IN THE SUPREME COURT OF FLORIDA

No. SC03-1815

ANTHONY LAMARCA

Appellant,

Versus

STATE of FLORIDA

Appellee.

FINAL AMENDED BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal involves the appeal of the circuit court's denial of Mr. Lamarca's motion for postconviction relief pursuant to Fl.R.Crim.P. 3.851, et.seq.

The following will be used to designate references to the record.

"T" ......Trial Transcript

"R".......Record on Direct Appeal

"PC-R" ...Postconviction Record

REQUEST FOR ORAL ARGUMENT

This is an appeal from the denial of postconviction relief in a capital case. This Court has allowed oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument is necessary given the seriousness of the claims raised herein.

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STATEMENT OF THE CASE AND FACTS

It is clear that at every juncture where Mr. Lamarca's attorneys had to make a decision, they made the decision least favorable or helpful to their client. Whether it was the decision to forgo investigating mitigation evidence until right before trial started, failing to file a legally sufficient motion to suppress, failing to call a witness to impeach a jailhouse snitch, failing to call a witness to rebut the state's claim of flight, failing to effectively investigate and cross examine the main witnesses in the case, or giving up their client and failing to zealously represent him as he slipped into incompetence causing him to effectively commit state sanctioned suicide, the decisions of Mr. Lamarca's attorney fell well below the constitutional standards announced recently by the United States Supreme Court in *Wiggins v. Smith*, 123 S.Ct. 2527 (2003). In 1998, at the time this case was tried, the prevailing norms for trying a capital case would have been reflected in the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989). Those norms are the constitutionally mandated minimum standards as adopted by the *Wiggins* Court and Mr. Lamarca's attorneys failed to follow them.

Worse yet, the state, in prosecuting the case, committed several acts of prosecutorial misconduct. In an attempt to alienate Mr. Lamarca from his family, and thus from many of his own guilt phase witnesses, the state concocted a story that included evidence of rape, where there was none; motive to kill, where none existed; and flight, which was known to be false. The state misled the court, the jury and this court

when it argued that there was evidence of rape. The state had in its possession evidence that there was no rape. There was not even any evidence of consensual sex. No semen was found on Tonya Flynn, in her panties or on the sheets. No physical evidence was found to prove the existence of a rape. However, the state informed the defense and members of Mr. Lamarca's family that they had evidence of a rape.

The state also withheld evidence that two key witnesses, relied upon by this Court in upholding Mr. Lamarca's conviction, received a benefit from the state. Further, the state presented to the jury that these two witnesses did not receive any deal, any benefit from the state in exchange for their testimony.

Anthony Lamarca, was indicted by the Grand Jury for the 6th Judicial Circuit, Pinellas CountyFlorida, on January 24, 1996, for the first-degree, premeditated murder of Kevin Flynn on December 2, 1995. (I, R.8) Anthony Lamarca was tried by jury from November 3 to November 6, 1997, before the Honorable Judge Brandt D. Downey, III. (XXXIV, T1;XXXI, T 1156) The court denied defense counsel's motion for Judgment of acquittal on the ground that the State's evidence was insufficient to prove premeditation at the close of the state's case and at the close of all the evidence (XXX, T 1012-30, XXXI, T. 1164-65) The jury found Anthony Lamarca guilty of first-degree murder as charged. (XV, R. 2876; XXXI, T. 1267) The court entered a judgment of guilt on November 6, 1997. (XV, R. 2877-78; XXXI, T 1271)On November 20, 1997, the penalty phase was conducted before the jury. (XXXII, R. 1)Prior to the hearing the court

held a *Faretta* hearing and found that Anthony Lamarca voluntarily waived his right to counsel and was competent to proceed as his own counsel during the penalty phase. (Vol XXXII, R.1305-1306) The court appointed the Public Defender's Office as stand-by counsel. (Vol. XXXII R. 1306) Stand-by defense counsel proffered mitigating evidence that it was prepared to offer on Defendant's behalf (Vol. XXXII, R. 1310-1319) and the State proffered evidence it would introduce in rebuttal to said evidence. (Vol. XXXII, R. 1320) The State moved into evidence certified copies of the judgment and sentence documenting that the Defendant had been convicted of a felony involving the use or threat of violence to another person, provided testimony via Det. Ross, of Miami Police Department, retired, regarding the facts and circumstances of said felony convictions and the Defendant cross-examined Det. Ross. (Vol XXXII, R. 1372) The Defendant advised the court hat he had reviewed the standard jury instructions and that he desired that none of the statutory mitigating circumstance jury instructions be read to the jury (Vol XXXII, R. 1421) The Defendant made a closing argument to the jury encouraging them to recommend the death penalty to the court. (Vol XXXII, R. 1419) The jury recommended death by an 11 to 1 vote (Vol. XVI, R 2916; XXXII, R, 135). The court ordered a Pre-sentence Investigation (PSI) and set a *Spencer* Hearing for December 19, 1997. (S 12-37). At the *Spencer* Hearing, the Defendant again announced that he did not wish to present any evidence in his behalf. (S.Vol I - P. 15) Dr. Sidney Merin's testimony was proffered by the State to rebut any non-statutory mental health mitigation

that the court might subsequently find in the record.(S. Vol I - P. 30) The Defendant declined opportunity to address the court or present any evidence or testimony. (S. Vol. I. - P. 34) Sentencing memorandums were requested to be filed by the State and the Defendant by January 30, 1998. The Defendant told the court that he did not want any argument on his behalf or any witnesses and he directed his counsel not to prepare any sentencing memorandum. The State filed sentencing memorandum arguing for the death penalty on January 30, 1998. (Vol. XVI, R..3012-23)The court held a sentencing hearing on February 28, 1998, the court sentenced

Anthony Lamarca to death. (Vols. XVI, R 3024-32; XXXIII, R. 3466-75)

The court found **only one aggravating factor**:

a. The Defendant was previously convicted of another capital felony or a felony

involving the use or threat of violence to a person. (Vols. XVI, R. 3028-29, XXIII, R. 3469-70;)

A review of the entire record revealed certain mitigating factors, both statutory and non-statutory that were considered by the court over objection by the Defendant as follows:

1. The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance. The court found that testimony that Defendant had been drinking, argued with daughter, that he was angry when he left bar

with son in law, and testimony that he was not drunk or intoxicated, these facts alone were insufficient to establish this mitigating circumstance. (Vols.XVI, R. 3029 - 30; XXIII, R. 3471-72)

2. Age of the Defendant. The court found that nothing in the record indicated a difference in Anthony Lamarca's emotional age from his 40 year chronological age and found age was not a mitigating factor. (Vols. XVI, R. 3030; XXIII, R. 3472)

3. Any other aspect of Defendant's character or record, and any other circumstance of the offense. This mitigating factor might have been developed, according to the court, if the proffered testimony had actually been presented. It was not established, however, because of Defendant's refusal to follow advise of his attorney. (Vols. XVI, R. 3030; XXIII, R. 3472 - 73)

4. The work record of the Defendant was not established as a mitigating factor due to insufficient facts. (Vols. XVI, R. 3030; XIII, R. 3473)

5. Defendant was well behaved during trial. This factor was found to have been established by the court although it was given very little weight. (Vols. XVI, R. 3030-31; XXIII, R. 3473-74)

6. The Defendant had a history of drug and alcohol abuse and suffered from other mental health defects. The court found that limited testimony was offered due to the Defendant's refusal to allow his attorneys to fully develop this mitigating circumstance. **Testimony established this circumstance, however, the court gave it**

very little weight. (Vols. XVI, R. 3031; XIII, R. 3474)

The court appointed the public defender to represent Anthony Lamarca on appeal (Vol. XVI, R. 3034) A Notice of Appeal was filed on March 7, 1998. (Vol. XVI, R. 3054)

ARGUMENT I

MR. LAMARCA WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND ADVISORY PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL FAILED TO EFFECTIVELY REPRESENT THEIR CLIENT, ADVOCATE FOR HIS POSITION AND PROTECT HIS INTERESTS WHEN IT WAS APPARENT THAT MR. LAMARCA WAS INCOMPETENT TO PROCEED TO TRIAL. COUNSEL'S INEFFECTIVENESS RESULTED IN THE FAILURE OF THE STATE'S CASE TO BE TESTED IN AN ADVERSARIAL WAY WHICH SEVERELY PREJUDICED MR. LAMARCA.

During their investigation of Mr. Lamarca's case, counsel for Mr. Lamarca, Mr. Ron Eide and Ms. Nora McClure, were aware that he was previously evaluated by Dr. Glenn Caddy. Dr. Caddy was appointed by the Federal District Court, Southern District of Florida, in 1984 to evaluate Mr. Lamarca for a class action lawsuit concerning prison conditions at Glades Correctional Institution.

Dr. Caddy had knowledge about Mr. Lamarca's mental state at the time of his evaluation in 1984, and subsequent evaluation in 1994, and would have been able to provide valuable insight into Mr. Lamarca's psychological profile.

During their representation of Mr. Lamarca, counsel had a difficult time

communicating effectively with their client. On one occasion, Mr. Lamarca forcibly "banged" his head into a glass divider in an interview room while speaking to counsel. Mr. Lamarca often acted irrational and impulsive with increasing levels of frustration. Dr. Caddy would have been able to advise counsel that this behavior was consistent with Mr. Lamarca's psychological condition and that a different approach to communicating with Mr. Lamarca was necessary.

When counsel failed to file a motion to suppress evidence removed from his father's house, it is the opinion of Dr. Caddy that this would have exacerbated Mr. Lamarca's condition.

When counsel failed to call a critical witness necessary to impeach an important state witness because counsel did not want to lose the ability to offer two closing statements, it is the opinion of Dr. Caddy that this would have further exacerbated Mr. Lamarca's condition.

Finally, when counsel failed to repeatedly investigate and present evidence requested by Mr. Lamarca, it is the opinion of Dr. Caddy that this, too, would have exacerbated Mr. Lamarca's condition.

The jury found Anthony Lamarca guilty of first-degree murder as charged. (XV, R. 2876; XXXI, T. 1267) The court entered a judgment of guilt on November 6, 1997. (XV, R. 2877-78; XXXI, T 1271) On November 20, 1997, the penalty phase was conducted before the jury. (XXXII, R. 1) Prior to the hearing the court held a *Faretta*

hearing and found that Anthony Lamarca voluntarily waived his right to counsel and was competent to proceed as his own counsel during the penalty phase. (Vol XXXII, R.1305-06)

The Court did not appoint an expert to evaluate Mr. Lamarca to determine whether he was actually psychologically competent to waive his right to counsel. (Vol XXXII, R.1305-07) The only inquiry made by the Court was directed at Mr. Lamarca's past dealings with the criminal justice system and his limited knowledge of what the State was going to present in the advisory phase. (Vol XXXII, R.1300-05)

Counsel for Mr. Lamarca did not offer to the Court that Dr. Caddy testify as to Mr. Lamarca's ability to competently waive his rights even though they had knowledge of Dr. Caddy's extensive history with Mr. Lamarca. Dr. Caddy was asked to evaluate Mr. Lamarca, but only after the guilt phase of the trial was completed. Dr. Caddy evaluated Mr. Lamarca six days before the advisory phase was to begin.

Counsel made no independent attempts to ensure that Mr. Lamarca was competently waiving his rights even though they had full knowledge of his erratic and impulsive behavior, past mental condition and that Mr. Lamarca was going to ask for the death penalty, an act of suicide.

The actions of counsel prevented Mr. Lamarca from aiding his defense and understanding his rights so that he could make a knowing, competent and voluntary waiver. Prejudiced ensued because of Mr. Lamarca's inability to aid in the guilt and

advisory phase of his trial and by waiving his counsel. After waiving his counsel, Mr. Lamarca did not present any mitigating evidence that was available, ensuring an advisory sentence of death.

Dr. Caddy testified at the evidentiary hearing. (PC-R 5/31/03, Vol II 176-288) Dr. Caddy testified as an expert witness in the field of Clinical and Forensic Psychology and death penalty investigation. Dr. Caddy has known Mr. Lamarca since 1984, when he was involved in the evaluation of prisoners involved in a civil action against the Florida Department of Corrections (Belle Glades Correctional Institution) alleging cruel and unusual punishment. Periodically, Dr. Caddy has maintained professional communications with Mr. Lamarca.

Dr. Caddy testified that Mr. Lamarca suffers from PTSD which relates back to his prison experience while in Belle Glade Correctional Institution. Dr. Caddy testified that he testified in federal court before Judge Payne and concluded that Mr. Lamarca had suffered substantial and outrageous abuse by some very violent people. And although Mr. Lamarca was physically and emotionally abused, he was one of the few that reported no physical rape. And the way he avoided rape was by confining himself in protective environments and sought friendship with powerful persons. During this time, Mr. Lamarca was still young and not powerful and his daily struggle was not to become someone's wife at Belle Glade. The system at Belle Glade was the lowest prison. The prison was rampant with drug abuse, guards were paid off to allow drug traffic, every

Saturday night pornographic movies were available and afterwards small white males were being raped by strong black males for their sexual gratification and entertainment. This prison also showed a lack of regard to prisoner's medical injuries created by anal penetration and one prisoner was beaten over the head by a steel chair which resulted in organic brain damage. Mr. Lamarca witnessed these assaults, the trafficking and all of the other events taking place in this prison. Being a young man that came out of his family dynamics nothing could have prepared Mr. Lamarca for what he experienced at Belle Glade. Dr. Caddy testified that because of issues of personality impairment, constant worrying and fear, PTSD, night after night, Mr. Lamarca could not sleep except when in solitary confinement.

Dr. Caddy testified that he had contact with Mr. Lamarca in 1993 and 1996 and in 1996 testified that Mr. Lamarca had developed a severe state of functioning that his coping skills would trigger instantly when provoked. It is his instinct to react. Dr. Caddy's next involvement with Mr. Lamarca occurred on October 9, 1997, when he received a call from Ms. McClure that Mr. Lamarca had been convicted of murder and asked if he would examine him for penalty phase testimony. She indicated that she called him because Mr. Lamarca was not willing to allow mitigation but that he would speak with Dr. Caddy. Dr. Caddy testified in his expert opinion that a call at this juncture in the proceedings would be a failure to understand the role of a forensic expert and their relevance to these proceedings. The time to hire a psychologist is when you get the case

because during the time it takes to prepare a murder case, one's mental health states can vary dramatically, nature of manipulations can vary, stories can change, and the system can change. Based upon Mr. Lamarca's mental illness, Dr. Caddy testified that Mr. Lamarca was more prone to be reactive, misjudge circumstances, be distrustful and lack confidence in others. As a result of this mental illness, Mr. Lamarca immediately was distrustful of his attorneys, which could explain the troubled relationship and barriers that counsel suffered when trying to communicate and develop a attorney-client relationship with Mr. Lamarca. Dr. Caddy further testified that Mr. Lamarca was irrationally reactive which means he responded to fear or threat almost as an instant response.

Dr. Caddy provided further testimony that he visited Mr. Lamarca in 1997 and it was clear that his life was falling away even further. And although Mr. Lamarca was glad or willing to see him, it was not because his attorney had asked him but because it was nice too. It was like a social visit. Dr. Caddy testified that Mr. Lamarca's relationship with his attorneys soured and Mr. Lamarca begin to take over his own case as the relationship further deteriorated. During Dr. Caddy's interview with Mr. Lamarca, he was prepared to talk about his life from his mother dying and brother becoming psychotic and how he felt traumatized looking back at his Belle Glade experience of watching people be killed. He spoke about prisoners being raped in the bathroom. Dr. Caddy testified that the impact of Mr. Lamarca being convicted had an impact because he always claimed his innocence. Mr. Lamarca spoke about some other criminal behavior,

problems with barriers, what has happened in his life since they last spoke, missing his granddaughter, his negativity about his daughters, the events surrounding his prison release, the relationship with his daughters, events leading up to the murder, thoughts of contemplating suicide around the time of murder, attempts to drug overdose and then he decides he is not going to kill himself. Mr. Lamarca further talks about being upset that Tonya would have made the statement that he raped her.

Dr. Caddy testified that by prior and present history by Mr. Lamarca providing information that would be relevant in mitigation and not allowing it to be spoken, he had taken control over the process and away from his counsel. In fact, Mr. Lamarca wanted to make a post-trial closing argument which he attempted to do by telling the court what he thought of them. Mr. Lamarca's behavior during this time was extremely reactive and basically was "give me liberty or give me death." Mr. Lamarca was trying to take control over the process in the only way that he could. This behavior was not based upon sound reason and judgment and it is not evidence that his attorneys would provide him with copies of cases or review discovery with Mr. Lamarca because that is standard practice for an attorney in conformance with evolving standards of professionalism. Dr. Caddy testified that Mr. Lamarca didn't want to die and doesn't. The changing point in the trial proceedings occurred after Tonya's testimony. The fact that his attorney's failed to impeach Tonya indicated that they really did not believe anything he said.

Dr. Caddy's next involvement occurred in May of 2002 when contacted by

CCRC. Again, Mr. Lamarca was having conflict with his attorneys and attempting to fire his attorneys. Dr. Caddy sent some materials to CCRC and received some information from the CCRC investigator, notes from Dr. Maher, information regarding letters between McClure, notes regarding Lori Lamarca, medical records of Joseph, some transcripts of the trial proceedings, Mr. Lamarca's testimonies, medical records, DOC records he had from before, and the competency evaluation from trial. Based upon this information, it is the opinion of Dr. Caddy that Mr. Lamarca was competent during the early stages of trial but after Tonya's testimony became irrational, enraged, paranoia kicked in and he came to believe that he was the only person that he could rely on. Mr. Lamarca was not competent to make rational choices and was unable to focus on the emotional components now driving him. Thus, although Mr. Lamarca was competent at the early stage of the proceedings at the point that Tonya testifies, he becomes incompetent. Although he knew that she would testify that he raped her, in the early stages he truly believed that this was because the police were pressuring her but in his own mind when she had to give testimony she would not maintain that position. Thus she would transform from the person that was manipulative or lying to one who would not do that in front of him. Tonya' testimony and betrayal was contrary to every system of keeping it within the family, preserving family honor. Mr. Lamarca believed that Tonya's statements constituted his death sentence. And as a result of her testimony, Mr. Lamarca became emotionally disconnected and when his lawyers did not attack Tonya on cross

examination, Mr. Lamarca withdrew himself. Mr. Lamarca became further disenchanted when his lawyers disagreed with him to bring in witnesses that would have called into question Tonya's testimony. Mr. Lamarca's believe that if one would believe that he raped Tonya he must have murdered Kevin. By not believing in him, his attorneys abandoned their duty to protect him which triggered Mr. Lamarca to full safety mode. And although Mr. Lamarca has helped others in their legal problems, he could not help himself.

Dr. Caddy testified that Mr. Lamarca would never stand mute. Under the circumstances he would have felt powerfulness to stand mute not powerful. Mr. Lamarca could not remain silent voluntarily. His judgment was lost and he is now reactive. This is the tantrum of a man on a glory trail. This is a reactive response to a series of events that culminate. Mr. Lamarca no longer had the ability to help his attorneys when they failed to give him support. There was no trust in their relationship and Mr. Lamarca just wanted them to be out of there. The fact that his attorneys did not perceive his witnesses as credible, the line was drawn quickly. This distrust is exemplified in Mr. Lamarca slamming his head into the wall during a meeting with his attorney. Mr. Lamarca was trying to get their attention even though he could hurt himself. Thus Mr. Lamarca would have been incapable of understanding and exercising his right to remain silent. This behavior in and of itself would be contrary to his psychological functioning.

Dr. Caddy further testified that Mr. Lamarca was incompetent to waive mitigation.

This issues goes back to the Tonya incident. Mr. Lamarca also finds out that the state advised family members that DNA proved the sexual assault of Tonya and he wanted to protect his family from standing up for him. If his family believed that he would rape Tonya then he didn't want them standing up for him anyway. Mr. Lamarca system of defense disintegrated. He had a code of his personal worth and he couldn't ask his family to be involved in helping him if they were a party to the state's attempt in convicting him and seeking a death sentence. Mr. Lamarca had to protect them and himself. This behavior by Mr. Lamarca is consistent with his family dynamics.

Dr. Caddy's opinion is that Mr. Lamarca was incompetent to waive his right to testify. Mr. Lamarca was incompetent to waive mitigation. Mr. Lamarca was reactive and therefore his actions were not voluntary as reflected in his psychological functioning. Dr. Caddy testified that a reactive choice is <u>not</u> voluntary.

On cross examination, Dr. Caddy testified that at some point Mr. Lamarca was noncompliant with his attorneys. There was a constant struggle between Mr. Lamarca and his counsel. Dr. Caddy doubts if they ever understood Mr. Lamarca's underlying dynamics and how to manage him. Dr. Caddy testified that he spoke with Ms. McClure approximately three times. November 15, approximately a half hour, November 17 and 18 both for brief periods. Dr. Caddy testified that he does not recall the details of those discussions. Regarding Tonya's testimony, even though Mr. Lamarca knew that she had made certain claims, he did not anticipate that she would make those claims in court. By

nature Mr. Lamarca has problems with trust and is vulnerable to become impulsive when people are not servicing his interest. Thus his attorney's apparent failure, according to Dr. Caddy, in not putting on testimony that he wanted produced which would call into question Tonya's testimony made Mr. Lamarca become reactive and therefore during the course of the trial he was not competent to proceed.

In *Wiggins v. Smith*, 123 S.Ct. 2527 (2003), the United States Supreme Court reiterated the standard established by *Strickland* nearly 20 years ago. That standard today still requires courts to determine whether counsel was deficient in his or her representation and whether that representation prejudice the defendant's case. *See Strickland v. Washington*, 466 U.S. 668 (1984). Justice O'Connor, in writing for the majority in *Wiggins,* as she did in *Strickland*, cautions this Court about how far that deference should be extended.

> When viewed in this light, the "strategic decision" the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post-hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing.

Wiggins, 123 S.Ct at2538.

Wiggins is not new law nor is it a new concept. Rather, *Wiggins* instructs this Court to look at the prevailing norms at the time of the trial to establish whether counsel was ineffective. In 1998, at the time this case was tried, the prevailing norms for trying a capital case would have been reflected in the *ABA Guidelines for the Appointment and*

Performance of Counsel in Death Penalty Cases (1989). While Wiggins did not change the law, it did mark a refinement in current law. First, strategic decisions could not be made without fully investigating the case. That investigation included both guilt phase and penalty phase evidence. Second, the ABA Guidelines were now the constitutionally mandated minimum guidelines for effective counsel.

The United States Supreme Court enunciated the two-prong test for analyzing an ineffective assistance of counsel claim in *Strickland v. Washington*, 466 U.S. 668 (1984). According to *Strickland* the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland*, 466 U.S. at 687. A court's determination of prejudice requires an assessment of "the totality of the evidence". *Id.* at 695. This totality of the evidence requirement is specific to each issue presented, not the performance of counsel as a whole. *Horton v. Zant*, 941 F.2d 1449, 1461 (11th Cir. 1991)("The state, however, reads this language to imply that we must evaluate an attorney's performance by examining his or her performance in its entirety and by viewing the whole trial as an indivisible unit. The state is simply mistaken.") In order to satisfy the burden of demonstrating that trial counsel was ineffective, the movant must demonstrate that

counsel's "representation fell below an objective standard of reasonableness." *Collier v. Turpin*, 155 F.3d 1277 (11th Cir. 1998) *citing Strickland*, 104 S.Ct. at 2064.

In *Blanco v. Singletary*, 943 F.2d 1477 (11th Cir. 1991), the Eleventh Circuit granted habeas relief on Blanco's claim that his trial counsel rendered ineffective assistance, in part, by not presenting available mitigating evidence at the penalty phase. Blanco's defense counsel conducted no investigation into possible mitigating evidence until the conclusion of the guilt phase of trial. After the jury returned a guilty verdict, Blanco told counsel that he did not wish to present witnesses in the penalty phase. The court rejected the argument that Blanco's instruction controlled the issue, noting that counsel may not blindly follow such commands. Rather, counsel "'first must evaluate potential avenues and advise the client of those offering potential merit.'" *Id.* at 1502 (quoting *Thompson v. Wainwright,* 787 F.2d 1447, 1451 (11th Cir.1986), *cert. denied,* 481 U.S. 1042, 107 S.Ct. 1986, 95 L.Ed.2d 825 (1987)). The court found counsel to be ineffective because:

> [t]he ultimate decision that was reached not to call witnesses was not a result of investigation and evaluation, but was instead primarily a result of counsels' eagerness to latch onto Blanco's statements that he did not want any witnesses called. Indeed, this case points up an additional danger of waiting until after a guilty verdict to prepare a case in mitigation of the death penalty: Attorneys risk that both they and their client will mentally throw in the towel and lose the willpower to prepare a convincing case in favor of a life sentence.

Blanco, 943 F.2d at 1503.

Blanco stands in contrast to *Koon v. State*, 619 So.2d 246 (Fla. 1993), case law

relied upon the court during the *Faretta* inquiry. *Koon* presented the same issue as in *Blanco*: whether counsel was ineffective for not having their client evaluated when he indicated that he wanted to waive all mitigation. In *Koon*, no ineffectiveness was found due in large part to counsel's pre-trial preparation into mitigation including psychological evaluations. In the instant case, Mr. Lamarca was not even evaluated until after the jury returned a verdict of guilty and six days before the advisory phase was to begin. As such, counsel was ineffective in the same manner as counsel was in *Blanco*.

In addition to the above cited cases, waiving counsel and mitigation during a death penalty proceeding implicates various issues other than those traditionally visited by this Court. This Court has erroneously applied traditional notions of competency to such cases where the defendant is electing to waive all mitigation in an election to die. Thus, this Court has failed to apply the correct legal standard for those who volunteer for the death penalty.

For example, a defendant's waiver of his right to proceed in habeas corpus is not valid unless it is "knowing, intelligent and voluntary." *Whitmore v. Arkansas*, 495 U.S. 149, 195, 110 S.Ct. 1717 (1990). In proving that a valid waiver of constitutional rights has occurred, the state bears the burden of proof. *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 522 (1986); *Commonwealth of Northern Marianas v. Mendiola*, 975 F.2d 465 (9th Cir. 1992)..

A "knowing and intelligent" decision is not necessarily a "voluntary" one. *Comer v.*

Stewart, 215 F.3d 910, 917 (9th Cir. 2000)(noting that voluntariness is a separate inquiry from competency). For example, a victim of the Spanish Inquisition might well rationally and intelligently choose to confess his heresy to prevent further torture - but such a decision would hardly be construed as voluntary. Conversely, a petitioner's thought process might be so distorted in the context of a particular decision that he could not possibly render that decision in a knowing and intelligent fashion - even in the absence of any coercive factor at all.

For this reason, the Court must engage in two discrete inquiries to evaluate whether the petitioner's stated desire to waive mitigation is valid. First, the Court must determine whether Mr. Lamarca was competent so that his decision to waive mitigation can be deemed to be "knowing and intelligent." Second, the Court must determine whether Mr. Lamarca arrived at the decision to waive mitigation of his own free will rather than as a result of coercion. A petitioner's waiver of a procedural right is voluntary if that decision is the "product of a free and deliberate choice rather than coercion or improper inducement." *Comer v. Stewart, supra*, 215 F.3d at 917. In assessing whether the waiver has arisen from a choice unfettered by coercive factors, the Court must evaluate the "totality of the circumstances." *Id.; United States v. Doe*, 155 F.3d 1070, 1074 (9th Cir. 1998).

In this context, the Supreme Court has made clear that coercion "can be mental as well as physical." *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991); *Brady v. United*

States, 397 U.S. 742, 754, 90 S.Ct 1463 (1970). Even subtle coercion, implied threats or slight promises can render a waiver involuntary. *Schneckloth v. Bustamonte*, 412 U.S. 218, 228-229, 93 S.Ct. 2041, 2048-9 (1973); *see also, Hutto v. Ross*, 429 U.S. 28, 30, 97 S.Ct. 202, 203 (1976).

Further, the Court is entitled to consider the mental vulnerability of the petitioner in assessing how coercive factors might bear on the voluntariness of the waiver in question. If the petitioner suffers from a vulnerable mental condition, coercion need not be forceful to render his waiver involuntary. *Comm. v. Mendiola, supra*, 975 F.2d at 485 (governmental coercion need not be strong if mental state of defendant is vulnerable); *Schneckloth, supra* , 412 U.S. at 228-9. ("[A]ccount must be taken of ... the possibly vulnerable subjective state of the person who consents.").

As to the question of competence, this Court is required to follow the standard set forth in *Rees v. Peyton* 384 U.S. 312, 86 S.Ct. 1505 (1966) and determine:

> *in the present posture of things* ... whether he has the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.

(emphasis added) *Id.*, 384 U.S. at 314, 86 S.Ct. at 1505; *Mata v. Johnson*, 210 F.3d 324, 327 (5th Cir. 2000); *Comer v. Stewart, supra*, 215 F.3d at 917.

As the *Rees* standard implies, the evaluation of a petitioner's competence must be anchored "in the present posture of things" - in the specific nature of the decision the

petitioner must make. Federal courts have repeatedly emphasized the specificity of the inquiry required. In *Chavez v. United States*, 656 F.2d 512, 518 (9th Cir, 1981), the Ninth Circuit observed that competency assessments must be made "with specific reference to the *gravity* of the decisions the defendant faces." (emphasis added). There, the Court explained:

> The test for competence is this traditionally stated in different terms depending upon the decisions and *consequences* presented to the defendant by the particular proceeding. It might be fair to require a marginally competent defendant to make certain kinds of decisions, but not others.
>
> Id., at 518. (citation omitted); *Miller v. Stewart*, 231 F. 3d 1248, 1250 (9th Cir. 2000)(competency of decision to represent oneself poses a different question than competency of decision to waive capital appeals.); *see also, Westbrook v. Arizona*, 384 U.S. 150 (1965)(per curiam)(competency to stand trial poses a different competency question than competency of decision to waive right to counsel and represent oneself.)

This line of jurisprudence has two lessons. First, the Court must assess the defendant's competence with reference to his *capacity to rationally decide the specific decision posed*. Second, the Court must employ a heightened standard for evaluating competence if the potential consequences of the decision are grave.

One can imagine no decision more grave than the decision to waive mitigation in a capital case. As the federal courts have observed, such a decision is nothing less than an election to die. *Miller v. Stewart, supra*, 231 F. 3d at 1250. The United States Supreme Court has repeatedly acknowledged that death penalty cases are unique from any other species of criminal case "in their finality." *e.g., Eddings v. Oklahoma*, 455 U.S. 104, 117-

118 (1982)(O'Connor, *concurring.)* For this reason, the standard for evaluating the competence of the defendant's waiver should be uniquely high.

At minimum, the Court should employ the standard used to evaluate the waiver of a constitutional right. Many courts have articulated that standard as follows:

> To waive a constitutional right, a defendant must have that degree of competence required to make decisions of very serious import. A defendant is not competent to waive constitutional rights if mental illness has substantially impaired his or her ability to make a *reasoned choice among the alternatives presented* and to understand the nature and consequences of the waiver.

(emphasis added) *Chavez v. United States, supra*, 656 F.2d at 518; *Mata v. Johnson*, 210 F.3d 324, 327 (5th Cir. 2000).

In sum, this Court should evaluate Mr. Lamarca's competency with reference to his mental ability to rationally assess the specific decision to waive mitigation.

ARGUMENT II

MR. LAMARCA WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS TRIAL, IN VIOLATION OF THE FOURTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL FAILED TO MOVE TO SUPPRESS CERTAIN EVIDENCE GATHERED BY LAW ENFORCEMENT IN VIOLATION OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISION OF THE FLORIDA CONSTITUTION. COUNSEL'S FAILURE SEVERELY PREJUDICED MR. LAMARCA.

On December 2, 1995 at 10:55 pm, Deputy Kennedy from the Pasco County

Sheriff's Office responded to the home of Mr. Lamarca's father at 9900 Ideal Lane in Hudson, Florida reference to shots being fired. Deputy Kennedy makes visual contact with Mr. Lamarca but Mr. Lamarca leaves the area. Deputy Kennedy then knocks on the closed door of the residence, but gets not response.

Deputy Ferguson then arrives at the same residence at 6:25 am on December 3, 1995. Deputy Ferguson notes that the aluminum screen door to the residence was open but the front brown door was closed. The residence is then secured. Deputy Ferguson is then relived by Deputy Lennon and Deputy Kennedy at 6:30 pm. Detective Blum and Morrison and crime scene technician Fagan are notified. Reports from Detectives Blum and Fagan indicate that the front door was broken into as if someone had possibly entered the residence by kicking open the door. All law enforcement officers deny entering the residence. Law enforcement officers from the Pasco County Sheriff's office state that they received permission from the owner of the residence, Mr. Lamarca's father at around 6:00 pm, to enter and search the residence. Law enforcement had Mr. Lamarca, Sr. sign a waiver to this effect.

Mr. Lamarca, Sr. testifies in deposition, which was entered into evidence, that he arrived at around 9:00 pm. He states that when he pulled up to his home, he saw law enforcement officers exiting his residence. He then goes on to state that after the officers exited his residence, he was asked to execute a waiver.

A search of the residence revealed a .22 caliber rifle which later was identified by

law enforcement as being a possible murder weapon. At no time did law enforcement have a warrant prior to entering the residence or claim to be acting due to exigent circumstances. Counsel deposed Mr. Lamarca, Sr. and had access to this information contained in the various police reports and supplements. Even when Mr. Lamarca requested that a motion to suppress the rifle be filed, counsel failed to file such a motion.

Evidence and testimony concerning the rifle as being the murder weapon was admitted into evidence without objection based a warrantless search and seizure. Counsel was ineffective for failing to file a motion suppressing the rifle. Mr. Lamarca was prejudiced because of the testimony concerning the rifle being the murder weapon and that Tonya Lamarca Flynn had seen Mr. Lamarca with a similar weapon. Further, testimony from the medical examiner and firearms expert helped substantiate the fact that the rifle was the weapon used to murder Kevin Flynn.

At the evidentiary hearing testimony was presented regarding this issue. Ron Eide testified (PC-R 5/29/03, Vol I pp. 65-227) that the rifle found in Hudson was an important piece of evidence in the State's case because this rifle was in Mr. Lamarca's possession prior to murder and the casing found were consistent with bullets found at Mr. Lamarca's trailer. Mr. Eide testified that from depositions he learned that Mr. Lamarca's access was inconsistent with the testimony of Angela and his father because Mr. Lamarca did not have a key to the residence. Mr. Lamarca, Sr. executed consent to search and therefore he felt that a motion to suppress would have been frivolous. Nora McClure

testified at the evidentiary hearing that she relies on the reports of Mr. Braun

William Braun, the public defender investigator in Mr. Lamarca's case testified at the evidentiary hearing that he conducted an interview of Mr. Lamarca, Sr., which was documented in a report and provided to counsel, that although he did permit law enforcement to search his home, he was reluctant. Further he felt intimidated and compelled to let police search the house. The police were there huddled in his foyer and already in position when he arrived home and he did not feel as if he could say no.

Joseph Lamarca testified at the evidentiary hearing (PC-R, 5/31/03, Vol. I pp 74-83) that Mr. Lamarca had a key to his father's house and was allowed in the house. He was allowed to eat and drink in the house, take a nap, or go there as needed. Mr. Lamarca was never told don't come into house. The whole family had keys to come and go. As such, Joeseph Lamarca testified that Mr. Anthony Lamarca had standing to challenge the illegal search and seizure.

The filing of a frivolous motion is against all Cannons of Ethics. A motion should have a factual and legal basis to support the alleged claims. Consent given under duress, intimidation, or compulsion are all grounds to challenge the voluntariness of the consent that was later obtained. The fact consent in this case was obtained under intimidation, duress, and compulsion would have supported a Motion to Suppress the evidence retrieved in a search of Mr. Lamarca Sr.'s home. The fact that counsel could offer no explanation other than this was a frivolous motion is not a trial strategy that is consistent

with evolving standards of professionalism. Counsel does not testify that he researched this issued, interviewed Mr. Lamarca himself, or interview Angela Lamarca and found the motion to be frivolous. Thus this court can only conclude that the decision of defense counsel not to challenge the search of Mr. Lamarca's home was ineffective and the resulting prejudice allowed the introduction of inadmissible evidence.

Because a private home is an area where a person enjoys the highest reasonable expectation of privacy under the Fourth Amendment, see, e.g., Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), the factors bearing on the voluntariness of a consent to search a home must be scrutinized with special care. "Although the police are certainly free to seek a voluntary consent to search a home, they are not entitled to use the coercive tactics which this record reveals to secure that consent and, indeed, must approach the task with some circumspection." Id. "The knock at the door [as here], whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples." Wolf v. Colorado, 338 U.S. 25, 28, 69 S.Ct. 1359, 1361, 93 L.Ed. 1782, 1785-86 (1949). The courts of this state and nation will not tolerate such exhibitions of overreaching police behavior--and any evidence secured thereby will not be admissible in our courts to convict any person who, as here, is a victim of such lawless conduct. Mapp v. Ohio, 367

U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). In addition where there is an illegal detention or other illegal conduct on part of law enforcement, a consent will be found voluntary only if there is clear and convincing evidence that the consent was not the product of the illegal police action. Reynolds v. State, 592 So.2d 1082 (Fla 1992), citing Norman v. State, 379 So.2d 643 (Fla. 1980). In this case, there was an unlawful entry into the residence. As such, the rifle should have been suppressed.

In *Wiggins v. Smith*, 123 S.Ct. 2527 (2003), the United States Supreme Court reiterated the standard established by *Strickland* nearly 20 years ago. That standard today still requires courts to determine whether counsel was deficient in his or her representation and whether that representation prejudice the defendant's case. *See Strickland v. Washington*, 466 U.S. 668 (1984). Justice O'Connor, in writing for the majority in *Wiggins,* as she did in *Strickland*, cautions this Court about how far that deference should be extended.

> When viewed in this light, the "strategic decision" the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post-hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing.

Wiggins, 123 S.Ct at2538.

Wiggins is not new law nor is it a new concept. Rather, *Wiggins* instructs this Court to look at the prevailing norms at the time of the trial to establish whether counsel was ineffective. In 1998, at the time this case was tried, the prevailing norms for trying a

capital case would have been reflected in the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989). While Wiggins did not change the law, it did mark a refinement in current law. First, strategic decisions could not be made without fully investigating the case. That investigation included both guilt phase and penalty phase evidence. Second, the ABA Guidelines were now the constitutionally mandated minimum guidelines for effective counsel. Further, Guideline 11.5.1 admonishes the attorney to file appropriate motions upon completion of the investigation.

It is clear that the state committed acts of prosecutorial misconduct when presenting the case to the jury. Prior to trial, the defense for Mr. Lamarca was successful in preventing the introduction of pictures of the home on Ideal Lane showing several doors broken at the hinges. These photographs were to be used by the state to show that Mr. Lamarca committed a burglary of his father's home by kicking or forcing open the front and bedroom doors. (*See* TR. 747-747; State's Exh. 21) In actuality, as was shown by the evidence, these doors were forced open by the police in conducting their warrantless search and seizure. However, contrary to the court's order on Mr. Lamarca's motion in limine, the state introduced these pictures to the defense.

ARGUMENT III

MR. LAMARCA WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND ADVISORY PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL FAILED TO EFFECTIVELY CROSS EXAMINE TONYA LAMARCA FLYNN. COUNSEL'S FAILURE SEVERELY PREJUDICED MR. LAMARCA.

Tonya Lamarca Flynn was listed by the state as a witness against Mr. Lamarca. She reported to law enforcement that she was raped by Mr. Lamarca. Later investigation by law enforcement revealed no evidence of sexual battery and, as a result, the state nolle prossed the sexual battery charges. During the course of the investigation, Tonya Flynn made several other statements to law enforcement. Tonya Lamarca Flynn admitted to making false statements and she also denied drinking with Steve Slack on the night of the alleged sexual battery. Further on the 911 tape entered into evidence, her mannerism and demeanor do not indicate someone who was the victim of a sexual battery.

Counsel failed to effectively cross examine Tonya about the events in question. Tonya Flynn made several inconsistent statements to law enforcement and other persons. Tonya Flynn made a written statement and testified at deposition that Mr. Lamarca kicked in the door of the Pasco home. (Written statement of Tonya Flynn;Deposition Tr. 65-66) Officers Kennedy and Ferguson stated in their supplemental reports that the front door was intact and closed. (Supplemental police reports.) Tonya Flynn testified in deposition that Kevin Flynn and Mr. Lamarca did not have any "problems" in the past. (Deposition Tr. 85;102-03) However, Tonya Flynn told PCSO Deputy Herrick that her and her father had problems in the past. (Deposition Tr. 5; 7) Tonya Flynn told Stacy Morrison that Mr. Lamarca ejaculated on the bed sheets during the sexual battery. (Deposition Tr. 21) Tonya Flynn told Molly Jerman, who was conducting the S.A.V.E.

examination that Mr. Lamarca did not ejaculate during the sexual battery. (S.A.V.E. exam report) Sue Livingston of the FDLE testified that Mr. Lamarca is excluded from all sources of semen and that no semen is on the bed sheets. (FDLE Report; Deposition Tr. 18; 9-10) Steve Slack testified during deposition that Tonya Flynn never told him that Mr. Lamarca raped her. (Deposition Tr. 13) Tonya Flynn told Stacy Morrison that she told Steve Slack that Mr. Lamarca raped her. (Deposition of Stacy Morrison Tr. 24-25) Steve Slack testified during deposition that he and Tonya Flynn went straight from Dino and Jan's bar to the another bar called the Regal Beagle. (Deposition of Steve Slack Tr. 13-16) Tonya Flynn testified that her and Steve Slack went from Dino and Jan's bar to Mr. Lamarca's trailer to look for her husband Kevin Flynn because she was worried about him before proceeding to the Regal Beagle. (Deposition testimony of Tonya Flynn Tr. 81-82) Tonya Flynn testified at deposition that she never went to Mr. Lamarca's trailer where Kevin Flynn's body was found after leaving the Regal Beagle. (Deposition of Tonya Flynn Tr. 85) PCSO Deputy Herrick testified at deposition that Tonya Flynn appeared at Mr. Lamarca's trailer were Kevin Flynn's body was found. (Deposition of Deputy Herrick Tr. 9-10) Tonya Flynn testified at deposition that her mother told her that Kevin Flynn was dead. (Deposition of Tonya Flynn Tr. 94) PCSO Deputy Herrick testified that he told her at the scene that Kevin Flynn was dead. (Deposition of Deputy Harrick Tr. 9-10)

Further, a critical witness to the State was James Michael Hughes. A statement of

James Hughes was presented as evidence against Mr. Lamarca at trial. Hughes testified as follows:

> Q. [SAO Crane] And in that conversation that you had–you had with him, did he relate his intentions with regard to his son-in-law or his feelings about his son-in-law at that time?
> A. [Hughes] Yes, sir.
> Q. Tell us what he told you specifically as it relates to his son-in-law and what he planned to do with regard to his son-in-law.
> A. He told me he was gonna kill his son-in-law.
> Q. Did he tell you why?
> A. He said because he had raped his daughter.
> Q. And what was your response to that?
> A. I told them that they were married, so why would you want to do something like that. And he says, I don't care, I'm gonna kill him.

(TR. 872-73)

This statement was used by the Florida Supreme Court in discussing the case against Mr. Lamarca: "James Hughes testified that prior to the murder appellant told him he was going to kill the victim. Hughes asked why and appellant replied, "I'm going to kill him". Lamarca v. State, 785 So.2d 1209, 1211 (Fla. 2001). Surprisingly, the Florida Supreme Court did not notice the inconsistency this statement had with the State's theory of the case as stated later in the Court's opinion:

> Thus, appellant's incestuous desire for his daughter and the victim's demand that appellant stay away are relevant to prove appellant's motive to kill his son-in-law. The motive contradicts the defense strategy of attempting to prove that Tonya killed her husband and tends to prove appellant's premeditation. Id at 1213.

This alleged statement to Hughes is critical in two respects. First, no where does Tonya

Flynn ever testify that Kevin Flynn raped her, making the statement false and discrediting both Hughes and Flynn. Her Grand Jury testimony would therefore be relevant if she testified that Kevin Flynn raped her or did not rape her. Second, the Hughes statement is relevant, contrary to the Florida Supreme Court's analysis, to supply a motive to Tonya Flynn to kill her husband. If the statement of Hughes is correct, then Tonya was raped by Kevin Flynn and she wanted revenge.

Counsel never questioned Tonya Flynn about this statement which does not appear in her testimony. Had counsel explored this comment made by Hughes on cross examination, two scenarios could have developed. The statement to Hughes would have been discovered as false, discrediting Hughes entire testimony. Alternatively, the statement, if true, would have provided Tonya Flynn's motive to kill Kevin Flynn.

Sue Livingston testified at the evidentiary hearing that she is a Chief Law Enforcement Officer with FDLE. Ms. Livingston was stipulated as an expert in the field of serology and DNA analysis. Ms. Livingston testified that she conducted the DNA analysis in the Lamarca case under the standard operating procedures. Exhibit 2, a copy of Ms. Livingston's report and Exhibit 3, a copy of the FDLE submission report of blood and saliva were introduced into the record. According to the results of Ms. Livingston's testing, the DNA semen on Mrs. Tonya Flynn's panties, excluded Mr. Lamarca as the donor. In addition, Ms. Livingston testified that it was reported that the suspect had ejaculated in on the bedsheets and therefore she looked for semen on the bed sheet. She

conducted a visual exam on the bed sheet followed by a test for stains. The results of her findings indicate that semen was not present on the sheets in which Mrs. Flynn indicated were on the bed when Mr. Lamarca raped and then ejaculated on the sheet. Ms. Livingston further testified that there were no hairs found and therefore DNA was limited to the semen found in Mrs. Flynn's panties. Ms. Livingston also did PCR testing, which is the best test for other items like saliva.

Ms. Livingston did presumptive test on 2 saliva swabs from Tonya Flynn that were retrieved from her face and chest. The presumptive test indicated that there was the presence of saliva on Mrs. Flynn's face. Ms. Livingston then conducted a PCR test. The result of the face swab shows that there were 6 markers consistent with Tonya Flynn only and not from anyone else. The second swab from Mrs. Flynn's breast also showed the presence of saliva under the presumptive test. Again, Mrs. Livingston conducted a PCR test which showed that this profile indicated that there was more than one donor in that mix. The conclusion being that Mr. Lamarca and Tonya were possible donors and Kevin and Jasmine were excluded as donors. This evidence was clearly inconsistant with the testimony of Tonya Flynn that Mr. Lamarca had smeared his tongue all over the breast head and chest of Tonya Flynn.

> Q. [State] Okay. What did he do to you physically?
> A. [Tonya Flynn] He had me get on my hands and knees and then proceeded to have intercourse with me in that fashion. I kept trying to tell him that I needed to get home to my daughter, that he had to let me go, that people were going to start wondering where I was. And he kept telling me just a little bit longer,

> when I'm done I'm gonna kill myself, you got to let me do what I need to do before I die. And it continued.

(TR. 754-755).

Her statement to the police was more detailed on this point:

"….he told me to get into the bed….so I did….and the whole time he's standing in front of the door…so I got into the bed…and he started out by putting his mouth between my legs….He did try to go through the rectal area, and I bucked and [unreadable], and twisted until he quit, and I begged him please it hurts do do that please it hurts, so he didn't….he continued with where he was….When he got ready to ejaculate, twice he grabbed a hold of himself and squeezed I guess to make him not do it, then the last time I kept telling him I have to get to my daughter, I can't stay, I've gotta go, aren't you done yet, please I have to leave, and he said a few more minutes, a few more minutes, a few more minutes. He finally got off of me and he ejaculated into a white bed sheet that was in the corner of the bed."

(Statement of Tonya Lamarca Flynn, 12-7-95, Pinellas County Sheriff's Office; Defense Composite Exhibit 1 [records relied upon by Dr. Caddy])

Defense Counsel Eide testified that he knew that there was no physical evidence of rape. There was no semen collected and the saliva on Mrs. Flynn's chest, and not breast, was not positively identified but had some characteristics of Anthony. There also was some bruising on her neck but not consistant with Tonya Flynn's testimony. Further, another bruise which she attributed to Mr. Lamarca was yellow and thus a healing bruise, too old to come from any incident complained of by her. Mr. Eide testified that Mrs. Flynn's testimony was that he ejaculated on the sheet but there was nothing found to match Mr. Lamarca. He remembers the swab from her chest area and her statement that he licked his hands and placed them on her body various parts. He knew that only one slide pointed to Anthony possibly and this is the reason the rape had been dropped by

Pasco County. Mr. Eide stated that if he discredited Tonya regarding the rape at trial, he could have discredited her regarding other statements. Defense counsel Eide further testified that Mr. James Michael Hughes motives were inconsistent with the state theory that Mr. Lamarca had killed Kevin to facilitate a sexual assault of Tonya Flynn. Mr. Eide admits that he never questioned Tonya about Hughes statement that the motive for the killing was because Kevin had raped his daughter.

The testimony of Ms. Livingston was never presented to the jury. Ms. Livingston testified that had she received a subpoena she would have responded. Counsel were ineffective in not cross-examining Mrs. Flynn as to the findings by Ms. Livingston's report. Counsel was also ineffective in failing to present to testimony of Ms. Livingston to the jury. Ms. Livingston's testimony is scientific evidence that would have cast doubts in the mind of the juror regarding the testimony of Tonya Flynn. Ms. Flynn's testimony was crucial to the state's case and provided the motive for the commission of this crime. The fact that counsel had evidence that Mrs. Flynn had the presence of semen in her panties, which were collected after the crime, would show that Mr. Lamarca was not the contributing donor for that semen and could not have perpetrated a rape upon Mrs. Flynn. Further, her testimony regarding Mr. Lamarca ejaculating on the sheets would have further casts doubts in the mind of the jury regarding the alleged rape. The probability that Mr. Lamarca's genetic profile could have contributed to saliva on Mrs. Flynn's breast is not indicative of rape when she herself was not excluded as the possible

donor. Further, the stronger evidence is the semen and counsel could state no particularized trial strategy in not informing the jury that there was not scientific evidence that would indicate that Mr. Lamarca raped Tonya. In fact, the evidence shows otherwise. Further information being provide by Mr. Hughes was never verified with Tonya Flynn. If Tonya Flynn would have been asked whether Kevin had raped her and she reported this information to her father while he was in prison and she denied this act occurred, this information and testimony would have discredited the testimony of James Michael Hughes as a witness in the guilt phase of the proceedings.

Steve Slack testified at the evidentiary hearing that Tonya Flynn never told him that her father raped her. He further testified that Tonya Flynn was not concerned about her husband's whereabouts on the night of the murder. Mr. Slack testified that he and Tonya went from Dino and Jan's bar to another bar called the Reagle Beagle where they continued to have drinks. These statements by Mr. Slack would have refuted the testimony of Tonya Flynn as to her activities on that evening. Mrs. Flynn was making a conscious effort to conceal her actions on that evening and counsel never presented contradicting information to the jury. Counsel had this information prior to trial and were ineffective in failing to impeach the veracity of Tonya Flynn. Counsel knew the importance of impeaching Tonya's testimony at this critical juncture in the proceedings. By failing to effectively cross-examine Mrs. Flynn as to the inconsistencies in her statements and to present contrary evidence otherwise, Mr. Lamarca did not receive the

effective assistance of counsel as guaranteed and the resulting prejudice resulted in his conviction and ultimate sentence of death.

ARGUMENT IV

MR. LAMARCA WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL FAILED TO MOVE FOR A MOTION TO CONTINUE THE TRIAL WHEN THEY KNEW THEY WERE UNPREPARED TO PROCEED TO TRIAL. COUNSEL'S FAILURE TO MOVE FOR A MOTION TO CONTINUE SEVERELY PREJUDICED MR. LAMARCA.

During the investigation of Mr. Lamarca's case, the State listed scores of witnesses pursuant to discovery. Defense counsel deposed many of these witness. In addition, counsel for Mr. Lamarca listed and deposed many of their own witness thought to be relevant to the case. Counsel had requested a motion to continue which was granted on September 26, 1997. One week before trial, counsel indicated in their notes that they were not ready for trial. Three days before trial, counsel again indicates in their notes that they were not ready for trial. Counsel conceded in their notes that when they went to trial, they would not be ready and would be proceeding only having prepared portions of the discovery. Counsel never filed a formal motion to continue based on the large amount of discovery and their not being prepared for trial. Counsel was ineffective for not asking the Court for a continuance. Mr. Lamarca was prejudiced because counsel was unprepared for trial and unable to present Mr. Lamarca's case. Further, Counsel for Mr. Lamarca had not even effectively began to investigate mitigation evidence until after Mr.

Lamarca was convicted.

ARGUMENT V

MR. LAMARCA WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL FAILED TO EFFECTIVELY CROSS DARRIN BROWN. COUNSEL'S FAILURE SEVERELY PREJUDICED MR. LAMARCA.

Darrin Brown was called by the State concerning Mr. Lamarca's arrival in the state of Washington and several statements made by the defendant. Counsel for Mr. Lamarca did not cross examine Mr. Brown concerning any matters. During deposition, Mr. Brown admitted that he felt threatened by the state to testify against Mr. Lamarca. The state offered the evidence of Mr. Lamarca's appearance in another state to infer evidence of guilt based on flight. Counsel failed to effectively cross examine Mr. Brown concerning Mr. Lamarca's travel arrangements.

Further, counsel failed to effectively cross examine Mr. Brown about the statements made by Mr. Lamarca and the his feeling of being threatened by the state to testify. The failure of counsel to cross examine Mr. Brown at all prejudiced Mr. Lamarca by failing to rebut the evidence of flight offered by the state and the failure to present to the jury that Mr. Brown's statements were coerced.

Ron Eide testified at the evidentiary hearing that he did not cross-examine Darren Brown at the guilt phase of the proceeding. Mr Eide indicated that he took his deposition and Mr. Brown equivocated on statements to law enforcement regarding Mr. Lamarca

stating that he had killed Kevin because he's an asshole. In his deposition Mr. Brown further indicated that he felt threatened by the state to testify and that he was uncomfortable that Anthony was going to be staying with his mom right out of prison. Mr. Eide testified that Mr. Brown purported to have a poor memory in his deposition and because of this he was able to keep his statements out. Mr. Eide indicates that Mr. Brown testimony changed from what he had initially told law enforcement. Mr. Eide further testified that he did not cross-examine Mr. Brown regarding feeling threatened to testify. Mr. Brown's testimony was limited to Anthony coming up there suddenly. Therefore, there was no benefit to asking Mr. Brown anything. Mr. Eide indicates that he does not know what would be gained from cross-examination of Mr. Brown on those issues.

Ron Eide further testified that he was aware that Mr. Lamarca was arrested in Washington and living in the house with Darren Brown. Mr. Eide testified that he had the opportunity to review the report of Sgt. D. Anderson, which he received in discovery and took his deposition (State's Exhibit 3 and 4 were introduced into the record). Mr. Eide testified that he was aware of the statements that Darren Brown attributed to Lamarca. He further testified that he asked Investigator Braun to follow up on this information. Mr. Eide testified that Mr. Brown's deposition did not help Mr. Lamarca. Mr. Brown only indicates that he is unaware that Mr. Lamarca was going to show up in Washington. Mr. Eide testified that flight was not a big deal when taken in the context of Mr.

Lamarca's testimony and that the testimony of Lori Galloway would not have assisted Mr. Lamarca in rebutting the testimony of Mr. Brown.

Judge Crane testified at the evidentiary hearing regarding Darrin Brown. He stated that Mr. Brown, according to his statements in the deposition, was threatened with false prosecution. Further, Judge Crane testified that he had no reason to believe that Darrin Brown was not truthful in his statements.

ARGUMENT VIa

MR. LAMARCA WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL FAILED TO OFFER THE TESTIMONY OF LORI LAMARCA GALLOWAY TO REBUT THE EVIDENCE OF GUILT OFFERED BY THE STATE IN THE FORM OF HIS FLEEING THE STATE OF FLORIDA. COUNSEL'S FAILURE TO OFFER THIS EVIDENCE SEVERELY PREJUDICED MR. LAMARCA.

The state offered evidence of Mr. Lamarca's "flight" to Washington through the testimony of Darrin Brown and Dan Anderson as evidence of his guilt. The state presented this evidence to show that Mr. Lamarca "suddenly" appeared in Springdale, Washington at the home of Lori Galloway after the death of Kevin Flynn. Mr. Lamarca did not flee to Washington but made prior arrangements to go to Washington after his release from prison. Lori Galloway knew of Mr. Lamarca's prior plan to visit in Washington and invited him to come stay with her. Ms. Galloway was actually expecting Mr. Lamarca to arrive the day before and rode to Spokane, Washington the day before

Mr. Lamarca's arrival. After Mr. Lamarca's arrest, Lori Galloway was contacted by the state. She advised the state that Mr. Lamarca had made prior arrangements to visit with her. The state attempted to have her make a statement to the contrary. She refused. Counsel for Mr. Lamarca failed to depose or present Lori Galloway. The state, possessing the statement of Lori Galloway, presented testimony to the contrary knowing such evidence was false. The State also possessed the statement of Tina Lamarca. Tina Lamarca knew of Mr. Lamarca's plan to leave Florida for the State of Washington.

Lori Galloway-Lamarca testified at the evidentiary hearing, while Mr. Martin sat in the courtroom that she spoke with Mr. Martin from the State Attorney's Office and that he was less than candid as he indicated that she was lying to him regarding Mr. Lamarca's prearranged plans to travel to Washington. Mrs. Lamarca further testified in the presence of Mr. Martin that he told her that she was harboring a fugitive and that the marital privilege would not protect her from communications with Mr. Lamarca because they had been married after the crime and events in question occurred. Mrs. Lamarca further testified in the presence of Mr. Martin that Mr. Martin told her that there was DNA proof showing that Mr. Lamarca had raped his daughter Tonya.

Mrs. Lamarca testified that she had an ongoing relationship with Mr. Lamarca, whom she met while he was incarcerated, and that prior to his release they had written letters and discussed his move to Washington. In preparation for Mr. Lamarca's relocation, Mrs. Lamarca moved to Washington to establish a home for when Mr.

Lamarca would be released. They had both discussed this relocation area. Mrs. Lamarca further testified that upon Mr. Lamarca's release, they spoke and he indicated that he wanted to spend some time with his family before coming to Washington. She also testified that they had discussed the specifics of Mr. Lamarca's travel and that she knew that he would be traveling by the Greyhound Bus line and that she knew the day and time of his arrival. Mrs. Lamarca testified that Mr. Lamarca did not try to conceal his identity upon arrival to Washington. He introduced himself as Anthony Lamarca to everyone. Mrs. Lamarca did indicate that she was aware of Mr. Lamarca using a false name on a job application but that he had done this only because he had found it difficult to obtain a job because of his criminal record. Mrs. Lamarca testified that while in Washington, Mr. Lamarca attempted to find work daily.

Glen Martin, Assistant State Attorney for the 6th Judicial Circuit was present and participated throughout these proceedings and testified that he spoke with Lori Lamarca and was advised that there were prearranged plans for Mr. Lamarca to travel to Washington. Mr. Martin recalls asking Lori if Darren was a liar and discussing marital privilege because she married Mr. Lamarca while he was in custody in Washington. Mr. Martin testified that he did not threaten Lori to change her testimony, he does not recall discussing harboring a fugitive with Lori and he does not recall talking with Lori regarding DNA testimony proving that Mr. Lamarca raped Tonya.

Mr. Eide's testimony that he did not know why Lori Galloway's testimony would

have been beneficial to Mr. Lamarca's case is without question showing of ineffective assistance of counsel. The state argued zealously that upon the murder and rape of Kevin Flynn and Tonya that Mr. Lamarca fled the state. Counsel had within their knowledge and possession testimony that they could have presented to counter this argument by the State. Further the State was aware of the testimony of Lori Galloway and failed to produce this information through discovery. Also importantly, Mr. Martin himself spoke with Mrs. Galloway and knew the testimony that she could provide and yet argued that Mr. Lamarca fled the state of Florida to avoid prosecution. By not presenting the testimony of Lori Galloway to contest statements made by Mr. Brown and to argue contrary to the state's contention denied Mr. Lamarca of the effective assistance of counsel and further establishes the lack of preparedness of counsel in presenting Mr. Lamarca's case to the jury.

Counsel was ineffective in not offering the testimony of Lori Galloway. This prejudiced Mr. Lamarca by allowing the state to offer evidence of Mr. Lamarca's guilt through inference by flight.

ARGUMENT VIb

THE STATE OFFERED TESTIMONY IN VIOLATION OF *BRADY* AND *GIGLIO* AT THE GUILT PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS CONCERNING MR. LAMARCA'S TRAVEL PLANS.

While the prosecution's constitutional duty of disclosure no longer measured by

moral culpability or willfulness, *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable, *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). It is clear that this case falls squarely within the parameters of *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). By not calling Lori Galloway and by not offering the statement of Tina Lamarca, the state was allowed to offer testimony of law enforcement officers and Darrin Brown to show that Mr. Lamarca had fled the State of Florida after he allegedly shot and killed Kevin Flynn. This was patently false and known to the state.

The evidence presented against Mr. Lamarca was material to his conviction. *Giglio* error is a species of *Brady* error that occurs when "the undisclosed evidence demonstrates that the prosecution's case included perjured testimony and that the prosecution knew, or should have known, of the perjury." *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). "If false testimony surfaces during a trial and the government has knowledge of it, ··· the government has a duty to step forward and disclose." *Brown v. Wainwright*, 785 F.2d 1457, 1464 (11th Cir.1986). "In order to prevail on a *Giglio* claim, a petitioner must establish that the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony, and that the falsehood was material." *Tompkins v. Moore*, 193 F.3d 1327, 1339 (11th Cir.1999).

The origins of the *Giglio* doctrine lie in the Supreme Court's decision in *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), which held that a prosecutor's failure to correct false testimony by the principal state witness that he had received no promise of consideration in return for his testimony violated the defendant's Fourteenth Amendment due process rights and required a reversal of the judgment of conviction. The Court explained that "it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." Id. at 269, 79 S.Ct. 1173 (citing *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935))."The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.* This principle, the Court observed, "does not cease to apply merely because the false testimony goes only to the credibility of the witness," since "[t]he 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." *Id.* Reversal was required because "the false testimony used by the State in securing the conviction may have had an effect on the outcome of the trial." Id. at 272, 79 S.Ct. 1173.

Subsequently, in *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the Supreme Court held that the government's failure to correct false testimony that its key witness (the defendant's coconspirator) had received no promise of

nonprosecution in exchange for his testimony, as well as the prosecutor's false statement to this effect in closing argument, required that the defendant be granted a new trial. The Court explained that "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." *Id. at* 153, 92 S.Ct. 763 (citation and internal quotation marks omitted).

The *Giglio* Court made clear, however, that such errors do not require automatic reversal, and articulated a "materiality" standard to guide the determination of whether a new trial is warranted:

> We do not ··· automatically require a new trial whenever a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict. A finding of materiality of the evidence is required under Brady. A new trial is required if "the false testimony could ··· in any reasonable likelihood have affected the judgment of the jury.

Id. (citations and internal quotation marks omitted). Because "the Government's case depended almost entirely on [the falsely testifying witness's] testimony," the Court reasoned, his "credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it." *Id. at* 154-55, 92 S.Ct. 763. Accordingly, the Court reversed the judgment of conviction.

Since its decisions in *Napue* and *Giglio*, the Supreme Court "has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally

unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976) (footnote omitted) (emphasis added); *see also Kyles v. Whitley*, 514 U.S. 419, 433 & n. 7, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); *United States v. Bagley*, 473 U.S. 667, 677, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *accord Brown*, 785 F.2d at 1465-66.FN3

The "any reasonable likelihood" standard differs from the materiality standard applicable to other types of *Brady* violations because of the nature of the error. As the Supreme Court has explained, "the Court has applied a strict standard of materiality [to Giglio violations], not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process." *Agurs*, 427 U.S. at 104, 96 S.Ct. 2392; accord *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir.1995).

In its order denying relief, the circuit stated the standard which it was following:

To establish that the State violated the precepts of Giglio v. United States, 405 U.S. 150 (1972), the defendant must show that the State knowingly permitted the presentation of false testimony, which testimony must have been material to the case. Ventura v. State, 794 So.2d 553, 562 (Fla. 2001)(citing Robinson v. State, 707 So.2d 688, 693 (Fla. 1988)). In determining whether testimony is material to the case, the court must determine "***if there is a reasonable probability*** that the false evidence may have affected the judgement of the jury," thereby undermining the verdict. Ventura, 794 So. 2d at 563 (quoting Routly v. State, 590 So.2d 397, 400 (Fla. 1991)).

(Order at 19)(emphasis added).

This is an incorrect standard in determining materiality under Giglio. The correct standard, as established in *Giglio* is "Where the government uses perjured testimony in obtaining a conviction, and knew or should have known of the perjury, the defendant's due process right to a fair trial is violated ***'if there is any reasonable likelihood*** that the false testimony could have affected the judgment of the jury.' " Nowhere does the lower court cite any legal authority using the correct standard nor does it recognize the differing standards of materiality under Brady and Giglio. A "reasonable probability" standard differs from a "reasonable likelihood" standard. *See, e.g., Alzate*, 47 F.3d at 1110 n. 7 (noting that "the district court applied the 'reasonable probability of a different result' standard," which "is substantially more difficult for a defendant to meet than the 'could have affected' standard we apply"); Stephens v. Hall, 407 F.3d 1195, 1206 (11th Cir.2005) ("This reasonable likelihood standard imposes a 'considerably less onerous' burden on [the petitioner] than the Brady standard.").

Further, the lower court does not attempt to analyze materiality under the correct standard by weighing the suppressed and non-suppressed evidence in the case as was done recently in *Ventura v. State*, — F.3d — (11th Cir. 2005). The lower court utterly failed to identify and apply the correct legal standard.

The trial court's only analysis regarding the issue of flight was a brief outline of facts that occurred in Florida which the trial court concedes is not the incident in question. (Order at 20). The trial court states that the defendant was seen walking shirtless along a

road in Pasco County after the murder. (Order at 20). This is irrelevant to the issue of flight because the murder occurred in Pinellas County. The facts concerning the police encounter are also irrelevant because of the location far from the crime scene. Further, Mr. Lamarca had been recently released from prison and the hostile manner which Officer Kennedy approached Mr. Lamarca, with his hand on his service gun and without any communication as to why he was going to be detained, likely caused Mr. Lamarca temporary emotional trauma.1

Further, the trial court dismissed the impact of the flight issue as it was presented during the State's case. What the trial court neglects, however, is the State's repeated use of Mr. Lamarca's trip to Washington during argument for various motions and to the jury. (R.****)

Additionally, in denying the claim, the lower court states in its order that the defense failed to demonstrate a *Brady* or a *Giglio* violation because the defense knew of the existence of Lori Lamarca. (Order at 19-20).

In analyzing a *Brady* claim, the United States Supreme Court established the three prongs necessary for a *Brady* claim:

> There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

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1 Mr. Lamarca's last encounter with law enforcement was his confinement at Belle Glades Correctional Institution where he was brutalized by guards and inmates. This created a disorder of PTSD which Dr. Caddy testified about during the evidentiary hearing.

Id. at 282.

As recognized by the Florida Supreme Court, the "due diligence" requirement was not part of the Supreme Court's analysis of a *Brady* claim. This omission by the Court was by no means accidental. Rather, the defendant's knowledge may have a bearing on whether evidence was available but the defendant's knowledge is not always dispositive. For example, in *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir. 1995), the Tenth Circuit reviewed a petitioner's excluded evidence claim under *Brady*:

> In this case, the State readily admits that it did not disclose the Dean/Hicks information to the defense. However, the State maintains that *Brady* only requires the prosecution to disclose information which is otherwise unknown to the defendant. Because Mr. Banks' trial counsel knew or should have known that Dean and Hicks previously had been arrested for the crime, the State maintains that the prosecution had no obligation to turn over the Dean/Hicks information. We disagree. Whether the defense knows or should know about evidence in the possession of the prosecution certainly will bear on whether there has been a Brady violation. ***Obviously, if the defense already has a particular piece of evidence, the prosecution's disclosure of that evidence would, in many cases, be cumulative and the withheld evidence would not be material.*** See Mustread v. Gilmore, 966 F.2d 1148, 1152 (7th Cir.1992); Hughes v. Hopper, 629 F.2d 1036, 1040 (5th Cir.1980), cert. denied, 450 U.S. 933, 101 S.Ct. 1396, 67 L.Ed.2d 367 (1981). ***However, the prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge***.

Banks, at 1516-17 (footnotes omitted)(emphasis added).

Thus, under the Tenth's Circuit's analysis of the Supreme Court's Brady line of cases, the defendant's knowledge is not an independent prong but part of the "materiality" prong. In a similar case, the Sixth Circuit in *Schledwitz v. U.S.*, 169 F.3d 1003 (6th Cir. 1999) discussed the "due diligence" issue:

> The government's contention that Schledwitz "knows what he told [Beliles]" also misses the mark. According to Beliles's affidavit, he "remember[s] being questioned ... about a certain trust agreement, and in fact, knew that Mr. Schledwitz consistently represented the bank stock as referred to in the agreement as his own." J.A. at 804. The government interprets this statement to mean that Schledwitz directly told Beliles that he was responsible for the stock. Beliles could just as well have meant that he overheard Schledwitz speaking to others regarding the stock transaction, or was aware of Schledwitz's representations through some other second-hand way. Moreover, even assuming, as the government does, that Schledwitz did indeed tell Beliles that the stock was his own, the government forgets that due diligence is still grounded in due process. See, e.g., Evans v. Kropp, 254 F.Supp. 218, 222 (E.D.Mich.1966) (McCree, J.) ("In gauging the nondisclosure in terms of due process, the focus must be on the essential fairness of the procedure and not on the astuteness of either counsel") (quoting Barbee v. Warden, 331 F.2d 842, 846 (4th Cir.1964)). Whereas Horne's interview with Beliles was presumably memorialized and filed, the supposed conversations between Beliles and Schledwitz, upon which the interview was based, would have occurred anywhere from seven to fourteen years prior to Schledwitz's trial in 1992. And, of course, Schledwitz was certainly busy in the interim, being a co-defendant in two of perhaps the most highly-publicized trials in the State of Tennessee since Clarence Darrow and William Jennings Bryan met in 1925 in the Scopes Monkey Trial. We do not believe that due process stretches so far as to hold a defendant accountable for every conversation he has ever had in his lifetime regardless of the surrounding and intervening circumstances.

Id. at 1013.

In the instant case, even though the defense knew of Lori Lamarca, the State presented information it knew was false. Had counsel been effective in presenting Ms. Lamarca as a witness, it is clear that the State would not have been able to argue flight. As the court's have recognized, evidence of flight is, in itself, irrelevant unless a nexus is made. By fabricating this nexus, the State created a powerful piece of evidence. The evidentiary value was not the fact that Mr. Lamarca went to Washington. The value and

relevance of his trip to Washington was that it allowed the State to argue that Mr. Lamarca admitted the crime. Flight as evidence of admission is as every bit as powerful as a verbal confession.

ARGUMENT VIIa

MR. LAMARCA WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL FAILED TO OFFER THE TESTIMONY OF JAMES ZACCANINO TO REBUT THE TESTIMONY OF MICHAEL HUGHES. COUNSEL'S FAILURE SEVERELY PREJUDICED MR. LAMARCA.

James Michael Hughes was called as a witness by the state concerning statements allegedly made by Mr. Lamarca. while in prison. Hughes testified as follows:

> Q. [SAO Crane] And in that conversation that you had–you had with him, did he relate his intentions with regard to his son-in-law or his feelings about his son-in-law at that time?
> A. [Hughes] Yes, sir.
> Q. Tell us what he told you specifically as it relates to his son-in-law and what he planned to do with regard to his son-in-law.
> A. He told me he was gonna kill his son-in-law.
> Q. Did he tell you why?
> A. He said because he had raped his daughter.
> Q. And what was your response to that?
> A. I told them that they were married, so why would you want to do something like that. And he says, I don't care, I'm gonna kill him.

(TR. 872-73)

These statements allegedly concern Mr. Lamarca's desire to kill his son-in-law upon his release from confinement. Hughes claimed that James Zaccanino heard Mr.

Lamarca statement at the same time. James Zaccanino claims that this story concerning Mr. Lamarca's statements was fabricated. In an affidavit, Mr. Zaccanino states "I attest that Anthony Lamarca never stated in my presence 'That upon his release he was going to kill Tonya's husband'". Further Mr. Zaccanino states in his affidavit that Hughes advised him that testifying to this statement would help him at his next parole hearing. Mr. Lamarca informed his counsel of these facts and that Mr. Zaccanino would testify as to this point. Two orders by the court, upon counsel's request, were entered transporting Mr. Zaccanino to Pinellas County to testify as a witness. (Tr. 2400, 2589) James Zaccanino was in the Pinellas County jail at the time of Mr. Lamarca's trial.

Counsel never fully investigated Mr. Zaccanino nor did they call him to the stand to offer evidence to rebut the testimony of James Michael Hughes**.** Counsel was ineffective for failing to call James Zaccinino which prejudiced Mr. Lamarca by allowing the testimony of Mr. Hughes to go unchallenged.

Counsel was ineffective for not calling this witness to impeach the credibility of James Michael Hughes. Further, the statements admitted into evidence created a presumption of intent required for a first degree murder conviction, thus creating prejudice.

ARGUMENT VIIb

THE STATE OFFERED TESTIMONY IN VIOLATION OF *BRADY* AND *GIGLIO* AT THE GUILT PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH

AMENDMENTS CONCERNING MR. LAMARCA'S STATEMENTS.

As stated in Argument VIIa, Hughes testified that Anthony Lamarca intended to kill his son-in-law. Hughes claimed that James Zaccanino heard Mr. Lamarca's statement at the same time. Two detectives investigating the Lamarca case, one being Detective Tillia spoke to James Zaccanino regarding Hughes's statement. Mr. Zaccanino relayed to the detectives that this story concerning Mr. Lamarca's statements was fabricated. This information collected by law enforcement was never turned over to the defense nor did the state attempt to correct the testimony of James Michael Hughes.

During Mr. Lamarca's trial, Hughes was asked by Assistant State Attorney Crane whether he received any "deals" in exchange for his testimony:

> Q. Are there any deals – are there any deals between you and the State Attorney's Office, sir?
> A. No, sir.
> Q. Any agreements between you and the State Attorney's Office for your testimony?
> A. No, sir.
> Q. Do you have any agreed disposition of how this will affect your charges in Charlotte County?
> A. No, sir, I don't. I don't.

(Trial Tr. 879.)

James Michael Hughes did appear before the circuit court in Charlotte County while Mr. Lamarca's case was pending. On November 25, 1997, Mr. Hughes sentencing was delayed so proper consideration could be given "a request made by Mr. Hughes

which the State seriously wants to consider based on his – based on the history of this case and Mr. Hughes' history". (Statement made by ASA Kirshy).

Nearly one month later, Mr. Hughes was sentenced by the court on December 30th. This was done after he had testified against Mr. Lamarca. At the time of Mr. Hughes' sentencing, he was eligible to being sentenced as a Habitual Felony Offender, exposing him to a 10 year prison sentence. After a brief exchange between defense counsel and the court, the judge states to Hughes: "I have been advised in open court that one of your proposals was submitted to the state attorney. I assume that to mean Mr. D'Alessandro, and it was acceptable to him". Transcript of December 30th hearing, circuit court case97-629F, pg. 2).

Further in the hearing, defense counsel approaches the bench to make a request:

> Mr. Cooper: Your Honor, he has only one favor to ask, and I don't think that the State's going to object **because of his cooperation in another case**. He's worried about going to the facility up north. If the court orders the D.O.C. reception facility in Miami, that all he's asking for.
> The Court: I don't have a problem with it.
> Mr. Burns: I don't have [a] problem with it.

(Id. at 4)

After he is sentenced, his defense attorney notes, on the record, that Hughes' deal was "under guidelines" (Id. at 13**) and the court orders him to the Miami reception area instead of the Orlando reception facility.** (Id.) This is an obvious attempt to

ensure that Mr. Hughes does not meet Mr. Lamarca at the Orlando Reception facility.[2]

In establishing the several claims of misconduct contained in Mr. Lamarca's motion to vacate, the one striking piece of evidence occurred during the actual preparation for this evidentiary hearing.

On April 11, 2003 counsel for Mr. Lamarca argued two motions compelling the Office of the State Attorney to Provide Records, specifically requesting the State Attorney records contained in Charlotte County on one of the main witnesses in the case against Mr. Lamarca, James Michael Hughes. It was clear from the previously filed motion to vacate that collateral counsel was pursuing a claim of prosecutorial misconduct relating to this evidence. The State Attorney for the Sixth Circuit objected, stating that "[e]very State Attorney, including Mr. Joseph D'Alessandro for Charlotte County, is the records custodian for his or her office. Each records custodian is responsible for giving access only to his/her own records."

On April 21, 2003 the lower court entered an order holding the motion to compel in abeyance directing counsel to request the records directly from the Office of the State Attorney in Charlotte County.

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[2] Any attempt by the state to argue that Mr. Hughes was attempting to elude other individuals that he testified against would be misleading because he specifically did not want to go to the reception facility where Mr. Lamarca would be processed.

On May 2, 2003, counsel and his investigator traveled to Charlotte County, by request of the Office of the State Attorney of that county, to inspect the file on James Michael Hughes. There were no "run notes" contained in the file. Just prior to the evidentiary hearing, on May 22, 2003, the Office of the State Attorney for the Sixth Judicial Circuit provided run notes from the Charlotte County State Attorney file of James Michael Hughes. (Defense Exhibit 5) Testimony from assistant state attorney Glenn Martin and from assistant state attorney John Burns established that the run notes were deliberately taken out when counsel traveled to inspect the file. The run notes revealed that James Michael Hughes received a below guideline sentence based on his cooperation in the Lamarca case, contrary to testimony at deposition and trial.

On February 26, 1996, counsel for Mr. Lamarca filed a "Notice of Discovery" pursuant to "Fla.R.Crim.P. 3.220, Amend. XIV, U.S. Const., Art.I§9, Fla. Const., *Brady v. Maryland*, 373 U.S. 83 [(1963)] and *United States v. Agurs*, 427 U.S. 97 (1976)". Specifically, counsel requested under paragraph 12 of the demand "Pursuant to *Brady v. Maryland*, supra, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution any material or information within the State's possession or control which tends to negate the guilt or reduce the degree of guilt of the accused as to the offense charged, or affect the credibility of any person described in Fla.R.Crim.P.3.220(b)(1)(1) and section 1 of this demand."(R 17-22) Further, under paragraph 21 of this same demand, Mr. Lamarca requested the following:

> The names of any persons who have been promised anything for their statements or testimony relating to this cause, including (but not limited to) offers or promises of; money, preferred treatment, reward, immunity, leniency, favorable recommendation, or other benefits, identified as such.

On March 12, 1996, the Office of the State Attorney replied indicating that it would provide such materials. (R 32-42)

As stated before, when present counsel attempted to inspect the file, the run notes were deliberately taken out even though a specific request was made for them and the lower court ordered that the file be released. At the evidentiary hearing, Assistant State Attorney John Burns admitted that the notes were deliberately removed. Those run notes show that Mr. Hughes received a deal in exchange for his testimony in the Lamarca case.

Further, it is clear from the run notes that the State Attorney for the Sixth Judicial Circuit was aware that Hughes had pending charges and that his sentencing was delayed until after his testimony was completed. There is no other rational inference that can be drawn from the evidence produced.

Further, the testimony of Judge Crane during the evidentiary hearing bolsters Mr. Lamarca's claim. Judge Crance admits that he knew of Hughes's court proceedings in Charlotte County. (PC-R. 845). He testified that he communicated with the Charlotte County State Attorney's Office concerning his testimony in the Lamarca case. (PC-R. 845) Finally, Judge Crane testified that prior to Hughes's plea in Charlotte County, he informed the State Attorney that Hughes did cooperate in the Lamarca case. (PC-R.

846). Judge Crane and the Pinellas State Attorney's Office communicated at least five times regarding his cooperation in the Lamarca case. (Defense Exhibit 5) This Court would have go through a rather extreme exercise in believing numerous coincidences in order to validly deny this claim.

The United States Supreme Court recently issued the opinion in *Banks v. Dretke*, 124 S.Ct. 1256 (2004). In *Banks*, the Supreme Court set aside a defendant's death sentence on Brady grounds. The jury never learned that a major witness, Mr. Farr, "whose testimony was the centerpiece of Bank's prosecutions penalty phase case" had been a paid informer for the police who had been paid specifically for playing an investigatory role in the case. Further, the jury did not learn of Farr's problems with drugs. *Id*. The Brady rule covers impeachment evidence, especially if the witness is a key witness. *Id*. As such, under Banks, a conviction should be set aside if "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine the confidence of the verdict". *Id.*, quoting *Kyles v. Whitley*, 514 U.S. 419 (1995).

Here, as stated before, the testimony of James Michael Hughes was crucial to the state's case. It established premeditation and motive for the killing of Kevin Flynn. The suppressed two pieces of evidence, Mr. Zaccanino's statement and the deal received by Hughes were material in Mr. Lamarca's case under *Brady* and *Kyles*. The trial court, in its order, questions the credibility of Mr. Zaccanino and points to the fact that he may

have had difficulty hearing. (Order at 21). This is refuted by the evidence. Mr. Zaccanino did not testify that he did not hear Mr. Lamarca make a statement about killing Kevin Flynn. Rather, Mr. Zaccanino testified in great detail about the conversation he had with Hughes outlining his plan to frame Lamarca. (Order at 21). Further, the trial court discredits Mr. Zaccanino because he is a life-long friend of Mr. Lamarca and he is serving a life sentence. (Order at 21).

Under a *Kyles* materiality analysis, this was clear error. First, Mr. Zaccanino's evidentiary testimony is entirely consistent with the information given to both law enforcement and Ron Eide. Second, both Hughes and Smith were felons who testified at the trial. Their testimony was never discounted by the trial court in post-conviction proceedings. Lastly, Mr. Zaccanino is serving a life sentence. There is no benefit he can ever receive for his testimony. On the other hand, Hughes did receive a benefit for the testimony he offered.

Under *Giglio*, the United States Supreme Court "has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976) (footnote omitted) (emphasis added); *see also Kyles v. Whitley*, 514 U.S. 419, 433 & n. 7, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); *United States v. Bagley*, 473 U.S. 667, 677, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985);

accord Brown, 785 F.2d at 1465-66.FN3. A *Giglio* materiality standard is lower than the *Brady* standard. Under *Giglio*, the State bears the burden of showing that the suppressed evidence was not material.

In its order, the trial court states that Hughes's did not receive a benefit but concedes that he did receive a mitigated departure sentence based on his "substantial cooperation with law enforcement". (Order at 22). This statement is internally at odds with itself and is entirely inconsistent with a *Giglio* analysis.

In determining whether undisclosed evidence is material, all suppressed evidence is considered collectively, rather than item-by-item, to determine if the "reasonable probability" test is met. *Kyles*, 514 U.S. at 436, 115 S.Ct. 1555; *Frost*, 125 F.3d at 383. Thus, in determining the materiality of this claim, all suppressed evidence must be considered. The trial court in conducting a materiality under Brady and Giglio, fails to consider all evidence to ascertain "a reasonable probability that the trier of fact would have reached a different outcome had the evidence been disclosed and used at trial".

Finally, the importance of Hughes's credibility cannot be underscored because this Court, in it direct appeal opinion, relies on this statement, as well as the statement of Smith, in finding the trial court's erroneous exclusion of evidence harmless.

ARGUMENT VIII

MR. LAMARCA WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL FAILED TO OFFER THE EVIDENCE OF STEVE SLACK TO REBUT THE TESTIMONY OF TONYA LAMARCA FLYNN. COUNSEL'S FAILURE SEVERELY PREJUDICED MR. LAMARCA.

Steve Slack was at the same bar with Mr. Lamarca and Tonya Lamarca Flynn on the night of the murder and sexual battery. Pursuant to discovery, his deposition was taken. During his deposition, he testified about Tonya Lamarca's state of mind during the night in question. Slack testified in deposition he saw Tonya Lamarca Flynn at the bar around 11:00pm or 12:00 am where they consumed alcoholic beverages. Slack further testified that Tonya Lamarca Flynn never mentioned that she was "raped" by Mr. Lamarca. He testifies that she told her that Tina Lamarca was raped. Slack then testifies that the two go to another bar that night and drink. Steve Slack previously stated that they went straight from one bar to another. Tonya Flynn testified that her and Steve Slack went looking for Kevin Flynn first and then went to another bar. Counsel for Mr. Lamarca never call Steve Slack to testify to rebut the testimony of Tonya Lamarca Flynn. Steve Slack testified at the evidentiary hearing that Tonya Flynn never told him that her father raped her. He further testified that Tonya Flynn was not concerned about her husband's whereabouts on the night of the murder. Mr. Slack testified that he and Tonya went from Dino and Jan's bar to another bar called the Reagle Beagle where they

continued to have drinks. These statements by Mr. Slack would have refuted the testimony of Tonya Flynn as to her activities on that evening. Mrs. Flynn was making a conscious effort to conceal her actions on that evening and counsel never presented contradicting information to the jury. Counsel had this information prior to trial and were ineffective in failing to impeach the veracity of Tonya Flynn.

ARGUMENT IX

THE STATE OFFERED TESTIMONY IN VIOLATION OF *BRADY* AND *GIGLIO* AT THE GUILT PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS WHEN JEREMY SMITH TESTIFIED ABOUT RECEIVING CONSIDERATION FROM THE STATE CONCERNING PENDING CRIMINAL CHARGES. THE EVIDENCE WAS MATERIAL AND WOULD HAVE EFFECTED THE OUTCOME OF THE TRIAL.

Jeremy Smith was called by the state to testify against Mr. Lamarca concerning statements he allegedly made implicating himself in the murder of Kevin Flynn. It is alleged that Mr. Lamarca went to the residence of Jeremy Smith shortly after the death of Kevin Flynn and confessed to the murder. Jeremy Smith then testified that he loaned Anthony Lamarca clothes because Mr. Lamarca was wet and without a shirt. Evidence introduced at the evidentiary hearing in the form of police reports show that this would have been impossible. The police reports of Mr. Lamarca and those regarding Jeremy Smith indicate that these two individuals are not close in size, weight and body structure.

Mr. Lamarca was much larger than Jeremy Smith and could not fit into his clothes. The state knew this information was false but presented it to jury regardless of the truth.

Worse yet, Jeremy Smith, at the time of his involvement in Mr. Lamarca's case, had an active warrant for a violation of probation on a burglary case. Jeremy Smith was arrested on this warrant. Jeremy Smith was exposed to prison for the violation of probation. On February 26, 1996, Jeremy Smith's step-mother, Florence Smith called the Office of the State Attorney. She left a message indicating that Jeremy Smith would not testify in the Lamarca case unless he received full immunity.

On March 4, 1996, Jeremy Smith allegedly changed his mind concerning this manner. Jeremy Smith sent a letter from jail to the Office of the State Attorney. Smith indicated in the letter that he was going before the court on May 16, 1996 [s]o please feel free to attend at this court date."

In actuality, Smith was appointed an attorney to handle case CRC94-1099CFAWS. On March, 13, 1996, Sonny Im entered a notice of appearance. According to detailed billing records, Mr. Im[3] communicated with Smith's mother on March 12 when she called his office. The next day, March 13, Mr. Im interviewed Smith at the jail. Mr. Im learns that the state has offered mandatory prison.

That same day, Detective Tillia called Mr. Im and confirmed Smith's "info". The

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[3] It should be noted that Sonny Im was appointed a county judge after this case. He is still presently on the bench.

detective then calls back and states that Mr. Im needs to talk to ASA Crane. Later, Mr. Im calls Detective Blum and states that he will write a letter on behalf of Smith.

The next day, Mr. Im spoke to ASA Crane who would "work on it".

On March 20, Mr. Im notes that he had a conference "with ASA Crane, **no letters**, wants detectives to appear in court in person, he wants to be there also."

On March 22, ASA Crane and detective Tillia appeared personally and testified on behalf of Mr. Smith.

At Mr. Lamarca's trial, Jeremy Smith testified in response to assistant state attorney Martin's questions:

> Q. Okay. The arrest of you [sic] for that violation of probation, that's all over with now?
> A. Yes, sir, it is.
> Q. And you were sentenced by a court up in Pasco?
> A. Yes, sir.
> Q. Now, at the time of the sentencing, did you receive **any benefit whatsoever** in return for talking with Detective Tillia back in February of 1996?
> A. No, sir. I did not.

(Trial Tr. 926).

It is clear from the billing statement prepared by Mr. Im and Mr. Smith's testimony at trial that Jeremy Smith did receive a benefit from the state, that the state knew of such benefit and that the state did nothing to correct this misstatement.

Smith had various charges and was subject to prosecution for numerous crimes at the time of Mr. Lamarca's trial. Smith had another charge of retail (petty) theft in Pinellas,

technical violations of probation and a possible charge of absconding to another state to avoid prosecution for his violation of probation. These numerous violations and uncharged offenses were never factored into Smith's scoresheet. The inclusion of these would have raised his prison time. This was another "benefit" given to Smith by the State in exchange for his testimony. This is clearly misconduct of the worst kind contemplated by *Giglio* and its progeny.

Further, under *Brady*/*Kyles*, the State had a duty to disclose this deal to the defense. Failure to disclose such evidence was material as defined by *Kyles*. First, it would have shown a potential source of bias for his testimony. As presented, Smith's testimony was offered only because he was a concerned citizen. Second, depending upon the receipt of the information, Smith would have been impeached because of his prior deposition testimony. Finally, it would have shown a consistent theme in the State's prosecution: the use of jailhouse snitch testimony in exchange for deals.

For example, the Unted States Supreme Court stressed the dangers of informant testimony such as Smith's4:

> The jury, moreover, did not benefit from customary, truth-promoting precautions that generally accompany the testimony of informants. This Court has long recognized the "serious questions of credibility" informers pose. *On Lee v. United States*, 343 U.S. 747, 757, 72 S.Ct. 967, 96 L.Ed. 1270 (1952). See also Trott, Words of Warning for Prosecutors Using Criminals as Witnesses, 47 Hastings L.J. 1381, 1385 (1996) ("Jurors suspect [informants'] motives from the moment they hear about them in a case, and they frequently disregard their testimony altogether

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4 As well as James Michael Hughes.

> as highly untrustworthy and unreliable ...."). We have therefore allowed defendants "broad latitude to probe [informants'] credibility by cross-examination" and have counseled submission of the credibility issue to the jury "with careful instructions." *On Lee*, 343 U.S., at 757, 72 S.Ct. 967; accord, *Hoffa v. United States*, 385 U.S. 293, 311-312, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966). See also 1A K. O'Malley, J. Grenig, & W. Lee, Federal Jury Practice and Instructions, Criminal § 15.02 (5th ed.2000) (jury instructions from the First, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits on special caution appropriate in assessing informant testimony).

Id. at 1278.

Two recent cases underscore the State High Court's concern over non-disclosure of evidence by the State. In both *Mordenti v. State*, 2004 WL 2922134 (Fla.), and *Floyd v. State*, 2005 WL 673689 (Fla.), this Court reversed capital convictions based on *Brady* violations. While the Florida Supreme Court worked within existing state and federal constitutional law, the Florida Supreme Court's application of the prejudice prong of *Brad*y appears to be a more expansive threshold than previously used. For example in *Mordenti*, the Court found two main *Brady* violations and, in *Floyd*, one. These violations were analyzed against a myriad of evidence presented and upheld on direct appeal. The *Floyd* court went so far as to turn a direct evidence case, with a confession, a bloody sock and possession of the decedent's stolen property, to a circumstantial case.

As in Mr. Floyd's case, there was no physical evidence linking Mr. Lamarca to the crime. No fingerprints, no DNA, no eyewitness identification. While this Court stated that Mr. Lamarca's case was not circumstantial, it remains no less circumstantial than *Floyd*.

As stated previously, under a *Giglio* analysis, the state bears the burden of showing that the evidence was not material.

ARGUMENT X

MR. LAMARCA WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND ADVERSARY PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL FAILED TO OFFER EXPERT TESTIMONY REGARDING THE COMPLETE ABSENCE OF ANY DNA MATERIAL FROM THE SCENE OF THE ALLEGED SEXUAL BATTERY OF TONYA LAMARCA FLYNN.

It was alleged by Tonya Lamarca Flynn that Mr. Lamarca committed sexual battery upon her on the night of the murder. The rape allegedly occurred at 9900 Ideal Lane in Hudson, Florida in Pasco County. Law Enforcement collected all evidence at the scene of the alleged rape and tested the evidence for the presence of semen. Tonya Lamarca Flynn was examined by trained medical personnel and evidence was collected for testing. All tests came back negative or inconclusive. No results were positive. Counsel never retained the services of an expert when this information was discovered. Counsel should have retained an expert in this field to testify about the veracity of Tonya Lamarca Flynn's story and the lack of physical evidence.

Evidence was introduced at the evidentiary hearing from Sue Livingston, an employee of FDLE. Her testimony revealed that there was no semen found anywhere at the Pasco County crime scene, contrary to the allegations of the state's main witness Tonya Flynn. In fact, there was no physical evidence at all linking Mr. Lamarca to a

sexual battery of Tonya Flynn. The State knew that there was no evidence of a sexual battery and worse yet, the state knew that all of the physical and scientific evidence contradicted the testimony of Ms. Flynn. Yet the state knowingly presented this false evidence.

During the trial, the State introduced the testimony of crime scene technician Fagan. The State elicited from Fagan the possibility that the semen was missed during the processing or testing. This was absolutely false. The State had the report of Sue Livingston which conclusively stated that no semen was found at all. None at the crime scene. None on Tonya Flynn. The State also knew of the proceedings for the rape case in Pasco county and that those charges had been dropped due to the lack of any physical evidence and Tonya Flynn's inconsistent statements. The State's bltent prosecutorial misconduct was a serious *Giglio* violation. Worse yet, the Defense did nothing to counter this argument.

Counsel was ineffective for not retained an expert in this field. This prejudiced Mr. Lamarca because the testimony of Tonya Lamarca's sexual Battery was allowed before jury because it was alleged to inextricably intertwined with the murder.

ARGUMENT XI

MR. LAMARCA WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE ADVERSARY PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE MITIGATION EVIDENCE AND PRESENT SUCH

EVIDENCE TO THE COURT.

Counsel failed to adequately utilize mitigation experts. Experts in the areas of psychology and psychopharmacology were available to the defense at the time of Mr. Lamarca's trial and are available now. These experts would testify as to their findings about Mr. Lamarca's mental health problems. These problems were related to his drug and alcohol abuse as well as mental health issues such as depression. Mental health experts would have testified that Mr. Lamarca was under extreme emotional distress at the time of the trial. Further, defense counsel failed to investigate Mr. Lamarca's background and to obtain sufficient records to provide to the experts, such as: medical records, school records, work records, and prison records. **This evidence clearly indicates that counsel was ineffective during their entire representation of Mr. Lamarca.**

Shirley Furtick testified as an expert in the field of clinical social work in the administration and interpretation of bio/psycho/social assessments of individuals. She testified that she reviewed various records, spoke with various family members including Joe, Vincent, Faith, Lori and Mr. Lamarca. She also indicated that she would have desired to speak with Angela Lamarca; however she did not wish to be interviewed and that Mr. Lamarca, Sr., is now deceased. Ms. Furtick further review Mr. Lamarca's incarceration records from 1976-2001, the testimony from trial regarding Tina and Tonya Lamarca, the penalty phase information proffered, newspaper clippings, county jail

records, medical records of Joseph Lamarca, and consulted with Dr. Caddy regarding his findings.

Ms. Furtick testified that when Tonya testified did this have an affect on Anthony and offered five conclusions as indicated in his bio/psycho/social assessment. The question presented is how does Mr. Lamarca become the person he is? Ms. Furtick testified that Mr. Lamarca was raised in Suffolk County an affluent area that had an influx population growth which led to pockets of poverty, community breakdown, truancy, and juvenile delinquency in Mr. Lamarca's sibling group. Mr. Lamarca was raised in a 5 bedroom/1 bath home, with three families living in the home with their children and adult relatives moving in and out of the home. In addition there were friends who were also in and out of home. Mr. Lamarca's father was absent during the majority of his childhood and his mom had to deal with all of this with limited support. Mr. Lamarca's life was chaotic, crowded, with little privacy. The boys and girls shared individual rooms with adult relatives. Thus there were a lot of mixed messages in terms of relationships. There also was the presence of an uncle, Mr. Luigi, who was in home and was abusive to children in home. In addition the maternal uncles also were abusive to children in the home. Ms. Furtick also concluded that Mr. Lamarca was truant from school, he became a dropout, and he engaged in juvenile delinquent behavior early on primarily because of the influence of his three older brothers in home. Ms. Furtick reports that all of the children eventually dropped out of school by age 16-17 and were

engaging in juvenile behavior by stealing. As a result, Mr. Lamarca was in and out of the penal system between ages of 18-20 and had moved out of the home at the age of 17. Mr. Lamarca spent 1 ½ months in juvenile detention. After leaving the detention center Mr. Lamarca began to move around the country and became a teenage father at approximately 19-20. Ms. Furtick testified that when Mr. Lamarca enters the correctional system, the problems adjusting mirrored his home environment. Mr. Lamarca was in conflict with his older brother Joe. At the point Mr. Lamarca enters Belle Glade, while involved in juvenile activities, his expectations regarding his safety and survival are not what he expected of a young adult going into the system. Mr. Lamarca was in a very violent system trying to figure out how to survive. He spent a lot of time in confinement, there was a lack of privacy, personal property, and there were unclear boundaries. This environment was in contrast with his home. Although his siblings would fight with one another individually, on the street they protected one another. But in prison there was no buffer. Mr. Lamarca eventually learns adaptive coping skills. Compensation: not getting resource by persons in authority compensated by using legal system to address his issues. He also learned to rationalize and normalize his situation. He was misled regarding boundaries and there were mixed messages for a child growing up in his environment. Mr. Lamarca also learned other survival techniques for example, his family had a code of silence, "don't tell." This family code resulted in Mr. Lamarca being blamed for things that his other siblings had done and if told they would beat him later. Mr. Lamarca has a

sense of fairness/justice and when others don't understand that he didn't do it, he acts aggressively, reactive, and shuts down. Mr. Lamarca experiences paranoia about relationships and circumstances and thus this affected his relationship with his attorneys. When he felt that he was being treated unfairly, he emotionally shuts down or impulsively lashes out without regard to consequences. These are not voluntary reactions. If he felt they were not be responsible for him or couldn't trust them his response to them would be to shut down or act against them. These were actual response to his attorneys. Mr. Lamarca made several suggestions to his attorneys and he did not feel they acted on his behalf. By not acting in his interests and significant family relationships cut off, Mr. Lamarca lost all that was here in terms of his support.

In terms of relationships with Tonya, hearing her testimony regarding the facts was a lost relationship and an inaccurate account. Therefore, he reacts. He took an impulsive stand that probably was not in his best interest. Tonya breaks the family code because you don't talk about what goes on in the family, it stays in the family and you handle it there. The issue for Mr. Lamarca is personal survival, you do them before they do you.

Lori Lamarca testified at the evidentiary hearing that she met Mr. Lamarca while he was incarcerated. Mrs. Lamarca further testified that Mr. Lamarca was kind and considerate of her and her children. Mr. Lamarca would make special cards for her daughter each holiday and on her birthday. Mrs. Lamarca testified that Mr. Lamarca has great artistic talent. Mrs. Lamarca further testified that when Mr. Lamarca arrived in

Washington he immediately began to look for work. When he could not find work he begin to chop wood for the family so that they could be warm. She indicated that he did this despite the weather conditions. Mrs. Lamarca also testified that Mr. Lamarca begin to assist her in her business and would accompany for each performance to ensure her safety.

Dr. Glen Caddy testified as an expert witness in the field of Clinical and Forensic Psychology and death penalty investigation. Dr. Caddy has known Mr. Lamarca since 1984, when he was involved in the evaluation of prisoners involved in a civil action against the Florida Department of Corrections (Belle Glades Correctional Institution) alleging cruel and unusual punishment. Periodically, Dr. Caddy has maintained professional communications with Mr. Lamarca.

Dr. Caddy testified that Mr. Lamarca suffers from PTSD which relates back to his prison experience while in Belle Glade Correctional Institution. Dr. Caddy testified that he testified in federal court before Judge Payne and concluded that Mr. Lamarca had suffered substantial and outrageous abuse by some very violent people. And although Mr. Lamarca was physically and emotionally abused, he was one of the few that reported no physical rape. And the way he avoided rape was by confining himself in protective environments and sought friendship with powerful persons. During this time, Mr. Lamarca was still young and not powerful and his daily struggle was not to become someone's wife at Belle Glade. The system at Belle Glade was the lowest prison. The

prison was rampant with drug abuse, guards were paid off to allow drug traffic, every Saturday night pornographic movies were available and afterwards small white males were being raped by strong black males for their sexual gratification and entertainment. This prison also showed a lack of regard to prisoner's medical injuries created by anal penetration and 1 prisoner was beaten over the head by a steel chair which resulted in organic brain damage. Mr. Lamarca witnessed these assaults, the trafficking and all of the other events taking place in this prison. Being a young man that came out of his family dynamics nothing could have prepared Mr. Lamarca for what he experienced at Belle Glade. Dr. Caddy testified that because of issues of personality impairment, constant worrying and fear, PTSD, night after night, Mr. Lamarca could not sleep except when in solitary confinement.

Dr. Caddy testified that he had contact with Mr. Lamarca in 1993 and 1996 and in 1996 testified that Mr. Lamarca had developed a severe state of functioning that his coping skills would trigger instantly when provoked. It is his instinct to react. Dr. Caddy's next involvement with Mr. Lamarca occurred on October 9, 1997, when he received a call from Ms. McClure that Mr. Lamarca had been convicted of murder and asked if he would examine him for penalty phase testimony. She indicated that she called him because Mr. Lamarca was not willing to allow mitigation but that he would speak with Dr. Caddy. Dr. Caddy testified in his expert opinion that a call at this juncture in the proceedings would be a failure to understand the role of a forensic expert and their

relevance to these proceedings. The time to hire a psychologist is when you get the case because during the time it takes to prepare a murder case, one's mental health states can vary dramatically, nature of manipulations can vary, stories can change, and the system can change. Based upon Mr. Lamarca's mental illness, Dr. Caddy testified that Mr. Lamarca was more prone to be reactive, misjudge circumstances, be distrustful and lack confidence in others. As a result of this mental illness, Mr. Lamarca immediately was distrustful of his attorneys, which could explain the troubled relationship and barriers that counsel suffered when trying to communicate and develop a attorney-client relationship with Mr. Lamarca. Dr. Caddy further testified that Mr. Lamarca was irrationally reactive which means he responded to fear or threat almost as an instant response.

Dr. Caddy provided further testimony that he visited Mr. Lamarca in1997 and it was clear that his life was falling away even further. And although Mr. Lamarca was glad or willing to see him, it was not because his attorney had asked him but because it was nice too. It was like a social visit. Dr. Caddy testified that Mr. Lamarca's relationship with his attorneys soured and Mr. Lamarca begin to take over his own case as the relationship further deteriorated. During Dr. Caddy's interview with Mr. Lamarca, he was prepared to talk about his life from his mother dying and brother becoming psychotic and how he felt traumatized looking back at his Belle Glade experience of watching people be killed. He spoke about prisoners being raped in the bathroom. Dr. Caddy testified that the impact of Mr. Lamarca being convicted had an impact because he

always claimed his innocence. Mr. Lamarca spoke about some other criminal behavior, problems with barriers, what has happened in his life since they last spoke, missing his granddaughter, his negativity about his daughters, the events surrounding his prison release, the relationship with his daughters, events leading up to the murder, thoughts of contemplating suicide around the time of murder, attempts to drug overdose and then he decides he is not going to kill himself. Mr. Lamarca further talks about being upset that Tonya would have made the statement that he raped her.

Dr. Caddy testified that by prior and present history by Mr. Lamarca providing information that would be relevant in mitigation and not allowing it to be spoken, he had taken control over the process and away from his counsel. In fact, Mr. Lamarca wanted to make a post-trial closing argument which he attempted to do by telling the court what he thought of them. Mr. Lamarca's behavior during this time was extremely reactive and basically was "give me liberty or give me death." Mr. Lamarca was trying to take control over the process in the only way that he could. This behavior was not based upon sound reason and judgment and it is not evidence that his attorneys would provide him with copies of cases or review discovery with Mr. Lamarca because that is standard practice for an attorney in conformance with evolving standards of professionalism. Dr. Caddy testified that Mr. Lamarca didn't want to die and doesn't. The changing point in the trial proceedings occurred after Tonya's testimony. The fact that his attorney's failed to impeach Tonya indicated that they really did not believe anything he said.

Dr. Caddy's next involvement occurred in May of 2002 when contacted by CCRC. Again, Mr. Lamarca was having conflict with his attorneys and attempting to fire his attorneys. Dr. Caddy sent some materials to CCRC and received some information from the CCRC investigator, notes from Dr. Maher, information regarding letters between McClure, notes regarding Lori Lamarca, medical records of Joseph, some transcripts of the trial proceedings, Mr. Lamarca's testimonies, medical records, DOC records he had from before, and the competency evaluation from trial. Based upon this information, it is the opinion of Dr. Caddy that Mr. Lamarca was competent during the early stages of trial but after Tonya's testimony became irrational, enraged, paranoia kicked in and he came to believe that he was the only person that he could rely on. Mr. Lamarca was not competent to make rational choices and was unable to focus on the emotional components now driving him. Thus, although Mr. Lamarca was competent at the early stage of the proceedings at the point that Tonya testifies, he becomes incompetent. Although he knew that she would testify that he raped her, in the early stages he truly believed that this was because the police were pressuring her but in his own mind when she had to give testimony she would not maintain that position. Thus she would transform from the person that was manipulative or lying to one who would not do that in front of him. Tonya' testimony and betrayal was contrary to every system of keeping it within the family, preserving family honor. Mr. Lamarca believed that Tonya's statements constituted his death sentence. And as a result of her testimony, Mr. Lamarca

became emotionally disconnected and when his lawyers did not attack Tonya on cross examination, Mr. Lamarca withdrew himself. Mr. Lamarca became further disenchanted when his lawyers disagreed with him to bring in witnesses that would have called into question Tonya's testimony. Mr. Lamarca's believe that if one would believe that he raped Tonya he must have murdered Kevin. By not believing in him, his attorneys abandoned their duty to protect him which triggered Mr. Lamarca to full safety mode. And although Mr. Lamarca has helped others in their legal problems, he could not help himself.

Dr. Caddy testified that Mr. Lamarca would never stand mute. Under the circumstances he would have felt powerfulness to stand mute not powerful. Mr. Lamarca could not remain silent voluntarily. His judgment was lost and he is now reactive. This is the tantrum of a man on a glory trail. This is a reactive response to a series of events that culminate. Mr. Lamarca no longer had the ability to help his attorneys when they failed to give him support. There was no trust in their relationship and Mr. Lamarca just wanted them to be out of there. The fact that his attorneys did not perceive his witnesses as credible, the line was drawn quickly. This distrust is exemplified in Mr. Lamarca slamming his head into the wall during a meeting with his attorney. Mr. Lamarca was trying to get their attention even though he could hurt himself. Thus Mr. Lamarca would have been incapable of understanding and exercising his right to remain silent. This behavior in and of itself would be contrary to his psychological functioning.

Dr. Caddy further testified that Mr. Lamarca was incompetent to waive mitigation. This issues goes back to the Tonya incident. Mr. Lamarca also finds out that the state advised family members that DNA proved the sexual assault of Tonya and he wanted to protect his family from standing up for him. If his family believed that he would rape Tonya then he didn't want them standing up for him anyway. Mr. Lamarca system of defense disintegrated. He had a code of his personal worth and he couldn't ask his family to be involved in helping him if they were a party to the state's attempt in convicting him and seeking a death sentence. Mr. Lamarca had to protect them and himself. This behavior by Mr. Lamarca is consistent with his family dynamics.

Dr. Caddy's opinion is that Mr. Lamarca was incompetent to waive his right to testify. Mr. Lamarca was incompetent to waive mitigation. Mr. Lamarca was reactive and therefore his actions were not voluntary as reflected in his psychological functioning. Dr. Caddy testified that a reactive choice is not voluntary.

On cross examination, Dr. Caddy testified that at some point Mr. Lamarca was noncompliant with his attorneys. There was a constant struggle between Mr. Lamarca and his counsel. Dr. Caddy doubts if they ever understood Mr. Lamarca's underlying dynamics and how to manage him. Dr. Caddy testified that he spoke with Ms. McClure approximately three times. November 15, approximately a half hour, November 17 and 18 both for brief periods. Dr. Caddy testified that he does not recall the details of those discussions. Regarding Tonya's testimony, even though Mr. Lamarca knew that she had

made certain claims, he did not anticipate that she would make those claims in court. By nature Mr. Lamarca has problems with trust and is vulnerable to become impulsive when people are not servicing his interest.

In Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988), the court stated:

> [F]ailure to uncover mitigating, psychiatric and childhood information about petitioner's background and to present that information at penalty phase of capital murder prosecution actually prejudiced petitioner; reasonable probability existed that result of sentencing proceeding would have been different if attorney had presented psychiatric, family court, youth services, and prison records that indicated schizophrenia, childhood of brutal treatment and neglect, physical, sexual, and drug abuse, and low IQ.

In *Wiggins v. Smith*, 123 S.Ct. 2527 (2003), the United States Supreme Court reiterated the standard established by *Strickland* nearly 20 years ago. That standard today still requires courts to determine whether counsel was deficient in his or her representation and whether that representation prejudice the defendant's case. *See Strickland v. Washington*, 466 U.S. 668 (1984). Justice O'Connor, in writing for the majority in *Wiggins,* as she did in *Strickland*, cautions this Court about how far that deference should be extended.

> When viewed in this light, the "strategic decision" the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post-hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing.

Wiggins, 123 S.Ct at2538.

The United States Supreme Court enunciated a two-prong test for analyzing an

ineffective assistance of counsel claim in Strickland v. Washington, 466 U.S. 668 (1984). According to Strickland the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Strickland, 466 U.S. at 687. A court's determination of prejudice requires an assessment of "the totality of the evidence". Id. at 695. This totality of the evidence requirement is specific to each issue presented, not the performance of counsel as a whole. Horton v. Zant, 941 F.2d 1449, 1461 (11th Cir. 1991)("The state, however, reads this language to imply that we must evaluate an attorney's performance by examining his or her performance in its entirety and by viewing the whole trial as an indivisible unit. The state is simply mistaken.") In order to satisfy the burden of demonstrating that trial counsel was ineffective, the movant must demonstrate that counsel's "representation fell below an objective standard of reasonableness." Collier v. Turpin, 155 F.3d 1277 (11th Cir. 1998) citing Strickland, 104 S.Ct. at 2064.

A claim of ineffective assistance of counsel applies to the penalty phase of a capital trial because a "capital sentencing proceeding...is sufficiently like a trial in its adversarial format and in the existence of standards for decision...that counsel's role in the proceeding is comparable to counsel's role at trial - to ensure that the adversarial testing

process works to produce a just result under the standards governing decision." Collier, 155 F.3d at 1290, citing Strickland, 104 S.Ct. at 2064.

The United States Supreme Court has consistently held that in capital cases, the sentencer must make an individualized decision based on both the circumstances of the offense and the character and propensities of the offender. Lockett v. Ohio, 438 U.S. 586 (1978), followed by Eddings v. Oklahoma, 455 U.S. 104 (1982); Hitchcock v. Dugger, 481 U.S. 393 (1987); Penry v. Lynaugh, 492 U.S. 302 (1989). Failure to investigate or to present mitigation evidence can be a basis for an ineffective assistance of counsel claim. Jackson v. Herring, 42 F.3d 1350 (11th Cir. 1995); Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991); Hall v. Washington, 106 F.3d 742 (7th Cir. 1997); Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995); Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995).

If the court concludes that mitigating evidence was available, it must be determined whether counsel's failure to offer such evidence was a tactical or strategic choice. A tactical decision to forego presentation of mitigation evidence "enjoys a strong presumption of correctness which is virtually unchallengeable." Eutzy v. Dugger, 746 F.Supp. 1492 (N.D. Fla. 1989) citing Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988). In Eutzy, the district court sought to define the standard for a tactical or strategic decision:

A tactical, or strategic, decision implies an informed, knowledgeable,

> reasoned choice. Such a reasoned judgement cannot be made and options exercised unless and until an investigation into the defendant's background and character has been made. The court recognizes that counsel has to balance the good against the bad and decide whether presenting the good side of the defendant will outweigh the adverse evidence that may come in by way of cross examination or rebuttal. Certainly, if counsel feels that under the circumstances, it would adversely affect the defendant to present the positive evidence, he can and should make the strategic choice not to do so. A strategy of silence, however, may be adopted only after an investigation, however limited.

Eutzy, 746 F.Supp. at 1499.

Also, failure to investigate potential and known mitigation witnesses can be a basis for ineffective assistance of counsel. Blanco v. Singletary, 943 F.2d 1477, 1500-01 (11th Cir.1991) (deficient performance where counsel left messages with relatives mentioned by defendant but neglected to contact them). As stated previously, counsel failed to adequately and effectively investigate mitigation evidence until **after** the jury returned a verdict of guilty.

ARGUMENT XII

MR. LAMARCA'S SENTENCE OF DEATH IS UNCONSTITUTIONAL IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE HIS SENTENCE RESTS UPON THE PROOF OF ONLY ONE AGGRAVATOR WHICH HAS BEEN REPEATEDLY FOUND TO BE INADEQUATE UNDER FLORIDA LAW.

The trial court and the Florida Supreme Court have repeatedly reduced cases from death to life when there was the existence of only one aggravator. Of the over fifty cases

reviewed by the courts since 1975, only five cases have had their death sentences intact. Further, one of these cases, Duncan v. State, 619 So.2d 279 (Fla. 1993) has received post-conviction relief in the trial court based on ineffectiveness of counsel.

Mr. Lamarca's case is a single aggravator case which the Florida Supreme Court upheld based on several factors, all of which are under attack in the present motion. See Lamarca v. State, 785 So.2d 1209 (Fla. 2001).

The Florida Supreme Court affirmed the single aggravator based on the prior violent felony of attempted sexual battery, with the use of a knife. Prior to trial, Mr. Lamarca's sentence concerning the knife was vacated. Lamarca v. State, 515 So.2d 309 (Fla. 3rd DCA 1987). Presentation of this evidence also violated the dictates of *Apprendi* and *Ring*.

Further, because Mr. Lamarca waived mitigation, the wealth of statutory and non-statutory mitigation was not presented, although proffered by defense counsel pursuant to case law. The court did find that Mr. Lamarca suffered from mental disorders, a mitigator generally given great weight by the Supreme Court of Florida. As such, Mr. Lamarca's conviction based upon a single aggravator is unconstitutional given the facts of this case.

ARGUMENT XIII

MR. LAMARCA'S SENTENCE OF DEATH IS UNCONSTITUTIONAL IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF

THE FLORIDA CONSTITUTION BECAUSE HIS SENTENCE RESTS UPON AN IMPROPER AGGRAVATOR WHEN THE STATE INTRODUCED EVIDENCED THAT MR. LAMARCA COMMITTED A PRIOR VIOLENT FELONY USING A KNIFE.

The state argued in the advisory phase that Mr. Lamarca used a knife in the case of his prior violent felony. The state repeatedly made reference to this fact.

The Florida Supreme Court affirmed the single aggravator based on the prior violent felony of attempted sexual battery, with the use of a knife. Prior to trial, Mr. Lamarca's sentence concerning the knife was vacated. Lamarca v. State, 515 So.2d 309 (Fla. 3rd DCA 1987).

ARGUMENT XIV

MR. LAMARCA'S SENTENCE OF DEATH IS UNCONSTITUTIONAL IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE THE STATE COMMITTED PROSECUTORIAL MISCONDUCT IN THE PRESENTATION OF MR. LAMARCA'S PRIOR FELONY.

The state argued in the advisory phase that Mr. Lamarca used a knife. The State knew that Mr. Lamarca's sentence was vacated based on the use of the knife. However, during opening statements to the jury and closing statements after the presentation of it's only witness, the state repeatedly mentioned that Mr. Lamarca had been convicted of a prior violent felony that involved use of a knife.

The Florida Supreme Court affirmed the single aggravator based on the prior

violent felony of attempted sexual battery, with the use of a knife. Prior to trial, Mr. Lamarca's sentence concerning the knife was vacated. Lamarca v. State, 515 So.2d 309 (Fla. 3rd DCA 1987). The state knew this but because Mr. Lamarca was unrepresented at this time, he was powerless to act.

ARGUMENT XV

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR WHO WAS A MAIN WITNESS IN THE CASE TO BE AN ADVOCATE FOR THE STATE.

Many of the appellant's claims involve allegations of prosecutorial misconduct. Those claims were made against both Sean Crane and Glen Martin, both assistant state attorneys at the time of Mr. Lamarca's trial. Prior to the evidentiary hearing, Mr. Lamarca specifically plead these claims and mentioned both assistant state attorneys. Mr. Lamarca listed both these attorneys as witnesses and issued subpoenas to them to appear for the evidentiary hearing.

At the evidentiary hearing it was announced that Mr. Martin would be acting as an attorney for the state in the case. As a matter of record, Mr. Martin was the lead assistant state attorney for the state during the present evidentiary hearing.

In *Shaarga v. State*, 102 So.2d 809 (Fla. 1958), this Court stated the appropriate rule for the advocate who becomes a witness:

> We have the view that the better practice would be for a prosecuting officer who becomes a witness to withdraw from the actual prosecution of the

> cause. This is so because a jury is naturally apt to give to the testimony of the prosecuting attorney himself much more weight than it would accord to the ordinary witness.

Later, this Court in *Occhicone v. State*, 768 So.2d 1037 (2000), reaffirmed this rule. Here, the case is entirely different. Mr. Martin was noticed on several occasions prior to the evidentiary hearing that he would become a witness. The allegations against Mr. Martin involved instances of prosecutorial misconduct in which the finder of fact would have to determine the credibility of Mr. Martin. Further, one witness used to establish prosecutorial misconduct, Lori Galloway, was crossed on this subject by Mr. Martin. These are not cases of extraordinary circumstances where the ASA is asked immediately to become a witness in order to rebut the testimony of a witness. Nor would there have been undue hardship for there were several attorneys for the state who actively participated. The actions of the court and of the state clearly fall out of the exception to the advocate-witness rule. As such, Mr. Lamarca did not receive a fair and proper evidentiary hearing nor a fair adjudication of his case by the court.

ARGUMENT XVI

MR. LAMARCA WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL FAILED TO EFFECTIVELY IMPEACH THE TESTIMONY OF JEREMY SMITH WITH HIS PRIOR CONVICTIONS INVOLVING CRIMES OF DISHONESTY. COUNSEL'S FAILURE SEVERELY PREJUDICED MR. LAMARCA.

During the state's direct examination of Jeremy Smith**,** the state attorney elicited information about the number of "felony convictions" Mr. Smith had. (Vol XXIX, R. 924) Mr. Smith answered that he had "one". Counsel for Mr. Lamarca never inquired into Mr. Smith's record. Had counsel inquired into Mr. Smith's record, counsel would have learned of another conviction for a crime of dishonesty. On March 23, 1995, Jeremy Smith entered a plea of guilt in case number 95-07971MMANO. This involved a charge of "retail theft", a crime of dishonesty. This certified copy of conviction was entered into evidence during the evidentiary hearing.

Jeremy Smith's veracity was a central issue in his testimony. Impeaching Jeremy Smith with two crimes of dishonesty would have cast a pallor of doubt on his testimony.

ARGUMENT XVII

MR. LAMARCA WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL FAILED TO EFFECTIVELY INVESTIGATE AND THEN CROSS EXAMINE THE TESTIMONY OF THE STATE'S BALLISTIC EXPERT.

At trial, the State offered the testimony of Mr. Denio as an expert in the field of ballistics. At deposition, Mr. Denio testified as to his qualifications and the tests he performed. During the investigation of the case, it was discovered that on the car alleged driven by Tonya Lamarca with Mr. Lamarca as a passenger, there was a presumptive test for gunpowder done on the exterior of the vehicle. This test showed that there was the

presence of powder on the driver side door but not on the passenger side where Mr. Lamarca was seated. This evidence would have buttressed the defense's case that it was Tonya Flynn and not Mr. Lamarca that had fired the weapon killing Kevin Flynn. This evidence was introduced into evidence at the evidentiary hearing. Counsel was ineffective for not hiring a ballistic expert to present this testimony and to rebut the testimony of Mr. Denio.

CONCLUSION

As stated above, Mr. Lamarca's attorney were ineffective in their representation of their client. They did nothing by way of preparation of the case that would have effectively challenged the state's evidence even when they had possession of it. Further, Mr. Lamarca's attorney did no investigation regarding mitigation evidence until after the guilt phase was completed. This conduct violates all of the mandates of *Wiggins*.

Further, the state acted egregiously in repeated instances of prosecutorial misconduct that continued up to and during the evidentiary hearing. This Court has stated on numerous occasion that it would not condone the such behavior. Here is such behavior before this Court. As such, Mr. Lamarca should be granted full relief as requested.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by U. S. Mail, first-class, to all counsel of record on this ____ day of November , 2005.

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I hereby certify that a true copy of the foregoing Initial Brief of Appellant was generated in a Times New Roman, 14 point font, pursuant to Florida Rule of Appellate Procedure 9.210.

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