

IN THE SUPREME COURT OF FLORIDA

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CASE NO. SC03-17

LOWER COURT CASE NO. 87-2719 CF

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ANTHONY JOHN PONTICELLI,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

---

ON APPEAL FROM THE CIRCUIT COURT  
OF THE FIFTH JUDICIAL CIRCUIT,  
IN AND FOR MARION COUNTY, STATE OF FLORIDA

---

INITIAL BRIEF OF APPELLANT

---

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**PRELIMINARY STATEMENT**

This proceeding involves the appeal of the circuit court's denial of Mr. Ponticelli's initial motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court denied several of Mr. Ponticelli's claims without an evidentiary hearing. The circuit court held a limited evidentiary hearing on portions of Mr. Ponticelli's ineffective of counsel claims, Ake, Brady and newly discovered evidence claim. The following abbreviations will be utilized to cite to the record in this cause, with appropriate page number(s) following the abbreviation.

"R. \_\_\_\_." - record on direct appeal to this Court;

"Supp. R. \_\_\_\_." - supplemental record on appeal;

"PC-R. \_\_\_\_." - record on appeal from the denial of postconviction relief;

"Supp. PC-R. \_\_\_\_." - supplemental record on appeal from denial of postconviction relief.

All other references will be self-explanatory or otherwise explained herewith.

### STANDARD OF REVIEW

Mr. Ponticelli has presented several issues which involve mixed questions of law and fact. Thus, a de novo standard applies.

### REQUEST FOR ORAL ARGUMENT

Mr. Ponticelli has been sentenced to death. The resolution of the issues in this action will determine whether Mr. Ponticelli lives or dies. This Court has not hesitated to allow oral argument in other capital cases in similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Ponticelli, through counsel, accordingly urges that the Court permit oral argument.

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### STATEMENT OF THE CASE

Mr. Ponticelli was indicted on January 4, 1988, with two counts of first-degree murder in the deaths of Nicholas and Ralph Grandinetti and one count of armed robbery (R. 1375-6). Mr. Ponticelli pled not guilty to the charges (R. 1385).

Mr. Ponticelli's capital jury trial commenced on August 9, 1988. After the State rested, the trial court granted the defense's motion for judgment of acquittal as to the armed robbery count (R. 941). Guilty verdicts were returned on both counts of first degree murder on August 12, 1988. The penalty phase began on August 18, 1988. That same day, the jury recommended a death sentence by a vote of nine to three for each of the murders (R. 1371-2). A sentencing hearing was held on September 6, 1988, at which time Mr. Ponticelli was sentenced to death for the two counts of first degree murder (R. 1849-51).

On direct appeal, this Court affirmed Mr. Ponticelli's convictions and sentences. Ponticelli v. State, 593 So. 2d 483 (Fla. 1991).

After filing a writ of certiorari to the United States Supreme Court, the Court vacated the judgment and remanded for further consideration in light of Espinosa v. Florida, 505 U.S. 1079 (1992). Ponticelli v. Florida, 506 U.S. 802 (1992).

This Court found the challenge procedurally barred. Ponticelli v. State, 618 So. 2d 154 (Fla. 1993).

A motion to vacate sentence pursuant to Rule 3.850 was filed on April 11, 1995 (Supp. PC-R. 1-60). Mr. Ponticelli

filed his Rule 3.850 motion early in order to institute public records' proceedings. Over the next few years, a series of status hearings were held and amended Rule 3.850 motions were filed which included public records updates (PC-R. 12-27, 30-7, 38-79, 80-108, 110-36, 153-68, 170-290; Supp. PC-R. 195-257, 297-455, 495-657, 700-849).

On June 30, 1998, after receiving additional public records, Mr. Ponticelli filed his fifth amended Rule 3.850 motion (Supp. PC-R. 1255-1532).

A Huff hearing was held on September 23, 1998, and on November 3, 1998, the lower court entered an order granting a limited evidentiary hearing (PC-R. 321-401; Supp. PC-R. 1673-93). On July 10, 2000, an evidentiary hearing commenced. Following the hearing, the lower court entered an order denying all relief on November 1, 2002 (Supp. PC-R. 1736-60). Rehearing was denied on December 17, 2002 (PC-R. 2758).

Mr. Ponticelli timely filed a notice of appeal.

#### **STATEMENT OF FACTS**

##### **A. THE TRIAL RECORD**

Mr. Ponticelli was indicted for two counts of first-degree murder and one count of armed robbery on January 4, 1988 (R. 1375-6). The Public Defender's Office was appointed to represent Mr. Ponticelli, but moved to withdraw as counsel due to a conflict of interest (R. 1396). On February 23, 1988, five and a half months before Mr. Ponticelli's capital trial, James Reich was appointed to represent Mr. Ponticelli (R. 1400-1).

On June 6, 1988, trial counsel file a Motion for Appointment of Expert Witnesses in which he stated:

1. Discovery depositions of three essential or extremely important witnesses for the State of Florida in this cause have disclosed that the Defendant, for approximately one month prior to November 27<sup>th</sup>, 1997 was, on a daily basis ingesting large amounts of Cocaine, both "Crack" and powder.

2. The evidence of such use and the apparent effect of the same upon Defendant has been disclosed by the following State witnesses:

a. Joseph Leonard: This witness testified ... that sometime in September or October, 1987, Defendant accompanied his parents to the State of New York and was there for approximately four to six weeks. After the Defendant returned from this visit this witness, for the first time, learned that the Defendant was using crack cocaine and Defendant's behavior and personality changed substantially.

\* \* \*

3. Defendant is charged in this cause with two counts of First Degree Murder which requires proof by the State of Florida of premeditation by Defendant.

4. The undersigned believes that the Defendant, due to the drug use as set forth above, was, on November 27<sup>th</sup>, 1987 incapable of "premeditating" any act and was incapable of forming the intent necessary to constitute First Degree Murder.

5. A person who is an expert in the area of the effect of cocaine on mental processes is necessary to the reasonable defense outlined above in order to give Defendant the opportunity to effectively present said defense to the jury in this cause.

(R. 1408-9). The court granted the defense's request (R. 1411).

The following month, trial counsel filed a Motion for Psychiatric Examination requesting that the court appoint experts to determine whether Mr. Ponticelli was competent to proceed (R. 1413-5). The court appointed Drs. Harry Krop,

Rodney Poetter and Robin Mills to evaluate Mr. Ponticelli for competency (R. 1416).

On July 25, a few weeks before trial, the defense filed a Notice of Intent to Rely on Insanity Defense (R. 1424-5).

Trial counsel also requested that the State disclose, any assistance provided to the jailhouse informant, Dennis Freeman and his involvement with law enforcement (R. 1429-30).

A competency hearing was held on August 2, 1988 (R. 1176-1217). Dr. Mills testified that Mr. Ponticelli was not competent to stand trial because of Mr. Ponticelli's delusional thinking and the fact that "his associations were loose"; one thought was not tracking logically upon the other (R. 1183). Dr. Mills concluded that Mr. Ponticelli was suffering from a psychosis that prevented him from assisting his attorney (R. 1186).

While Dr. Poetter believed Mr. Ponticelli was competent he found that Mr. Ponticelli was in denial and that his denial was a way of coping with the stress of the trial (R. 1198). Dr. Poetter testified that "emotionally I doubt that [Mr. Ponticelli] really is aware that he could be sentenced to death" and thus, Mr. Ponticelli was mildly impaired (R. 1202). The fact that Mr. Ponticelli was not communicating with his trial counsel was based on his religious beliefs and his denial of his situation (R. 1203). Dr. Poetter testified that Mr. Ponticelli believed that he was helping himself by not saying anything and that every decision was affected by his thinking process (R. 1205).

Dr. Krop testified that he believed Mr. Ponticelli was competent to stand trial (R. 1211). Like Dr. Poetter, Dr. Krop believed that Mr. Ponticelli's denial of his situation was his way of coping (R. 1213). Dr. Krop stated that this coping mechanism was inappropriate because it did not allow him to assist his attorney (R. 1214). The court found that Mr. Ponticelli was competent (R. 1217).

On August 8, 1988, a hearing was held, at which, trial counsel requested that the court suppress the statements obtained from Mr. Ponticelli. Without taking any testimony or hearing the tape recorded statements, the motion was denied (R. 1233).

On August 9, 1988, Mr. Ponticelli's capital trial commenced. During voir dire, the court and defense counsel told the jury that there may be a defense of insanity (R. 66). The State also raised the issue of cocaine or drug use (R. 104).

During trial counsel's opening statement he told the jury:

In the process of this trial, you will discover that there are inconsistencies; that there are contradictions; that there are some outright lies; that the evidence against Tony Ponticelli is insufficient to constitute proof beyond and to the exclusion of every reasonable doubt that he, from a premeditated design, to effect the death of Nicholas and Ralph Grandinetti, shot them.

I submit to you that the evidence will not demonstrate, and that the evidence will not show that the State has proven beyond a reasonable doubt the elements of those offenses.

(R. 292). However, trial counsel also went on to state:



The evidence will show that approximately two weeks before the deaths of Nicholas and Ralph Grandinetti, beginning around that period of time, not only was Tony Ponticelli using cocaine that he got from the Grandinettis, he was using cocaine that he secured from another source in Oklawaha. The cocaine that he was getting from Oklawaha was in the form of what they call crack.

On the night that Nicholas and Ralph Grandinetti were murdered, Tony Ponticelli was on what the Mental Health profession calls "a run". He was pulling a cocaine train, or it was pushing him, but in any event, had, at that time, been using cocaine to the extent that his mental processes, his physical condition was such that he was set up for a psychotic episode.

You will hear what cocaine does to you. You will hear what a small amount of cocaine does to you. You will hear what a lot of cocaine does to you, and it's not pretty.

. . . First of all, that the elements of first degree murder have not been proven; second of all, that there is a reasonable doubt as to whether or not Tony Ponticelli shot Nicholas and Ralph Grandinetti.

The evidence is going to establish that there is reason to believe that there is at least, at the very least, a reasonable doubt as to the mental state, that is the insanity of Tony Ponticelli at the time that Nicholas and Ralph Grandinetti were killed.

\* \* \*

[W]hile there is reasonable doubt as to who did the killings, . . . there is no reason not to believe that Tony Ponticelli, whatever he did that night, whatever role he played in the deaths of Nicholas and Ralph Grandinetti, that he was not legally sane

. . .

(R. 293-5).

The evidence at trial included testimony that in the morning hours, on the Saturday following Thanksgiving, Ellzey Harrington saw a red car near his house (R. 305). Later that afternoon, Harrington approached the car and found two individuals, later identified as Nicholas and Ralph

Grandinetti (R. 310). The individuals appeared to have blood; and one was in the back seat while the other was in the front, passenger seat (R. 309-10).

After an investigator arrived from the Marion County Sheriff's Department, it was determined that Ralph Grandinetti was dead (R. 321). Nicholas Grandinetti was transported to the hospital for treatment (R. 351).

The following day an autopsy occurred of Ralph Grandinetti (R. 363). Dr. Sanderson, M.D., noticed abrasions to Ralph Grandinetti's face and a bullet wound to the left side of his head (367-8). Dr. Sanderson concluded that Ralph Grandinetti "died from the gunshot wound to the head" and died within a minute or two of the gunshot (R. 374).

Investigator Bruce Munster was assigned to investigate the offense as the lead detective. He spoke to Timothy Keese because Keese owned the car in which the Grandinetti's were found and also lived with them (R. 780). Keese told him that Tony Ponticelli had been with the brothers on the night before the car was found (R. 782).

At trial Keese testified he returned from a trip out of town on the Friday evening, following Thanksgiving, about 7:30 p.m. (R. 415-6). Keese was accompanied by his brother, Roger, who was in the Navy at that time (R. 416). Tony Ponticelli, whom he knew from Mr. Ponticelli's coming to purchase cocaine from the Grandinetti's was present at the trailer along with Nicholas and Ralph (R. 416). Mr. Ponticelli had purchased large quantities of cocaine from the

Grandinettis for the last few weeks, sometimes two or three times a day (R. 426-7).

Keesee told the jury: "They were discussing money that Tony had owed them for..." (R. 416). Mr. Ponticelli indicated that he would raise money by helping the brothers sell drugs (R. 417). Ralph "told [Tony] to make the calls" and handed Tony the phone (R. 417). Keesee remembered that Ralph was "pushy" and "insistent" with Mr. Ponticelli (R. 436-7); "It was apparent that Ralph wanted money" (R. 443). Keesee also observed that Mr. Ponticelli was nervous, but he told the jury that Mr. Ponticelli did not want to be taken home because he wanted to find a way to pay them that night (R. 419, 442).

Keesee admitted that there was cocaine at the trailer on that evening, however, he testified:

Q: While you were there, you stated that there was some cocaine on the table.

Did you, yourself, see anybody - any of the people partake of any of that cocaine?

A: No.

(R. 420). Keesee and his brother left the trailer at approximately 8:30 p.m. (R. 420). When Keesee returned that evening the brothers were not there (R. 421).

Due to Keesee's information, Inv. Munster interviewed Mr. Ponticelli on Saturday evening and Mr. Ponticelli told him that he had been with the Grandinetti's earlier in the evening on Friday night but had left them at about 9:30 p.m. and traveled to Gainesville with John Turner (R. 783).

On December 3, 1987, Inv. Munster spoke to Mr. Ponticelli because he "had a subpoena which would compel [Mr. Ponticelli] to be at the state attorneys that afternoon, ..." (R. 786).<sup>1</sup>

Later that day, Inv. Munster spoke to Mr. Ponticelli again, with his parents present (R. 814). The jury heard Mr. Ponticelli's second taped statement in which he stated that

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<sup>1</sup>During Mr. Ponticelli's trial the statement referred to by Inv. Muster was played. The court reporter did not record the statement. The following occurred:

THE COURT: When I considered your Motion to Suppress the other day, if I had the benefit of this testimony, I probably - it was probably available but I didn't hear the exact comments that Investigator Munster told Mr. Ponticelli at the time he took the statement.

The way I hear the tape now, it sounds to me like even though the investigative subpoena was not served, it's clear that the statement was given in response to the threat of the subpoena and that Investigator Munster told him that the statement wouldn't be used against him.

(R. 791-2). The trial court suppressed the first statement, a portion of which the jury already heard, but ruled that he would allow the jury to hear a second taped statement taken a few hours after the first statement. Trial counsel stated:

MR. REICH: That creates a problem.

THE COURT: Sure, it does.

MR. REICH: Freeman made reference, in his testimony to statements that Mr. Ponticelli . . . made to Bruce Munster that were inconsistent and were lies made up for the purpose of misleading the police . . .

That testimony is tainted, I believe, and at this point I think I am necessarily going to have to ask the court for a mistrial, and because of the taint from Freeman.

THE COURT: Motion for mistrial is denied.

(R. 804-5).

Nicholas and Ralph Grandinetti picked him up when he was walking and told Tony that he owed them \$100 (Supp. R. 13). Nicholas Grandinetti told Mr. Ponticelli that he needed the money because someone was after him (Supp. R. 14). Mr. Ponticelli offered to try to sell some of the cocaine for the Grandinetti's to get the money (Supp. R. 14).

Mr. Ponticelli told Inv. Munster that he drove with the Grandinettis to try to sell the cocaine and they picked up another individual, named Charlie (Supp. R. 15-6). While driving, Charlie told them to stop the car (Supp. R. 18). Mr. Ponticelli got out of the car to go to the bathroom and Charlie started shooting and "started coming after [Tony]" (Supp. R. 18). A few days later, Inv. Munster again interviewed Mr. Ponticelli, this time they spoke on the phone (R. 831). Mr. Ponticelli recounted essentially the same events that he had in his earlier statement (Supp. R. 32-5). But, Mr. Ponticelli told Inv. Munster that another individual came through the woods near where they stopped the car (Supp. R. 42).

Inv. Munster then interviewed Joey Leonrad about a firearm (R. 832). Leonard testified for the State at Mr. Ponticelli's trial. Leonard explained that he knew Mr. Ponticelli for a few years and in early November, 1987, Mr. Ponticelli paid for a tattoo for Leonard (R. 608). In exchange for the tattoo Leonard loaned Mr. Ponticelli a gun, a .22 (R. 608).

On the Friday after Thanksgiving, Mr. Ponticelli called

Leonard and requested a ride at about 8:30 p.m. (R. 610-1). At the time, Mr. Ponticelli told Leonard that he was with Nicholas Grandinetti (R. 611). At approximately 9:30 p.m., Mr. Ponticelli stopped by Leonard's home and gave him the gun back and told him that he "did Nick" (R. 611). There was no other conversation at that time (R. 613). Bobby Meade was also present during the conversation (R. 613).

On Saturday, Leonard spoke to Mr. Ponticelli who told him that he: "did Nick, his brother" (R. 616). Mr. Ponticelli also explained that Nick and his brother were harassing Tony for money and were not going to let him leave their house unless he paid them \$175 (R. 617). Mr. Ponticelli also told Leonard that the three of them were driving around trying to sell cocaine and he shot the Grandinettis (R. 619). Mr. Ponticelli did not know why he had shot the Grandinettis (R. 623).

Robert Meade also testified about the Friday following Thanksgiving. Meade recalled that Mr. Ponticelli arrived between 9:00 and 9:30 p.m. at Leonard's house (R. 574). Meade testified similarly to Leonard as he told the jury that Mr. Ponticelli gave Leonard the gun back and told them that he had killed Nick (R. 575). Mr. Ponticelli asked them what he should do with the bodies that were in the car (R. 577). Mr. Ponticelli also told them that the Grandinettis had "roughed him up" (R. 596).

The day that Inv. Munster interviewed Leonard and Meade, Nicholas Grandinetti died (R. 836). Dr. Maruniak performed

the autopsy the following day. Dr. Maruniak testified that Nicholas Grandinetti suffered two gunshot wounds to the back of the head and also had some bruising around the back and side of his head (R. 386). The cause of death was cardiac arrest due to the gunshot wounds (R. 398).

A few days later, Inv. Munster arrested Mr. Ponticelli (R. 836). Mr. Ponticelli gave another statement, which the jury heard, wherein he denied shooting the Grandinettis (Supp. R. 46).

Following his arrest, Mr. Ponticelli provided another statement (R. 840). Mr. Ponticelli told Inv. Munster that an individual, named Steve Foley, ran into he and the Grandinettis on Friday, and shot the Grandinettis (R. 841).

A few weeks after his arrest, Dennis Freeman contacted Inv. Munster and told him that he had information about the case (R. 846-7). Freeman provided Inv. Munster with a map that Mr. Ponticelli had drawn which led to Dotson's house (850). Freeman also provided the phone number of Ron Halsey (R. 851).

At trial Keith Dotson testified for the State. Dotson told the jury that he met Mr. Ponticelli on the Friday following Thanksgiving around 5:00 p.m. (R. 511-2). Dotson explained that his cousins and a friend were visiting and that they were going to watch movies if Mr. Ponticelli wanted to join them (R. 512).

Dotson testified that Mr. Ponticelli arrived at his house around 6:30 p.m., while they were watching Scar Face (R. 512-

3). Mr. Ponticelli stayed for thirty minutes, but returned an hour or so later (R. 513-4). After Mr. Ponticelli left the second time, Ed Brown instructed Dotson to get his shotgun and not to answer the phone (R. 516). Dotson recalled that about an hour later, at 8:30 p.m., Mr. Ponticelli again returned and told him that he had "killed two guys" for money and cocaine (R. 517). Mr. Ponticelli also requested that he be allowed to wash his clothes (R. 517). Dotson did not see any money or cocaine (R. 517).

Dotson testified that Mr. Ponticelli was acting "freaked out" or "hyped up" (R. 520, 532). After they washed his clothes, they drove Mr. Ponticelli home (R. 521).

Dotson's cousin, Ed Brown, who was from West Virginia, was also present at Dotson's house over Thanksgiving weekend (R. 465). Brown testified that on the Friday following Thanksgiving, at 7:30 p.m., Mr. Ponticelli stopped by the Dotson house while they were watching Scar Face (R. 469-70). Brown testified:

Q: During your stay in Florida anytime earlier that week, had you ever seen Mr. Ponticelli?

A: No ma'am.

(R. 469). Mr. Ponticelli watched the movie for thirty minutes or so and then left (R. 473). Mr. Ponticelli returned after dark in a car and stated that he was going to kill two guys (R. 473-4). At that time, Brown also saw a gun (R. 474). Mr. Ponticelli also asked if they could give him a ride later that night (R. 474). Brown confirmed that Dotson got his shotgun



and the group agreed not to answer the phone if it rang (R. 476).

Later that evening, Mr. Ponticelli returned and stated: "I did it, dudes." (R. 477). He washed his clothes (R. 478). Brown described Mr. Ponticelli for the jury and told them that he acted like he "shouldn't have done it" and that he was "really worried" (R. 480). "He was hyper, you know, he was all around the room - he would look in all the rooms and everything and just - he was acting real scared, you know, worried" (R. 481). They drove Mr. Ponticelli home (R. 482). Ed Brown denied using cocaine with Mr. Ponticelli (R. 508).

Likewise, Brian Burgess, Dotson's friend from West Virginia testified at Mr. Ponticelli's trial. Burgess testified that he never met Mr. Ponticelli prior to the Friday evening, after Thanksgiving (R. 535). Burgess testified that Mr. Ponticelli arrived between 6:00 and 7:00 p.m., while they watched movies (R. 536). Mr. Ponticelli left after about thirty minutes, but returned an hour or so later and told him that he was going to kill the two guys in the car (R. 536-7). Burgess also saw that Mr. Ponticelli possessed a gun (R. 538).

About 9:00 or 10:00 p.m., Mr. Ponticelli returned in a cab and told him that he shot two people in the back of the head (R. 540-1). Mr. Ponticelli told him that he needed money (R. 542).

Mr. Ponticelli walked around the house looking out the

windows as his clothes were washed (R. 544). Burgess then drove Mr. Ponticelli home (R. 544).

Like the others, Warren Brown testified that he met Mr. Ponticelli on Friday evening (R. 557). Mr. Ponticelli stopped by around 7:00 p.m. and then again at 9:00 p.m. (R. 558). However, Warren Brown testified that after Mr. Ponticelli confessed to shooting two people, he requested that they provide him with an alibi for the evening (R. 561). Warren Brown also described Mr. Ponticelli as "nervous" (R. 565).

Ronald Halsey met Mr. Ponticelli through John Turner on the Sunday after Thanksgiving in 1987 (R. 640). Turner and Mr. Ponticelli stopped by Halsey's house and burned some clothes (R. 643-4). Mr. Ponticelli told Halsey:

that he owed Nick some money for some cocaine, I believe it was a hundred dollars, and that Nick and Ralph roughed him up, threw him in the back of the car and they were driving somewhere, and they came to a stop and Tony took a gun. He shot the driver twice in the back of the head and then he shot the passenger twice in the back of the head.

(R. 645). Mr. Ponticelli also told him that he had spent the money he obtained on crack (R. 648).

Douglas Freeman testified that had been incarcerated in the same cell with Mr. Ponticelli in late 1987 (R. 716). According to Freeman, Mr. Ponticelli discussed his case with him (R. 720). Mr. Ponticelli told him that on the night of the crime, the Grandinetti's picked him up because he owed them money (R. 722). While they were at the trailer, Mr. Ponticelli considered committing the crime, but someone else was there (R. 741). He drove around with the Grandinettis to

the Dotson house because he "was making them think that these particular people wanted to buy some cocaine" (R. 734). Mr. Ponticelli continued to drive around with the Grandinettis and he was in the back seat (R. 744). He shot both of the brothers in the back of the head (R. 744-5).

Mr. Ponticelli told Freeman that he abandoned the car and took the money and cocaine that the brothers had (R. 748). According to Freeman, Mr. Ponticelli told him that he killed the brothers in order to rob them of cocaine and money (R. 753).

Mr. Ponticelli also admitted that he had disposed of his clothes and given Inv. Munster false statements (R. 721, 726). Freeman stated:

Q: Speaking about cocaine, did the defendant tell you whether or not, on the night of the murders, that he had used any cocaine?

A: Yes, he did.

Q: What did he tell you?

A: . . . I specifically asked him had he been doing any drugs or drinking, heavily or whatever, that particular day, and he said no.

(R. 753). Freeman also testified that he was not receiving any benefits for his testimony (R. 714).

Freeman had been convicted of twenty-six felonies (R. 739). Additionally, Freeman had provided information to law enforcement many times since 1976 (R. 755). Freeman also admitted that he was paid for information and had attempted to retain money received during his assistance in drug transactions (R. 757).

As to physical evidence, Mr. Ponticelli's fingerprint was identified on a video box in the car (R. 668, 908). Also, the bullets recovered from the Grandinettis matched the gun that was recovered from Leonard (R. 926-7).

During the defense case, Mr. Ponticelli's trial counsel presented the testimony of John Turner. Turner knew Mr. Ponticelli for about a year at the time of the crime (R. 947). When Mr. Ponticelli returned from New York in October, 1987, he spent much of his time with Turner (R. 948). Mr. Ponticelli and Turner used cocaine, including free basing, every day, from 8:00 or 9:00 a.m. until 3:00 or 4:00 a.m. (R. 948, 950, 953).

On cross examination, the State elicited testimony from Turner that he did not recall seeing or using cocaine with Mr. Ponticelli on the Friday following Thanksgiving (R. 961).

Defense counsel also attempted to present the testimony of Dr. Mark Branch, who was an expert in behavioral pharmacology (R. 973-4). Trial counsel wanted Dr. Branch to testify as to the effects of cocaine on the mind and body and to explain cocaine psychosis (R. 975-8).

The state objected to Dr. Branch's testimony and the court refused to allow the jury to hear the testimony because there was no evidence of cocaine use at the time of the offense (R. 993).

During the State's closing argument, the prosecutor stated:

If you'll remember the testimony of the two

young men from West Virginia, Ed Brown and Brian Burgess, they were both present at Keith Dotson's house in Silver Springs Shores on Friday night when the defendant returned for a second time to that residence.

These fellows didn't know the defendant, and he told them at that time, "I'm going to kill a couple of guys."

(R. 1054). The prosecutor argued that the statements Mr. Ponticelli made demonstrated his state of mind and that insanity was not an issue in the case (R. 1055-6).

The prosecutor explained away Mr. Ponticelli's paranoid behavior on the night of the crime as "a rational fear of the consequences of his actions that evening." (R. 1063).

During trial counsel's closing argument, he directed the jury to consider Mr. Ponticelli's cocaine use:

[Y]ou heard testimony from his friends and from his father. They described a young man who, in a six week period of time in the fall of last year, changed from being a very friendly, a very affable, fun kind of guy, kind of laid back and mellow, one with whom people wanted to associate, to a fellow who was nervous and unreliable and short tempered.

(R. 1075). Trial counsel also argued that Mr. Ponticelli's cocaine use was relevant to whether or not the murders were premeditated (R. 1077).

As to the four witnesses present at Dotson's house on Friday evening, trial counsel told the jury: "I don't believe they would come to Ocala, Florida, and sit in this chair and lie to y'all" (R. 1093). He also told the jury: "And there's no doubt in my mind, at least, that he said the things that those boys from West Virginia say he said." (R. 1101-2).

The jury found Mr. Ponticelli guilty of both counts of

premeditated murder (R. 1152).

The penalty phase commenced on August 18, 1988. Trial counsel presented only the testimony of Dr. Mills. Dr. Mills explained the personality changes that occur when an individual uses intoxicants (R. 1321). Based on a hypothetical, Dr. Mills believed that Mr. Ponticelli was suffering from an extreme mental or emotional disturbance because of his repeated use of cocaine at the time of the crime (R. 1322, 1325). Dr. Mills also testified that Mr. Ponticelli's capacity to appreciate the criminality of his conduct was substantially impaired (R. 1325).

The State argued to the jury that the pecuniary gain aggravator applied. As to cold, calculated and premeditated, the State argued that the strongest evidence was from the "fellows from West Virginia" who testified as to Mr. Ponticelli's statements (R. 1342). The State also argued the heinous, atrocious and cruel aggravator as to the death of Nicholas Grandinetti (R. 1343).

As to mitigation, the State told the jury:

Dr. Mills points to the defendant's actions, his paranoia, his hyperness, when he stopped by the house where the fellows from West Virginia were, and he felt that, yes, this was a result of his using cocaine.

Remember that the defendant was telling these young men that he was planning to kill two people and he returned and told them, yes, he had, in fact, done this. I submit to you that that is not that abnormal a reaction and, sure, we know that the defendant used a lot of cocaine, but there was no evidence at all during the trial that he had used cocaine that day; none whatsoever. In fact, he told Dennis Freeman that he did not use cocaine that day.

(R. 1349-50).

The jury recommended death for both murders by a vote of nine to three (R. 1372).

The trial court sentenced Mr. Ponticelli to death for the murder of Ralph Grandinetti, finding two aggravators: pecuniary gain and the crime was committed in a cold, calculated and premeditated manner (CCP)(R. 1167-8, 1172). Likewise the court sentenced Mr. Ponticelli to death for the murder of Nicholas Grandinetti, finding the same two aggravators and the crime was heinous, atrocious and cruel (HAC)(R. 1168, 1172).

In mitigation, the court considered that Mr. Ponticelli had no significant criminal history, but pointed out that the "convictions are not required to negate a mitigating factor" (R. 1170. The court also considered Mr. Ponticelli's age. The court did not find either mental health mitigator had been established (1171-2). In fact, the court stated: "there is absolutely no evidence that defendant used any alcohol or drugs on the day of the offense" (R. 1836).

#### **B. THE DIRECT APPEAL**

This Court affirmed Mr. Ponticelli's convictions and sentences. Ponticelli v. State, 593 So. 2d 483 (Fla. 1991). However, this Court also found that errors occurred. First, this Court held that it was error to admit Mr. Ponticelli's second statement which the jury heard, but this Court found the error harmless. Id. at 488.

This Court also found that Mr. Ponticelli's jury heard

improper evidence from Freeman when the State attempted to rehabilitate him about the fact that there may be reprisals from other jail inmates. This Court found the error harmless. Id.

As to the penalty phase, this Court found that the lower court's rejection of the mental health mitigators was supported by the record and pointed out: "there was no evidence of drug use on the evening of the murders." Id. at 491.

The United States Supreme Court vacated the judgment and remanded for further consideration in light of Espinosa v. Florida, 505 U.S. 1079 (1992). Ponticelli v. Florida, 506 U.S. 802 (1992).

On March 4, 1993, this Court held: "A review of the record reveals that the instruction given on [heinous, atrocious and cruel] was even less detailed than that found insufficient in Espinosa. However, the challenge to the sufficiency of the instruction is procedurally barred because there was no request for specific instructions or objection to the instructions given." Ponticelli v. State, 618 So. 2d 154 (Fla. 1993).

### **C. THE POSTCONVICTION PROCEEDINGS**

Mr. Ponticelli's evidentiary hearing commenced on July 10, 2000. The Brady, ineffective assistance of counsel at both the guilt and penalty phases, Ake, competency claims, among others, were somewhat intertwined and primarily focused on Mr. Ponticelli's history of drug use, drug use near the



time of the crime and behavior following his incarceration along with the inconsistencies and evolution of many of the State's witnesses' testimony regarding premeditation.

**1. The Days and Hours Preceding the Crime**

Mr. Ponticelli presented testimony that several State witnesses lied at his trial: Timothy Keese, the roommate of the Grandinettis, who had seen Mr. Ponticelli within hours of the crime, admitted that he lied at trial (PC-R. 532). Keese explained the events that led to his false testimony: The day following the crime, Inv. Munster interviewed Keese (PC-R. 506). Keese told Inv. Munster that the reason he and his brother left the trailer was because they were uncomfortable because of the "cocaine usage" at the trailer (PC-R. 508). Specifically, Keese told Inv. Munster that Mr. Ponticelli had done "one line" of coke in the forty minutes he was present at the trailer (PC-R. 508). Keese also observed that on the table there were baggies, a razor blade and a piece of glass (PC-R. 509).

Keese was interviewed by the prosecutor, Sarah Balius, who took notes when they spoke (PC-R. 513-4). Keese recalled that he told the prosecutor that he witnessed Mr. Ponticelli use cocaine on the night of the crime (PC-R. 514).

During preparation for his testimony, the prosecutor asked him similar questions and when he changed his answers, she said, "Good" (PC-R. 537). Keese "could tell by her response as she wrote, that it was helping her case." (PC-R. 537).

In explaining his contradictory deposition and trial testimony from his original statement to Inv. Munster, Keese believed that it was helping his case, as well as the State's against Mr. Ponticelli (PC-R. 537). He stated:

At the time [of trial] I was still under the influence of cocaine, still doing cocaine, and I had paranoid feelings, also.

I was trying to get out of the spotlight, and I thought, you know, it would bring more trouble on me if I didn't cooperate. So I was trying to play ball and just get the past past me.

(PC-R. 514). Keese also explained that when Inv. Munster searched his car he found needles and drug paraphernalia (PC-R. 515). Keese interpreted the fact that he was not prosecuted to the fact that the State was going "light" on him because he was cooperating on other matters (PC-R. 515). Keese was also trying to cooperate with the State so that they would release his car and property.

Keese had also been charged with possession of cocaine one month before he gave his deposition (PC-R. 515). Keese pled to the charge and interpreted the fact that the State allowed him to plead as a favor (PC-R. 518).

At trial, Keese was under the influence of cocaine (PC-R. 521).

Keese also testified that he had previously seen Mr. Ponticelli use cocaine on eight to ten occasions over a two week period and characterized him as a "peeper", i.e., paranoid (PC-R. 510-11). Mr. Ponticelli would peak out the windows and Nicholas Grandinetti would attempt to calm him down (PC-R. 511). He also described that when Mr. Ponticelli

used cocaine he became uneasy, fidgety and anxious (PC-R. 513).

On the night of the crime, contrary to his trial testimony, he described Mr. Ponticelli as: "nervous, sitting on the edge of his chair, anxious to leave. He mentioned a couple of times: 'I need to get going.'" (PC-R. 527).

Like Keesee, Brian Burgess and Edward Brown also admitted that they testified falsely at Mr. Ponticelli's capital trial (PC-R. 600, 652). Specifically, Burgess and Brown told the lower court that they met Mr. Ponticelli on Thanksgiving Day or the early morning hours of Friday and that they did not see Mr. Ponticelli three times on Friday evening, as they testified at trial (PC-R. 591, 652, 660). In Burgess' recorded statement to Inv. Munster he did in fact state that he only saw Mr. Ponticelli twice on Friday evening and he could not explain why he changed his testimony at trial (PC-R. 607)

On Thursday, Mr. Ponticelli came to Dotson's house, after dark, while the group watched movies (PC-R. 592). Burgess and Brown testified that the evening turned into a party with 20 to 25 people (PC-R. 593). Mr. Ponticelli was drinking beer and using cocaine (PC-R. 593, 653).

Later in the evening, Burgess, Warren Brown, Turner and Mr. Ponticelli left the party and traveled to a trailer to buy more cocaine (PC-R. 594, 654). When they returned to the party Mr. Ponticelli showed them how to cook the cocaine and make a homemade pipe to smoke it (PC-R. 655). The cocaine use

began in the car ride back to the Dotson house and extended throughout the night (PC-R. 619, 657).

Burgess also described Mr. Ponticelli's behavior on Friday night; he testified that the first time he saw Mr. Ponticelli he acted nervous and "edgy-like" (PC-R. 607). When Mr. Ponticelli came back to the house later, he acted "really paranoid", i.e., "[j]ust real nervous, couldn't sit down, looking out the windows, looking out the doors, going from room to room, window to window, and had a knife in his hand the whole time." (PC-R. 607).

Burgess and Brown also admitted that they used cocaine with Mr. Ponticelli on Friday night (PC-R. 610, 672).

John Turner was Mr. Ponticelli's closest friend at the time of the crime. Inv. Munster threatened Turner when he spoke to him during the investigation (PC-R. 954). On December 21, 1987, Turner provided a statement to Inv. Munster in which he stated that Mr. Ponticelli told him that the Grandinetti brothers pursued him that night, located him, threatened him and used cocaine with him (PC-R. 958).

Turner remembered attending the party at the Dotson house on Thursday night which lasted until the morning hours of Friday (PC-R. 974, 977). Mr. Ponticelli free based cocaine and reacted the way he always did when he used cocaine (PC-R. 975, 980).

During his deposition, Turner informed trial counsel and the State that he had met the individuals from West Virginia before the night of the crime and that "Me and Tony took them

over to Nick's house, and he got them some coke." (PC-R. 985).  
Turner told Inv. Munster about the cocaine party (PC-R. 986).

Turner also testified about he and Mr. Ponticelli's cocaine addiction in the weeks preceding the crime:

Q: How did you obtain the cocaine that you and Mr. Ponticelli used during that period of time?

A: A few different ways. We first had just powdered cocaine, and we would cook it up, freebase it. And after a while I guess our - I guess - I guess our bodies just didn't work anymore, and we were - we were just spilling and wasting more than we were cooking up. We would just drop it, and we were shaking.

Q: What do you mean when you say you're shaking?

A: Shaking, I mean, just -

Q: Like tremors?

A: Yes. Just shaking. Just trying to get the next hit.

Q: Was that anticipation of getting the hit or was it the cocaine that was messing up your physical function, do you know?

A: I think it was both. It was just the - it was the anticipation of - that's the whole thing about freebasing or crack cocaine is that you just - you can't wait to get to the next hit. That's all you're trying to do. You're just trying to get to the next hit, and that's all that matters.

\* \* \*

Q: But were there times when [your dealer] would actually seek you out to sell you crack cocaine?

A: Many times he would knock on my window at 6:00 in the morning at my bedroom window and wake me up. You know?

"I've got what you need."

"I don't have no money."

"Well, that's okay. Here's a \$20 rock on me. Come see me tomorrow."

He would know I'm not gonna leave it sit there. I'm gonna smoke it. As soon as I do, I'm gonna be at his house, and then it starts the process all day.

Q: Once you started on a day you didn't stop until you were exhausted?

A: Right. At that point we didn't even have to get started anymore, though. It was - our body was so - it was just waking up it was time to get started. You know? After - after a couple of months of doing that, you don't need that first hit anymore. You just crave it constantly.

(PC-R. 966-8).

Every time Mr. Ponticelli used cocaine at Turner's house he was "wiggling":

[W]hen you're inside of a bedroom and the door never opens but you still look under the bed fifteen or twenty times to make sure that there's nobody in there, when you hide in a corner, when you peek out the windows out the blinds, and when you can't stand to have anything on, no television, no radio, no loud noises . . .

(PC-R. 969). Mr. Ponticelli would also react similarly when they used cocaine in the car (PC-R. 970).

Frank Porcillo testified at Mr. Ponticelli's evidentiary hearing. Porcillo was friends with Mr. Ponticelli in 1987 (PC-R. 556-7). Porcillo recalled that when he met Mr. Ponticelli, Mr. Ponticelli worked full-time and spent a lot of his time off working on his car (PC-R. 559-60). During this time, Porcillo described Mr. Ponticelli as laid back, non-violent and respectful (PC-R. 561).

Porcillo testified that in the fall of 1987, when Mr. Ponticelli returned from New York, Tony was using and smoking cocaine (PC-R. 562). According to Porcillo, Mr. Ponticelli's

behavior changed when he used cocaine; was paranoid and not easy to be around when he was using cocaine (PC-R. 563-5). "If he did say something, it didn't make any sense", he rambled (PC-R. 565). Mr. Ponticelli was the cocaine user who would hide in the corner and act inappropriately to noises (PC-R. 565-6).

On the Friday following Thanksgiving, 1987, Porcillo saw Mr. Ponticelli at the convenience store just after dark and described him as acting "whacked" (PC-R. 568). There was also a red car in the parking lot (PC-R. 581). Porcillo believed that Mr. Ponticelli "was like going off the edge." (PC-R. 569). Mr. Ponticelli acted the same way he had acted when Mr. Porcillo had witnessed him use cocaine (PC-R. 574).

Robert Meade, who testified at trial, saw Mr. Ponticelli on Friday, in the late evening. He testified that Mr. Ponticelli acted like he was on cocaine, i.e., very irrational and crazy (PC-R. 932, 937). Meade had told Inv. Munster in a statement that Mr. Ponticelli was on crack the night of the crime (PC-R. 940). Meade had also met Nicholas Grandinetti earlier that night and Mr. Grandinetti told him that he was looking for Mr. Ponticelli, because he [Tony] owed him [Nick] money (PC-R. 945).

## **2. The Prosecution**

Inv. Munster testified at Mr. Ponticelli's evidentiary hearing. Inv. Munster had only recently learned of his obligation under Brady (PC-R. 1053).

Inv. Munster admitted that Keesee told him that there was

cocaine being used at the Grandinetti trailer on the night of the crime (PC-R. 1032).

Inv. Munster's undisclosed notes also reflected that he was aware of the Thanksgiving cocaine party at the Dotson house and that Mr. Ponticelli bought cocaine from the Grandinetti's for Dotson and his friends from West Virginia (PC-R. 1050-1, 1054-5). Inv. Munster's notes reflect that witnesses changed their testimony from their initial statements, including Mr. Ponticelli's discussing his motives for the crime.

Sarah Williams, formerly Sarah Balius, prosecuted Mr. Ponticelli in 1987-1988 (PC-R. 1085). Ms. Williams agreed that if Mr. Ponticelli was "not on cocaine at the time [of the crime] it's hard to establish a cocaine psychosis defense (PC-R. 1101).

Ms. Williams' undisclosed notes from an interview with Keese indicated that he had told her that on the night of the crime the individuals at the trailer were "doing cocaine" (PC-R. 1108). Ms. Williams conceded that her notes of the interview with Keese were inconsistent with his deposition testimony wherein he testified that no one was using cocaine at the trailer (PC-R. 1114). In fact, her deposition notes are marked to indicate that she did in fact believe that Keese had told Inv. Munster about the cocaine usage at the trailer on night of the crime (PC-R. 1117-8, Def, Ex. 8). Ms. Williams did not correct the false testimony (PC-R. 1120).

As to the information about the Thanksgiving night



cocaine party, Ms. Williams agreed that if the information about the party were true it would have caused a serious problem for the prosecution at trial (PC-R. 1128). In fact, Ms. Williams testified:

Q: [I]f it could have been established at trial that a cocaine party took place at the Dotson residence and lasted until say 3 a.m. on Friday morning and all of these West Virginia people were there and a couple of them were smoking cocaine with [Mr. Ponticelli], that would have been very, very different that what you thought the case was about, is that right?

A: It sure would have been.

(PC-R. 1129).

Ms. Williams also testified about Dennis Freeman, the jailhouse informant. While Freeman testified at trial that he wasn't receiving any benefit for his testimony, Ms. Williams' notes reflected that she had told Freeman's attorney that she "would make no firm offer prior to [Mr. Ponticelli's trial] but assured him his cooperation would be remembered with favor before mitigating judge/Sturgis. Will make no formal deal on the record prior to trial" (PC-R. 1136-7, Def. Ex. 9). Ms. Williams did not believe that she was obligated to reveal her communications about her assurances that Freeman would receive "favours" for his cooperation under Brady (PC-R. 1138).

### **3. Mr. Ponticelli's Pre-Trial Incarceration**

Mr. Ponticelli also presented witnesses with whom he was incarcerated at the jail while he was awaiting his trial. Kenneth Moody was incarcerated in the jail in the summer, 1988. He described Mr. Ponticelli as having long hair and a

beard and being "buggy" (PC-R. 886). He explained that a "bug" was a jail term for individual who was not right (PC-R. 886). He testified that Mr. Ponticelli would "talk to god" and that he "thought god was going to save him or he didn't talk to nobody, didn't associate with nobody. He'd stand there and stare out the window and talk to god." (PC-R. 886). Everytime Moody saw Mr. Ponticelli he had a bible (PC-R. 887).

Moody also testified that Inv. Munster approached him about "snitching" on Mr. Ponticelli (PC-R. 888).

Likewise, Wilbur Bleckinger was incarcerated with Mr. Ponticelli (PC-R. 904). Bleckinger noticed that Mr. Ponticelli acted as if he was having a conversation with god; Mr. Ponticelli would speak out loud and then pause as if he were waiting for an answer (PC-R. 905-6). Mr. Ponticelli would also pace with his bible around the cell (PC-R. 907).

Jose Burgos knew Mr. Ponticelli from the area and was incarcerated with him in the jail (PC-R. 914). He testified that Mr. Ponticelli was in his own little world at the jail and he spent most of his time reading the bible (PC-R. 916). Burgos often observed Mr. Ponticelli walk around with a towel on his head, with the lights out in his room, praying (PC-R. 916). Mr. Ponticelli would also talk aloud to someone, but no other individual was present (PC-R. 916).

Prior to trial, Mr. Ponticelli corresponded with several friends and relatives. Wendy Falanga had had very little

contact with Mr. Ponticelli in the two or three years prior to his arrest. However, Mr. Ponticelli wrote her from the jail, while awaiting trial (PC-R. 780). She described the lengthy letters she received as odd and containing a lot of scripture; "[a]nd every other sentence - after every sentence was a scripture, the sentences were fragmented. It was a thought here, and then the next sentence was a completely unrelated thought". (PC-R. 781). Sometimes, she would receive several letters a day (PC-R. 782).

Likewise, Mr. Ponticelli contacted Concetta O'Berry when he was incarcerated, pre-trial. He wrote her what sounded to her like a suicide note (PC-R. 842). He wrote that God had told him to write her the letter, but he never mentioned anything about his case or the fact that he was in jail (PC-R. 842-3). Ms. O'Berry was concerned about the letter and contacted Mr. Ponticelli's brother, it was only then that she learned that he was in jail (PC-R. 844). Ms. O'Berry later spoke to Mr. Ponticelli on the phone and when she asked about his case he told her that he did not know what was going on (PC-R. 846).

Nancy Kelskey also had contact with Mr. Ponticelli while he was incarcerated before his trial (PC-R. 812). She testified that his letters were "overly religious" and erratic, i.e., jumping from one conversation to another (PC-R. 812). Even his handwriting was erratic (PC-R. 812). He wrote similar letters to Patricia Leonard (PC-R. 854).

#### **4. Mr. Ponticelli's Background**

As to Mr. Ponticelli's childhood and background several witnesses testified. Michael Barnes met Tony when he was a child of ten or so in New York (PC-R. 683). Barnes described Tony as a quiet child who followed the group and never said much (PC-R. 683). The other kids teased Tony because he was overweight and wore glasses (PC-R. 684).

While in junior high school, Barnes and Tony started to experiment with marijuana (PC-R. 685). They would meet before and after school and smoke joints (PC-R. 685). When they reached high school Barnes and Tony used marijuana even more, usually between classes. They also started experimenting with other drugs, including black beauties, which were speed, mescaline, which was a psychedelic drug, hash and Valium (PC-R. 686-7). Later in high school, they began to use cocaine (PC-R. 687).

When Tony used cocaine his personality changed (PC-R. 688). Barnes explained:

A: Well, when he started smoking it, he just - he wasn't himself. He started like getting, I don't know, paranoid. Like we would be hanging out partying, walk down the road, and all of a sudden, you know, it was like he was losing it, and he would say, "Oh, Mike, there's someone over there in the woods."

"Anthony, what are you talking about?"

"Mike, I'm telling you there's someone in the woods."

I'd look over and there's nobody there. He was hallucinating, you know, really bugging out from it.

Q: And was there ever anybody in the woods?

A: No.

Q: And did this happen pretty regularly?

A: Almost every time we were doing it as, you know, we were doing it more and more.

(PC-R. 688-9).

After Tony stopped spending time with Wendy Falanga his cocaine use increased (PC-R. 691). This time Tony went from using two grams at a time to three and a half (PC-R. 691).

Barnes recalled that after Tony moved to Florida, he returned to New York for a wedding (PC-R. 693). Barnes accompanied Tony back to Florida and recounted that when they arrived back in Florida they met John Como at his parents' restaurant and started using cocaine (PC-R. 697). During the evening, after the restaurant was closed a young woman knocked on the door (PC-R. 697). Barnes and Como wanted to see what she needed, but Tony did not want them to open the door (PC-R. 697). After they assisted the young woman, they looked for Tony and found him in a cabinet with the door closed: "It looked like someone took a water hose and put it over his head; soaking wet with two knives in his hands swearing that there's somebody on the roof." (PC-R. 698). Como did not believe that Tony was acting rationally; he was acting like a madman (PC-R. 733-4). The following morning, Tony was gazing at the ceiling, not hearing a word Como said (PC-R. 737).

Joseph Orlando and Como, Tony's cousins, also spent time with Tony when they were young (PC-R. 710, 724). They, too, engaged in drug and alcohol use with Tony when they were teenagers (PC-R. 713). They used marijuana, hash, mescaline and cocaine (PC-R. 713, 726). Once, after using marijuana

laced with angel dust, Tony had a bad reaction and blacked out (PC-R. 727).

Tony attended Orlando's wedding in September, 1987, in New York and extended his trip in order to spend some time with his cousin (PC-R. 716-7). While Tony was in New York, the two went on a cocaine binge and drank a lot of alcohol; Tony was using twenty-eight to thirty-six grams of cocaine over a four to five day period (PC-R. 719-20).

Orlando confirmed the accounts of Tony's behavior when he used cocaine, he got paranoid and anxious, more so than most people (PC-R. 721).

Wendy Falanga was yet another friend of Tony's from New York (PC-R. 770). Tony was the only friend that was allowed in Falanga's parents' house when they were teenagers (PC-R. 771). Later, Falanga also used drugs with Tony, including cocaine, Valium, meprobamate, alcohol and Ativan (PC-R. 772). In fact, Falanga introduced Tony to cocaine:

Q: Were you doing cocaine before Tony?

A: Yes, I was.

Q: And do you remember the first time you did cocaine with Tony?

A: Yes, I do.

Q: Can you describe for the Court how that came about?

A: I was using cocaine and Tony wasn't. And I started dating someone near his house, and Tony used to come with me.

And my now ex-husband at the time was the man I was dating, and he started getting nervous, because we were all using cocaine and Tony wasn't.

And as with a lot of people on cocaine, you get

nervous if you're not using, whether or not he was a police officer, I don't know, just crazy stuff. And so I kind of convinced Tony to begin using.

Q: And that was so he could continue hanging out at Mike's?

A: So he could continue to hang, yeah.

Q: Did you think at any point in time that Tony had a crush on you during this period of time?

A: From the very beginning, he did.

Q: How do you know that?

A: He told me, and just basically the way he acted. I was pretty much the only person that he was really, really comfortable with.

And in a way, in a sense, I kind of used that to get him to -- I knew that I could get him to pretty much do anything I wanted him to.

Q: And was it your understanding that that was the first time that Tony did cocaine?

A: Yes.

\* \* \*

Q: Okay. Once you got Tony to do his first line, did y'all continue to use cocaine?

A: Yes.

Q: Can you explain to the Court how that progressed?

A: It began to escalate rapidly. And then I was introduced to free-basing and, in turn, which I introduced to Anthony. And we began free-basing on a daily basis, sometimes going weeks without sleeping or eating, doing nothing but drugs.

Q: And I'm assuming that at this point y'all were older, high school years for Tony?

A: Yes.

\* \* \*

Q: Okay. Do you know approximately, once y'all got going with this habit, about how much y'all would do a day?

A: At the very least, an eight ball, which is three-and-a-half grams of cocaine, sometimes more.

Sometimes, because my boyfriend had sold it, I would take what he had to sell and I would, you know, cut it, and I would take some out without him knowing.

So then, therefore, you know, we could use even more when I was able to do that.

Q: And once y'all started to free-base, were you doing more free-basing than snorting?

A: Pretty much only free-basing.

Q: Okay. And were you mixing the free-basing with those other drugs you listed for us before?

A: Absolutely.

Q: Can you explain how that would -- what would a night of binging be like?

A: We would smoke all of the free-base until it was gone, and then we would try to come down by using any type of barbiturate we could get our hands on or alcohol or anything that would bring us down off the cocaine.

There would be times when Tony would have like black-outs. And as a matter of fact, one particular time comes to my mind when I actually thought he was dead. He was breathing shallow. I couldn't wake him up, couldn't get him to speak.

But I was afraid. Because I knew there was so much drugs in the house, I was afraid to call 911 and, you know, I was afraid to tell anyone. And I actually thought he was dead. And he didn't wake up until almost two days later.

Q: Okay. How would Tony's personality change when he was using the cocaine?

A: Oh, my goodness. It was night and day. When he wasn't using, he was shy, sweet, polite. He was a doll.

When he was using, he became ultra-paranoid. He would even go so far sometimes -- and there was a lot of other users that we would hang out with, and it's normal to be somewhat paranoid.

But I had never seen anybody as paranoid as he would get. I mean, there was one time that he actually would tape the shades shut, thinking that someone was outside trying to, you know, to get him.



I had never seen anybody get that bad.

Q: How would he act when he would get paranoid? What would make you think this guy is paranoid?

A: We would be in the middle of any type of a normal conversation, and, you know, he would think he saw something or heard something, and just get like really wiggled out about it.

Q: How would his body react?

A: Trembling, he would get sweaty. I mean, he was scared, almost like -- I don't know how to describe it. As if he had really seen something or heard something.

Q: And each of these times, there was nothing that he really should have been scared about?

A: Absolutely not. I mean, it wasn't even -- it didn't even happen where if there was a noise outside.

I mean, like I said, there's a certain amount of paranoia that goes with using cocaine. And if someone would knock at the door, you know, I would get scared and I would put away the drugs and stuff like that. That would be normal stuff that people would get paranoid about.

When there's absolutely no sounds, no knocks on the door, no lights in the windows, and just out of nowhere, in the middle of a conversation, you think someone is outside, trying to get in to get you, that type of paranoid, that extensive.

Q: How about mood swings?

A: Again, night and day. When he was using -- and at the time we pretty much were using -- we were using every day.

He would go from being in the middle of a conversation to either getting really, really paranoid or breaking down and crying, and almost putting himself like in a fetal position and rocking.

Q: Can you remember what would get him to that stage, where he would be crying or rocking or upset?

A: Sometimes nothing. Sometimes nothing. Really there was nothing that prompted his paranoia most of the time.

Q: How about did you ever see Tony at all ever

become violent?

A: No. No.

Q: That wasn't part of his personality?

A: No. Scared, very, very scared. But even when he was scared, no.

(PC-R. 772-8).

Falanga stopped using drugs in 1986, when she learned that she was pregnant (PC-R. 779). She also had gotten married and believed that her marriage "devastated Tony" (PC-R. 780).

Concetta O'Berry testified that she knew Mr. Ponticelli as a child and Tony would visit her father who was ill (PC-R. 838). In high school, Mr. Ponticelli became distant (PC-R. 839). One night, he confided in her that he had a drug problem and "he wanted to get clean" (PC-R. 840).

Tony's sister-in-law, Rita Carr and his sister, Nancy Kelskey also testified. Kelskey told the lower court that her brother was born as a "blue baby." (PC-R. 805). Carr recalled that when Tony was a child he was quiet and happy (PC-R. 793). They both explained that Tony was adopted when he was seven and originally lived with the family as a foster child (PC-R. 793, 805). Several other foster children also lived with the Ponticelli's and all of the children got along (PC-R. 794, 805). Tony later confided in Carr that he felt separated from the family because he was adopted (PC-R. 799).

While Tony was in high school, Kelskey noticed a change in his personality - he was aloof and didn't care (PC-R. 810).

She suspected he was using drugs (PC-R. 810).

Carr allowed Tony to live with them when he returned to New York in 1987, but Tony began to distance himself and stay out late (PC-R. 797). Finally, she asked him to leave because she believed he was using drugs (PC-R. 798).

Patricia Leonard met Tony in early 1987 through her brother, and they started dating (PC-R. 849). She told the court that Tony was very easy going (PC-R. 851). Robert Meade, Tony's friend reiterated Leonard's description (PC-R. 927). Tony did not use cocaine when he first moved to Florida (PC-R. 852). Tony was also very good to her son (PC-R. 858).

When Tony was in New York, he called Leonard and confided to her that he had started using cocaine, again (PC-R. 852).

Upon his return to Florida Tony's friends noticed a change in his personality - he was nervous, jittery and alienated himself (PC-R. 853, 928). His friends saw him using cocaine and crack (PC-R. 929). Meade described the effect of cocaine on Tony: "He would get very irrational and very unpredictable . . . and would make statements that really didn't mean anything" (PC-R. 930).

##### **5. Mr. Ponticelli's Mental Health**

At Mr. Ponticelli's evidentiary hearing, he presented a substantial amount of expert information about his mental health.

Dr. Michael Herkov, a psychologist, testified and the court considered him an expert in clinical psychology,

neuropsychology, forensic psychology and substance abuse (PC-R. 1343-4). In conducting an evaluation of Mr. Ponticelli, Dr. Herkov reviewed voluminous materials (PC-R. 1345-50).

Initially, Dr. Herkov testified that in his opinion Mr. Ponticelli was not competent to stand trial (PC-R. 1351). During his review of the materials, Dr. Herkov learned that Mr. Ponticelli refused to communicate with his trial attorney about the offense (PC-R. 1352). Dr. Herkov testified that the materials indicated that Mr. Ponticelli's actions were based upon his religious beliefs (PC-R. 1352). However, Dr. Herkov found that Mr. Ponticelli's religious beliefs were based a "psychosis or a delusion, rather than simply a Christian or Judeo-Christian belief about trusting in God" (PC-R. 1353).

Dr. Herkov explained that a delusion is a fixed false belief that is not rational (PC-R. 1354). In Mr. Ponticelli's case his delusion included the idea that if he assisted in his defense he would be calling God a liar (PC-R. 1354). Another indication of Mr. Ponticelli's delusion was that he engaged in ideas of reference, which meant that everything that happened had significance for him, an example of which he gave was if someone gave Mr. Ponticelli a piece of candy, he believed it was from God (PC-R. 1354). Mr. Ponticelli "believed that God was going to manipulated the judge like a puppet, that he was going to be transported out of the courtroom. Very unusual beliefs and consistent with a delusional process" (PC-R. 1356).

Dr. Herkov also believed that Mr. Ponticelli was

hallucinating when he was receiving answers from God and seeing Jesus' face in the moon (PC-R. 1361, 2380). He heard inmates speaking to him when they were not (PC-R. 1361).

Dr. Herkov concluded that Mr. Ponticelli was psychotic, possibly due to the withdrawal from cocaine (PC-R. 1363). It was Mr. Ponticelli's psychosis that forced him to jump from one topic to the next in his conversations and letters (PC-R. 1364). Dr. Mills' notes of his interview with Mr. Ponticelli corroborated Dr. Herkov's findings because Dr. Mills stated: "It is essentially impossible to really record [the interview] because there are breaks and they don't make sense (PC-R. 1364).

Mr. Ponticelli displayed other symptoms of psychosis - increased goal directed activity and hypergraphia. These symptoms appeared in Mr. Ponticelli's preaching and attempts to convert everyone with whom he came into contact and in his letter writing (PC-R. 1365-6). Mr. Ponticelli also experienced a sense of euphoria "which is a hallmark sign of mania"; and he experienced increased energy, even though sleeping and fasting (PC-R. 1238-9).

Dr. Herkov concluded that given Mr. Ponticelli's religious delusion, he did not have the capacity to assist his trial attorney. Mr. Ponticelli's actions were "not based on a volitional, rational decision", but rather based on his religious delusion (PC-R. 1370).

Dr. Herkov also considered Mr. Ponticelli's state of mind at the time of the offense and found that Mr. Ponticelli was

voluntarily intoxicated at the time of the offense (PC-R. 1373). Dr. Herkov found significant evidence to suggest that Mr. Ponticelli was intoxicated on cocaine at the time of the offense (PC-R. 1373). He noted the amount of cocaine use the night before the offense, his chronic cocaine use in the week preceding the offense, his lack of sleep and his use of cocaine within hours of the offense in forming his opinion (PC-R. 1373). Dr. Herkov also found that Mr. Ponticelli was a severe cocaine addict (PC-R. 1387).

Dr. Herkov also believed that Mr. Ponticelli was suffering from an extreme mental or emotional disturbance at the time of the offense and that his ability to conform his behavior to the requirements of the law was substantially impaired at the time of the offense (PC-R. 1374).

In forming his opinions, Keesee's testimony about the use of cocaine at the trailer was important to Dr. Herkov (PC-R. 1389). Dr. Herkov also testified that Mr. Ponticelli was under the influence of cocaine for the entire day or two before the offense due to the fact that cocaine has long lasting effects on brain receptor modifications (PC-R. 1396-7). In fact, Dr. Herkov opined that Mr. Ponticelli's neurotransmitters were altered and would have been altered even had he not used cocaine in eighteen hours prior to the offense (PC-R. 1445). Dr. Herkov also explained that: "[y]ou can have the feelings of paranoia that can go much longer than the high. People who are strung out on cocaine can show signs of paranoia for hours and sometimes even days,

especially in these chronic abusers" (PC-R. 2396). Mr. Ponticelli's cocaine use could have affected his ability to plan and premeditate (PC-R. 1407).

Dr. Herkov explained that cocaine stimulates the central nervous system when used (PC-R. 1376). Cocaine affects dopamine transmission and can also lead to brain damage and affect behavior and perception (PC-R. 1382-3).

Dr. Harry Krop evaluated Mr. Ponticelli shortly before trial to determine competency to proceed (PC-R. 1502). Dr. Krop believed that at the time of trial it was difficult to determine how much of Mr. Ponticelli's religiosity was typical or a delusional belief; he had concerns even at the time of trial (PC-R. 1506, 1530). However, because he found no information to suggest Mr. Ponticelli suffered from a mental illness at the time of trial, he concluded that Mr. Ponticelli's decision not to speak to his trial attorney was volitional (PC-R. 1507).

Dr. Krop was requested to re-evaluate Mr. Ponticelli in 1998, and was provided information for his evaluation. For the first time in his career, Dr. Krop changed his opinion as to competency from 1988 and testified that Mr. Ponticelli was not competent to stand trial in 1988 due to his delusional beliefs (PC-R. 1524, 1528, 1530). Dr. Krop based his opinion on the testimony he reviewed since the trial which corroborated Mr. Ponticelli's statements (PC-R. 1525). Specifically, Dr. Krop stated that Mr. Ponticelli did not have the capacity to communicate with his attorney, testify

relevantly or challenge prosecution witnesses (PC-R. 1525).

Dr. Krop also indicated that even at the time of trial, as his report stated, he believed that at the time of the offense Mr. Ponticelli was intoxicated from his cocaine use and that his ability to conform his conduct to the requirements of the law may have been diminished (PC-R. 1535). Despite his opinions, Dr. Krop was not asked to testify at trial (PC-R. 1536).

As did Dr. Herkov, Dr. Krop testified that he found that both of the statutory mental mitigators applied to Mr. Ponticelli (PC-R. 1547-8).

At trial, Mr. Ponticelli's trial counsel attempted to introduce the testimony of Dr. Marc Branch during the guilt phase (PC-R. 1646). However, the State objected and the court did not allow the jury to hear Dr. Branch's testimony (PC-R. 1646). Dr. Branch's research specialized in the effects of drugs on behavior (PC-R. 1637). Dr. Branch testified that in 1988, he made several assumptions based on the information that was presented to him by trial counsel. For example, he believed that Mr. Ponticelli's cocaine use was very heavy, but for a short period of time (PC-R. 1653). Following the trial, he learned that Mr. Ponticelli's cocaine use was much more longstanding and that he was in fact a poly-substance abuser (PC-R. 1653-4).

In 1988, Dr. Branch was aware that there was at least one account of Mr. Ponticelli engaging in peeping (PC-R. 1654-5).



Dr. Branch later learned that Mr. Ponticelli often suffered from paranoid delusions while using cocaine, which he believed was a significant difference from what he knew at trial (PC-R. 1655). The behaviors he learned that Mr. Ponticelli engaged in while on cocaine were consistent with psychosis; Mr. Ponticelli experienced both hallucinations and delusions (PC-R. 1656).

Since the evidentiary hearing, Dr. Branch also learned that Mr. Ponticelli was in fact using cocaine on the day of the offense, even within hours of the offense (PC-R. 1662). He also learned that the day before the offense Mr. Ponticelli had very little sleep and very little to eat (PC-R. 1663).

In 1988, Dr. Branch was only able to say that it was possible that Mr. Ponticelli was psychotic at the time of the offense (PC-R. 1668). However, based on all of the information he learned following the offense he was reasonably certain that Mr. Ponticelli was psychotic at the time of the offense due to his ingestion of cocaine (PC-R. 1669).

Dr. Branch found that the statutory mental health mitigators applied to Mr. Ponticelli, due to his cocaine use near the time of the offense (PC-R. 1673). Dr. Branch was never asked to consider mitigation in 1988 (PC-R. 1674).

Dr. Barry Crown, a neuropsychologist, conducted neuropsychological testing on Mr. Ponticelli in 1995 (PC-R. 1214). Mr. Ponticelli's testing reflected deficiencies in his brain functioning (PC-R. 1218-9, 1220, 1221, 1226, 1230-1,

1232, 1233). Overall, Dr. Crown found that Mr. Ponticelli's brain functioning was significantly impaired and "that his deficits were particularly related to executive functions" (PC-R. 1234-5). Executive functioning is controlled by the frontal lobes of the brain, which are responsible for planning, organization, concentration, attention, memory and understanding the long-term consequences of immediate behavior (PC-R. 1215).

Dr. Crown also testified that Mr. Ponticelli's cocaine use would diminish his frontal lobe functioning (PC-R. 1238).

Dr. Crown reviewed the testing conducted pre-trial by Dr. Poetter and found that Dr. Poetter failed to note that a scatter of Mr. Ponticelli's scores occurred (PC-R. 1318). A scatter is a red flag that further testing should be conducted to determine if the patient is impaired in brain functioning (PC-R. 1318).

While the State's expert, Dr. Wayne Conger, disagreed with many of the conclusions of the other experts, he did concede that Mr. Ponticelli was a long time poly-substance abuser and cocaine addict at the time of the offense (PC-R. 2283). Dr. Conger also did not disagree with Dr. Crown that Mr. Ponticelli suffered from brain damage, he just did not believe that it was significant enough to explain Mr. Ponticelli's competency at the time of trial or state of mind at the time of the offense (PC-R. 2223).

## 6. Trial Counsel

James T. Reich was appointed to represent Mr. Ponticelli at his capital trial, on February 23, 1988 (PC-R. 1767, 1769). Mr. Ponticelli's was Mr. Reich's first capital trial (PC-R. 1767). He had never attended a course on penalty phases (PC-R. 1853). Mr. Reich prepared for both the guilt and penalty phases of the trial; he did not have an investigator assisting him (PC-R. 1768). Mr. Reich recalled the "vast majority" of his time was spent on the case to the guilt phase (PC-R. 1771).

Mr. Reich believed that Mr. Ponticelli was not competent. In preparation for the case, Mr. Reich visited Mr. Ponticelli a few times at the jail, but in his first few visits he "did most of the talking. [He] didn't let [Mr. Ponticelli] talk at all." (PC-R. 1776).<sup>2</sup> Finally, on June 30, 1988, Mr. Reich visited Mr. Ponticelli to discuss his case (PC-R. 1777). Mr. Reich described that meeting:

I wanted to know about his history. I wanted to know a lot about it. I wanted to know whatever he knew about the case and about him. And as I began to explain to him what I thought the case was about, before I would ever let him talk to me, I noticed that he wasn't paying attention to me. He seemed to be distracted. He seemed to be not only not interested but disinterested

And, you know, when I - I would ask him questions that at points when I would need some information in order to fill some things in for me he would not respond.

(PC-R. 1778-9). Mr. Ponticelli told Mr. Reich that God told

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<sup>2</sup>Mr. Reich admitted that he did not ask his client for any information or input, prior to obtaining discovery and taking depositions.

him not to speak to him (PC-R. 1779). Mr. Reich immediately filed a motion to determine if Mr. Ponticelli was competent (PC-R. 1781).

However, Mr. Reich did not review Mr. Ponticelli's jail records or speak to any inmates or correctional officers about Mr. Ponticelli (PC-R. 1863).

Throughout trial, Mr. Reich thought that there were indications that Mr. Ponticelli was incompetent - during a trial break and again after the jury found Mr. Ponticelli guilty he found Mr. Ponticelli mumbling to himself very rapidly in the cell and he did not acknowledge Mr. Reich's presence (PC-R. 1787, 1789). Mr. Ponticelli's "mind was somewhere else" (PC-R. 1787). Also, after the second day of trial, after Mr. Reich felt that he had "watched it come down all day", he went to speak to Mr. Ponticelli and Mr. Ponticelli smiled and told him to have faith (PC-R. 1788-9). Mr. Ponticelli would not allow Mr. Reich to arrange for his hair to be cut or his beard trimmed (PC-R. 1791). Mr. Ponticelli did not ask a single question throughout the trial (PC-R. 1792-3). Mr. Ponticelli agreed to testify at a pre-trial hearing, but then, at the hearing, Mr. Ponticelli told trial counsel that he saw God the night before and God told him not to testify (PC-R. 1784).<sup>3</sup> Mr. Reich did not bring the incidents to the court's attention (PC-R. 1788).

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<sup>3</sup>In order to convince Mr. Ponticelli to testify, Mr. Reich told him that he needed him to testify or say one thing and that "[s]urely God will let you do that much" (PC-R. 1784).

As to his theory of defense, Mr. Reich believed that his only possibility for an acquittal was to present an insanity defense based on cocaine psychosis or voluntary intoxication (PC-R. 1772, 1774). In his opening statement, Mr. Reich argued cocaine psychosis and in the alternative reasonable doubt (PC-R. 1304). Mr. Reich agreed that his theories of defense were inconsistent (PC-R. 1805). Mr. Reich testified that if he had evidence of cocaine use close in time to the offenses he would have stayed with his original theory of cocaine psychosis, i.e., insanity and voluntary intoxication (PC-R. 1805).

Mr. Reich also recalled that the State attempted to "sanitize" the case in terms of drugs (PC-R. 1794). Specifically, the State moved to prevent the toxicology reports of the Grandinetti's from being introduced as well as Keesee's prior drug history (PC-R. 1798). As to the toxicology reports, the court overruled the objection, yet Mr. Reich never introduced the reports (PC-R. 1799). Mr. Reich also never introduced the evidence of drug paraphernalia which tested positive for cocaine (PC-R. 1821). However, the prosecutor's approach was to tell the jury that there was no evidence of cocaine use on the day of the offense and Mr. Ponticelli's bizarre behavior demonstrated his consciousness of guilt (PC-R. 1806-7).

As to the evidence presented in postconviction, Mr. Reich testified that Keesee's testimony that he had seen Mr. Ponticelli use cocaine shortly before the offense would have

been relevant information that he would have used in his defense (PC-R. 1811). "With that testimony, Marc Branch . . . gets to get on the stand. I get my opinion from him. . . . I get my instruction. Plain and simple" (PC-R. 1811).

As to the jailhouse informant, Mr. Reich was aware that Freeman had been previously "planted" in another capital case to obtain statements, but, he naively did not explore that issue (PC-R. 1786). Mr. Reich also testified that it was clear from the prosecutor's notes that in Freeman's mind he believed that he received preferential treatment, yet at trial he testified that he did not (PC-R. 1815).

Mr. Reich was also never informed that Mr. Ponticelli told Freeman about a cocaine party on Thanksgiving night (PC-R. 1818). Had Mr. Reich known of the cocaine party he would have used that information in presenting his defense of insanity and/or voluntary intoxication and to impeach Dotson, the Browns and Burgess (PC-R. 1826-7). Mr. Reich believed the information would have allowed him to cast doubt on the testimony of the West Virginia group based on their ability to remember (PC-R. 1827).

Also, the testimony about cocaine use proved that Freeman was lying when he testified that Mr. Ponticelli told him that he did not use cocaine on the day of the offense (PC-R. 1828).

Trial counsel agreed that had he known about Mr. Ponticelli's longstanding reaction and behavior while using cocaine he would have presented it to the jury because it

would have supported his theory of defense (PC-R. 1834). He would have also provided such information to his experts (PC-R. 1836).

As to the penalty phase, Mr. Reich stated that at the time of Mr. Ponticelli's trial he "didn't know" how to do a penalty phase (PC-R. 1854, 1908).

Mr. Reich testified that as to the penalty phase, the court did not accept the testimony from Dr. Mills about the statutory mental health mitigators (PC-R. 1808). He recalled the prosecutor again argued the lack of cocaine use on the day of the offense to defeat the mitigation (PC-R. 1809). Again, had he known of the information from Keese he would have argued the information in regards to the statutory mental health mitigators; "It's no longer speculation" (PC-R. 1811). Likewise, Mr. Reich would have used the testimony about the cocaine party to support the statutory mitigators (PC-R. 1827).

Mr. Reich candidly admitted that he did not investigate Mr. Ponticelli's background, specifically his time in New York, as he should have (PC-R. 1829). Mr. Reich only interviewed Mr. Ponticelli's parents as to background information, and they knew nothing about drugs (PC-R. 1830, 1853). Mr. Ponticelli's parents did provide him with names of family members from New York who knew Mr. Ponticelli, John Como was one name that was provided, along with others, but trial counsel never contacted him (PC-R. 1855-6, 1890, Def.

Ex. 28).

The Ponticellis also told Mr. Reich about school teachers and Tony Ponticelli's work history (PC-R. 1900)

Trial counsel never even attempted to obtain releases for school records, employment records or any other records (PC-R. 1857-8). He did not know that Mr. Ponticelli was a "blue baby" at birth (PC-R. 1857). He knew none of the circumstances of Mr. Ponticelli's adoption (PC-R. 1857). Had he known of Mr. Ponticelli's difficult birth or exposure to toxins at his job, he would have presented it to the jury as mitigation (PC-R. 1858).

Mr. Reich agreed that he needed Turner's testimony about Mr. Ponticelli's behavior on drugs, but did not present what Turner had told him in his deposition (PC-R. 1831).

Overall, Mr. Reich also admitted that he knew only a partial view of Mr. Ponticelli's drug history which he characterized as "very inaccurate" (PC-R. 1832). Had he known the extent of his cocaine use and his behavior when using cocaine, he would have presented it as mitigation (PC-R. 1835). Also, Mr. Reich "had no idea how to go about proving mental health mitigators" (PC-R. 1854). He did not follow-up on Dr. Branch's suggestion to retain a clinical psychologist despite the fact that Dr. Poetter recommended someone skilled in drug and alcohol abuse in the Ocala area to him (PC-R. 1859).

When asked what his penalty phase would have looked like



had he had all of the information presented at the evidentiary hearing, trial counsel stated: “[t]he kind of penalty phase that should have been put on for this man is just - I mean, think about it” (PC-R. 1862).

As to penalty phase objections, Mr. Reich believed that he preserved his objection to the vagueness of the HAC aggravator (PC-R. 1851). He also believed that he would not have conceded the CCP aggravator if he had had more information (PC-R. 1864). Trial counsel summed up his thoughts by stating:

Q: . . . [Did] you get this flavor from the evidentiary hearing; that there was a concerted effort by the State in this case to exclude cocaine from that trial?

A: Of course. If they gave me cocaine, they stand a good chance of losing their death penalty at least and giving me a second degree at worst.

(PC-R. 1838). Mr. Reich never imagined that he could be misled by the State in 1988 (PC-R. 1840).

#### **SUMMARY OF ARGUMENT**

Mr. Ponticelli's case provides a classic case of an inexperienced, unskilled trial attorney who is further disadvantaged due to the State's actions to "sanitize" the trial and limit the defense strategy of using Mr. Ponticelli's cocaine use near the time of the crime by hiding information of such.

Had trial counsel effectively represented Mr. Ponticelli and been provided with the evidence he needed to present a cogent theory of voluntary intoxication or cocaine psychosis

at the time of the offense and to attack premeditation, Mr. Ponticelli's case would have been placed in a whole new light, both at the guilt and penalty phase.

Overwhelming evidence existed that Mr. Ponticelli, a long-time, severe cocaine addict reacted in a bizarre and extremely paranoid way when he used cocaine. In fact, the individuals who encountered Mr. Ponticelli within the twenty-four hours preceding the offense and shortly after the offense described him as paranoid, anxious, edgy, fidgety and "whacked". Evidence also existed that Mr. Ponticelli used a large amount of cocaine within twelve to eighteen hours of the offense, and that he had had little or no sleep and food for the week preceding the offense. In fact, evidence existed, which the State failed to disclose, that Mr. Ponticelli did use cocaine within an hour or so of the offense. Due to the longstanding effects of cocaine on Mr. Ponticelli, his drug use was crucial in defending him at both the guilt and penalty phase.

Furthermore, a plethora of evidence existed to impeach and rebut the alleged statements Mr. Ponticelli made which that State argued illustrated his premeditation of the offense. At all of the witnesses' initial statements nothing was said about why Mr. Ponticelli said he had committed the offense. In fact, some of the witnesses said that Mr. Ponticelli did not say. Yet, as time went on, the witnesses statements evolved and included reasons why Mr. Ponticelli

committed the offense, i.e., that he wanted the Grandinetti's cocaine and money.

Had the evidence and information been revealed to the jury of Mr. Ponticelli's drug use and its effects and the inconsistencies about Mr. Ponticelli's motivation, Mr. Ponticelli would not have been convicted of first-degree murder and would not have been sentenced to death.

In light of the constitutional error which occurred at Mr. Ponticelli's capital trial, a new trial is required.

#### ARGUMENT

##### ARGUMENT I

**THE CIRCUIT COURT ERRED IN DENYING MR. PONTICELLI'S CLAIM THAT HIS RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND HIS RIGHTS UNDER THE FIFTH, SIXTH AND EIGHTH AMENDMENTS WERE VIOLATED, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED FALSE EVIDENCE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING.**

In order to insure that a constitutionally sufficient adversarial testing, and hence a fair trial, occur, certain obligations are imposed upon the prosecuting attorney. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment' ". United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). In Strickler v. Greene, 527 U.S. 263, 281 (1999), the Supreme Court reiterated the "special role played by the American prosecutor" as one "whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." See Hoffman v. State, 800 So.

2d 174 (Fla. 2001); State v. Huggins, 788 So. 2d 238 (Fla. 2001); Rogers v. State, 782 So. 2d 373 (Fla. 2001). The State's duty to disclose exculpatory evidence is applicable even though there has been no request by the defendant. Strickler at 280.<sup>4</sup> The State also has a duty to learn of any favorable evidence known to individuals acting on the government's behalf. Id. at 281. Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or sentencing phase of the trial would have been different. Garcia v. State, 622 So. 2d 1325, 1330-31 (Fla. 1993). 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." Bagley, 473 U.S. at 680. "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." Kyles v. Whitley, 514 U.S. at 434; Strickler v. Greene, 527 U.S. at 289-90.

This Court has indicated that the question is whether the State possessed exculpatory "information" that it did not reveal to the defendant. Young v. State, 739 So.2d 553 (Fla. 1999). If it did and it did not disclose this information, a new trial is warranted where

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<sup>4</sup>This Court has recognized that the United States Supreme Court in Strickler eliminated the due diligence element of a Brady claim. Occhicone v. State, 768 So. 2d 1037, 1042 (Fla. 2000); Way v. State, 760 So. 2d 903 (Fla. 2000).

confidence is undermined in the outcome of the trial. In making this determination "courts should consider not only how the State's suppression of favorable information deprived the defendant of direct relevant evidence but also how it handicapped the defendant's ability to investigate or present other aspects of the case." Rogers v. State, 782 So. 2d at 385. This includes impeachment presented through cross-examination challenging the "thoroughness and even good faith of the [police] investigation." Kyles v. Whitley, 514 U.S. at 446.

The lower court's order denying Mr. Ponticelli's claim is flawed in that the lower court did not apply the correct standard to analyze Mr. Ponticelli's claim. Initially, the lower court ignored the United States Supreme Court and this Court's jurisprudence on the elements of a Brady claim. In Cardona v. State, this Court, relying on United States Supreme Court precedent, identified the three elements required in order to prove a Brady claim and indicated that diligence was not required. 826 So. 2d 968, 973 (Fla. 2002).

However, the lower court, in denying Mr. Ponticelli's Brady claim, specifically applied a diligence requirement upon Mr. Ponticelli and his trial counsel in analyzing his claim (Supp. PC-R. 1751, 1753). The lower court's order is in error because there is absolutely no requirement that either Mr. Ponticelli or his trial counsel act diligently.

Furthermore, the lower court specifically found that the Keesee information concerning Mr. Ponticelli's drug use within

an hour or so of the offense was contained in Inv. Munster and the prosecutor's interview notes and that Keesee told Inv. Munster about Mr. Ponticelli's cocaine use on the night of the offense (Supp. PC-R. 1752). Clearly, the information was suppressed by the State.

There is no doubt that the evidence was exculpatory. The evidence of Mr. Ponticelli's state of mind on the night of the offense was the central feature of the defense's case.

Trial counsel's theory of defense was that Mr. Ponticelli was insane at the time of the offense and voluntarily intoxicated (PC-R. 1772). Mr. Ponticelli's cocaine use was important to his state of mind at the time of the offense, which trial counsel believed lessened his culpability and also impacted whether or not death was the appropriate penalty.

Likewise, Keesee's information impeached State witnesses. Keesee himself could have been impeached on his evolving statements which would not only have undercut his testimony, but the entire investigation. Defense counsel could have argued that the State was hiding relevant evidence and coaching witnesses so that the jury did not hear favorable evidence. Also, Freeman, the jailhouse informant, who testified that Mr. Ponticelli told him that he had not used drugs on the day of the offense, either lied to the jury to assist the State, in which case his credibility would have been diminished, or Mr. Ponticelli did not tell Freeman the truth, which would have again cast doubt on Freeman's other

testimony.

The evidence was certainly exculpatory as both substantive evidence of Mr. Ponticelli's state of mind and as impeachment evidence.

The lower court also applied the wrong standard to determine the prejudice of the suppressed information. The court stated: "The evidence of the Defendant's guilt was overwhelming. This Court finds that no reasonable probability exists that the evidence regarding drug usage found in Investigator Munster's field notes and Prosecutor Balius' interview notes would have changed the outcome of guilt or penalty phase of Defendant's trial." (PC-R. 1754).

The lower court's order did not comply with prejudice analysis set forth in Kyles. The Kyles prejudice analysis requires this Court to determine **the effect** of the undisclosed, exculpatory evidence when considered in light of the evidence presented at trial. Kyles, 514 U.S. at 435. The Supreme Court described the Bagley materiality analysis:

The second aspect of *Bagley* materiality bearing emphasis here is that **it is not a sufficiency of evidence test**. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. **One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.**

Id. (emphasis added).

In Mr. Ponticelli's case, the undisclosed evidence certainly puts the whole case in a different light. Mr. Reich believed that his only possibility for an acquittal was to present insanity and involuntary intoxication based on cocaine use (PC-R. 1772, 1774). However, trial counsel was forced to argue reasonable doubt "because the evidence [of cocaine psychosis] was not there" (PC-R. 1804).

Mr. Reich testified that if he had evidence of cocaine use close in time to the offense he would have stayed with his original theory of insanity and voluntary intoxication (PC-R. 1805). Indeed, with Keesee's testimony that he had seen Mr. Ponticelli use cocaine shortly before the offense, trial counsel stated: "With that testimony, Marc Branch . . . gets to get on the stand. I get my opinion from him. . . . I get my instruction. Plain and simple" (PC-R. 1811).

Likewise, as to penalty phase, the statutory mental health mitigators that the lower court and this court found speculative because there was no evidence of Mr. Ponticelli's drug use on the day of the offense are based in fact and no longer speculative.

Keesee's information places Mr. Ponticelli's case in a whole new light at both the guilt and penalty phases.

The lower court ignored the other Brady violations committed by the State such as: John Turner and Freeman told Inv. Muster about the cocaine party on the evening before and early morning of the offense, yet he failed to disclose this



information to defense counsel. Likewise, the prosecutor failed to disclose that she had informed Freeman's attorney that she would reward Freeman for his assistance.

As to the cocaine party that began on Thanksgiving night and continued through the early morning hours of the day of the offense, there is no doubt that this information was equally exculpatory in terms of Mr. Ponticelli's state of mind at the time of the offense and relevant to the penalty phase. The information also undermined the credibility of the State's witnesses: Dotson, Burgess, Ed Brown and Warren Brown all of whom provided testimony about inculpatory statements that Mr. Ponticelli allegedly made to them. Undoubtedly, trial counsel would not have vouched for the witnesses' credibility as he did in his closing argument had he known that they were not telling the truth about when they met Mr. Ponticelli, whether they saw him use drugs and whether they used drugs with him.

Also, Freeman's credibility could have also been questioned since he failed to reveal this information to defense counsel or during his testimony.

Likewise the State's entire investigation would have been undermined because the defense could have argued that the State coached the witnesses in order to minimize Mr. Ponticelli's drug use near the time of the offense and that the State failed to interview any other witness from the party.

As to the undisclosed "deal" between the prosecutor and

Freeman: Freeman testified that he was receiving no benefit for his testimony, yet he knew that the State had "assured him his cooperation would be remembered with favor before mitigating judge/Sturgis" (PC-R. 1136-7, Def. Ex. 9).

Freeman's testimony was false. The fact that no formal deal existed, his knowledge that the State would return the favor for him provided an incentive to color or outright lie about what Mr. Ponticelli allegedly told him. Indeed, perhaps the State's arrangement was even more dangerous in terms of Freeman wanting to do as much as he could to assist the State, including testifying falsely, if it meant that he may curry more "favor" with them at the time of his sentencing. In fact, in Freeman's initial statement he told Inv. Munster that he did not know why Mr. Ponticelli committed the offense. However, after learning of the "favor" he could expect from the State, at trial he suddenly testified that Mr. Ponticelli had told him why he committed the crimes - for drugs and money. Thus, Freeman's testimony evolved and provided a motive which assisted the State in establishing premeditation and aggravating factors.

Furthermore, had counsel known of the State's arrangement with Freeman he testified that he would have also challenged Freeman's role as a state agent and would have had a strong argument that Freeman's testimony should have been suppressed.

Again, the lower court failed to consider the information about Freeman and the cocaine party in terms of the effect on

the penalty phase.

The information about the cocaine party would again have allowed defense counsel to argue statutory and non-statutory mitigation. And, in light, of the expert testimony of the longstanding effects of cocaine on Mr. Ponticelli's mind and body, the information would have supported the statutory mental health mitigators. Also, the information would have negated the State's argument that Mr. Ponticelli's bizarre behavior following the offense demonstrated his consciousness of guilt, rather than the fact that his recent cocaine use was still effecting him and causing him to act irrationally due to his extreme paranoia.

Also, the State's argument that Mr. Ponticelli told Mr. Freeman that he did not use drugs on the day of the crime would have been undercut by the testimony about the cocaine party.

The testimony which was suppressed places Mr. Ponticelli's case in a whole new light and undermines confidence on the verdict and sentence.

The State's Brady violations also led them to also violate Giglio throughout Mr. Ponticelli's capital trial. In Giglio v. United States, 405 U.S. 150, 153 (1972), the United States Supreme Court recognized that the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice."

The United States Supreme Court has further recognized that a prosecutor is:

the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935). Accordingly, the Court "forbade the prosecution to engage in 'a deliberate deception of court and jury.'" Gray v. Netherland, 518 U.S. 152, 165 (1996), quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935). This Court has stated "Truth is critical in the operation of our judicial system. . . ." The Florida Bar v. Feinberg, 760 So.2d 933, 939 (Fla. 2000). If the prosecutor intentionally or knowingly presents false or misleading evidence or argument in order to obtain a conviction or sentence of death, due process is violated and the conviction and/or death sentence must be set aside unless the error is harmless beyond a reasonable doubt. Kyles v. Whitley, 514 U.S. 419, 433 n.7 (1995).

In cases "involving knowing use of false evidence the defendant's conviction must be set aside if the falsity could in **any reasonable likelihood** have affected the jury's verdict." United States v. Bagley, 473 U.S. at 678, quoting United States v. Agurs, 427 U.S. at 102. (emphasis added) Thus, if there is "any reasonable likelihood" that uncorrected false and/or misleading argument **affected** the jury's determination, relief must issue. In other words, where the

prosecution violates Giglio and knowingly presents either false evidence or false argument in order to secure a conviction, a reversal is required unless the error is proven harmless beyond a reasonable doubt. Bagley, 473 U.S. at 679 n.9. See United States v. Alzate, 47 F.3d 1103, 1110 (11<sup>th</sup> Cir. 1995).

In Mr. Ponticelli's case, the State failed to correct false and/or misleading testimony. The lower court found that the testimony of Keesee, Ed Brown and Burgess at Mr. Ponticelli's trial was false (Supp. PC-R. 1755). The court did not address the testimony of Freeman, Warren Brown or Dotson.<sup>5</sup>

Despite the court's finding that the testimony was false, the court found that it was "understandable that [the prosecutor] and Munster could have overlooked" the witnesses' previous statements. (Supp. PC-R. 1755-6). Additionally the court found that the false testimony did not affect the jury's decision to convict Mr. Ponticelli of first degree murder (Supp. PC-R. 1756). The court's finding is in error. At the evidentiary hearing documentary evidence and testimony were introduced that Keesee told both Inv. Munster and the prosecutor that he witnessed Mr. Ponticelli use cocaine on the

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<sup>5</sup>The fact that the lower court found Keesee, Brown and Burgess' testimony false implicitly also finds that Freeman, Dotson and Warren Brown testified falsely at Mr. Ponticelli's capital trial.

night of the offense.<sup>6</sup> Likewise, Inv. Munster was well aware, from several sources that there had been a cocaine party that lasted until the morning hours of the day of the offense at the Dotson home and the Mr. Ponticelli was using cocaine.

Yet, when Keesee testified at his deposition and at trial that he did not see Mr. Ponticelli use cocaine on the evening of the offense, the State sat mute. Likewise the State allowed Dotson, Ed Brown, Warren Brown and Burgess to testify falsely about, among other topics, when they met Mr. Ponticelli, that they did not see him use cocaine, the Scar Face movie, his motivation for committing the offense and the fact that they had never used drugs.<sup>7</sup>

The State could not have merely overlooked the contradictory testimony when the State was well aware that the crucial issue at trial was Mr. Ponticelli's state of mind, due to cocaine use, at the time of the offense. All of the State's actions pre-trial and during trial in minimizing Mr. Ponticelli's drug use demonstrate that the State was aware of any of the drug use that the defense could prove: The State filed a motion to prevent mention of the toxicology reports and of Keesee's prior drug use (PC-R. 1798); The State objected to the testimony of Dr. Marc Branch who was the

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<sup>6</sup>Inv. Munster sat at counsel table throughout the entire trial, assisting the prosecutor.

<sup>7</sup>As to the reference to the group watching Scar Face, due to the testimony presented at the evidentiary hearing, it is unclear that Mr. Ponticelli even watched this movie with the group.

defense expert regarding cocaine psychosis. During the State's argument, the prosecutor pointed out that there was no evidence of Mr. Ponticelli's drug use on the day of the offense; The State repeatedly argued to the jury that there was no evidence that Mr. Ponticelli used cocaine on the night of the offense.

Indeed, the prosecutor's deposition notes are marked to indicate that she did in fact believe that Keesee had told Inv. Munster about the cocaine usage at the trailer on night of the crime: "Told B.M. Is it on tape?" (PC-R. 1117-8, Def, Ex. 8). The prosecutor's failure to correct the false testimony was not an oversight, but a deliberate deception. In reviewing the notes, trial counsel testified that the notes reflected: "she wants to know whether or not Bruce Munster has gotten - has tape recorded Keesee's statement that he did - that he saw Tony do cocaine in the trailer that night" and to find out "whether or not [trial counsel is] going to get a tape recording of Timothy Keesee with that statement on it." (PC-R. 1812-2).

The record belies the lower court's finding that the State "overlooked" the inconsistencies and false testimony when State witnesses were testifying falsely.

As to the effect on Mr. Ponticelli's conviction and sentence, even the prosecutor admitted that if Mr. Ponticelli was "not on cocaine at the time [of the crime] it's hard to establish a cocaine psychosis defense (PC-R. 1101). Further,

as to the information about the Thanksgiving night cocaine party, the prosecutor agreed that if the information about the party were true it would have caused a serious problem for the prosecution at trial (PC-R. 1128).

Not only would the false testimony have effectively impeached the State's witnesses and all of their testimony, but also it would have changed the entire defense case. Trial counsel would have been allowed to present his cocaine psychosis expert and argue voluntary intoxication and/or insanity at the time of the offense. The falsities also affected the penalty phase, including the statutory and non-statutory mitigation and the applicability of the pecuniary gain and CCP aggravators.

The false testimony affected the jury's determination because the error cannot be proven harmless beyond a reasonable doubt. This Court must grant Mr. Ponticelli a new trial.

## **ARGUMENT II**

**THE CIRCUIT COURT ERRED IN FAILING TO ADDRESS MR. PONTICELLI'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE AT THE PENALTY PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.**

### **A. DEFICIENT PERFORMANCE**

Despite the fact that Mr. Ponticelli pleaded his claim that trial counsel ineffective at the penalty phase of his capital trial, the lower court granted an evidentiary hearing on his claim and Mr. Ponticelli presented a wealth of



mitigating evidence at his capital trial, the lower court failed to address Mr. Ponticelli's claim in the order denying relief.

James T. Reich was appointed to represent Mr. Ponticelli at his capital trial in 1988, on February 23, 1988, only five and a half months before his capital trial (PC-R. 1767, 1769). Mr. Reich had never conducted a penalty phase or even attended a course on how to investigate or present penalty phase evidence (PC-R. 1853). Mr. Reich did not have an investigator assisting him (PC-R. 1768). Mr. Reich recalled that he spent the "vast majority" of his time on the guilt phase (PC-R. 1771).

On June 30, 1988, just over one month before Mr. Ponticelli's capital trial began, his trial attorney met Mr. Ponticelli at the jail for his first substantive interview (PC-R. 1781). When he met Mr. Ponticelli, he doubted his client's competence (PC-R. 1781).

It is undisputed that trial counsel conducted almost no investigation of Mr. Ponticelli's background of life history in order to prepare for the penalty phase. In fact, Mr. Reich candidly admitted that at the time of Mr. Ponticelli's trial he "didn't know" how to do a penalty phase (PC-R. 1854, 1908).

Trial counsel's deficiencies in his performance cannot be attributed to the fact that his client, whom he believed was incompetent would not communicate with him. Mr. Reich never even attempted to discuss Mr. Ponticelli's background with

him.

Furthermore, Mr. Reich admitted that he did not investigate Mr. Ponticelli's background, specifically his time in New York, (which was essentially from Mr. Ponticelli's birth until he was eighteen or nineteen years of age, a year prior to the offense), as he should have (PC-R. 1829). Mr. Reich only interviewed Mr. Ponticelli's parents as to background information, and they knew nothing about drugs (PC-R. 1830, 1853). Mr. Ponticelli's parents did provide him with names of family members from New York who knew Mr. Ponticelli, John Como was one name that was provided, along with others, but trial counsel never contacted him or anyone else (PC-R. 1855-6, 1890, Def. Ex. 28).<sup>8</sup>

The Ponticellis also told Mr. Reich about school teachers and Tony Ponticelli's work history, but Mr. Reich failed to attempt to uncover any information about Mr. Ponticelli's background (PC-R. 1900)

Trial counsel never even attempted to get releases for school records, employment records or any other records (PC-R. 1857-8). He did not know that Mr. Ponticelli was a "blue baby" at birth (PC-R. 1857). He knew none of the circumstances of Mr. Ponticelli's adoption (PC-R. 1857).

Trial counsel testified that had he known of Mr. Ponticelli's difficult birth or exposure to toxins at his job,

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<sup>8</sup>Como knew Barnes, O'Berry, Falanga, Orlando and many of Mr. Ponticelli's other friends from New York.

he would have presented it to the jury as mitigation (PC-R. 1858).

Even the mitigation of which Mr. Reich was aware, he did not present. Mr. Reich testified that he knew of Turner's testimony about Mr. Ponticelli's behavior on drugs, but did not present what Turner had told him in his deposition (PC-R. 1831).

Also, even without Mr. Ponticelli's input, Mr. Reich knew many of Mr. Ponticelli's friends and acquaintances whom he had met in the year preceding the offense, yet he failed to conduct a mitigation interview with any of them. For example, had he spoken to Joey Leonard, whom he knew was a good friend of Mr. Ponticelli, he would have learned that Mr. Ponticelli dated Mr. Leonard's sister, Patty.

Overall, Mr. Reich admitted that he knew only a partial view of Mr. Ponticelli's background, which focused on his recent drug history (PC-R. 1832). He characterized his knowledge of Mr. Ponticelli's background as "very inaccurate" (PC-R. 1832). Had he known the extent of his cocaine use, his behavior when using cocaine, and other background information, he would have presented it as mitigation (PC-R. 1835, 1858).

Likewise, had Mr. Reich questioned the inconsistencies in the witnesses', from West Virginia, statements and interviewed Turner about mitigation, he would have learned and used the testimony about the cocaine party on the evening and early morning hours preceding the offense to support the statutory

mitigators (PC-R. 1827). And he could have used the witnesses' inconsistencies regarding Mr. Ponticelli's statements about his motive for the offense to rebut the aggravators of pecuniary gain and CCP because the statements undercut premeditation and the theory that the offense was committed for drugs and money.

Additionally, trial counsel failed to adequately prepare his mental health expert. Trial counsel agreed that had he known about Mr. Ponticelli's longstanding reaction and behavior while using cocaine he would have provided such information to his mental health experts (PC-R. 1836). Mr. Reich testified that he "had no idea how to go about proving mental health mitigators" (PC-R. 1854). He did not follow-up on Dr. Branch's suggestion to retain a clinical psychologist despite the fact that Dr. Poetter recommended someone skilled in drug and alcohol abuse in the Ocala area to him (PC-R. 1859).

As to penalty phase objections, Mr. Reich believed that he had preserved his objection to the vagueness of the HAC aggravator and the CCP aggravator (PC-R. 1851). He also conceded the cold, calculated and premeditated aggravator, seemingly only because the jury found Mr. Ponticelli guilty of first degree murder (PC-R. 1864).

Trial counsel's investigation, preparation and performance at the penalty phase was deficient. Trial counsel has an absolute obligation to conduct a thorough investigation

of his client's background. Williams v. Taylor, 529 U.S. 362, 396 (2000). This Court has held: "[A]n attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." State v. Riechmann, 777 So. 2d 342, 350 (Fla. 2000), quoting Rose v. State, 675 So. 2d 567, 571 (Fla. 1996). It certainly can neither be considered through nor reasonable to fail to investigate the first eighteen or nineteen years of a twenty year old client's life.

As in Wiggins, trial counsel failed to "discover **all reasonably available** mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." \_\_\_ U.S. \_\_\_, \*9 (2003)(emphasis in original), quoting, ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989). Counsel did little more than speak to Mr. Ponticelli's parents and failed to follow-up on any of the information that they provided.

Counsel's highest duty is the duty to investigate, prepare and present available mitigation. Where counsel unreasonably fails in that duty, the defendant is denied a fair adversarial testing process and the results of the proceeding are rendered unreliable. Stevens v. State, 552 So. 2d 1082 (Fla. 1989); Bassett v. State, 451 So. 2d 596 (Fla. 1989); State v. Michael, 530 So. 2d 929 (Fla. 1988); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988).

Trial counsel admittedly failed to investigate Mr. Ponticelli's

background, social and mental health history. His performance was deficient.

**B. PREJUDICE**

When asked what his penalty phase would have looked like had he had all of the information presented at the evidentiary hearing, trial counsel stated that he "would have had so much" (PC-R. 1862). Mr. Reich testified: "[t]he kind of penalty phase that should have been put on for this man is just - I mean, think about it" (PC-R. 1862).

At trial, Mr. Reich presented scant testimony about Tony's background, other than in the three weeks preceding the offense he was using cocaine on a daily basis. However, even with this information, trial counsel failed to explain what the drug use meant or substantiate the statutory mental health mitigators. The trial court and this Court found that the statutory mental health mitigators did not apply because there was no evidence of cocaine use on the day of the crime (R. 1836, Ponticelli v. State, 593 So. 2d 483, 491 (Fla. 1991)).

The kind of penalty phase to which Mr. Reich referred that he would have wanted to present was a penalty phase that provided the jury with an entire picture of Tony's background and mental health. The jury would have heard that Tony's life began tragically when he was abandoned by his biological mother after a difficult birth, where he was a "blue baby" (PC-R. 805).

Tony was brought to the Ponticelli home six months later

along with several other foster children (PC-R. 793, 805). Tony's childhood was unremarkable - he was quiet and happy and got along well with the other foster children (PC-R. 793). Eventually, the other foster children were placed with their natural parents and Tony remained with the Ponticelli's. Tony was adopted by the Ponticelli's when he was seven (PC-R. 793, 805). Later, in his life, Tony confided to his sister-in-law that he felt separated from the family because he was adopted and his adopted father seemed to have no time for him (PC-R. 799).

As Tony approached his early teens he remained quiet and desperately tried to fit in with his peers (PC-R. 683). His desire to fit in probably contributed to the fact that he was a follower (PC-R. 683). Unfortunately, Tony's desire to fit in was inhibited by his weight problem and the fact that he wore glasses which the other children teased him about (PC-R. 684).

Whether it was Tony's desire to fit in with his friends or to escape the feelings that he didn't fit in with his family, he turned to drugs and alcohol at a young age; in junior high he experimented with marijuana and beer (PC-R. 685, 713, 726).

In high school, Tony's substance abuse continued and increased. Tony was using marijuana during school hours and also started experimenting with other drugs, including black beauties, mescaline, hash and Valium (PC-R. 686-7, 713, 726).

In high school, Tony met Wendy Falanga, who was older than Tony and developed a crush on her (PC-R. 772-3). Falanga introduced Tony to cocaine:

Q: Were you doing cocaine before Tony?

A: Yes, I was.

Q: And do you remember the first time you did cocaine with Tony?

A: Yes, I do.

Q: Can you describe for the Court how that came about?

A: I was using cocaine and Tony wasn't. And I started dating someone near his house, and Tony used to come with me.

And my now ex-husband at the time was the man I was dating, and he started getting nervous, because we were all using cocaine and Tony wasn't.

And as with a lot of people on cocaine, you get nervous if you're not using, whether or not he was a police officer, I don't know, just crazy stuff. And so I kind of convinced Tony to begin using.

Q: And that was so he could continue hanging out at Mike's?

A: So he could continue to hang, yeah.

(PC-R. 772-5). Tony's use of cocaine progressed rapidly, probably because he was free-basing cocaine almost immediately after he started using it (PC-R. 691). He also continued to use other drugs.

Tony's cocaine use caused him to neglect his school work, it even caused him to forego eating and sleeping because he was so strung out (PC-R. 810).

In 1985 or 1986, Falanga got married and it "devastated Tony" (PC-R. 780). Following Falanga's marriage, his cocaine



use increased and he took the news hard (PC-R. 691).

When Tony was not on drugs, he was sweet and respectful (PC-R. 777). His friends parents' liked Tony and he would spend time speaking to their parents (PC-R. 838).

Additionally, Tony helped his adopted father with a cleaning business and was motivated to hold jobs in high school.

But, when Tony used cocaine his personality changed (PC-R. 688). His friend, Michael Barnes explained:

A: Well, when he started smoking it, he just - he wasn't himself. He started like getting, I don't know, paranoid. Like we would be hanging out partying, walk down the road, and all of a sudden, you know, it was like he was losing it, and he would say, "Oh, Mike, there's someone over there in the woods."

"Anthony, what are you talking about?"

"Mike, I'm telling you there's someone in the woods."

I'd look over and there's nobody there. He was hallucinating, you know, really bugging out from it.

Q: And was there ever anybody in the woods?

A: No.

Q: And did this happen pretty regularly?

A: Almost every time we were doing it as, you know, we were doing it more and more.

(PC-R. 688-9). Barnes testimony about the change in Tony's personality was corroborated by every witness who witnessed Tony use cocaine (PC-R. 510-1, 565, 721, 775-8, 930, 969-70). Tony also experienced mood swings: "He would go from being in the middle of a conversation to either getting really, really paranoid or breaking down and crying, and almost putting himself like in a fetal position and rocking" (PC-R. 778).

In high school, Tony confided in Concetta O'Berry that he had a drug problem; he was using cocaine every day and "he wanted to get clean" (PC-R. 840).

With help, Tony was able to graduate from high school. Shortly, thereafter, his parents moved to Florida and Tony came with them. The change of scenery and peer group appeared to help Tony stop using cocaine. Tony held a job and spent time working on his car (PC-R. 559-60). One of Tony's jobs required him to work around lead and he began to lose his hair. Tony appeared to return to his easy going relaxed self (PC-R. 851, 927).

In September, 1987, Tony returned to New York to attend the wedding of his cousin, Joseph Orlando, and extended his trip in order to spend some time with his cousin and family (PC-R. 716-7). While Tony was in New York, Tony started using cocaine; the two cousins went on a cocaine binge and also drank a lot of alcohol; Tony was using twenty-eight to thirty-six grams over a four to five day period (PC-R. 719-20, 852).

Tony's reaction to cocaine had not changed - he got paranoid and anxious, more so than most people (PC-R. 721).

Tony returned to Florida in late October with his friend Michael Barnes. The night they returned to Florida Barnes and Tony's cousin John Como used cocaine (PC-R. 697). Barnes and Como witnessed Tony have a severe paranoid reaction to the drug, which they described as he was acting like a madman (PC-R. 733-4). Tony ended up hiding in a cabinet, drenched in

sweat with two knives in his hands swearing that there was somebody on the roof (PC-R. 698).

The friends Tony had met in Florida in the preceding year also noticed a complete change in his personality - he was nervous, jittery and alienated himself (PC-R. 853, 928). His friends saw him using cocaine and crack (PC-R. 929).

In the three weeks preceding the offense, Tony spent nearly everyday with John Turner (R. 948). Tony and Turner used cocaine, including free basing, every day, from 8:00 or 9:00 a.m. until 3:00 or 4:00 a.m. (R. 948, 950, 953). Keesee saw Tony buy significant quantities of cocaine from the Grandinettis ten to fifteen times in a two week period (R. 416).

Every time, which meant nearly everyday, Mr. Ponticelli used cocaine at Mr. Turner's house he was "wiggling":

[W]hen you're inside of a bedroom and the door never opens but you still look under the bed fifteen or twenty times to make sure that there's nobody in there, when you hide in a corner, when you peek out the windows out the blinds, and when you can't stand to have anything on, no television, no radio, no loud noises . . .

(PC-R. 969). Tony would also react similarly when they used cocaine in the car (PC-R. 970).

Tony's cocaine use continued during the week of the homicides. On Thursday evening, Tony attended a cocaine party at Dotson's house (PC-R. 974, 977). The party lasted until the early morning hours of the following day (PC-R. 974, 977). When they returned to the party Mr. Ponticelli showed them how

to cook the cocaine and make a homemade pipe to smoke it (PC-R. 655). Mr. Ponticelli free based cocaine that night and reacted the way he always did when he used cocaine (PC-R. 975, 980).

On the evening of the offense, the Grandinetti's sought out Tony because he owed them money (PC-R. 945). Keesee saw Tony within an hour or so of the offense at the Grandinetti trailer (PC-R. 532). Tony was "nervous, sitting on the edge of his chair, anxious to leave. He mentioned a couple of times: 'I need to get going.'" (PC-R. 527). Keesee was only at the trailer for about forty minutes, but in the time he witnessed Tony use cocaine and he saw cocaine on the table along with a razor blade and glass (PC-R. 509).

After, Keesee saw Tony at the trailer, Frank Porcillo, a friend of Tony's, ran into him at the convenience store, near the pay phone (PC-R. 568). Tony approached Mr. Porcillo and acted like he "was like going off the edge." (PC-R. 569).

Later in the evening, Robert Meade, who testified at trial, saw Tony and believed that Mr. Ponticelli on cocaine and because he was acting very irrational and crazy (PC-R. 932, 937).

In the days following the offense Tony told Turner that the Grandinetti brothers pursued him that night, located him, threatened him and used cocaine with him and that Tony was scared (PC-R. 958).

In addition to the overwhelming amount of information

trial counsel could have presented about Mr. Ponticelli's background, history and behavior even up to within hours of the offense, trial counsel could have also presented evidence of Tony's mental make-up prior to and at the time of the offense.

Dr. Herkov found significant evidence that Mr. Ponticelli was intoxicated on cocaine at the time of the offense (PC-R. 1343-4, 1373). Dr. Krop who had evaluated Mr. Ponticelli at the time of trial for competency, also indicated that at the time of trial, as his report stated, Mr. Ponticelli was intoxicated from his cocaine use at the time of the offense and that his ability to conform his conduct to the requirements of the law may have been diminished (PC-R. 1535).

Likewise, Dr. Marc Branch, who consulted with Mr. Reich at trial believed that based on all of the information he learned following the trial he was reasonably psychologically certain that Mr. Ponticelli was psychotic at the time of the offense due to his ingestion of cocaine and that Tony's cocaine use effected his behavior at the time of the offense (PC-R. 1669).

The doctors noted the amount of cocaine use the night before the offense, his chronic cocaine use in the week preceding the offense, his lack of sleep and his use of cocaine within hours of the offense in forming their opinions.

The doctors also found that Mr. Ponticelli was a severe, longstanding, cocaine addict and that he was in fact a poly-substance abuser (PC-R. 1387, 1653-4).

Dr. Herkov believed that within a reasonable degree of medical certainty Mr. Ponticelli was suffering from an extreme mental or emotional disturbance at the time of the offense and that his ability to conform his behavior to the requirements of the law was substantially impaired at the time of the offense (PC-R. 1374). Also, Mr. Ponticelli's cocaine use could have affected his ability to plan and premeditate (PC-R. 1407).

As did Dr. Herkov, Dr. Krop and Dr. Branch testified that they found that both of the statutory mental mitigators applied to Tony (PC-R. 1547-8, 1673). Dr. Krop and Dr. Branch could have testified to their opinions at trial, but were not requested to do so. In fact, neither of them were even asked to consider mitigation in 1988 (PC-R. 1674).

Additionally, Dr. Barry Crown, a neuropsychologist, conducted neuropsychological testing on Mr. Ponticelli in 1995 (PC-R. 1214). Mr. Ponticelli's testing reflected deficiencies in his brain functioning (PC-R. 1218-9, 1220, 1221, 1226, 1230-1, 1232, 1233). Overall, Dr. Crown found that Mr. Ponticelli's brain functioning was significantly impaired and "that his deficits were particularly related to executive functions" (PC-R. 1234-5).

Had trial counsel even inquired of the mental health

individuals who evaluated Tony, he would have learned that mental health mitigation existed which was supported by the facts existing at trial. Had he adequately investigated and provided information to those same mental health experts, he would have found that there was a sound basis on which to argue compelling mental health mitigation, both statutory and non-statutory. Had he adequately presented testimony about the effects of long term cocaine use on Tony's mind and the behaviors that would persist, even without use on the day of the crime, he could have supported the statutory mental health mitigators, even without evidence of Tony's drug use within one to twelve hours of the offense.

But as counsel readily admitted he "had no idea how to go about proving mental health mitigators" (PC-R. 1854).

Furthermore, had trial counsel effectively represented Mr. Ponticelli at his capital penalty phase, he would have known how to preserve issues regarding the instructions on the aggravating circumstances.<sup>9</sup> He would have realized that "heightened premeditation" was different from premeditation and there was ample evidence at his disposal to rebut the premeditation required for first degree murder, let alone the

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<sup>9</sup>This Court found that the instructions provided to Mr. Ponticelli's capital jury were in error, yet found that the error had not been preserved. Had trial counsel properly preserved the error, Mr. Ponticelli would, at a minimum, have received a new sentencing proceeding. Trial counsel had no strategy to fail to preserve the issue, in fact he thought he had (PC-R. 1851). The prejudice of counsel's failure to adequately represent Mr. Ponticelli is evident. Relief must be granted.

heightened premeditation required to prove the CCP aggravator.

Trial counsel also would have argued against the pecuniary gain aggravator, since the trial court found insufficient evidence that Mr. Ponticelli robbed the victims (R. 941). Obviously, the logical inference would have been that if there was not sufficient evidence to prove that Mr. Ponticelli robbed the victims, there also was insufficient evidence to prove that, beyond a reasonable doubt, Mr. Ponticelli's primary motivation was to steal drugs and money from the victims. Furthermore, the inconsistent and contradictory statements and testimony of Dotson, Freeman, Burgess and the Browns, along with Turner's statement as to what Mr. Ponticelli told him completely rebutted the pecuniary gain aggravator.

At trial the State presented two aggravating factors for the murder of Ralph Grandinetti, pecuniary gain and CCP. For the murder of Nicholas Grandinetti, the State presented the same two aggravators along with the HAC aggravator. The jury recommendations for death were not unanimous, but only nine to three for each of the murders.

Additionally, Mr. Ponticelli had no prior history of violent conduct and he was only 20 years of age at the time of the crime. 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 impair confidence in the outcome of the proceedings. Strickland, 466 U.S. at 695. "In assessing prejudice, [this Court] must reweigh the evidence in aggravation against the totality of mitigating evidence." Wiggins v. Smith, \_\_\_ U.S. \_\_\_ (2003).

Had counsel discovered and presented the available mitigating circumstances, there is more than a reasonable probability that the jury would have voted for life and that the balance of aggravating and mitigating circumstances would have been different. Mr. Ponticelli has shown that "[the] death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Strickland, 466 U.S. at 687.

The overwhelming mitigation could not and would not have been ignored had it been presented to the judge and jury. Prejudice is established under such circumstances. See, Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995)(prejudice established by presenting of "substantial mitigating evidence" in postconviction); Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992)(prejudice established by "strong mental mitigation" which was "essentially un rebutted"); Bassett v. State, 541 So. 2d 596, 597 (Fla. 1989).<sup>10</sup>

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<sup>10</sup>Prejudice was found in these cases despite the existence of numerous aggravating circumstances. See, Hildwin (four aggravating circumstances); Phillips (same); Mitchell (three aggravating circumstances); Bassett (same).

Mr. Ponticelli is entitled to relief.

### ARGUMENT III

#### THE CIRCUIT COURT ERRED IN DENYING MR. PONTICELLI'S CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE PRE-TRIAL AND AT THE GUILT PHASE OF HIS TRIAL IN VIOLATION OF MR. PONTICELLI'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

In Strickland v. Washington, 466 U.S. 668, 688 (1984) the Supreme Court held that counsel has a "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland requires a defendant to plead and show: 1) unreasonable attorney performance, and 2) prejudice. Courts have repeatedly ruled that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980); Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(en banc). See also Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982)("[a]t the heart of effective representation is the independent duty to investigate and prepare"). Likewise, courts have recognized that in order to render reasonably effective assistance an attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). An attorney is responsible for presenting argument consistent with the applicable principles of law. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989).

Mr. Ponticelli was denied the effective assistance of

counsel pre-trial and at the guilt phase of his capital trial.

**A. COMPETENCY**

Counsel to investigate, secure and present information relating to Mr. Ponticelli's competency to proceed at the time of his trial. At the evidentiary hearing, trial counsel testified that he waited until just over one month before trial to conduct a substantive interview with Mr. Ponticelli (PC-R. 1777). During that meeting, trial counsel realized that Mr. Ponticelli was not competent (PC-R. 1776-7). Mr. Ponticelli told Mr. Reich that God told him not to speak to him (PC-R. 1779). Mr. Reich filed a motion to determine if Mr. Ponticelli was competent (PC-R. 1781).

However, Mr. Reich did not review Mr. Ponticelli's jail records or speak to any inmates or correctional officers about Mr. Ponticelli (PC-R. 1863). Trial counsel also failed to provide the experts with any materials about Mr. Ponticelli's background or history.

During trial, a brief competency hearing was held after which, the court found that Mr. Ponticelli competent. However, even throughout trial, Mr. Reich thought that there were indications that Mr. Ponticelli was incompetent. For example, during a trial break and again after the jury found Mr. Ponticelli guilty he found Mr. Ponticelli mumbling to himself very rapidly in the cell and he did not acknowledge Mr. Reich's presence - "it was as if [Mr. Reich] wasn't there"

(PC-R. 1789).

Had trial counsel investigated and prepared, he would have learned that Mr. Ponticelli's jail records contained information that was relevant to a competency determination. Mr. Ponticelli had eight bibles in his cell, he wore towels on his head for religious purposes, he alienated himself from other inmates. Further, inmates who were incarcerated with Mr. Ponticelli described bizarre behavior: Mr. Ponticelli did not converse with other inmates; he spoke to God and paused as if he were waiting for answers; he paced around his cell reading the bible; he hallucinated and believed he heard inmates and God speaking to him; he thought he saw Jesus' face in the moon.

Additionally, Mr. Ponticelli wrote lengthy and bizarre letters to former, friends and his sister (PC-R. 780, 812). His letters quoted scripture and jumped from one topic to the next (PC-R. 781, 812). He stated in his correspondence that God had told him to write (PC-R. 842-3).

At trial, Dr. Mills opined that Mr. Ponticelli was incompetent because he was psychotic and was fixated on a religious delusion (R. 1186). In postconviction, Dr. Herkov agreed with Dr. Mills that Mr. Ponticelli was delusional at the time of trial and supported his opinion with evidence that trial counsel could have uncovered but failed to do so. Likewise, Dr. Krop, who saw Mr. Ponticelli at the time of trial and in postconviction changed his opinion and believed

that based on the evidence developed that Mr. Ponticelli was incompetent to proceed at the time of trial due to his fixed religious delusion which prevented him from assisting his attorney or challenging evidence or testifying relevantly (PC-R. 1525).<sup>11</sup>

Had trial counsel investigated or presented the evidence of Mr. Ponticelli's bizarre behavior, the outcome of the competency hearing would have been different.

**B. TRIAL DEFENSE**

Trial counsel failed to conduct an adequate investigation; failed to ensure competent mental health professionals were available to assist with Mr. Ponticelli's defense during guilt/innocence phase; failed to utilize impeachment material available to him; engaged in inconsistent defenses such that Mr. Ponticelli was certain to be convicted; failed to deliver on his promise to the jury to introduce expert testimony of cocaine psychosis due to his lack of knowledge, failure to investigate, and failure to present available evidence which would have supported the expert's opinions and made the opinion testimony admissible; failed to investigate, discover, obtain jury instructions regarding, and argue a defense of voluntary

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<sup>11</sup>Dr. Krop testified that this was the first time in his professional career that he changed his opinion as to the competency of an individual (PC-R. 1524). Dr. Krop's opinion was largely based on the compelling evidence that was available at trial but trial counsel failed to develop (PC-R. 1525).

intoxication; failed to object to lead investigator Bruce Munster's presence throughout the trial such that witnesses were intimidated into testifying in misleading and perjurious fashion; failed to properly argue and present testimony regarding motions to suppress illegally obtained statements of Mr. Ponticelli; failed to properly cross-examine witnesses; failed to obtain toxicology results on the victims; failed to object to improper questioning and argument by the prosecutor; failed to protect the jurors from the inflammatory and prejudicial impact of extended and improper exposure to gruesome photographs; inexplicably vouched for the credibility of State witnesses; and conceded issues throughout the trial to the detriment of Mr. Ponticelli.

The State's theory at trial was that Mr. Ponticelli killed the Grandinettis, after deliberately planning to do so, in order to obtain money and cocaine. The State's theory of premeditation was dependent upon proof that Mr. Ponticelli was not under the influence of narcotics at the time of the homicides and that he announced his intention to kill the victims and then admitted doing so to disinterested witnesses whom he had just met the day of the homicides. The State's case consisted almost entirely of statements attributed to Mr. Ponticelli.

Trial counsel was ineffective in failing to defend Mr. Ponticelli against the State's theory and present a cogent defense of voluntary intoxication. During trial counsel's

opening statement to the jury, he told the jury that he would present evidence that Mr. Ponticelli was not guilty of first-degree murder (R. 292). He indicated that based on Mr. Ponticelli's cocaine use preceding the crime that Mr. Ponticelli did not have the required mental state to commit first-degree murder (R.293-5). Trial counsel extensively discussed the defense of cocaine intoxication with the prospective jurors. Counsel promised the jury that they would hear "what cocaine does to you" and "it's not pretty" (R. 294, 295).

By putting forth an insanity or voluntary intoxication defense, trial counsel admitted Mr. Ponticelli's guilt. However, trial counsel also told the jury that there was reasonable doubt that Mr. Ponticelli did not commit the offense (R. 292). Thus, trial counsel presented an inconsistent defense. Trial counsel admitted that his theories were inconsistent (PC-R. 1805).

However, at trial, no evidence was ever presented by trial counsel to support his insanity or voluntary intoxication defense; his expert witness was excluded from testifying (R. 992), and no insanity or voluntary intoxication instruction was given to the jury and counsel was precluded from arguing insanity during closing argument.

For trial counsel to promise the jury evidence of insanity, argue it in opening statement, and then be forced to abandon the defense due to his lack of knowledge or inability

to introduce adequate evidence. Further, the deficiency was prejudicial in the most extreme sense: counsel conceded his client committed the homicides, embarked on an affirmative defense with patently insufficient evidence, was precluded from arguing the defense, and by switching theories in the middle of the trial effectively pled Mr. Ponticelli guilty to capital murder.

Furthermore, trial counsel could have presented a voluntary intoxication defense even without evidence of Mr. Ponticelli's drug use on the evening of the crime. John Turner testified in his deposition that Mr. Ponticelli had told him that he used cocaine on the night of the offense. Further, had trial counsel investigated Mr. Ponticelli's history of drug use, he would have learned that Mr. Ponticelli had a longstanding, severe drug addiction, dating back to his early teens. He also knew that Mr. Ponticelli was using significant amounts of cocaine within the three weeks preceding the offense. Had he understood his defense, he would have learned that cocaine's effects, specifically on Mr. Ponticelli were longstanding and caused him to become extremely paranoid and agitated. Trial counsel's own expert, Dr. Branch, could have explained that Mr. Ponticelli's recent use of cocaine alone and combined with the long term effects of cocaine and Mr. Ponticelli's history of cocaine use and the behavior which resulted when Mr. Ponticelli used cocaine would have substantiated a voluntary intoxication defense.



Likewise, trial counsel's concessions both in opening and closing arguments "were the functional equivalent of a guilty plea to first-degree" premeditated murder. Harvey v. State, \_\_\_ So. 2d \_\_\_ (Fla. July 3, 2003), 2003 Fla. Lexis 1140, \*5. In opening statement, in no uncertain terms, trial counsel told the jury that Mr. Ponticelli committed the offense, but that he was insane at the time of the offense (R. 294-5). Yet, because he presented no evidence of insanity and failed to obtain an instruction about insanity he effectively pleaded Mr. Ponticelli guilty to first-degree premeditated murder.

However, perhaps even more egregiously, during his closing argument, trial counsel told the jury that as to the witnesses present at Dotson's house on the night of the offense that "there's no doubt in my mind, at least, that he said the things that those boys from West Virginia say he said." (R. 1101-2). The witnesses from West Virginia, specifically Burgess and Ed Brown were the witnesses who established premeditation, i.e., they testified that Mr. Ponticelli told them that he planned to kill the Grandinettis shortly before the offense (R. 473-4, 536-7). As in Harvey trial counsel's statement:

clearly demonstrates that trial counsel admitted that [Ponticelli] deliberated his plan to kill the [Grandinettis]. By stating that [Ponticelli] had a conversation in which [he] discussed the plan to commit murder, trial counsel conceded that [Ponticelli] acted with premeditation and, therefore conceded [Ponticelli's] guilt to first-degree murder. Trial counsel's comments were the functional equivalent of a guilty plea . . .

Id. at \*11; see also Nixon v. State, 758 So. 2d 618 (Fla. 2000).

As in Harvey and Nixon, Mr. Ponticelli pleaded not guilty and did not consent to trial counsel's strategy of conceding premeditated first-degree murder. Thus, as this Court has held, trial counsel's performance constituted per se ineffective assistance of counsel and amounted to a violation of United States v. Cronin, 466 U.S. 648 (1984).

Trial counsel also provided ineffective representation by allowing Inv. Munster to be excluded from the rule prohibiting any witness from hearing other witnesses testify (R. 303). Throughout the trial, counsel constantly vouched for the credibility of the lead investigator charged with putting together two cases of First Degree Murder. By vouching for Inv. Munster, trial counsel vouched for the evidence Inv. Munster developed and introduced during the trial. This assured conviction and denied Mr. Ponticelli a true adversarial testing.

Not only did trial counsel vouch for Inv. Munster, but he conceded the credibility of other witnesses and their testimony. The Browns and Burgess were key to the State's case because they allegedly only met Mr. Ponticelli the day of the homicides, were disinterested witnesses, and testified regarding inculpatory statements purportedly made by Mr. Ponticelli (R. 1092-3; 1100-1101).

Trial counsel conceded that Mr. Ponticelli made

statements to the Browns and Burgess despite having "known them for less than 4 hours" (R. 1100). This statement conceded what was clearly false testimony. Inv. Munster's own investigative records reveal that Mr. Ponticelli met the witnesses the day before the homicides and had freebased cocaine with them all night prior to the day of the homicides. Further, during Turner's deposition, trial counsel learned that not only had Burgess, Dotson, and the Browns met Mr. Ponticelli prior to the day of the homicides, but that Turner and Mr. Ponticelli had taken Burgess and the Browns to the Grandinetti trailer to acquire cocaine on a day and at a time prior to the homicides. This not only contradicted testimony regarding the time of Mr. Ponticelli's first meeting the witnesses, but contradicted the West Virginia witness testimony that they had not consumed cocaine with Mr. Ponticelli and that they did not consume drugs generally. A witness' use of narcotics is highly relevant to his ability to recall, testify accurately, and subjects the witness to damaging and often effective cross-examination.

Warren Brown also indicated he met Mr. Ponticelli prior to the day of the homicides, both in his original statement to Munster and during his pre-trial deposition. Edward Brown testified he first met Mr. Ponticelli "maybe on Thursday night" (which was Thanksgiving and the day prior to the homicides) during pre-trial deposition. Curiously, by the time trial arrived, all these witnesses testified consistent

with the State's theory of the case: they first met Mr. Ponticelli the day of the homicides, they didn't do any cocaine, Mr. Ponticelli didn't do any cocaine, and Mr. Ponticelli made several inculpatory statements to near strangers and frightened them one and all. Trial counsel also conceded the prosecution's timeline regarding the evening of the homicides by vouching for the credibility of the West Virginia witness testimony. Trial counsel was informed during Inv. Munster's deposition that telephone records revealed that Mr. Ponticelli made a long distance call from the Grandinetti's trailer to at 7:46 p.m., the evening of the homicides. This is the time the witnesses from West Virginia were purportedly meeting Mr. Ponticelli for the first time. Trial counsel was informed, knew or should have known that this trial testimony was patently false, yet he not only failed to confront them with their inconsistent statements during cross-examination and failed to impeach them with the long distance telephone records. Instead, he vouched for their credibility. It was unreasonable for him to concede falsehoods which contributed to his client's convictions and sentences of death.

Trial counsel was aware that the State had utilized the services of Freeman, a professional "snitch". Despite this knowledge, trial counsel conceded that Mr. Ponticelli made inculpatory statements to Freeman:

Now, notwithstanding that, evidence of this crime, evidence that led to finding witnesses that

testified in this court, was secured from testimony -- excuse me, from information given by Dennis Freeman and that, I can attribute -- I can't attribute to anything that makes sense, other than Tony Ponticelli did, in fact, give him that information.

(R. 1101).

Thus, trial counsel conceded all guilt phase issues by asserting a thwarted insanity defense, vouching for the lead investigator's credibility, conceding the truthfulness of witness testimony, and vouching for witness credibility. This was patently ineffective assistance and denied Mr. Ponticelli an adversarial testing to the extent that confidence in the outcome of the trial is undermined.

Not only did trial counsel help the State with its case by conceding matters, he also failed to object to improper questions by the prosecutor, failed to object to the admission of inflammatory and prejudicial evidence lacking in relevance, and failed to cross-examine witnesses in a competent fashion. Specifically, some examples are: trial counsel allowed the prosecutor to ask numerous witnesses about their "feelings" or "thoughts" after Mr. Ponticelli allegedly made statements to them (Brown - R. 475-478; 481-482; Dotson - R. 517; Burgess - R. 538-539; Meade - R. 581; Leonard - R. 614-615); trial counsel allowed witnesses to testify to hearsay without objection (Brown - R. 485; Dotson - R. 514; Burgess - R. 544; Brown - R. 558-560; Leonard - R. 627; Inv. Munster - R. 827-829; 831-834; 848; 851-852; 880-882); trial counsel allowed the State to mention the titles of videos found in the

victims' automobile which had absolutely no evidentiary value ("Eliminators"; "Deadly Impact" - R. 667); trial counsel allowed Inv. Munster to refer to Mr. Ponticelli's request for an attorney without objection or motion for mistrial (R. 809); failed to object to the prosecutor's leading of Dr. Maruniak into testifying beyond his area of expertise to the prosecutor's theory of the homicides (R. 382-410); failed to cross-examine paramedic Kaufman regarding his administration of Narcan to Nicholas Grandinetti when such questioning would have established that there was evidence of narcotics use (R. 342-352); failed to introduce toxicology reports regarding narcotics use by the victims during the defense case (R. 376, 381-382); failed to interpose the proper objection to continued publication of gruesome photographs to the jury and conceded their admissibility (R. 359); failed to object to questions by the prosecutor designed to prop up witness credibility by referring to prior consistent statements (Meade - R. 582-583; Leonard - R. 630); failed to properly argue and present Motions to Suppress regarding statements attributed to Mr. Ponticelli, with the result being a portion of an inadmissible statement was published to the jury (R. 791-792); failed to argue Mr. Ponticelli invoked his right to counsel during custodial interrogation regarding subsequent statements to Inv. Munster; and failed to request either a mistrial or instruction once the jury heard a portion of the suppressed statement (R. 804).

Trial counsel's performance pre-trial and at the guilt phase of Mr. Ponticelli's trial was deficient. Had trial counsel performed effectively, Mr. Ponticelli would not have been convicted of first-degree murder. Relief is warranted.

#### ARGUMENT IV

**MR. PONTICELLI DID NOT RECEIVE COMPETENT ASSISTANCE FROM A MENTAL HEALTH EXPERT AS HE WAS ENTITLED TO UNDER AKE V. OKLAHOMA IN VIOLATION OF HIS FIFTH, SIXTH, EIGHT AND FOURTEENTH AMENDMENT RIGHTS.**

A criminal defendant is entitled to expert psychiatric assistance when his mental state is relevant to guilt or sentencing. Ake v. Oklahoma, 470 U.S. 68 (1985). There exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1275, 1279 (5th Cir. 1976). Counsel has a duty to conduct proper investigation into a client's mental health background and to assure that the client is not denied a professional and professionally conducted mental health evaluation. See Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984). "The failure of defense counsel to seek such assistance when the need is apparent deprives an accused of adequate representation in violation of his sixth amendment right to counsel." Proffitt v. United States, 582 U.S. 854, 857 (1978). Trial counsel's failure to ensure the assistance of a competent qualified mental health expert to assist in evaluating Mr. Ponticelli for competence, establishing a defense and mitigating circumstances and rebutting aggravation deprived

the jury and judge of an accurate account of Mr. Ponticelli's background and mental impairments, denied Mr. Ponticelli the adversarial testing to which he was entitled.

Pre-trial, there was a dispute about whether Mr. Ponticelli was competent to proceed. Dr. Mills believed that Mr. Ponticelli suffered from a psychosis involving a fixed delusional belief which prevented him from assisting his trial counsel (R. 1186). At the time of trial, Dr. Krop believed that there were signs of psychosis, but he concluded that Mr. Ponticelli made a choice not to speak to his trial counsel (PC-R. 1507). Dr. Krop conducted no testing and relied solely on the inaccurate information obtained in an interview with Mr. Ponticelli (R. 1210).

Similarly, Dr. Poettner, who found Mr. Ponticelli competent, performed some, but not a complete battery of testing (1192-3). Dr. Poettner had not been provided with any background information relevant to Mr. Ponticelli.

In postconviction, Dr. Krop changed his opinion, based on evidence that was available at the time of trial, but counsel failed to develop (PC-R. 1525). Likewise, Dr. Herkov agreed that Mr. Ponticelli was incompetent at the time of trial (PC-R. 1351).

Additionally, evidence was available that Mr. Ponticelli was incapable of committing premeditated murder due to his cocaine use, yet trial counsel failed to develop this issue.

Likewise, statutory and nonstatutory mitigation was



available based on Mr. Ponticelli's mental condition.

None of the experts were provided adequate or accurate information in order to conduct an evaluation.

Trial counsel's failure to ensure the assistance of a competent qualified mental health experts to assist at every stage of the trial was ineffective. Relief is proper.

**ARGUMENT V  
THE LOWER COURT ERRED IN DENYING MR. PONTICELLI AN  
EVIDENTIARY HEARING ON SEVERAL OF HIS CLAIMS.**

The lower court erred when it summarily denied several of Mr. Ponticelli's claims (Supp. PC-R. 1673-93).

**A. MR. PONTICELLI WAS INCOMPETENT DURING HIS CAPITAL TRIAL AND SENTENCING PROCEEDINGS IN VIOLATION OF THE UNITED STATES AND FLORIDA CONSTITUTIONS.**

It has long been the rule in this state that:

A person accused of an offense or a violation of probation or community control who is mentally incompetent to proceed at any material stage of a criminal proceeding shall not be proceeded against while he is incompetent.

Fla. R. Crim. P. Rule 3.210 (a). The conviction of an incompetent defendant denies him of the due process of law. See James v. Singletary, 967 F.2d 1562, 1573 (11th Cir. 1992); Pate v. Robinson, 383 U.S. 375 (1966).

Mr. Ponticelli was incompetent during his pre-trial, trial and sentencing proceedings.

Likewise, Mr. Ponticelli was incompetent to proceed during his direct appeal. Mr. Ponticelli is guaranteed the effective assistance of counsel on appeal under Evitts v. Lucey, 469 U.S. 387 (1985). Mr. Ponticelli must be able to

"rationally" communicate with appellate counsel. Laferty v. Cook, 949 F.2d 1546 (10th Cir. 1991) cert. denied, 112 S. Ct. 1942 (1992).

Sources available at trial evidence that Mr. Ponticelli suffered from a complicated birth, was exposed to lead in his work environment for a prolonged period of many months, and suffered from long term addiction to cocaine in all its debilitating forms. The cocaine addiction compounded prior damage to his brain and his forced withdrawal from cocaine, coupled with an internally and externally mandated religious "rapture", rendered him incompetent and incapable of assisting his trial attorney prior to and during trial. Mr. Ponticelli suffered from classic symptoms of mental illness during the trial process, including oral and visual hallucinations and overtly delusional thought processes. This resulted in his involuntary inability to consult with trial counsel. Relief is proper.

**B. THE STATE'S USE OF A JAILHOUSE AGENT VIOLATED MR. PONTICELLI'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.**

Prior to trial, Mr. Ponticelli was housed in the Marion County Jail. While incarcerated, Mr. Ponticelli was placed in a cell block with Freeman, who admits he is a seasoned snitch (R. 765). With the intent of conveying incriminating information to the State, Freeman attempted to gain Mr. Ponticelli's trust. Freeman, without Mr. Ponticelli's knowledge, met regularly with an investigator working on Mr.

Ponticelli's case for the purpose of disclosing incriminating information. This information was used by the State in its ongoing investigation of the homicides, and Freeman ultimately testified at trial (R. 725). Mr. Ponticelli was advised neither of Freeman's status as a State agent, nor of his right to remain silent.

Freeman's solicitation of information from Mr. Ponticelli was in violation of Mr. Ponticelli's Fifth and Sixth Amendment rights. The government used Freeman in an attempt to make a case against Mr. Ponticelli. Trial counsel's motion in limine to prevent Freeman from testifying was denied (R. 1448-1451).

Protection of an individual's right to remain silent is deemed inviolate. An individual must be informed of prior to custodial interrogation. Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964).

Consequently, when an individual is in custody, he must be advised of his rights under Miranda v. Arizona prior to interrogation.

During each interrogation, Mr. Ponticelli was significantly deprived of his freedom of movement because he was incarcerated. Consequently, the State had the duty to protect Mr. Ponticelli's Fifth Amendment right to silence.

Furthermore, because the prosecution had commenced, Mr. Ponticelli's Sixth Amendment right to counsel had attached at the time of his interrogations by Freeman. Kirby v. Illinois, 92 S. Ct. 1877 (1972). Indeed, the State knew that Mr.

Ponticelli was actually represented by counsel. The Supreme Court has held that incriminating statements "deliberately elicited" by the police after an accused's Sixth Amendment right to counsel has attached may not be used against a defendant, absent a knowing and voluntary waiver. Massiah v. United States, 377 U.S. 201 (1964). The Court later extended Massiah, when the government placed an informant in the same cell as the defendant since the government, at minimum, "must have known" that its informant would take the steps necessary to secure statements for the government. United States v. Henry, 447 U.S. 264, 274 (1980).

In Henry, a number of factors supported the conclusion that the government had "deliberately elicited" incriminating statements from the defendant. Among these facts were the following: the cellmate was a paid informant; the informant was seemingly just another inmate; and the defendant was in custody and under indictment at the time the conversations took place. Id. at 270. The Court noted that "confinement may bring into play subtle influences that will make [defendants] particularly susceptible to the ploys of undercover Government agents," Id. at 274. The government's argument that it had instructed its informant not to question or interrogate the defendant was rejected, because under the circumstances the government "must have known" that the informant would take affirmative steps to secure incriminating information. Id. at 271. Therefore, the Court held that the

government violated the defendant's Sixth Amendment right to counsel by "intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel." Id. at 274. Mr. Ponticelli's case is replete with Henry factors and Freeman's was a State agent.

Immediately following Mr. Ponticelli's arrest for first degree murder, Freeman was transferred from the Lake County Jail to the Marion County Jail. He was placed in a cell pod in which he had previously acted as a State agent in at least three cases. Shortly thereafter, Mr. Ponticelli was transferred from a different location within the jail.

Here, the government at least "must have known" that its informant would take the steps necessary to secure statements for the government. Henry, 447 U.S. at 271. Mr. Ponticelli need not conclusively show intent on the part of the State because "[d]irect proof of the State's knowledge [that it is circumventing the Sixth Amendment] will seldom be available to the accused." Maine v. Moulton, 106 S. Ct. 477, at 487 (1985).

The information Freeman provided was crucial to the State's investigation and strategy. Mr. Ponticelli was thus deprived of fundamental constitutional rights through which the guarantee of a fair trial is realized. Consequently, confidence in the outcome of the proceedings is undermined, and relief is proper.

**C. MR. PONTICELLI'S SENTENCING JURY WAS MISLED BY COMMENTS AND INSTRUCTIONS WHICH DILUTED ITS RESPONSIBILITY.**

Mr. Ponticelli's jury was told by the court and the prosecutor that the judge ultimately determined the sentence,

and the jury's role was merely advisory, in violation of law (R. 43, 1143, 1315-16, 1365, 1368, 1369, 1370 1506, 1731, 1738). However, because great weight is given the jury's recommendation in Florida, the jury is a sentencer. Espinosa v. Florida, 112 S. Ct. 2926 (1992). Here, the jury's sense of responsibility was diminished by the misleading comments and instructions regarding the jury's role. This diminution of the jury's sense of responsibility violated the Eighth Amendment. Caldwell v. Mississippi, 472 U.S. 320 (1985). To the extent that defense counsel failed to make the appropriate objections, counsel rendered ineffective assistance of counsel. Relief is proper.

**D. MR. PONTICELLI'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. PONTICELLI TO PROVE THAT DEATH WAS INAPPROPRIATE.**

Mr. Ponticelli's jury was improperly instructed that mitigating factors must outweigh aggravating factors (R. 815).

Under Florida law, a capital sentencing jury must be:

[T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .

[S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added).

This straightforward standard was never applied at the penalty phase of Mr. Ponticelli's capital proceedings.

Defense counsel rendered prejudicially deficient assistance in failing to object to the errors. Relief is

proper.

**E. THE COURT OVERBROADLY AND VAGUELY INSTRUCTED THE JURY ON THE MURDER FOR THE PURPOSES OF PECUNIARY GAIN IN VIOLATION OF ESPINOSA V. FLORIDA, STRINGER V. BLACK AND THE EIGHTH AND FOURTEENTH AMENDMENTS. INSTRUCTION ON PECUNIARY GAIN WAS IMPROPER AND DID NOT APPLY TO THE FACTS OF THIS CASE.**

The jury was given the following instruction regarding the murder for pecuniary gain: "the crime for which the defendant is to be sentenced was committed for financial gain" (R. 1024).

The instruction was vague and overbroad. Florida law has limited this circumstance to situations where the primary motive for the homicide was pecuniary gain. The jury was not so advised. Under Espinosa v. Florida, 112 S. Ct. 2926 (1992), the instruction given to the jury violated Mr. Ponticelli's rights. Defense counsel rendered prejudicially deficient assistance in failing to object to the errors. See Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990).

The facts of this case do not meet the elements set forth by this Court. Mr. Ponticelli was unable to form the intent necessary to establish this aggravator. Relief is proper.

#### **CONCLUSION**

Based upon the foregoing argument, reasoning, citation to legal authority and the record, appellant, ANTHONY JOHN PONTICELLI, urges this Court to reverse the lower court's order and grant him Rule 3.850 relief.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to Kenneth Nunnelley, Assistant Attorney General, 444 Seabreeze Blvd., Suite 500, Daytona Beach, Florida 32118, on October 16, 2003.

**CERTIFICATION OF TYPE SIZE AND STYLE**

This is to certify that the Initial Brief of Appellant has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

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