IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-17

LOWER COURT CASE NO. 87-2719 CF

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

REPLY BRIEF OF APPELLANT

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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.

A. GIGLIO v. UNITED STATES

In arguing that this Court should deny Mr. Ponticelli's claim that the State allowed false testimony to be presented to the jury, the State urges this Court to defer to the lower court's order denying relief. (Response at 64-5)("The Circuit Court applied the proper standard in finding that the testimony at issue was not "material" for *Giglio* purposes, and, because that is so, there is no basis for relief."). However, the State is incorrect. This Court is required to defer to factual findings made by the lower court, only to the extent that those findings are supported by competent,

[1]Mr. Ponticelli will not reply to every issue and argument, however he does not expressly abandon the issues and claims not specifically replied to herein. For arguments not addressed herein, Mr. Ponticelli stands on the arguments presented in his Initial Brief.

substantial evidence. Sochor v. State, 883 So. 2d 766, 785 (Fla. 2004). After doing so, this Court is then required to review *de novo* the application of those facts to the law. Id. A review of the lower court's order shows that not only were the findings not supported by competent, substantial evidence, but they were in fact contradicted by the testimony and evidence presented during the evidentiary hearing. Likewise, the lower court's analysis was in error.

To prove a Giglio violation has occurred, a defendant, like Mr. Ponticelli must show that: 1) the testimony given was false; 2) the prosecutor knew the testimony was false; and 3) the statement was material. Guzman v. State, 868 So. 2d 498, 505 (Fla. 2003). As to the materiality prong, this Court has explained "that false evidence is material 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" Id. at 506, quoting United States v. Agurs, 427 U.S. 97, 103 (1976). Further, "[t]he State, as the beneficiary of the Giglio violation, bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt." Guzman, 868 So. 2d at 506.

There is no doubt that false testimony was presented at Mr. Ponticelli's capital trial. Timothy Keesee lied to Mr. Ponticelli's jury; Brian Burgess, Keith Dotson, Edward Brown and Warren Brown all lied to Mr. Ponticelli's jury; and Dennis Freeman lied to Mr. Ponticelli's jury. In her closing

argument, the prosecutor relied on the false testimony. Specifically, Keesee lied about the fact that no drugs or cocaine were used at the trailer when he observed Mr. Ponticelli with the victims shortly before the crimes occurred. He also lied when he testified that Mr. Ponticelli was given the chance to leave the residence and he declined. The Browns, Dotson and Burgess lied about the fact that they had never used cocaine with Mr. Ponticelli and that they had only met him on Friday evening. They also lied about the fact that Mr. Ponticelli was at their house on early Friday evening discussing his intent to kill the victims. None of the witnesses, referred to as the "West Virginia witnesses", or the State disclosed the "group meeting" that the prosecutor arranged with them.[2] Freeman lied to the jury about the fact that promises had been made to him for favorable treatment on his pending charges, that Mr. Ponticelli had told him that he had not used any drugs or alcohol on the evening he shot the victims and that he committed the crimes for drugs and money.[3] Freeman also lied about when Mr. Ponticelli formed

[2]At the "group meeting" the prosecutor informed the witnesses that she was not concerned about any of their drug use: "She said that she didn't care – whatever we had done was frivolous to her . . . " (PC-R. 674). She went on to state that she wanted to obtain a conviction and sentence of death. The prosecutor's comments to the witnesses also establishes undisclosed impeachment of the witnesses.

[3]Because the lower court fails to even address much of the false testimony presented at Mr. Ponticelli's trial, this Court cannot defer to the court's order, as the State requests.

premeditation; he testified that Mr. Ponticelli formed premeditation while at the Grandinetti residence.

As to Timothy Keesee, the trial prosecutor, Sarah Williams, testified at the evidentiary hearing and identified her notes from an interview with Mr. Keesee (Def. Ex. 7). The prosecutor's notes reflect that: "He was making calls to sell coke, collect money, doing cocaine." (Def. Ex. 7).[4] Mr. Keesee testified that the prosecutor had interviewed him and he described what had occurred while he was at the trailer. According to Keesee, the "he" reference in the prosecutor's notes was to Mr. Ponticelli (PC-R. 514). Ms. Williams admitted that her notes were inconsistent with Keesee's deposition and grand jury testimony (PC-R. 1084).

During, Keesee's deposition, Ms. Williams again took notes. Those notes were also introduced at the evidentiary hearing (Def. Ex. 8). Ms. William's wrote in her notes that Keesee "said no one was using cocaine" at the trailer and that Keesee did not tell anyone that cocaine was used (Def. Ex. 8). The portion of the notes that "Keesee did not tell anyone" is underlined and in the margin of her notes, the prosecutor wrote "told BM. Taped." (Def. Ex. 8).

Indeed, in Investigator Munster's supplemental report, dated December 23, 1987, he indicated that Keesee told him

[4]Keesee also testified that he had told Ms. Williams, the prosecutor, and Investigator Munster, the lead detective that he observed Mr. Ponticelli use cocaine at the trailer on the night of the crimes (PC-R. 508, 514).

that cocaine was being used at the victim's trailer on the night of the crimes (Def. Ex. 507-8).[5] Keesee made this statement the day after the crimes (PC-R. 507). At the evidentiary hearing Investigator Munster testified:

> Q: So did Keesee tell you they were using cocaine in the trailer?
>
> A: Yes, he did.

(PC-R. 1032).

Trial counsel was unaware of Keesee's statements to the State (PC-R. 1810-1). The trial prosecutor failed to correct Keesee's testimony either during his grand jury testimony, deposition, during the motion in limine to prevent reference to cocaine use and at trial that no cocaine was used by Mr. Ponticelli or anyone at the trailer on the night of the crimes (PC-R. 1121). In fact, Ms. Williams was able to successfully argue that Dr. Marc Branch should be excluded based on the fact that there was no evidence that Mr. Ponticelli had used any cocaine prior to the crimes (R. 993). The trial prosecutor also argued during the closing argument of the guilt phase that there was no evidence of cocaine use before the crimes were committed (R. 1063). Additionally, she argued that Mr. Ponticelli had been provided with the opportunity to leave the trailer and he declined (R. 1056-7; 1119-20).[6] The

[5]During Investigator Munster's deposition, he testified that he could not recall whether Keesee told him that cocaine was used at the trailer on the night of the crimes.

[6]The prosecutor argued Keesee's false testimony to refute Leonard and Mead's testimony that Mr. Ponticelli was not

trial prosecutor argued that the jury should believe Freeman when he testified that Mr. Ponticelli had told him that he (Ponticelli) had not used any drugs prior to the crimes (R. 1067). The prosecutor commented that Freeman's testimony "can only be true."[7]

Likewise, during the penalty phase, the prosecutor argued that the statutory mental health mitigators had not been established due to the fact that there was no evidence of cocaine use before the crimes were committed (R. 1349-50). The trial court and this Court accepted the prosecutor's argument and rejected the statutory mental health mitigators based on the fact that there was no evidence of cocaine use prior to the crimes (R. 1836); Ponticelli v. State, 593 So. 2d 483, 491 (Fla. 1991).

Keesee's testimony at trial was false. Trial prosecutor Williams and Investigator Munster knew of the false testimony, but failed to correct it. There is nothing vague about the prosecutor's notes introduced at the hearing.

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allowed to leave the Grandinetti residence. Thus, Keesee's testimony was critical to the prosecution's case to prove premeditation.

[7]In light of Keesee's testimony at the evidentiary hearing, and the undisclosed information surrounding the prosecutor's promise of leniency to Freeman, it is now clear that Freeman's testimony was largely false. The prosecutor also knew that Freeman never mentioned premeditation or motive until after receiving assistance from the State. In fact, John Turner's information refuted Freeman's testimony, because, Turner had informed the State that Mr. Ponticelli obtained the gun for protection from the victims.

During the evidentiary hearing, the trial prosecutor also identified her notes from a conversation she had with Freeman's attorney. Her notes reflect: "Spoke with Fred Landt regarding Dennis Freeman. Told him I would make no firm offer prior to Defendant'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." (Def. Ex. 9). While confirming her conversation with Freeman's attorney, Ms. Williams testified that she didn't "consider that making him a promise." (PC-R. 1138). Trial counsel's interpretation of the note differed and he was certain that the note constituted impeachment of Freeman, at the very least (PC-R. 1815).

In addition, Investigator Munster's notes from his interview with Dennis Freeman indicate that Mr. Ponticelli told him that he and two guys from West Virginia bought an eight ball from Nick Grandinetti on Thanksgiving night and smoked it at Keith Dotson's house (PC-R. 1050-1). Again, this information was not turned over to defense counsel. Investigator Munster failed to investigate this information even though he received similar information from John Turner (PC-R. 974, 977).

As to the materiality of the false testimony, or the truth, the trial prosecutor admitted that Keesee's information about Mr. Ponticelli's drug use and the information about the Thanksgiving cocaine party was important to the competency

determination:

> Q: And if Dr. Mills had had Timothy Keesee to talk to early on in the investigation and he told him that he most certainly was doing cocaine at the time very close to the offenses, that might have supported this report a little more, mightn't it?
>
> A: If he was.
>
> Q: Yeah. And if those West Virginia boys were cooking up cocaine and smoking it with [Mr. Ponticelli] until 3 or 4:00 in the morning the day of the homicides, that might have lent a little more credibility to Dr. Mills, too, huh?
>
> A: Yeah. But I really doubt that one.
>
> Q: You need to read Monday's testimony.

(PC-R. 1177-8). The trial prosecutor also agreed that such evidence was important in the penalty phase:

> Q: . . .will you review what the judge found regarding extreme mental or emotional disturbance at the time of the offenses, what he relied on in rejecting that?
>
> A: (Witness examines document.)
>
> He rejected it because he found Dr. Mills' testimony must be characterized as mere speculation.
>
> Q: Right. And that would explain what he was referring to in four when he says, again, it was mere speculation on the part of Dr. Mills.
>
> A: Yes.
>
> Q: So he rejected his testimony?
>
> A: Yes.
>
> Q: Okay. And he also said the reason why the opinion – he rejected Dr. Mills' opinion is that the illegal use of cocaine by the Defendant and a description of hyperactivity on the evening of the murders was speculative, correct?
>
> A: Right.

Q: So that was my point earlier. If he was on cocaine, it would not have been speculative, it would have been fact, correct?

A: If he had been in cocaine?

Q: Yeah. At the time of the homicide?

A: Yeah. If he had been on cocaine.

(PC-R. 1184-5). The prosecutor also conceded the importance of the information about what really happened on the evening of Thanksgiving with the individuals from West Virginia:

Q: But if that was true, if, in fact, it was true that John Turner and Mr. Ponticelli had met the gentlemen from West Virginia on Thanksgiving night, Thursday, 1987, and that Mr. Ponticelli and Mr. Turner had gone and gotten cocaine for the boys from West Virginia implying that they were going to do something with it, that would have been a fairly serious problem for you at trial, would it not?

A: Yes.

Q: Okay. Because your West Virginia witnesses testified that they had never met Mr. Ponticelli before the Friday of the homicides, correct?

A: Right. Mm hm.

Q: And they gave this nice little scenario of everybody all said the dame thing by the time they got to trial three times; there early watching Scarface, came back later and said he was going to off these guys, came back two, two and a half hours later and said, “I did it. Here’s the cocaine and money,” right?

A: Right.

Q: That’s the scenario. And didn’t all of those witnesses testify that they did not consume any cocaine with Anthony Ponticelli?

A: That’s correct.

Q: And they didn’t take any of his money?

A: No.

Q: And they didn't know him until that Friday?

A: Right.

Q: Okay. So they would have been – if it could have been established at trial that a cocaine party took place at the Dotson residence and lasted until say 3 a.m. Friday morning and all of these West Virginia people were there and a couple of them were smoking cocaine with my client, 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. 1128-9).

Indeed, when Mr. Ponticelli met the witnesses from West Virginia was a critical issue at trial. The State argued that the witnesses were credible because Mr. Ponticelli had only known them for a few hours when he confessed that he intended to kill the Grandinetti's. However, knowing that the witnesses actually met Mr. Ponticelli the previous evening and that they had used used cocaine with Mr. Ponticelli would have impacted the credibility of the witnesses, their ability to remember the events and their possible motives for stating that Mr. Ponticelli voiced an intent to commit the crimes with which he was convicted.

There is no doubt that the evidence that was suppressed was material. The State has made no attempt to demonstrate that the suppressed evidence was harmless beyond a reasonable doubt. The State like the lower court, simply argues that the suppressed evidence does not "support the idea that [Mr. Ponticelli] was "insane at the time of the murders." (Response

at 64). However, as recognized by the trial prosecutor, at a minimum, the evidence would have impacted the competency proceedings, would have been useful to impeach key State witnesses, would have provided a basis for the testimony and opinions of Dr. Marc Branch in the guilt phase, and would have substantiated the mental health opinions in the penalty phase. Indeed, the evidence establishes voluntary intoxication and Mr. Ponticelli's inability to establish specific intent. The State cannot show that the constitutional error was harmless beyond a reasonable doubt.

The State also argues that because Mr. Ponticelli was aware that the witnesses were testifying falsely, that he cannot complain about the State's failure to correct the testimony (Response at 65). However, this Court need look no further than the cases concerning the State's obligation to reveal exculpatory evidence and to see that the State's argument makes no sense.

First, whether or not Mr. Ponticelli informed his trial counsel that he had consumed cocaine shortly before the crimes makes no difference to the State's obligation to turn over the exculpatory evidence. Trial counsel could not impeach the State's witnesses with Mr. Ponticelli's statements. However, had he been provided the inconsistent statements of the witnesses, he could have impeached the State's witnesses and argued that the witnesses were not credible. See Florida Evidence Code §90.801 (2). Likewise, trial counsel could have

argued that the State's witnesses had motives to lie and please the State or even have gone so far as to argue that based on the evolution of the statements, the witnesses had been coached. See Banks v. Dretke, 540 U.S. 668 (2004); Cardona v. State, 826 So. 2d 968, 980 (Fla. 2002)("Finally, critical to the issue of Gonzalez's credibility as a witness at trial, and thereby important to our materiality consideration, the contradictions between Gonzalez's pretrial statements to the prosecutors and her testimony at trial after meeting with prosecutors suggests coaching by the State of its most important witness. Coaching is suggested because the testimony that was altered between the time of Gonzalez's three interviews and the trial parallels the State's themes at trial...).

Indeed, in Banks, the United States Supreme Court confronted a similar argument made on behalf of the government in attempting to fault petitioner in his federal habeas proceedings. The Supreme Court explained:

> The State here nevertheless urges, in effect, that 'the prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence," so long as the 'potential existence' of a prosecutorial misconduct claim might have been detected . . . A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendants due process.

540 U.S. at 696 (citations omitted).

In Cardona v. State, this Court granted a new trial based on undisclosed statements made by a State witness regarding

the activities of the defendant on the days preceding her son's death. 826 So. 2d 968 (Fla. 2002). Surely, the defendant, Cardona, knew what her activities were in the days preceding her son's death. However, this Court held: "Cardona could not impeach Gonzalez because she did not have the inconsistent description of events contained in the interviews." Id. at 975. Likewise, while Mr. Ponticelli may have known that the witnesses were lying to the jury, he had no way to impeach those witnesses without the disclosure of their inconsistent statements. It matters not that Mr. Ponticelli "did nothing to correct or call attention" to the false testimony. (State's Response at 66).

Also, in Roman v. State, this Court granted a capital defendant a new trial based on the inconsistent statements made by a State witness, but not disclosed to the defense. 528 So. 2d 1169, 1171 (Fla. 1988). At issue in Roman was whether Roman was intoxicated at the time of the crime. Id at 1170. This Court noted that at trial, "Roman introduced expert testimony that he does not know right from wrong when intoxicated. Thus, a primary issue at trial was whether or not Roman was drunk at the time of the offense." Id. The State presented seven witness to testify that Roman was not drunk and the defense presented three witnesses who testified to the contrary. Id. Following the trial, Roman learned that one of State's witnesses had previously provided a statement that was inconsistent with his trial testimony. This Court

held: "[The witness'] undisclosed statements were important not only for impeachment purposes, but for the content as well." Id. at 1171. Again, Roman could have told his trial counsel that the witness was lying, and he may have done so, however, without the statement to prove that the testimony is false, the defendant's word has no value.

Likewise, the United States Supreme Court vacated the death sentence in Brady v. Maryland, based on the suppressed confession of Brady's co-defendant. 373 U.S. 83 (1963). At Brady's trial, he testified and admitted to being present during the commission of the charged crimes, however, he claimed that his co-defendant "did the actual killing." Id. at 84. Despite, Brady's protestations that his co-defendant had committed the murder, the Supreme Court held that the suppressed statement of Brady's co-defendant admitting to the murder was exculpatory and in that case material. Id. at 90. So, even if Mr. Ponticelli had informed his trial attorney about his drug use in the early morning hours and shortly before the crimes were committed, even if he had testified to those facts, the State still violated Brady in failing to disclose the prior inconsistent statements. As in Brady, the prosecutor in Mr. Ponticelli's case played "the role of an architect of a proceeding that does not comport with standards of justice . . . " Id at 88.

Furthermore, Mr. Ponticelli had no knowledge of the deal that the State made with Freeman. While the State does not

believe that there was a formal deal, the caselaw proves otherwise. In Napue v. Illinois, the Supreme Court reviewed a petitioner's claim that the State had violated Brady and Giglio, in failing to reveal that a promise for consideration was made. 360 U.S. 264 (1959). In Napue, a State witness testified that he had not received any promise for consideration in return for his testimony. Id. at 265. However, it was later revealed that the witness and the State had discussed that a recommendation for a reduction of the witness' sentence would be made and possibly effectuated. Id. at 266. The United States Supreme Court held that the witness' testimony that he "had been promised no consideration for his testimony" was false and the dealings with the prosecution was the type of consideration that must be revealed. And, where, as here, the State knows of such a promise and fails to correct the witness' testimony, a Giglio violation occurs. Napue, 360 U.S. at 269-70.

Likewise, in United States v. Bagley, the United States Supreme Court reviewed a situation where the State failed to respond to defense counsel's request that the State reveal any deals that had been made with witnesses. 473 U.S. 667, 683 (1985). As in Mr. Ponticelli's case, no "formal" deal had been made with the State witness, however, the Court found that the "possibility of a reward had been held out to [the State witnesses]" . . . This possibility of a reward gave [the State witnesses] a direct, personal stake in respondent's

conviction. The fact that the stake was not guaranteed through a promise or binding contract, . . . served only to strengthen any incentive to testify falsely in order to secure a conviction." Id.

Thus, the mere fact that there were discussions about assisting Freeman is sufficient to show that Freeman testified falsely at Mr. Ponticelli's capital trial and the State was aware of the falsehood.

Indeed, the prosecutor's notes demonstrate that she "assured him his cooperation would be remembered with favor before mitigating judge/Sturgis." (Def. Ex. 9). The promise of leniency and the possibility that Freeman may benefit was incentive for him to manufacture testimony. In fact, Freeman never told the prosecutor or law enforcement that Mr. Ponticelli had told him that he planned to kill the victims until after he received the assurance from the prosecutor that his "cooperation would be remembered." As found in Bagley, the defense could have made a compelling argument that the "possibility of a reward" provided Freeman a stake in Mr. Ponticelli's conviction and therefore his recent mention that Mr. Ponticelli told him he intended to kill the victims was fabricated to make sure Mr. Ponticelli was convicted and that Freeman obtained the reward.[8] Because, Freeman was a critical

[8]In fact, Freeman never mentioned anything about Mr. Ponticelli indicating he intended to kill the victim's until shortly before trial, after his attorney had spoken to the prosecutor in Mr. Ponticelli's case, after the prosecutor's assistance with his gain time and after Investigator Munster

witness in establishing premeditation, statutory aggravators and minimizing Mr. Ponticelli's cocaine use on the day of the crimes, it was crucial that defense counsel be informed of any impeachment evidence.

As in Banks, Mr. Ponticelli's jury "did not benefit from customary, truth-promoting precautions that generally accompany the testimony of informants." 540 U.S. at 702. Because, informers pose "serious questions of credibility" it was necessary for Mr. Ponticelli's trial attorney to be fully armed with information that would have assisted the defense. Id. (citations omitted).

The critical witnesses at Mr. Ponticelli's trial lied to the jury. Because "'the jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend'", Gorham v. State, 597 So. 2d 782, 785 (Fla. 1992), quoting Napue v. Illinois, 360 U.S. 264 (1959), Mr. Ponticelli is entitled to a new trial.

B. BRADY v. MARYLAND

Again, the State urges this Court to employ an incorrect standard of review. Rather than the State's standard of review, "[w]hen reviewing Brady claims, this Court applies a

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authored a letter for a reduction of sentence on Mr. Ponticelli's behalf.

mixed standard of review, 'deferring to the factual findings made by the trial court to the extent they are supported by competent, substantial evidence, but reviewing de novo the application of those facts to the law." Johnson v. State, 2005 Fla. LEXIS 595, *37-8 (Fla. March 31, 2005), quoting, Lightbourne v. State, 841 So. 2d 431, 437-8 (Fla. 2003).

Also, again, the lower court failed to address many of Mr. Ponticelli's allegations that the State suppressed exculpatory information, thus, there are no findings from the lower court to which to defer.[9]

In its Response, the State argues that Mr. Ponticelli cannot claim that the State violated due process in failing to disclose the exculpatory information known to the State. As the lower court found, the prosecutor and lead investigator in Mr. Ponticelli's case knew that Keesee had told them that Ponticelli used cocaine shortly before the crimes. However, the lower court excuses the State's behavior because Mr. Ponticelli did not prove that he "did not possess the evidence himself." Additionally, at the hearing, the State admitted knowing about the cocaine party which occurred in the early

[9]The lower court ignored the 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. The lower court also ignored the coaching of Keesee and the impact of the undisclosed group meeting with the witnesses from West Virginia.

morning hours on the day of the crimes and at which Mr. Ponticelli consumed a large amount of cocaine and behaved oddly.

In fact, Mr. Ponticelli did prove that he did not possess the evidence himself.[10] The exculpatory material was not only that Mr. Ponticelli had used cocaine in the early morning hours and shortly before the crimes, but that State witnesses informed the State of this in their initial statements and then changed their testimony during deposition and at trial. The change of testimony was as much exculpatory as was the substantive evidence in the original statements.

As stated previously, a review of this Court and the United States Supreme Court's caselaw demonstrates that a trial attorney can do little with information provided by his client.[11] However, when State witnesses possess that same

[10]Even if the State's analysis were true, Ponticelli did not know of Keesee's statement to Inv. Munster and Prosecutor Williams; he did not know of the statements made by Dotson, Burgess and the Browns; and he had no idea that the prosecutor spoke to Freeman's defense attorney about assisting him.

[11]Based on the State's argument, the following scenario could occur: a capital defendant facing the death penalty, was present at the scene of the crime, witnesses the murder and can identify the actual killer. The defendant is actually innocent. The defendant possesses information about the crime which exculpatory to his case. However, the real killer pointed the finger at the defendant and for whatever reason, the State charges the innocent witness with capital murder. The real killer takes on the role as State witness. According to the State's logic, it makes no difference if the actual killer confesses to the State and then testifies that he/she witnessed the defendant kill the victim. According to the State, that confession need not be disclosed and does not qualify as Brady material because the defendant possesses the same information that was suppressed. Obviously, under Brady,

information, inform the State of it, and then change it, much can be done with that evidence. See Cardona v. State, 826 So. 2d 968 (Fla. 2002). Mr. Ponticelli's knowledge of what occurred on the day of the crimes is not evidence. The fact that Keesee, the Browns, Burgess, Dotson and Freeman all changed their testimony from their original statements is evidence – not only substantive but also impeachment evidence.

Recently, in Mordenti v. State, this Court ordered a new trial because the prosecution suppressed evidence that was exculpatory and material. 894 So. 2d 161 (Fla. 2004). At issue in Mordenti were statements made by a State witness claiming that Mordenti committed the murder and information provided to the prosecution from the co-defendant's trial attorney regarding the content of a conversation between Mordenti and his co-defendant. Id. The suppressed information concerned a phone call between Mordenti and his co-defendant about the purchase of a boat and notes regarding the sequence of events testified to by the State's key witness. Id. at 168. In undisclosed notes, the State key witness informed the prosecution that the co-defendant did, in fact, have a boat for sale. Id. at 173. Thus, even though Mordenti was a party to the conversation and must have known what the content of the conversation concerned, this Court found a Brady

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this result is absurd. Likewise, the State's argument that initial statements made by Keesee, the Browns, Burgess and Dotson is equally absurd.

violation. The suppressed information, like the suppressed information in Mr. Ponticelli's case, impeached a key State witness, while also supporting the defense's theory of the case. Id. at 174.

Also, this Court explained the value of the witness' prior inconsistent statements: "The undisclosed evidence would not only have empowered the defense to discredit Gail but also would have stifled the prosecution's fervid efforts to portray Gail as a believable witness. Specifically, the withheld information would have cast doubt on the veracity of Gail's testimony and the timing of critical events leading up to the murder." Mordenti, 894 So. 2d at 171. Likewise, in Mr. Ponticelli's case, the credibility of Keesee, the West Virginia witnesses and Freeman was essential to the prosecution's case. The State specifically relied on the credibility of the West Virginia witnesses to establish the timeline of the events on the evening of November 27, 1987 (R. 1054). Those witnesses also testified to Mr. Ponticelli's premeditated intent to kill the victims. However, the prior inconsistent statements of the State's witnesses demonstrates that the prosecution's theory of the events on the night of the crimes was wrong, thus impeaching the West Virginia witnesses. And, those witnesses were also not credible about Mr. Ponticelli's forming intent to kill the victims.[12]

[12]Not only was Mr. Ponticelli not at the Dotson residence when the witnesses said he was, voicing intent to kill the victims, the witnesses never mentioned Mr. Ponticelli's

Further, the State's reliance on Occhicone is misplaced. In Occhicone, the witnesses whom Occhicone claimed substantiated the fact that he was intoxicated on the day of the homicides did not testify that he was not intoxicated, they were simply never asked that question. Occhicone v. State, 768 So. 2d 1037 (Fla. 2000). Therefore, the State had not suppressed any impeachment evidence. Here, the State witnesses changed there testimony and trial counsel did not have the statements to either present the substance of the previous statements or impeach the credibility of the witnesses.

The State suggests that finding that the State is in fact obligated to turn over exculpatory statements from witnesses would lead to a wholly absurd result. (Response at 61). But, this is the law. To argue that the State need not turn over exculpatory information, particularly information that a witness has changed his story "would encourage [the State] to withhold information from counsel, as [the State in Mr. Ponticelli's case] did. (Response at 61). Clearly, this is not the desired result to ensure due process and the right to a constitutionally sound trial.

Recently, this Court stated:

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alleged statements about his intent until after their initial statements to law enforcement and the group meeting with the prosecutor where they were told that she was not concerned about any of their illegal conduct (PC-R. 674). It was also at the meeting where the prosecutor informed the witnesses that she wanted to obtain a conviction and sentence of death.

> [A]ll of the *Brady* evidence elicited below, including impeachment evidence of the jailhouse informant, could have been persuasive for the defense when weighed against the State's case, especially when considered in the light of the heavy burden upon the State to prove guilt in a criminal case beyond any reasonable doubt and the legal requirement that the jury's verdict be unanimous. In effect, this means that only one juror finding reasonable doubt would change the outcome.

Floyd v. State, 902 So. 2d 775, 785 (Fla. 2005). In light of the undisclosed, exculpatory evidence in Mr. Ponticelli's case, there is no doubt that one juror would have changed his or her mind and had a reasonable doubt that he was guilty of premeditated, first degree murder. As stated in his Initial Brief, the evidence that was suppressed by the State would have placed Mr. Ponticelli's case in a whole new light. A new trial is required.

ARGUMENT II

THE CIRCUIT COURT ERRED IN DENYING 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.

In responding to Mr. Ponticelli's argument that he was deprived of constitutionally adequate representation at the penalty phase of his capital trial, the State does nothing more than recite the lower court's order (Response at 69-75) and argue that because Mr. Ponticelli "refused to cooperate with his attorney", his claim must fail (Response at 69).

In fact, the State fails to address any of the arguments set forth in Mr. Ponticelli's briefs. Like the lower court, the State never addresses the fact that Mr. Ponticelli's trial

counsel failed to make proper objections during the penalty phase of Mr. Ponticelli's capital trial. Objections, which had they been made, would have resulted in relief on direct appeal. Mr. Ponticelli is not to fault for trial counsel's failure to object. Also, like the lower court, the State ignores the caselaw which requires that an attorney conduct a reasonable investigation into the client's background. At the time of Mr. Ponticelli's capital trial, trial counsel had an absolute obligation to investigate and prepare mitigation for his client. See Rompilla v. Beard, 125 S.Ct. 2456, 2465-6 (2005). The American Bar Association Guidelines in effect at the time of Mr. Ponticelli's trial stated:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction . . . The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of the facts constituting guilt or the accused's stated desire to plead guilty.

1 ABA Standard for Criminal Justice 4-4.1 (2d ed. 1982 Supp.). The guidelines make three points relevant to Mr. Ponticelli's case abundantly clear: 1) the lawyer has a duty to thoroughly and comprehensively investigate for the penalty phase; 2) the investigation must be promptly done; and 3) it makes no difference that the client does not assist the attorney. In fact, in Rompilla, the United States Supreme Court pointed out that defense counsel has an absolute duty to investigate, even when the defendant and/or his family suggest that no

mitigating evidence is available. 125 S.Ct. at 2460.

The Rompilla Court found that trial counsel rendered prejudicially deficient performance as to the penalty phase despite the fact that Rompilla's "own contributions to any mitigation case were minimal." Rompilla, 125 S. Ct. at 2462. Counsel found that Rompilla was "uninterested in helping," minimized any problems he may have had in his childhood, and "was even actively obstructive by sending counsel off on false leads." Id. Despite this, the Supreme Court found that counsel rendered prejudicially deficient performance.

Likewise, in Deaton v. Dugger, this Court also made clear that trial counsel has an absolute duty to investigate mitigation even when a capital defendant requests that he mitigation not be presented. 635 So. 2d 4, 14 (Fla. 1993).

In Mr. Ponticelli's case it is clear that trial counsel simply did not know how to investigate or prepare for Mr. Ponticelli's capital penalty phase and trial counsel's deficient performance was unrelated to Mr. Ponticelli. Trial counsel admitted at the evidentiary hearing that he only spoke to Mr. Ponticelli's parents to obtain background information (PC-R. 1830, 1853). He did not speak to any of Mr. Ponticelli's siblings, relatives or friends, despite the fact that Mr. Ponticelli's parents had provided trial counsel with a list of individuals who knew Mr. Ponticelli, including Mr. Ponticelli's siblings and John Como.[13] (Def. Ex. 28, State's

[13]Como knew Barnes, O'Berry, Falanga, Orlando and many of Mr.

Ex. 13D). Trial counsel failed to even investigate mitigation with those individuals who he knew were friends with Mr. Ponticelli, like John Turner, Joey Leonard or Bobby Meade – all witnesses at Mr. Ponticelli's capital trial. Had he asked Mr. Leonard about Mr. Ponticelli, he would have learned that Mr. Ponticelli dated Leonard's sister, Patty. Mr. Ponticelli in no way restricted his trial counsel's ability to interview potential mitigation witnesses or present evidence in mitigation.

Also, trial counsel failed to obtain any records regarding Mr. Ponticelli. He did not even ask Mr. Ponticelli to sign releases for records, so Mr. Ponticelli cannot be blamed for trial counsel's deficient performance.

Trial counsel also failed to present the testimony of the mental health experts who evaluated Mr. Ponticelli for competency. Dr. Krop testified at the evidentiary hearing that his report included mitigating information and had he been asked he would have testified to the existence of both statutory mental health mitigators: that Mr. Ponticelli suffered from an extreme mental or emotional disturbance at the time of the crimes and that his capacity to appreciate the criminality of his conduct was substantially impaired (PC-R. 1535). Likewise, the other reports also contained mitigation which went unpresented. Trial counsel's failure to use the

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Ponticelli's other friends from New York.

evidence which he possessed had nothing to do with Mr. Ponticelli.

Trial counsel failed to obtain additional experts, like a neuropsychologist or an expert who could have testified about the effects of cocaine, even though the competency experts recommended that trial counsel obtain additional mental health experts for mitigation and even provided a name of an expert to contact (PC-R. 1859). Again, trial counsel's decision not to heed the experts' advice had nothing to do with Mr. Ponticelli.

The State's argument that Mr. Ponticelli was to blame for trial counsel's deficient performance is not supported by the record. 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.

A. COMPETENCY

The State argues that Mr. Ponticelli's claim of ineffective assistance of counsel is procedurally barred because this Court addressed a competency claim on direct appeal. However, the lower court addressed Mr. Ponticelli's claim on the merits, thus, the claim has not been defaulted. Likewise, this Court has recognized that while a substantive claim may be procedurally barred, the content of the claim may be appropriately raised in a claim of ineffective assistance

of counsel. See Carroll v. State, 815 So. 2d 601, 610 (Fla. 2002)(holding that the defendant's underlying competency claim was procedurally barred because it should have been raised on direct appeal, but addressing the claim that trial counsel was ineffective in failing to litigate the competency issue at trial and presenting evidence.).

In Mr. Ponticelli's case, he presented evidence that was not known at trial because trial counsel failed to adequately investigate and prepare the issue of Mr. Ponticelli's competency. In its Response, the State fails to address any of the evidence presented concerning trial counsel's failure to review Mr. Ponticelli's jail records or speak to any inmates or correctional officers about Mr. Ponticelli (PC-R. 1863); failure to provide the experts with any materials about Mr. Ponticelli's background or history; and failure to alert the trial court to Mr. Ponticelli's bizarre behavior that trial counsel witnessed throughout trial; (PC-R. 1789).

Instead of addressing the facts germane to the issue of trial counsel's failure to adequately investigate and prepare for the penalty phase, the State argues that Dr. Herkov could not "express the opinion that Ponticelli was suffering from cocaine psychosis at the time of the murder." (Response at 78). While Mr. Ponticelli disagrees as to the opinions of Dr. Herkov, Mr. Ponticelli's mental state at the time of the crimes was completely unrelated to whether or not Mr. Ponticelli was competent to proceed at trial. Drs. Herkov,

Krop and Mills all testified that he was not (R. 1186; PC-R. 1351, 1524, 1528, 1530).

Further, any reliance on Dr. Conger's testimony is misplaced because Dr. Conger relied on inadmissible and inaccurate information in forming his opinions.[14] For example, Dr. Conger relied on Mr. Ponticelli's interaction with Freeman as indicative of Mr. Ponticelli's competency to proceed at the time of his trial. However, any interactions between Mr. Ponticelli and Freeman occurred in December, 1987, within weeks of Mr. Ponticelli's arrest and months before Mr. Ponticelli's capital trial (See R. 1257; PC-R. 2241).[15] Therefore, Mr. Ponticelli's bizarre behavior was witnessed by trial counsel, his family and other inmates[16] occurred long after Mr. Ponticelli and Freeman had any "interactions". Indeed, as Dr. Krop noted in forming his opinion that Mr. Ponticelli was not competent to proceed, Mr. Ponticelli began

[14]Also, Dr. Conger admitted that he had no training or experience in forensic evaluations or assessment techniques (PC-R. 2066).

[15]Even the State agreed at the time of Mr. Ponticelli's evidentiary hearing that Mr. Ponticelli's behavior eight months prior to his trial were not relevant to the competency determination (PC-R. 1853).

[16]The lower court erred in finding that Mr. Ponticelli had not established with accuracy the timeframes in which the various inmate incarcerated with Mr. Ponticelli observed his bizzare behavior. Moody testified the he witnessed the bizarre behaviors in the summer, 1988, when he was housed in a cell with Mr. Ponticelli (PC-R. 884-901). Bleckinger observed Mr. Ponticelli in August, 1988, during Mr. Ponticelli's original trial proceedings (PC-R. 904). Blecklinger's observations were similar to those observed by trial counsel.

to experience the headaches and sensations which influenced his bizarre behavior after he no longer had contact with Freeman (PC-R. 1031).

Dr. Conger erred in basing his opinion on Mr. Ponticelli's "interactions" with Freeman because there was a significant delay between those "interactions" and the trial. See Strickland v. Francis, 738 F.2d 1542 (11th Cir. 1984); Lokos v. Capps, 625 F.2d 1258 (5th Cir. 1980); Wallace v. Kemp, 757 F.2d 1102 (5th Cir. 1984).

Dr. Conger also erred in basing his opinion on the speculation that Mr. Ponticelli had provided trial counsel with the name of "Anthony Pemberton". Trial counsel testified that he

was provided with Pemberton's name by Investigator Munster not Mr. Ponticelli (PC-R. 1896-7). Thus, Dr. Conger's testimony that Mr. Ponticelli could have assisted his trial counsel if he desired to do so was based on a fact that Dr. Conger knew to be false.[17] The lower court's reliance on Dr. Conger's opinion is likewise in error.

In fact, at the evidentiary hearing, Dr. Conger agreed with Dr. Branch that the hallmarks of psychosis are delusions and hallucinations (PC-R. 2147). Dr. Conger went on to concede that O'Berry's description of her communications with Mr. Ponticelli establish that Mr. Ponticelli was experiencing

[17]Dr. Conger was present for the testimony of trial counsel.

delusions and/or auditory hallucinations in 1988 (PC-R. 2261). Dr Conger also recognized that evidence existed that Mr. Ponticelli experienced poor reality testing, irrational thought and “a compartmentalized delusional disorder”. (Def. Ex. 33b; PC-R. 2245-7).

Dr. Herkov opined that Mr. Ponticelli was incompetent to proceed at the time of trial based on the fact that he was experiencing delusions and hallucinations. However, the lower court ignored the evidence upon which Dr. Herkov based his opinion, including his interview with O’Berry and her statement that Mr. Ponticelli was “seeing God” while receiving instructions (PC-R. 1362); Mr. Ponticelli’s father’s statement that it appeared that Mr. Ponticelli had an “out of body expereience (Def. Ex 32b); Falanga’s statements that Mr. Ponticelli had related that he spoke with God (PC-R. 789-90); and trial counsel’s observations of Mr. Ponticelli’s bizarre behavior (PC-R. 1783-4).

The lower court also erred in characterizing Dr. Herkov’s rebuttal testimony as a “concession”. Dr. Herkov’s opinion did not waiver as to Mr. Ponticelli’s competency. In fact, during the evidentiary hearing, the State asked Dr. Herkov if he was aware of Mr. Ponticelli’s “interactions” with Freeman being closer in time than John Jackson’s observations of Mr. Ponticelli’s. Dr. Herkov was not aware of this because it was untrue. Jackson observed Mr. Ponticelli after the “interactions” with Freeman occurred (PC-R. 2394-5).

The State also misled Dr. Herkov when it inquired about trial counsel notes from his jail visit with Mr. Ponticelli regarding Willie Baker and Mr. Ponticelli's statement that Baker may fabricate testimony about him; the State indicated that the letter was "dated, sometime prior to the trial". (State Ex. 13A). But, in fact there is no date on the note from Mr. Ponticelli (See State Ex. 13A).

Also, the State asked Dr. Herkov about his knowledge of Mr. Ponticelli's assistance during the motion to suppress. However, the State failed to mention that ultimately, Mr. Ponticelli refused to assist trial counsel because Mr. Ponticelli had seen God the night before and as told not to testify (PC-R. 1783-4).

Finally, the lower court's reliance on the competency reports from 1988, was in error. The reports, in and of themselves, demonstrate that Mr. Ponticelli's self-report was inaccurate and inconsistent between what he told the various experts. For example, he told Dr. Mhatre that he was older than he was, stating that he was 22 years of age when he was only 21 years of age. Mr. Ponticelli was also inconsistent about other information, like his history of drug use. Trial counsel should have known, from looking at the reports themselves, that the self-report was inaccurate and unreliable. The evidence produced at the evidentiary hearing shows the unreliability and uselessness of the competency reports prepared at the time of the trial.

At the time of Mr. Ponticelli's competency proceedings there was a plethora of evidence available to prove that Mr. Ponticelli was incompetent to proceed. Mr. Ponticelli's communications with O'Berry evidence that he was suffering from delusions and auditory hallucinations while incarcerated (PC-R. 351-55). The observations of Mr. Ponticelli by other inmates demonstrate his bizarre behavior and delusions. Even trial counsel's own observations and communications with Mr. Ponticelli led him to believe that his client was incompetent, yet he failed to inform the court or the mental health experts of his observations (PC-R. 1777-84). Had trial reasonably investigated and prepared, he could have proven that Mr. Ponticelli was not competent to proceed.

B. TRIAL DEFENSE

In arguing that Mr. Ponticelli is entitled to no relief, the State merely recites the lower court's order and asserts that Mr. Ponticelli cannot complain about trial counsel's performance when he failed to provide trial counsel with information. However, the State fails to address any of the facts set forth in Mr. Ponticelli's initial brief regarding trial counsel's knowledge of Mr. Ponticelli's cocaine use preceding the crimes. 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.

Had trial counsel investigated his defense at all he would have been able to present a coherent and convincing case that Mr. Ponticelli was not guilty of premeditated, first-degree murder.

Likewise, the State argues that Mr. Ponticelli cannot complain when his trial counsel "vouched" for the credibility of the witnesses from West Virginia because he did not inform his trial counsel that the witnesses were dishonest (Response at 80). However, even without information from Mr. Ponticelli trial counsel should have known that the witnesses' testimony was inconsistent with their previous statements and testimony. None of the witnesses initially told Investigator Munster that Mr. Ponticelli had voiced an intent to commit any crimes on November 27, 1987.

Also, trial counsel could and should have been aware that it was impossible for Mr. Ponticelli to be at the Dotson residence in the early evening hours on Friday, November 27, 1987, voicing an intent to kill the victim's, when the phone records from the victim's trailer prove that he was already there and that he made a phone call to an individual in New York. Investigator Munster's reports make clear that the Mr. Ponticelli made a phone call 7:46 p.m., the evening of the homicides, from the victim's trailer. Trial counsel failed to use this valuable impeachment evidence.

Trial counsel's performance at the guilt phase of Mr. Ponticelli's trial was woefully deficient. The "laundry list" of examples cited by Mr. Ponticelli evidence trial counsel's failure to adequately represent Mr. Ponticelli. Mr. Ponticelli proved his claim and is entitled to relief.

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.

The State argues that because Mr. Ponticelli's expert did not testify that Mr. Ponticelli was insane at the time of the crimes, his claim must fail. (Response at 84). The State is incorrect. Mr. Ponticelli's claim not only concerns the expert mental health assistance he did not receive at his capital guilt phase, but also pre-trial, during the competency proceedings and during the penalty phase. Further, Mr. Ponticelli's insanity at the time of the crimes was not the

only mental health issue at the guilt phase of his capital trial. Trial counsel testified that he wanted to prove voluntary intoxication or that Mr. Ponticelli could not form the required specific intent to be guilty of premeditated, first degree murder.

However, the mental health experts that were retained in Mr. Ponticelli's case were not provided with the necessary background materials to conduct a thorough and reliable evaluation. As stated previously, the competency reports were based on inaccurate and unreliable information. Trial counsel should have been aware of the unreliability of the background information and investigated Mr. Ponticelli's background from collateral sources. He also should have requested that objective testing be conducted. The competency experts recommended that trial counsel retain the services of an expert in cocaine, and even provided the name of an individual, but trial counsel failed to heed the experts' advice.

While mental health experts were appointed to assist Mr. Ponticelli at his capital trial, the experts' evaluations were inaccurate and incomplete. Essentially, Mr. Ponticelli was deprived of expert assistance. 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 Reply 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 February 6, 2006.

CERTIFICATION OF TYPE SIZE AND STYLE

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