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

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Mr. Braddy submits this Reply to the State's Answer Brief. Mr. Braddy will not reply to every argument raised by the State. However, Mr. Braddy neither abandons nor concedes any issues and/or claims not specifically addressed in this Reply. Mr. Braddy expressly relies on the arguments made in his Initial Brief for any claims and/or issues that are only partially addressed or not addressed at all in this Reply.

ARGUMENT IN REPLY

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

March 7, 2014 Motion to Withdraw

CCRC South moved to withdraw from Mr. Braddy's case on March 7, 2014. The Initial Brief proposes that there was an actual conflict of interest where Mr. Dupree had been a supervising prosecutor who approved the offer of a plea agreement on one of Mr. Braddy's prior violent felony cases in Broward County. In addition, there was error below alleged where the circuit court failed to grant any evidentiary development on the conflict of interest created by CCRC South Neal Dupree's prior employment as an assistant state attorney where as a supervisor he

made decisions concerning a plea agreement offer tendered to Mr. Braddy's counsel on a case that became a prior violent felony used to aggravate the instant capital offense.[1] Finally, Mr. Braddy pled that there was a simultaneous failure by the circuit court to conduct a *Nelson* inquiry regarding related request(s) by Mr. Braddy to discharge CCRC-South from representing him in postconviction and the instant appeal. (AB. at 34)

The Answer takes the position that this Court should review the rulings of the lower court "in the context of the proceeding that generated that ruling," and that if that is done, no relief should issue. *Id.* The facts dictate that there should be relief.

The State argues that CCRC South made no showing below of an adverse effect on Mr. Braddy, pursuant to *Cuyler v. Sullivan*, 446 U.S. 335 (1980), such that an actual conflict of interest pursuant to § 27.703(1), Fla. Stat. (2013) was shown to exist. That is, where CCRC South made no attempt to explain how Mr. Dupree's prior employment as a supervising ASA who approved a plea that resulted in a conviction used as an aggravator in the instant case would adversely affect CCRC-South's ability to represent Defendant in the postconviction proceedings. (AB. at 35).

[1] The only "development" was a hearing on the motion to withdraw held on March 21, 2014, during which Mr. Dupree and Mr. Braddy confirmed on the record that they both believed there was an actual conflict of interest based on Mr. Dupree's actions as a prosecutor and his then current status as postconviction counsel in his role as CCRC South. (PCR. at 2579-93)

First, the State criticizes CCRC South for waiting 9 months after filing a Notice of Appearance in the case and "after it had appeared to realize the alleged conflict" before moving to withdraw. (AB. at 36) This position completely fails to take into account the State's knowledge of the life-threatening accident suffered by Paul Kalil, the initial counsel designated by Mr. Dupree to represent Mr. Braddy, while he was on vacation in South Africa and his subsequent replacement by Roseanne Eckert. That replacement took place eleven (11) months after this Court designated CCRC South as counsel. Along with the replacement of lead counsel in mid-stream there was a subsequent and simultaneous refusal by Florida Department of Corrections to allow out-of-state psychological experts, retained by CCRC South, into the prison to evaluate clients including Mr. Braddy and to subsequently consult with counsel, a delay that began on July 9, 2014 and only ended with this Court's Order on May 14, 2015. (Supp. PCR. 201-03)

The Answer contends that nothing that Mr. Dupree said during his appearance as an officer of the court at the single truncated hearing concerning his prior involvement in one of Mr. Braddy's cases provided any support for the existence of an actual conflict of interest or the presumption of prejudice that was argued in the initial brief. (AB. at 36-39) In fact, both Mr. Dupree and Mr. Braddy set forth their argument for an actual conflict of interest in straight-forward terms during the brief March 21, 2014 hearing:

> MR. DUPREE: I think the problem that I have is this and more from Mr. Braddy's point of view. I think if you look at this case and the case history, which I'm sure Your Honor is aware of, I just don't want to be in a position down four or five, six months down the road where this issue gets raised. I want to raise it as quickly as I can with the Court.
>
> The conflict that I see, really Mr. Braddy's conflict, literally I'm one of the people that prosecuted him in the past. If something goes wrong in this case or something needs to be handle[d] on the case later down the road, if Your Honor denies our motion that there's an adverse ruling, if there's an issue that is out there and that it's going to be raised that somehow I was once the prosecutor in the case that I tried to prosecute him and I'm now doing my job the best possible job for Mr. Braddy in order to overturn his conviction [and] his death sentence.
>
> I just think this is something the Court should be concerned about, well he is concerned about it. This certainly creates a conflict for me because I was involved with the prosecutors in Mr. Braddy's case, and I just don't feel comfortable about that.
>
> ***
>
> But in this case, I was directly involved in the prosecution of the case. I think that's my biggest concern and I think that's also a concern for Mr. Braddy is that once I prosecuted him.
>
> I do think it is an actual conflict. I understand what 703 says and I understand the rules change all the time but I do believe that is an actual conflict. If I was a prosecutor at the time and later on now I'm defending him, that's just so many problems with that, Judge.

(PCR. 2589-90). Mr. Braddy was so concerned about the conflict after it was revealed to him by counsel that he indicated to the Court during the hearing that he

was willing to risk waiving his federal court rights in order to get substitute counsel appointed for state court purposes. (PCR. 2582-83) He indicated that he did not wish to waive any conflict and wished to proceed on CCRC South's motion to withdraw:

> THE DEFENDANT: Yes. I think I will go ahead and proceed. I'm placed between a rock and a hard place. If something happens on this and something comes up and I don't win, then I won't be able to say that counsel was, that there was a conflict and if I do, I'm placed in a spot where I'm not in advantage either way.
>
> THE COURT: Okay. So what I'm hearing is that you are not willing to waive the conflict and you want to proceed forward with the motion to withdraw, correct?
>
> THE DEFENDANT: Yes, ma'am.

(PCR. 2584-85) The State argued during the hearing that prior representation did not equal a "conflicting interest" and did not count as a conflict especially considering the remoteness in time of the prior representation. (PCR. 2587-88) Counsel below pled that no relationship of trust could be established once Mr. Braddy was advised by counsel that Mr. Dupree had been a supervising ASA on one of his priors. The Answer asserts that whether this is true or not, it is irrelevant because the Supreme Court has rejected any Sixth Amendment guarantee of a 'meaningful relationship' between an accused and his counsel in *Morris v. Slappy*, 461 U.S. 1, 14 (1983). (AB. at 41) However, the concurrence in that opinion, joined by Justices Brennan and Marshall, points to other factors at play that are material considerations beyond the

9th Circuit's finding, which was rejected by the majority, that the 6th amendment required a "meaningful relationship" between attorney and client. *Id.* at 21.

> Given the importance of counsel to the presentation of an effective defense, it should be obvious that a defendant has *21 an interest in his relationship with his attorney. As we noted in *Faretta v. California*, 422 U.S. 806, 834, 95 S.Ct. 2525, 2540, 45 L.Ed.2d 562 (1975), "[t]he right to defend is personal." It is the defendant's interests, and freedom, which are at stake. Counsel is provided to assist the defendant in presenting his defense, but in order to do so effectively the attorney must work closely with the defendant in formulating defense strategy. This may require the defendant to disclose embarrassing and intimate information to his attorney. In view of the importance of uninhibited communication between a defendant and his attorney, attorney-client communications generally are privileged. See *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981). Moreover, counsel is likely to have to make a number of crucial decisions throughout the proceedings on a range of subjects that may require consultation with the defendant. **These decisions can best be made, and counsel's duties most effectively discharged, if the attorney and the defendant have a relationship characterized by trust and confidence**.[4] (The American Bar Association Standards for Criminal Justice state that "[d]efense counsel should seek to establish a relationship of trust and confidence with the accused." ABA Standards for Criminal Justice 4–3.1(a) (2d ed. 1980) (hereinafter ABA Standards). The Standards also suggest that "[n]othing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence." *Id.*, at 4•29 (commentary)).

Morris v. Slappy, 461 U.S. 1, 20-21, 103 S. Ct. 1610, 1621, 75 L. Ed. 2d 610 (1983) (emphasis added). That kind of relationship is clearly lacking in the instant case. In

Florida postconviction there is a specific statutory basis for inquiring beyond the surface when a client makes a complaint about the quality and effectiveness of appointed postconviction counsel. *See* Fla. Stat. § 27.711 (12)[2]. There was no inquiry by the lower court into any allegations by Mr. Braddy regarding the performance of assigned postconviction counsel at the hearing.

The State also argued that, "as a result, the Florida court[s] have repeatedly held that a lack of confidence and trust in an attorney is not a basis to discharge the attorney. *Schoenwetter v. State*, 931 So. 2d 857, 870 (Fla. 2006)." (AB. at 41) Although the case cited involved, as in the instant case, a motion to withdraw by counsel in a death penalty case, the instant case does not involve an "accused" in a pre-trial or trial situation as in *Schoenwetter*, but rather a postconviction circumstance. And in Mr. Braddy's case there was ample evidence before the lower court of a series of circumstances, noted in the Initial Brief, that prevented counsel

[2] The court shall monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation. The court shall also receive and evaluate allegations that are made regarding the performance of assigned counsel. The Justice Administrative Commission, the Department of Legal Affairs, or any interested person may advise the court of any circumstance that could affect the quality of representation, including, but not limited to, false or fraudulent billing, misconduct, failure to meet continuing legal education requirements, solicitation to receive compensation from the capital defendant, or failure to file appropriate motions in a timely manner. Fla. Stat. Ann. § 27.711 (12) (West)

from providing effective assistance, including Braddy's refusal to cooperate in seeing defense experts, etc.

> Based in part on the trial court's rulings on the victim impact evidence, defense counsel filed a motion to withdraw as counsel for Schoenwetter.[7] Defense counsel stated they would not have the defense controlled by Schoenwetter. The trial court denied the motion and in so doing noted that the rulings on the victim impact evidence were based on the fact that the evidence as limited was admissible under the statute. Moreover, the trial court attempted to alleviate any concerns by having the defendant evaluated despite the trial court's belief that no additional competency evaluation was necessary. The trial court properly denied the motion to withdraw. ***This record does not demonstrate that the attorney-client relationship had deteriorated to the point where counsel could no longer give effective aid in the fair representation of the defense***. *See Wilson v. State,* 753 So.2d 683, 688 (Fla. 3d DCA 2000). General loss of confidence or trust standing alone will not support withdrawal of counsel. *See Johnston v. State,* 497 So.2d 863, 868 (Fla.1986).

Schoenwetter v. State, 931 So. 2d 857, 870 (Fla. 2006) (emphasis added).

Mr. Braddy's case is distinguishable. CCRC South made an affirmative representation that an actual conflict of interest existed as between the agency and the client, a perception affirmed by the client himself. The State's Answer says that there was no showing of an adverse effect on attorney performance, therefore there can be no actual conflict of interest. *Mickens v. Taylor*, 535 US 162, 171 (2002). (AB at 40).

A review of Mr. Dupree's statements at the March 21, 2014 hearing on the motion to withdraw indicates that he was a prosecutor in Broward County from 1983-87 and was a felony trial supervisor who supervised the division that Mr. Braddy's case came up in. (PCR. 2585) He indicated that he supervised 10-15 lawyers. (PCR. at 2587) Mr. Dupree described the circumstances in which he realized there was a conflict:

> There was a plea agreement that was done. I would had to signed off on the plea agreement at the time that it was done; I discovered this literally down the road, apparently I don't have the memory that Ms. Jaggard does. I don't remember every case I did 30 years ago, I possibly did thousands of people and I've supervised cases where there were ten, twenty thousands of people. It only came up because of one of the letters that Mr. Braddy sent to us indicated that he had a Broward County case, which I did not know at the time; it was during the time that I worked at the State Attorney's Office. I examined that as I saw I was involved in the case, so I wanted to bring that to Mr. Braddy's attention which I did.
>
> ***
>
> If somebody wanted a plea agreement, that person would have to come to me and get me to review the case with me and I would have to sign off on the plea agreement. Frankly, it was my decision that would allow that plea agreement whether to go forward or not. Unfortunately, the prosecutor on the case was Mr. Wilson and Mr. Wilson has since died. Frankly, I didn't realize who Mr. Braddy was, to be honest with you, but when I saw that I went down to the State Attorney's Office and had the filed pulled out for me and I reviewed the files and everything and I did sign off on the plea agreement.

(PCR. 2585; 2586) The Answer briefly describes this testimony by stating that "Mr. Dupree sought to justify the delay by stating that he did not remember having had any involvement in Defendant's prior case and admitted to being able to access the prosecution files on the prior case." (PCR. 2585-86)

Despite Mr. Dupree's testimony, the Answer argues that CCRC South was on notice that Mr. Dupree had been involved in Mr. Braddy's prior violent felony aggravator cases because sufficient information was available in the direct appeal opinion at the time of its provisional appointment. (AB at 42) *See Braddy v. State*, 111 So. 3d 810, 826-27, n.1, 858-60 (Fla. 2012). Although the account of the crimes that Braddy was convicted of that is included in this Court's opinion is extensive, it does not include the names of prosecutors or specific information that necessarily would have alerted Mr. Dupree to what the State appears to consider to be his only "ministerial" role in the case:

> 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 *827 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[1] 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.

For mitigation evidence, the defense presented expert testimony regarding Braddy's ability to adjust to life in prison. Additionally, the defense presented testimony from Braddy's family and a close friend to establish that Braddy was a good husband and father and that his death would be hard on the family. Braddy's father testified that out of his six sons, Braddy was the only one who gave him trouble but that he loved Braddy nonetheless. Cyteria testified that despite Braddy's shortcomings, she still considered him a good husband and father. She denied having knowledge of any extramarital affairs in which Braddy might have been involved. All of Braddy's family members testified that his death would be hard on them individually.

Braddy v. State, 111 So. 3d 810, 826-27 (Fla. 2012)

Braddy next contends that the trial court erred by allowing the State to introduce at his penalty phase trial inadmissible hearsay evidence of his prior violent felony convictions. Over Braddy's objection,[11] the trial court allowed the State to introduce—through the testimony of Detective Suco—the arrest affidavit and plea colloquy from Braddy's convictions for armed burglary, robbery, and kidnapping related to his 1984 crimes against the Coles. We review the trial court's decision to admit evidence under an abuse of discretion standard. *Hudson,* 992 So.2d at 107. "In determining whether a trial court has abused its discretion in admitting evidence of prior violent felony convictions, this Court looks at the tenor of the witnesses' testimony and whether this testimony became a central feature of the penalty phase." *Franklin v. State,* 965 So.2d 79, 96 (Fla.2007) (citing *Cox v. State,* 819 So.2d 705, 715–16 (Fla.2002)). We hold that the trial court did not abuse its discretion by allowing the State to introduce the arrest report, affidavit, and plea colloquy from Braddy's conviction for his crimes against the Coles.

79 In setting forth the procedural rules governing penalty phase trials for defendants sentenced to death or life

imprisonment for capital felonies, section 921.141(1) provides, in relevant part:

In the [penalty phase] proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant *and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6).* Any such evidence which the court deems to have probative value may be received, *regardless of its admissibility under the exclusionary rules of evidence, provided the *859 defendant is accorded a fair opportunity to rebut any hearsay statements.*

§ 921.141(1), Fla. Stat. (2006) (emphasis added). The evidence challenged by Braddy was presented by the State in order to establish that Braddy "was previously convicted of ... a felony involving the use or threat of violence to the person," an enumerated aggravating circumstance under section 921.141(5). In overruling Braddy's objection to the evidence, the trial court expressly noted that the documents were admissible as "evidence of a prior violent crime." The trial court also provided Braddy a fair opportunity to rebut the hearsay statements contained in the evidence, ruling that defense counsel could introduce depositions given by the Coles in order to challenge the evidence presented through Detective Suco.

Moreover, in presenting the affidavit and plea colloquy, Detective Suco simply read the details of the crime as recorded in the arrest affidavit. There is no indication that Detective Suco made any kind of emotional display. Nor can it be said that the testimony was the central feature of the penalty phase, because the State presented evidence of two additional prior violent crimes as well as victim impact testimony, including by Shandelle. The trial court was thus well within its discretion in admitting the arrest affidavit and plea colloquy. *See Franklin,* 965 So.2d at 96–97 (holding that evidence of prior violent felony was properly admitted where there was no evidence of

emotional display by witnesses and testimony was not central feature of penalty phase); *Cox,* 819 So.2d at 715–16 (holding that evidence of prior violent felonies was properly admitted where "witnesses tersely related the crimes committed against them, and each was able to do so without any emotional display," and prior offenses did not become a central feature of penalty phase).

Braddy also argues that the trial court's ruling violated his constitutional right to confront his accusers. Because Braddy failed to object to the evidence on this ground at trial, the issue is unpreserved and we review it for fundamental error.

8081 While it is true that Braddy's "Sixth Amendment right of confrontation applie[d] to all three phases of [his] capital trial," *Rodriguez v. State,* 753 So.2d 29, 43 (Fla.2000), we have "previously recognized that admissions by acquiescence or silence do not implicate the Confrontation Clause." *Globe v. State,* 877 So.2d 663, 672 (Fla.2004). A guilty plea includes a confession to the acts which constitute the crime. *McCrae v. State,* 395 So.2d 1145, 1154 (Fla.1980) (quoting *Boykin v. Ala.,* 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969): "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction.").

82 Braddy claims that in pleading guilty, neither he nor his then attorney stipulated to the truthfulness or admissibility of the hearsay within the affidavit. Braddy points specifically to the following exchange, which occurred during the hearing in which Braddy pleaded guilty to the charges laid against him for his crimes against the Coles:

[THE COURT:] Will you accept as a factual basis the probable cause affidavit the police brought out?

THE DEFENDANT: I haven't seen it.

[DEFENSE COUNSEL]: But, Judge, yes, we stipulate to the probable cause affidavit as well as the Information in

> terms of what the State would present at trial against Mr. Braddy.
>
> Despite Braddy's contention that his then counsel's stipulation to the arrest affidavit did not constitute a stipulation to "the *860 truthfulness or admissibility" of the facts contained therein, the law is nonetheless clear "that a plea of guilty is an in-court confession." *Robinson v. State*, 373 So.2d 898, 902 (Fla.1979). Because Braddy does not contest the validity of his guilty plea, the language by which Braddy—through his counsel—stipulated to the facts contained in the affidavit is irrelevant. The trial court's ruling did not violate Braddy's Confrontation Clause rights and no fundamental error therefore occurred.

Braddy v. State, 111 So. 3d 810, 858-60 (Fla. 2012). The Answer points to an improper citation in the Initial Brief to *People v. Abar*, 786 N.E. 2d 1255, 1259-63 (N.Y. 2003) (Smith, J., dissenting), and points out that the majority opinion actually supports the denial of the motion to withdraw. (AB. at 44-45) Counsel apologizes for that mistake. In that regard, however, the fact is that the extent of Mr. Dupree's actions as a prosecutor in the Braddy prior are not dissimilar to the actions of the supervising prosecutor that established an actual conflict of interest in the recently decided case of *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016). As the Supreme Court notes:

> During the trial, the prosecutor requested permission from her supervisors in the district attorney's office to seek the death penalty against Williams. To support the request, she prepared a memorandum setting forth the details of the crime, information supporting two statutory aggravating factors, and facts in mitigation. After reviewing the

> memorandum, the then district attorney of Philadelphia, Ronald Castille, wrote this note at the bottom of the document: "Approved to proceed on the death penalty." App. 426a.

Williams at 1903. More specifically, in *Williams*, the Supreme Court found that supervising prosecutor Castille, who later became Chief Justice Castille of the Pennsylvania Supreme Court, had a "significant, personal involvement as a prosecutor in a critical trial decision" when he "wrote [a] note at the bottom of the document" to authorize his subordinate to seek the death penalty. *Id.* at 1904. In *Williams*, as in Mr. Braddy's case, the State contended that there was no significant involvement by the supervising prosecutor, and as the Supreme Court describes in the opinion, specifically argued that the trial prosecutor's action in *Williams* "amounted to a brief administrative act," *Id.* Justice Thomas agreed with this position in his dissent, noting that "both the Chief of the Homicide Unit and the District Attorney, Ronald Castille, approved the trial prosecutor's decision to seek the death penalty by signing a piece of paper. See App. 426. That was Castille's only involvement in Williams' criminal case." *Id*. at 1915, Thomas, J. *dissenting*.

In *Williams*, the actual conflict of interest was established when, many years later, Chief Justice Castille refused to recuse himself from decisions concerning issues regarding Mr. Williams that were then before the Pennsylvania Supreme Court. The point here is not to claim that the Constitutional standard for judicial recusal is the same as the standard or requirements in Florida for supporting the

existence of an actual conflict of interest where postconviction counsel like Mr. Dupree had prior involvement as a prosecutor in a case used as an aggravating factor in the defendant's death penalty case. Rather, *Williams* here stands for the proposition that the kind of involvement that Mr. Dupree had as a supervising prosecutor in Mr. Braddy's case was not *de minimus* and can support an actual conflct.

The Answer says that Mr. Braddy's argument concerning the failure to hold an evidentiary hearing on the conflict issue and the lower court's failure to allow CCRC South to withdraw was undermined where no request was made to present any evidence at the hearing on CCRC-South's motion to withdraw. (PCR. 2585-92) This position ignores Mr. Braddy's subsequent discharge of counsel, which was ratified by the lower court on June 30, 2014. (PCR. 2803-40) The State's argument that CCRC South failed to file a motion for rehearing is also impacted by the later discharge of counsel. (AB. at 43)

The Answer says there was no abuse of discretion by the trial court in failing to hold a *Nelson* hearing. *See Guardado v. State*, 965 So. 2d 108, 115 (Fla. 2007) (this Court applies an abuse of discretion standard regarding holding *Nelson* inquiries). Mr. Braddy filed a *pro se* motion to discharge CCRC South counsel in this Court on March 3, 2015, and this Court relinquished jurisdiction back to the state circuit court. The Answer states that no *Nelson* hearing in circuit court was

necessary where the lower court had previously denied the same motion on January 7, 2015. (AB. at 47) The failure to further inquire was an abuse of discretion by the trial court that prejudiced Mr. Braddy's attempt to acquire conflict-free counsel. Pursuant to Fla. Stat. § 27.711 (12), allegations concerning the performance of postconviction counsel should have been heard.

This Court should also have relinquished jurisdiction so that the lower court could conduct a *Nelson* hearing concerning a motion to discharge counsel that was filed *pro se* by Mr. Braddy on October 21, 2015 in this Court. (AB. at 46) "[A] review of the motion shows, Defendant's complaints concerned the conflict alleged in CCRC-South's motion to withdraw, his counsel's communication with him and his disagreements with counsel regarding strategic decisions. (PCR. 2118-26)." (AB. 47-48) The failure to further inquire was an abuse of discretion by the trial court that prejudiced Mr. Braddy's attempt to acquire conflict-free counsel. As noted *supra*, pursuant to Fla. Stat. § 27.711 (12), allegations concerning the performance of postconviction counsel should have been heard.

ARGUMENT III

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.

In both his Initial Rule 3.851 and his Successive and/or Amendment to the Initial Rule 3.851 Mr. Braddy alleged that trial counsel was ineffective during the penalty phase rendering his sentence fundamentally unfair depriving him of the protections 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); and *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). The United States Supreme Court has consistently affirmed the right of a capital defendant to the effective assistance of counsel and emphasized counsel's duties in a capital case. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Wiggins v. Smith*, 539 U.S. 510 (2003). With respect to his claims of ineffective assistance of counsel, Mr. Braddy can establish both of *Strickland's* prongs—deficient performance and prejudice which undermined the adversarial testing process at trial.

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.

On July 16, 2015, counsel for Mr. Braddy filed a motion to relinquish jurisdiction in this Court, pursuant to *Tompkins v. State*, 894 So. 2d 857 (Fla. 2005), to pursue litigation of a new *successive* Rule 3.851 motion with an amended penalty phase ineffective assistance of counsel claim that included information obtained from expert evaluations finally undertaken following successful litigation with the Department of Corrections over the DOC's failure to allow out-of-state expert psychologists into the prison to see Mr. Braddy and other CCRC South clients.

The Rule 3.851 motion was filed in circuit court on July 13, 2015. (Supp. PCR 1-48) After this Court denied the motion to relinquish jurisdiction on July 23, 2015, instead of staying and abeying the successive motion pursuant to *Tompkins*, the

lower court dismissed the successive Rule 3.851 motion in an Order dated July 27, 2015. The Order stated in pertinent part:

> This Cause having come before the court on Defendant's Successive Motion to Vacate Judgments of Conviction and Sentence filed on July 13, 2015, and Florida Supreme Court having denied the Motion to Relinquish Jurisdiction on July 23, 2015, finds as follows: 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). Wherefore, it is Ordered and Adjudged that Defendant's Successive Motion to Vacate Judments and Sentence is Dismissed.

A motion for rehearing filed on July 28, 2015, was denied by the lower court on July 31, 2015. Counsel then filed a notice of appeal of the dismissed Rule 3.851 motion in the circuit court on August 3, 2015, which was docketed in this Court as a supplement to the instant appeal on August 7, 2015.

Thereafter, counsel filed a motion to supplement the instant record on appeal with the dismissed Rule 3.851 motion and attachments, the order of dismissal and several expert reports that and competency evaluations of Mr. Braddy that were material to the claims included therein. This Court allowed the supplementation of the record in an Order dated December 21, 2015. (Supp. PCR 1142-50) The Initial Brief in the instant appeal relied on the allegations in that successive brief, as noted in the Answer Brief. No merits ruling and indeed no case management conference was held below on the dismissed Rule 3.851 motion, and this Court should remand

for both before proceeding further based on the state's position that the issues and claims included in the July 13, 2015 motion are not before this Court.

In its Answer Brief, the State falsely asserts that "…, Defendant does present any argument regarding why the lower court's ruling was erroneous." (AB. At 63) Presuming that the State intended to argue that Mr. Braddy "[didn't] present any argument" in his initial brief as to why the lower court erred in its summary denial of Mr. Braddy's penalty phase ineffective of counsel claims, the State is incorrect. In his initial brief, Mr. Braddy argued that he is entitled to a remand to the circuit court for an evidentiary hearing on his claims of ineffective assistance of counsel. In support of that argument, Mr. Braddy highlighted numerous instances in which trial counsel was deficient in performance, and had counsel not been deficient, there is a reasonable probability that the jury would have recommended a life sentence.

First, Mr. Braddy argued that trial counsel was deficient in failing to fully investigate before deciding on a strategy for the penalty phase:

> 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).

(IB. at 49) (emphasis added) As he argued in his initial brief:

> …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."

(IB. at 51) (emphasis added) Trial counsel's theory that their client was a "good guy" failed to present the jury with the necessary evidence needed to understand much of Mr. Braddy's criminal past...specifically his 1984 crime spree. Subsequent to the jury's finding that Mr. Braddy was guilty of the 1998 crimes, the "good guy" story presented by the defense lacked credibility in light of the facts of the prior violent felonies.

Had trial counsel performed an adequate mitigation investigation he would have realized that a "good guy" defense theory would deprive the jury of critical information needed to understand Mr. Braddy. Had the jury been presented with a clearer and more complete picture of Mr. Braddy, they would have been able to make sense of how this man–a man who has a loving and caring family–could commit the crimes he was convicted of in 1984 and 1988. As was developed in postconviction, even in light of Mr. Braddy's refusal to cooperate, Dr. Schaich was able to diagnose Mr. Braddy with Paranoid Personality Disorder and Rule-Out Bipolar Disorder 1. With this knowledge, the jury would have had a better understanding of Mr. Braddy and there is a reasonable probability that the balance of aggravating and mitigating

circumstances would have been different, or at least, that the deficiencies substantially impaired confidence in the outcome of the proceedings. *Strickland* at 695; *Wiggins* at 534.

Next, Mr. Braddy argued that there was no record waiver of mitigation. 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). 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).

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) (Fla. Stat. 1997). *See 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 and as a result, Mr. Braddy was prejudiced.

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 Fla. Stat. § 921.141 (7)(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)

The State’s assertion that Mr. Braddy failed to present any argument in support of his claim that he is entitled to a remand for an evidentiary hearing on his penalty phase issues is disingenuous. As demonstrated in both his initial brief, and reiterated in this reply brief, Mr. Braddy has clearly made argument in support of his position that the lower court erred in summarily denying his penalty phase

ineffective assistance of counsel claims and that he is entitled to a remand for an evidentiary hearing below.

Had trial counsel adequately investigated, he would have been aware that Mr. Braddy suffers from serious mental illness and would have recognized that presenting a "good guy" defense theory was deficient in performance ultimately prejudicing Mr. Braddy.

ARGUMENT IV

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.

In his Rule 3.851 motion, Mr. Braddy alleged that both challenged and unchallenged prosecutorial misconduct during his 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); and *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). The United States Supreme Court has consistently affirmed the right of a capital defendant to the effective assistance of counsel and emphasized counsel's duties in a capital case. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Wiggins v. Smith*, 539 U.S. 510 (2003). With respect to his claims of ineffective assistance of counsel, Mr. Braddy

can establish both of *Strickland's* prongs—deficient performance and prejudice which undermined the adversarial testing process at trial.

Mr. Braddy was denied a reliable adversarial testing. In order to obtain a new trial, Mr. Braddy must show that his attorneys rendered deficient performance and that he was prejudiced by that performance. *See Strickland*. Had trial counsel effectively represented Mr. Braddy, there is a reasonable probability that the outcome of the case would have been different. The result of Mr. Braddy's trial is unreliable due to trial counsel's deficient performance in failing to make objections to improper and misleading comments and arguments made by the State.

In its Answer Brief, the State incorrectly asserts that Mr. Braddy's appeal to this Court of the lower court's denial of his claims that the prosecutor engaged in improper conduct during his trial "are not properly before this Court and are meritless." (AB. at 74) The State continues to distort Mr. Braddy's arguments by asserting that "on appeal, Defendant attempts to claim that he was prejudice [sic] because the result of his direct appeal would have been different had his trial counsel objected and *makes no mention of any alleged effect on the results of either the guilt or penalty phase.*" (AB. at 75) (emphasis added) The State completely fails to comprehend the argument made to the lower court and to this Court and comes to the illogical conclusion that Mr. Braddy is somehow "alter[ing] the claims on appeal". (AB. At 75)

In his Rule 3.851, Mr. Braddy argued to the lower court that:

> ***…trial counsel was ineffective in failing to object to the comments and/or preserve the issue for appeal.***
>
> > 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. Failure to preserve an issue may result in the client being executed even though reversible error occurred at trial. For this reason, trial counsel in a death penalty case must be especially aware not only of strategies for winning at trial, but also of the heightened need to fully preserve all potential issues for later 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).

(Supp. PCR. at 101) (emphasis added) He goes on to list numerous instances in which the prosecutor "marshalled a host of improper arguments designed to deprive Harrel Braddy of a fair trial." *Id*. He further acknowledged that this Court "found that trial counsel failed to preserve the issue for appeal" ***and as a result of trial counsel's failure, Mr. Braddy was prejudiced***. *Id.* (emphasis added)

Contrary to the State's mistaken belief that Mr. Braddy failed to allege an effect on the results of either the guilt phase or the penalty phase, in his Initial Brief, Mr. Braddy pointed out numerous instances in which Assistant State Attorney Abbe Rifkin's repeated improper comments contributed not only to the guilty verdict, but also to the death recommendation.

In his Initial Brief to this Court, Mr. Braddy again made the same argument that was made to the lower court. That is, he argued that trial counsel's performance in failing to object to improper comments was deficient pursuant to *Strickland*, and as a result, he was prejudiced. Specifically, he argued that:

> ***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.

(IB. at 69) (emphasis added) On direct appeal, Mr. Braddy challenged the comments made by the prosecutor in and of themselves. Whereas here, he argues that ***trial counsel's failure to object to the prosecutor's inflammatory arguments throughout the trial was deficient performance under Strickland***.[3] He asserted that ***"[b]ut for trial counsel's repeated failure to interpose timely and/or specific objections*** to Miami–Dade Assistant State Attorney Abbe Rifkin's repeated improper comments

[3] "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).

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*." (IB. at 69) (emphasis added) Trial counsel's failure to object to improper comments resulted in this Court rejecting Mr. Braddy's claims on direct appeal…the effect being that Mr. Braddy was denied a new trial that he would have been entitled to under this Court's case law had trial counsel not been deficient in his performance.

In his Initial Brief, He pointed to the guilt phase opening statement where ASA Rifkin improperly claimed that the victim was alive when she was attacked by the alligator. (IB. at 69-70) He also pointed to multiple instances in her guilt phase closing argument where she denigrated the defense: 1) when she "accused defense counsel of misleading the jury saying, 'I mean their whole thing is manipulation, misrepresentation,' and falsely claimed they had misstated the evidence."; and 2) by arguing to the jury that "[a]gain and again and again and again, from day one, this defendant has been trying to blame this victim. He's been pinning [it all on] Shandelle Maycock. He's doing it again. He's trying to blame Shandelle Maycock for killing her child. If she hadn't jumped out of the car, she wouldn't – the child wouldn't have died…". (IB. at 70) She accused Mr. Braddy of manipulation and stonewalling for exercising his Fourth Amendment rights. *Id*. Mr. Braddy further argued that she impermissibly appealed to the jurors' emotions by emphasizing that

"it would be a 'miscarriage of justice' if they were to find him guilty of a lesser-included offenses (T. 2683)." *Id*.; *see generally Cardona*.

Mr. Braddy clearly made numerous arguments[4] that trial counsel was deficient in failing to object to improper comments, thus prejudicing Mr. Braddy, and had trial counsel not been deficient and properly preserved the issue for direct appeal, Mr. Braddy would have been granted a new trial. Therefore, the fact that trial counsel was ***deficient*** in his performance for failing to make proper objections, which resulted in this Court's rejection of Mr. Braddy's challenge on direct appeal to the improper comments, was the cause for the "alleged effect" that the State seems to believe is lacking in the Initial Brief. (AB. at 75) That effect being that Mr. Braddy was ***prejudiced*** as a result of the deficient performance.

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. 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. The State's assertion that Mr. Braddy has attempted to "alter the claims on appeal" is a red herring meant only to distract this Court from the argument that was actually made, and rejected, below and appealed to this

[4] Mr. Braddy has not reiterated all arguments raised in his Initial Brief in this Reply and does not waive any arguments not specifically addressed in this Reply.

Court…the argument that trial counsel was deficient in failing to object to the improper comments made by the prosecutor and that Mr. Braddy was prejudiced by that deficient performance.

This Court has long condemned the types of arguments made in this case:

> As is evidenced by the case law, this type of comment has been considered improper under clearly established Florida law for over three decades, ***including in cases arising out of Miami–Dade County, the same location where Cardona's retrial was held.*** *See Edwards*, 428 So. 2d at 359. As the Third District stated in *Edwards*:
>
> > The prosecutor's argument was an improper appeal to the jury for sympathy for the wife and children of the victim, the natural effect of which would be hostile emotions toward the accused. It is the responsibility of the prosecutor to seek a verdict based on the evidence without indulging in appeals to sympathy, bias, passion, or prejudice. *Harper v. State*, 411 So. 2d 235 (Fla. 3d DCA 1982).

Cardona v. State, 185 So. 3d 514, 522 (Fla. 2016) (emphasis added) (citing *Edwards v. State*, 428 So. 2d 357 (Fla. 3d DCA 1983)). Notably, the *Cardona* case and the *Edwards* case were prosecuted by the same State Attorney's Office that prosecuted Mr. Braddy. In both the *Cardona* case and the *Edwards* case, the prosecutor's comments were found to be prejudicial to the defendant and in both cases, remanded for a new trial. Mr. Braddy was also prejudiced by the same sort of improper conduct found to be prejudicial in *Cardona* and *Edwards*. 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. Those challenges were not preserved

for appeal and Mr. Braddy was denied a new trial, or at least, a new sentencing hearing on direct appeal, therefore trial counsel was deficient in his performance and as a result, Mr. Braddy was prejudiced.

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.

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 5th day of July, 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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