THE SUPREME COURT OF FLORIDA

No. SC03-648

MERYL MCDONALD

Appellant,

versus

JAMES V. CROSBY
Secretary, Florida Department of Corrections

Respondent/Appellee.

AMENDED BRIEF OF APPELLANT

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I. Preliminary Statement

This appeal involves the appeal of the circuit court=s denial of Mr. McDonald=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.

AT@ .....Trial Transcript

APP@.....Penalty Phase Hearing

AR@.....Record on Direct Appeal

AHH@.....Addendum Transcript

APC-R@ ...Postconviction Record

II. Certificate of Type Size and Style

I hereby certify that a true copy of the foregoing Amended 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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III. 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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VI. Statement of the Case and Facts

A. Course of Proceedings and Disposition in Court Below

The Circuit Court of the Sixth Judicial Circuit, Pinellas County, Florida, pursuant to its sentencing order (R. 2526-43) entered the judgment and sentence on November 16, 1995. (R.2544-46).

On April 27, 1994, an indictment was amended making Mr. McDonald one of five people indicted for the murder of Dr. Stevenson. (R. 1-2). On October 13, 1994, Mr. McDonald was taken into custody in the State of New York by Pinellas County, Florida, law enforcement officers and was returned to the State of Florida October 27, 1994. His plea of not guilty was filed November 22, 1994. (R. 436) On December 16, 1994, in open court, his trial date was set beyond his speedy trial period. (R.462).

A joint trial of Mr. McDonald and Robert Gordon was held from June 6, 1995 through June 15, 1995. The jury returned a verdict of guilty of murder in the first degree as to both Mr. McDonald and Mr. Gordon. (R. 2362-64) A penalty phase proceeding was held on June 16, 1995, after which the jury recommended the death penalty by a majority vote of 9 to 3. (R.2402) The jury was not sworn before voir dire began.(TT, 16-18).

On direct appeal, the sentence and conviction were affirmed. *McDonald v. State*, 743 So.2d 501 (Fla. 1999).

B. Post-Conviction Proceedings

Mr. McDonald was originally represented by the Office of the Capital Collateral Regional Counsel - Middle (hereinafter CCRC-M) for post-conviction purposes. CCRC-M prepared a Motion to Vacate for Mr. McDonald. Mr. McDonald, however, refused to verify the motion. CCRC-M then filed the unverified motion on December 11, 200. Mr. McDonald, pursuant to Fl.R.Crim.P. 3.850 and 3.851 filed his own motion on December 15, 2000. CCRC-M filed a certification of conflict and motion to withdraw and for appointment of conflict free counsel. At a hearing on the motion on January 30, 2001, the court determined that there was no legal conflict. The ultimate result of the hearing was that both motions were struck. On January 31, 2001, Mr. McDonald partially agreed to swear to the motion which was subsequently filed on February 2, 2001 in which the court accepted nunc pro tunc to December 11, 2000. However, on or about March 2, 2001, Mr. McDonald filed the Defendant=s Motion to Remove Conflict Counsel, and to Strike Counsel, and for Self-Representation. At a hearing held April 18, 2001, the court granted Mr. McDonald the right to represent himself after a *Faretta* inquiry pursuant to *Faretta v. California*, 422 U.S. 806 (1975).

The court allowed Mr. McDonald to withdraw the motion filed by CCRC-M and reinstated his previously stricken pro se motion and appointed CCRC-M as standby counsel. The oral order of April 18, 2001 was filed May 18, 2001.

On June 14, 2001, the State filed its response and exhibits. Thereafter, on July 16, 2001, Mr. McDonald filed a motion to amend and Supplement his motion. The court then ordered a Huff hearing pursuant to *Huff v. State*, 622 So.2d 982 (Fla. 1993) and held the hearing on July 25, 2001. Without objection, the court allowed Mr. McDonald to supplement his original motion and to proceed on his supplemental 3.850 postconviction relief motion. At the Huff hearing, Mr. McDonald waived issues 2 and 10. The court granted a hearing as to issues 6, 11, 12, and 14 but summarily denied issues 1, 3, 4, 5, 7, 8 through 13, 15, 16 and supplemental claim 1 as to knowingly using false DNA evidence. The evidentiary hearing was held on November 29 and 30, 2001.

During the hearing but just prior to the commencement of the evidentiary hearing, Mr. McDonald sought to depose FBI agents Michael Vick, Chris Allen and Audrey Lynch in order to inquire about the fraud committed on the court by agents Vick and Allen relating to DNA and hair analysis. In addition, Mr. McDonald sought to inquire about the June 13, 1994 lab report of agent Lynch, and to find out what part each of the agents played concerning DNA evidence. At the commencement of the evidentiary hearing the court denied the requests to depose agents. The court also urged CCRC-M to provide Mr. McDonald with previously received documents which were previously not provided to him.

At the conclusion of the evidentiary hearing the court stated that it did not want to

hear closing arguments but would accept written closing arguments. On February 10, 2003, the court denied Mr. McDonald=s motion for postconviction relief. Timely notice of appeal was filed on March 6, 2003.

As a result of Mr. McDonald=s pro-se representation, all mitigation and other penalty phase issues were waived as well as numerous guilt phase issues.[1]

C. Proceedings before this Court

After the denial of Mr. McDonald=s post-conviction motion, the Circuit Court of Pinellas County appointed the Office of the Public Defender to file the post-conviction brief on behalf of Mr. McDonald, in violation of Chapter 27. In September, the circuit court appointed CCRC-M to file the brief in Mr. McDonald=s case, only one month prior to the due date of the brief. After the appointment, Mr. McDonald filed numerous pleadings before this court in an attempt to have CCRC-M again removed from his case. This Court requested briefing on this issue from the State as well as from CCRC-M.[2] This Court denied Mr. McDonald=s motion to proceed *pro se* and appointed CCRC-M to file the instant brief.

VII. Brief Statement of Facts

[1] Several guilt phase issues which were identified by this court in its direct appeal opinion were waived by Mr. McDonald. *See infra*.

[2] In addition to the arguments filed by CCRC-M, current counsel also sought to have this Court relinquish jurisdiction and remand this case back to the circuit court where a full and fair evidentiary hearing could be completed. CCRC-M renews this motion in a separate pleading.

A. Facts Introduced at Trial and Sentencing

The facts introduced in the trial of this case have previously set forth by this Court in *Gordon v. State*, 704 So.2d 107, 108-10 (Fla 1998). By way of summary, the victim, Dr. Louis A. Davidson was found murdered in his St. Petersburg apartment on January 25, 1994. He and his wife were involved in a bitter dissolution of marriage which involved the custody of a minor child. Shortly after the discovery of his body, the St. Petersburg police department placed his wife, Denise Davidson, who resided in Tampa, under 24 hour surveillance. As the result of that action, the police obtained copies of Western Union money transfers from Mrs. Davidson made primarily to Mr. Gordon. Telephone intercepts and cell phone records obtained by warrant primarily linked to others and Mr. Gordon. The police obtained various motel registrations placing Mr. McDonald and Mr. Gordon and others in Tampa at various times prior to and including the day of the homicide. None of the evidence introduced placed Mr. McDonald at the scene of the homicide.

The conviction of Mr. McDonald was obtained almost exclusively from false DNA evidence, false hair and fiber evidence, tampering with a grey sweatshirt and from the testimony of Susan Shore. There was absolutely no fingerprint, hair fibers or any other physical evidence from Mr. McDonald at the crime scene. There was no testimonial evidence placing Mr. McDonald in the apartment of the victim, including that of Susan Shore.

Neither defendant testified in their own defense and neither counsel neglected to present any evidence or put on any defense. During the penalty phase, Mr. McDonald presented only one penalty phase witness. At the conclusion of the penalty phase, the jury recommended death by a vote of 9 to 3.

Of the three remaining individuals indicted for the murder, Denise Davidson was convicted and sentenced to life. Susan Shore entered into a plea agreement in exchange for her testimony and Leo Cisneros remains at large.

B. Facts Introduced at the Evidentiary Hearing

Mr. McDonald proceeding pro se and against the advice of counsel, presented the transcribed testimony of Dr. Renee Herrera from the Robert Gordon hearing, the entire recently released FBI documents and himself.

Dr. Renee Herrera, an associate professor at the department of biological sciences at Florida International University was permitted by the court at the evidentiary hearing[3] to offer his opinion as an expert in the field of DNA population genetics and molecular biology. He testified that he had reviewed the trial testimony of FBI agent Michael Vick who was the state=s DNA expert at trial. (TT, 1214). Dr. Herrera also went to the FBI facilities in Quantico, Virginia, so he could analyze and inspect materials not previously provided. Included in the documentation the lab

[3] As argued in Mr. McDonald=s petition for habeas corpus, Mr. McDonald was not allowed to obtain the services of an expert DNA witness. The testimony of Dr. Herrera is from Mr. Gordon=s evidentiary hearing.

possessed, including the data used by the FBI to generate probabilities. The expert identified certain issues of concern which included that the probabilities generated were not Arobust@ but far below the current standards of expectation; that only three of the four slides gave usable numbers; and that the location of the bands of the materials used could have been compromised by multiple donations. He also opined that since the victim was of mixed racial origin, the calculations could contain uncertainty up to two orders of magnitude in either direction. Subgroups or substructures was another area of concern to Dr. Herrera due to the controversy within the scientific community as to their effect on population frequency calculations. He opined that, because of all of the issues that existed in this case, the testimony of agent Vick would not have been accepted in the general scientific community. At this stage of the hearing, the court acknowledged its own concern over the substructure issue. A final area of concern was that the testimony of agent Vick implied that he had actually performed the testing. Dr. Herrera opined, however, that other individuals conducted the tests.

At the conclusion of Dr. Herrera=s testimony, the state was permitted to call Dr. Martin Tracey, also a professor of biological sciences at Florida International University. At the evidentiary hearing, Dr. Tracey testified that he too had reviewed the trial testimony of agent Vick but found no irregularities. Dr. Tracey agreed with Dr. Herrera that evidence is more compelling when the odds are less frequent. He also testified that agent Vick=s presentation of the ratio=s with each of the three major

groups was consistent with the 1992 NRC recommendation. He acknowledged that these three groups would not apply to the victim. Dr. Tracey also agreed with Dr. Herrera that the missing bands would have made the bands unusable. When Dr. Tracey was questioned about the number of probes, Dr. Tracey admitted that from 1990 through 1995, the industry standard was four probes. He admitted that when these tests were performed in the instant case, the FBI was only using three probes because the fourth probe was not giving interpretable results.

Mr. McDonald presented himself as a witness and testified that he had provided his defense team with the names and addresses of potential alibi witnesses. He also testified that he maintained his innocence to his defense team and detectives. Mr. McDonald testified that upon meeting Mr. Schwartzburg, he told his attorney that he had been in West Palm beach at the time of the murder with an exotic dancer named Tina. He gave the location of the club and the time when Tina was working. He gave this same information to Mr. Watts and the defense investigator Mr. Hitchcox whom Mr. McDonald met one time in December of 1994. Mr. McDonald also testified that he gave his attorney the names of Everton Miller and Eli Ellison who saw Mr. McDonald in Miami on January 24 at 8:30 pm. He also told his attorney that he did not meet Ms. Shore until January 28, three days after the crime occurred.

Mr. McDonald testified that at no time did either of his attorneys discuss the physical evidence in the states possession or the existence of the states expert, Michael

Vick. The first time Mr. McDonald was aware of agent Vick was when the witness took the stand. The same was true for Chris Allen and William Bodziak. Mr. McDonald testified that he was not informed about the progress of his case, the witnesses in his case and whether any witnesses would be called on his behalf. Finally, none of the physical evidence against Mr. McDonald was discussed with him.

Mr. McDonald was questioned by the state about his alibi witnesses and the motion to sever which was withdrawn by his attorney without Mr. McDonald=s consent. Mr. McDonald testified that at no time was he with a meeting with Mr. Schwartburg, Mr. Gordon and Mr. Love. He also testified that Mr. Schwartberg told him that he would proceed to trial without calling any witnesses and felt that the state did not have a strong case.

Mr. McDonald also testified that he requested a severance from Mr. Gordon because of the different arrest dates which would have effected Mr. McDonald=s speedy trial times. At no time, did either attorney discuss trial preparation or strategy and that he was unfamiliar with his rights.

Mr. Schwartzberg then testified and stated he did not recall Mr. McDonald telling him about an alibi. Mr. Schwartzberg testified that he took extensive notes every time he met with Mr. McDonald but could not, at this time, present those notes to substantiate his claim regarding the alibi witness. Much of Mr. Schwartzberg=s testimony was fraught with his inability to remember key conversations with his client.

Mr. Schwartberg testified that he had filed a demand for discovery which was complied with on December 8, 1994. Mr. Schwartberg did not file a motion to compel because he had felt that all discovery regarding the FBI analysis was turned over to him. He testified that he was unable to say when those reports were received. However, through the postconvition process, it was submitted that the FBI documents were never released until June of 2000.(Exhibit B).

Mr. Schwartberg admitted reviewing the statements of Clair Dobb and Virginia Ferguson who positively identified Susan Shore at the Days Inn wearing a grey sweatshirt and tennis shoes. Further, he admits that Susan Shore stated such in her deposition. Further, Mr. Schwartzberg admitted that the only tennis shoes purchased on Denise Davidson credit card were for a small sized women=s shoe. He also testified that he was unaware about when much of the physical evidence was sent to the FBI for testing.

Counsel testified that this was the second DNA case he had litigated and that had he not been prepared he would have moved for a continuance. The court reminded Mr. Schwartzberg that he had indeed moved for a continuance which was denied. Counsel further testified that he did not challenge the DNA evidence in this case because he felt that it was beneficial to his defense even though he admitted that the evidence used had been lost or destroyed.

Mr McDonald attempted to question counsel about the reason for not

challenging the DNA evidence under Frye. Counsel testified that if challenged, a Frye hearing would be required. At this point, the court interjected and stated:

> Mr. McDonald, I will tell you that I probably have tried more cases than any judge in this circuit, and I have never had a Frye test being requested to keep DNA out. Ever. And the reason for that is because its fairly much futile, and most lawyers don=t want to waste the time. That=s number one. And number two, you=ve already heard your lawyer say he didn=t consider it harmful in your particular case. And I presume the reason for that is, by having sat through the case, is because the testimony of Susan Shore put your client clearly at the compound.

When questioned about his theory of the case, Mr. Counsel testified that it was one of Mr. McDonald being framed. He could not recall how much time was used to discuss the theory of defense with his client.

When questioned about the FBI reports, counsel testified that he received the reports from the FBI witnesses. He admitted that he never reviewed reports from agent Vick or any notes from agent Vick nor did he know who prepared the June 22, 1994 report which indicated a DNA match of the victim He also admitted that he never reviewed a June 13, 1994 lab report and reviewing case sheet of agent Audrey Lynch which indicated that no DNA match was ever found on the sweatshirt. He admitted that he never deposed agent Vick nor called any expert witness regarding the DNA evidence.

Counsel was then questioned regarding the speedy trial issue. Counsel admitted

that he never waived speedy trial and was not present when the trial of Mr. Gordon and Ms. Davidson was continued from January 24, 1995 to June 6, 1995. He admitted that he was familiar with Fl.R.Crim.P. 3.191 and that the rule applied to Mr. McDonald. When asked why he never filed a notice of expiration or motion for discharge, counsel stated AI can=t answer that question. I don=t know.@. The court then attempted to rehabilitate Mr. Schwartzberg with repeated questions.

VIII. Brief Statement of the Law

The past few years have witnessed a subtle but tremendous change in the United States Supreme Court=s jurisprudence as it relates to mitigation in death penalty cases. Under the old standards announced in *Strickland*,[4] very little could be argued on post-conviction if the trial attorney invoked the protective shield of Astrategy@. Today, many of the old notions of Astrategy@ are gone. Beginning with *Williams v. Taylor*, 529 U.S. 362 (2000), through *Wiggins v. Smith*, 539 U.S 510 (2003) to this most recent term=s decision in *Florida v. Nixon*, 125 S.Ct. 551 (2004), the concept of mitigation has become more broad and more inclusive than ever before. The duty to fully and thoroughly investigate facts must be done before an attorney can claim that he did not present certain mitigation as part of his trial strategy. *Wiggins*. Strategic reasons to not present certain mitigation because possible unfavorable evidence may surface as a result is no longer reasonable and constitutes deficient performance.

[4] *Strickland v. Washington*, 466 U.S. 668 (1984).

Williams. Failure to investigate mitigation because of the client=s demands is no longer acceptable. *Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003), *cert. denied*, 125 S.Ct. 344 (2004). Finally, an attorney=s claim that he or she would simply not have presented that particular mitigation to the jury is now deficient performance. *Williams*.

The scope of mitigation has also been defined, or more appropriately, returned to its original definition. The United States Supreme Court in *Tennard v. Dretke*, 124 S.Ct. 2562 (2004) and *Smith v. Texas*, 125 S.Ct. 400 (2004) reiterated that mitigation must be defined Ain the most expansive terms@, rejecting state court attempts to create a Anexus@ of mitigation to the crime or a threshold of relevance beyond Aany fact that is of consequence@ which a fact-finder may Adeem to have mitigating value@. This Alow threshold of relevance@ fully incorporates the necessity to conduct a complete biopsychosocial history of the accused, including past family history. Thus, Avirtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.@

With the Supreme Court=s decision in *Wiggins*, the importance of the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (2003) cannot be emphasized enough. Recently, in the Supreme Court=s *Nixon* decision, the Court utilized the newest 2003 Guidelines **and** the Commentary in granting the State of Florida=s appeal from a 1984 trial. With the adoption of the *ABA*

Guidelines, *Wiggins* is now applicable to all stages of Florida=s trifurcated capital trial.

This Court has been busy as well in the area of prosecutorial misconduct. Two recent cases underscore the this 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.), the this Court reversed capital convictions based on *Brady* violations. While this Court worked within existing state and federal constitutional law, the 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.

However, most troubling in this case is the failure of the circuit court to do an adequate job in protecting Mr. McDonald=s rights when it allowed him to proceed pro-se. When a defendant who is entitled to counsel elects to waive that right and self-represent, the judge must inform the defendant of the risks inherent to self-representation and make an inquiry sufficient to determine whether the defendant's waiver of counsel is being made knowingly and intelligently. *See Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *Traylor v. State*, 596 So.2d 957, 968 (Fla.1992); *Wilson v. State*, 724 So.2d 144, 145 (Fla. 1st

DCA 1998); see also Fla. R.Crim. P. 3.111. When a defendant waives the right to counsel, the trial court's failure to perform an adequate *Faretta* inquiry is per se reversible error. *See State v. Young*, 626 So.2d 655, 657 (Fla.1993).The trial court should conduct a *Faretta* inquiry at every critical stage of a case. *Traylor v. State*, 596 So.2d 957 (1992); *Brown v. State*, 830 So.2d 203 (2002).

However, "The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." *Faretta*, 422 U.S. at 834.

When a motion to discharge counsel is based on Aineffectiveness@, the proper procedure is to conduct a *Nelson* inquiry first to determine whether counsel is adequately representing the defendant. If the trial court finds that counsel is not effective in representing the defendant, then new counsel should be appointed rather than allowing the defendant to proceed *pro se*. *Malone v. State*, 852 So.2d 412 (Fla. 5th DCA 2003); *see McKinney v. State*, 850 So.2d 680 (Fla. 4th DCA 2003).

Mr. McDonald did not adequately waive his right to counsel as evidenced in the evidentiary hearing record. As a result, many valid and cognizable claims were waived by his inability to properly follow the rules of law and procedure. As a result, Mr. McDonald=s case has not been adequately tested under our adversarial system.

Argument I

MR. MCDONALD=S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION WERE VIOLATED WHEN THE POST-CONVICTION TRIAL COURT CONDUCTED AN INADEQUATE *FARRETTA* INQUIRY AND BY ALLOWING MR. MCDONALD TO PROCEED PRO SE.

A. Faretta

Mr. McDonald was represented by the Office of the Capital Collateral Regional Counsel for the Middle Region of Florida (hereinafter ACCRC-M@). This office investigated Mr. McDonald=s case and subsequently filed an appropriate motion for postconviction relief. Mr. McDonald, however, did not verify the motion. His reluctance was not based on any allegation that the facts contained in the motion were invalid but rather because Athat he do not trust or has confidence in CCRC ability to represent the defendant.@[5] In his motion previously filed with this Court, Mr. McDonald alleged that CCRC-M failed to challenge the collection of evidence in violation of the Fourth Amendment, failure to challenge the DNA evidence presented at trial, failure to challenge Susan Shore=s testimony, failure to challenge the violation of Defendant=s right to a speedy trial, failure to find the alibi witnesses and failure to challenge jurors.

It is clear from the ROA that CCRC-M=s original Motion to Vacate included

[5] This allegation was made in the Defendant=s pro se motion to discharge CCRC filed on March 5, 2001.

these claims, and more. The trial court conducted a hearing on January 30, 2001 to address the claims contained in Mr. McDonald=s motion to discharge. The trial court denied the motion. Another motion was filed by Mr. McDonald on March 2, 2001 in which he raised the same allegations. Again, the trial court conducted a hearing on April 18, 2001 and found no conflict. At that point, the trial court conducted a *Faretta* hearing pursuant to *Faretta v. California*, 422, U.S. U.S. 806 (1975) and Fl.R.Crim.P. 3.111(d).[6] The trial court found that Mr. McDonald had voluntarily, intelligently and knowingly waived his right to counsel and discharged CCRC-M.[7]

Mr. McDonald filed an amended Motion to Vacate on July 10, 2001 which was substantially the same as the original one he filed in December of 2000. Neither motion filed by the Defendant *pro se* adequately addressed in any manner the ineffectiveness of counsel in failing to adequately investigate and present mitigation evidence.

The Sixth Amendment of the U.S. Constitution guarantees the right of self-representation. *Faretta*, 422 U.S. at 821, 95 S.Ct. 2525; *see also* Art. I, ' 16, Fla. Const. In *Faretta*, the United States Supreme Court held that the defendant's unequivocal request to represent himself should have been granted where the record

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[6] The trial court=s order does not specifically mention Rule 3.111(d) but this Court promulgated the Rule to comport with *Faretta*.

[7] The trial court appointed CCRC-M stanby counsel which, under the law, has no legal bearing since a defendant does not have the right to hybrid representation.

affirmatively showed he was "literate, competent, and understanding, and that he was voluntarily exercising his informed free will." *Id.* at 835, 95 S.Ct. 2525. Thus, "a criminal defendant who is competent to choose self-representation may not be denied that choice, even though the decision for self-representation will most certainly result in incompetent trial counsel." *Eggleston v. State*, 812 So.2d 524, 525 (Fla. 2d DCA 2002). There are no "magic words" in a *Faretta* inquiry. Rather, courts look to the defendant's general understanding of rights as codified in rule 3.111(d), Florida Rules of Criminal Procedure.

When a defendant who is entitled to counsel elects to waive that right and self-represent, the judge must inform the defendant of the risks inherent to self-representation and make an inquiry sufficient to determine whether the defendant's waiver of counsel is being made knowingly and intelligently. *See Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *Traylor v. State*, 596 So.2d 957, 968 (Fla.1992); *Wilson v. State*, 724 So.2d 144, 145 (Fla. 1st DCA 1998); see also Fla. R.Crim. P. 3.111. When a defendant waives the right to counsel, the trial court's failure to perform an adequate *Faretta* inquiry is per se reversible error. *See State v. Young*, 626 So.2d 655, 657 (Fla.1993).The trial court should conduct a *Faretta* inquiry at every critical stage of a case. *Traylor v. State*, 596 So.2d 957 (1992); *Brown v. State*, 830 So.2d 203 (2002).

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When a motion to discharge counsel is based on Aineffectiveness@, the proper procedure is to conduct a Nelson inquiry first to determine whether counsel is adequately representing the defendant. If the trial court finds that counsel is not effective in representing the defendant, then new counsel should be appointed rather than allowing the defendant to proceed *pro se*. *Malone v. State*, 852 So.2d 412 (Fla. 5th DCA 2003); *see McKinney v. State*, 850 So.2d 680 (Fla. 4th DCA 2003).

B. Minimum Standards

This Court and the United States Supreme Court have long recognized that Adeath is different@.[8] In so recognizing, this Court has promulgated Minimum Standards for Attorneys in Capital Cases under Fl.R.Crim.P. 3.112. This rules reads, in pertinent part:

> a) Statement of Purpose. The purpose of these rules is to set minimum standards for attorneys in capital cases to help

[8] AAs the United States Supreme Court first stated more than twenty-five years ago, "death is different in kind from any other punishment imposed under our system of criminal justice." *Gregg v. Georgia*, 428 U.S. 153, 188, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *see also State v. Dixon*, 283 So.2d 1, 7 (Fla.1973) (stating that because "[d]eath is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation ..., the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes"). We have acknowledged that "death is different" in recognizing the need for effective counsel in capital proceedings "from the perspective of both the sovereign state and the defending citizen." *Sheppard & White, P.A. v. City of Jacksonville*, 827 So.2d 925, 932 (Fla.2002).@ *State v. Davis*, 29 Fla. L. Weekly S82 (Fla.. February 19, 2004).

ensure that competent representation will be provided to capital defendants in all cases. Minimum standards that have been promulgated concerning representation for defendants in criminal cases generally and the level of adherence to such standards required for noncapital cases should not be adopted as sufficient for death penalty cases. Counsel in death penalty cases should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, zealously committed to the capital case, who has had adequate time and resources for preparation. These minimum standards for capital cases are not intended to preclude any circuit from adopting or maintaining standards having greater requirements.

(b) Definitions. A capital trial is defined as any first-degree murder case in which the State has not formally waived the death penalty on the record. A capital appeal is any appeal in which the death penalty has been imposed. A capital postconviction proceeding is any postconviction proceeding where the defendant is still under a sentence of death.

(c) Applicability. This rule applies to all lawyers handling capital trials and capital appeals, who are appointed or retained on or after July 1, 2002. Subject to more specific provisions in the rule, the standards established by the rule apply to Public Defenders and their assistants.

(d) List of Qualified Conflict Counsel.

(1) Every circuit shall maintain a list of conflict counsel qualified for appointment in capital cases in each of three categories:

(A) lead trial counsel;

(B) trial co-counsel; and

(C) appellate counsel.

No attorney may be appointed to handle a capital trial or appeal unless duly qualified on the appropriate list.

(2) The conflict committee for each circuit is responsible for approving and removing attorneys from the list pursuant to section 925.037, Florida Statutes. Each circuit committee is encouraged to obtain additional input from experienced capital defense counsel.

(e) Appointment of Counsel. A court must appoint lead counsel and, upon written application and a showing of need

by lead counsel, should appoint co-counsel to handle every capital trial in which the defendant is not represented by retained counsel or the Public Defender. Lead counsel shall have the right to select co-counsel from attorneys on the lead counsel or co-counsel list. Both attorneys shall be reasonably compensated for the trial and sentencing phase. Except under extraordinary circumstances, only one attorney may be compensated for other proceedings. In capital cases in which the Public Defender is appointed, the Public Defender shall designate lead and co-counsel.

(f) Lead Counsel. Lead trial counsel assignments should be given to attorneys who:

(1) are members of the bar admitted to practice in the jurisdiction or admitted to practice pro hac vice; and

(2) are experienced and active trial practitioners with at least five years of litigation experience in the field of criminal law; and

(3) have prior experience as lead counsel in no fewer than nine state or federal jury trials of serious and complex cases which were tried to completion, as well as prior experience as lead defense counsel or co-counsel in at least two state or federal cases tried to completion in which the death penalty was sought. In addition, of the nine jury trials which were tried to completion, the attorney should have been lead counsel in at least three cases in which the charge was murder; or alternatively, of the nine jury trials, at least one was a murder trial and an additional five were felony jury trials; and

(4) are familiar with the practice and procedure of the criminal courts of the jurisdiction; and

(5) are familiar with and experienced in the utilization of expert witnesses and evidence, including but not limited to psychiatric and forensic evidence; and

(6) have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases, including but not limited to the investigation and presentation of evidence in mitigation of the death penalty; and

(7) have attended within the last two years a continuing legal education program of at least twelve hours' duration

devoted specifically to the defense of capital cases. Attorneys who do not meet the continuing legal education requirement on July 1, 2002, shall have until March 1, 2003, in which to satisfy the continuing legal education requirement.

(g) Co-counsel. Trial co-counsel assignments should be given to attorneys who:

(1) are members of the bar admitted to practice in the jurisdiction or admitted to practice pro hac vice; and

(2) qualify as lead counsel under paragraph (f) of these standards or meet the following requirements:

(A) are experienced and active trial practitioners with at least three years of litigation experience in the field of criminal law; and

(B) have prior experience as lead counsel or co-counsel in no fewer than three state or federal jury trials of serious and complex cases which were tried to completion, at least two of which were trials in which the charge was murder; or alternatively, of the three jury trials, at least one was a murder trial and one was a felony jury trial; and

(C) are familiar with the practice and procedure of the criminal courts of the jurisdiction; and

(D) have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases, and

(E) have attended within the last two years a continuing legal education program of at least twelve hours' duration devoted specifically to the defense of capital cases. Attorneys who do not meet the continuing legal education requirement on July 1, 2002, shall have until March 1, 2003, in which to satisfy the requirement.

(h) Appellate Counsel. Appellate counsel assignments should be given to attorneys who:

(1) are members of the bar admitted to practice in the jurisdiction or admitted to practice pro hac vice; and

(2) are experienced and active trial or appellate practitioners with at least five years of experience in the field of criminal law; and

> (3) have prior experience in the appeal of at least one case where a sentence of death was imposed, as well as prior experience as lead counsel in the appeal of no fewer than three felony convictions in federal or state court, at least one of which was an appeal of a murder conviction; or alternatively, have prior experience as lead counsel in the appeal of no fewer than six felony convictions in federal or state court, at least two of which were appeals of a murder conviction; and
>
> (4) are familiar with the practice and procedure of the appellate courts of the jurisdiction; and
>
> (5) have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases; and
>
> (6) have attended within the last two years a continuing legal education program of at least twelve hours' duration devoted specifically to the defense of capital cases. Attorneys who do not meet the continuing legal education requirement on July 1, 2002, shall have until March 1, 2003, in which to satisfy the requirement.

It is clear that this Court set very high standards for those attorneys who handle capital cases and separated those standards for those who handle non-capital cases.(AMinimum standards that have been promulgated concerning representation for defendants in criminal cases generally and the level of adherence to such standards required for noncapital cases should not be adopted as sufficient for death penalty cases.@)

While this Court declined to adopt these same standards for Collateral Counsel, it did recognize that under Chapter 27, there are higher standards for representation of

capital postconviction cases than regular postconviction cases.[9] Those standards are statutorily set out below:

27.704. Appointment of assistants and other staff

> Each capital collateral regional counsel may:
> (1) Appoint, employ, and establish, in such numbers as he or she determines, full-time or part-time assistant counsel, investigators, and other clerical and support personnel who shall be paid from funds appropriated for that purpose. A full-time assistant capital collateral counsel must be a member in good standing of The Florida Bar, with not less than 3 years' experience in the practice of criminal law, and, prior to employment, must have participated in at least five felony jury trials, five felony appeals, or five capital postconviction evidentiary hearings or any combination of at least five of such proceedings. Law school graduates who do not have the qualifications of a full-time assistant capital collateral counsel may be employed as members of the legal staff but may not be designated as sole counsel for any person.

[9] It should be noted that this Court has made a distinction by appointing the CCRC-s automatically to postconviction matters whereas non-capital defendants must make a showing for appointment of counsel.

Recently, the United States Supreme Court issued its landmark decision in *Wiggins v. Smith*, 123 S.Ct. 2527 (2003) in which it established constitutional minimum standards for those who represent defendants in capital death cases. Those standards are those contained in the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989)*[10]. *Wiggins*, 123 S.Ct. at 2537. Guideline 5.1 establishes the minimum qualifications of trial, appellate and postconviction attorneys. Those standards are high and require large amounts of training and experience.

It is clear that, based on Mr. McDonald=s performance at the evidentiary hearing, that he does not posses any of the skills envisioned by any of the aforementioned standards.

C. Examples of the Failings of the Faretta Inquiry

From the very beginning, the trial court should have been aware of Mr. McDonald=s inability to knowingly, intelligently and voluntarily waive his right to counsel when he filed his first pro se Motion to Vacate. As stated above, there is no attack on the investigation and presentation of mitigation evidence by his trial attorneys. *Wiggins* is very clear as to the minimum standards an attorney must meet with regards to this very important issue. In the motion filed by CCRC-M, it is alleged that the attorneys presented no meaningful mitigation evidence and clearly did not do

[10] These were amended in 2003.

the minimum required by the Constitution. Rather, the post-hoc rationalization of the attorneys was allowed to stand as to why a lot of investigation was not done. As such, the trial court abused it discretion in allowing Mr. McDonald to proceed pro se and waive his mitigation.

The trial court, as mentioned above, failed to renew the *Faretta* inquiry when it was clear from the record that Mr. McDonald was not prepared for the evidentiary hearing. At the outset, Mr. McDonald declared that he is not prepared for the hearing and moved for a continuance. (ROA Vol. 20, pg. 3230-31). The trial court observed that Mr. McDonald did not even follow the basic and rudimentary rule of noticing the trial court. (Vol. 20, pgs. 3226, 3227) The trial court denied his motion.

Next, Mr. McDonald moved to have a DNA expert appointed to help him with his case. (ROA Vol. 20, pg. 3252-53). This was denied by the trial. What is worse, rather than protecting Mr. McDonald=s rights, the trial court made every attempt to deny him rights when he tried to present evidence. At the previous *Huff* hearing, the trial court forced Mr. McDonald to waive his right to investigate and present his own DNA evidence. The trial court instead forced Mr. McDonald to rely upon the evidence adduced at Mr. Gordon=s evidentiary hearing. (ROA Vol. 20, pg. 3252-55). Mr. McDonald=s standby counsel objected to waiving this right. (Id. at 3254) Further on, the trial court even conceded that Mr. McDonald made many errors but proceeded with the hearing regardless of Mr. McDonald=s rights.

> I=m prepared to find this man is an intelligent man. He=s made some serious errors here. I=m sorry, get on the telephone, do what you need to do to see if can get somebody here. If you can=t, it=s his fault. I=m going to have a hearing, I=m going to conclude it by tomorrow, and then I=m going to do an order.

(ROA Vol. 20 pg. 3267).

AStand-by@ counsel attempted to help Mr. McDonald proceed with his DNA argument and to help clarify his request for a DNA expert. (ROA Vol. 20, pg. 3261-66) When Astand-by@ counsel attempted to help further, he was quickly rebuked for trying to help:

> Yes, and I want you to stop because that is what the problem is. They don=t their cake and eat it too. I=ve warned him about the dangers of self-representation. He has elected to represent himself. You are standby counsel, not his counsel. **Therefore, you are out of order.**

(Id. at 3266)

Again, instead of protecting Mr. McDonald=s rights as a *pro se* litigant, the trial court used his status to his disadvantage by forcing him to call himself as a witness. (ROA Vol 21, pg. 3387) The court made no inquiry as to whether he was waiving his Fifth Amendment Right to remain silent. Rather, the trial court compelled him to be a witness against himself. *Id.*

Under *Faretta* a trial judge has to be sensitive both to the right to counsel as well as the right to self- representation; however, judges have little leeway in either direction, since there are two constitutional rights at stake. If a defendant has met the

requirements of *Faretta* for self-representation, but the court denies self-representation because of the court's concern that the defendant's ignorance of the law will result in the defendant not receiving a fair trial, it may well violate *Faretta*. *Morris v. State*, 667 So.2d 982, 986 (Fla. 4th DCA 1996).

Morris is still good law in Florida and has not been overruled by the amendments to Fl.R.Crim.P. 3.11(d)[11] or *State v. Bowen*, 698 So.2d 248 (Fla. 1997). *Morris* should not be read as an additional requirement after *Faretta*. Rather, *Morris* should be read as a component of *Faretta* in which the Afair trial factor@ is part of *Faretta*. *Bowen*, itself, contemplates such a factor:

> Because the consequences are serious, courts must ensure that the accused is competent to make the choice and that self-representation is undertaken "with eyes open":
>
> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, **the accused must "knowingly and intelligently" forgo those relinquished benefits. Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."**

Bowen, 698 at 250, *citing Faretta* at 835, 95 S.Ct. at 2541 (citations omitted) (*quoting Adams v. United States ex rel. McCann*, 317 U.S. 269, 279, 63 S.Ct. 236,

[11] 719 So.2d 873 (Fla. 1998).

242, 87 L.Ed. 268 (1942))(emphasis added).

Prior to the amendments to Fl.R.Crim.P. 3.111(d), a judge could deny self-representation in a regular criminal case if it was Acomplex@ or there were other circumstances. *Morris*, 667 at 986 (citing old version of Rule). It deleted the language in 3.111(d)(3) and added language in section (d)(2) that mandated, as part of the *Farretta* inquiry, that the defendant be apprised of the Adangers and dis-advantages of self representation@. As its appendix to the Rule, this Court added the necessary colloquy to be given but only as it pertains to trials and pleas. There is no such colloquy for postconvition representation and no such colloquy for capital death cases.

In the instant case, this Court has no record of the *Farretta* inquiry and whether the correct colloquy was given. There is no evidence that Mr. McDonald made the decision with his Aeyes wide open@. Actually, there is evidence to the contrary as he proceeded along the post-conviction appeal process. One striking example is that Mr. McDonald even waived those claims that this Court pointed out in it=s direct appeal decision that might rise to a level of ineffectiveness of counsel if investigated.

Because Adeath is different@, postconviction death penalty cases can create an Aunusual circumstance@ by virtue of the knowledge necessary and the resources necessary to investigate and properly plead a case. When Mr. McDonald requested resources, such as a DNA expert, he was denied his request by the trial court. When

he requested discovery, he was likewise denied by the trial court. (ROA Vol 20, pg. 3250). When Mr. McDonald requested transcripts, transcripts that would be available to CCRC-M defendants, he was denied access. (ROA Vol. 20, pg. 3237-44).

Mr. McDonald was denied a full and fair evidentiary hearing because of the inadequate Faretta hearing and the trial court=s inability to protect his rights. As such, this Court, after a review of the appropriate transcripts, should remand this case back to the trial court so it may conduct a proper evidentiary hearing with CCRC-M as counsel.

ARGUMENT II

MR. MCDONALD WAS DENIED HIS RIGHT TO EFFECTIVE COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION WHEN COUNSEL FAILED TO ADEQUATELY CHALLENGE THE RACIAL COMPOSITION OF THE JURY VENIRE.

In it=s opinion affirming Mr. McDonald=s conviction and sentence, this court noted:

> First, McDonald claims that he was prejudiced by the fact he was convicted by a jury drawn from an all-white venire. In Gordon, we held that Gordon failed to refute the trial court's finding that jury members were randomly selected by computer and there was no evidence that blacks had been systematically excluded from the jury selection process. See 704 So.2d at 111-12. McDonald also failed to make the requisite showing; thus his claim likewise is without merit.

McDonald v. State, 743 So.2d at 503 fn.8.

Similarly, in Mr. McDonald=s co-defendant=s case, this Court addressed this

issue, although in more detail:

> The United States Supreme Court has set clear guidelines to ensure that juries are drawn from a fair cross section of society. In *Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S.Ct. 692, 702, 42 L.Ed.2d 690 (1975), the Court held that "petit juries must be drawn from a source fairly representative of the community [although] we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." To that end, while defendants are not entitled to a particular jury composition, "jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." Id., at 538, 95 S.Ct. at 702 (emphasis added). Accordingly, the Court invalidated those sections of Louisiana's constitution and criminal procedure code which precluded women from serving on juries unless they expressly so requested in writing.
>
> Several years later under slightly different facts, the Court invalidated a Missouri statute which provided an automatic exemption for any woman that asked not to serve on jury duty. *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979). To give effect to Taylor's fair cross-section requirement, the Court established a three-prong test for determining a prima facie violation thereof. Id., at 364, 99 S.Ct. at 668. The proponent must demonstrate:
> (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.
> Id. (emphasis added). Since the Court in Taylor had already found that women "are sufficiently numerous and distinct from men," 419 U.S. at 531, 95 S.Ct. at 698, Duren only needed to satisfy the last two prongs of the test. He did this by presenting statistical data which showed that women

> comprised over fifty percent of the relevant community but only approximately fifteen percent of the jury venires, Duren, 439 U.S. at 364-66, 99 S.Ct. at 668-69, and demonstrating that this large discrepancy "occurred not just occasionally, but in every weekly venire for a period of nearly a year." Id., at 366, 99 S.Ct. at 669. The Court concluded that this undisputed trend "manifestly indicates that the cause of the underrepresentation was systematic--that is, inherent in the particular jury-selection process utilized." Id. Thus the Court instituted the procedures for establishing a prima facie violation of the Sixth Amendment's fair cross-section requirement.
>
> In this case, there is no evidence in the record that Gordon followed these procedures in challenging the venire. Indeed, beyond some general objections about the venire's composition, the issue was only briefly raised and then without supporting data. Since counsel was presumably aware of the fair cross-section requirement and the Duren test for establishing a prima facie violation, it made no sense to claim, off the cuff, that there was an unrepresentative venire if, first, counsel did not have any supporting data and, second, counsel was aware of the random method from which venires were generated in his county. (Fn.12) Counsel made no attempt to comply with the Duren procedures for substantiating a fair cross-section violation, not to mention Florida Rule of Criminal Procedure 3.290, which requires that "[a] challenge to the [jury] panel shall be in writing and shall specify the facts constituting the ground of the challenge."
>
> FN12. Gordon does not explain how the trial judge was supposed to conclude, under Duren, that his venire was not a fair cross-section of the relevant community, since he did not provide her with any data from which to make such an informed decision.

Instead, after the venire entered the courtroom, McDonald's counsel simply commented to the court that "despite the fact that both of our clients are black,

there are no blacks on the jury panel." Counsel objected that the venire did not represent "a fair cross section of Pinellas County." After Gordon's counsel joined in the objection, the trial judge noted that:

> Counsel on both sides are well aware that the jurors are selected at random in Pinellas County by computer and they are likewise selected at random as a panel downstairs. I'm sure there are some black ones downstairs, but if I started plucking them out, that would be just as wrong. In other words, I have no reason to doubt that these folks were picked totally at random by the computer selection and at this point in time, I'm sure we may be adding to the group, so your motion is noted. It's overruled because there's nothing I can do about it. But as I said, if there's any change, why I will make sure that the record reflects that there are some blacks to be added to the panel.
>
> Neither McDonald's nor Gordon's counsel challenged the factual basis of the trial judge's ruling that the venire was randomly selected by computer, nor did either of them follow any of the procedures established in Duren or required by Florida Rule of Criminal Procedure 3.290 for substantiating a prima facie violation of the fair cross-section requirement.

Gordon v. State, 704 So.2d at 711-12.

In the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (2003)[12], it is very clear that counsel, when confronted with such situations as the case at bar, should properly challenge the venire composition. In Guideline 10.10.2, it reads:

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[12] Recently, in the Supreme Court=s *Nixon* decision, the Court utilized the newest 2003 Guidelines **and** the Commentary in granting the State of Florida=s appeal from a 1984 trial.

Guideline 10.10.2 Voir Dire and Jury Selection

A. Counsel should consider, along with potential legal challenges to the procedures for selecting the jury that would be available in any criminal case (particularly those relating to bias on the basis of race or gender), whether any procedures have been instituted for selection of juries in capital cases that present particular legal bases for challenge. Such challenges may include challenges to the selection of the grand jury and grand jury forepersons as well as to the selection of the petit jury venire.

B. Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding Adeath qualification@ concerning any potential juror=s beliefs about the death penalty. Counsel should be familiar with techniques: (1) for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the defendant is death-eligible, regardless of the individual circumstances of the case; (2) for uncovering those prospective jurors who are unable to give meaningful consideration to mitigating evidence; and (3) for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable.

C. Counsel should consider seeking expert assistance in the jury selection process.

In its Commentary to the Guideline, the ABA discusses the importance of race in jury selection.

> Counsel should also develop a strategy for rehabilitating those prospective jurors who have indicated opposition to the death penalty. Bearing in mind that the history of capital punishment in this country is intimately bound up with its history of race relations, counsel should determine whether discrimination is involved in the jury selection process. Counsel should investigate whether minorities or women are under represented on the jury lists from which grand and petit juries are drawn, or if race or gender played a role in the selection of grand jury forepersons. The defense in a capital case is entitled to voir dire to discover those potential jurors poisoned by racial bias, and should do so when appropriate. Death qualification often results in the removal of more prospective jurors who are members of minority groups than those who

> are white, because minority jurors are more likely to express reservations about the death penalty. Neither race nor gender may form a basis for peremptory challenges, but a recent empirical analysis of capital murder cases supports the conclusion that Adiscrimination in the use of peremptory challenges on the basis of race and gender . . . is widespread.@ Counsel should listen closely to the prosecutor=s voir dire, challenges for cause and reasons for exercising peremptory challenges, make appropriate objections, and ensure that all information critical to a discrimination claim is preserved on the record.

Thus, it is clear from this Court=s own observations and decision in both the McDonald and Gordon cases that counsel was not aware of the law for challenging jury venires nor was Mr. McDonald=s counsel effective in challenging the jury. Because of the issues outlined in Argument I, Mr. McDonald did not have the opportunity to adequately challenge this claim in the circuit court during the evidentiary hearing. Mr. McDonald would be able to present such a claim should this court relinquish jurisdiction.

ARGUMENT III

MR. MCDONALD WAS DENIED HIS RIGHT TO EFFECTIVE COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION WHEN COUNSEL FAILED TO OBJECT TO CLEAR PROSECUTORIAL MISCONDUCT DURING THE STATE=S CLOSING ARGUMENT.

Closing argument "must not be used to inflame the minds and passions of the

jurors so that their verdict reflects an emotional response to the crime or the defendant." *Bertolotti v. State*, 476 So.2d 130, 134 (Fla.1985). Furthermore, if "comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument." *Garron v. State*, 528 So.2d 353, 359 (Fla.1988). "Although this legal precept--and indeed the rule of objective, dispassionate law in general--may sometimes be hard to abide, the alternative--a court ruled by emotion--is far worse." *Jones v. State*, 705 So.2d 1364, 1367 (Fla.1998).

In this Court=s direct appeal opinion in the instant matter, this Court recognized:

> McDonald also challenges the prosecutor's following remarks concerning the pain and suffering felt by the victim:They subdued him and tied him. Why, ladies and gentlemen, did they have to do this to him? Why did they have to blindfold him, gag him, they had to gag him because he was crying out and they had to keep him quiet. There was more violence than that. They broke three of his ribs. Gagging on the mouth, look at the mouth injury? How tightly he was gagged. And why? Because he was crying out for mercy. He was crying out. He is lying there. He is tied up and he is down and what it happening, the water is filling up.... We all filled up our bath tub before, and what was Dr. Davidson having to do during that period of time? Listen to the water as it filled that bath tub, with him either in it or out of it, it doesn't matter. Listen to water as it filled up. And as he knew his life was going to be taken away. And under their scenario I sure hope they held him down, because if you think about it, if they didn't hold him down when he was trying to get up then what he did is he would have had to necessarily be hog tied like he was, hearing the water falling.Think about the time frame when you go back in the jury room. Think about the time frame if [sic] would take. How long it would take to fill the tub up. Twenty

minutes? How long they were in the house. It is a lot longer than it sounds. And if he is lying like this, ladies and gentlemen, and that water is filling up and they're not holding his head down. Is he drowning with the possibility of ever getting any air at all as that bath tub is filling up with water as he is drowning face down, not able to get up, not able to do anything but rock and roll. That is the method of this killing and the ordeal that this doctor went through. That is the aggravating circumstance of heinous, atrocious and cruel. McDonald contends that the comments on what the victim must have felt during the attack violated the "golden rule" because they forced the jury to place themselves in the shoes of the victim. Unfortunately, defense counsel did not object to any of these comments during the State's closing remarks or move for a mistrial. Instead, counsel for McDonald filed a motion for new trial following the conclusion of the penalty phase proceeding which alleged improper comments by the prosecutor during closing arguments. At a hearing held on August 4, 1995, the trial court denied the motion because no objection had been made at trial. Because counsel failed to object to the alleged improper statements by the state attorney during closing argument, McDonald has not preserved this issue for review, and, therefore, his arguments are not cognizable on appeal. See *Chandler v. State*, 702 So.2d 186, 191 (Fla.1997), cert. denied, 523 U.S. 1083, 118 S.Ct. 1535, 140 L.Ed.2d 685 (1998); *Kilgore v. State*, 688 So.2d 895, 898 (Fla.1996). The only exception to this procedural bar is where the prosecutor's comments constitute fundamental error. See *Urbin v. State*, 714 So.2d 411, 418 n. 8 (Fla.1998); *Bonifay v. State*, 680 So.2d 413, 418 n. 9 (Fla.1996). Fundamental error is defined as the type of error which "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Urbin, 714 So.2d at 418 n. 8 (quoting Kilgore, 688 So.2d at 898). Upon consideration of the comments made during closing remarks in this case, taken both individually and collectively, we find that allegedly improper comments do not rise to the level of fundamental error. [FN9] See *Sochor v. State*, 619 So.2d 285, 290 (Fla.1993).

FN9. However, because we are very concerned about improper arguments in death cases, we address several of the improprieties in the prosecutor's closing arguments. First, the evidence does not support the inference that the defendants gagged the victim because he "begged for mercy" or was "crying out." There were no witnesses to the events which took place inside the victim's apartment so it is not known what, if anything, Dr. Davidson may have cried out. While it is a reasonable inference to assume the victim was gagged to keep him quiet, the prosecutor's embellishment onwhat the victim may or may not have said, without factual support in the record, was an appeal to the emotions of the jurors. Such conduct is clearly prohibited. See Urbin, 714 So.2d at 421 (holding that prosecutor's imaginary script of what victim must have said at time of robbery constituted impermissible "subtle 'golden rule' argument"). Further, the prosecutor's several references to the victim's knowledge of impending death as he listened to the water fill the bath tub came very close to asking the jury to place themselves in the shoes of the victim. Arguments asking the jury to place themselves in the victim's shoes are clearly prohibited because they violate the "golden rule" and improperly appeal to the fear and emotion of the jurors. See *Garron v. Stat*e, 528 So.2d 353, 358, 359 n. 6 (Fla.1988) (holding statement asking jury to "[i]magine the anguish and the pain that [the victim] felt as she was shot in the chest" violated golden rule and was clearly prohibited); *Bertolotti v. State, 476 So.2d 130 (Fla.1985)* (holding that "golden rule" arguments are prohibited). Here, the record reveals that the prosecutor's remarks came during his discussion of the applicability of the HAC aggravator. Thus, the comments appear to be more of an attempt to describe the heinousness of the crime than a request to the jury to consider what the victim must have felt. Nevertheless, we find these remarks come perilously close to a golden rule violation. We admonish counsel to refrain from making any argument that asks the jury to consider what the victim must have felt.

While we find the prosecutor's remarks to be ill-advised, they

do not rise to the level of fundamental error.

McDonald, 743 So.2d at 504-05.

Unfortunately, because of the issue presented in Argument I, Mr. McDonald never challenged this clear case of deficient performance on the part of his counsel. Had counsel objected to such argument, thus properly preserving the issue for appeal, Mr. McDonald may have been able to prevail on the issue. However, Mr. McDonald never properly presented this issue. Counsel is requesting that this issue be remanded back to the circuit court so an evidentiary hearing may be held on the matter.

ARGUMENT IV

THE TRIAL COURT ERRED IN NOT GRANTING AN EVIDENTIARY HEARING WHEN A CLEAR SHOWING WAS MADE UNDER FL.R.CRIM.P. 3.851 SHOWING THE STATE VIOLATED THE PROVISIONS OF *BRADY V. MARYLAND, KYLES V. WHITLEY* AND THEIR PROGENY AND *GIGLIO* AND ITS PROGENY WHEN THEY SUPPRESSED EVIDENCE CONCERNING DNA EVIDENCE AND PRESENTED FALSE EVIDENCE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

To establish a *Brady* violation, a defendant must demonstrate: "(1) the State possessed evidence favorable to the accused because it was either exculpatory or impeaching; (2) the State willfully or inadvertently suppressed the evidence; and (3) the defendant was prejudiced." *Allen v. State*, 854 So.2d 1255, 1259 (Fla.2003) (*citing Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286

(1999)); *see also Banks v. Dretke*, 540 U.S. 668, 124 S.Ct. 1256, 1272, 157 L.Ed.2d 1166 (2004).

In establishing materiality, or prejudice, under *Brady*, the United States Supreme Court has emphasized that prejudice is measured by determining "whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' " *Strickler*, 527 U.S. at 290 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). Confidence is undermined when "there is a reasonable probability that had the information been disclosed to the defendant, the result of the proceeding would have been different." *Young v. State*, 739 So.2d 553, 559 (Fla.1999). The Florida Supreme Court has recognized that " '[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.' " *Id.* at 557 (*quoting Kyles*, 514 U.S. at 434). When the suppressed evidence undermines confidence in the result of the trial the defendant is entitled to have his conviction set aside. In reviewing the impact that withheld materials might have on defendants, courts must assess the cumulative effect of the evidence. *See Kyles*, 514 U.S. at 441, 115 S.Ct. 1555, 131 L.Ed.2d 490. In other words, courts should assess the importance of the suppressed materials taken together. *See id.* In addition, courts should consider not only how the State's suppression of

favorable information deprived the defendant of direct relevant evidence but also how it handicapped the defendant's ability to investigate or present other aspects of the case. *See United States v. Bagley*, 473 U.S. 667, 683, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (reviewing court may consider directly any adverse effect that prosecutor's failure to respond to request for information from defendant might have had on preparation or presentation of defendant's case).

Mr. McDonald argues that the lower court granted an evidentiary hearing on the related issue of DNA evidence as it related to ineffective assistance of counsel but denied a hearing on this claim.

The state tendered agent Vick as an expert in the filed of DNA analysis. (T 1214) His testimony was crucial to the state obtaining a conviction against Mr. McDonald. Agent Vick, however, testified before the court that he specifically conducted the DNA test. However, five years after this testimony, Dr. Herrera discovered through his investigation that Agent Vick was not the individual who conducted the DNA analysis. No evidence was presented by the state to refute this point. Further, in June of 2001, Mr. McDonald discovered an FBI report dated June 13, 1994 signed by Audrey Lynch which states that no DNA match was ever found. (*See* Exhibit AC@ *previously admitted by the defense*.)

This evidence was withheld by the state at the time of trial and was only

recently discovered by counsel during post-conviction proceedings.[13] Based on the discovery of the Lynch report, Mr. McDonald filed a motion to depose agents Vick, Allen and Lynch.[14] The state opposed the motion and the court did not even consider the request until the actual date of the evidentiary hearing.

It has long been established that the prosecution's "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." *Giglio v. United States*, 405 U.S. 150, 153, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) (quoting *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791 (1935) (per curiam)). "Ordinarily, we presume that public officials have properly discharged their official duties." *Bracy v. Gramley*, 520 U.S. 899, 909, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997) (quoting *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15, 47 S.Ct. 1, 71 L.Ed. 131 (1926)). The Supreme Court has several times underscored the "special role played by the American prosecutor in the search for truth in criminal trials." *Strickler v. Greene*, 527 U.S., at 281, 119 S.Ct. 1936; *accord, Kyles*, 514 U.S., at 439-440, 115 S.Ct. 1555; *United States v. Bagley*, 473 U.S. 667, 675, n. 6, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *Berger*, 295 U.S., at 88, 55 S.Ct. 629. *See also Olmstead v. United States*, 277 U.S. 438, 484, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting). Courts,

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[13] At the *Huff* hearing, Mr. McDonald argued to the court that such evidence qualified as newly discovered evidence.

[14] Mr. McDonald was *pro se* at this time.

litigants, and juries properly anticipate that "obligations [to refrain from improper methods to secure a conviction] ... plainly rest[ing] upon the prosecuting attorney, will be faithfully observed." *Berger*, 295 U.S., at 88, 55 S.Ct. 629. Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation. *See Kyles*, 514 U.S., at 440, 115 S.Ct. 1555 ("The prudence of the careful prosecutor should not ... be discouraged.").

By contrast to an allegation of suppression of evidence under *Brady*, a *Giglio* claim is based on the prosecutor's knowing presentation at trial of false testimony against the defendant. *See Giglio*, 405 U.S. at 154-55, 92 S.Ct. 763. Under *Giglio*, where the prosecutor knowingly uses perjured testimony, or fails to correct what the prosecutor later learns is false testimony, the false evidence is material "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, 49 L.Ed.2d 342 (1976). Justice Blackmun observed in *Bagley* that the test "may as easily be stated as a materiality standard under which the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt." 473 U.S. at 679-80, 105 S.Ct. 3375. The State, as the beneficiary of the *Giglio* violation, bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt. *Id.* at 680 n. 9, 105 S.Ct. 3375 (stating that "this Court's precedents indicate that the standard of review applicable to the knowing use

of perjured testimony is equivalent to the *Chapman [v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)] harmless-error standard")

Thus, while materiality is a component of both a *Giglio* and a *Brady* claim, the *Giglio* standard of materiality is more defense friendly. The *Giglio* standard reflects a heightened judicial concern, and correspondingly heightened judicial scrutiny, where perjured testimony is used to convict a defendant. *See Bagley,* 473 U.S. at 682, 105 S.Ct. 3375 (explaining that the defense-friendly standard of materiality is justified because the knowing use of perjured testimony involves prosecutorial misconduct and "a corruption of the truth-seeking function of the trial process") (citing *Agurs,* 427 U.S. at 104, 96 S.Ct. 2392). Under *Giglio,* once a defendant has established that the prosecutor knowingly presented false testimony at trial, the State bears the burden to show that the false evidence was not material.

In the instant action, Mr. McDonald attempted to present evidence establishing that the State withheld crucial DNA evidence and that they also presented false evidence. However, Mr. McDonald was not allowed to proceed on this claim. Further, based on the issues in Argument I, Mr. McDonald was not able to properly depose important government witnesses concerning the DNA report. As such, this Court should remand this issue back to the circuit court so a full and fair evidentiary hearing may be conducted.

ARGUMENT V
THE LOWER COURT ERRED IN SUMMARILY

DENYING APPELLANT=S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM FOR FAILURE TO MOVE TO EXCLUDE OR SUPPRESS PHYSICAL EVIDENCE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND TO THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

A. Failure to Challenge Hair Evidence which was Illegally Seized

The only testimony that linked Mr. McDonald to a gray sweatshirt is that of agent Chris Allen. He testified that he performed some analysis regarding the hair and that he found one facial hair and two head hairs that matched the appellant.

The record reflects that the appellant=s hair samples were taken from him on February 26, 1994 while he was at the Dade County Jail waiting to be extradited to South Carolina for an outstanding warrant on a drug charge. The detectives did not have a warrant or court order to take hair samples. Mr. McDonald gave the samples because it was explained that it was necessary for the South Carolina warrant which they indicated was a standard operating procedure. At that time, it was never established that Mr. McDonald was a suspect nor did law enforcement have probable cause to obtain the samples.

Without the testimony of agent Allen, the state=s ability to link the sweatshirt to Mr. McDonald would have been impossible. A motion to suppress his testimony should have been done. Counsel for Mr. McDonald knew of the existence of the

physical evidence and knew of the circumstances surrounding its seizure but took no action in suppressing it. The post-conviction court, in dismissing this claim stated that the hair samples were legally obtained. However, this was done without a hearing on the matter. Further, the lower court ruled that there could be no prejudice shown on the part of counsel. Yet the court, however, ignored the fact that this evidence was used against him in trial to link him to the piece of physical evidence with DNA on it.

The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect. See, e.g., *Strickland v. Washington*, 466 U.S., at 686, 104 S.Ct., at 2064; *United States v. Cronic*, 466 U.S. 648, 655-657, 104 S.Ct. 2039, 2044-2046, 80 L.Ed.2d 657 (1984). In order to prevail, the defendant must show both that counsel's representation fell below an objective standard of reasonableness, *Strickland*, 466 U.S., at 688, 104 S.Ct., at 2064, and that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id., at 694, 104 S.Ct., at 2068. Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice. *Kimmelman v.*

Morrison, 106 S.Ct. 2574 (1986)

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. 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). Guideline 11.4.1 states, in pertinent part:

> GUIDELINE 11.4.1 INVESTIGATION
> A. Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately

upon counsel's entry into the case and should be pursued expeditiously.

B. The investigation for preparation of the guilt/innocence phase of the trial should be conducted regardless of any admission or statement by the client concerning facts constituting guilt.

C. The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.

D. Sources of investigative information may include the following:

1. Charging Documents:

Copies of all charging documents in the case should he obtained and examined in the context of the applicable statues and precedents, to identify (inter alia):

A. the elements of the charged offense(s), including the element(s) alleged to make the death penalty applicable;

B. the defenses, ordinary and affirmative, that may be available to the substantive charge and to the applicability of the death penalty;

C. any issues, constitutional or otherwise, (such as statutes of limitations or double jeopardy) which can be raised to attack the charging documents.

3. Potential Witnesses:

Counsel should consider interviewing potential witnesses, including:

A. eyewitnesses or other witnesses having purported knowledge of events surrounding the offense itself;

B. witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), possible mitigating reasons for the offense(s), and/or other mitigating evidence to show why the client should not be sentenced to death;

C. members of the victim's family opposed to having the client killed. Counsel should attempt to conduct interviews of potential witnesses in the presence of a third person who will he available, if necessary, to testify as a defense witness at

> trial. Alternatively, counsel should have an investigator or mitigation specialist conduct the interviews.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989).

It is clear from the evidence presented to the post-conviction court that trial counsel made no attempt to investigate nor suppress any evidence in this case. While Mr. McDonald=s motion was far below any acceptable standards, he did make the requisite showing under Fl.R.Crim.P. 3.851 in order to obtain an evidentiary hearing on the issue. This court should remand the case back so a full and fair evidentiary hearing may be held.

B. Failure to Challenge the Warrant

In the report of Det. Celona dated March 20, 1994, he claims that on March 1, 1994, at approximately 1600 hours hehad a conversation with agent Allen. Through this conversation, Det. Celona learns that the hair and fiber analysis has been done and that a match was found from both the cashmere coat from the victim=s apartment and from the hair samples of the appellant. However, at that time, no analysis had been done. Detective Celona testified that on March 17, 1994 he sent the appellant=s hairs to the FBI lab. This contradicts the sworn statement referenced above that by March 1, there was a match.

The hair evidence was not only crucial to the conviction of the appellant, it was necessary to get the indictment and arrest warrant. The only hairs found on the

sweatshirt were Caucasian hairs. It is argued that Detective Celona and agent Allen fabricated this evidence against Mr. McDonald. The knowing presentation of this evidence by the state violates *Giglio* and it=s progeny.

In denying this claim, the court erred by stating that counsel could not suppress this evidence. This is clearly incorrect. Counsel was deficient for not moving to suppress this evidence and its introduction was prejudicial to the appellant.

C. Counsel Was Ineffective for Failing to Investigate the State=s DNA Evidence

Agent Allen testified that he had been engaged in the scientific examination of hair evidence for approximately five years but that he received no specialized training in this procedure. (T. 1239-41). In his testimony, he stated that in his opinion, the hairs found on the sweatshirt match the appellant. He went on to further testify, however, that he was not able to fully complete the testing because the coloration of the dye that was used blocked out the internal characteristics of the hairs. Something he relies upon in making an identification. The state used the testimony of Carol Cason and agent Allen to show that the hair on the sweater and those taken from Mr. McDonald were dyed. However, agent Allen was never offered to have this expertise and no challenge was made by counsel.

This evidence was damaging as the prosecutor, in his closing argument, relied upon agent Allen=s testimony and stated that there was a Amatch@. (T.2145-46). Counsel was ineffective for failing to challenge this testimony or obtain the services of

an expert.

During the evidentiary hearing, Mr. McDonald requested the services of a court appointed DNA expert. (*See supra* Argument I). However, this request was denied. Further, based on the other issues stated in Argument I, Mr. McDonald was not able to adequately investigate or challenge the State=s DNA evidence. There is very little, if any, useful testimony developed by Mr. McDonald at the evidentiary hearing. This court should remand the case back so a full and fair evidentiary hearing may be held after a complete investigation has been done by current counsel.

ARGUMENT VI

THE LOWER COURT ERRED IN SUMMARILY DENYING APPELLANT=S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO CHALLENGE THE STATE=S FIBER TESTIMONY OF AGENT CHRIS ALLEN IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Agent Allen testified that he removed one carpet fiber from the sweatshirt which was later found to be consistent with the fibers removed from the appellant=s apartment. The record in this case reflects that a five page transmittal letter of Det. Celona from February 26, 1994, consistent with his deposition, shows that three known carpet samples from the victim=s apartment was sent to the FBI lab on February 27, 1994. Mr. McDonald claims that these fibers were removed from the

Days Inn because there is no report of any technician removing carpet fibers from the victim=s apartment. Counsel for Mr. McDonald should have been aware of the discrepancy of Det. Celona=s prior testimony and Technician Anderson=s testimony.

Agent Allen also testified that he removed six green cashmere coat or belt fibers from the sweatshirt which was consistent with those obtained from a coat from the victim=s apartment. The trial court ruled that appellant did not make a sufficient showing that the evidence was misleading or that counsel could have suppressed the evidence. Again, as stated before, Det. Celona=s March 20 report indicates that by March 1 of that same month, an analysis was done showing a match when, in fact, no analysis had been done by that point.

Further, counsel was ineffective for not requesting a *Frye* hearing regarding the admissibility of the fiber testimony. While the post-conviction court stated that no *Frye* hearing would have been given, even if requested, evidence could have been presented concerning the scientific acceptability of such evidence.

ARGUMENT VII

THE LOWER COURT ERRED IN RULING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE FORENSIC EVIDENCE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

A. Failing to Request A Frye Hearing

Counsel never challenged the DNA evidence because he believed that it was

beneficial to his defense. Counsel never consulted with his client about this theory or with the propriety of challenging the DNA evidence. Counsel could not make a strategic decision whether to challenge the DNA evidence against Mr. McDonald because counsel did not have the FBI documents. However, as established by *Wiggins*, before a strategic decision can be made, that decision must be made after a thorough investigation. Counsel never deposed the FBI expert prior to trial and only spoke to agent Vick at trial.

In denying this claim, the court states that no Frye hearing was necessary and that the issues raised by the testimony in Mr. McDonald=s June 1995 trial were not affected by those issue first announced in *Vargus v. State*, 640 So.,2d 1139 (Fla. 1st DCA 1994) regarding ethnic substructures and population frequencies. However, such evidence was not generally accepted until *Brim v. State*, 695 So.2d 268 (1997) was announced by this Court. Further, th trial court ignored the fact that it was Dr. Tracey=s testimony that was rejected by the Vargus court months before the appellant=s trial.

B. Failure to engage the Services of a DNA Expert.

Dr. Herrera=s testimony was introduced at the evidentiary hearing as an expert in population genetics and molecular biology. Agent Vick had no such training yet counsel stipulated to his expertise.

In *Ramirez v. State*, 810 So.2d 836 (Fla. 2001) this Court held that general

scientific testimony and recognition requires the impartial testimony of experts. Agent Vick does not qualify as one who is impartial nor as an expert. Further, Dr. Herrera believed that agent Vick did not conduct the tests that he testified he did. Counsel would have discovered this had he hired a DNA expert at the time of trial.

In *Troedel v. Wainwright*, 667 F.Supp. 1456 (S.D. Fla. 1986), the court held that the failure to depose the state=s expert witness or to consult with an expert in the field fell below the scope of reasonably professional assistance. In the instant case, there can be argument that this was a reasonable defense strategy since no investigation had been done.

C. Failure to Seek to Exclude Results of Tests Where the Material Tested Had Been Lost or Destroyed

Counsel testified during the evidentiary hearing that he did not file a motion to suppress or exclude the bloodstain sweatshirt because he believed the testimony and evidence was beneficial to his defense. Once again Mr. McDonald asserts that counsel never discussed DNA with his client. A trial strategy of doing nothing is not an acceptable one. *William v. State*, 513 So.2d 1063 (Fla. 1987).

It is clear from the record that the DNA evidence in this case was destroyed. The state cites *Arizona v. Youngblood*, 488 U.S. 51 (1988) in support of its position. However, the appellant states that the evidence was destroyed in bad faith because the evidence was suppressed by the state and the fact that the Lynch report indicates that there was no DNA match. Such destruction of the evidence makes it impossible for

the appellant to challenge the states assumption that the DNA did match or that the destruction was inadvertent.

The duty to fully and thoroughly investigate facts must be done before an attorney can claim that he did not present certain evidence as part of his trial strategy. *Wiggins*; *Williams v. Taylor*, 529 U.S. 362 (2000). The *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (2003) are very clear concerning an attorney=s duty to investigate:

> Guideline 10.7 Investigation
> A. Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.
> 1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.
> 2. The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.
> B. 1. Counsel at every stage have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel.
> 2. Counsel at every stage have an obligation to satisfy themselves independently that the official record of the proceedings is complete and to supplement it as appropriate.

Again, the Commentary to the Guideline is instructive:

> As noted supra in the text accompanying notes 47-49, between 1973 and 2002 some 100 people were freed from death row in the United States on the grounds of innocence.

> Unfortunately, inadequate investigation by defense attorneys **B** as well as faulty eyewitness identification, coerced confessions, prosecutorial misconduct, false jailhouse informant testimony, **flawed or false forensic evidence,** and the special vulnerability of juvenile suspects **B** have contributed to wrongful convictions in both capital and noncapital cases. In capital cases, the mental vulnerabilities of a large portion of the client population compound the possibilities for error. This underscores the importance of defense counsel=s duty to take seriously the possibility of the client=s innocence, to scrutinize carefully the quality of the state=s case, and to investigate and re-investigate all possible defenses....***4. Physical Evidence: Counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or sentencing. With the assistance of appropriate experts, counsel should then aggressively re-examine all of the government=s forensic evidence, and conduct appropriate analyses of all other available forensic evidence.***

(Emphasis added).

ARGUMENT VIII

THE LOWER COURT ERRED IN SUMMARILY DENYING APPELLANT=S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO CHALLENGE PHYSICAL EVIDENCE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The record reveals that an employee at the Days Inn discovered the sweatshirt and tennis shoes lying on the floor. These items were turned over to her supervisor who then placed them in the hotel=s lost in found property box with other items.

Counsel made no attempt to investigate the possible contamination of these objects with other lost objects, or evidence of tampering to present to the jury. *See eg.*, *Taplis v. State*, 703 So.2d 453 (Fla. 1997).

While the employees of the Days Inn identified the object (Exhibit AF@), it is also clear that none of the employees could identify Mr. McDonald being at the hotel. Further, during her deposition, Ms Shore admitted to being the one who wore the gray sweatshirt. The post-conviction court denied this claim, stating that it was reasonable trial strategy.

The duty to fully and thoroughly investigate facts must be done before an attorney can claim that he did not present certain evidence as part of his trial strategy. *Wiggins*; *Williams v. Taylor*, 529 U.S. 362 (2000). The *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (2003) are very clear concerning an attorney=s duty to investigate:

> Guideline 10.7 Investigation
> A. Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.
> 1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.
> 2. The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.
> B. 1. Counsel at every stage have an obligation to conduct a full examination of the defense provided to the client at all

> prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel.
> 2. Counsel at every stage have an obligation to satisfy themselves independently that the official record of the proceedings is complete and to supplement it as appropriate.

Again, the Commentary to the Guideline is instructive:

> As noted supra in the text accompanying notes 47-49, between 1973 and 2002 some 100 people were freed from death row in the United States on the grounds of innocence. Unfortunately, inadequate investigation by defense attorneys **B** as well as faulty eyewitness identification, coerced confessions, prosecutorial misconduct, false jailhouse informant testimony, **flawed or false forensic evidence,** and the special vulnerability of juvenile suspects **B** have contributed to wrongful convictions in both capital and noncapital cases. In capital cases, the mental vulnerabilities of a large portion of the client population compound the possibilities for error. This underscores the importance of defense counsel=s duty to take seriously the possibility of the client=s innocence, to scrutinize carefully the quality of the state=s case, and to investigate and re-investigate all possible defenses....***4. Physical Evidence: Counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or sentencing. With the assistance of appropriate experts, counsel should then aggressively re-examine all of the government=s forensic evidence, and conduct appropriate analyses of all other available forensic evidence.***

(Emphasis added).

Counsel never investigated any of the physical evidence in this case nor did he present any evidence at trial to rebut the State=s case. Unfortunately, due to the position that Mr. McDonald was put in at the evidentiary hearing, the States case was

not properly challenged. This Court should remand this case back for a full and fair evidentiary hearing on this issue.

ARGUMENT IX

THE LOWER COURT ERRED IN SUMMARILY DENYING APPELLANT=S CLAIM OF INEFFECTIVENESS OF COUNSEL FOR FAILING TO CHALLENGE THE EXPERT SHOE IMPRINT TESTIMONY OF AGENT WILLIAM BODZIAK IN VIOLATION OF THE OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Counsel failed to challenge the introduction of a pair of tennis shoes found at the Days Inn along with the gray sweatshirt. Counsel failed to effective challenge the evidence based on the fact that the witnesses at the Days Inn identified Ms. Shore as wearing white tennis sneakers and that Ms. Davidson had purchased female sized tennis shoes. There is no evidence directly linking the tennis shoes to Mr. McDonald.(*See* Defense Exhibit AG@ *previously submitted*)

Further, no shoe prints ever were found to Amatch@ the shoes found at the Days Inn. Agent Bodziak was allowed to testify that the shoe had the same characteristics as those found at the crime scene, even though he was not the individual who did the examination. Instead, that was done by agent Dunn as revealed in the FBI documents during the post-conviction process. Unfortunately, due to the position that Mr. McDonald was put in at the evidentiary hearing, as stated in Argument I, the States

case was not properly challenged. This Court should remand this case back for a full and fair evidentiary hearing on this issue.

ARGUMENT X

THE LOWER COURT ERRED IN SUMMARILY DENYING APPELLANT=S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM FOR FAILING TO CHALLENGE THE TESTIMONY OF SUSAN SHORE IN VIOLATION OF THE OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND THE STATE COMMITTED *BRADY* ERROR WHEN IT SUPPRESSED EVIDENCE THAT IT HAD PAID A STATE WITNESS.

The only testimony that places Mr. McDonald at or near the crime scene is the testimony of Susan Shore, a prosecution witness who was allowed to plea in exchange for her testimony. Documents revealing that the state paid for her to live in an apartment were never handed over to the defense nor was it revealed that the prosecutor coached Ms. Shore on an almost daily basis.

Further, counsel never introduced the statements of three witnesses: Debbie Green, Edward Holden and Patricia Axhorn. These witnesses testified that she traveled to the area with her boyfriend to look for an apartment in the vicinity of the crime. (*See* Defense Exhibit AK@ *previously submitted*).

Due to the position that Mr. McDonald was put in at the evidentiary hearing, as stated in Argument I, the State=s case was not properly challenged. This Court should remand this case back for a full and fair evidentiary hearing on this issue.

ARGUMENT XI

THE LOWER COURT ERRED IN RULING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO SEVER IN VIOLATION OF THE OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

On June 5, 1995, counsel for Mr. McDonald filed a motion to sever. This was a day before trial was to commence. Mr. McDonald was never informed of this nor was he present at this hearing. Counsel withdrew his motion to sever after counsel for Mr. Gordon withdrew his notice of alibi.

Mr. McDonald never waived his right to be tried with the time frames established by Fl.R.Crim.P. 3.191(a) and wanted his case severed so that he would not be affected by Mr. Gordon=s trial or time frames. At no point prior to the day before trial did Mr. Schwartzberg attempt to protect his client by filing a motion to sever. *Santiago v. State*, 698 So.2d 919 (Fla. 5th DCA 1997) held that a motion to sever should be granted to protect a defendant=s right to a speedy trial. In the instant case, both co-defendant=s had waived speedy trial.

Due to the position that Mr. McDonald was put in at the evidentiary hearing, as stated in Argument I, the State=s case was not properly challenged. This Court should remand this case back for a full and fair evidentiary hearing on this issue.

ARGUMENT XII

THE LOWER COURT=S ERRED THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO

INVESTIGATE PRESENT AN ALIBI DEFENSE IN VIOLATION OF THE OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

As stated *infra*, Mr. McDonald advised all members of his defense team that he had an alibi for the time of the murder. Mr. McDonald presented himself as a witness and testified that he had provided his defense team with the names and addresses of potential alibi witnesses. He also testified that he maintained his innocence to his defense team and detectives. Mr. McDonald testified that upon meeting Mr. Schwartzburg, he told his attorney that he had been in West Palm beach at the time of the murder with an exotic dancer named Tina. He gave the location of the club and the time when Tina was working. He gave this same information to Mr. Watts and the defense investigator Mr. Hitchcox whom Mr. McDonald met one time in December of 1994. Mr. McDonald also testified that he gave his attorney the names of Everton Miller and Eli Ellison who saw Mr. McDonald in Miami on January 24 at 8:30 pm. He also told his attorney that he did not meet Ms. Shore until January 28, three days after the crime occurred.

Mr. Schwartzberg then testified and stated he did not recall Mr. McDonald telling him about an alibi. Mr. Schwartzberg testified that he took extensive notes every time he met with Mr. McDonald but could not, at this time, present those notes to substantiate his claim regarding the alibi witness. Much of Mr. Schwartzberg's

testimony was fraught with his inability to remember key conversations with his client.

The *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (2003) are very clear concerning an attorney=s duty to investigate:

> Guideline 10.7 Investigation
> A. Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.
> 1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.
> 2. The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.
> B. 1. Counsel at every stage have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel.
> 2. Counsel at every stage have an obligation to satisfy themselves independently that the official record of the proceedings is complete and to supplement it as appropriate.

Mr. Schwartzberg=s testimony does not contradict the testimony of Mr. McDonald which he erroneously assumed he needed to present in order to present this claim.[15] Mr. Schwartzberg=s testimony reveals that he did not remember the events in question nor did he have his notes to refresh his recollection.

[15] *See supra* Argument I.

Mr. McDonald was denied a full and fair evidentiary hearing because of the inadequate *Faretta* hearing and the trial court=s inability to protect his rights. Mr. McDonald was not able, based on his education, intelligence and experience, to properly submit his claim. As such, this Court, after a review of the appropriate transcripts, should remand this case back to the trial court so it may conduct a proper evidentiary hearing with CCRC-M as counsel.

ARGUMENT XIII

MR. MCDONALD=S RIGHT TO FAIR AN INDIVIDUALIZED SENTENCING UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION WERE VIOLATED WHEN THE POST-CONVICTION TRIAL COURT CONDUCTED AN INADEQUATE *FARRETTA* INQUIRY AND BY ALLOWING MR. MCDONALD TO PROCEED *PRO SE*.

As argued infra, Mr. McDonald did not make a knowing, intelligent and voluntary waiver of his right to counsel and therefore did not make a knowing waiver of his numerous penalty phase claims. Counsel was never able to present any of the mitigation and other penalty phase evidence to the evidentiary court because that court had removed CCRC-M.

In support of this Claim, current counsel attaches a copy of the original Motion to Vacate Conviction and Sentence as Attachment A1". In addition, due to ruling by the court removing current counsel from the case, and thus removing counsel=s

statutory authority to investigate the case, numerous examples of inadequately investigated mitigation cannot be presented. Counsel requests a limited amount of time to competently and ethically complete Mr. McDonald=s investigation, an investigation required by the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 10.15.1* (2003) .

Conclusion

For the aforementioned reasons, counsel requests that this court relinquish jurisdiction and remand this case back to the circuit court so a full and fair evidentiary hearing may be conducted.

CERTIFICATE OF SERVICE

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

_____

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