able for us to pay for it, so this is what you get. There are no other doctors in the area that will do this. I have spent exhausted a number of hours because the intent here was that you all will have a very thorough evaluation done since you filed your motion alleging that Mr. Braddy is paranoid. However, since you all have decided you are not going to do it, this is a court appointed and these are the doctors that I have selected to evaluate him to determine if he's competent for purpose of self-representation. . .

(PCR. 2235-36.) CCRC explained that the court was not ordering the evaluation as a favor but to comply with the law. The court further accused CCRC of attempting the delay the process and of asking for something more than a standard competency evaluation. (PCR. 2236-37.) When CCRC attempted to explain that the competency motion did not seek any type of evaluation beyond what might be considered a normal forensic evaluation, the court said, "I understand you really want to hear yourself talk." (PCR. 2245.)

On May 16, 2015, CCRC filed an "Amended Motion for Competency Evaluation and Determination Nunc Pro Tunc to April 18, 2014 and Objection to Dr. Alan Waldman as a Court Expert." (Supp. PCR. 1179-88.)⁵ With respect to Braddy's state-of-mind, CCRC alleged in relevant part:

⁵ The motion also addressed the court's obvious misunderstandings concerning payment for competency evaluations citing to *Miami-Dade County v. Jones*, 793 So. 2d 902 (Fla. 2001), *Orange Cnty. v. Capital Collateral Reg'l Counsel*, 796 So. 2d 530 (Fla. 2001) and Florida Statute § 916.115(2).

Based on communications with Mr. Braddy, he is oriented as to time and place and has a **general** understanding of the purpose of the proceedings and the respective roles of the judge, prosecutors, and defense counsel. However, Mr. Braddy has exhibited extreme paranoia and a tendency to perseverate about certain facts and details regarding his case. Without revealing specific examples due to the attorney-client privilege, Mr. Braddy has made certain allegations about his experiences in the prosecution of his case that appear to be unreliable or untrue and may be the product of paranoid delusions. Some of the accusations have been regarding his prior attorneys, Terence Lenamon and Andrew Stanton. In order to develop a factual claims of ineffective assistance of counsel it is necessary to have Mr. Braddy's input especially because he had a prior relationship with the primary witness in this case. Because of the paranoia and obsessiveness exhibited by Mr. Braddy, it has been impossible to carry on a relevant and productive conversation with Mr. Braddy about the facts of his case, his rights, and the procedures in his collateral litigation.

There is good cause to believe that Mr. Braddy is either not competent to proceed in postconviction, or, if competent, he is not competent to represent himself. Further, there is reason to believe that Mr. Braddy's reasons for seeking to discharge counsel are not the product of rational thinking. "[A] judicial determination of competency is required when there are reasonable grounds to believe that a capital defendant is incompetent to proceed in postconviction proceedings in which factual matters are at issue, the development or resolution of which require the defendant's input." *Carter v. State*, 706 So. 2d 873, 875 (Fla. 1997). The procedures outlines in *Carter* were subsequently incorporated into Florida Rule of Criminal Procedure 3.851(g). *Hernandez-Alberto v. State*, 126 So. 3d 193, 200-01 (Fla. 2013). The question presented is whether Mr. Braddy "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational

as well as factual understanding of the proceedings against him.” *Dusky v. United States*, 362 U.S. 402 (1960). . . .

Here, Mr. Braddy seeks to discharge counsel and pursue his collateral remedies *pro se*. Even if we assume that (1) Mr. Braddy will be found competent to proceed in postconviction and (2) that he has the right to represent himself in this proceedings, the question of self-representation presents a more nuanced issue for this Court to decide: that is whether this Court **may** or **should** limit any right to self-representation if Mr. Braddy is in that “gray area” of competence such that he cannot rationally decide to reject counsel. *Indiana v. Edwards*, 554 U.S. 164, 173- 174 (2008).

(Supp. PCR. 1180-81; 1182.) CCRC objected to the appointment of Dr. Alan Waldman based upon the reports of various attorneys and mental health professionals in the northern part of Florida as well as his arrest history for aggravated assault. (Supp. PCR. 1186-87.) The court appointed Dr. Eric Mings as requested by CCRC and Dr. Tonya Warner. (PCR. 558, 563, 2272.) Braddy responded regarding his attorney: “She’s planning to sink me and she’s going to sink me if you force her on me.” (PCR. 2281.)

After the competency evaluation reports were submitted, the court held a hearing where Braddy was found competent to proceed. The court ordered that Braddy would be allowed to proceed *pro se* and that CCRC would remain as standby counsel. (PCR. 2806.) The written order was entered on July 3, 2014. (PCR. 789-790.) The parties, along with counsel for the Department of Corrections, then

discussed the logistics of transferring 31 boxes plus disks to the prison for Braddy's use. (PCR. 2805-2839.)

On August 12, 2014, Braddy filed two separate motions seeking an order declaring him indigent for costs and granting funds for experts in crime scene reconstruction and handwriting analysis. (PCR. 796-821.) A third motion seeking funds for a pathologist was filed on August 13, 2014. (PCR. 827-832.) Rather than address Braddy's motions, the court *sua sponte* reversed its prior ruling and revoked Braddy's right to self-representation on August 12, 2014. (PCR. 822-826.) The court determined that Braddy was previously represented by a male attorney "without incident" but, "from the instant the female attorney was assigned, the Defendant began to complain about his attorney." (PCR. 823.) The court also determined that Braddy wanted to represent himself because he did not want to be represented by the female attorney. (PCR. 823.) The court also gratuitously found that the "Defendant was represented by numerous extremely qualified attorneys" at the trial stage. (PCR. 822.) The court stated that the July 3, 2014 amendments which would prohibit death row inmates from self-representation in postconviction⁶ caused the court to reconsider the previous position:

[I]n assessing the Defendant's right to represent himself, this Court must consider its solemn duty to ensure the death penalty is imposed fairly, consistently and in a reliable manner as well as to guarantee minimal delays in

⁶ See Amended Fla. R. Crim. P. 3.851(b)(6).

the postconviction process. (citations omitted). Taking this great responsibility into consideration along with the Defendant's long history of disruption and delay as reflected in the trial court file, this Court, sua sponte vacates its Order dated July 3, 2014 allowing the Defendant to represent himself.

(PCR. 826.)

CCRC filed a motion for reconsideration on August 15, 2014 challenging the factual and legal basis for the motion reappointing CCRC to represent Braddy. (PCR. 839-843.)

On August 29, 2014, CCRC filed a "Motion for Delivery of Sealed and Exempt Records to the Clerk of the Court and Request for an *In Camera* Inspection to be Held in Open Court."

A public records hearing was held on September 2, 2014 regarding demands to the Miami-Dade Police Department ("MDPD"). The court expressed the opinion that documents that were not introduced at trial are not relevant even though the defense explained that the personnel and internal affairs files might contain impeachment material. (PCR. 2294-2341.)

CCRC then raised the issue of the claimed exemptions, suggesting that the parties could address the "content of the claimed exemptions next week." (PCR. 2342.) In response to an inquiry from the court about the process, CCRC explained that the court should review the documents that were claimed as exempt for *Brady* material. Additionally, some of the exemptions claimed by an agency might not be

accurate and therefore, CCRC indicated that objections to any claimed exemptions could be set forth in a memorandum that would be forthcoming. (PCR. 2344-45.) The State expressed dissatisfaction with how CCRC was representing Braddy, complaining that “they have been incredibly dilatory in seeking this review,” and that it “is their problem at this point.” (PCR. 2347.) In response, the court explained, “I’m not going to fault them for their delay, because it’s not fair because probably that’s somewhat attributable to this Court.” (PCR. 2348.)

Finally, CCRC reminded the court that there had been no order following the April public records hearing and that there were still records from the Miami-Dade State Attorney’s Office outstanding. (PCR. 2351-52.) The court subsequently ratified the transcript of the April 4, 2014 hearing instead of providing a written order for this Court’s review. (PCR. 864-948.)

A hearing on demands for records relevant to lethal injection was held on September 11, 2014. (PCR. 2359-2388.) At that hearing, CCRC asked the court about the claimed exemptions and the court indicated that records had already been reviewed and most of them contained work product. (PCR. 2383.) CCRC asked that the records be made part of the record for purposes of appeal. (PCR. 2385.)

The court entered an order on the claimed exemptions on September 15, 2015 finding that none of the records contained exculpatory information and that “All documents in these documents were either work product not subject to disclosure or

documents which had already been provided to the Defendant.” There was no ruling on whether there were any documents that contained impeachment material. (PCR. 1060-64.)

In response, CCRC filed a motion for reconsideration and a request to be heard setting forth specific legal arguments in opposition to the claimed exemptions. (PCR. 967-1055.) With respect to the Office of the State Attorney, CCRC challenged the specific claimed exemptions and set forth legal arguments regarding the following:

BOX 6194 (Att. B1, B2)

Mr. Braddy challenges all exemptions based on 395.3025 & 456.057, Fla. Stat. (patient medical records) because the SAO wholly failed to specify the basis of the exemption as it is unknown whose records these are. If the records belong to Shandelle Maycock, the Defendant is entitled to review them to determine the extent of her injuries as well as to challenge her statements made during the penalty phase. *If the records belong to the Defendant, he is entitled to a copy*

Mr. Braddy challenges all exemptions based on 406.135, Fla. Stat., (autopsy photographs) because, *although properly exempt from public disclosure, he is entitled to a copy as part of his defense.*

Mr. Braddy challenges all exemptions based on 119.71(1), Fla. Stat., (Attorney Notes/Work Product) because the statute does not exist. If the SAO meant 119.071(1), the SAO failed to specify the basis of the exemption as it is unknown how many pages of records are contained in this box or whether the public record(s) claimed are notes or interviews, or outlines of depositions, or notes taken during phone conversations with law enforcement or communications such as email, inter or

intra office memorandum, phone messages, letters or faxes or *Brady* material.

Mr. Braddy challenges all exemptions based on 943.053, Fla. Stat., (criminal history) because *he is entitled to copies of his own record.*

BOX 6196 (Att. C1, C2)

Mr. Braddy challenges all exemptions based on 943.053 & 943.0525, Fla. Stat., (criminal history) because *he is entitled to copies of his own record.*

BOX 6197 (Att. D1, D2)

Mr. Braddy challenges all exemptions based on 119.071(1), Fla. Stat., (Attorney Notes/Work Product) because the SAO failed to specify the basis of the exemption as it is unknown how many pages of records are contained in this box or whether the public record(s) claimed are notes or interviews, or outlines of depositions, or notes taken during phone conversations with law enforcement or communications such as email, inter or intra office memorandum, phone messages, letters or faxes or *Brady* material.

BOX 6198 (Att. E1, E2)

Mr. Braddy challenges all exemptions based on 119.071(1), Fla. Stat., (Attorney Notes/Work Product) because the SAO failed to specify the basis of the exemption as it is unknown how many pages of records are contained in this box or whether the public record(s) claimed are notes or interviews, or outlines of depositions, or notes taken during phone conversations with law enforcement or communications such as email, inter or intra office memorandum, phone messages, letters or faxes or *Brady* material.

Mr. Braddy challenges all exemptions based on 943.053 & 943.0525, Fla. Stat., (criminal history) because he is entitled to copies of his own record.

BOX 6199 (Att. F1, F2)

The claimed exemption under 395.3025 Fla. Stat., (patient medical records) for the records of Jose Bermudez is appropriate. However, Mr. Braddy is entitled to obtain copies of all documents used in support of the conviction that was used as a aggravator. Romilla v. Beard, 545 U.S. 374 (2005).

The documents that should be contained in folder #26 are missing.

Mr. Braddy challenges all exemptions based on 943.053, Fla. Stat., (criminal history) because he is entitled to copies of his own record.

BOX 6200 (G1, G2)

Mr. Braddy challenges all exemptions based on 119.71(1), Fla. Stat., (Attorney Notes/Work Product) because the statute does not exist. If the SAO meant 119.071(1), the SAO failed to specify the basis of the exemption as it is unknown how many pages of records are contained in this box or whether the public record(s) claimed are notes or interviews, or outlines of depositions, or notes taken during phone conversations with law enforcement or communications such as email, inter or intra office memorandum, phone messages, letters or faxes or *Brady* material.

Mr. Braddy challenges all exemptions based on 395.3025 & 456.057, Fla. Stat. (patient medical records) because the SAO wholly failed to specify the basis of the exemption as it is unknown whose records are contained in this box.

Mr. Braddy challenges all exemptions based on 943.053, Fla. Stat., (criminal history) because he is entitled to copies of his own record.

BOX 6201 (H1, H2)

Mr. Braddy challenges all exemptions based on 119.071(1), Fla. Stat., (Attorney Notes/Work Product) because the SAO failed to specify the basis of the exemption as it is unknown how many pages of records are contained in this box or whether the public record(s) claimed are notes or interviews, or outlines of depositions, or notes taken during phone conversations with law enforcement or communications such as email, inter or intra office memorandum, phone messages, letters or faxes or *Brady* material.

While Mr. Braddy's medical records are properly exempt under 395.3025(4), he is entitled to copies of his own record.

BOX 6203 (I1, I2)

Mr. Braddy challenges all exemptions based on 119.71(1), Fla. Stat., (Attorney Notes/Work Product) because the statute does not exist. If the SAO meant 119.071(1), the SAO failed to specify the basis of the exemption as it is unknown how many pages of records are contained in this box or whether the public record(s) claimed are notes or interviews, or outlines of depositions, or notes taken during phone conversations with law enforcement or communications such as email, inter or intra office memorandum, phone messages, letters or faxes or *Brady* material.

Mr. Braddy challenges all exemptions based on 395.3025 & 456.057, Fla. Stat. (patient medical records) because the SAO wholly failed to specify the basis of the exemption as it is unknown whose records these are.

Mr. Braddy challenges all exemptions based on 943.053, Fla. Stat., (criminal history) because he is entitled to copies of his own record.

BOX 6204 (J1, J2)

Mr. Braddy challenges all exemptions based on 119.071(1), Fla. Stat., (Attorney Notes/Work Product) because the SAO failed to specify the basis of the exemption as it is unknown how many pages of records are contained in this box or whether the public record(s) claimed are notes or interviews, or outlines of depositions, or notes taken during phone conversations with law enforcement or communications such as email, inter or intra office memorandum, phone messages, letters or faxes or *Brady* material.

Mr. Braddy challenges all exemptions based on 943.053, Fla. Stat., (criminal history) because he is entitled to copies of his own record.

(PCR. 970-1055.) (emphasis in original.)

The court denied the motion for reconsideration:

There is no exculpatory evidence in the boxes or anything that would remotely be considered exculpatory. The records of the State Attorney are work product and are exempt. To turn over legitimate work product of the State Attorney would create more problems and in the long run, lead to exculpatory evidence being hidden/destroyed. Communications between members of the Office of the State Attorney would occur via personal email accounts so that no records would exist.

(PCR. 1065.) (emphasis added).

As part of the investigation and preparation regarding Braddy's case, CCRC retained the services of Amador and Associates, LLC. Dr. Xavier Amador is a New

York licensed clinical psychologist who has consulted on or testified in cases in both state and federal courts throughout the country. On Friday, September 12, 2014, CCRC sent a request to have Dr. Amador see Braddy at Union Correctional Institution on Thursday, September 18, 2014. Late in the afternoon of September 17, 2014, the DOC emailed a letter notifying CCRC that Dr. Amador would not be allowed to visit with Braddy based upon DOC's new and novel interpretation of Florida Statutes § 490.012 and 490.014.

On September 18, 2015, the court held a hearing on CCRC's demands for records from the (DOC) concerning the refusal to allow expert witnesses into the prison to see inmates who were preparing their collateral claims. The court misunderstood that CCRC was attempting to show that the State was interfering with its investigation and instead, denied the demand finding that documents sought were not "relevant to any colorful claims" related to "ineffective assistance of counsel under 3.851." (PCR. 956-961; PCR. 2396; Supp. PCR. 1202-03.)

Because CCRC was unable to investigate Braddy's case due to DOC's interference, Braddy joined in a writ challenging the DOC's denial of access to his experts of choice on September 18, 2014. (FSC docket and order in *Finney, et al. v. Jones*, SC14-1703). The Florida DOC was represented on the writ in the Florida Supreme Court by the Office of the Florida Attorney General.

The initial motion for postconviction relief was filed on October 2, 2014. Because he had not completed his penalty phase investigation due to State action, Braddy was only able to file a place-holder or a “shell” in Claim VII, in which he alleged that he was deprived of a reliable penalty phase hearing due to state misconduct and/or the ineffective assistance of counsel. (PCR. 1177-84.)

The State filed its response on November 7, 2014. The court set a case management conference for January 8, 2015 prompting Braddy to file an emergency motion to stay the proceedings in this Court on January 2, 2015. The case management conference was held on January 8, 2015. The stay motion was denied by this Court on January 15, 2015. (PCR. 1814.)

On February 19, 2015, the lower court entered an order summarily denying Braddy’s motion without an evidentiary hearing. (PCR. 1827-1851.) Braddy’s motion for rehearing was filed on February 19, 2015 and denied on February 23, 2015. (PCR. 1852-59.) On February 25, 2015, a timely notice of appeal was filed in this Court. (PCR. 2099-2100.)

On March 10, 2015, this Court entered an order relinquishing jurisdiction to the lower court based on Braddy’s *pro se* motion to discharged CCRC as counsel. (PCR. 2137.) Instead of conducting a hearing and allowing Braddy to be heard, the lower court simply entered a written order denying the motion to discharge counsel on March 13, 2015. (PCR. 2135-36.)

An amended notice of appeal was filed on March 16, 2015 to include the last order entered by the circuit court. (PCR. 2148-49.)

On May 14, 2015, this Court granted the *Finney* writ holding that “The Florida Department of Corrections is hereby ordered to grant the requests of Capital Collateral Regional Counsel-South to allow its selected consultants to visit Petitioners in Union Correctional Institution for such consultations as counsel shall have requested its consultants to conduct.” *See Finney v. Jones*, 171 So. 3d 116 (Table) (Fla. 2015) (unpublished).

On June 15, 2015, Dr. David Schaich of Amador and Associates, LLC, was finally allowed into the Union Correctional Institution in Starke, Florida for the purpose of interviewing and evaluating Harrel Braddy. Dr. Schaich issued his report on June 30, 2015 in which he confirmed that Braddy suffers from mental illness. (Supp. PCR. 204-24.) Dr. Schaich concluded that “at the time of the commission of the offenses, Harrel Braddy suffered from . . . 301.0 Paranoid Personality Disorder; 296.42 Rule-Out Bipolar Disorder, Most Recent Episode Manic; V61.10 Relationship Distress with Spouse or Intimate Partner, History of Trauma.” (Supp. PCR. 205.) He further opined:

Harrel’s history includes many aspect of paranoia beginning as a teenager, leading up to the present. Many of his early friends stated that he was suspicious of what they were saying about him and often hid outside a friend’s window to overhear their conversation. In 1984 he

was arrested for attempted murder after his girlfriend broke up with him, demonstrating extreme jealousy, paranoia, and impulsivity. While incarcerated he wrote numerous letters of complaint to the department of corrections that often conveyed paranoid and irrational requests. . . .Harrel's behavior on the day of the crime was, in my opinion, a response to paranoid thinking and impulsivity stemming from, in part, a result of a long history of Paranoid personality disorder. Furthermore, several aspects of Harrel's history, and his behavior at the time of the crime, involved symptoms that suggest an additional diagnosis of Bipolar I Disorder.

Id., at 221. Dr. Schaich also noted that Mr. Braddy's paranoia has interfered with his ability to participate in his defense. *Id.*, at 223.

After reviewing Dr. Schaich's report, CCRC filed a "Successive Motion to Vacate Judgments of Conviction and Sentence, or, in the alternative, Amendment to the Initial Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend" on July 13, 2015. (Supp. PCR. 1-1140.) CCRC alleged that Braddy was deprived of his Sixth Amendment right to the effective assistance of counsel because, *inter alia*, trial counsel failed to investigate and present mitigation at the penalty phase of the trial.

On July 16, 2015, CCRC filed a motion in this Court to relinquish jurisdiction to the circuit court so that Braddy could litigate his constitutional penalty phase claims. This Court denied the motion on July 23, 2015. The lower court then immediately denied the successive Rule 3.851 motion on July 24, 2015, relying on

this Court's denial the previous day of the Motion to Relinquish Jurisdiction, finding that "This court lacks jurisdiction and the proper procedure is to dismiss the motion." See *Tellas v. State*, 811 So. 2d 756 (Fla. 1st DCA 2002)." Counsel filed a motion for rehearing on July 28, 2015. The motion noted that "[w]hen the appellate court denies a motion to relinquish jurisdiction, the circuit court should hold the successive or amended postconviction motion in abeyance. *Tompkins v. State*, 894 So. 2d at 859-60." The circuit court denied rehearing on July 31, 2015, and on August 3, 2015, counsel for Mr. Braddy filed a Second Amended Notice of Appeal, or, in the Alternative, Notice of Appeal.

SUMMARY OF THE ARGUMENT

Argument I: Due to an on-going conflict of interest, CCRC South moved to withdraw from Mr. Braddy's case. Braddy also moved *pro se* for the discharge of counsel. CCRC South's motion for withdrawal was denied by the lower court, but Braddy's motion to discharge counsel and represent himself was initially approved by the lower court following a competency evaluation of Braddy, undertaken at counsel's request. CCRC South was appointed as stand-by counsel. Subsequently, some two months prior to the due date of Braddy's Rule 3.851 motion, the lower court, *sua sponte*, cancelled Braddy's self representation and re-appointed CCRC South as counsel. Here, the actions of the lower court in denying the motion to withdraw and/or the motion(s) to discharge CCRC South violated Braddy's statutory and/or constitutional rights to conflict-free counsel and rights to due process and equal protection. The actions of the lower court also interfered with counsel's ability to investigate, to prepare, and to file a complete and proper postconviction motion, to the substantial prejudice of Braddy.

Argument II: Florida public records production procedures under Florida Statute § 119.19 and Fla. R. Crim. P. 3,852 were unconstitutional as applied in Braddy's case and violate ART. I, § 24 of the Florida Constitution in circumstances where collateral counsel explained to the lower court that trial counsel would have had access to the requested documents and specifically explained the

concerns regarding police and criminalists in this case, yet the court's rulings (found in the transcript and not in an order) denying access were an abuse of discretion.

Argument III: Trial counsel was ineffective in preparing for the penalty phase of Braddy's trial in circumstances where there was no of record waiver of mitigation by their client. Trial counsel's decision to portray Braddy as a "good guy" to the jury utterly failed to take into account or to explain his 1984 criminal acts or to explain them as acts of a "good guy," due to counsel's failure to properly investigate the cultural and social roots of Braddy's mental health issues that include debilitating and untreated mental illness. The resulting prejudice was that the jury had an incomplete and false picture of Braddy when they made a recommendation of the death penalty in the case.

Argument IV: Trial counsel was ineffective where they failed to make proper objections to improper statements and argument by the prosecutor at both the guilt phase and penalty phase, resulting in severe prejudice to Braddy. *See Cardona v. State.*

Argument V: Braddy was deprived of a fair and impartial jury pursuant to the 5th, 6th, 8th, and 14th Amendments to the United States Constitution in circumstances where a juror's lack of candor to the court and the parties resulted in his removal prior to the penalty phase after his participation in the guilt phase criminal convictions.

Argument VI: There was a lack of adversarial testing at the guilt phase of Braddy's trial due to trial counsels' ineffectiveness. Counsel failed to retain, consult, or present as a witness an expert to challenge the voluntariness of Braddy's statements to law enforcement; failed to retain, consult or present as a witness a crime scene or forensic expert; and failed to retain, consult or present as a witness a forensic pathologist. These omissions by counsel were prejudicial in circumstances where counsel is required to conduct a complete investigation in order to know what evidence is available before a reasonable or strategic decision can be made whether or not to present it.

ARGUMENT I

THE DENIAL OF THE MOTION TO WITHDRAW AND/OR THE MOTION(S) TO DISCHARGE CCRC VIOLATED BRADDY'S STATUTORY AND/OR CONSTITUTIONAL RIGHTS TO CONFLICT- FREE COUNSEL AND HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION

A. CCRC has a continuing conflict of interest such that CCRC cannot ethically represent Braddy

In an order dated April 26, 2013, CCRC was appointed to represent Braddy in his postconviction proceedings. (PCR. 81.) The order directed CCRC to either file a motion to withdraw due to a conflict of interest or file a notice of appearance in the trial court within thirty days. However, CCRC did not receive the motion until May 10, 2013. (PCR. 1129.) On May 22, 2013, a notice of appearance was filed by CCRC. (PCR. 226-28.)

Months later, a letter from Braddy prompted an office discussion about the facts of Braddy's case which reminded the appointed CCRC, Neal A. Dupree, that he had previously been involved in the prosecution of Braddy. After further investigation, it was discovered that an actual conflict of interest existed due to Dupree's prior role as a supervising attorney in the Office of the State Attorney in Broward County, Florida. During the time that Dupree was employed with Broward County State Attorney's Office, he was the direct supervisor of those who prosecuted Braddy in his charges of burglary, kidnapping, and escape in Case No. 84-11922-CF, which was used to establish the prior violent felony aggravator

supporting Braddy's sentence of death. On March 7, 2014, CCRC filed a motion to withdraw pursuant to Florida Statute § 27.703(1). (PCR. 355-359.)

The lower court denied CCRC's motion to withdraw on March 21, 2014. (PCR. 391-395.) The court found that there was no actual conflict citing to *Cooper v. State*, 856 So. 2d 969 974-975 (Fla. 2003). The court further found that the motion was untimely based on an unsupported assumption that CCRC had a copy of the record on appeal within thirty days of appointment. The court further assumed that CCRC had received records from the "Department of Corrections as well as records from the State Attorney of the Seventeenth Judicial Circuit." (PCR. 394-395.)

As the record reflects, the relationship between CCRC and Braddy continued to deteriorate as evidenced by Braddy's repeated attempts to represent himself. (PCR. 486-87; 504-06; 507-56; 570-72; 575-81; 753-86; 789-90; 791-95.)

After the lower court summarily denied an evidentiary hearing, CCRC filed a notice of appeal to this Court on February 25, 2015, divesting the lower court of jurisdiction. (PCR. 2099-2100.) On March 10, 2015, this Court entered an order relinquishing jurisdiction to the lower court based on Braddy's *pro se* motion to discharge CCRC as counsel. (PCR. 2137.) Instead of conducting an evidentiary hearing and allowing Braddy to be heard, the lower court simply entered a written order denying the motion to discharge counsel on March 13, 2015. (PCR. 2135-36.)

B. Brady is entitled to conflict-free counsel

The lower court's refusal to appoint conflict-free counsel was in error.

The capital collateral regional counsel shall not accept an appointment or take any other action that will create an actual conflict of interest. If, **at any time during the representation of a person**, the capital collateral regional counsel alleges that the continued representation of that person creates an actual conflict of interest, the sentencing court, shall upon determining that an actual conflict exists, designate another regional counsel.

Fla. Stat. § 27.703(1) (2013) (emphasis added). Because of the conflict of interest, CCRC filed a motion to withdraw pursuant to Florida Statute § 27.703(1) on March 7, 2014, seven months before Braddy's motion for postconviction relief pursuant Florida Rule of Criminal Procedure 3.851 was due to be filed. The lower court denied the motion to withdraw on March 21, 2014 finding that the motion was "untimely" and that no "actual" conflict exists.

In 1985, the Florida Legislature created Capital Collateral Representative (CCR), a central, state-funded office for the purpose of providing counsel to death sentenced inmates in the pursuit of their collateral remedies. Ch. 85-332, Laws of Florida. This Court has recognized that "each defendant under sentence of death is entitled, as a statutory right, to effective legal representation by the capital collateral representative in all collateral relief proceedings." *Spalding v. Dugger*, 526 So. 2d 71, 72 (Fla. 1988). Even before the Legislature created a statutory right to counsel in capital postconviction proceedings, this Court recognized that the federal right to

due process may require the appointment of collateral counsel in particular cases. *Graham v. State*, 372 So. 2d 1363, 1365-66 (Fla. 1979).

In 1997, in response to the recommendations set forth in the “Shevin” report, the Legislature divided the CCR into three regions each called the Capital Collateral Regional Counsel (CCRC). Ch. 97-313, Laws of Florida; Fla. Stat. § 27.7001; *see also Allen v. Butterworth*, 756 So. 2d 52, 57-58 (Fla. 2000). Then in 1998, the Florida Legislature created a registry of private attorneys to represent death row inmates in their capital proceedings for the purpose of alleviating a “backload of capital cases.” *Olive v. Maas*, 811 So. 2d 644, 650 (Fla. 2002). It is the policy and law in this State to provide death row inmates with competent, effective, conflict-free lawyers in postconviction proceedings. *See Fla. Stat. § 27.703 (1) (2013); Olive v. Maas*, at 653 (“The appointment of counsel in **any** setting would be meaningless without some assurance that counsel give **effective** representation.”) (emphasis in the original). The lower court’s failure to appoint conflict-free counsel to represent Braddy was contrary to this Court’s stated policy and case law and has resulted in a denial of due process.

Without any evidence before it, let alone competent, substantial evidence, the lower court found as a fact that CCRC had numerous records including “records from the State Attorney of the Seventeenth Judicial Circuit.” Braddy alleged that he can prove that he did not receive any records from the Seventeenth Judicial Circuit

until April 29, 2014. Furthermore, timeliness is only a factor where there is no specific conflict alleged. Fla. R. Crim. P. 3.852(b)(2); Fla. Stat. § 27.703(1) (2013).

The rules governing public records litigation in capital cases provide that:

Within 15 days after receiving written notification of the Supreme Court of Florida's mandate affirming the sentence of death, the **attorney general shall file with the trial court a written notice of the mandate and serve a copy of it upon the state attorney** who prosecuted the case, the Department of Corrections, and the defendant's trial counsel. The notice to the state attorney shall direct the **state attorney to submit public records to the records repository within 90 days after receipt of written notification and to notify each law enforcement agency involved in the investigation of the capital offense to submit public records to the records repository within 90 days after receipt of written notification.** The notice to the Department of Corrections shall direct the department to submit public records to the records repository within 90 days after receipt of written notification.

Fla. R. Crim. P. 3.852(d)(1). Braddy alleged that the attorney general sent its notification to the state attorney on May 6, 2013. He further alleged that it was not until May 24, 2013 that the state attorney sent the Notice of Affirmance of Death Penalty and to Produce Public Records to law enforcement including the Broward Sheriff's Office. There was no notice provided to the Office of the State Attorney in the Seventeenth Judicial Circuit. Once the law enforcement agencies receive the notice, the rules give them a full 90 days to send records to the repository in Tallahassee. Fla. R. Crim. P. 3.852(e). (PCR. 1129.)

Braddy alleged that he could establish at an evidentiary hearing that he did not receive records from the Broward County Sheriff's Office until August 29, 2013, more than three months after CCRC filed its notice of appearance. Similarly, Braddy alleged that he did not receive the files from the Office of the State Attorney until September 26, 2013. He also alleged that he establish that he was not able to obtain a copy of the record on appeal (ROA) until September 2013 through no fault of his own. There are thousands of records in Braddy's case: CCRC has amassed nearly 40 bankers boxes of records and that does not include the records that were obtained on disk from the state records repository. (PCR. 1130.)

Furthermore, collateral counsel has a duty to "establish a relationship of trust with the client." American Bar Association, *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 1005 (2003) ("*ABA Guidelines*"). "Establishing a relationship of trust with the client is essential ... to ensure that the client will listen to counsel's advice on important matters such as whether to testify and the advisability of a plea." *ABA Guidelines* at 1008. "[C]ourts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat v. United States*, 486 U.S. 153, 160 (1988) (discussing the fact that a waiver of a conflict of interest is not always sufficient to cure the concern regarding the

reliability of the proceedings). In the Sixth Amendment context, prejudice to a defendant is presumed based on the affirmative representation by counsel of a conflict. *Cuyler v. Sullivan*, 446 U.S. 335 (1980).

Counsel is unaware of any Florida cases on point but there are cases from other jurisdictions that illustrate that Braddy is, at the very least, entitled to an evidentiary hearing on his claim that an actual conflict is present and that this could not have been known within thirty days. A case from New York described the appearance of impropriety that has resulted from CCRC's continued representation of Braddy:

The representation of a defendant by an attorney who prosecuted him gives rise to a consequential appearance of impropriety imbedded in the inherent conflict of interest of being in a position of having to undo charges that the attorney, as a prosecutor, felt were appropriate and just. The conflict is actual, not potential.

People v. Abar, 786 N.E.2d 1255, 1259-60 (NY 2003). The New York Court looked to Standard 4-3.5(h) of the *ABA Standards for Criminal Justice Prosecution Function and Defense Function* (3d ed.) for guidance. The *ABA Standards* provide: “[d]efense counsel who formerly participated personally and substantially in the prosecution of a defendant should not thereafter represent any person in the same or a substantially related matter.” *Id.* at 1260. Braddy could not have pled to the Broward County case unless and until Dupree authorized the agreement. That is substantial involvement.

An Oklahoma court found a conflict existed where the court-appointed defense attorney had previously prosecuted the defendant on cases that were used to seek an increased penalty:

[The] court appointed attorney who represented appellant in this trial had previously served as assistant district attorney and successfully convicted appellant in the two former convictions which were used for enhancement of punishment....The United States Supreme Court held in *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 1717, 64 L.Ed.2d 333 (1976), that a defense counsel has an ethical obligation to avoid conflicting representations and to advise the court promptly to avoid conflict of interest

Worthen v. State, 711 P.2d 943, 943-44 (Ok. 1985). The court ordered an evidentiary hearing on the matter.

There are a few Florida cases that address conflicts arising during the course of trial with similar issues. In *Endress v. Coe*, the **State** sought to disqualify a former prosecutor from representing the defendant. However, because the former prosecutor had no involvement at all with the defendant, there was no conflict:

Absent a showing of participation to any extent in the investigation leading to a criminal charge, or some involvement in the case itself, or some advantage gained that would work to the disadvantage of the state, a former assistant state attorney should not be automatically disqualified from acting as defense counsel for a defendant investigated or charged during the time counsel served as an assistant state attorney.

433 So. 2d 1280, 1280-81 (Fla. 2nd DCA 1983). In another Florida case, the court found that no conflict existed in a similar situation because the former prosecutor

had no memory about the defendant's case. *Rodriguez v. State*, 684 So. 2d 833, 833-34 (Fla. 3rd DCA 1996). In Braddy's case, he has shown that Dupree was personally involved in approving the plea agreement on the prior violent felony charge that was used as an aggravator in his death penalty case. Moreover, as alleged, Dupree does remember his involvement in the prior prosecution of Braddy.

In *Cooper v. State*, 856 So. 2d 969 (Fla. 2003), this Court rejected an ineffective assistance of trial counsel claim where the defendant alleged a conflict of interest:

The first of Cooper's trial attorneys, Ronnie Crider, had, prior to his representation of Cooper, been employed as a deputy sheriff and as a prosecutor with the Sixth Circuit State Attorney's Office. Although Crider had some interaction with law enforcement officers who eventually participated in the investigation of Cooper's crimes while a sheriff's deputy, and was an employee of the State Attorney's Office during the investigation of the instant case, **Crider never had any actual or substantive connection with the investigation or prosecution of Cooper.** Nothing before this Court suggests that Crider's interests were compromised at trial, and Cooper's claim that Crider suffered from a conflict of interest is entirely hypothetical.

856 So. 2d at 974-75 (Fla. 2003). Unlike the situation in *Cooper*, Dupree was personally involved as a supervisor in the prosecution of Braddy. More significantly, the fact that there was no prejudice shown in a postconviction case does not bear on the conflict in the instant case. In the context of determining whether the conflict

resulted in prejudice, the prejudice inquiry does not look to the outcome of the proceeding but to whether there is an adverse consequence to the defendant:

[A] more “limited” presumption of prejudice applies with regard to the usual conflict of interest claim. (citation omitted)... . [T]he entire focus in such a case is upon the adequacy of counsel's performance, rather than upon actual prejudice to the defense. (citations omitted). **If a conflict of interest is shown to have an actual adverse effect on the representation afforded by counsel, it is presumed that the defendant was prejudiced, and actual prejudice to the defense need not be proven.**

Fogarty v. State, 513 S.E.2d 493, 495-96 (1999).

Here, the adverse effect is that collateral counsel has not been able to establish a relationship of trust with Braddy as a direct result of the conflict. At all times, Braddy has stated that he would prefer that the lower court appoint conflict-free counsel. But, given the choice between proceeding *pro se* and accepting the representation of CCRC, Braddy chose to represent himself. Almost immediately after this Court denied CCRC’s motion to withdraw, Braddy filed his motion seeking to proceed *pro se*, which the lower court granted. Several weeks later, and just weeks before his rule 3.851 motion was due to be filed, the court reversed its ruling *sua sponte*, without notice or an opportunity to be heard, and reappointed CCRC in violation of Braddy’s statutory and constitutional rights to conflict-free counsel, due process, and equal protection.

The conflict between Braddy and CCRC has continued as evidenced by his *pro se* motions to discharge counsel filed in this Court on March 3, 2015 and October 21, 2015. The lower court failed to provide Braddy with the most basic requirements of due process: the opportunity to be heard under the procedures set forth in *Nelson v. State*, and approved by this Court:

If incompetency of counsel is assigned by the defendant as the reason, or a reason [for seeking the appointment of a new attorney] the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense. If no reasonable basis appears for a finding of ineffective representation, the trial court should so state on the record and advise the defendant that if he discharges his original counsel the State may not thereafter be required to appoint a substitute.

Hardwick v. State, 521 So. 2d 1071, 1074-75 (Fla. 1988) citing *Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA 1973). Whether the lower court conducted an “adequate *Nelson* hearing” is subject to an abuse of discretion standard. *Green v. State*, 133 So. 3d 597, 598 (Fla. 2d DCA 2014) (reversing the conviction because the *Nelson* inquiry was inadequate). Here, where the lower court erred as a matter of law due to the failure to hold any hearing at all; that error cannot be deemed harmless.

Appellant respectfully submits that based on the actual conflict of interest, this Court should remand his case to the circuit court for the appointment of conflict-free counsel who should be allowed additional time to investigate and then amend the postconviction motion(s) as justice may require. *See United States v. Cronin*, 466 U.S. 648, 659-60 (1984).

ARGUMENT II

FLORIDA STATUTE § 119.19 AND RULE 3.852 ARE UNCONSTITUTIONAL AS APPLIED, AND VIOLATE ART. I, § 24 OF THE FLORIDA CONSTITUTION

A. Florida has one of the broadest public records law in the country

This Court has held that criminal investigative information is public record once the conviction and sentence become final. *State v. Kokal*, 562 So. 2d 324 (Fla. 1990). Following the decision *Kokal*, numerous death row inmates obtained relief as the direct result of the disclosure of public records pursuant to Article I, § 24 of the Florida Constitution and Chapter 119, Florida Statutes. *See e.g., Roman v. State*, 528 So. 2d 1169 (Fla. 1988); *Gorham v. State*, 597 So. 2d 782 (Fla. 1992); *Garcia v. State*, 622 So. 2d 1325, 1330 (Fla. 1993); *Young v. State*, 739 So. 2d 553 (Fla. 1999); *Roger v. State*, 800 So. 2d 174 (Fla. 2001); *Johnson v. State*, 44 So. 3d 51 (Fla. 2010). It is in the public interest to have valid constitutional claims discovered and relief granted when warranted. Continued free and open access to public records can only serve to increase the reliability of death sentences in this state.

In 1996, this Court promulgated new Florida Rule of Criminal Procedure for the purpose of providing “orderly procedures” for public records litigation in capital cases. *In re: Amendment to Florida Rules of Criminal Procedure-Capital Postconviction Public Records Production*, 683 So. 2d 475, 476-76 (Fla. 1996). In 1998, the Florida Legislature created the state records repository for capital cases. In revising rule 3.852 accordingly, the Court wrote: “it is ...our intent to discourage the abuse of the production process and the trial court with public records production issues which should be able to be resolved by good faith discussion by the producing agencies and counsel for the postconviction defendant. *Amendments to Florida Rules of Criminal Procedure 3.852 (Capital Postconviction Pub. Records Prod.) & Rule 3.993 (Related Forms)*, 754 So. 2d 640, 642-43 (Fla. 1999).

As Braddy alleged below, the actual practice has been that Florida state agencies have taken buzzwords from cases litigated under warrant as a shield to avoid turning over records that would otherwise be available to any other citizen in Florida. Following suit, the lower court denied the majority of Braddy’s requests for public records without consideration regarding Justice Anstead’s concurring opinion regarding the adoption of rule 3.852 that “the State and its agencies should respond to their obligations to provide discovery in accord with the spirit of Florida's open records policy...” *In re Amendment to Florida Rules of Criminal Procedure-Capital Postconviction Pub. Records Prod.*, 683 So. 2d at 477. Just a few years after rule

3.852 was promulgated, Justice Anstead reiterated in a concurring opinion that death row inmates should not be denied access to public records: “We need to be very careful that we not end up with an outcome where a death-sentenced defendant, whose life may literally be affected, is barred from enforcing his constitutional right as a citizen to access to public records that any other citizen could routinely access.” *Sims v. State*, 753 So. 2d 66, 72 (Fla. 2000). The manner in which Florida Rule of Criminal Procedure 3.852 has been **applied** to Braddy’s case violated his rights under Article I, § 24, of the Florida Constitution, because he has been denied access to public records.

B. The denial of records that were claimed exempt was in error as a matter of law

The Miami-Dade Office of the State Attorney submitted a voluminous number of documents under seal based on the unsupported assertion that the documents are exempt because they are “Attorney Notes/Work Product” and exempt under Florida Statute § 119.071(1)(d)(1). (PCR. 970-1055.) The statute pertaining to the work product exemption provides:

A public record that was prepared by an agency attorney (including an attorney employed or retained by the agency or employed or retained by another public officer or agency to protect or represent the interests of the agency having custody of the record) or prepared at the attorney's express direction, **that reflects a mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and that was prepared exclusively for civil or criminal litigation or**

for adversarial administrative proceedings, or that was prepared in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings, is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution until the conclusion of the litigation or adversarial administrative proceedings. For purposes of capital collateral litigation as set forth in s. 27.7001, the Attorney General's office is entitled to claim this exemption for those public records prepared for direct appeal as well as for all capital collateral litigation after direct appeal until execution of sentence or imposition of a life sentence.

Florida Statute § 119.071(1)(d)(1) (emphasis added). Braddy notes that the legislature specifically stated that any work product contained in the files of the Office of the Attorney General remain exempt throughout postconviction litigation; **there is no such continuing exemption for the SAO files.** The SAO has not met its burden to establish that it is entitled to the claimed exemption because work product is only confidential “until the conclusion of the litigation or adversarial administrative proceedings.” *Id.*

Collateral counsel’s right to certain work product contained in the prosecutor’s files was addressed by this Court:

Inter-office memoranda and intra-office memoranda communicating information from one public employee to another or merely prepared for filing, even though not a part of an agency's later, formal public product, would nonetheless constitute public records inasmuch as they supply the final evidence of knowledge obtained in connection with the transaction of official business.

Kokal at 327 (citing *Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980)). Notes prepared by the prosecutor that are provided to another person in the agency, even if they include trial preparation materials, are public records and not exempt from disclosure once the litigation is complete. *Coleman v. Austin*, 521 So. 2d 247, 248 (Fla. 1st DCA 1998); *Orange County v. Florida Land Co.*, 450 So. 2d 341, 344 (Fla. Dist. Ct. App. 1984) (handwritten notes of any interview with any witness that was communicated with the trial team would be a non-exempt public record.); In *Lightbourne v. McCollum*, this Court made clear that any attorney work product that does constitute a public record is no longer subject to the exemption because the direct appeal is final. 969 So. 2d 326, 332 (Fla. 2007).

Florida Rule of Criminal Procedure 3.852 is not independent of Chapter 119. For example, the rule provides that the definition of “public records” is found in Florida Statute § 119.011(12).⁷ The state attorney is obligated to deliver “all public records, in a current, nonproprietary technology format, that were produced in the state attorney's investigation or prosecution of the case” to the records repository

⁷ “Public records” means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

“[w]ithin 90 days after receipt of a written notice of the mandate from the attorney general.” Fla. R. Crim. P. 3.852(e)(3). Fla. R. Crim. P. 3.852(f) allows the producing agency to claim certain exemptions pursuant to Florida Statute § 119.07. Upon defense motion, the trial court will review the records and the claimed exemptions.

The lower court was under the misunderstanding that Braddy’s right to public records that were initially produced but claimed as exempt turned only on whether the records were exculpatory and not whether the exemption was proper. “There is no exculpatory evidence in the boxes or anything that would remotely be considered exculpatory.” (PCR. 1065.) Based on the language in the order, there was no review as to whether the documents contained in the files could have been used as impeachment based on *Brady v. Maryland*, 373 U.S. 83 (1963); *see also Banks v. Dretke*, 540 U.S. 668, 684-85, 124 S. Ct. 1256, 1268-69, 157 L. Ed. 2d 1166 (2004) (new trial granted after federal district court granted access to prosecutor files).

The court utterly failed to consider the propriety of the claimed exemptions even though Braddy submitted a detailed memorandum of law explaining exactly why the records were not properly exempt. (PCR. 970-1055.); *see* Statement of Case and Facts, *supra*. Instead of following the law, the lower court made up a new policy reasoning that turning over public records would result in lead prosecutor Abbe Rifkin hiding public records:

The records of the State Attorney are work product and are exempt. To **turn over legitimate work product of the**

State Attorney would create more problems and in the long run, lead to exculpatory evidence being hidden/destroyed. Communications between members of the Office of the State Attorney would occur via personal email accounts so that no records would exist.

(PCR. 1065.) (emphasis added). Of course, the location of a record or email does not determine whether it was prepared in connection with official agency business and intended to perpetuate, communicate, and formalize knowledge of some kind. *Butler v. City of Hallandale Beach*, 68 So. 3d 278, 280-81 (Fla. Dist. Ct. App. 2011) (fact that an email was sent from employee's "private email on her own personal computer is not the determining factor as to whether the email was a public record."). Nevertheless, the court's refusal to grant access to work product under *Kokal* and *Lightbourne* based on an assumption that the prosecutors would hide records is an error as a matter of law.

This Court has granted relief in numerous cases where material evidence that was in the State's possession was discovered only after trial. *See Cardona v. State*, 826 So. 2d 968, 969 (Fla. 2002) (granting a new trial where the Miami-Dade SAO failed to disclose material criminal investigation reports of extensive interviews with Cardona's codefendant and the State's key witness against Cardona); *Young v. State*, 739 So. 2d 553, 555-56 (Fla. 1999) (rejecting the argument that the notes were work product and granting a new trial due to the failure to disclose state attorney notes regarding witness interviews); *Johnson v. State*, 44 So. 3d 51, 53 (Fla. 2010), as

revised on denial of reh'g (Sept. 2, 2010) (new trial granted based on handwritten notes by the prosecutor that revealed that the jail-house snitch acted as an agent of the police); Braddy is entitled to the work product as the Office of the State Attorney is no longer entitled to keep it secret under Florida's Constitution.

C. The denial of records under rule 3.852 was an abuse of discretion

The failure of the lower court to hold the agencies accountable for upholding the promise of open access to public records renders rule 3.852 unconstitutional as applied. The record establishes that trial counsel accused law enforcement of improper conduct during the unlawful interrogation of Braddy. *See* Argument VI. Retired Detective Gregory Smith used physical force against Mr. Braddy in an effort to force him to incriminate himself and trial counsel cross-examined Detective Hoadley at trial about his efforts to manufacture facts in aggravation of the death sentence. *Braddy* at 839. Despite the foregoing, counsel for MDPD argued in open court at a hearing on September 2, 2014, that there never had been any allegation of wrongdoing against any of the officers at trial. (PCR. 2295.) As Justice Quince recognized in her dissent on direct appeal, the entire interrogation was tainted by police misconduct. *Braddy* at 873-74. Therefore, Braddy's request for the internal affairs files on each of the officers involved should have been granted. Furthermore, the MDPD cited to *Glock v. Moore*, 776 So. 2d 243 (Fla. 2001) and *Mills v. State*, 786 So. 2d 547 (Fla. 2001) in support of its objections to the production of additional

public records pursuant to Florida Rule of Criminal Procedure 3.852(g). Of course, those cases were litigated under warrant and did not involve demands under rule 3.852(g) so they are not applicable at all.

Furthermore, Braddy was convicted, in part, based on questionable testimony regarding biological materials that were supposedly found in the trunk liner of his vehicle after a number of inspections. *See* Argument VI. Braddy was and is entitled to investigate the qualifications of the “criminalists” who testified against him and part of that investigation includes looking into their credentials. *See e.g. State v. Roche*, 114 Wash. App. 424, 438, 59 P.3d 682, 691 (2002), as amended (Dec. 4, 2002) (granting a new trial after it became known that the criminalist was stealing heroin). *See also* Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (2009) (NAS Report). Braddy is entitled to investigate the backgrounds of those who testified against him and he is entitled under Florida’s constitution to the records that would help him do just that. It was error to deny the records of the criminalists who investigated Braddy.

The court expressed the opinion that documents that were not introduced at trial are not relevant even though the defense explained that the personnel and internal affairs files might contain impeachment material. (PCR. 2294-2341.) The denial of records under rule 3.852 are reviewed for an abuse of discretion. *Hill v.*

State, 921 So. 2d 579, 584 (2006). Where, as here, collateral counsel explains that trial counsel would have had access to the requested documents and specifically explained the concerns regarding police and criminalists in this case, the court's rulings (found in the transcript and not in an order) were an abuse of discretion. (PCR. 2332-41.)

ARGUMENT III

BRADY WAS DENIED ADVERSARIAL TESTING AT THE PENALTY PHASE OF HIS TRIAL DUE TO THE INEFFECTIVE ASSISTANCE OF COUNSEL AND/OR STATE MISCONDUCT IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Appellant, Harrel Braddy, alleged in his Successive Motion to Vacate Judgments of Conviction and Sentence, or, in the Alternative, Amendment to the Initial Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend and in Claim VII of his initial rule 3.851 that he was deprived of the effective assistance of counsel at the penalty phase. (Supp. PCR. 1-1141.) (PCR. 1174-75; 1177-84.)

Strickland v. Washington, 466 U.S. 668, 685, (1984) and its progeny make clear the duties of counsel in investigating possible mitigation even in cases where the client indicates he does not wish to present any mitigation. Counsel's highest duty is the duty to investigate, prepare, and present the available mitigation.

Rompilla v. Beard, 545 U.S. 374 (2005) (“[e]ven when a capital defendant and his family members have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review materials that counsel knows the prosecution will probably rely on as evidence of aggravation at the trial’s sentencing phase.”); *see also Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000). The conclusions in *Wiggins* are based on the principle that “strategic choices made after less than complete investigation are reasonable” only to the extent that “reasonable professional judgments support the limitations on investigation.” *Wiggins*, 539 U.S. at 512.

The U.S. Supreme Court has long referred to the *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*⁸ as “guides to determining what is reasonable.” *Wiggins v. Smith*, 539 U.S. 510, 524-25 (2003); *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Williams v. Taylor*, 529 U.S. 362, 396 (2000). As the *Wiggins* Court further explained, the applicable ABA standards state that “counsel should consider presenting . . . medical history, educational history, employment and training history, **family and social history, prior adult and juvenile correctional experience, and religious and cultural influences.**” *Id.* (emphasis in original).

⁸ American Bar Association, *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913 (2003).

The first prong in an ineffective assistance of counsel claim is whether trial counsels' performance was deficient with performance being measured against an objective standard of reasonableness under prevailing professional norms. *Rompilla v. Beard*, 545 U.S. at 380. Braddy alleged below that he could establish that the *ABA Guidelines* are not simply aspirational; rather, they set forth the prevailing professional norms in the defense of capital crimes as they existed in the community prior to the publication of the *Guidelines*. In order to establish the second prong, Braddy must show that he was prejudiced by the deficient performance. Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or that the deficiencies substantially impaired confidence in the outcome of the proceedings. *Wiggins v. Smith*, 539 U.S. at 534.

A. Deficient Performance

i. Failure to investigate before deciding on a strategy

Research establishes that by the time the penalty phase begins, the defense team is unlikely to change the jurors' perception of the defendant on trial. Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 *Stan. L. Rev.* 1447, 1457 (1997). In fact, jurors often decide on the appropriate punishments before the start of the penalty phase. Sean D. O'Brien, *When Life Depends on It: Supplementary Guidelines for the*

Mitigation Function of Defense Teams in Death Penalty Cases, 36 Hofstra L. Rev. 693, 706-07 (2008). Because jurors are likely to decide whether the death penalty is appropriate during the first phase, “counsel should begin to develop a theme that can be presented consistently through both the first and second phases of the trial. Ideally, the theory of the trial must complement, support, and lay the groundwork for the theory of mitigation.” *ABA Guidelines*, 31 Hofstra L. Rev. 913, 1059 (2003) (Commentary to Guideline 10.11).

By the late 1990s when Braddy was first arrested on this case, it was standard practice for capital defense team to employ the use of life chronologies and genograms in order to make sense of all the information gathered about the client:

The chronology consists of a ‘narrative, historical account of the influences or events which have the most significant effect on the client's life,’ and span ‘at least three generations.’ . . . Genograms, ‘annotated family trees which depict the relationships between family members and patterns of impairments’ within the client's family, also help organize and display data that will be ‘very useful in explaining to juries the long-term effects of various influences on the client.’

Sean D. O'Brien, *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 Hofstra L. Rev. 693, 722-23 (2008)(citations omitted). During the process of putting together the social history, it is important not to judge the information gathered until the picture is complete. “Evidence of the defendant's redeeming traits must be accompanied by

evidence that his crimes are ‘humanly understandable in light of his past history and the unique circumstances affecting his formative development, that he is not solely responsible for what he is.’” *Id.* at 722-23(citations omitted).

When Braddy went to prison in 1984, he constantly denied any wrongdoing when disciplined for even minor infractions and he made numerous grievances for every perceived injustice. (Supp. PCR. 225-562.) [Att. E to Successive 3.851 Motion of July 13, 2015] (Selected DOC records). When he didn’t get his way, he appealed. And when he was charged with a capital offense, he managed to get rid of some of the best-known attorneys in Miami-Dade County for one reason or another by filing motions to proceed without counsel as well as bar complaints. This behavior prompted Justice Pariente to suggest that Braddy was a difficult defendant during the oral argument on direct appeal. However:

The very features that make a client “difficult” are the same features that may hold the key to a persuasive mitigation case.[] **The defense attorney must explore the client's possible mental illness or mental impairments that might interfere with the client's capacity to assist in his or her defense** and that also might serve as an effective argument for the client's reduced culpability during sentencing.

Bradley A. MacLean, *Effective Capital Defense Representation and the Difficult Client*, 76 Tenn. L. Rev. 661, 674 (2009) (citations omitted) (emphasis added).

Either one of Braddy’s many lawyers, or the State, or the judge should have requested a competency hearing pursuant *Indiana v. Edwards*, 554 U.S. 164, 173-

174 (2008) before allowing him to fire his lawyer(s) and represent himself at any stage of the proceedings. Trial counsel recognized that their client was exhibiting signs of mental illness but failed to follow up on them. This failure was not the result of any strategy. Braddy can demonstrate at an evidentiary hearing that by the time defense attorney Terrence Lenamon was recruited as co-counsel to assist G.P Della Ferra on this case, the pressure was on to get the case to trial. Instead of conducting a constitutionally adequate penalty phase investigation, trial counsel simply acquiesced to their mentally ill client by putting some family members on the stand to say that they loved Braddy and that he is a “good guy.” However, the reality is that Braddy did sign releases for information and there is no evidence **on the record** that Braddy ever made a knowing, intelligent, and/or voluntary waiver of mental health mitigation. There is certainly no basis to conclude that Braddy interfered with the required investigation into his social history.

In *Rompilla v. Beard*, 545 U.S. 374 (2005), the U.S. Supreme Court made clear that trial counsel must not only present mitigation but he must investigate and attack the aggravators as well. Even though the defense theory was that the client was innocent, trial counsel was well aware that the jury would hear about his violent, manic, and erratic 1984 crime spree. This Court described the evidence of the prior violent felonies as follows:

The State introduced the judgment and sentence from Braddy's attempted first-degree murder, robbery, and

kidnapping of Corrections Officer Jose Bermudez, as well as of Braddy's ensuing escape. Bermudez testified that on September 14, 1984, he had been escorting Braddy from the courthouse to the jail after Braddy had been denied bond at a bond hearing. Braddy attacked Bermudez in a stairwell, knocking Bermudez to the ground and choking him until Bermudez lost consciousness. When he awoke a short time later, Braddy again choked him to unconsciousness. Bermudez woke up on the floor of a holding cell wearing only his socks and underwear, with Braddy's handcuffs on the floor nearby. Braddy was nowhere to be found.

On September 25, 1984, while a fugitive from police, Braddy broke into the home of Joseph and Lorraine Cole, an elderly couple in Hollywood, Florida. Braddy hid in a closet but was later discovered by the couple and exited the closet with a gun drawn. Braddy ordered both victims into a bedroom and ordered them to lie on the bed. Braddy told Lorraine that she would have to drive him out of the area in the couple's car in order to help him through blockades. While Braddy walked Lorraine to the garage, Joseph climbed through a window and ran to a neighbor's house to call the police. When Braddy saw that Joseph had escaped, he apparently changed his mind about taking Lorraine with him. He stole the Coles' 1984 Ford station wagon and fled alone. Braddy's fingerprint was found inside the Coles' house, and both of the Coles positively identified Braddy in a photo lineup. Because the Coles could not be located to testify[] at Braddy's penalty phase, the State introduced evidence of the details of Braddy's crimes against the Coles by having Detective Suco read the arrest affidavit from that case. The State also introduced the arrest affidavit and plea colloquy into evidence.

The State further introduced Braddy's prior criminal history through the testimony of Griffin Davis. Davis testified that on the night of October 5, 1984, he had exited a building to retrieve something from his car when Braddy approached him at gunpoint. Braddy forced Davis into

Davis's car, and the two drove onto U.S. Highway 27, with Braddy driving while keeping a gun trained on Davis. When both an oncoming car and a car behind Braddy flashed their lights, Davis capitalized on the distraction and jumped out of the car. Davis hid in a canal beside the road, while Braddy turned around and made three or four passes of the area with his gun hanging out of the window. Eventually, Braddy drove off and Davis made his way to police. The State introduced the judgment and sentence from Braddy's burglary, robbery, and kidnapping of Davis.

Braddy v. State, 111 So. 3d at 826-27.

Trial counsel failed to address the 1984 crime spree in any meaningful way because the defense theory—a theory based on what their mentally ill client wanted and not based on a reasonable investigation—was that their client was a “good guy.” This was deficient performance. Trial counsel was constitutionally ineffective in the penalty phase by failing to investigate, consider, and present available mitigating evidence. Counsel cannot advise or make a reasonable decision about that which he has failed to investigate. *See Douglas v. Woodford*, 316 F.3d 1079, 1089 (9th Cir. 2003); *State v. Lewis*, 838 So. 2d 1102, 1113 (Fla. 2002) (“Although a defendant may waive mitigation, he cannot do so blindly; counsel must first investigate all avenues and advise the defendant so that the defendant reasonably understands what is being waived and its ramifications and hence is able to make an informed, intelligent decision.”); *see also Thompson v. Wainwright*, 787 F.2d 1447, 1451 (11th Cir. 1986).

ii. There was no record waiver of mitigation

The State has a duty to ensure that society’s ultimate penalty is not imposed except in appropriate cases and that the sentence is not arbitrary or the result of a mistake. *Gregg v. Georgia*, 428 U.S. 153 (1976). Florida law requires trial attorneys to make a proffer of all available mitigation before a defendant in a capital case may waive his constitutional right to present evidence in the penalty phase at trial. *Koon v. Dugger*, 619 So. 2d 246 (Fla 1993). This is the only way to ensure the “reliability, fairness, and uniformity in the imposition of the death penalty” consistent with Eighth Amendment jurisprudence. *Muhammad v. State*, 782 So. 2d 343, 363-65 (Fla. 2001).⁹

⁹ This Court recently modified the holding in *Muhammad*:

We also reaffirm our commitment to the principles and procedures articulated in *Muhammad v. State*, 782 So. 2d 343 (Fla. 2001), that require a trial court to consider mitigation evidence even when the defendant waives mitigation. However, recognizing the tension that may exist when a trial court appoints standby counsel to present mitigation evidence in these circumstances, as was done in this case, we prospectively modify the *Muhammad* procedures to the limited extent that trial courts should utilize an independent, special counsel—rather than standby counsel—to **represent the public interest in bringing forth all available mitigation for the benefit of the jury, the trial court, and this Court.**

Marquardt v. State, 156 So. 3d 464, 469-70 (Fla. 2015), *reh'g denied* (Apr. 17, 2015) (emphasis added).

Before a capital defendant may waive the presentation of certain mitigation, the court is obligated to “conduct a searching interrogation in the face of an intentional relinquishment or abandonment of the [right to present mitigation].” *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969), quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). It is not uncommon for death row inmates to waiver and vacillate regarding the decision to present mitigation. *See i.e., Lonchar v. Thomas*, 517 U.S. 314 (1996) (pre-AEDPA decision applying the “basic doctrine of fairness in holding the merits of the defendant’s first habeas corpus petition should be addressed despite previous delay brought on by the defendant’s prior assertions that he wanted to die” and his refusal to cooperate with attorneys).

On direct appeal, this Court found that Braddy “waived all mitigating factors, with the exception of the catch-all” provision set forth under Fla. Stat. § 921.141(6) (h) *Braddy v. State*, 111 So. 3d at 828. This finding is not supported by the record:

When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, **counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be.** The court should then require the **defendant to confirm on the record that his counsel has discussed these matters with him**, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.

Koon v. Dugger, 619 So. 2d 246, 250 (Fla. 1993) (emphasis added); *Grim v. State*,

971 So. 2d 85 (Fla. 2007). There is no proffer, no waiver colloquy on the record, nor was there a PSI ordered by the trial judge. The failure to proffer what mitigation could have been presented was deficient performance.

B. Prejudice

The prejudice analysis requires an evaluation of totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the collateral proceeding—and weigh it against the aggravation. *Porter v. McCollum*, 130 S. Ct. 447, 454 (2009). Courts may not “discount to irrelevance” evidence that is presented in postconviction where the jury may have had a different view than the judge. *Id.* at 455. In searching for a reasonable probability courts must “engage with [mitigating evidence],” *id.*, as part of their “[] duty to search for constitutional error with painstaking care,” *Kyles v. Whitley*, 514 U.S. 419, 422 (1995), which requires courts to “‘speculate’ as to the effect” of non-presented evidence. *Sears v. Upton*, 130 S. Ct. 3266, 3266-67 (2010).

Braddy is somewhat of an enigma. There was no shortage of “good guy” evidence to put on for the jury’s consideration: Braddy’s parents, siblings, wife, children and childhood and friends all got in line to testify how much they cherish him and how his death would be devastating to them. (T. 3013-20, 3025-34, 3053, 3076, 3185, 3213-34; S.R. 55, 74-75.) Even while incarcerated, Braddy encouraged his children’s academic pursuits: his daughter Alexis was studying child

development at Florida State University; his daughter April earned a Ph.D. at the University of Florida; his son Harrel Junior is a kindergarten teacher. (T. 3013-40.) Braddy was a devout member of his church, where he was a deacon, tithed generously and played the bass, steel drums, and lead guitar in the church band. (T. 3051, 3072-75.) His childhood friends the Taylor brothers—Shadrick, Jerry and Timothy—loved him like a brother; in fact, the gospel band they formed with him was called “The Taylor Brothers.” (S.R. 73, 102-3.) Braddy had saved Shadrick Taylor from drowning. (T. 3092.) Even when Braddy went to prison in 1984, he did not waste his time; instead he pursued his education as a paralegal and he worked in the prison library. Dr. Brad Fisher testified at trial about Mr. Braddy’s history of model prison behavior, opining that he was not likely to present a danger there. (T. 2983-84.)

The problem with the presentation of the “good guy” evidence is that after the jury convicted Braddy of the attempted murder of Shandelle Maycock and the murder of her daughter, Quatisha Maycock, they heard about the 1984 crime spree. This was not a just a man who lived his whole life as a hard-working, church going family man but a person who just got out of prison after a victimizing random strangers in the process of escaping from the courthouse and evading authorities. Even if Braddy was innocent of the 1998 crimes that he had been convicted of, the “good guy” story presented by the defense lacked credibility in light of the prior

violent felonies. In fact, the “good guy” evidence even invited argument that Mr. Braddy is a violent person according to the FSC. *Braddy v. State*, 111 So. 3d at 852.

The explanation for the apparent contradiction is that Braddy suffers from serious mental illness. As in many families, there were good times and bad, but for Braddy, his paranoid personality kept him from succeeding like most of his other brothers.¹⁰ During postconviction, Dr. David Schaich of Amador and Associates, LLC, was retained to determine whether Braddy suffered from any mental illness. His June 30, 2015 forensic psychological evaluation report reveals that Dr. Schaich reviewed numerous documents including police reports, transcripts, prison records, school and work records, and summaries of interviews of family members. It also states that he interviewed persons who knew Mr. Braddy very well. On June 15, 2015, Dr. Schaich traveled to Union Correctional Institute to meet, interview and evaluate Mr. Braddy. Mr. Braddy refused to cooperate, but Dr. Schaich was still able to make clinical observations regarding his behavior. (Supp. PCR. 204-24.)

Based on his review of the material and his personal interviews and observations, Dr. Schaich diagnosed Braddy with Paranoid Personality Disorder and Rule-Out Bipolar Disorder I. When Braddy’s criminal history is viewed in the context of manic episodes, his seeming dual personality makes more sense. Braddy

¹⁰ Contrary to the picture presented to the jury, Harrel Braddy was not the only family member who had difficulties in his life. His brother Joe had a history of drug addiction and he died at the age of 41.

is and was a family man with a deep personal religious conviction. He has formed loving relationships with his wife, parents, children, and friends but he also suffers from a severe mental illness that reduces his ability to conform his conduct to the requirements under the law. He constantly sabotaged everything that was good in his life due to his mental illness.

The failure to investigate Braddy's social history meant that trial counsel knew little to nothing about his life and the influences on his behavior. Epigenetics has been defined as "the study of heritable changes in gene function that do not change the DNA sequence but, rather, provide an 'extra' layer of transcriptional control that regulates how genes are expressed." D. Rodenhiser and M. Mann, *Epigenetics and human disease: translating basic biology into clinical applications*, Canadian Med. Assn. J. 174(3): 341–48, 341 (2006). Through research in epigenetics, scientists have shown that trauma experienced by our ancestors is expressed in our genes and can influence our behavior. Thus, many African-Americans are negatively impacted by coping skills or mechanisms that were developed by their ancestors who were enslaved. See Joy Degruy Leary, *Post Traumatic Slave Syndrome: America's Legacy of Enduring Injury and Healing*, Uptone Press (2005).¹¹

¹¹ This phenomenon of "historical trauma" is not limited to the black descendants of slaves:

According to this theory, which was first propounded in

Braddy alleged that had trial counsel investigated and completed a proper social history, they would have discovered that Harrel Braddy's paternal great-grandparents, George and Pleasant Fields were slaves from South Carolina who migrated to Georgia. George and Pleasant were married in 1877, and they produced ten (10) children, including Joe Braddy's mother, Lubelle, who was born in 1898. According to Joe Braddy, Sr., he never met his grandfather, George, because he was killed by the Ku Klux Klan. The end of slavery gave way to the Reconstruction era and Harrel Braddy's ancestors were among those who endured the bloodshed, violence, and desolation it wrought. Education was simply a luxury, and a largely unwanted distraction from work. Later, in 1916, Lubelle married Joe's father, John Eddie Braddy who came from a family of ministers. Lubelle and John Braddy had

the 1980s by Dr. Maria Yellow Horse Brave Heart, a Native American professor of clinical social work, the traumatic effect of certain events in Native American history is internalized and passed on to later generations through epigenetic transfer, among other means. The cumulative psychological wounding resulting from colonization, relocation, and other historical traumas can create a sense of hopelessness or lack of control that permeates Native American culture.

United States v. Woody, No. CR-13-08093-001-PCT, 2015 WL 1530552, at *6 (D. Ariz. Apr. 6, 2015). More recently, researchers have discovered that “descendants of people who survived the Holocaust have different stress hormone profiles than their peers, perhaps exposing them to anxiety disorders.” Tori Rodriguez, *Descendants of Holocaust Survivors Have Altered Stress Hormones*, Scientific American, Vol. 26, Issue 2 (Feb. 12, 2015). The importance of preparing an accurate and complete family tree cannot be overstated.

eight children, including Joe Braddy, Sr.

Joe Braddy, Sr. dropped out of school in the 5th grade and worked as a sharecropper until he was 16 years old. In 1943 when he was drafted into the army. Joe married his sweetheart, Pinkie, in 1944 in Vidalia, Georgia.

Pinkie Laura Braddy was the third of twelve children born in 1921 in the small town of Cedar Crossings, GA. Her parents (Harrel's grandparents) were Thomas and Anna Outlaw; they both died from a stroke. The Outlaw family eventually changed their name to Outler. Pinkie went all the way to the Eleventh grade before she dropped out of school. During World War II, Pinkie was working as an elevator operator when group of white servicemen pretended to need help finding their room. Instead, they sexually assaulted her; she never went back to the job.

Joe and Pinkie Braddy's first-born son was Thomas. Harrel was born in 1949 at home, however, Pinkie hospitalized after giving birth due to complications. By 1951, the young couple packed up the two boys and moved away from the dead-end life of the rural south in Georgia to Miami, Florida. The Braddys settled in Liberty City, a predominantly black community that sprang up near the Liberty Square Housing Project which had opened in the late 1930's. Liberty City arose from the desire of black families to escape the crime, disease, and overcrowded conditions in "Colored Town," as it was then known, or "Overtown," as it is now more commonly known. Federal programs helped to alleviate some of the sanitation and waste

problems that posed a constant threat to the population. As a result, a strong black middle-class quickly developed in and around Liberty City.

At a hearing, Braddy would have shown that their family settled and thrived in Liberty City. Joe was a homeowner—and one of the first in his neighborhood to achieve that status. The Braddy household bustled with activity. The older boys, Harrel and Thomas, were engaged in a never-ending sibling rivalry with Harrel constantly challenging his older brother's authority. Harrel and Thomas gained three new brothers in the 1950's. Tyrone was born in 1953. He was followed by Steven in 1955, and Irvin, born in 1959. When the boys were growing up Liberty City was a new community that had been developed out of Florida's swamp and marshland. During Harrel's early years, his free-time was devoted to hunting, fishing, and hiking with his brothers, cousins, and friends. Harrel was particularly close with the Taylor brothers, who lived just a few blocks from the Braddys. Harrel greatly enjoyed the outdoors and quickly became an expert at raccoon hunting and catching catfish and bass with home-crafted fishing poles. But even during this time, Harrel began exhibiting abnormally paranoid behavior; during sleepovers, he would make excuses to leave and then he would crawl around the perimeter of the house so he could listen at the window to see if his buddies were talking about him.

Joe was a hard-working man who believed strongly in corporal discipline. Joe and Pinkie had been raised as "God-fearing" devotees of Pentacostal Christianity,

and they raised their children in the same manner. The Braddys worshipped at the “House of God” Church in Liberty City. Joe served as a Deacon, and set a strict daily regiment for his sons. Disobedience in any form was met with beatings and/or whippings. If Harrel and his brothers were late getting home for supper, Joe would be waiting for them in the front yard, armed with a quarter-piece of hose cut he had cut from the main water-hose. Joe whipped the boys until he was satisfied that they had learned their lesson. Harrel’s mother, Pinkie, was equally comfortable enforcing corporal discipline. On more than one occasion, Harrel was reminded of Pinkie’s temper. When Harrel was a student at D.A. Dorsey School, one of his teachers contacted Pinkie and informed her that Harrel was struggling to pay attention in class, and was frequently “staring out the window.” Pinkie went to the school and whipped Harrel in front of his classmates. Neither parent ever hesitated to punish with violence.

Braddy could have established that by the late 1950’s and early 1960’s, Liberty City began to suffer as a result of failed government social programs. The large living structures, including “The Villages,” once so appealing and promising, had fallen into disrepair and neglect. In turn, this spilled into the larger community. Harrel, just entering his teen years, fell under the influence of a considerably older peer group. Harrel began skipping school to spend time with friends at “The Villages,” a nearby housing project. He was arrested for trespassing at age 13.

In 1962, Joe and Pinkie decided to send young Harrel to live with Pinkie's parents, Thomas and Anna Outler, in Vidalia, Georgia. Vidalia was a world apart from the "Magic City" Harrel found so compelling. The Outlers lived in a shack that had a stove, a few carpets on the floor, and cots. It was as poor and limited as one could imagine. Harrel also went to school in the still deeply segregated south but the schools for the black children were anything but equal to the schools that the white children attended. Despite the poverty and the racism he experienced living with his maternal grandparents, Harrel received plenty of attention, and enjoyed hunting, fishing, and hiking.

In 1964, Joe and Pinkie brought Harrel back to their home in Miami. Larry Taylor remembered that when Harrel came back, he seemed like a different person. He would wear his cowboy-boots and he took on the persona of a country-boy. But, before too long, Harrel threw off the cowboy character and instead, began acting out again with greater frequency. Harrel's father Joe decided that if Harrel was not going to return to school, he was going to work. Harrel's formal education ended, and he became a full-time laborer in the construction business.

When Harrel turned 16, his father gave him a guitar and Harrel began playing in the church band. Harrel was a great musician and he played in a gospel band with the Taylor brothers. Harrel idolized the gospel group called the *Mighty Clouds of Joy*. His obsession led him to steal a blue Cadillac El Dorado convertible so he could

be just like the lead singer in the band *Mighty Clouds of Joy*. Harrel also purchased an expensive guitar, the same one that the lead guitarist in the above mentioned gospel group played. The Taylor brothers felt that Harrel was obsessed with possessions and always had to have the very best of everything to the point that he even thought his dog was better than everyone else's dog. He treated women the same as his guitar or his car; they were possessions to collect. Harrel would brag about everything and it was impossible for his friends to get a word in when he was on a roll. Harrel would do "dumb things" and never took responsibility for his actions. The Taylor brothers eventually kicked him out of the band because of excessive absences.

At a hearing, Braddy would present testimony that Bipolar Disorder is characterized by excessive involvement in activities that have a high potential for painful consequences. Dr. Schaich explained in his report that Mr. Braddy "exhibited odd behavior memorialized in police reports that are consistent with mania: e.g., throwing objects at police officers, and impulsively using a sledgehammer to commit seemingly senseless goals. He also had multiple girlfriends in addition to his wife with whom he often became suspicious and jealous." (Supp. PCR. 223.) In March of 1984, Harrel survived nine (9) gunshot wounds inflicted by one James Summers who was involved with Delores Smart and Harrel in a love triangle. In the aftermath, Summers went to prison for ten (10) years, and Braddy was hospitalized, but made

a full recovery. While Harrel had escaped with his life, according to his friends, the experience emboldened him and he developed a “Superman” approach to life.

Contrary to the finding of this Court on direct appeal, Braddy never waived his right to present statutory mental health mitigation. Dr. Schaich has found that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance pursuant to Florida Statute § 921.141(b). Dr. Schaich noted that the statements Braddy made to Shandelle Maycock demonstrated an inflated self-esteem and grandiosity. “His behavior at the time of the crime, like the majority of his other arrests, involved impulsive, reckless, and manic behavior that took place without reason or justification.” (Supp. PCR. 223.)

Had trial counsel investigated their client’s social history and obtained relevant documents such as school records and prior records of incarceration, the jury would have had a clearer picture of Braddy and would have been able to make sense of how this man—a man who has a caring family—could commit the crimes that he was convicted of in 1984. The failure by trial counsel to present mitigation and to rebut the aggravators must be considered in light of the improper prosecutorial arguments. Trial counsel also unreasonably failed to object to improper comments. *See* Argument III, *infra*. Assistant State Attorney Abbe Rifkin suggested the death penalty is appropriate or else the State would not be seeking it in this case; she violated the prohibition against Golden Rule; she impeached the witnesses by

questions about Mr. Braddy's extra-marital affairs, and she denigrated the defense by attempting to turn mitigating evidence against him. *Braddy v. State*, 111 So. 3d at 855-56. Even though the Court found the improper arguments were harmless in the context of direct appeal, they must be reanalyzed for prejudice in the context of the statutory mental health mitigation that was not investigated or presented.

The essential feature of the penalty phase of a capital trial is that sentencing be individualized "focusing on the particular characteristics of the individual." *Thomas v. Kemp*, 796 F.2d 1322, 1325 (11th Cir. 1986). The indispensable prerequisite to a reasoned determination of whether a defendant shall live or die is accurate information about a defendant and the crime committed. *Gregg v. Georgia*, 428 U.S. 153, 190 (1976). Because trial counsel failed to present a complete and accurate picture of Mr. Braddy's life, the prosecutor made up her own story to fill in the gaps for the jurors: "I will submit to you that this has been since birth. He's been [violent] since birth." (T. 3315-16.) Had the jury known about Mr. Braddy's mental illness, there is a reasonable probability that the jury would have recommended a life sentence.

A defendant is entitled to an evidentiary hearing on his motion for postconviction relief unless 1) the motion, files, and records in the case conclusively show that the defendant is not entitled to any relief, or 2) the motion or a particular claim is facially invalid. *Phillips v. State*, 894 So. 2d 28, 36-37 (Fla. 2004). The

Appellant respectfully requests a remand to the circuit court for a full and fair hearing on his claims of ineffective assistance of counsel.

ARGUMENT IV

TRIAL COUNSEL'S FAILURE TO PRESERVE A CONSTITUTIONAL CHALLENGE TO THE PROSECUTOR'S IMPROPER ARGUMENTS DEPRIVED BRADY OF HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Both challenged and unchallenged prosecutorial misconduct during Harrel Brady's trial rendered the convictions fundamentally unfair and deprived him of the reliability in the sentencing determination that the Sixth, Eighth, and Fourteenth Amendments require. *See Darden v. Wainwright*, 477 U.S. 168 (1986); *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). Recently this Court found, in similar circumstances, that Miami-Dade prosecutors had exceeded the bounds of a fundamentally fair trial due to overzealous advocacy:

We are compelled to vacate Cardona's convictions and remand for a new trial based on the pervasiveness and the cumulative effect of the prosecutor's numerous improper closing arguments in the guilt phase, which repeatedly crossed the line this Court has clearly established regarding impermissible prosecutorial comments.

As we have stated for decades, we expect and require prosecutors, as representatives of the State, to refrain from engaging in inflammatory and abusive arguments, to maintain their objectivity, and to behave in a professional manner. *See, e.g., Delhall v. State*, 95 So. 3d 134, 170 (Fla. 2012); *Brooks v. State*, 762 So. 2d 879, 904–05 (Fla.

2000); *Gore v. State*, 719 So. 2d 1197, 1202 (Fla. 1998);
Urbini v. State, 714 So. 2d 411, 418–22 (Fla. 1998).

Most of the improper comments were objected to, and those objections were overruled, amplifying the prejudicial effect of the comments by implicitly placing the trial court's imprimatur of approval on the remarks.

Cardona v. State, 2016 WL 636048 at *1 (Fla. 2016) (emphasis added).

On direct appeal in Mr. Braddy's case, the State argued vehemently in its Amended Answer Brief that trial counsel failed to preserve an objection to the State's arguments. See *Appendix A*, Answer Brief filed August 17, 2010 at 63-74; 82-91. But for trial counsel's repeated failure to interpose timely and/or specific objections to Miami-Dade County Assistant State Attorney Abbe Rifkin's repeated improper comments during both the guilt and penalty phase, Braddy, too, would have been granted a new trial based upon this Court's long-standing precedent as cited in *Cardona v. State*. This Court rejected Braddy's challenge to the improper prosecutorial arguments because "[s]everal of the comments . . . were not preserved for appeal because Braddy either failed to object on the specific legal grounds that he now asserts or because, after having made objections that the trial court sustained, Braddy failed to move for a mistrial." *Braddy* at 838, 846.

ASA Abbe Rifkin marshalled a host of improper arguments designed to deprive Harrel Braddy of a fair trial in the guilt phase. The prosecutor argued in her opening statement at the guilt phase that the deceased was alive when she was

attacked by an alligator. (T. 1614.) In her closing argument, Rifkin improperly argued:

You heard the testimony from Doctor Perper yesterday. Mr. Della Fera told you that Doctor Perper said that these rocks did not cause that injury. **We must have been in a different trial.** Doctor Perper clearly said that the injury, the depression injury to the left side of the head is consistent with those rocks.

(T. 2725.) These arguments during the guilt phase contributed to the jury's death recommendation.

ASA Rifkin accused defense counsel of misleading the jury saying, "I mean their whole thing is manipulation, misrepresentation," and falsely claimed they had misstated the evidence. (T. 2723-24.) When counsel tried to suggest that the fatal injury occurred during the jump from the car, she inveighed against the defense for attacking Shandelle Maycock. (T. 2720.) She bolstered the detectives, and told the jury that Braddy's exercise of the right to silence was just a plan to "manipulate and stonewall and stretch things out." (T. 2661.) ASA Rifkin commented on Braddy's exercise of his Fourth Amendment rights, and even his exercise of the right to trial. (T. 2659, 2663.) She criticized Braddy for not living up to religious principles, and she told the jurors it would be a "miscarriage of justice" if they were to find him guilty of lesser-included offenses (T. 2683.)

The inflammatory rhetoric continued in the penalty phase. ASA Rifkin "vouched" for the use of the death penalty, telling the jury that there had already

been an extra-judicial determination that Harrel Braddy should be executed, explaining that “the Legislature has set out what the determination is that the State has to make in bringing a case like this to you as a death penalty case ...” (T. 3312-13.) She made several “Golden Rule” arguments, telling jurors to put themselves in the child’s position, creating an imaginary script: “It’s dark and they are driving ... Where’s mommy? Where’s mommy?” (T. 3331.) The prosecutor instructed the jury to sit for five minutes imagining themselves in Quatisha’s place:

It's dark, it's pitch black. You've seen all of this. And then, you get thrown in. . . . [I]t's even worse probably if you left her there to die and drive away and she fell in. You even have more time to think about it. You have more time to be afraid.

(T. 3331, 3333-34.) *Braddy v. State*, 111 So. 3d at 849. Trial counsel failed to object to these improper arguments.

Prosecutor Rifkin falsely instructed the jury that a vote for life would be to ignore their duty and “do what’s easy” instead. (T. 3355.) She denounced Braddy as a man who was violent since the day of his birth and scolded him for infidelities she had never proven. (T. 3515-16; 3351.) She again attacked defense counsel, warning he would “scream” and “shout” to distract them. (T. 3314.) Finally, she argued that Braddy’s case in mitigation should be weighed as aggravation against him. (T. 3340-42.)

In determining that, where the State is seeking the death penalty, what we have to look at are those murder cases that are so egregious, those defendants who commit acts

that are so egregious, who have backgrounds that are so bad that they have earned the death penalty.

We don't just do it by putting the numbers in a computer. We take it to a jury of his peers, a jury of everyone's peers. We all represent—you all represent everyone, him and everyone in this courtroom. We take it to you because we say all right, those are 12 people who are going to be able to weigh those factors.

The State's burden is to prove the aggravators beyond a reasonable doubt. And the Legislature has set out what the determination is that the State has to make in bringing a case like this to you as a death penalty case, okay.

Braddy, 111 So. 3d at 848. While trial counsel objected, he did not obtain a ruling and therefore, this Court only reviewed the comment for harmless error.

Next, ASA Rifkin violated the Golden Rule but there was no contemporaneous objection: She went on to place the jury in the position of Quatisha when she said:

He takes her to a place where he know she's going to die. He takes her to a place where he knows it's probably going to be nothing left of her. It's dark, it's pitch black. **You've seen all of this. And, then you get thrown in.**

(T. 3333.) (emphasis added).

Prosecutor Rifkin continued with her improprieties when she instructed the jury on the duties of the job they had been charged with:

Life does mean life. Is that the appropriate sentence here? It's not what's good enough. It's what's appropriate. That's what you have been charged with doing...Not to do what's good enough. Not to do what's easy. Your job is to do the hard one. Your job is to give him the consideration

he's entitled to and the State the consideration that Its [sic] entitled to.

(T. 3355.) Rifkin improperly instructed the jurors that a life recommendation would violate the duties that they had been charged with as jurors. But, she didn't stop there. She also attacked Braddy's character calling him "violent since birth" for the soul purpose of inflaming the juror's passions:

This is a guy who cannot live out in the community without hurting someone.

...you don't just wake up one morning and say I'm going to be violent today. I will submit to you that this has been since birth. He's been this way since birth.

(T. 3315-16.) Prosecutor Rifkin went beyond the pale, completely disregarding the law by telling the jury that Braddy was violent since the day he was born.

It wasn't enough for ASA Rifkin to only attack Braddy's character, she also felt compelled to attack defense counsel, a sworn officer of the court. She warned the jury that defense counsel would attempt to confuse them about the aggravators in the case by "...arguing about the ones and screaming about the ones that they can. Because if you scream loud enough, maybe you can drown out the shouts of the ones that are written in stone." (T. 3326.) Going on to chastise the defense for improperly attacking law enforcement, when in fact, defense counsel had not engaged in any such improprieties:

They're going to attack the police in this case. You heard it in opening statements. They are going to attack and tell

you that they are lying. . . The reason he had to attack Detective Hoadley is because if you believe Detective Hoadley, . . . , then the aggravator, as far as eliminating a witness, is proven. So he had to make Detective Hoadley look like a liar.

(T. 3357, 3360-61.) ASA Rifkin still wasn't satisfied. She then went on to instruct the jury to consider mitigation as non-statutory aggravation in violation of Florida Statute § 921.141 (1998). By in large, the mitigation presented to the jury focused on Braddy's family and the positive role he played within his family. Prosecutor Rifkin referred to the Braddy family as "a lovely, lovely, lovely family," but shortly thereafter instructed the jury that "[Y]ou know, his family highlights, highlights, highlights the fact that the aggravators outweigh the mitigators." (T. 3340-41.) This egregious misrepresentation of the law was further expressed to the jury when ASA Rifkin criticized Braddy for presenting this mitigation to the jury in the first place:

His family has already been hurt by this defendant. Why were these people brought in to demonstrate things to you? 12, 13 of them. Not only family, but the friends.

(T. 3341.)

Trial counsel's failure to object to the prosecutor's inflammatory arguments throughout the trial was deficient performance under *Strickland v. Washington*, 466 U.S. 668, 685 (1984). "Counsel must contemporaneously object to improper comments to preserve a claim for appellate review. Unobjected-to comments are grounds for reversal only if they rise to the level of fundamental error." *Merck v. State*, 975 So. 2d 1054, 1061 (Fla. 2007). There can be no strategic reasons for failure

to object to improper argument: “One of the most fundamental duties of an attorney defending a capital case at trial is the preservation of any and all conceivable errors for each stage of appellate and post-conviction review.” American Bar Association, *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 1030 (2003)

Trial counsel’s repeated failure to either timely object, make a specific objection and/or move for mistrial when he did object and obtained a favorable ruling prejudiced Braddy. This Court has long condemned the types of arguments made in this case, most recently, in the Miami-Dade County case of Ana Cardona:

Over sixty years ago, this Court stated:

Under our system of jurisprudence, prosecuting officers are clothed with quasi-judicial powers and it is consonant with the oath they take to conduct a fair and impartial trial. The trial of one charged with crime is the last place to parade prejudicial emotions or exhibit punitive or vindictive exhibitions of temperament. *Stewart v. State*, 51 So. 2d 494, 495 (Fla.1951). While prosecutors should be encouraged to prosecute cases “with earnestness and vigor,” they are not at liberty to strike “hard blows.” See *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

Our decision is required by our prior precedent, which mandates reversal where a prosecutor “exceed[s] the bounds of proper conduct and professionalism and provide[s] a ‘textbook’ example of overzealous advocacy.” *Gore*, 719 So. 2d at 1202. As we have previously emphasized, “[t]his type of excess is especially egregious in this, a death case, where both the prosecutors and courts are charged with an extra

obligation to ensure that the trial is fundamentally fair in all respects.” *Brooks*, 762 So. 2d at 905 (quoting *Gore*, 719 So. 2d at 1202).

Cardona v. State, 2016 WL 636048 at *1 (Fla. 2016) (emphasis added). The prejudice here is that if trial counsel had persevered the challenges for appeal, Braddy would have been granted a new trial, or at least, a resentencing hearing.

A defendant is entitled to an evidentiary hearing on his motion for postconviction relief unless 1) the motion, files, and records in the case conclusively show that the defendant is not entitled to any relief, or 2) the motion or a particular claim is facially invalid. *Phillips v. State*, 894 So. 2d 28, 36-37 (Fla. 2004). The lower court erred in summarily denying an evidentiary hearing on Braddy’s claims that he received ineffective assistance of counsel in both the guilt and penalty phase due to the failure to object and preserve a challenge based on the prosecutor’s conduct.

ARGUMENT V

BRADDY WAS DEPRIVED OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

In *Irvin v. Dowd*, the U.S. Supreme Court explained:

In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, ‘indifferent’ jurors. The failure to accord an accused a fair hearing violates even the minimum standards of due

process. ‘A fair trial in fair tribunal is a basic requirement of due process.’

366 U.S. 717, 721 (1961) (internal citations omitted). It simply cannot be said that Braddy’s trial comported with the mandate or spirit of the constitutional guarantee of a “fair tribunal.” A “touchstone of a fair trial is an impartial trier of fact—‘a jury capable and willing to decide the case solely on the evidence before it.’” *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)).

Braddy alleged that on August 28, 2007, day one of Braddy’s penalty phase, it was revealed on record that Jose Ravelo, one of the jurors who sat on Braddy’s guilt phase jury, the jury that convicted Braddy on all seven counts, had been arrested and charged with a third degree felony on August 23, 2007. It was further revealed that photos had been taken of Ravelo engaging in the activity that led to his subsequent arrest about one month prior to the date of his arrest. Braddy’s *voir dire* began on June 25, 2007 and guilt phase began on July 9, 2007 and concluded on July 17, 2007, therefore these photos would have been taken at a point in time near the empaneling of Braddy’s jury and the rendering of the guilty verdict. Ravelo failed to disclose this critical background information during *voir dire*. As a result, Harrel Braddy was deprived of his Sixth Amendment right to a fair and impartial jury under state and federal law. *United States v. Perkins*, 748 F.2d 1519, 1533 (11th Cir. 1984); *Conaway v. Polk*, 453 F.3d 567 (4th Cir. 2006); *see also Chester v. State*, 737 So.

2d 557 (Fla. 1999). Relevant and material facts regarding Ravelo's criminal history were concealed from trial counsel and the court, therefore inherent prejudice is presumed.

At trial, in an effort to stress to the venire the importance of telling the truth to the questions asked of them either by the court, the attorneys, or the juror questionnaire, the trial judge court informed the jurors that:

[i]t presents a major problems [sic] if people tell us things under oath that's not true **because during the jury selection, the statements that you give to the judge, the answers that you give to the lawyers, the things that you have written down on your jury questionnaire are answers that are under oath.** And we expect that you will be telling us, the lawyers and myself, the truth when you answer the questions.

* * *

The lawyers, **in order to make an intelligent and informed decision**, have to have the information that they need, and they have to be able to rely upon it. That's why all of the answers that you gave on paper, or when we speak to you, will be under oath....

(T. 10-11.) (emphasis added). The trial judge also informed the venire that, "[T]his is very serious business, and we expect everybody will treat it accordingly." (T. 12.)

In an effort to make certain that all of the jurors understood the importance of candor and truthfulness during the *voir dire* process, the trial judge went on to state that:

Sometimes jurors conveniently forget things that may have happened to them in their lives because they think no one will find out about it, or it's just nobody else's business. In jury selection, **everything is our business**

because the lawyers need to have information so that they can make that informed decision about you.

In the questionnaire, for instance under question number 14: Have you or someone close to you ever been accused or arrested of a crime?

(T. 21-22.) (emphasis added).

A juror's lack of candor during *voir dire* which results in the non-disclosure of material information relevant to jury service justifies a new trial as a matter of law. *Chester v. State*, 737 So. 2d 557 (Fla. 1999). This Court set out a three-part test for determining whether the nondisclosure of information warrants a new trial: 1) the information must be relevant and material to jury service in the case; 2) the juror concealed information; and 3) the failure to disclose was not attributable to lack of due diligence. *De La Rosa v. Zequeira*, 659 So. 2d 239 (Fla. 1995).

Braddy had a right to know about Juror Ravelo's pending criminal investigation and should have been entitled to question him on this material fact. The omission of this relevant information prevented counsel from making an informed judgment-which in all likelihood would have resulted in a valid cause challenge. Had trial counsel known a juror was under criminal investigation, by the same agency that arrested Braddy, and by the same agency that was engaged in the prosecution of Braddy, he would or should have moved to strike him for cause, and if not successful, used one of his peremptory challenges to excuse him from the jury.

In light of the trial court's strict admonition, a number of jurors who had answered "no" to question number 14, brought to the courts attention concerns about whether they should have answered "yes." But prospective Juror Jose Ravelo never mentioned that he was the subject of a criminal investigation. To this day Braddy does not know, and cannot not know, whether or not Ravelo was aware of that criminal investigation because pursuant to Rule 4-3.5(d)(4), Rules Regulating the Florida Bar, counsel for Braddy is prohibited from contacting Ravelo to determine the answer to that all important question. Had Ravelo been aware that he was under criminal investigation at the time he voted to convict Braddy on all seven counts, and if he intentionally concealed that information from the Court and Braddy's trial counsel, serious concerns arise questioning the reasons that Ravelo cast a vote for guilt as well as, the reliability of Braddy's convictions. Because undersigned counsel is barred from interviewing Ravelo, one will never truly be able to confidently rely on the validity of his guilty vote.

Miami-Dade Police Department was the arresting agency in Ravelo's criminal case and the State Attorney's Office of the Eleventh Judicial Circuit would have been the prosecuting agency. The fact that Ravelo was under criminal investigation should have been disclosed to Braddy's trial counsel but agencies withheld the police reports concerning the investigation. Public records requests were made for records concerning jurors. Argument concerning requests to FDLE noted that such requests

are part of the public records process. (PCR. 698-99.) As for the requests made to the state attorney and the Miami-Dade Police for criminal records of the jurors, objections to same were heard at a hearing, but the records concerning Ravelo and the other jurors were not provided. (PCR. 284-89; 309-13; 314-17; 709-14; 744.) The judge refused to find the requests relevant, stating on the record, “You are not going to get anything from me with regard to the jurors, okay.” (PCR. 714.)

The prosecutor is required to disclose to the defense evidence “that is both favorable to the accused and ‘material either to guilt or punishment.’” *United States v. Bagley*, 473 U.S. 667, 674 (1985) (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). “Knowledge of the information is imputed upon the prosecutor regardless of whether the prosecutor actually knew about the suppressed evidence. *Kyles v. Whitely*, 514 U.S. 419 (1994); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Freeman v. Georgia*, 559 F.2d 65 (5th Cir. 1979). Had trial counsel gained possession of the withheld information, Ravelo would have been removed from the jury panel and replaced with an alternate.

Based on the juror misconduct in concealing facts that were relevant and material from trial counsel during *voir dire* and through the conclusion of the guilt phase, inherent prejudice is presumed. Braddy was prejudiced when relevant and material facts regarding juror Ravelo’s criminal history were concealed from trial counsel and the court, and therefore Braddy is entitled to an evidentiary hearing, and

thereafter, a new trial. *Young v. State*, 720 So. 2d 1101, 1103 (Fla. 3d DCA 1998);
see also Lowrey v. State, 705 So. 2d 1367 (Fla. 1998).

ARGUMENT VI

BRADDY WAS DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL AND/OR THE STATE'S FAILURE TO DISCLOSE CRITICAL EXCULPATORY EVIDENCE AND IMPROPER PROSECUTORIAL AND JUDICIAL MISCONDUCT, IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE US CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

A. The defendant has a right to the effective assistance of counsel

Braddy was denied a reliable adversarial testing. In order to obtain a new trial, Braddy must show that his attorneys rendered deficient performance and that he was prejudiced by that performance. *Strickland v. Washington*, 466 U.S. 668 (1984). The jury never heard the considerable and compelling evidence that was exculpatory as to Braddy. In order “to ensure that a miscarriage of justice [did] not occur,” *United States v. Bagley*, 473 U.S. 667, 675 (1985), it was essential for the jury to hear the evidence. *State v. Gunsby*, 670 So. 2d 920 (Fla. 1996). Whether the State suppressed the evidence, defense counsel unreasonably failed to present the evidence, or the evidence is newly discovered, confidence is undermined in the outcome because the jury did not hear the evidence. The Eighth Amendment recognizes the need for

increased scrutiny in the review of capital verdicts and sentences. *Beck v. Alabama*, 477 U.S. 625 (1980).

Had trial counsel adequately represented Braddy, there is a reasonable probability that the outcome of the case would have been different. Trial counsel failed to file necessary pre-trial motions, failed to consult with and/or retain defense experts, adequately cross-examine state witnesses, and make objections to improper and misleading comments and arguments by the State. Braddy's convictions were the result of trial counsel's ineffective assistance and state misconduct.

B. Trial Counsel was ineffective for not hiring an expert to assist in challenging the voluntariness of Braddy's statements and/or failing to impeach the State's witnesses.

Braddy filed a motion to suppress all statements he made to the police following his arrest on November 7, 1998 pursuant to *Miranda v. Arizona*, 394 U.S. 436, 455 (1966). At the hearing on the motion to suppress, the state presented the testimony of the detectives who arrested and interrogated him. The motion was denied. At trial, the State recalled the parade of law enforcement officers who had contact with Braddy over the course of the lengthy interrogation. Trial counsel cross-examined those witnesses to show that Braddy's statements were not voluntarily made. Braddy did not testify.

The jury was instructed that they must determine whether Braddy's "alleged statement was knowingly, voluntarily, and freely made" and that they should

consider circumstances such as whether Braddy had been threatened in order to get him to make the statement. Finally, the jury was told, “If you conclude the defendant’s out of court statement was not freely and voluntarily made, you should disregard it.” (R. 2924.) Once the jury was sent out to deliberate, they came back with a question that indicates concerns regarding the interrogation: “When was Harrel Braddy officially arrested?” (R. 2941B.) After being told that they must rely upon their own recollection, the jury rendered its guilty verdicts.

On direct appeal, Braddy challenged the introduction of the statements pursuant to the seminal case of *Miranda v. Arizona*, 384 U.S. 436 (1966) in which the Supreme Court of the United States recognized that custodial interrogation is inherently coercive. (*See* Appendix B, excerpt from Amended Initial Brief on direct appeal at 19-42, incorporated herein by specific reference). The Florida Constitution likewise requires that, “if the suspect indicates in any manner that he or she does not want to be interrogated, interrogation must not begin or, if it has already begun, must immediately stop.” *Traylor v. State*, 596 So. 2d 957, 966 (Fla. 1992). This Court rejected all of Braddy’s grounds for challenging the introduction of his statements at trial. *Braddy v. State*, 111 So. 3d 810, 830-32 (Fla. 2012).

However, Justice Quince dissented based on the *Miranda* violations that occurred during the lengthy interrogation. Justice Quince wrote that Braddy “unequivocally revoked his waiver when he told police he was tired of talking to

them and wanted to go to jail.” *Braddy v. State*, 111 So. 3d at 875 (Quince., J., dissenting). Further, Justice Quince found that “Braddy did not revoke his invocation when he told the police two hours later that he would take them to where he left Quatisha.” Justice Quince observed:

Detective Smith's physical assault on Braddy after Braddy exercised the right of silence constitutes interrogation. Not only did Smith yank Braddy out of the car and pin him to the side of the car by placing his forearm across Braddy's neck, but Smith also questioned Braddy about Quatisha's location. Smith's actions were known, or at least should have been known, to be reasonably likely to evoke an incriminating response from Braddy. . .we must remember the purpose behind our decisions in *Miranda* and *Edwards*: preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment. What could violate this principle more than an officer using actual physical force in an attempt to gain information? Thus, Smith interrogated Braddy in violation of Braddy's right to remain silent.

Braddy v. State, 111 So. 3d at 877 (Quince., J., dissenting).

A defendant’s “case may stand or fall on his ability to convince the jury” that his alleged confession is of dubious credibility, *Crane v. Kentucky*, 476 U.S. 683, 689 (1986), as a “confession is like no other evidence.” *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991). In his rule 3.851 motion, Braddy alleged that it was standard practice at the time Braddy was tried to use experts in police coercion and tactics in order to mount challenges to pre-trial statement and to testify before the jury as well.

United States v. Hall, 93 F.3d 1337 (7th Cir. 1996); *Boyer v. State*, 825 So. 2d 418, 420 (Fla. 1st DCA 2002).

Braddy alleged that had an expert in police practices or police misconduct been retained in this case, he could have advised counsel on common police tactics so they could have **effectively** litigated the motion to suppress. An expert could have explained to the judge, and if necessary, the jury about that factors that can lead to an involuntary and therefore, unreliable confession. The “modern era” of research in the area of police interrogation techniques, false confessions, and voluntariness dates back to the early 1980s. There have been two factors that have led to a renewed interest in the field: one is the advent of DNA testing and how that has highlighted the number of factually innocent people who have been imprisoned; and the other has been a focus on the use of torture in the context of suspected terrorists. An expert witness could have testified regarding the history of the “third degree” and, since *Miranda*, law enforcement has turned to using what is known as the “fourth degree” which involves calculated psychological coercion. Braddy informed the lower court that he retained an expert psychologist who would have been available in 2007 and who can testify about the plan that was willfully executed by law enforcement in getting Braddy to make incriminating statements after he had invoked his rights.

Had such an expert been utilized at the pre-trial suppression hearing, and later at trial, it would have changed the way that Braddy thought about testifying and

putting his credibility at issue. As it stood, there was no one who could present the events to the trial judge in a way that challenged the police conduct during the course of the interrogation. Had the motion to suppress been effectively litigated, it should and would have been granted resulting in the exclusion of Braddy's custodial statements and confidence in the outcome of the guilt phase is undermined. The burden at all times was on the State to show that the statements were voluntary. *Ramirez v. State*, 739 So. 2d 568 (Fla. 1999).

At an evidentiary hearing, Braddy would show that from the very beginning, the police used the classic "good cop/bad cop" game in an effort to get Braddy to incriminate himself. In a psychological ruse designed to weaken Braddy's will, the police lied to him and told him that his mother had a heart attack. An expert could have explained that the type of common police tactic is not generally recommended because it can elicit incriminating statements from the innocent as well as the guilty. After Braddy invoked his right and asked to be taken to jail, the police did not honor that request. Instead, the officers went out to breakfast with the ASA Abbe Rifkin. What Braddy learned was that he would be in that room until the police were satisfied. Upon their return, Braddy supposedly came up with the idea to go out and find the child; trial counsel failed to cross-examine Detectives Suco and Chambers regarding the veracity of that story.

Both the judge and jury were misled about Det. Greg Smith's actions out in the Everglades. The story presented to the fact-finders was the tempers were high and the Det. Smith, being human, was just worried about the little girl and his emotions got the better of him. According to the State, Smith's actions, while wrong, were perfectly understandable given the situation. If trial counsel had properly prepared for the motion to suppress by reading pre-trial depositions conducted by former counsel, Tony Moss, the State would not have been able to mislead the judge and jury about Smith's calculated plan to see just how much he could get away with in this case.

Q: Who finally made the decision to take Braddy out of the car and to seek his active assistance in the search?

A: I asked Detective Suco if I could speak to him.

Q: Okay. All right.
Was that your idea or did somebody suggest that to you?

A: I believe it was my idea at the time.

Q: Okay.
What was your objective?

A: To find the little girl.

Q: No, I mean, let me rephrase it this way. Was there something in particular that made you think that he would cooperate with you more so than he had up to that point?

I mean, obviously, we haven't found the little girl so far.

A: It was my understanding he was very cooperative with Detective Suco from the very beginning. I thought it was time to be a little more aggressive because we were

not finding the little girl. I was aware of certain case law and I felt it was time for us to put our foot down and to try to get him to cooperate with us and tell us where the little girl was.

Q: Now at the time this thought occurred to you, had somebody else expressed that thought?

A: I expressed it with Sergeant Smith earlier.

Q: Did he share your sentiments?

A: Yes.

Q: You mentioned of being aware of certain case law. We'll get to that identifying it in a second. For right now, tell us if you could, what interpretation of case law you were relying on?

A: I was aware of case law involving kidnapping victims that might still be alive and that certain coercive techniques could be utilized in securing the victim's --

Q: Exactly, what specifically?

A: It's my understanding, as much as physical force, some could be used to locate a victim if there's a possibility they're still alive.

Q: You're referring to State or Federal case law or both?

A: I believe it's both. I don't know the actual citation. I'm familiar with the case that happened, I believe, it was in Dade, back in the 80's.

Q: Would you be able to access the citation of it?

A: At some point I believe I could.

Q: Did you or any other detective consult with anybody from the State Attorney's Office regarding the legal issue you're referring to?

A: I apparently did not. I believe someone was in contact with the State Attorney's Office. I believe it was Detective Suco.

Q: Well, did you ever approach the subject with r I know you said you discussed it with Gary Smith.

A: Yes, I did.

Q: Did you ask him to call the State to verify this?

A: I don't recall asking him or if he did call the State.

Q: Okay.

A: It was pretty apparent that we had been there for two hours with him. We had not found the little girl.

Q: Right.

A: Things were getting a little bit desperate. We still hadn't found her. The possibility was that she was still alive, I thought we had to step it up a notch and that's what I did.

Q: Did you ever threaten Braddy in any manner?

A: I wouldn't say that I threatened him, but, I certainly grabbed him and didn't handle him gently.

Q: Was there any other reason you grabbed him aside from the emotions that you described and aside from your legal understanding that you were permitted to do so?

A: No, sir.

Q: By the way, just for the record, is everything you said to him and everything he said to you incorporated in your report?

A: Yes.

Q: Did you ever hear anyone threaten Harrel Braddy in any manner?

A: No sir.

Q: Did you ever see anyone put his or her hand on him for any reason?

A: No, just me.

Q: Did you hear anyone getting emotional with him?

A: No.

Q: Raising a voice, getting wildly, anything like that?

A: No, sir. I was the only one.

Q: Did you, at any time, slam Braddy against Suco's vehicle?

A: No, I didn't slam him against the vehicle. I had him against the vehicle, though.

Q: Did you or any other officer shove him in the back in an easterly direction at any time?

A: Not that I recall, no.

Q: Have you ever been made aware of whether you've been accused or some other officer has been accused of slamming him into the car or shoving him in the back?

A: I'm not aware of that.

Q: Against you or any other officers?

A: No, sir.

Q: Now during the search when you accompanied Braddy, did your report reflect fully and accurately everything you said to him and everything he said to you?

A: Yes.

Q: As you've been here this morning, do you remember any other exchanges between the two of you that is not recorded in your report?

A: Well, we talked a lot. I pretty much put everything in my report that was discussed, yes, sir.

Q: Now, at that time, would it be safe to say that Braddy would not have been free to leave if he wanted to?

A: He was not free to leave, no.

Pre-trial deposition of Greg Smith. (PCR. 1164-67.) (October 2014 Rule 3.851 motion).

There are three primary factors for the court to consider regarding a *Miranda* violation: whether the statement or product of the interrogation is reliable; whether the will of the suspect has been overborne; and whether the conduct is so egregious that due process has been violated and the statements should be suppressed consistent with the policy considerations set forth in *Miranda*. Here, the trial court only considered whether Braddy's will was overborne but did not consider the due process issue that arises when courts condone the behavior that took place in this case. It was not merely happenstance that Braddy made incriminating statements to Det. Diaz – it was part of the good cop/bad cop plan all along. Det. Smith admitted this much in his deposition but trial counsel failed to cross him about this at the suppression hearing.

The fact that trial counsel filed and argued a motion to suppress does not prohibit a finding that trial counsel were ineffective in adequately preserving the matter for appeal. *See Smith v. Zant*, 887 F.2d 1407 (11th Cir. 1989) (The district court should have looked at whether the trial attorney had rendered deficient performance based on the *Strickland* analysis in failing to present evidence of the defendant's cognitive defects and mental retardation to the fact finder. *Id.* at 1417, J. Tjoflat, concurring); *see also Owens v. United States*, 387 F.3d 607 (7th Cir. 2004) (Counsel was ineffective in drug case for failing to adequately move to suppress evidence seized pursuant to a search of the defendant's house). Braddy was prejudiced by the failure of trial counsel to utilize an expert in police tactics and coercion. Had trial counsel hired an expert, the incriminating statements would have been suppressed and if they were not suppressed, there is a reasonable probability that the jury would have discounted his statements as they were not voluntary.

C. Crime scene and forensic evidence

Counsel failed in his duty to attack the questionable testimony that was presented to the jury under the guise of "science." *See Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); *see also Stokes v. State*, 548 So. 2d 188 (Fla. 1989) (applying *Frye* standard in Florida case); *see also, Ramirez v. State*, 651 So. 2d 1164, 1166-7 (Fla. 1995) (laying out four step test).

Trial counsel was ineffective for failing to hire a crime scene expert to explain to the jury why the state's key forensic evidence was not only questionable, but scientifically unacceptable. Had trial counsel hired its own independent forensic crime scene expert, the jury would have heard that the evidence collected from the Lincoln could not be determined to be credible and therefore, the DNA results were not reliable.

The forensic evidence collected from the inside of the Lincoln cannot be relied upon as credible for a multitude of reasons. The evidence is unreliable because the chain of custody was broken. The break in the chain of custody is not the only thing that is concerning about Miami-Dade's handling of this critical forensic evidence. Miami-Dade police department's handling of this key piece of evidence used to convict Braddy falls far below the accepted professional norms.

On November 7, 1998, Braddy was taken into custody by Miami-Dade police officers. At that time, Braddy was driving a rented 1999 Lincoln Town Car. Instead of following proper procedure and preserving the integrity of the evidence by towing the Lincoln back to police headquarters, Detective Milito himself drove the vehicle to a secure, but open, lot at headquarters and gave the keys to homicide. (T. 1924-25.) When asked why he drove the Lincoln instead of having it towed, he testified that "time was of the essence." (T. 1916-17.) The Lincoln was then towed from police headquarters to the ME's office for processing. (T. 2282.)

At trial, the state presented the testimony of Toby Wolson, a criminalist in the Miami-Dade's forensic biology lab, who testified as an expert in the field of DNA analysis. Wolson testified that DNA samples taken from the trunk liner from inside the Lincoln matched the DNA of Shandelle Maycock. (T. 2407.) On cross, Wolson conceded that when he looked inside the trunk of the Lincoln upon the initial inspection at the ME's office, he did not see any signs of reddish stains on the liner that appeared to be blood. (T. 2411.) It is important to note that this visual inspection was conducted with the use of high intensity lighting. (T. 2256.) Furthermore, when asked whether he was present when the evidence was collected from the Lincoln, Wolson testified that his "notes don't indicate if [he] was there when any of the evidence was collected." (T. 2411.) Miami-Dade police department criminalist, Sharon Hinz, an expert in the field of forensic biology, testified on cross that reddish brown stains on the trunk liner were visible to the naked eye without the need for special or enhanced lighting. (T. 2394.) This contradictory testimony presented to the jury regarding the state's key forensic evidence is distressing at best.

In the early morning hours of November 8, 1998, CSI Detective Victor Chavez responded to the ME's office to process the Lincoln at the request of homicide Detective Nichols. (T. 2256.) Chavez testified that the reason that the vehicle was taken to the ME's office for processing is because, "[t]hey have a garage facility where they have high-intensity lighting. They can close the garage doors and

we can do specialized lighting and photography in that location, because we can make it completely dark if it's necessary.” (T. 2256.) Operating under the authority of a search warrant, Chavez and Detective Wilson latent processed the exterior of the car. (T. 2266.) By order of an unnamed Homicide sergeant, Chavez and Wilson did not process the interior. (T. 2266.) He was told not to process the interior because “there may be some chemical processing at a later time...”. (T. 2273-74.) There was never any testimony elicited explaining why the chemical processing of the Lincoln was not done at that point in time. Chavez also testified that he never processed the interior that evening, but that he left at 5:00 am and had no knowledge of whether or not someone processed the interior of the vehicle later. (T. 2267-68, 2270-71.)

At some point after Chavez and Wilson processed the exterior of the Lincoln, it was mistakenly returned to Enterprise Rental. (T. 2277-78.) Detective Suco testified that upon learning that the vehicle had been released from Miami-Dade police custody, the rental company was called and told not to touch the car. (T. 2278.) He also testified that he made the determination that the Lincoln had not been cleaned. (T. 2278.) But yet, he testified that he never went to Enterprise to observe the vehicle. (T. 2283.) The Lincoln was, yet again, towed first to Molina Towing and then to Miami-Dade headquarters. Interestingly, there was never any testimony elicited as to 1) who authorized the release of the Lincoln to Enterprise; 2) how the vehicle was returned to Enterprise; or 3) who was inside of the Lincoln during the

time between its release to Enterprise and its return to Miami-Dade headquarters. In fact, Suco testified that he “believe[d] [he] saw [the Lincoln] the second time [they] got it back,...” and that “other than what [he]was told and what [he has] seen in the reports and the tow sheet”, he couldn’t give any testimony regarding how the Lincoln got back to Enterprise Rental. (T. 2283.) Nor did he know how long the vehicle had been at Enterprise. (T. 2283.)

At some point, the Lincoln was back at police headquarters. On November 10, 1998 CSI Anthony Wilson, along with Detective Byrd, executed a second search warrant on the Lincoln. Wilson testified that when he opened the trunk and looked inside, he did not see any visible signs of discoloration or staining. (T. 2304.) However, Sharon Hinz testified that the cutouts that were taken from the liner by Wilson and Byrd that were given to her had reddish stains on them which appeared to be blood that were visible to the naked eye without the use of special lighting. (T. 2394.) It is important to stress the contradictory testimony, regarding the state’s key forensic evidence, of Sharon Hinz and Toby Wolson. Wolson, who was viewing the trunk liner under high-intensity lighting did not see any signs of reddish stains on the liner that appeared to be blood. But yet, Sharon Hinz could see reddish stains which appeared to be blood with the naked under regular room lighting.

This critically important, contradictory testimony was never challenged by trial counsel. Had trial counsel hired an independent forensic expert, the jury would

have heard that the evidence collected from the Lincoln could not be determined to be credible and therefore, the DNA results were not reliable. Trial counsel was ineffective for failing to hire a crime scene expert and Braddy was severely prejudiced as a result. At an evidentiary hearing, Braddy can present witnesses and evidence to challenge the reliability of the State's evidence at trial.

D. Failure to consult with and/or present a forensic pathologist

Trial counsel was ineffective in failing to retain and consult with a pathologist and/or present a pathologist in order to challenge the State's theory of the case. The prosecutor argued in her opening statement that the deceased was alive when she was attacked by an alligator. (Vol. 142, T. 1614.)

The State called the Medical Examiner, Dr. Joshua Perper, who determined that Quatisha was killed by a single blunt-force trauma causing a depressed skull-fracture that could have been caused by falling against rocks. (T. 2536-39, 2541.) The injury would have caused unconsciousness within a fraction of a second. (T. 2539.) There were signs of post-mortem triangular injuries, which Dr. Perper testified were consistent with alligator teeth, and one arm had been torn from the body. (T. 2509.) However, Dr. Perper also suggested that the child may have been alive even if unconscious when an alligator bit her head. (T. 2515.)

Dr. Perper testified that there was 20 cc of semi-digested food in the victim's stomach and that it would take 1-4 hours to digest that amount of food. Digestion

stops upon death. (T. 2543.) The victim's great-grandmother, Alma Caswell, testified in a deposition that the child ate dinner at her house that Friday evening. Had trial counsel determined when the child last ate, a pathologist could and would have shown that she died long before she was left in the Everglades.

Braddy alleged that trial counsel should have consulted with a pathologist to establish a reasonable doubt as to whether the child was killed as a result of being thrown onto rocks off the Alligator Alley. (PCR. 1171-72.) Braddy has consulted with a forensic pathologist who can explain at an evidentiary hearing why Dr. Perper's theories about when the injuries were sustained were not based on the evidence. Further, since this case involved a question as to time of death, certain tests should and could have been performed such checking the vitreous potassium levels. Pre-trial preparation and the use of an expert witness could have mitigated against the improper comments made by ASA Rifkin in closing argument:

You heard the testimony from Doctor Perper yesterday. Della Fera told you that Doctor Perper said that these rocks did not cause that injury. **We must have been in a different trial.** Doctor Perper clearly said that the injury, the depression injury to the left side of the head is consistent with those rocks.

(T. 2725.) The improper and misleading argument resulted in aggravation of the death sentence; trial counsel was ineffective in failing to rebut the State's theory by failing to retain and consult with a pathologist and/or present a pathologist and Braddy was prejudiced.

E. Prejudice

This court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.” *Wiggins v. Smith*, 539 U.S. 510, 527 (2003). In other words, counsel must conduct a complete investigation to know what evidence is available before a reasonable decision can be made whether or not to present it. Trial counsel cannot make the decision not to call a particular witness and call it a strategic one when he is unaware of the evidence that the witness would present to the jury. Trial counsel could and should have located these witnesses, determined what evidence they had to offer to the jury, and only then could he have made a strategic decision not to call the witness. Anything less is deficient performance. Braddy has been prejudiced and relief is warranted.

CONCLUSION

The argument in support of relief herein present federal and state constitutional issues and are predicated on the violation of Appellant’s protected federal rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, supported by applicable federal law and associated rights under the Florida Constitution and applicable state law. This Court is herein provided with the opportunity to review and correct these claimed violations of Mr. Braddy’s federal and state constitutional rights.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND FONT

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed on this 15th day of March, 2016, and opposing counsel will be served on this date. Counsel further certifies that this Petition is typed in Times New Roman 14-point font.

/s/William M. Hennis III
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