IN THE SUPREME COURT OF FLORIDA

CASE NO. SC-03-1312

ROBERT LAVERN HENRY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT I

MR. HENRY WAS NOT AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS 1988 TRIAL AND WAS DENIED A FULL AND FAIR EVIDENTIARY HEARING ON THE ISSUE

a. The lack of a full and fair hearing

In his Initial Brief Mr. Henry argued that he was denied a full and fair hearing on the limited issue granted by the lower court. The lower court granted a hearing on the failure of trial counsel to develop and present mitigation including mental health mitigation. The lower court however refused to allow Mr. Henry to present the findings of the mental health experts who had evaluated Mr. Henry for the purpose of his Rule 3.850 hearing on the purported grounds that he was conducting the hearing on only the deficient performance prong of the Strickland[1] test for ineffective assistance of counsel and not the prejudice prong. The lower court asserted that any findings by the post conviction experts would relate to prejudice only. The State contends that the hearing was full and fair because there was no new evidence to develop. Both the State and the lower court are in error.

The State quotes at length from the case of Wiggins v.

[1] Strickland v. Washington, 466 U.S. 668 (1984).

Smith, 123 S. Ct. 2257 (2003) in support of its contention that the hearing was full and fair. However the State ignores the basic principle explained in Wiggins of the duty to investigate all reasonably available evidence. Wiggins specifically addresses the failure by trial counsel to investigate a capital defendant's social history for the purpose of developing potential mitigation. It clarifies the fact that applicable professional standards require such investigation. Applicable professional standards are set forth in the American Bar Association Standards of Criminal Justice:

> Counsel's conduct . . .fell short of the standards for capital defense work articulated by the American Bar Association (ABA) --standards to which we have long referred as guides to determining what is reasonable. Strickland, supra at 688; Williams v. Taylor, supra at 396. The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor@. (ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases[2] 11.41 (C) p. 93 (1989) (emphasis added).

(Wiggins v. Smith, 123 S. Ct at 2536-2537).

Mr. Henry wished to show that there existed an abundance

[2] Henceforth AABA Guidelines@.

of reasonably available statutory and non statutory mental health mitigation, had trial counsel only bothered to look for it. Mr. Henry was prepared to present the testimony of Dr. Hyde, Dr. Dudley and Dr. Crown as to their findings. These findings would have supported the existence of statutory and non statutory mental health mitigation. They would also have established that the mitigation was Areasonably available@ at the time of Mr. Henry=s capital trial. They would have established that Mr. Henry=s neurological, neuropsychological and psychiatric deficits were long standing, and would have easily been uncovered by a proper evaluation at the time of trial. And they would have established the connection between Mr. Henry=s unstable and chaotic childhood and the subsequent post traumatic stress disorder and severe depression which characterized his adult life, and the substance abuse which he used to attempt to self medicate. Trial counsel=s failure to develop a social history and present it to the mental health expert retained by his predecessor therefore precluded the proper investigation and development of mental health mitigation, as the testimony of Mr. Henry=s mental health experts would demonstrate. The lower court=s prohibition of Mr. Henry presenting such findings meant that he was unable to show the large quantity of reasonably available mitigation that was available to trial counsel. The existence of

reasonably available mitigation is relevant to deficient performance as well as prejudice.

Mr. Henry noted the case of State v. Lewis, 838 So. 2d 1102 (Fla. 2002) which supports the principle that deficient performance can be shown by presenting the Ainformation regarding [Mr. Henry] was available if a reasonable investigation had been conducted.@ Lewis at 1110. The State=s attempts to distinguish Lewis from the instant case does so purely on the basis of the type of mitigation adduced at the Lewis evidentiary hearing. This is a distinction without a difference. The issue here is whether the mental health mitigation was Areasonably available@. That cannot be shown without presentation of the mental health evidence itself.

The State also attempts to distinguish the instant case from Wiggins in this regard. Again, the attempt is misplaced. The State argues that to the extent that Mr. Henry=s mental health mitigation relies on the use of drugs, it was Mr. Henry who precluded the use of that evidence. Answer brief at 44. However, this argument is flawed for two reasons. First of all, there is significant mental health evidence as to brain damage, neurological defect and psychiatric illness - including depression and post traumatic stress disorder - that is not related to Mr. Henry=s drug use, a fact that the State omits to mention. See PCR. 1366. This evidence was

available, and Mr. Henry did not prejudice the investigation of it, as evidenced by his cooperation with the evaluations that were carried out by Dr. Block Garfield and the court appointed competency psychologists. However the State=s argument regarding Mr. Henry=s drug use is also contra to the principles established by Wiggins itself. Wiggins is clear that the ABA Guidelines supply the guide to what is reasonable in investigating mitigation. The Guidelines specifically refer to cases such as Mr. Henry=s in which counsel believes that the client does not wish mitigation to be investigated. ABA Guideline 10.7 (A) (2003) states in pertinent part that ACounsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty@. Guideline 10.7(A)(2) further states that AThe investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be conducted or presented@. Furthermore, as the Commentary to the 2003 ABA Guidelines explains:

> Counsel should bear in mind that much of the information that must be elicited for the sentencing phase investigation is very personal and may be extremely difficult for the client to discuss. Topics such as childhood sexual abuse should therefore not be broached in an initial interview. Obtaining such information typically requires overcoming considerable barriers such as shame, denial and repression as

> well as other mental or emotional impairments from which the client may suffer.
>
> As noted supra in the text accompanying Note 101, a mitigation specialist who is trained to recognize and overcome these barriers and who has the skill to help the client cope with the emotional impact of such disclosures is invaluable in conducting this aspect of the investigation.

(Commentary to ABA Guideline 10.7 p. 84 (2003))[3]

Thus it is clear that any purported waiver or denial of drug use by Mr. Henry in no way prevents such evidence from being Areasonably available@ pursuant to Wiggins.

This Court knows full well that the establishment of deficient performance in post conviction requires that post conviction counsel investigate the evidence that would have been reasonably available to trial counsel. This includes

[3] The fact that Mr. Henry was tried in 1990 before the promulgation of the 2003 Guidelines is not a bar to their application to the instant case. As the Sixth Circuit explained in Hamblin v. Mitchell, 354 F. 3d 482, (2003) ANew ABA Guidelines adopted in 2003 simply explain in greater detail than the 1989 guidelines the obligations of counsel....The 2003 ABA guidelines do not depart in principle or concept from Strickland [or] Wiggins.@ Hamblin, 354 F. 3d at 487. at Thus the 2003 guidelines are applicable as the Sixth Circuit found, to cases tried before they were promulgated in 2003 since they merely explain in more detail the concepts promulgated previously. This principle is also corroborated by Rompilla v. Beard, 125 S. Ct 2456 (2005), which was tried before even the 1989 Guidelines were promulgated. In Rompilla as in Hamblin, the 2003 Guidelines were utilized in the analysis of deficient performance of the Strickland test.

mental health evidence developed during the course of post conviction proceedings. The preclusion of Mr. Henry=s post conviction experts rendered the hearing a sham. This Court should remand the case back to the lower court for a full and fair hearing on, inter alia, the deficient performance prong of the Strickland test.

b. Deficient Performance

The lower court found and the State argues that trial counsel did not render deficient performance in his representation of Mr. Henry at his penalty phase. As argued above, Mr. Henry was not given a full and fair hearing on this issue. However, since the State now asserts that the record shows that trial counsel did not render deficient performance, Mr. Henry would counter as follows.

The State asserts that A[t]he fatal flaw in argument is that it is nothing more than a laundry list of what current counsel thinks Raticoff could have done@. Answer Brief at 10. The State further complains that Raticoff=s hands were tied due to the restrictions placed on him by Mr. Henry. However the State=s analysis completely ignores the fact that the Areasonable professional norms@ of Wiggins, the ABA Guidelines, specifically addresses the issue of clients who are reluctant to have certain areas investigated. As noted supra, Guideline

10.7(A)(2)states that AThe investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be conducted or presented@. In the recent case of Rompilla v. Beard, 125 S. Ct 2456 (2005) the United States Supreme Court granted relief to a defendant notwithstanding the fact that Mr. Rompilla=s own contributions to any mitigation case were Aminimal@, and the fact that the defendant was even Aactively obstructively sending counsel off on false leads@. Rompilla, 125 S. Ct at 2462. Thus, contrary to the State=s assertion, the fact of an uncooperative or unwilling client is thus no bar to establishing deficient performance under a Strickland analysis.

The State next asserts that counsel=s performance was not deficient with regard to Mr. Henry=s drug use because Mr. Henry denied using more than marijuana on a regular basis. This again highlights the requirement of the ABA Guidelines to obtain as much information as possible from multiple sources and not to take at face value what the client says. As the Commentary to the 2003 Guidelines says, @The collection of corroborating information from multiple sources - a time consuming task - is important wherever possible to ensure the reliability and the persuasiveness of the evidence.@ Commentary to ABA Guidelines 10.7 at 88 (2003). Had trial

counsel looked to sources other than Mr. Henry and the mental health experts who relied solely on his self report, he would have discovered multiple sources to show the true nature and extent of Mr. Henry=s substance abuse disorder and intoxication.[4]

The State attempts to negate trial counsel=s abandonment of investigation into Mr. Henry=s mental health issues because of the report of Dr. Trudi Block Garfield, which Raticoff described as Adevastating@. However the State ignores the fact that the report was not designed for the purpose of developing mitigation, as Dr. Block Garfield herself admitted. (PCR. Supp T. 105) As she further testified, she would normally ask for records and access to other individuals who knew the defendant (PCR. Supp T. 106) Her evaluation was not of the sort she would usually do when asked to look onto mitigation, but rather a preliminary assessment of Mr. Henry=s psychological state. Raticoff=s reliance on this report without further attempts at investigation represents a fundamental misconception of Dr. Block Garfield=s charge and his resultant

[4] The State=s assertion of the finding of premeditation also begs the question. Had a proper investigation of Mr. Henry=s substance abuse history been carried out, this would not have been found. However no hearing was granted on trial counsel=s failure to adequately challenge the aggravating circumstances alleged by the State at trial. No hearing was granted on any aspect of Mr. Henry=s guilt phase. Had such hearing been granted, Mr. Henry could have refuted this assertion.

abandonment constitutes deficient performance.

The State makes much of the fact that Raticoff asked for a competency evaluation. As noted supra, however the competency evaluations are in no way sufficient for the development of mental health mitigation. They do not constitute an acceptable substitute, as Dr. Block Garfield=s testimony clearly illustrates.

The State also makes much of its assertion that trial counsel would have been precluded from having another confidential expert pursuant to Rule 3.216. However, the State omits to note that for purposes other than insanity, the rule allows additional experts to be appointed for the defense upon a showing of good cause. See Fla. R. Crim. P. 3.216(f). And as Dr. Block Garfield stated, in other capital cases, she had in fact recommended further evaluation by additional mental health specialists. She further testified that:

> If I had any information, whether it would be through behavior observed by the Defendant, or whether it would have been anything that would have triggered something in the test results or if I had collateral information, I would have done so.

(PCR Supp T. 108)(emphasis added)[5]

[5] The ABA Guidelines indicate that the blanket application of such a restriction on expert services is inappropriate. Guideline 4.1 (B) states that counsel should Areceive the assistance of all expert investigative and other ancillary professional services reasonably necessary or appropriate to provide a high quality of legal representation at every stage

Thus, had Mr. Raticoff supplied collateral materials to Dr. Block Garfield that suggested further testing, she would have recommended it. Such recommendation could then have been used by trial counsel as good cause for the appointment of specialist experts. If the court had appointed such experts, then additional evidence as to Mr. Henry=s mental health mitigation would have been uncovered. If the trial court had not appointed such experts, then trial counsel would have preserved the issue for appeal, even while being rendered ineffective by the actions of the court. However, Dr. Block Garfield was not supplied with additional information or access to other witnesses. In fact her contact with Raticoff was minimal, limited to a telephone call (PCR Supp T. 110). Raticoff did not ask her to do any additional tests. He simply abandoned his investigation.

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of the proceedings@ ABA Guideline 4.1(B)(2003). Clearly, given the indicators in Mr. Henry=s social history, additional mental health evaluations were necessary. As Dr. Block Garfield testified, crack cocaine causes brain damage. The use of crack cocaine would therefore suggest that neurological and/or neuropsychological evaluations were Areasonably necessary@. Similarly, a constitutionally adequate social history investigation would indicate the possibility of serious psychiatric difficulties. Raticoff himself asserted that he wanted to seek additional mental health evaluations after seeing Dr. Block Garfield=s report. However rather than seeking additional services as recommended by the Guidelines, he sought two court appointed competency psychologists. Raticoff did not attempt to have additional confidential experts appointed but merely assumed that he would be denied. This was error.

The State also mischaracterizes the significance of the testimony of the lay witnesses at the evidentiary hearing. The State suggests that the testimony of Joe Henry, Martha Gilbert, Carolyn Cason, and Eddie Simpson suggested that Mr. Henry did not have a significant substance abuse problem. The State=s argument is misplaced. Several of the witnesses testified as to Mr. Henry=s marijuana use. In and of itself, this should have put trial counsel on notice as to the possibility of other drug use. Furthermore, as the State acknowledges, Eddie Simpson had actually seen Mr. Henry in possession of crack cocaine. (PCR 775-780). Whether Mr. Henry had been seen in possession of crack cocaine or seen actually using it is a distinction without a difference. If Raticoff had done a proper social history investigation as mandated by Wiggins, the discovery of either observed crack possession or observed drug ingestion would have prompted a reasonable attorney to investigate further.

As Dr. Block Garfield, testified at the evidentiary hearing, crack cocaine results in the deterioration of brain cells, and that A[t]here are all kinds of areas that are affected in the brain@ (PCR Supp T. 109). If trial counsel had properly investigated the lay witnesses who were available he would have discovered that Mr. Henry had been seen in possession of crack cocaine. This in turn should have altered

him to the possibility of brain damage and the need to test for it. At the very least it should have alerted him to ask his expert what the effects of crack cocaine on the brain would be. He did neither.

While an attorney is not required to investigate every conceivable avenue of potential mitigation, the Supreme Court has emphasized that:

> In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of known evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.

(Wiggins v. Smith 123 S. Ct. 2527, 2538 (2003). Furthermore:

> Strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgment supports the limitations on investigation.

Id at 2539, citing Strickland, 466 U.S. at 690-691.

This is just one such situation. Any purported strategy to abandon further investigation into Mr. Henry=s mental health was made after a less than complete investigation. The evidence of lay witnesses at the evidentiary hearing would have led a reasonable attorney to investigate further.

As Wiggins makes clear, the solitary act of retaining a mental health expert is insufficient to constitute the

requisite "reasonable investigation" and does not substitute for the investigation of the defendant's social history. See Wiggins at 2536 in which the retained psychologist "conducted a number of tests on petitioner...conclud[ing] that petitioner had an IQ of 79, had difficulty coping with demanding situations and exhibited features of a personality disorder" but "revealed nothing of his life history" Id. at 2536.[6] Given a full and fair evidentiary hearing, deficient performance can be proved.

c. Prejudice

The lower Court refused to hear any evidence as to prejudice and the State does not address this issue. However, it is noteworthy that even with the absence of mitigation presented to the jury, the death recommendations were 8-4 and 9-3. Given these thin margins, if only three of the jurors who voted for death had been persuaded to change their votes the recommendation would have been for life. Mr. Henry has unearthed compelling and credible evidence as to the existence of statutory and non statutory mitigation that was not investigated at the time of his trial. Given a full and fair

[6] The situation in the instant cause, however is even more egregious than in Wiggins because in Wiggins,the psychologist conducted interviews with some of Mr. Wiggins' family members, whereas in Mr. Henry's case, the retained psychologist did not.

evidentiary hearing, he can prove it.

d. The motion for blood and clothing analysis

The lower court declined to allow Mr. Henry the opportunity to have Mr. Henry=s clothing tested for cocaine residue because Athere was no testimony that Mr. Henry was intoxicated at the time of the crime@ (PCR 1642). The State agrees with the lower court. Both are erroneous.

The request for drug residue testing was predicated on the need to quantify the amount of cocaine that Mr. Henry had ingested prior to the crime. If cocaine metabolites were identified and quantified, this would lead to information as to the amount of cocaine ingested by Mr. Henry. This in turn would have led to a calculation of how intoxicated he was during the commission of the crime. As such it is relevant to the establishment of statutory and non statutory mental health mitigation. Mr. Henry=s original counsel, Mr. Solomon, predicated his motion for a confidential expert on Mr. Henry=s intoxication at the time of the crime. At the evidentiary hearing, trial counsel Raticoff claimed to be aware of the fact of Mr. Henry=s cocaine use. (PCR. 1251-1265). The lower court based its denial of testing on the ground that ANo one observed Mr. Henry ingesting drugs at the time of the crime; no one testified with any credibility about having observed Mr. Henry ingesting drugs in the days before the crime was

committed.@ (PCR.1642). However the lower court=s finding of the witnesses lack of credibility is not an appropriate reason to deny Mr. Henry the testing he needs. The Court=s blanket dismissal of all the lay witness testimony as a basis for denying such testing denies Mr. Henry due process. Both the lower court and the State have their analysis backwards. The State=s argument is circular. Mr. Henry requested drug testing in order to show objectively how intoxicated he was at the time of the crime. The denial of such testing because there was Ano evidence@ of his intoxication is an oxymoron. Mr. Henry produced witnesses and documentation which was sufficient to put a reasonable attorney on notice that further investigation into Mr. Henry=s cocaine use at the time of the crime was necessary and in particular, to quantify his level of intoxication. Mr. Henry must be allowed to do the testing he requested in order to have a full and fair hearing on this issue.

e. The purported waiver of mitigation

The State claims that this Court=s finding on direct appeal that Mr. Henry made a knowing, intelligent and voluntary waiver of mitigation dictate that the waiver is valid. However the State sidesteps the crux of this issue - the fact of Mr. Henry=s mental health issues which were undiscovered through trial counsel=s lack of investigation and

which influenced and impaired his decision making capacity. As detailed above, trial counsel did not conduct a reasonable investigation into the reasonably available mental health mitigation. Significant mental health mitigation, both statutory and non statutory thus went undiscovered. As is made plain by Lewis and State v. Deaton, 635 So. 2d 4(Fla. 1993), Mr. Henry could not waive mitigation the existence of which he was unaware. Because he did not know of the nature and extent of his neurological, psychiatric, and neuropsychological impairments as well as his cocaine psychosis, because he had never been evaluated for mental health mitigation, Mr. Henry did not know what was available.

The State contends that AAppellant=s evidentiary presentation below did not uncover any significant evidence that would call into question this Court=s earlier finding that Henry=s waiver was valid@ Answer Brief at 52. However, since Mr. Henry was precluded by the lower court from presenting such mitigation, which ruling was heartily encouraged by the State, such argument is meaningless. The State cannot have it both ways. The State=s argument would only be valid if Mr. Henry had been allowed to put on his new evidence of statutory and non statutory mental health mitigation, and it had been found to be cumulative. At a full and fair evidentiary hearing with testimony from Mr. Henry=s post conviction mental

health experts as to their findings, Mr. Henry will be able to show that there was significant mitigation that was not waived because it was undiscovered. A full and fair hearing is warranted.

f. Trial counsel=s mental health and substance abuse problems

At the evidentiary hearing, Mr. Henry sought to question trial counsel Bruce Raticoff as to his mental health and/or substance abuse disorder. The State objected and the lower court prohibited this line of questioning. The State continues to assert that the issue of trial counsel=s mental illness and substance abuse is irrelevant to the issue of whether or not he was ineffective in his representation of Mr. Henry. However this simplifies the situation to the point of absurdity.

Mr. Henry submitted in his initial brief that Raticoff=s mental illness and substance abuse affected his strategy as to whether to investigate and/or present mental health and substance abuse as mitigation. As the ABA Guidelines clearly state, this kind of information Ais very personal and may be extremely difficult for the client to discuss@ because of the shame factor. See Commentary to ABA Guideline 10.7 p. 84 (2003). The same logic holds equally well to trial counsel. The same reluctance to discuss, or even think about his own

impairments caused Raticoff to shy away from a full investigation of Mr. Henry=s impairments because it would necessarily focus his mind on his own impairments.

As the Court is well aware, strategy is a key element in the analysis of the deficient performance prong of the Strickland test for ineffective assistance of trial counsel. Common sense dictates that the question of whether Raticoff=s strategy was impaired or affected by his mental illness can only be reached once the existence of the mental illness is established. This is yet another example of the sham that the evidentiary hearing below was reduced to. Without being able fully to explore Raticoff=s strategy or lack thereof, as it may have been affected by his own mental health difficulties, Mr. Henry was precluded from putting on his full case as to ineffective assistance.

Additionally, the establishment of Raticoff=s mental illness and substance abuse problems is relevant to any determination of the credibility of his evidentiary hearing testimony, a fact which the State does not address. The presence of a substance abuse disorder or a major mental illness would not only affect Raticoff=s strategic thinking, but his memory of events as well. The State relies heavily on Raticoff=s testimony in its attempt to refute Mr. Henry=s arguments. If such testimony were shown to be unreliable

because Mr. Raticoff=s memory was inaccurate or confabulated, its value to the lower court and the State=s position would be greatly diminished.

Because Mr. Henry was not allowed to ask Raticoff about this issue he was forced to make his case without the pertinent facts. A full hearing as to the effect of Raticoff=s mental illness on both his strategy at the time of the trial and his memory of it is warranted.

g. The lower court=s findings are not supported by the record

Mr. Henry argued in his initial brief that the findings of fact by the lower court are not borne out by the record. In particular, the lower court rested much of its conclusion upon its credibility findings relating to Mr. Henry=s expert and lay witnesses. The State responded by citing a number of cases in which the lower court made findings of credibility against defense witnesses in post conviction capital proceedings which credibility findings were upheld by this Court. However in the cases cited by the State the credibility analysis is relevant to the prejudice prong of the Strickland test rather than the deficient performance prong. Thus they are factually distinguishable from the instant case in which the lower court artificially attempted to sever the deficient performance prong from the prejudice prong, and

refused to allow Mr. Henry the opportunity to present evidence of the reasonably available mitigation that was reasonably available at the time of Mr. Henry=s trial. The lay witnesses testified as to information that they could have given Raticoff, had he investigated it, which would have put him on notice of a need to do further investigation into Mr. Henry=s substance abuse, psychiatric and neurological impairments. The attempt to make credibility findings against Mr. Henry=s expert witnesses is even more contrived, since they were not even allowed to testify as to their findings. However given the lower court=s artificial restrictions on the parameters of the evidentiary hearing, It is the existence of the information that was presented that is germane to the deficient performance prong, not its believability or weight.

The credibility findings by the lower court are essentially irrelevant to any finding relating to deficient performance for failing to investigate reasonably available evidence. The correct analysis under Strickland and Wiggins is whether the information presented would have prompted a reasonable attorney to investigate the issue further. The lower court however did not do this analysis but simply relied on a supposed credibility finding as the basis for refusing to find deficient performance.

> Strategic choices made after less than complete investigation are reasonable only

> to the extent that reasonable professional judgment supports the limitations on investigation.

Wiggins at 2539, citing Strickland, 466 U.S. at 690-691. The lower court=s factual findings are not relevant to its legal conclusion as to Raticoff=s performance. Relief is warranted.

ARGUMENT II

SUMMARY DENIAL OF ALL MR. HENRY=S OTHER CLAIMS

Under Rule 3.850 and this Court's well settled precedent, a post conviction movant is entitled to evidentiary hearing unless the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief". Fla. R. Crim. P. 3.850. See also Lemon v. State, 498 So. 2d 923 (Fla. 1986); Hoffman v. State, 613 So.2d 1250, (Fla. 1987); O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984); Gorham. Mr. Henry has alleged facts relating to the guilt phase, which, if proven, would entitle him to relief. Furthermore, the files and records in this case do not conclusively show that he is entitled to no relief. The State contends that all of Mr. Henry=s claims relating to ineffective assistance of counsel pre-trial and at guilt phase as well as the failure to investigate aggravating circumstances were properly denied without an evidentiary hearing. However the State=s position does not take account of the prevailing law relating to the standards for what is reasonable investigation

in the context of ineffective assistance of counsel. It did not take account of the need to look at cumulative error in establishing prejudice. The State merely parrots the lower court=s findings with affirmations that the summary denial was correct.

Mr. Henry raised an argument relating to the polygraph of Leroy Rowell performed on the statement he made implicating other participants in the murder. Mr. Henry pled it in the alternative as both a Brady claim and as a Strickland violation. The State asserts that AHenry could have obtained the polygrapher=s conclusions by simply asking for them@ Answer Brief at 59. This is a tacit admission of trial counsel=s deficient performance for failing to investigate. However the State asserts that summary denial was appropriate because the polygraph would not have been admissible and because it would not have made a difference because of Mr. Henry=s contradictory statements. Both these arguments beg the real question here.

As noted in the preceding argument, Wiggins and Rompilla emphasize that the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases provide the Areasonable norms@ for investigation in a capital case. Guideline 10.7 A(1) is clear that AThe investigation regarding guilt should be conducted regardless of any admission or

statement by the client concerning the facts of the alleged crime or overwhelming evidence of guilt...@ ABA Guideline 10.7 A(1) (203). Thus, while Mr. Henry made some statements that contradicted Lowell=s polygraphed statements, that did not absolve Raticoff from the duty to investigate. Nor does the fact that the polygraph was Ainconclusive@ reduce the weight of the evidence. The fact remains that the statement was made at all and was available, and that the polygrapher could not say that Lowell was lying. The investigation of this fact would have spurred Raticoff to conduct further investigation into alternative theories of the case. Thus, whether or not the polygraph was admissible, Raticoff should have obtained it.

Similar considerations apply to trial counsel=s failure to investigate and properly challenge the admission of the dying declaration of Janet Thermidor. Trial counsel did absolutely nothing to challenge the experts hired by the State who opined that Janet Thermidor knew she was going to die, regardless of what the medical team were telling her. Trial counsel did not even consult with an expert who might have countered the opinions of the State=s witnesses Dr. Podgorny and Dr. Dellerson. This violated Guideline 10.8, which states that counsel Aconsider all legal claims potentially available@ Guideline 10.8 A (1) (2003) and that counsel Athoroughly investigate the basis for each potential claim@ Guideline 10.8

A(2) (2003). Because counsel failed to investigate the State=s case here, he was unable to challenge the State=s position. As a result the extremely prejudicial dying declaration was admitted. The State claims that this was litigated on direct appeal. However it was the actual admissibility of Janet Thermidor=s statement that was litigated, not the issue of what Raticoff did and didn=t do. An evidentiary hearing is likewise warranted on this issue.

Similar considerations also apply to Raticoff=s failure to challenge Mr. Henry=s statements to the police on the grounds of his mental disabilities. As noted in the preceding argument, Mr. Henry suffers from a plethora of mental health problems, exacerbated by his substance abuse disorder and cocaine psychosis at the time of the crime. His statements were thus not knowing, intelligent or voluntary. The State complains that Mr. Henry did not make additional argument on top of what was raised in his Rule 3.850 motion, and that the issue is therefore waived. However, Mr. Henry met the pleading requirements of Rule 3.850.[7] The claim was not conclusory. Each claim in the Rule 3.850 incorporated every other claim by specific reference. See e.g. PCR. 628. Both the Rule 3.850 motion and the Initial Brief give ample

[7] Fla. R. Crim. P. 3.850(6) merely requires Aa brief statement of the facts (and other conditions) relied upon in support of the motion@.

argument as to the mental health conditions suffered by Mr. Henry. The fact that trial counsel failed to investigate Mr. Henry=s mental state in anything other than a cursory fashion again precluded him from raising a relevant legal claim. The fact that trial counsel filed a motion to suppress the statements on other grounds is not germane to this issue. Raticoff=s failure to investigate this meritorious issue meant that he was unable to Apresent the claim as forcefully as possible@ and to tailor Athe presentation of particular facts and circumstances in [Mr. Henry=s] case@. See ABA Guideline 10.8B(1) (2003). As a result of Raticoff=s failure to investigate this issue, the motion to suppress was lost.

Likewise, the claim as to counsel=s ineffectiveness for failing to move for a change of venue requires a hearing but was improperly summarily denied by the lower court. The State does not even answer this argument on the merits but merely echoes the lower court=s finding that it was improperly pled and procedurally barred. It is neither. In his Rule 3.850 motion Mr. Henry detailed the fact that at least six (6) of the jurors were aware of the case from the extensive media coverage;

> Out of twelve jurors chosen for the jury at least six were already familiar with the outrageous and inflammatory media reporting surrounding Mr. Henry's trial. Having exhausted all of his peremptory challenges, counsel requested additional

> preemptories due to the extensive publicity (R. 989). However, counsel's request for additional challenges was denied by the trial court (R. 989).

(PCR. 787)

The claim then detailed the level of inflammatory local publicity that had been generated by the case including much lurid speculation as to facts which ultimately were not admitted into evidence. The prejudice is that jurors would have been influenced to prejudge the case according to the lurid media reporting of the case rather than form the evidence. The pleading requirements have been met.

Mr. Henry also argued that trial counsel was ineffective for failing to challenge the sloppy procedures at the Broward Sheriff=s Office. Had trial counsel investigated the mismanagement and general bad practices at the office, he would have been able to impeach much of the forensic evidence offered by the State. In particular, the fact that it appears to be routine practice for laboratory personnel to lie about their work casts doubt on the veracity of this testimony. This claim was properly pled below and an evidentiary hearing should be granted. The above failures of trial counsel at Mr. Henry=s guilt phase, together with the others listed in his Initial Brief caused prejudice to Mr. Henry, contrary to the State=s assertion to the contrary. As the United States

Supreme Court has explained in the related context of materiality attendant to a Brady v. Maryland claim,[8] the issue is whether the jury "would reasonably have been troubled" by the withheld information and whether "disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable." Kyles v. Whitley, 514 U.S. 419, 441-43 (1995). In Kyles, the lower court which presided over a postconviction evidentiary proceeding found the Brady material unworthy of belief. See Kyles, 514 U.S. at 471 (Scalia, J., dissenting). The Kyles majority, however, determined that this credibility finding was not fatal to the Brady analysis because the lower court's post-trial credibility determination "could [not] possibly have effected the jury's appraisal of [the witness'] credibility at the time of Kyles's trials." Kyles at 450 n.19 (emphasis added). The materiality test for a Brady claim is identical to the prejudice test for a Strickland claim. See Strickler v. Greene, 527 U.S. 263 (1999). As such, the Kyles analysis applies with equal force to a Strickland prejudice analysis. However the jury is barely mentioned in the State=s answer brief.

Here, the errors and omissions attributable to trial counsel pretrial and at the guilt phase tainted the very

[8] 373 U.S. 83 (1963).

makeup of the jury, and allowed the jury to hear inflammatory facts that were never offered in evidence by the State. It allowed the jury to hear both the dying declaration of Janet Thermidor and the statements of Mr. Henry himself. And it allowed the jury to keep a mistaken impression of the forensic evidence as incontrovertible. Taken together, but for these errors, there is a reasonable probability that the jury would have found reasonable doubt as to Mr. Henry=s guilt, and thus that Mr. Henry would not have been convicted.

Similar arguments apply to the penalty phase. The evidentiary hearing was limited to the issue of ineffectiveness relating to the investigation and development of mental health mitigation. It did not cover the failure by trial counsel, inter alia to rebut the aggravating circumstances relied on by the State. ABA Guideline 10.11 is clear that trial counsel should consider the use of:

> Experts and lay witnesses along with supporting documentation...to provide medical, psychological, sociological, cultural or other insights into the client=s mental and/or emotional state and life history that may explain or lessen the client=s culpability for the underlying offense(s); to give a favorable opinion as to the client=s capacity for rehabilitation or adaptation to prison; to explain possible treatment programs or other wise support a sentence less than death; and/or rebut or explain evidence presented by the prosecutor.

ABA Guideline 10.11 F (2) (2003).[9] In Mr. Henry=s case, the State sought five aggravating circumstances, which trial counsel did nothing at all to rebut. Indeed trial counsel conceded aggravating factors. See (R. 2645, 2649, 2651.)[10] However, what is very clear is that trial counsel did absolutely nothing to investigate any possibility of refuting aggravating circumstances. This is particularly insidious given that at least two of the aggravators found - CCP and avoiding arrest - involve an element of intent, which Mr. Henry can show was absent due to his state of mind at the time of the crime. This is yet further illustration of the illusory nature of the evidentiary hearing that was conducted. If Mr. Henry had been allowed to put on the reasonably available mental health evidence developed during post conviction he can show that in fact Mr. Henry was incapable of the intent necessary for these aggravators to apply, and that as a result he was prejudiced by the finding of those aggravators. A hearing is warranted on this issue.

CONCLUSIONS AND RELIEF SOUGHT

Based upon the foregoing and the record, Mr. Henry

[9] See also Rompilla v. Beard, 125 S. Ct. 2546 (2005),(holding that trial counsel=s failure to investigate a prior felony file that he knew the prosecutor would use as aggravation to be ineffective assistance.)

[10] The State maintains that this is not the case. However the record clearly supports trial counsel=s concession.

respectfully urges this Court to reverse the lower court order, grant a full and fair evidentiary hearing on the issue of ineffective assistance of counsel at Mr. Henry:s penalty phase and a hearing on all the claims summarily denied by the lower court and grant any other relief this Court deems appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first class postage prepaid, to Celia Terenzio Esq., Office of the Attorney General,1515 N. Flagler Drive, Suite 900, West Palm Beach, Florida 33401 on August 5, 2005.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that this brief complies with the font requirements of rule 9.210(a)(2), Fla. R. App. P.

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