IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1330

ERNEST D. SUGGS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR WALTON COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

HILLIARD E. MOLDOF
Florida Bar Number 215678
1311 SE Second Avenue
Fort Lauderdale, FL 33316
(954) 462-1005

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This appeal involves a Rule 3.850 motion on which an evidentiary hearing was granted on some issues, and summarily denied on others. References in the brief shall be as follows:

(R. ___) -- Record on Direct appeal;

Only the first two volumes of the five-volume record on appeal are numbered sequentially. Thus, the post-conviction evidentiary hearing will be identified as PC.Ev. _____. The rest of the record on appeal will be identified by the date of each hearing.

References to the exhibits introduced during the evidentiary hearing and other citations shall be self-explanatory.

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The Giglio[1] claim

In its Answer Brief, the State simply reiterates the trial court's conclusion that there was no evidence to support the claim that jailhouse snitches James Taylor and Wallace Byers provided false or misleading testimony (Answer Brief at 17-18).

This conclusion, however, is belied by the record and the testimony from the evidentiary hearing. At the hearing, George Broxson testified that James Taylor was given special privileges at the Walton County Jail that other inmates simply did not have. According to Broxson, Taylor had a voice-activated tape recorder and used it on others at the jail (PC. Ev. at 47).

Mr. Broxson testified that James Taylor lived in a one-man cell and

> ...the reason I know Taylor was doing something in there with the tape player that he wasn't supposed to be doing, telling on people, because I go over

[1]Giglio v. United States, 405 U.S. 150 (1972).

> and speak to him and he reaches under the bed, pulls the tape player out because it's a voice activated tape player and rewinds the tape because I spoke and the tape player kicked on and made a recording.

(PC. Ev. at 11).

He knew Taylor to be a known informant for the State, and that he had items that other inmates did not have, including the tape recorder. Mr. Broxson's testimony was confirmed by James Taylor, who spoke with Gerald Shockley, a former FBI agent who interviewed Taylor at the county jail in Dothan, Alabama, on January 16, 1996. During that interview, Mr. Taylor admitted to fabricating his testimony at Mr. Suggs' trial. He told Mr. Shockley that he "received enough information from the Sheriff's office to be able to give investigators a statement as to what Ernie Suggs allegedly said." (PC. Ev. at 103).

In Guzman v. State, 868 So. 2d 498 (Fla. 2003), this Court explained that "[t]he State as beneficiary of the Giglio violations, bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt." Id. This Court said that this is a "more defense friendly standard," yet the State here failed to prove the false testimony of Taylor and Byers was harmless. Their testimony was critical to the State's case. The State in its Answer Brief made no effort to bear its burden to prove that

the presentation of this false testimony was harmless beyond a reasonable doubt. Nor does it give reasons why Mr. Shockley or Mr. Broxson's testimony should not be believed. The State offered no evidence to rebut Mr. Shockley or Mr. Broxson's testimony. The witness the State did call actually supported Mr. Suggs' position. Quinn McMillan, the former Sheriff of the Walton County Sheriff's Department for 20 years, could not remember what the rules were at the jail, and what items inmates were allowed to have in their cells (PC. Ev. at 179-181). Mr. Suggs is entitled to a new trial.

The Brady[2] Claim

The trial court erroneously misconstrued the facts when it found that the typewritten note from the prosecutor to the medical examiner seeking a "clarification" of Pauline Casey's time of death, was "in fact disclosed to the defense"[3] (PC. R. at 337), despite the testimony from the prosecutor who said that he did **not** turn the note over to the defense. The document also was not in the defense attorney files obtained in post-conviction.

No explanation was offered on how defense counsel

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[2]Brady v. Maryland, 373 U.S. 83 (1963).

[3]The note's significance is that the time of death does not correspond with Mr. Suggs' arrest.

obtained this note since it was not turned over by the prosecution. The State argues that this was a factual finding by the trial court and should be upheld "as long as it supported by competent, substantial evidence in the record" (Answer Brief at 19). But, there was no competent or substantial evidence in the record to support this finding. Proof that defense counsel did **not** have this memo in the record at trial was when he cross examined Dr. Kielman. The medical examiner was not questioned about the time of death, or whether he changed his findings after speaking with the prosecutor, to make it fit more closely with the State's theory. Mr. Kielman was not asked one question on cross examination (R. 3394).

In its Answer Brief, the State argues that "this memorandum really is not Brady material" Answer Brief at 19, n. 10. The State describes this note as "the medical examiner's opinion regarding the time of death, not the prosecutor's query concerning the opinion." The State is simply wrong. The memo was written by the prosecutor to the medical examiner, asking him to "clarify" the time of death in his autopsy, because the time of death did not correspond with the arrest of Mr. Suggs. This was Brady and evidence of impeachment. Mr. Suggs was arrested four hours **before** the

time of death established by the medical examiner (PC. Ev. at 116). Curiously, the medical examiner was not questioned at trial by the prosecutor about the time of death. (R. 3371-3395).

In Banks v. Dretke, 124 S.Ct. 1256 (2004), the United States Supreme Court held that when police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is incumbent on the State to set the record straight. The Court also said that a rule in which the "prosecutor may hide, defendant must seek" is untenable in a system constitutionally bound to accord defendants due process. "Prosecutor's dishonest conduct or unwarranted concealment should attract no judicial approbriation." Kyles v. Whitley, 514 U.S. 419, 440 (1995).

The State "is under a continuing obligation to disclose any exculpatory evidence." Johnson v. Butterworth, 713 So.2d 985, 987 (Fla. 1998); see also Roberts v. Butterworth, 668 So.2d 580 (Fla. 1996)(finding that Brady obligation continues in post-conviction). In Ventura v. State, 673 So. 2d 479 (Fla. 1996), this Court said, "The State cannot fail to furnish relevant information and then argue that the claim need not be heard on its merits because of an asserted procedural default that was caused by the State's failure to

act."

Contrary to the State's argument, this report was **not** of debatable exculpatory value. The information contained in the memo showed that the victim's time of death cast doubt on whether Mr. Suggs could have committed the crime, since he was arrested four hours before the time of death. For the State to lay blame for the murder on Mr. Suggs, the medical examiner had to change his mind about the time of death. This was not simply a matter of opinion. These are facts.

Mr. Suggs should have had the benefit of the information contained in the memo. Boshears v. State, 511 So. 2d 721 (Fla. 1st DCA 1987); Perdomo v. State, 565 So. 2d 1375 (Fla. 2nd DCA 1990).

Exculpatory and material evidence is evidence of a favorable character for the defense that creates a reasonable probability that the outcome of the guilt and/or capital sentencing trial would have been different. Garcia v. State, 622 So. 2d at 1330-31. This standard is met and reversal is required once the reviewing court concludes that there exists a "reasonable probability that had the [unpresented] evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 680 (1985).

Materiality "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have ultimately resulted in the defendant's acquittal." Way v. State, 760 So. 2d 903, 913 (Fla. 2000). Rather:

> The materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Strickler v. Green, 527 U.S. 263, 290 (1999)(quoting Kyles v. Whitley, 514 U.S. 419, 435 (1995).

The cumulative effect of the suppressed evidence must be considered when determining materiality. See, Way, 760 So. 2d at 913 (citing Kyles, 514 U.S. at 436 and n. 10). "It is the next effect of the evidence that must be assessed." Way, 760 So. 2d at 913 (quoting Jones v. State, 709 So. 2d 512, 521 (Fla. 1998)); see Kyles, 514 U.S. at 436 and n. 10.

Here, the trial court found that defense counsel had this memo in its possession. Yet, defense counsel failed to question Dr. Kielman about the discrepancy in the time of death or whether he changed his opinion after talking to the prosecutor. In fact, defense counsel conceded at the evidentiary hearing that this memo and the time of death

excluded Mr. Suggs as a suspect in Pauline Casey's murder (PC. Ev. at 226). Thus, this new evidence could have put the whole case in a different light.

If this wasn't Brady material, then it was ineffective assistance of counsel for failure to question the medical examiner about the time of death. In a 7-5 vote for death, this impeaching evidence was critical.

ARGUMENT II

THE HEARING COURT ERRED IN DENYING MR. SUGGS' CLAIM THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL.

The State argues that despite the numerous instances outlining Mr. Suggs' ineffective assistance at the guilt phase, he has "failed to demonstrate any individual error" Answer Brief at 51). On the contrary, Mr. Suggs has established so many instances of ineffective assistance of counsel that he was denied an adversarial testing and a new trial should be ordered.

The Massiah[4] Violation - In its Answer Brief, the State argues that Mr. Suggs "failed to demonstrate a Massiah violation" Answer Brief at 25. The State's argument is not

[4]Massiah v. United States, 377 U.S. 201 (1964)(the use of undercover police informants to obtain incriminating information from a criminal defendant out of bond and awaiting trial was a violation of the Fifth and Sixth Amendment.

supported by the record, or by the testimony of George Broxson or Gerald Shockley. Moreover, the record is clear that trial counsel failed to investigate and challenge the jailhouse snitches in their role in obtaining incriminating statements from Mr. Suggs.

While lead defense counsel Donald Stewart knew that James Taylor was a confidential informant, he did not investigate him or the other jailhouse snitches because "nobody told us" that they existed. (PC. Ev. at 138-139). If defense counsel was waiting to be told that Mr. Byers and Mr. Taylor were state agents who specifically were placed in Mr. Suggs' cell to obtain information from him, he would still be waiting today. It is not the role of trial counsel in a capital case to wait for information to drop in his lap. Rather, it is counsel's obligation to investigate the facts of the case, including whether jailhouse informants sought to obtain information from Mr. Suggs at the behest of law enforcement.

An attorney's failure to properly investigate and prepare a defense may be grounds for ineffective assistance of counsel. Majewski v. State, 487 So. 2d 322 (Fla. 1st DCA 1986)(allegation that defense counsel failed to interview or call alibi witnesses sufficiently alleged ineffective assistance of counsel claim). See also, Light v. State, 796

So. 2d 610 (Fla. 2nd DCA 2001)(counsel has a duty to reasonable investigation or to make reasonable decision that particular investigations are unnecessary). Such an experienced lawyer such as Mr. Kimmel must have known that jailhouse informants, of all witnesses, should be more thoroughly investigated due to their penchant for pursuing any means possible to gain a favorable sentence.

While Mr. Stewart was waiting for the information on State agents to come to him, Mr. Kimmel testified that he did not file a Massiah claim or investigate the informants at the Walton County Jail because the legal team had no money to investigate them. He did not hire an investigator to speak to the inmates at the jail.[5] Since he lived in Pensacola and co-counsel was in Alabama, "We cannot travel 80 miles or 150 miles to take depositions on fishing expeditions of all of the inmates the jail." (PC. Ev. At 224). Mr. Suggs' defense lawyers did not need to interview "all of the inmates" at the jail, only those who shared a cell with Mr. Suggs.[6] Had they

[5]Donald Stewart testified that he hired an investigator on the case only after the guilty verdict was reached (PC. Ev. at 142).

[6]At the evidentiary hearing, post-conviction counsel submitted a list of inmates who shared a cell with Mr. Suggs. This list of inmates in cells 210 and 211 was verified by former Walton County Sheriff Quinn McMillan. In addition to Mr. Suggs,

investigated the inmates who shared a cell with Mr. Suggs, they would have found George Broxson, an inmate who would have told them that James Taylor was a professional informant who was given special treatment by Sheriff's Department personnel not given to other inmates. He was allowed to keep in his cell a regular razor blade, cologne, private metal lock box, necklace, watch, fingernail clippers and ring (R. 3585). He also was allowed to keep a voice-activated tape recorder, which he kept under his mattress and secretly recorded inmates as they came into his cell, presumably to turn over to law enforcement when it suited his purposes (PC. Ev. at 47).

In addition to failing to uncover the inmates who were acting as State agents, defense counsel also failed to request or uncover the jail logs, which showed that James Taylor was booked into the jail under the alias "Robert Locksley," in an effort to conceal his true identity (PC-R. at 355-358).

The State relies on the testimony of Quinn McMillan, the former sheriff of Walton County to discount these facts, but his memory was sketchy at best. While he was able to identify a list of inmates who were kept in the jail cell by cell (PC. Ev. at 179), he could not "remember the rules" of what items

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Mr. Byers and Mr. Taylor, aka as Mr. Locksley, there were 12 other names on the list, hardly a "fishing expedition" of **all** the inmates at the Walton County Jail.

inmates were allowed to have in their cells (PC. Ev. at 180). He also testified that he was "wasn't familiar" with whether Mr. Suggs occupied the same cell as Wallace Byers and James Taylor" (PC. Ev. at 179).

The Richardson[7] violation -- On direct appeal, this Court held that the trial court failed to conduct a Richardson hearing, and that trial counsel

> waived his request for such a hearing by stating that a Richardson hearing would not cure the damage of admitting Judge Lindsey's testimony....Moreover, Suggs' counsel had ample opportunity to renew his request for a Richardson hearing, but failed to do so. On these facts, we determine that Suggs waived his Richardson hearing request, and we deny this claim.

Suggs v. State, 644 So. 2d 64, 69 (Fla. 1994).

At the evidentiary hearing, defense attorney Kimmel had no explanation for failing to request a Richardson hearing, other than to say, "....we did the best we could under the circumstances" (PC.Ev. at 134-135).

Failure to request a Richardson hearing in this instance was

not minor or inconsequential, as argued by the State in its Answer Brief and Kimmel at the evidentiary hearing. Kimmel said requesting a Richardson hearing would only have delayed the proceedings and "I don't know what prejudice we could

[7]Richardson v. State, 246 So. 2d 771 (Fla. 1971).

prove," (PC. Ev. at 90).

The prejudice was obvious. Jailhouse informant, Wally Byers, was an important part of the State's case and provided information on the aggravating factors. Mr. Byers testified that Mr. Suggs told him that he killed Pauline Casey, robbed her and wanted to rape her (R. 3399-3400).

While serving a three-year sentence in the county jail, Byers was repeatedly released from the jail on his own and, on one of those occasions, was staying at the Hilton Hotel in Crestview where he was involved in a dispute with his wife and was re-arrested (R-3415-18). At trial, the State announced its intent to call County Judge Lewis Lindsey to testify that Byers was released from the Walton County Jail as a result of his instructions, not because of preferential treatment by law enforcement or the prosecutor (R-2120).

The State's purpose in calling Judge Lindsey to testify about Byers was to bolster Byers' testimony, and leave the jury with the impression that Byers was a credible witness, improperly implying Byers' statements about Mr. Suggs were true. Not only did Judge Lindsey testify that he approved medical releases for Mr. Byers, but "checked on him frequently while he's been in the jail" (R. 3503).

If this testimony was so irrelevant, as argued by the

State and Kimmel, then how do they explain the State's later argument to the jury that Judge Lindsey's testimony was beyond reproach. "What can they say about that?" the prosecutor asked rhetorically in closing argument(R-4411).

Kimmel allowed the State to offer unrebutted testimony from Judge Lindsey that Byers' testimony was credible and then permitted the State to argue that Judge Lindsey's testimony was unimpeachable. Failure to object to this Richardson violation, and then failure to object to the judge's testimony was ineffective assistance of counsel.

Failure to object to medical examiner testimony – The State simply repeats the trial court's ruling that the defense counsel's failure to replace the two jurors who got sick from viewing the autopsy photos was a "tactical decision." (PC. Ev. At 340). But, this purported "tactical decision" was patently unreasonable. Mr. Kimmel never explained how allowing two jurors who were sickened by the pictures of what his client allegedly did was a strategic advantage. Two jurors were so overwhelmed by the medical examiner's testimony and photos that two nurses were called in to evaluate them. Once nurse said the jurors "were just upset by what was going on in the courtroom" (R. 3388). Juror Linda Lee said she felt dizzy and she needed to "just calm down a little" (R. 3391). Defense

counsel never questioned the two jurors about their ability to be fair and impartial after viewing the photos. Defense counsel never objected to them remaining on the panel, even after getting sick and requiring medical attention.

At the evidentiary hearing, defense counsel said he embraced these two jurors and did not strike them because they showed that they were human, and he could relate to them and their pain (PC. Ev. at 247). It is unclear how failing to inquire about whether the jurors could be fair and impartial to Mr. Suggs is related to feeling the juror's pain. If these jurors were so human that Mr. Kimmel could feel their pain, then it is also a human reaction to sickening photos that the jurors could blame Mr. Suggs for their pain. Mr. Kimmel's obligation was to ensure a fair and impartial jury for Mr. Suggs, not to embrace the jury to the detriment of his client. This alleged "strategic decision" was patently unreasonable.

Strickland's prejudice standard requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 694. A defendant is not required to show that counsel's deficient performance "[m]ore likely than not altered the outcome of the case." Strickland, 466 U.S. at 693. The Supreme Court specifically rejected that

standard in favor of showing a reasonable probability. See Kyles v. Whitley, 115 S. Ct. 1555 (1995) (discussing identity between Strickland prejudice standard and Brady materiality standard). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Id. Here, inquiring whether the jurors could be fair, objecting to the two sickened jurors, seeking to replace them, or moving for a mistrial, would have led to a fair trial.

Failure to address how Pauline Casey's fingerprints got on Mr. Suggs' automobile

Both the State and the trial court said that no evidence was offered to establish an alternative explanation for how Ms. Casey's fingerprints ended up in Mr. Suggs' car. This response ignores the testimony that was available in the record and could have been elicited at trial had Mr. Suggs had effective counsel.

In deposition, Ted Valencia, the owner of the Teddy Bear Bar, was asked whether Mr. Suggs was friendly with Pauline Casey. He replied, : "[y]es. She played pool with him that day if I'm not mistaken and invited him down there (to the bar

where she worked)" (R. 512). Mr. Valencia was deposed on January 7, 1991, more than a year and a half before trial (R. 504 524), but at trial, he was not questioned by defense counsel about their friendly relationship.

James Casey, Pauline Casey's father-in-law, also was deposed that same day and testified that other people told Ray Hamilton that Mr. Suggs was "there at the Hitching Post" and that Mr. Suggs was Pauline Casey's "friend from Alabama" (R-500). James Casey testified that his son "referred to [Mr. Suggs] as a friend" (R-501). Inexplicably, Mr. Casey was not called by the defense at trial.

Trial counsel failed to present this information, or seek out others who could have established the friendly link between Mr. Suggs and Pauline Casey. Trial counsel failed to hire an investigator until **after** Mr. Suggs' jury returned a guilty verdict.

When asked why no evidence of an alternative explanation of how Pauline Casey's fingerprints were placed in the car was presented, Kimmel testified that Donald Stewart did his own investigation and traveled:

> all over, ...he almost got attacked in one of the bars because they found he was the defense attorney, trying to investigate this. He actually endangered himself trying to get that kind of information. We had nothing to tell us that we

> could prove those fingerprints were in the car for any legitimate reason.

(PC. Ev. at 202).

Mr. Stewart, however, never testified that he was attacked or that he had been in danger. Trial counsel failed to present testimony that would have bolstered the argument that Mr. Suggs and Pauline Casey were friends who had been shooting pool together at the Hitching Post and that there could have been other reasons why Pauline Casey's fingerprints were on Mr. Suggs' car.

It was crucial that defense counsel establish that Mr. Suggs and the victim were friends who were together on the afternoon of her death at her invitation. This would have given another explanation how the victim's fingerprints could have gotten on Mr. Suggs' car. Defense counsel was ineffective for failing to investigate, call witnesses or otherwise present evidence to establish these facts.

Failure to investigate the fabricated testimony of Steve Casey and Ray Hamilton

The State argues that no evidence was presented at the evidentiary hearing that Steve Casey sold his truck on the day before his wife's murder (Answer Brief at 38). But the State is wrong.

At trial, Steve Casey, the husband of Pauline Casey,

testified that on August 6, 1990, the day his wife was murdered, he was at home trying to sell his 1969 Chevy pick-up truck. He testified that he sold the truck that day for $1,200.00 to an older gentleman from Panama City, but he could not remember his name (R. 3679).

State witness Ray Hamilton also testified at trial that on the night of August 6, 1990, he was at the Teddy Bear Bar when he received a telephone call from Steve Casey, who told him that he had sold the pick-up truck (R. 2788-2796).

When defense counsel finally hired an investigator at the conclujsion of the guilt phase, they found evidence that Steve Casey sold his truck the day **before** his wife's murder for $300. His alibi that he was at home selling his truck that night was a fabrication, as was Ray Hamilton's corroboration.

Mr. Suggs' trial counsel only learned of Mr. Casey's lie **after** the jury returned the guilty verdict.

At the evidentiary hearing, Mr. Stewart said he went to "every length that I know of that we possibly could have done to find out if Mr. Casey had actually sold that car on Sunday night, which we later learned after the trial of this case," (PC. Ev. at 141).

Mr. Stewart testified that only **after the trial** was he able to find the woman whose father bought the car from Mr.

Casey and this information contradicted Mr. Casey's alibi. It was only **after the trial** that he hired an investigator to look into Mr. Casey's story as to when he sold the car. In Defense Exhibit 7, (PC-R. at 368), Mr. Stewart identified a letter he wrote to Mr. Suggs' post-conviction attorney dated April 16, 1993, in which said he hired an investigator on the case "the day the jury returned their verdict" (PC.Ev. at 368).

Whatever information was found by this investigator, however, was too little too late. While defense counsel testified that "...we did everything we could do as lawyers to investigate the case," they failed to do their job by hiring an investigator (PC. Ev. at 143).

There was no indication the investigator had any difficulty after trial locating information to rebut Steve Casey's alibi. This information was readily available to trial counsel **before trial** if only they had hired an investigator to look for it.[8] Mr. Kimmel, however, testified that it was Mr. Stewart's decision to hire an investigator after the verdict was in, even though they split up the work load (PC.Ev. at 186) and "divided up the responsibility" of

[8]Though Mr. Kimmel testified that they did not have the funds to hire an investigator to check out the jailhouse informants, he never explained how they could suddenly afford an investigator after Mr. Suggs was found guilty.

the case (PC. Ev. at 184).

Mr. Kimmel testified that “It was not a mutual decision and I was not involved in that decision.” (PC. Ev. at 257). Mr. Kimmel conceded, however, that an investigator was hired **after** the verdict that uncovered information that could have been used at trial (PC. Ev. at 258). This would have been particularly important since the jury was focused on the viability of Steve Casey’s testimony and relied on this false testimony in reaching its 7-5 verdict in favor of death.

Failure to object to repeated and numerous improper closing arguments

The State argues that trial counsel were “two very experienced” attorneys who made the tactical decision not to object to the prosecutor’s repeated and improper objections (State Answer Brief at 47-48). Again, the record does not support this argument.

The prosecutor improperly argued a blatant golden rule argument (R. 4502-4503; 4379-4380; 4407); improperly argued that Mr. Suggs offered “no explanation” for the evidence presented by the State, which was a comment on his right to silence; improperly told the jurors that Mr. Suggs’ lawyers were putting up a “smoke screen” and trying to “create a diversion” (R. 4380-82; 4410-4411); and improperly called them

"hired guns" and "Monday morning quarterbacks," (R. 4404-4405; 4412).

This Court on direct appeal found that the prosecutor's comments were not objected to and therefore not preserved on appeal. Suggs v. State, 644 So. 2d 64, 69 (Fla. 1994).

At the evidentiary hearing, Mr. Kimmel conceded that he should have approached the bench to make objections to these improper arguments, and noted that nothing stopped him from doing so to perfect the appellate record (PC. Ev. at 266).

He also testified that he did not object to the prosecutor's comments because "...there is a collegiality up here....where we treat each other professionally" (PC.Ev. at 243).

Mr. Kimmel apparently confused "collegiality" with perfecting his appellate record and zealously protecting his client's rights to due process and a fair trial. Had counsel objected to these reversible errors, Mr. Suggs would have been entitled to a new trial. The State, in its Answer Brief, offers no case that finds "collegiality" as a reasonable tactic for not preserving a capital defendant's rights.

Trial counsel's failure in Mr. Suggs' case was complete and overwhelming. Trial counsel failed to hire an investigator and investigate the facts of the case; failed to

investigate jail house informants to determine if they were State agents; failed to impeach the medical examiner about the time of time and whether he was pressured by the prosecutor to change his time of death; placed lying State witnesses on the stand and created extensive prosecutorial misconduct that permeated this case. This accumulation of error denied Mr. Suggs an adequate adversarial testing. State v. Gunsby, 670 So. 2d 902 (Fla. 1996). Mr. Suggs is entitled to relief.

ARGUMENT III

THE HEARING COURT ERRED IN DENYING MR. SUGGS' CLAIM THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL.

The State argues that Mr. Suggs' trial counsel was not ineffective because "This is not a case where trial counsel did not investigate the feasibility of presenting mental health mitigation at the penalty phase."

The State's argument is contrary to the testimony of Donald Stewart, the lead attorney on the case, who testified that he did **not** hire a neuropsychologist or mental health expert to evaluate his client (PC. Ev. at 124). This was Mr. Stewart's first penalty phase (PC. Ev. at 153), and he testified that he **did not** know what information would help Mr. Suggs.

Mr. Stewart testified that he did not consult with any mental health experts nor was he aware that Mr. Suggs may have had organic brain damage. As he testified at the post-conviction hearing, "...if I had known or had some indication that that (organic brain damage) was present in Mr. Suggs, I would have done something about it" including calling a mental health expert (PC.Ev. at 131-132). But, because of his close ties to the Suggs family, he did not pursue a mental health evaluation, presumably for fear of embarrassing the family.

Mr. Kimmel described himself as an experienced trial counsel who had defended 400 cases, and among the two defense attorneys, he was the expert on Florida law (PC. Ev. at 217). Yet, he testified that he did not have the money to hire an investigator on Mr. Suggs' case at guilt phase, and failed to ask the judge to declare Mr. Suggs indigent for costs. Though avenues were available to him, Mr. Kimmel failed to hire an investigator who could have looked into areas of Mr. Suggs' case. "We did not hire a investigator in this case." (PC.Ev. at 250). Mr. Kimmel testified that he relied on himself and Mr. Stewart to investigate the case, and ran into difficulties, like hostile witnesses, because of it. (PC. Ev.

at 251).

Mr. Kimmel said he was brought into the case by Donald Stewart, and that his focus was on the guilt phase. He said it was up to Mr. Stewart to deal with the Suggs family and obtain the necessary school and medical records to be used in a penalty phase. Mr. Kimmel did not obtain any of Mr. Suggs' school or medical records or any other background materials on his client, because he assumed that Mr. Stewart was responsible for that aspect of the case (PC. Ev. at 275-278).

The State argues that there was no need for a mental health expert because Mr. Suggs had already been evaluated "by an objective mental health expert and received a report that trial counsel determined would do more harm than good" Answer Brief at 64).

The State conveniently ignores the fact that Dr. Larson, the "objective mental health expert" was ordered by the court to evaluate Mr. Suggs and report to his first attorneys, the public defender's office. Dr. Larson saw Mr. Suggs in 1990 and 1991, more than a year before he went to trial (PC. Ev. at 382, Exhibit 44).

Dr. Larson described his report as a "preliminary evaluation as I have not yet received the Defendant's school records, have not interviewed the Defendant's parents, nor

received relevant medical records and psychiatric records from previous periods of incarceration. Additionally, the Defendant would not cooperate with neuropsychological testing" (PC. Ev. at 383-393).

Despite requesting additional materials on Mr. Suggs to do

a more complete examination, Mr. Suggs' trial attorneys decided not to follow up with him or any other mental health expert. **No** mental health evidence was presented at penalty phase, and no other mental health experts were retained by counsel for Mr. Suggs. Defense counsel did not ask anyone to evaluate Mr. Suggs for mitigation as his penalty phase.

On one hand, Mr. Kimmel, the Florida expert, testified that the additional materials sought by Dr. Larson were not available, "or Donald Stewart would have got them," (PC. Ev. at 275). But on the other hand, he testified that "We were focusing on guilt or innocence," and they did not even attempt to obtain any of Mr. Suggs' background materials. It is unclear which story was true. Mr. Kimmel testified that he did not encourage Mr. Suggs to undergo a psychological evaluation.

Failing to investigate Mr. Suggs' mental health was clear ineffective assistance of counsel. The State argues that failing to present unfavorable reports of an expert is

not ineffective assistance of counsel (Answer Brief at 65). No one has suggested that trial counsel should have. What is ineffective assistance of counsel, however, is failure to provide an expert with enough material in which to make an evaluation, and failure to seek other experts who may have better rapport with the client. Relying on one mental health expert, who was hired several years before by a different lawyer, not given critical background information, and who has difficulty getting the client to cooperate, does not relieve defense counsel of its obligation to investigate his client's background and present mitigation to the sentencer.[9]

In Wiggins v. Smith, 123 S. Ct. 2727 (2003), the United States Supreme Court repeatedly reaffirmed the importance of a thorough investigation by defense counsel into mitigating factors to be presented in the penalty phase of a capital case. See, e.g. Id. at 2537; Williams v. Taylor, 529 U.S. 362 (2000); Strickland v. Washington, 466 U.S. 668 (1984).

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[9]At Mr. Suggs' penalty phase, defense counsel presented the testimony of three witnesses. Barbara Tucker testified that she has known Mr. Suggs and his family for 32 years. She described his father as a former police commissioner in Anniston, Alabama, and Ernie as a hard worker who attended school in Alabama and went to military academy (R. 4661-4670). Rhonda Carlson testified that Ernie Suggs worked for her father from 1975 through 1979 (R. 4671-4678). Loretta Suggs, Mr. Suggs' mother, testified that Ernie was a "happy, normal child," who went to military school, obtained his GED and attended gunsmith school in Colorado (4679-4681).

Similarly, this Court also has recognized the importance of trial counsel's investigation into mitigating factors and has reversed sentences where such investigations have been deficient and prejudice has resulted. See, e.g. Ragsdale v. State, 798 So. 2d 713, 720 (Fla. 2001); Rose v. State, 675 So. 2d 567, 570-74 (Fla. 1996); Stevens v. State, 522 So. 2d 1082, 1085-87 (Fla. 1989).

In Wiggins, the Court stressed that defense counsel's investigations "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. Id. at 2537 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1 (c) at 93 (1989). Referring to ABA Guidelines, the Court noted that among those topics that should be considered for presentation are "medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." Id. (citing 1989 ABA Guidelines 11.8.6, at 133).

In Wiggins, collateral counsel's investigation discovered a "bleak life history," including sexual and physical abuse, poverty and hunger. Even though funds were available to hire

a forensic social worker to prepare a detailed social history, Wiggins' trial attorneys had not done so. In collateral proceedings, Wiggins' trial counsel defended the lack of investigation or presentation of mitigating evidence by arguing that it was a matter of strategy and that trial counsel "decided to focus their efforts on 'retrying the factual case' and disputing Wiggins' direct responsibility for the murder." The Supreme Court concluded that Wiggins' defense team, who had presented none of the extensive mitigation during the penalty phase of the trial, had not performed the level of investigation that would allow them to make a reasonably informed decision not to present such mitigation. Id.

Determining that the decision not to pursue mitigation was made based on a premature and truncated investigation, the Court said:

> In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. Even assuming [Wiggins' trial counsel] limited the scope of their investigation for strategic reasons, Strickland does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.

Id. at 2538 (citing Strickland, 466 U.S. at 691).

The Court rejected arguments that Wiggins' defense team made a strategic decision based on the limited investigation they had conducted not to introduce mitigation. The Court ultimately determined that counsel's investigation into Wiggins' background did not meet the professional norms that prevailed at the time of trial, nothing that "despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." Id. at 2537. Hence, Wiggins' "counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible," Id. at 2538.

Similar observations can be made in Mr. Suggs' case. Defense counsel defended their actions at the penalty phase, arguing that they made a "strategic decision" to focus on the guilt phase of the trial. The 1989 ABA Guidelines that the Supreme Court concluded should have guided counsel's investigation in Wiggins should have provided similar guidance to Mr. Suggs' counsel, as he went to trial in June, 1992. These same guidelines existed at the time of Mr. Suggs' trial. These standards underscore not only the importance of defense

counsel's investigation into mitigating factors, but also the understanding that often strategy shifts between the penalty and guilt phases of a capital trial.

Preparing for both the penalty phase and guilt phase is essential, and counsel should be aware that the "sentencing phase of death penalty trial is constitutionally different from sentencing proceedings in other criminal cases." 1989 ABA Guidelines 11.8.1 at 123 n. 14. "If inconsistencies between the guilt/innocence and the penalty phase defenses arise, counsel should seek to minimize them by procedural or substantive tactics." 1989 ABA Guidelines 11.7.1 (B), at 115. In conducting the investigation into those who might present testimony at the penalty phase, counsel is required to seek out witnesses who are "familiar with aspects of the client's life history that might affect...possible mitigating reasons for the offense(s), and/or mitigating evidence to show why the client should not be sentenced to death" Id. 11.4.1 (d)(3)(B), at 95. n. 15. This is so regardless of any embarrassment it may cause family members.

Here, Mr. Stewart testified that he did not investigate Mr. Suggs because of his relationship to the Suggs' family and did not see any outward signs of mental illness. He testified that he knew that Mr. Suggs had difficulty in school, had gone

to military school and had some behavior problems while growing up, but did not know at the time of the penalty phase that that information would help him. Unfortunately, Mr. Stewart did not know these were red flags to have his client tested and evaluated.

Mr. Kimmel focused on the guilt/innocense phase of trial and said it was his co-counsel's responsibility to obtain background information on Mr. Suggs.

What is clear is that neither one of Mr. Suggs' trial counsel investigated or uncovered any mitigation regarding Mr. Suggs' family and social history. See, Armstrong v. State, 862 So. 2d 705 (Fla. 2003)(J. Anstead, concurring). Mr. Suggs is entitled to a new trial because of defense counsel's ineffective assistance of counsel at the penalty phase.

When mental health mitigating evidence was available, and "absolutely none was presented [by counsel] to the sentencing body, and .....no strategic reason was...put forward for this failure," the omission was "objectively unreasonable." Middleton v. Dugger, 849 F. 2d 491, 493-495 (11th Cir. 1988). "....psychiatric mitigating evidence not only can act in mitigation, it also could significantly weaken the aggravating factors." Elledge v. Dugger, 823 F. 2d 1439, 1447 (11th Cir.), cited in Hardwick v. Crosby, 320 F. 3d 1127 (11TH Cir. 2003).

The question is not whether counsel should have presented a mitigation case. Rather, the focus should be on whether the investigation supporting counsel's decision not to introduce mitigation evidence of Mr. Suggs' background was itself reasonable. See, Wiggins. Clearly, it was not.

At the evidentiary hearing, post-conviction counsel presented unrebutted evidence that Mr. Suggs suffers from significant neuropsychological deficits and impairments, particularly in the area of critical thinking and auditory selection attention. He has organic brain damage. In layman's terms, Mr. Suggs processes information like a 14-year-old child and has difficulty organizing his thoughts (PC. Ev. at 34-36). Mr. Suggs suffers from depression and flat affect.

Mr. Suggs' trial counsel were **unreasonable** in failing to investigate Mr. Suggs' mental health, and hire a mental health expert who could have evaluated Mr. Suggs for penalty phase and provide information about mitigation to the sentencer. Trial counsel were **unreasonable** in failing to call any mental health expert at the penalty phase who could have provided the statutory and non-statutory mental health evidence. Trial counsel were **unreasonable** when they failed to obtain and investigate any of Mr. Suggs' background. In light of seven-

to-five (7-5) jury recommendation for death and prevailing case law, the performance of Mr. Suggs' trial counsel was patently unreasonable.

Failure to offer proof of Mr. Suggs' incarceration record as mitigation.

The State argues that "It borders on the absurd to suggest that Skipper[10] and its progeny requires counsel to present such evidence when Suggs' first murder followed by the murder of Pauline Casey, spoke volumes about his potential for rehabilitation and future dangerousness, none of which was favorable to Suggs" (Answer Brief at 54).

The State fails to understand the nature of Skipper evidence and its purpose in a penalty phase.[11] Skipper deals with the defendant's good prison record and is relevant to mitigation. Future dangerousness is not an aggravating circumstance in Florida, nor can it be introduced as a non-statutory aggravation. Rather, it is Mr. Suggs' good history in prison in Alabama, where he served a prior sentence and where he was let out early for good conduct that was

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[10]Skipper v. South Carolina, 476 U.S. 1 (1986).

[11]The State also failed to recognize that after the three defense penalty phase witnesses testified at trial, defense counsel offered into evidence a presentence report of by Alabama probation officer and a record compiled by Mr. Suggs while he was in prison in Alabama (R. 4681).

mitigation that the jury should have been told about and illustrates that Mr. Suggs can adapt well in a structured environment.

Trial counsel's failure to object to HAC and CCP

The State argues that Mr. Suggs can show no prejudice because the case was "undisputedly HAC." (Answer Brief at 56).[12] The State misunderstands the argument. The argument is not whether the facts support the crime of heinous, atrocious or cruel, but whether trial counsel properly objected to a change in the law and a change to the language of the jury instruction. At the evidentiary hearing, Mr. Kimmel, the so-called Florida expert, characterized Espinosa as "a tidal wave, it was an earthquake," as to its impact on Florida law (PC. Ev. At 236). He added, however, that he learned of the Espinosa decision after Mr. Suggs had already been sentenced to death. He conceded, "I did not bring Espinosa to the attention of Judge Melvin before sentencing, that is correct." (PC. Ev. At 239). He offered no explanation for his failure, other than he simply did not think of this earthquake in Florida law. As a result, Mr. Suggs jury was instructed with the same defective instruction condemned in Espinosa. Thus,

[12]This Court found that this objection to HAC was not properly preserved. Suggs v. State, 664 So. 2d 64, 70 (Fla. 1994).

Mr. Suggs' jury received improper instructions as a co-sentencer. This was ineffective assistance of counsel.

CONCLUSION

As to those claims not addressed in the Reply Brief, Mr. Suggs relies on the arguments set forth in his Initial Brief and on the record. He submits that he is entitled to a new trial and/or a resentencing proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first-class postage prepaid, to Meredith Charbula, Assistant Attorney General, The Capitol, Tallahassee, FL 32399-1050 this 23rd day August, 2004.

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Hilliard E. Moldof, Esq.
Florida Bar Number 215678
1311 SE Second Avenue
Ft. Lauderdale, FL 33316
(954) 462-1005
Attorney for Mr. Suggs

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Reply Brief satisfies the Fla. R. App. P. 9.100 (1) and 9.210(a)(2).

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HILLIARD E. MOLDOF
Florida Bar No. 215678
1311 SE Second Avenue
Ft. Lauderdale, FL 33316
(954)462-1005