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

SUPPLEMENTAL INITIAL BRIEF OF APPELLANT

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SUPPLEMENTAL PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Ponticelli's claim that trial counsel was ineffective in his preparation and presentation of Mr. Ponticelli's penalty phase.

The following abbreviations will be utilized to cite to the record in this cause, with appropriate volume and 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.

"2d Supp. PC-R. ___." - second supplemental record on appeal from the denial of Mr. Ponitcelli's ineffective assistance of counsel at the penalty phase claim, following this Court's relinquishment of jurisdiction.

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

SUPPLEMENTAL REQUEST FOR ORAL ARGUMENT

Mr. Ponticelli has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than 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.

STANDARD OF REVIEW

The standard of review regarding Mr. Ponticelli's ineffective assistance of counsel claim at the penalty phase is de novo.

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SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS[1]

In 2003, Mr. Ponticelli appealed a final order denying Rule 3.850 relief to this Court. Mr. Ponticelli filed his Initial Brief In October, 2003.

On or about February 13, 2004, the State filed a motion to relinquish jurisdiction to the circuit court in order for the court to rule upon Mr. Ponticelli's claim that trial counsel had been ineffective at his penalty phase (2d Supp. PC-R. 1763-5).[2]

Mr. Ponticelli objected to the State's motion to relinquish jurisdiction:

> The State filed a motion to relinquish jurisdiction requesting that this Court relinquish jurisdiction so that the circuit court could amend its order to address the ineffective assistance of counsel claim that Mr. Ponticelli raised in his Rule 3.850 motion. Effectively, the State has conceded error. The State claims that such a procedure is in the interest of judicial economy.
>
> Mr. Ponticelli objects to relinquishing jurisdiction. Mr. Ponticelli's claims entitle him to a new trial and a new penalty phase. Nearly every witness who testified against Mr. Ponticelli has now admitted that his testimony was false. The State was aware of the false testimony, yet failed to correct it.

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[1]Mr. Ponticelli incorporates and relies on his statement of facts set forth in his Initial Brief, filed in October, 2003.

[2]This claim was included in Mr. Ponticelli's Rule 3.850 motion and an evidentiary hearing was held on the matter. However, the circuit court judge failed to address the issue in his original order.

Therefore, judicial economy would best be served by this Court hearing Mr. Ponticelli's claims now and remanding should this Court determine that he is entitled to any relief.

Also, it has now been years since the evidence was presented to the circuit court. Therefore, in order for the circuit court to make a determination about Mr. Ponticelli's claim will require a significant delay of his case so that the circuit court can review all of the pleadings and testimony presented below. This Court is already conducting that process, so, it is unnecessary to relinquish jurisdiction.

The State is simply trying to delay the inevitable, i.e., the relief to which Mr. Ponticelli is entitled. The appropriate time to raise the defect of the circuit court's order would have been in a motion for rehearing. In fact, Mr. Ponticelli filed a motion for rehearing on November 18, 2002 (PC-R. 2679-713). The State was ordered to respond (PC-R. 2714-8). Had the State wanted the circuit court to correct the defective order, they could have made such a request in the response.

In fact, the State did request that the circuit court correct the order in another respect. The State requested that the court make a ruling on Mr. Ponticelli's competency claim:

> **The only thing the State might ask in the way of an amended order is a finding by this Court as to whether or not, given all of the additional expert testimony during those nine days of evidentiary hearing, this Court would also agree with the experts pretrial that the defendant was in fact competent**.
>
> * * *
>
> **The only thing in conferencing this case, that we could even ask for, in addition to your 24 page November 1, 2002 order after the evidentiary hearing, is the finding as the State argued in its written**

> **argument after this hearing**. A finding of competency after the new testimony was presented during the evidentiary hearing.
>
> I read between the lines in your order, but I read the order again. I really don't see it explicitly stated as a factual finding by the Court given the new evidentiary hearing testimony.

(PC-R. 2751-2)(empahsis added).

> The circuit court declined to amend its order despite the State's request that a determination had not been made as to competency. If the State wanted the circuit court to also correct the defect of failing to rule on the ineffective assistance of counsel at the penalty phase claim, the State should have likewise requested the court to do so on rehearing. Since, the court declined to make any further rulings it is unlikely that the circuit court would have done so.
>
> Furthermore, this Court is required to conduct a de novo review of the record and claims, so, again,, it is unnecessary to relinquish jurisdiction. The State will suffer no prejudice if the appeal proceeds and this Court determines whether Mr. Ponticelli's trial counsel was ineffective at his capital sentencing proceedings.

Response to Motion to Relinquish Jurisdiction, filed February 27, 2004 (footnote omitted). Over defense counsel's objection, this Court granted the State's motion on April 1, 2004.

Proceedings were held in the circuit court and on September 9, 2004, the circuit court entered an order denying Mr. Ponticelli relief (2d Supp. PC-R. 1936-65). Mr. Ponticelli

filed a motion for rehearing on September 23, 2004.[3] The motion was denied in November, 2004.[4] On December 9, 2004, Mr. Ponticelli filed his notice of appeal as to the claim that trial counsel was ineffective at the penalty phase of his capital trial.[5]

This appeal follows.

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[3]Despite requesting that all pleadings and orders be included in the record on appeal, the Motion for Rehearing was not included in the record on appeal. Simultaneously with this supplemental brief, Mr. Ponticelli again requests that this Court direct the Clerk to supplement the record.

[4]Likewise, the order denying the Motion for Rehearing is not included in the record on appeal.

[5]Likewise, the notice of appeal is not included in the record on appeal.

SUPPLEMENTAL SUMMARY OF ARGUMENT

Trial counsel, James Reich, was ineffective in representing Mr. Ponticelli at the penalty phase of his capital trial. Trial counsel was inexperienced; he had never represented a defendant in a capital case or represented a defendant at a capital penalty phase. Trial counsel did not have co-counsel and did not obtain an investigator to assist in the preparation for the penalty phase. Trial counsel's investigation into Mr. Ponticelli's background consisted of speaking to Mr. Ponticelli's parents. Mr. Ponticelli's parents provided trial counsel with names of additional witnesses, but, trial counsel failed to contact them.

Trial counsel contacted a mental health expert, but provided him with inaccurate information about his client. Trial counsel failed to obtain any background records about Mr. Ponticelli. Also, several experts were appointed to evaluate Mr. Ponticelli for competency and even though those experts were not asked to consider mitigating circumstances their reports contained mitigation. Indeed, one of the experts recommended that trial counsel obtain the assistance of an expert skilled in drug and alcohol abuse. He even provided trial counsel with the name of such an expert in the Ocala area. Trial counsel did not

heed the expert's advice. Another court appointed expert recommended that trial counsel retain a clinical psychologist. Trial counsel did not heed the expert's advice. Trial counsel testified that he "had no idea how to go about proving mental health mitigators".

Had trial counsel contacted any of the individuals familiar with Mr. Ponticelli, including family members, friends, former girlfriends, he could have presented a compelling and accurate portrait of Mr. Ponticelli's life. That portrait traced the tragic life of a young man who from the very beginning felt alienated and unwanted. Mr. Ponticelli's escape or perhaps refuge was accomplished by consuming narcotics. Mr. Ponticelli's drug use quickly progressed and became a serious addiction. Mr. Ponticelli's behavior while using drugs was critical to explaining Mr. Ponticelli and his actions on the night of the crimes.

Likewise, had trial counsel investigated and prepared, he could have presented significant mental health mitigation, including both statutory mitigators. And, he could have attacked the statutory aggravators.

Further, trial counsel failed to make proper objections to the aggravating circumstances. Had trial counsel made the

required objections Mr. Ponticelli would have received a new penalty phase when this Court reviewed his case on direct appeal.

Trial counsel was deficient and his failure to adequately represent Mr. Ponticelli resulted in the judge imposing two death sentences.

SUPPLEMENTAL ARGUMENT

[6]ARGUMENT I
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.

A. INTRODUCTION

This Court relinquished jurisdiction to the lower court in Mr. Ponticelli's case to rule upon his claim that trial counsel was ineffective at his capital penalty phase. The lower court's order denying relief ignores portions of Mr. Ponticelli's claim. For example the lower court completely ignores the fact that trial counsel made no objections to the validity of the aggaravating circumstances. Had trial counsel objected to the heinous, atrocious and cruel aggravator, Mr. Ponticelli would have likely received a new penalty phase on direct appeal.

Further, the only cases cited by the lower court are Strickland v. Washington, 466 U.S. 668 (1984), and a few cases which pertain to the issue of whether a trial attorney's admission of inadequate representation is determinative of the issue (2d Supp. PC-R. 1936-7; 1939). The lower court never

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[6]A similar claim was raised in Mr. Ponticelli's Initial Brief as Argument II, pages 65-80. However, due to the

cites any of this Court's precedent regarding trial counsel's obligation to investigate and prepare for penalty phase or the standard by which a reviewing court must evaluate mitigating evidence to determine prejudice. The lower court fails to cite to the recent United States Supreme Court cases explaining the standards and analysis to determine an ineffective assistance of counsel claim at a penalty phase. See Williams v. Taylor, 529 U.S. 362 (2000), or Wiggins v. Smith, 539 U.S. 510 (2003). And, the lower court fails to recognize the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989), which the United States Supreme Court has stated provide the standards expected of trial counsel in capital cases.

It is also clear that the lower court failed to make any review of the numerous exhibits submitted by Mr. Ponticelli at the evidentiary hearing in support of his claims.[7]

Finally, contrary to this Court's rule, the lower court's order is devoid of a single record citation, despite the court's

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relinquishment, the circuit court has now entered an order denying Mr. Ponticelli's claim.

[7]In fact, counsel was told by a representative of the Clerk of the Court in Marion County that the exhibits were sent several months ago to this Court. Therefore, currently, there is no copy of the exhibits in Marion County.

summary of witness testimony and quotations. Fla. R. Crim. P. 3.851(f)(5)(D)(2003).

The lower court's disregard of critical evidence and issues, failure to cite to seminal caselaw concerning the standards to evaluate a claim such as Mr. Ponticelli's and failure to cite the record are just a few of the reasons that this Court must not accept the conclusion's stated in the lower court's order.

B. DEFICIENT PERFORMANCE

As to trial counsel, James Reich's, deficient performance, the lower court held: "The Court finds that although trial counsel could have done a more thorough job in the preparation of the penalty phase proceedings on this case, the Defendant has not demonstrated prejudice." (2d Supp. PC-R. 1937). Mr. Ponticelli has demonstrated that his trial counsel was deficient in representing him at his capital penalty phase.

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 or 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).

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 and Mr. Ponticelli's siblings, but trial counsel never contacted him or anyone else (PC-R. 1855-6, 1890, Def. Ex. 28).[8]

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, adoption 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, 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 John Turner's

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[8]Como knew Barnes, O'Berry, Falanga, Orlando and many of Mr. Ponticelli's other friends from New York.

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 trial counsel 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). Indeed, the lower court found: "[t]he circumstances of Ponticelli's life in New York remained largely unknown to trial counsel." Trial counsel testified that had he known the extent of Mr. Ponticelli's 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 that the crime was committed in a cold, calculated and premeditated manner 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).

Further, the experts who were appointed to determine competency issued reports that contained mental health mitigation. But, none of those experts were asked to testify.

As to penalty phase objections, Mr. Reich believed that he had preserved his objection to the vagueness of the heinous, atrocious and cruel aggravator and the cold, calculated and premeditated 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. Indeed, the lower court found: "Penalty phase counsel failed to discover and present existing mitigation evidence; failed to provide mitigation evidence to his experts for their review and failed to present multiple expert witnesses at the penalty phase." (2d Supp. PC-R. 1961).

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 thorough 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." 123 S. Ct. 2527 (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.

C. PREJUDICE

Despite the lower court's admission that Mr. Ponticelli "was able to call numerous new witnesses to testify at the post-conviction relief hearing and was able to construct a more comprehensive penalty phase case . . ." (2d Supp. PC-R. 1964), the court concluded that Mr. Ponticelli had not demonstrated prejudice (2d Supp. PC-R. 1937). In reaching such a conclusion, the lower court relied upon Mr. Reich's closing argument that the court characterized as "impassioned" (2d Supp. PC-R. 1944).[9]

[9]The lower court quotes trial counsel's closing argument twice in the order. See 2d Supp. PC-R. 1940-4; 1961-4). Trial

Further, the court stated that trial counsel "presented much the same picture of the Defendant and his drug usage at trial . . ." (2d Supp. PC-R. 1964), as was presented in postconviction.

The lower court erred in analyzing Mr. Ponticelli's claim and in its conclusion that Mr. Ponticelli had not demonstrated prejudice.

At Mr. Ponticelli's penalty phase, trial counsel presented the testimony of Dr. Robin 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).[10] Dr. Mills also testified that Mr. Ponticelli's capacity to appreciate the criminality of his conduct was substantially impaired (R. 1325).

During his closing argument, upon which the lower court placed great emphasis, trial counsel argued five statutory mitigators. Trial counsel told the jury that Mr. Ponticelli had been using cocaine for the three or four weeks preceding the crimes (R. 1355). But, prior to that timeframe Mr. Ponticelli had "no history of cocaine use" and "no criminal history" (R. 1355).[11] Trial counsel's argument as to this mitigator was contested by the State and rejected by the trial court (R. 1347; 1170). Thus, there would have been no reason not to present the complete and accurate picture of Mr. Ponticelli's lengthy and severe addition to drugs, dating back to pre-adolescence.

The lower court apparently was unaware of the findings made by the trial court in its sentencing order, and the law for that matter. The lower court stated that the testimony at the evidentiary hearing would "negate the Defendant's argument at

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counsel's closing argument comprises less that fourteen transcript pages in the record.

[10]Defense counsel was forced to use a hypothetical rather than evidence of Mr. Ponticelli's drug use because the State suppressed the evidence that Mr. Ponticelli used cocaine shortly before the crimes were committed.

[11]In the State's closing argument, the State urged the jury to disregard the mitigator that Mr. Ponticelli had no significant prior criminal history because Mr. Ponticelli had used drugs (R. 1347). In fact, the trial court accepted the State's argument and in its sentencing order pointed out that the "convictions are not required to negate a mitigating factor" (R. 1170). The trial court therefore did not find the mitigating circumstance.

the penalty phase that the Defendant had no prior criminal history and that his drug activity after he returned from New York was and aberration" (2d Supp. PC-R. 1951). As mentioned above, the State argued against the mitigator of no prior criminal history and the trial court agreed with the State and did not find the mitigator was established (R. 1170).

Additionally, while the lower court suggested that trial counsel made (or would have made) a strategic decision not to present an accurate and complete picture of Mr. Ponticelli's drug use so that he could argue for this statutory mitigator, trial counsel testified that had he known of Mr. Ponticelli's lengthy history of drug use, he would have presented it (PC-R. 1834). Also, trial counsel cannot make a strategic decision without investigating and obtaining complete and accurate information upon which a strategic decision may be made. See Wiggins v. Smith, 123 S.Ct. 2527, 2543 (2003); Henry v. State, 862 So. 2d 679, 685 (Fla. 2003)("A reasonable strategic decision is based on informed judgement."). And, this Court has recognized a history of substance abuse as mitigating evidence. Merck v. State, 763 So. 2d 295, 298 (Fla. 2000); Hildwin v. Dugger, 654 So. 2d 107, 110 (Fla. 1995).

Furthermore, the lower court also suggests that trial counsel's argument regarding this statutory mitigator "emphasized the Defendant's redeeming qualities" (2d Supp. PC-R. 1944). But, trial counsel never emphasized anything about Mr. Ponticelli's life in New York, except to state generally: "that the kind of person Tony Ponticelli was prior to the fall of 1987, is somebody who, without the influence of cocaine, without the involvement that he had, that that is a life that is worth saving . . . " (2d Supp. PC-R. 1944). However, the jury heard no evidence of what Tony Ponticelli's life was like.

Trial counsel also argued that Mr. Ponticelli's age was a mitigating factor (R. 1356). Mr. Ponticelli was twenty at the time of the crime. However, trial counsel made no attempt to explain or show the jury how Mr. Ponticelli's background and mental health issues may effect his maturity, decision making, judgment or impulsiveness. Indeed, trial counsel was totally unaware of such an argument and simply told the jury that they "should still consider [Mr. Ponticelli's age], notwithstanding the fact that he knew better." The State argued that at twenty, Mr. Ponticelli knew the difference between right and wrong and had attained the age of reason (R. 1348), thus minimizing any weight that the jury or judge would place in Mr. Ponticelli's age.

As to the statutory mental health mitigators, trial counsel merely mentioned them to the jury and then went on to state:

> Now, Dr. Mills very candidly told you that the behavior that was observed, in another context, could be caused by something other than drug use, but, in

> the context of this case, given the drug use, it was his opinion that it was cocaine induced.
>
> Whether it was induced by cocaine or not, whether that cocaine use was voluntary or not, is not of critical importance, but the fact that it existed and when we say his ability to appreciate his criminality was substantially impaired, that doesn't mean he didn't know the difference between right and wrong.

(R. 1357). However, trial counsel did not explain what it meant when Dr. Mills testified that Mr. Ponticelli's ability to appreciate the criminality of his conduct was substantially impaired.

The only other reference to the statutory mental health mitigators and Dr. Mills' testimony was even more confusing and followed trial counsel's brief mention that John Turner had testified that Mr. Ponticelli was obsessed with cocaine and could not control his urge to use it.[12] Trial counsel stated:

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[12]The lower court suggested that Mr. Reich's presentation of mitigating evidence was longer than the twenty minute estimate to which trial counsel testified, because trial counsel "incorporated" the witnesses from trial (2d Supp. PC-R. 1938). The "incorporation" of John Turner's testimony from guilt phase was to refer to him in two paragraphs during his closing argument. Trial counsel did not introduce Mr. Turner's deposition or present live testimony in order to counter the aggravators of pecuniary gain and that the crime was cold, calculated and premeditated fashion. In his deposition, Mr. Turner testified that Mr. Ponticelli had admitted to the shooting the Grandinetti's, but that he shot them because he was afraid for his life. He also told Mr. Turner that the Grandinetti's sought him out that night. Likewise, trial counsel referred to Tim Keesee in one paragraph in his closing

> And it is that involvement Dr. Mills tells you created the emotional – extreme mental or emotional disturbance and caused the diminished capacity or substantial impairment of the capacity to appreciate or to conform his conduct to the requirements of the law that created the mitigating circumstance.

(R. 1360).

The only other mitigating circumstance that trial counsel argued to the jury, under the catch-all that the jury could consider any other aspect of Mr. Ponticelli's "character or record and any other circumstance of the offense", occurred when trial counsel reminded the jury that the victims, Nick and Ralph Grandinetti "were voluntarily in the business of selling cocaine" and that "by the middle or towards the end of November, Nick and Ralph Grandinetti surely knew that Tony Ponticelli had a serious, serious drug problem" (R. 1361-2). Counsel stated: "Surely [the victims] had to know that the business they were in was seriously affecting Tony Ponticelli." (R. 1362).

Trial counsel argued no other mitigation, statutory or nonstatutory, to the jury. And, trial counsel failed to

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argument, reminding the jury that Mr. Ponticelli had purchased cocaine from the Grandinettis on several previous occasions (R. 1361-2). Trial counsel then argued that the Grandinettis were in the drug business and knew that cocaine was affecting Mr. Ponticelli (R. 1361-2). As to the other witnesses who testified in the guilt phase and referenced by the trial court, Robert Meade and Joseph Leonard, trial counsel failed to refer to

challenge any of the aggravating circumstances and even conceded the cold, calculated and premeditated aggravator (R. 1363).[13] There was evidence to rebut the aggravating circumstances.

Trial counsel's candid confession at the evidentiary hearing that he was ill equipped to represent Mr. Ponticelli in his penalty phase and that he "had no idea how to go about proving mental health mitigators" (PC-R. 1854), is evidenced by his disjointed, confusing and incomplete closing argument. The lower court's conclusion that Mr. Ponticelli has shown no prejudice due to trial counsel's "impassioned" plea to the jury to save Mr. Ponticelli's life is not supported by the record.

Furthermore, the jurors were instructed by the trial court that they must consider the evidence in finding aggravators or mitigators, not the lawyers argument (R. 1367-8). Trial counsel was obligated to produce mitigating evidence. It was trial counsel's burden to prove that the mitigating circumstances were

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either of their testimony in his "impassioned" plea to the jury. See 2d Supp. PC-R. 1940.

[13]Trial counsel told the jury that premeditation was formed at the home of the Keith Dotson. We now know that this "meeting" and alleged statements by Mr. Ponticelli in the early evening of the night of the crimes, in fact, did not occur. The phone records show that Mr. Ponticelli was already picked-up by the Grandinettis and taken to their trailer at the time when the witnesses from West Virginia and Keith Dotson testified that he was at their house.

proven.[14] Trial counsel's "impassioned" plea cannot be considered a substitute for mitigating evidence.

Indeed, this Court need look no further than the trial court's sentencing order to determine that trial counsel produced no evidence to support the mitigating factors, or any non-statutory mitigation. The trial court's order states that 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 did not find either mental health mitigator had been established (1171-2). The trial court finding rested on the fact that: "there is absolutely no evidence that defendant used any alcohol or drugs on the day of the offense" (R. 1836).[15] The trial court

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[14]The jury was told: "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you're reasonably convinced that a mitigating circumstance exists, you may consider it as established." (R. 1368).

[15]As to whether or not Mr. Ponticelli used cocaine on the evening of the crimes, and thus to establish the statutory mental health mitigators, 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

did not even consider Mr. Ponticelli's drug use as a non-statutory mitigating factor.[16]

However, because trial counsel failed to challenge the aggravating factors with readily available evidence, the trial court found, for the death of Ralph Grandinetti, 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).

Contrary to the lower court's conclusion, Mr. Ponticelli has demonstrated prejudice.

> 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)(emphasis added).

[16]And neither did this Court. On direct appeal, this Court held 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." Ponticelli v. State, 593 So. 2d 483, 491 (Fla. 1991).

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 (R. 1836, Wiggins v. Smith, ___ U.S. ___ (2003)Hildwin v. Dugger,

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[17]No information of the Mr. Ponticelli's background before he moved to Florida was presented to the jury. Thus, the lower court's comments that the jury heard essentially the same information as was presented at the evidentiary hearing is not supported by the record.

[18]The lower court never cites to the record on appeal.

[19]Dr. Herkov's testimony had nothing to do with mitigation:

> Q: Well, we already talked about the defendant speaking up at that competency hearing and saying the thing that he said to his attorney.
>
> But during Mr. Reich's testimony, did you know that there were, that there was another item that came

up which indicated that the defendant was going to assist his attorney, or had assisted his attorney?

A: Umm --

Q: That Jim Reich had to admit to on cross-examination. Did you know about that? Did you ever hear anything about the defendant assisting his attorney, Mr. Reich, at some point in the proceedings?

A: I don't have independent recollection. If you tell me, I'll let you know if I heard it before or not.

Q: Did you know that Mr. Reich testified that the defendant did agree with him, in a conversation down at the Marion County jail and pursuant to a motion Mr. Reich had filed, the defendant had agreed to take the stand and give some testimony that would reflect on the admissibility of Dennis Freeman's statements?
Jim Reich testified to that in this hearing, in front of this Court, in October of 2000. Did you know about that?

A: No.

Q: Mr. Ponticelli told Mr. Reich -- and Mr. Reich admits this to us, because it was in his notes from his trial file -- that the defendant was going to take the stand and testify at that motion hearing, just immediately prior to the trial. You didn't know about that?

A: I didn't know about that, no.

Q: All right. Well, knowing the bare specifics that I just gave you, would you think that would reflect on the defendant's capacity to assist his attorney at the time of the trial?
I'm telling you the motion hearing was just prior to the trial.

A: I would have to, I would actually have to read that and see what the motion was, et cetera. It has been

some time. And the reason I say that is because I believe Mr. Freedman was involved in Mr. Ponticelli's delusion. I think Mr. Freedman was a religious person in there.

I think, at one point Mr. Ponticelli wakes up and sees Freedman there, so he knows that the rapture hasn't occurred, has not occurred. So I'd have to look more about that. What is going on. Because that was something that had to do substantively -- or it was part of the religious -- I don't know.

Q: So was that something that you didn't know when you were deciding whether the defendant had the capacity to assist his attorney at the time of the trial?

A: No. From what you're telling me, that came out after I had formed my opinion.

Q: Did you know, further, that Jim Reich had to testify, when I showed him one of his handwritten notes, one of Jim Reich's personal handwritten notes from his trial file, that he had talked to the defendant by telephone from the Marion County jail, and the defendant had told him he was concerned that this man by the name of Willie Baker -- he had been told, Mr. Ponticelli had been told that Willie Baker was going to be making up some stuff about him in this case. Like as an inmate type informer. That he was worried about that.

Have you ever seen that note, that Mr. Reich had been told about that information?

A: No.

Q: And that that note was dated, it was sometime just prior to the trial.

Would that be important to you in determining whether or not the defendant had the capacity to assist his attorney in the case, if he was actually worried and actually communicated to his counsel "Hey, this guy is going to make up some stuff and say that I confessed to him or whatever."

Would that be important to you if you knew that?

A: Well, it would be -- whatever. Obviously, I would like to have as much information as I could have.

Would that have had an impact on my opinion, that one piece of information? I can't say definitively yes or no. I can't say it would not. I would have to weigh it in terms of everything else that I had. But I certainly couldn't just discount it.

Q: What about this map. Assuming if it's true, that this map is in evidence, that the defendant wrote with his own hands, that he gave to this Mr. Freeman character. It is written about, I think, in the Supreme Court opinion that you've already read.

Do you know about the map?

A: Where the clothes were or something?

Q: Where the clothes were burned at Ronald Halsey's house. A map with the phone number on it?

A: Yes.

Q: And the map turned out to be an accurate depiction of where it's at, and the phone number was one of the parties to this thing's phone number. It really was his phone number.

A: Yes.

Q: Would that tell you anything about whether he had the capacity to assist his attorney, if he is able to write this map and give it to Dennis Freeman, so that they could try to dispose of clothes?

And this is after he is in jail with Freeman. Arrested. Knowing that he needs to dispose of some evidence.

A: I would have to look at that. But that could be something.

Q: I mean, but you already knew that part. Right?

A: I know about the map. I wasn't familiar with the map, that the map was a deliberate attempt to dispose of evidence.

Q: And that's because so far you haven't been able to say that you read any part of the actual trial transcript. Right?

A: I did -- I certainly don't have a recollection of the penalty phase you're talking about. But I don't recall how much of the trial transcript I saw.

Q: Do you remember the testimony of Dennis Freeman in the trial, where he testified to all of that? And that map was put in evidence, and it was written about by the Supreme Court in their opinion, direct appeal opinion. Do you remember any of that?

A: I certainly remember the Supreme Court opinion, because I read that just in the last couple of days.

Q: Do you remember the extensive discussion that they had on Dennis Freeman?

A: About his testimony. I remember there was something there about whether he should not be allowed to testify because he said he was doing them a great danger, or something like that.

Q: Do you know whether that would be the mistrial -- they said that was an issue?

A: I do remember that.

Q: But you don't recall reading his testimony of his interaction with the defendant at the Marion County jail before the trial.

Because it seems to me that those facts of those discussions would be even more important than the discussions that you hung onto on John Jackson. Because the John Jackson discussions were eight months

prior to the trial. And we know that Dennis Freeman talks with the defendant much closer to the trial.

A: I would say that the same thing I said with Mr. Jackson's testimony. I think that it would – depending on what the statement was, that it may have some weight. How much weight I would give it, I would have to weigh it in terms of everything else that I saw. But I would certainly not state that I would just discount it.

(PC-R. 2427-32). Also, the State failed to inform Dr. Herkov that Freeman was separated from Mr. Ponticelli in early January, several months prior to Mr. Ponticelli's trial.

[20]Because Mr. Ponticelli was unwilling to testify, because "God had told him not to", trial counsel's motion was denied (PC-R. 1784).

[21]Again, the lower court, in denying Mr. Ponticelli's ineffective assistance of counsel at the penalty phase claim focuses on Dr. Krop's testimony in regard to Mr. Ponticelli's competency to proceed at trial. Dr. Krop's original report from trial contains mitigating evidence and he would have found the statutory mitigating circumstances had he been asked to evaluate Mr. Ponticelli for penalty phase. Thus, if this Court accepts the lower court's statement that: "Doctor Krop's original findings were sound, correct and remain true", then this Court should also accept Dr. Krop's original findings regarding mitigation and the presence of the statutory mental health mitigators (PC-R. 1535, 1547-8).

[22]Dr. Conger's test data from his evaluation with Mr. Ponticelli was consistent with an individual who suffered from organic brain damage. However, Dr. Conger believed that Mr. Ponticelli was not putting forth his best effort on the tests (PC-R. 2207-13). But, Dr. Conger conceded that Mr. Ponticelli showed his best efforts on the objective tests he conducted to determine if Mr. Ponticelli was malingering (PC-R. 2216). Further, as Dr. Herkov pointed out, Mr. Ponticelli's scores in the neuropsychological testing were consistent when he was tested in 1988 by Dr. Poetter and when he was tested in 2000 by Dr. Conger (PC-R. 2370-3). Mr. Ponticelli exhibited the same

deficits in the same areas (PC-R. 2370-3). Therefore, in order to exhibit such a consistent profile Mr. Ponticelli would had to have known in 1988 what tests were being conducted to determine frontal lobe impairment and then repeated his performance on the test battery administered twelve years later. He would also have had to have known what the raw score would translate into as the scaled score. Dr. Herkov testified that this would have been impossible to do (PC-R. 2372).

[23]Dr. Conger admitted that an individual's behavior was the best indicator of his mental state (PC-R. 1785).

[24]The chronology about Mr. Ponticelli's "goal oriented" behavior that Dr. Conger testified about was prepared by the State and left out many critical facts about the night of the crimes (PC-R. 2278). The chronology was provided to Dr. Conger a week or two before he testified (PC-R. 2278). The chronology was prepared based upon the testimony presented at trial, much of which has now been proven to be false (PC-R. 2278).

[25]Douglas Freeman did not inform law enforcement that Mr. Ponticelli had told him that he planned to commit the crimes and his motives until after he received a deal from the State, which was after his initial statement and after his pre-trial deposition. Instead, in his deposition, he testified that Mr. Ponticelli was evasive and did not answer questions about his motivation for committing the crimes. However Dr. Conger and the lower court rely upon Freeman's trial testimony. At trial, Freeman testified that Mr. Ponticelli told him that he intended to kill the victim's at their trailer but could not do so because of Keesee's presence. (R. 753). The State and trial court relied on Freeman's testimony during the penalty phase and in sentencing Mr. Ponticelli to death. Freeman's trial testimony is proven false due to Keesee's testimony about Mr. Ponticelli's statements and demeanor at the trailer. Likewise, Freeman's testimony that Mr. Ponticelli told him that he was not using cocaine at the time of the crimes has been proven false.

The individuals at Keith Dotson's house never mentioned anything about Mr. Ponticelli making a statement about his motive to commit the crime until after the "group meeting" occurred with the prosecutor at which time she told them that she wanted to convince the jury to recommend the death penalty. In fact, in Keith Dotson's pre-trial statement, he actually told

654 So. 2d 107 (Fla. 1995)Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995)(prejudice established by presenting of "substantial mitigating evidence" in postconviction); Phillips v. State, 608

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law enforcement that Mr. Ponticelli refused to tell him what had happened the night of the crimes or why. Yet, at trial he changed his story.

[26]Mr. Ponticelli also told Turner that he had been using cocaine shortly before the crimes (PC-R. 632-4).

[27]Keesee's testimony is corroborated by what Turner testified in his deposition that Mr. Ponticelli had told him.

[28]The description of Mr. Ponticelli on the night of the crimes was similar to the descriptions of Mr. Ponticelli a few weeks before the crimes when he was at his cousin's restaurant. Dr. Conger characterized Mr. Ponticelli's behavior on that night as "delusional" and that he had a "reduced ability to separate out what is real from what isn't" (PC-R. 2286).

[29]Even Dr. Conger's testimony reveals mental health mitigation.

[30]Dr. Conger did not know what type of proceeding he was testifying in – he believed it was the "re-trial" (PC-R. 2207).

[31]This Court's caselaw does not support Dr. Conger's opinion. See Amazon v. State, 487 So. 2d 8 (Fla. 1986); Masterson v. State, 516 So. 2d 256 (Fla. 1987).

[32]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.

[33]Again, Turner's testimony not only rebutted the aggravating factors, but also could have been used at both the guilt and penalty phases to show that Freeman was not being truthful about what Mr. Ponticelli allegedly told him.

So. 2d 778, 783 (Fla. 1992)(prejudice established by "strong mental mitigation" which was "essentially unrebutted"); Bassett v. State, 541 So. 2d 596, 597 (Fla. 1989).[34]

The mitigation presented at Mr. Ponticelli's evidentiary hearing was qualitatively and quantitatively different from that presented at trial. Numerous statutory and non-statutory mitigators were reasonably proven, including, but not limited to: Mr. Ponticelli was abandoned by his biological parents at birth; Mr. Ponticelli was a "blue baby" at birth; Mr. Ponticelli was placed with the Ponticelli family when he was an infant, along with several other children; the other foster children were returned to their parents; Mr. Ponticelli felt like an outsider in his own family and like he was neglected by his adopted father; Mr. Ponticelli struggled to fit in with his peers; Mr. Ponticelli was a follower; Mr. Ponticelli was teased by other children because he was overweight and wore glasses; Mr. Ponticelli had a long history of drug abuse, beginning when he was a pre-adolescent; Mr. Ponticelli's friend convinced him to start free-basing cocaine when he was a teenager; Mr. Ponticelli had severe paranoid reactions when he used cocaine; Mr. Ponticelli struggled through high school, but did graduate; Mr. Ponticelli held jobs while in high school and after he graduated; Mr. Ponticelli's addiction to cocaine was serious and longstanding; Mr. Ponticelli was psychotic at times when he used cocaine, i.e., he was unable to separate out reality; Mr. Ponticelli suffered from brain damage; Mr. Ponticelli had no prior arrests or convictions; Mr. Ponticelli was twenty years of age at the time of the crime; Mr. Ponticelli was a poly-substance abuser; on the night and early morning before the crimes Mr. Ponticelli attended a cocaine party where he consumed a large quantity of cocaine; Mr. Ponticelli did not seek out the Grandinetti brothers, they sought him out; Mr. Ponticelli wanted to leave the trailer, and was anxious; at the time of the crimes Mr. Ponticelli was sleep-deprived and malnourished; Mr. Ponticelli used cocaine shortly before the crimes occurred; shortly befor the crimes occurred Mr. Ponticelli was described as being "whacked" and shortly after the crimes he was also described as being "freaked out"; Mr. Ponticelli was suffering from an extreme mental or emotional disturbance at the time of the crime; Mr. Ponticelli ability to appreciate the criminality of his conduct was substantially impaired.

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[34]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).

Almost none of the compelling mitigation presented at the evidentiary hearing was known to the jury. Mr. Ponticelli has demonstrated prejudice. Mr. Ponticelli is entitled to relief.

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief 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 June 30, 2005.

CERTIFICATION OF TYPE SIZE AND STYLE

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