IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC03-710
Lower Tribunal No.: 94-00723-CFAWS

BOBBY RALEIGH,

Appellant.

V.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the Circuit Court's summary of denial of Mr. Raleigh's Motion for Postconviction Relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850.

The following symbols will be used to designate references to the record in this appeal.

"R" – Record on Direct Appeal to this Court.

"PCR" – Record on Instant 3.850 Appeal to this Court.

"PCT" - Record on Postconviction Transcript

REQUEST FOR ORAL ARGUMENT

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

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STATEMENT OF THE CASE AND FACTS

The Defense relies on the following statement of the facts of this case, which is taken from the Florida Supreme Court's opinion on direct appeal:

> In the early morning hours of June 5, 1994, while at the Club Europe in DeLand, Domingo Figueroa told Raleigh that someone had slapped his mother. Raleigh and Figueroa confronted Douglas Cox and his brother and while they were talking in the parking lot, Raleigh's mother ran out of the bar screaming at Cox. Raleigh took his mother to the car and returned to confront Cox.

After apologizing for his mother's actions and shaking hands with Cox, Raleigh obtained guns from his home. Raleigh and Figueroa then drove to Cox's trailer.

Raleigh went to the door with a gun in his hand and was told by Ronald Baker that Cox was asleep. Raleigh and Figueroa left, drove down a nearby dirt road, park, and later returned to Cox's trailer carrying guns. Raleigh walked to the end of the trailer and shot Cox in the head three times at close range. Figueroa and Raleigh shot Tim Eberlin, Cox's roommate, until their guns jammed. Raleigh then beat Eberlin in the head with the barrel of the gun until he stopped screaming. Raleigh and Figueroa drove to Raleigh's home where they burned the clothes they wore during the murders, dumped the bullets into a neighbor's yard, and later hid the guns in a secret compartment in Raleigh's Subaru. The police went to Raleigh's house that night and he agreed to talk to them. Raleigh initially denied his involvement in the murders, but after being told that Figueroa had implicated him, he taped a second statement admitting that he killed Cox and Eberlin.

On June 6, 1995, Raleigh pled guilty to two counts of first degree murder and the penalty
phase was conducted from August 8 to August 15, 1995. A jury unanimously recommended the death penalty on each count. On February 16, 1996, the trial court sentenced Raleigh to death, finding that the aggravating circumstances, (FN1) outweighed the one statutory mitigating circumstance, (FN2) and several nonstatutory mitigating circumstances. (FN3)

> (FN1.) Aggravating circumstances: (1) defendant was convicted of a prior violent felony (Cox and Eberlin); (2) defendant committed

> the murder while engaged in a burglary (Cox and Eberlin); (3) defendant committed the murder in a cold, calculated, and premeditated manner (Cox); (4) defendant committed the murder to avoid arrest or effect escape (Eberlin); (5) the murder was especially heinous, atrocious, or cruel (Eberlin).
>
> (FN2.) Statutory mitigating circumstance: Raleigh was nineteen at the time of the crime (§ 921.141(6)(g), Fla. Stat. (1995)).
>
> (FN3.) Nonstatutory mitigating factors: defendant (1) was intoxicated; (2) is remorseful; (3) pled guilty; (4) offered to testify against codefendant Figueroa; (5) could probably adjust well to prison life; (6) is a good son and friend to his mother; (7) is a good brother; (8) is a good father figure to ex-girlfriend's daughter; (9) was born into dysfunctional family; (10) did not know who fathered him; (11) attempted suicide; (12) has low self-esteem; (13) suffers from an adjustment disorder and is anti-social; (14) uses poor judgment and engaged in impulsive behavior; (15) is a follower.

Raleigh v. State, 705 So. 2d 1324, 1326-27 (Fla. 1997). On appeal, Raleigh raised the following issues, as framed by the Florida Supreme Court:

> Whether the trial court erred by (1) failing to instruct the jury on the "no significant history of criminal activity": statutory

> mitigator; (2) instructing the jury on the "pecuniary gain" aggravator: (3) failing to give the requested instruction on the ":cold, calculated, and premeditated: (CCP) aggravator; (4) dismissing a jury over defense objection, where there was no showing that the juror could not be fair; (5) finding the "during the course of a burglary" aggravator; (6) finding the "avoid arrest" aggravator; (7) finding the CCP aggravator for Cox's murder; (8) finding the "heinous, atrocious, or cruel" (HAC) aggravator for Eberlin's murder; (9) rejecting the "under substantial domination of another" statutory mitigator; (10) rejecting the "no significant history of criminal activity" statutory mitigator: (11) giving only "some weight" to the "remorseful and cooperative with authorities" nonstatutory mitigator; (12) rejecting Figueroa's life sentences as a nonstatutory mitigator; (13) giving "little weight" to Raleigh's voluntary intoxication; and (14) sentencing Raleigh to death, because death is disproportionate.

Raleigh v. State, 705 So. 2d at 1327 n. 4.

On March 23, 1998, the Supreme Court issued its Mandate, affirming Defendant's conviction and sentence. *See Raleigh v. State*, 705 So. 2d 1324 (Fla. 1998). On November 20, 1998, attorney of record, Christopher DeBrock, of Capital Collateral Region Counsel-Middle, filed a Motion to Vacate Judgment of Conviction and Sentence with Special Request to Amend. On January 12, 1999, the Court ordered the State to respond to the motion. In their response, filed March 26, 1999, the State argued that the motion was legally insufficient. On January 19,

2001, new counsel, Kenneth Malnik, filed an Amended Motion to Vacate Plea, Judgment of Conviction and Sentence. On February 26, 2001, the State filed its Response to Defendant's amended motion, and on April 4, 2001, Defendant filed his Reply to the State's Response. On August 2, 2001, a *Huff* hearing was held. *Huff v. State*, 622 So. 2d 982 (Fla. 1993). At the conclusion of the *Huff* hearing, and based on arguments presented therein, the Court granted Defendant an evidentiary hearing on claims (1),(3),(4),(6),(9), and (11). Subsequently, on August 9, 2001, the Court entered an Order denying Defendant any relief on claims (5),(7),(8),(10),(12),(13), and (14), but added claim (2) to the list of claims to be heard at the evidentiary hearing. The evidentiary hearing was held February 24 - 26, 2003 at which time the Court heard testimony from Dr. Ernest Bordini, Ms. Lisa Wiley, Attorney Michael Teal, Attorney Elizabeth Blackburn, Attorney James Alexander, and Attorney James Clayton. Defendant did not testify.

An Order denying claims (1),(2),(3),(4),(6),(9), and (11) was entered on March 24, 2003. A Notice of Appeal was filed on April 14, 2003.

ARGUMENT I

THE LOWER COURT ERRED IN DENYING MR. RALEIGH'S CLAIM THAT THE MENTAL HEALTH EXPERT DID NOT RENDER ADEQUATE MENTAL ASSISTANCE AS REQUIRED IN AKE v. OKLAHOMA

Mr. Raleigh argued in the Lower Court that he was denied his rights under the federal constitution to a professional, competent, and appropriate mental health evaluation for use in the aid of his defense. Defense counsel failed to obtain a professional, competent, and appropriate mental health evaluation. Counsel further failed to provide the background material necessary for an adequate and appropriate evaluation. *Ake v. Oklahoma*, 470 U.S. 68 (1985); *Morgan v. State*, 639 So. 2d 6 (Fla. 1994) With mental health at issue, counsel has a duty to conduct a thorough investigation into his client's mental health background, see *O'Callaghan v. State*, 461 So. 2d 1354 (Fla. 1984), and to assure that the client is not denied a professional and professionally conducted mental health evaluation. *Cowley v. Stricklin*, 929 F.2d 640 (11th Cir. 1991); *Mason v. State*, 489 So. 2d 734 (Fla. 1986); *Mouldin v. Wainwright*, 723 F.2d 799 (11th Cir. 1984). Mr. Raleigh's argument is that his mental condition was not adequately developed during sentencing in establishing (a) statutory

mitigation factors; (b) statutory aggravating factors and (c) myriad non-statutory mitigating factors. Dr. Ernest J. Bordini, a clinical forensic neuropsychologist, reviewed records, examined Mr. Raleigh, and testified at the subsequent evidentiary hearing and found numerous areas of omission in the prior psychological/neuropsychological evaluation performed by Dr. James Upson, Ph.D.

The Lower Court's rulings speak to two areas. First, the Court proffers that this claim is procedurally barred. However, the Court rules on the merits. Second, the Court finds that Dr. Bordini merely repackages Dr. Upson's findings and although Dr. Bordini's evaluation may be packaged better, it does not make Dr. Upson's evaluation inadequate. On both rulings, the Lower Court erred.

Dr. Bordini was qualified as an expert in Neuropsychology and as a Forensic Psychologist. As explained in the Lower Court's findings at R. 592-593, Dr. Bordini testified that he met with Mr. Raleigh three times to conduct his testing. He interviewed Mr. Raleigh's mother, Janice Figueroa and reviewed a history which included Dr. Upson's records, his report, depositions, and testimony; Defendant's deposition, testimony, and statements; statements from Ronald Baker and Andy Bennett (girlfriend) plus their testimony; Janice Figueroa's deposition,

testimony, and statements (spoke to her as well); Domingo Figueroa's statement; deposition of Dr. Reeves, the Medical Examiner,; a letter sent to Donna Stewart; medical records from West Volusia Memorial Hospital; and Joseph Miller's court testimony.

Dr. Bordini testified that Mr. Raleigh did not know who his natural father was, yet he suspected that his father was his maternal uncle; his mom was fifteen (15) years old when she gave birth to Defendant; he witnessed physical abuse and was sexually abused himself, as early as age four; he felt alienated from his stepfather; he witnessed his stepfather abuse his mom; he used drugs and alcohol, and huffed freon; attempted suicide; had bisexual feelings; and dealt drugs. The Lower Court continued at R. 593 that according to Dr. Bordini, Defendant's mom, Janice Figueroa, relayed that there was a family psychiatric history of anxiety disorder, depression, substance abuse, and incestuous relationships; that two of her sisters have panic attacks; she and another sister have been diagnosed with depression; other members suffer from alcoholism and depression; an uncle committed suicide; and one brother is on disability for paranoid schizophrenia. Mrs. Figueroa also described Defendant as naive, seen as a family joke, and easily influenced or manipulated.

Dr. Bordini administered the MMPI test to Defendant which

revealed elevations across several scales, indicating a broad range of features and multiple diagnosis. The scales showed evaluation in terms of symptoms relating to post-traumatic stress disorder; elevation on scale of depression; high elevation on the border line features scale; high score on the schizophrenia scale; slight elevation, not in the clinical range, on the antisocial personalty feature; and marked elevation on the suicide scale. He also administered a second test, Trauma Symptom Inventory, and Defendant obtained elevated scores on all the scales;, including depression and anxious moods, disturbances and sense of identity, sense of control, and impaired feelings of self-reference.

Dr. Bordini also conducted some neuropsychological testing. Dr. Bordini first noted some frontal lobe difficulties, but he did not elaborate. Using DSM IV, Dr. Bordini made a diagnosis of Defendant. As to Axis I, he noted cognitive disorder not otherwise specified, which he described as neuropsychological dysfunction directly related to developmental factors, and frequent freon inhalation, a communication disorder not otherwise specified, depression, posttraumatic stress disorder; and an anxiety disorder not otherwise specified. As to Axis II, he noted borderline personality disorder; dependent personality disorder (subserves his needs to others); and features of

antisocial personalt8y disorder. As to Axis III, Dr. Bordini noted that Defendant had chronic hip and hand pain.

In reference to statutory mitigators, Dr. Bordini indicated that Defendant was under extreme mental or emotional disturbance, extreme duress or substantial domination of another, his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (Defendant did understand he was killing someone, did appreciate the criminality of his conduct, but had less time to reflect during the second killing), and Defendant was only nineteen (19) years old at the time of the murders.

Dr. Bordini also testified that he did not find Defendant to be mentally retarded; Defendant had a 98 IQ; Defendant admired Domingo, and may have even had some feelings for him; Defendant's memory was impaired from alcohol; Defendant relies upon visual information more than language, i.e. gives visual signals more weight; and Defendant was drinking heavily on the night of the murders (approx. 3-4 drinks per hour).

The Lower Court's Order indicates Dr. Bordini testified as to Dr. Upson's failures. The Lower Court characterized these failure at R.. 593:

> (1) Dr. Upson was unaware of critical family history and witness statements, (2) failed to adequately understand Defendant's behavior before the murders; (3) did not

> have enough information about domination to adequately testify to it; (4) erred by failing to work with a diagnosis; (5) administered and scored the MMPI test wrong (Dr. Bordini could not replicate the results); (6) failed to administer a formal memory test; and (7) he failed to fully explore the effects of alcohol on Defendant's judgment and motor function on the night of the murders.

The Lower Court summarily dismisses these failures and instead suggests that Dr. Bordini's evaluation is just better packaged.

Dr. Bordini's explanation of Dr. Upson's deficiencies leads to the conclusion that Dr. Upson's evaluation <u>was inadequate</u>.

<u>DEFICIENT CLINICAL INTERVIEW</u>

> Q And what is that opinion with respect to Dr. Upson's conduct of the clinical interview of Mr. Raleigh?
>
> A I think there were some critical areas in the history that Dr. Upson was not aware of, and some critical areas in terms of witness statements about Bobby's state of mind and actions and behaviors that he was not aware of. I don't think he – I think his own testimony indicated that he felt he didn't have enough information about domination to testify adequately with respect to that aspect of mitigating circumstances.
>
> There was some failures in terms of follow-up questioning in terms of history of depression, family

psychiatric history. There was a failure to adequately understand Mr. Raleigh's behavior and psychiatric state in the days prior to the crime.

Q And what's the significance, in your opinion, assuming that Dr. Upson didn't do that, what's the deficiency in not exploring behavior in the days leading up to the incident?

A Well, one of the things that's a little bit hard to explain is that Dr. Upson initially indicates that he was not working with a diagnosis. That's not according to Florida standards in terms of any patient that we see, it's almost required that he have a diagnostic formulation. To formulate that diagnostic formulation, the family psychiatric history would cue him as to what types of things to inquire further about. There's some family history of psychosis, there's question of, you know, anxiety disorder, and so forth.

There's a question of how severely depressed he is and his family's predisposition to depression that is relevant.

So, certainly, one of the things when we're trying to understand a defendant's mental state at the time of the crime, asking about the days prior to or afterwards can be very revealing. You look for consistencies and inconsistencies. Oftentimes, the defendant can be motivated to tell you a different story on the day of the crime for self-serving purposes. They're usually less sophisticated as to sort of knowing how to respond about the days prior to, and so forth. And what you're looking for his patterns of behavior and the more consistent the

patterns are, you know, as an evaluator, the more weight or the more competent you could be in your conclusions. So understanding those facts is very critical to formulating the opinion.

(PCT 63-65)

DEFICIENCY IN TESTING

Q Do you have an opinion as to whether there were any deficiencies in Dr. Upson's neuropsych examination and findings of Mr. Raleigh?

A Yes.

Q Can you tell the Court what they are?

A Obviously, we discussed the problem with the MMPI in terms of it seems to not be scored correctly, which is one of the tests that we primarily rely on in terms of confirming our impressions about the depression and anxiety and so forth. Clearly, there is some concerns about the potential of Bobby having memory deficits because of his history. I can't understand, though, Dr. Upson did do a number of neuropsychological tests, he didn't do any formal memory tests, which I think is a significant deficiency and doesn't allow him to speak to whether Bobby has an amnestic disorder or not.

Q And when a say amnestic disorder, what does that mean?

A It's a word for memory problems.

Q And in this case did you make diagnoses under DSM IV.

A I did.

(PCT 88,89)

DEFICIENCY IN REVIEWING COLLATERAL DATA

> Q Did you find any deficiencies with respect to whether Dr. Upson gathered enough material to even formulate an opinion?
>
> A He apparently had asked for some material that he didn't receive.
>
> Q Okay, you don't know for a fact whether he received it or not, that's what he related?
>
> A That's what he testified to, correct. And there clearly was material that had to do with witness statements. You know, one dramatic example the witness statement of his waving the gun to his head. Other statements about Bobby slurring his speech or acting like he's wired while he's outside of the trailer, clearly, you know, speak to his state of mind and what was going on at the time. I can't see any reason not to, you know – it's unfathomable not to review those records. (PCT 65)

These failures and omissions deprived Mr. Raleigh of substantial evidence relevant to the outcome of Mr. Raleigh's penalty phase. Most disturbing is the lack of discussion of Dr. Upson's testimony by the trial court in its Sentencing Order. Dr. Upson is barely mentioned. Dr. Upson's minimal impact on the Court's decisions is reflected in its findings without mention of Dr. Upson; although it is his testimony which the

Court uses to make these findings:

> "The Court finds three aggravating factors have been established beyond a reasonable doubt. One statutory mitigating factor, the age of the Defendant, has been reasonably established. Several non-statutory factors were also established.
>
> The Statutory mitigator of the Defendant's age is not entitled to much weight. The non-statutory mitigators of the Defendant's guilty plea, offer to testify, and remorse are entitled to some weight and consideration. The remaining non-statutory mitigators are entitled to little weight." (R. 731)

The Lower Court in its evidentiary hearing order cites a number of cases , *Asay v. State*, 769, So. 2d 974, 986 (Fla. 2000); *Jones v. State*, 732 So. 2d 313, 320 (Fla. 1999); *Rutherford v. State*, 727 So. 2d 216, 224 (Fla. 1999); *Rose v. State*, 617 So. 2d 291, 293 (Fla. 1993); *Sireci v. State,* 502 So. 2d 1221; *Jones v. State*, 2003 WL 297074 at page 6 (Fla. February 13, 2003) to justify as adequate the work of trial counsel and the psychologist. (PCR 594) These cases will first be examined with respect to the quality of work of trial counsel and the mental health experts. Second, these cases will be examined with respect to the quality of the postconviction mental health mitigation.

This Court, in *Asay v. State*, 769 So. 2d 974 (Fla. 2000) ruled in citing as one of the reasons that penalty phase counsel

reasonably relied upon Dr. Vallely's report:

> "Dr. Sultan, a clinical psychologist who testified for Asay at the evidentiary hearing, testified that the results of the psychological tests she administered were not inconsistent with the results garnered by Dr. Vallely and a competent psychologist could have reached Dr. Vallely's diagnosis." *Id.* at 986.

In the instant case, Dr. Bordini testified at great length that he could not replicate Dr. Upson's test results leading him to the conclusion that Dr. Upson's test results were invalid. (PCT 80,81) In addition, Dr. Bordini criticized Dr. Upson' work, because Dr. Upson failed to make a diagnosis which is fundamental to a psychological evaluation. (PCT 64)

The Court, in its Order cites *Rose v. State*, 617 So. 2d 291, 293 (Fla. 1993). A close reading of *Rose* reveals a major distinction between this case and *Rose*.

> "There is no suggestion that Dr. Slomin ignored "clear indications" of mental health problems. We note that Dr. Krop initially concluded that Rose did not suffer from brain damage. Only after he performed more testing at Dr. Fox's suggestion did Dr. Krop conclude that the evidence suggested that Rose suffers from minimal brain damage. Further, Rose presented no evidence indicating that Dr. Slomin's examination was insufficient. Neither of the defense's mental health experts expressed an opinion on the sufficiency of Slomin's evaluation of Rose. They merely reached different conclusions than Slomin. The fact that Rose has now obtained a mental health expert

> whose diagnosis differs from that of the defense's trial expert does not establish that the original evaluation was insufficient." *Id.* at 295

Unlike any of the cases cited by the Lower Court and addressed above, here, Dr. Bordini, testified as deficiencies of the prior examining expert.

This Court has long recognized that relief should be granted where evidence offered in postconviction proceedings is qualitatively and quantitatively greater than offered at trial.

In *State v. Lara*, 581 So. 2d 1288 (Fla. 1991), this Court affirmed a Dade circuit court's grant of penalty phase relief to a capital defendant where the defendant presented at an evidentiary hearing evidence that, as the State conceded in that case, was "quantitatively and qualitatively superior to that presented by defense counsel at the penalty phase." *Id*. at 1290. Here the quality of evidence presented at the evidentiary hearing is far superior to that adduced at trial. The lower court erred by not considering the "totality of available mitigation – both that adduced at trial and the evidence presented at the evidentiary hearing." *See Williams v. Taylor*, 120 S. Ct. 1495, 1515 (2000).

This Court in *Asay* addressed the quality of the postconviction mental health testimony:

> "The mitigation presented at the evidentiary hearing is of a qualitatively lesser caliber than in other cases where this Court found that counsel rendered ineffective assistance for failing to present mental health mitigation. *Id.* at 987

Unlike *Asay*, Appellant submits that the mental health mitigation presented at the evidentiary hearing is of comparable qualitative caliber to where relief has been granted. In order to reach this conclusion, it is necessary to compare Dr. Bordini's testimony to Dr. Upson's testimony on critical points.

Unlike Dr. Upson, who provided no diagnosis, Dr. Bordini diagnosed Mr. Raleigh with borderline personality disorder. First, Dr. Bordini gave a detailed description of borderline personality disorder:

> A Borderline personality disorder is one of the more disruptive of the behavior disorders that involve impulse control. From a psychological standpoint, psychiatric standpoint, it's a disorder which is one step above schizophrenia. The person has some capacity for decompensating under stress and to some brief psychotic reactions. But it is also characterized by issues that involved mood control in terms of lability, anger, sense of self and identity. Other features that are common with that are substance abuse, self-mutilative behaviors. It's very common but difficult to treat a psychiatric disorder. It's very oftentimes associated with an abusive family history.

(PCT 97-24-98-11)

Then Dr. Bordini thoroughly explained the basis for his diagnosis:

> A Bobby has multiple symptoms of borderline personality disorder. You have some historical risk factors in terms of abuse and inconsistent, early family setting. You have the sexual abuse itself. You have, behaves very consistent. He has a very poor sense of identify, he is confused as to who he is and what he wants to do, whether it's occupation, whether it's his drug dealing, whether it's his sexual identity. It's really a number of different areas for him.
>
> He clearly has some emotional debility. One of the things that I observed when I first saw him was that he tends to sort of have this sort of, at times he can be very tearful and choked up, anxious, and just profoundly depressed and guilty. And other times he can be kind of giggly. So you see this affective lability, you know, when you just observe him. You know, descriptions of his behavior, you know, around the time of the crime, he is depressed at times, he is acting silly and thinking he's flirting. You see a lot of his affective lability.
>
> The history of self-cutting is classic, I mean, it's a very frequently associated symptom. Impulsive behavior, substance abuse, I mean, he just has multiple symptoms. If you just go through the history it's pretty clear that he meets the criteria.

(PCT 99-3-100-1)

Unlike Dr. Upson who briefly opined that alcohol may have had some neuropsychological impact on Mr. Raleigh. (R. 1304 & 1317) Dr. Bordini was accepted as an expert in the area of substance abuse assessment and treatment. (PCT 15) Dr. Bordini has attained proficiency in exams and had done professional evaluations in substance abuse. (PCT 14)

Dr. Bordini testified that, based on his interviews with Mr. Raleigh, Janice Figueroa and a review of witness statements, that Dr. Bordini conservatively estimated that Mr. Raleigh drank 18-24 standard doses of alcohol between 8 and 2:30 a.m. (PCT 70)

Dr. Bordini testified in great detail concerning indicants of impairment:

> A There is a large number of indicants of impairment. There is discussions that were described by witnesses while he's in the club where he's slurring his speech, or his balance is off. He's engaging in behaviors that are atypical of him, such is dancing nude on the porch. He is behaving very erratically, confused at times as to sort of what's going on in terms of the situation with his mom and Douglas Cox.
>
> He is passing out a couple of times during the course of the evening. He's having some blackouts. Witnesses, when he goes and talks outside of the trailer before they go back, described him as appearing wired, his being extremely talkative and kind of possibly somewhat uninhibited.
>
> He's behaving recklessly: he hands a

firearm to somebody he doesn't know, he aims it at himself, he –

Q When you say he aims at himself, he points the gun at himself?

A From what one of the witnesses says, he held – he pointed the gun at himself and actually cycled a round, which is kind of a scary thing to do. Again, showing very impaired judgment. I do believe that the witness statements at the time indicated that, you know, his speech was affected.

(PCT 70-22-71-20)

Dr. Bordini testified on gaps in Mr. Raleigh's memory as a result of alcohol impairment:

A He seems to have somewhat of a gap between sort of leaving the club and going to the house. Another bit of a gap on the ride out there. He has a gap from after he started beating Tim to the end of that. He has some memory loss for things that Domingo may have said to him.

In fact, I recall his being somewhat agitated when we had a discussion about when he was initially interviewed by the police officers who asked him about what had happened that night. He had not asked for an attorney yet and he was describing what was happening and some of his responses were that he didn't remember and he felt they became somewhat abuse toward him because of that. But he felt he honestly couldn't remember. He was telling them that and that's when he asked for his attorney.

(PCT 72-1-15)

However, Dr. Bordini's most significant testimony concerning Mr. Raleigh's impairment was to explain alcohol tolerance pertaining to Mr. Raleigh.

> A Yes. He indicated that he was consuming, you know, 16 to 18 drinks an evening, which, you know, again, that amount of alcohol usually would, you know, approach a lethal dose in terms of alcohol intoxication. It would kill about 50 percent of people, so that's a pretty high tolerance.

(PCT 73-11-16)

Dr. Bordini testified that judgment is impaired before motor function. (PCT 73) In addition, Dr. Bordini refuted the logic of the trial court in its sentencing order concerning the impact of alcohol on Mr. Raleigh.

> Q So with respect to his behavior, even though that, even though he appeared, from a motor standpoint, to be able to do things: shoot, walk, give directions, does that indicate that he wasn't impaired?
>
> A No. I think it's a common lay mistake in terms of backward reasoning. He did this, so, therefore, he could not have been intoxicated. But, you know, all you have to do is look at the newspaper and have accounts of, you know, people that were found with high blood-alcohol levels and did not get into an accident. You know, we have people who stand on top of cars, surf down the highway while on top of a car, which requires an incredible amount of balance and coordination, and they do this while intoxicated. Some get

killed, but there are some who made it.

And, again, I was involved with evaluating people for the Physician Recovery Network or impaired nurses. I can't tell you how many stories of people who, when intoxicated, could perform very intricate surgery. It's backward reasoning to say because they could do it they were not intoxicated. That doesn't make sense. Is it safe? Is it bad judgment? Obviously, it's not safe and it's extremely bad judgment.

(PCT 74-6-75-3)

A careful reading of Dr. Upson's testimony relates that he never clearly related Mr. Raleigh's deficits to show what impact if any those deficits had on the crime. Dr. Bordini gave a detailed explanation of the impact of Mr. Raleigh's neuropsychological deficits on the crime.

Q Specifically, the deficits that you discovered, what impact, if any, would they have had on this crime?

A Mr. Raleigh does have some memory deficits. There were not tested by Mr. Upson. This really has, you know, some bearing on how believable his report that he doesn't remember some things are. He has some communication skill deficits, he has some language processing deficits. For example, he has difficulty in following multi-step commands in terms of understanding the grammar and how it's related to that, which is kind of a receptive type of language difficulty. That can cause him to get confused as to what people

are saying to him. And I think also, importantly, he has some evidence of some difficulties in frontal lobe in terms of –

Q When you say frontal lobe, what does that mean?

A The frontal lobe is the area of the brain that is most developed relative to the rest of the brain weight in man. There are two large lobes that kind of go all the way from almost the center of your brain forward. They're considered to be very appropriate, very important in terms of functions that involve inhibiting behavior, controlling emotion, planning and organizing, starting and stopping behavior. Dr. Upson did note that he had a little bit of a separation on one of the tests, which is a sign of frontal lobe difficulties. And we found additional evidence of that on our examination.

Q You indicated that he had problems maybe with cues, taking cues. Can you relate that to his interpretation of Domingo
nodding?

A Yes. Bobby has a big split between his verbal IQ and his performance IQ. What that means is that he is more likely to take information and process it better, and relies upon visual information more than language. Psychologists and attorneys, and so forth, are largely language based, we can tell arguments about definitions and things like that. Someone who is primarily right hemisphered is going to take things in and kind of process them in a way that's more visual in nature. In terms of that incident in terms of the

Domingo giving him a nod, to Bobby, that's the equivalent of a – (PCT 85-86)

Q Specifically, assuming that Mr. Raleigh's telling you the truth in terms of his perception of that nod, how does his relative deficit impact the way he is processing that information?

A Mr. Raleigh, because of his deficit, is likely to interpret visual signals and weight those more heavily possibly than verbal signals.

Q So that – okay, so that compared to somebody who might be relying on a language to tell them to do something, he can interpret a nod as that something to do?

A He would rely more heavily on a visual signal probably.

Q And with respect to the fact that Mr. Raleigh has given multiple statements in this case, you have read those statements, what impact would his memory deficits have upon his ability to recount what happened to him that evening?

A Looking at the pattern of his memory difficulties, he does show a potential to get confused about things he recalls.
(PCT 87,88)

Dr. Upson did not address statutory mitigators in his report or direct examination.(PCT 190,191) Instead, Dr. Bordini gave a comprehensive explanation of why Mr. Raleigh met the mitigator

of whether the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. Dr. Bordini's conclusions were based on a through clinical interview of Mr. Raleigh and his mother of events leading tup to the homicide as well as detailed knowledge of witness statements:

> A I did feel it was an indication based upon his pleas for assistance in the period of time prior to the murders, his episodic disorientation –
>
> Q When you say episodic disorientation, what do you mean by that?
>
> A He wouldn't know where he was at times, wouldn't know what he was doing.

(PCT 106-23-107-4)

> Q Okay. You talked about episodic disorientation. Were there other behaviors or things that indicated he met the statutory mitigator?
>
> A Thank you. Subjective distress, increased cognitive disturbance –
>
> Q When you use – I know those terms may have meaning – when you use the term "subjective distress", what do you mean?
>
> A He was very depressed and anxious, severely so. He essentially felt he was losing his mind in the days prior to the evaluation. He felt he couldn't manage his own checkbook, he couldn't keep track of where he would wake up when he was intoxicated. He had fears that he would end up dead. That is a

great deal of distress.

Cognitive disturbance, he couldn't solve problems such as dealing with his checkbook. Anxiety driven behaviors. For example, that ritualistic chanting of the prayer on the way back from Virginia, he's sort of regressing to childlike ways he had of dealing with anxiety and stress. He had escalating alcohol consumption to levels that, you know, would be fatal in some other individuals. He's reckless in his behavior. He'd not taking good care of himself. He's neglecting his hygiene. He's putting himself at risk.

(PCT 107-7-108-5)

Q Specifically at the time of the murder, what does he engage in reckless behavior?

A His behavior at the time of the murder is, you know, very erratic. He is intoxicated. He's, you know, doing things he normally doesn't do, such as stripping and dancing naked. He set out on a plan to go out and confront individuals while he's armed. He's burning himself in the chest one moment. He hands the gun to a total stranger. He points the gun at his own self and cycles a round. You know, all of these are very, you know, erratic high-risk behaviors.

(PCT 108-6-16)

Dr. Bordini concluded that Mr. Raleigh's memory of events suggested the killing of Cox was under the influence of extreme emotional or mental disturbance.

A The amnestic qualities are consistent

> with the level of alcohol consumption. The things that he – again, based on the interview and interview style, Mr. Raleigh was careful, and I carefully questioned him as to sort of what did he have an independent memory for versus what was told to him. And he was relatively consistent in terms of his report. And his report was relatively consistent, you know, with the reports, in my opinion, of the other individuals who were witnesses.

(PCT 108-19-109-2)

Dr. Bordini, additionally, offered critical testimony that would have rebutted the aggravator of cold, calculated and premeditated.

> A His – from my best understanding of what his motive was is that when he approached the trailer his motive was to get Mr. Cox outside and that there was to be sort of, they would scare him or possibly get him up. At the time that his cousin had given him a nod, he motive was to kill Mr. Cox.
>
> Q Was it a motive that had been formulated before that?
>
> A Not from what I could determine. I don't see any indication from his report that that was true.

(PCT 109-6-15)

Dr. Bordini provided a thorough explanation of why the mitigator of extreme emotional or mental disturbance applied to the killing of Mr. Eberlin.

> A I think his level of emotional

> disturbance greatly peaked after shooting Mr. Cox. He – you know, his report is much more disjointed and much less clear. He talks about, not a full dissociation. I don't think he didn't believe it was real, but he had some sense that it wasn't quite real, which is kind of an anxiety manifestation. He's confused as to his own thoughts and that of, you know, commands that he feels that his cousin is making.
>
> He describes himself in a panic at that time relative to sort of being relatively calm in terms of the first murder. He largely is reacting to fear. He 's not quite sure what's going on. He has mixed motives in terms of killing, that one is to please Domingo in terms of following what he perceives as being "shoot him, shoot him". And the second one is that he is panicked by Timothy's screams. I mean, he wants to put Timothy out of this misery is some sense, and panicked, he wants it to stop.

(PCT 109-20-110-13)

Another example of testimony provided by Dr. Bordini that is qualitatively superior to Dr. Upson's testimony is in the area of substantial domination by Domingo. Dr. Upson related generic testimony that Mr. Raleigh is a follower and could be dominated without even knowing it. (R. 1341)

Dr. Bordini explained how this mitigator is applicable based on an analysis of Mr. Raleigh's personality and relationship with Figueroa.

Q What evidence do you have for the fact

that he was under substantial domination of the Domingo Figueroa?

A To answer that question, it really goes back to the history of his relationship with Domingo. He wanted to please Domingo. He has a dependent personality disorder, he's not very assertive, not very good at speaking up for himself. He will place himself at risk, with oftentimes no gain to himself, for Domingo. He also has sexual feelings for Domingo that he's probably got poorly integrated into some of his emotional relationship.

(PCT 111-9-18)

Moreover, Dr. Bordini related this mitigator to the specific events of the evening.

A I believe, my best analogy is that you have an intoxicated individual who is behaving very erratically, has a gun in his hand, he's being very reckless behavior, and the behavior is being directed toward himself, towards other people. He's passing out at various points in time. Essentially, he's kind of like a coke bottle that's kind of been shaken up and he's essentially being directed toward murdering Mr. Cox.

At several points in time in the evening it's my opinion that the murder would not have occurred if Bobby was left to his own devices. He would stay drinking at the club, he would spend time with Andy, he'd be passed out in the back. You know, that he is largely, you know, sort of going along with Domingo.

Q When you say going along with Domingo,

can you point to, based on the evaluation that you have done, can you point to specific instances where Domingo appeared to have asserted some kind of control over Bobby that night or Bobby succumbed to that?

A Yes. I mean, as he's leaving the nightclub Bobby wants to stay at the nightclub and do some more drinking, and Domingo was saying we gotta go, we gotta go. So Domingo was essentially directing him not to stay at the club. Bobby wanted to leave with his girlfriend Andy, which makes sense. But Domingo says no. You know, Domingo is choosing who is going to go with who.

Domingo has control of the key to the safe and the guns, so Domingo gets the guns. Domingo has control in the car in terms of Bobby is waving the gun around recklessly. Domingo take the gun away from him and Domingo hands it back to him later. Domingo, when they confront the two individuals outside the thing, Domingo directs Bobby to go talk to people.

So there are several instances throughout the night where Domingo is observed in control. In Bobby's mind, Domingo is ordering or signaling him to shoot Roger Cox when he comes out. In his mind, and what Bobby believes Domingo said, was to kill Timothy as well.

(PCT 111-22-113-9)

Finally, Dr. Upson's sole testimony concerning Mr. Raleigh's age was to testify that Mr. Raleigh was nineteen. (R. 1339) Dr. Bordini's testimony was qualitatively different because Dr.

Bordini testified concerning Mr. Raleigh's emotional maturity.

> Q Dr. Bordini, do you have an opinion as to the emotional age of Mr. Raleigh in terms of his maturity as a 19 year old?
>
> A Yes.
>
> Q And can you tell the Court what that is?
>
> A It is my opinion that Bobby functions much more like an early adolescent than he does a 19 year old.
>
> Q And what's the basis for that?
>
> A Largely, because of the difficulties he has in his formulation of his sense of identity, the dependent features. His naivete.
>
> Q With respect specifically to his drug dealing, how would you characterize – let me rephrase the question.
>
> What appeared to be his primary motivation with respect to the drug dealing?
>
> A I think the biggest motivation for him in the drug dealing was to assist his cousin, Domingo, and David.
>
> Q And is that consistent with the personality disorders that you specified?
>
> A It's very consistent. He's has a very dependent personality disorder, and he subserves himself to others.

(PCT 114, 118, 119)

The lower court never found Dr. Bordini's testimony to be

incredible. The closest the Court came to a criticism of Dr. Bordini's work was where it cited *Rutherford v. State*, 727 So. 2d 216, 224 (Fla. 1999)(court discounted expert testimony as a result of psychological examinations occurring six and ten years after the murder at issue. However, *Rutherford* can be distinguished because the appellant was not compliant at his initial psychological examination. (*Id.* at 224.) In contrast, Dr. Upson testified that Mr. Raleigh was very cooperative and forthright. (R. 1239, 1240)

Instead, the lower court found that the addition of Dr. Bordini's testimony on mitigation would not, within a reasonable probability, have led to the imposition of a life sentence, outweighing the multiple substantial aggravators at issue on this case.

With respect to the prejudice component, this Court recently vacated a death sentence in a case that originally this Court characterized as overwhelming aggravation in contrast to scant mitigation.

This Court, in *State v. Coney*, 845 So. 2d 120 (Fla. 2003) affirmed a trial court's granting a new penalty phase in a case where the jury recommended death by a seven-to-five vote, and the judge imposed a sentence of death based on five aggravating

circumstances[1] and no mitigating circumstances.

Consequently, this Court would be justified in granting a new penalty phase where significant mental health mitigation was not presented. Instead, the jury received weak testimony from an ill prepared expert. Therefore, the reliability of Mr. Raleigh's penalty phase was undermined.

ARGUMENT II

THE LOWER COURT ERRED IN FINDING THAT DEFENSE COUNSEL ADEQUATELY PREPARED THE MENTAL HEALTH EXPERT

The Trial Court offers a limited analysis in denying Mr. Raleigh's fourth claim. The Court noted that trial counsel could not be faulted for the Defendant failing to discuss his prior sex abuse, and failing to mention that he beat Timothy Eberlin with a gun. (PCR 595) The Trial Court then wrote, "Also, Mr. Teal testified at the evidentiary hearing that to his knowledge, he gave Dr. Upson all the information he requested. Whatever documents he requested, Mr. Teal furnished. This

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[1] The trial court found that the following aggravating circumstances were established:

> The murder was committed by a person under sentence of imprisonment; the defendant had been previously convicted of a violent felony; the defendant created a great risk of death to many; the murder was committed during the course of an arson; and the murder was especially heinous, atrocious, or cruel [HAC].

Coney, 653 So. 2d at 1011 n.1.

testimony was uncontradicted. Therefore, the Court finds that Defendant did receive a professional, competent, and appropriate mental health evaluation for use in the aid of his defense, that counsel provided all background information to Dr. Upson necessary for an adequate and appropriate evaluation; and that trial counsel adequately investigated and presented mitigation sufficient to challenge the State's case." *Id.*

The standard for review is contained in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the United States Supreme Court wrote:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result in reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."

This Court has held in *Stephens v. State*, 748 So. 2d 1028, 1033-34 (Fla. 1999) that this Court must give deference to the factual findings of the trial court but may independently review the lower court's legal conclusions.

This Court, in *Jones v. State*, 732 So. 2d 313, 315 (Fla. 1999) denied appellant's claim that he was denied effective assistance of counsel during the penalty phase of his trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution. This Court noted that appellant's lawyer moved the trial court to appoint Dr. Lawrence Anis to help in developing evidence of statutory and nonstatutory mitigation. *Id*. This Court noted that "Dr. Anis testified during the penalty phase that he had a credible and sufficient information base from which to make an evaluation and render opinions concerning appellant's mental and emotional status. *Id.* This Court noted that Davis testified that Dr. Anis did not indicate the information in the file, coupled with appellant's interview, was insufficient to conduct a competent mental evaluation. *Id.* at 316-317. *See Footnote 4-Id*. At 317.

Footnote 4

[4] In fact, Dr. Anis indicated to the contrary during his penalty phase testimony, as evidenced by the following question and answer:

Q [by Davis] Dr. Anis, did you have sufficient materials in conjunction with the interviews that you had of [appellant] to feel comfortable with the evaluation and the opinions that you gave to this jury?

A I am comfortable with the evaluation,

> the written evaluation that I gave you and to the State attorney, and with the statements I've made today.

Trial counsel failed to adequately prepare Dr. Upson because of his inexperience and delay in securing a mental health expert.

First, both trial counsel testified that Mr. Teal was responsible for the preparation and presentation of Dr. Upson's testimony. (PCT 182, 337) Second, Mr. Teal acknowledged that Mr. Teal was handling his first penalty phase and that Mr. Teal had limited experience with mental health issues. (PCT 181, 234)

Mr. Teal's delay in securing mental health mitigation resulted in an ill-prepared witness. Mr. Teal acknowledged that they were aware the State was seeking the death penalty from the outset. (PCT 180) Inexplicitly, trial counsel waited a year after the incident to secure a mental health professional and this mental health professional was secured only after Mr. Raleigh had pled guilty. (PCT 181) Mr. Teal conceded that Dr. Upson had only two months from the time of appointment to prepare for the penalty phase. (PCT 183)

The lower court's conclusion that trial counsel's testimony that to his knowledge, trial counsel gave Dr. Upson all the information he requested is contradicted by the record.

> Q But you're willing to draw an analysis of how much remorse he's feeling, as to

whether he's being led. You're willing to make an analysis on all these other factors, but you don't want to know all of the facts. You put on blinders and say don't give me the facts of the case?

A No, I did not do that. I requested the facts of the case and got some of them later. I reviewed the ones that were sent to me.

(R. 1732)

Dr. Upson's testimony during the cross-examination revealed that Dr. Upson did not have a sufficient and credible information to render opinions. This initial questioning underscored trial counsel's lack of direction to Dr. Upson.

Q Well then what can you tell me about the facts. Tell me what your perceptions of the facts is of this crime of June 5, 1994 that you utilized in reaching your conclusions?

A I was not asked to evaluate the crime scene.

Q So you do not know anything about it?

A No.

Q Do you know anything about the manner in which Mr. Raleigh perpetrated the crime other than what he told you?

A No.

(R. 1670-72)

The State repeatedly exposed Dr. Upson's lack of knowledge of critical witness statements, and Dr. Upson's only response

was an offer to review materials to see if his opinion might change. (R. 1688-1690)

Dr. Upson's lack of confidence in his own testimony is best illustrated by the following exchange:

> Q Were you informed that, on the night he committed these murders, he approached the mobile home, talked to somebody and said, "It's all about money. It's all about money." Were you aware of that?
>
> A No.
>
> Q You didn't know a lot about what happened out there, did you?
>
> A I know very little.

(R. 1700-1701)

Mr. Teal's testimony at the evidentiary hearing confirms the impression that Mr. Teal did not adequately provide Dr. Upson with background materials. Mr. Teal testified that he did not recall ever discussing with Dr. Upson two individuals, Ronald Baker and Patricia Pendarvis who had contact with Mr. Raleigh shortly before the homicide. (PCT 198) Nor did Mr. Teal know whether Dr. Upson spoke to or even read the statement of Mr. Raleigh's girlfriend, Andy Bennett, who was at the club with Mr. Raleigh. (PCT 198) Trial counsel was deficient in failing to adequately prepare Dr. Upson to testify.

Although trial counsel would not admit their deficiencies

in preparing Dr. Upson, both trial counsel testified concerning Dr. Upson's poor performance on the witness stand. (PCT 203, 204, 362) Therefore, the confidence in Mr. Raleigh's penalty phase was undermined by the poor preparation of Dr. Upson by trial counsel.

ARGUMENT III

THE LOWER COURT ERRED IN FAILING TO FIND THAT THE STATE VIOLATED MR. RALEIGH'S RIGHT TO DUE PROCESS BY PRESENTING FALSE EVIDENCE

The standard for reversal of convictions and sentences obtained through the use of false or misleading testimony is clear. Reversal is required if the false testimony could in any reasonable likelihood have affected the outcome. *United States v. Bagley*, 473 U.S. 667 (1985). In cases involving the use of false or misleading testimony, "the Court has applied a strict standard... not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth seeking process." *United States v. Agurs*, 467 U.S. 97, 104 (1976). The prosecution not only has the constitutional duty to fully disclose any deals it may make with its witnesses, *Bagley*; *Giglio v. United States*, 405 U.S. 150 (1972), but also has a duty to alert the defense when a

State's witness gives false testimony, *Napue v. Illinois*, 360 U.S. 264 (1959), and to correct the presentation of false state-witness testimony when it occurs. *Alcoria v. Texas*, 355 U.S. 28 (1957). Where, as here, the State uses false or misleading evidence, due process is violated whether the material evidence relates to a substantive issue, the credibility of a State's witness, or interpretation and explanation of evidence.

Mr. Raleigh argues that Domingo Figueroa's statement was not revealed to be false until after his penalty phase, but before his sentencing. Co-defendant Domingo Figueroa's statement was introduced during his (Mr. Figueroa's) trial and State Attorney, James Alexander, argued that the statement was untruthful on a number of points; yet, the same statement was admitted in Defendant's case, and at that time, the State argued consistently with Mr. Figueroa's statement.

The Lower Court found that the statements did not amount to false evidence or inconsistent evidence. This finding is in error.

A close reading of the State's closing argument reveals that the State offered inconsistent evidence in Figueroa's trial as evidenced by the following:

> "What did he tell his Uncle? Uncle Jose. Hey, man tell me what you did. Tell me what you did, Jose said. Tell me. This is the next day, if you remember. Finally, he

> says, man, it was really bad. It was bad. I killed one and Bobby killed one."

(R.1373, 1374 Figueroa trial)

Domingo Figueroa's above admission was never introduced by the State in Mr. Raleigh's penalty phase. Ms. Blackburn testified as to the State's position in Mr. Raleigh's case that Mr. Raleigh killed both individuals. (PCT 277) Mr. Figueroa's identical statement was introduced in Mr. Raleigh's penalty phase and Mr. Figueroa's trial. (PCT 277, 280, 281)

The State argued the inconsistent evidence concerning Domingo Figueroa's statement to his Uncle Jose as follows:

> "It doesn't sound like there is a whole lot of hesitation that I might have killed one or it's possible that I killed one or I am not sure if I killed one. I mean, he told his uncle the truth. I killed one and Bobby killed one."

(R. 1374 Figueroa trial)

Domingo Figueroa's admission to Uncle Jose contradicts Mr. Figueroa's taped statement where Mr. Figueroa stated on two occasions:

> Q He's in the middle of the bed. Is Timothy saying anything?
>
> A He just said, what the fuck. And he jumps up and he starts shooting. And then Bobby says, shoot him, shoot him. And I shot once, and that was it.
>
> Q Did you aim at Timothy?

A Not really. I don't even know if I hit him or not. (R. 629)

Q Bobby told you to shoot Timothy.

HUDSON: And how many times did you shoot?

THE WITNESS: Once.

BY INVESTIGATOR HORZEPA:

Q Just once?

A I don't know if I hit him or not.

(R. 627)

The amended pleading refers to the State's closing argument in Figueroa that makes reference to specific evidence. Consequently, this Court's ruling in *State v. Parker*, 721 So. 2d at 1151, *citing Parker v. Singletary*, 974 F.2d 1562 (11th Cir. 1992) is applicable where it was "not improper for the State to take inconsistent positions so long as it did not involve the use of necessarily contradictory evidence." Taking positions on evidence that are necessarily contradictory cannot be a clearer due process violation than Figueroa's taped statement and Figueroa's statement to his Uncle Jose. Recently, Justice Lewis in a concurring opinion condemned the State taking differing positions on evidence that gave rise to an ineffective assistance of counsel claim.

Justice Lewis wrote,

> "As a threshold issue, it is beyond debate that a state attorney in Florida is a "quasi judicial officer of the court. It is [his or her] duty to see that a defendant gets a fair and impartial trial." *Gluck v. State*, 62 So. 2d 71, 73 (Fla. 1952). As an officer of the court, "he [or she] is charged with the duty of assisting the Court to see that justice is done," and it is not his or her duty "merely to secure convictions." Smith v. State, 95 So. 2d 525, 527 (Fla. 1957); *see also Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935). Thus, a state attorney is no mere litigant, but an important participant in our system of fairly enforcing our criminal laws.
>
> Since the prosecuting attorney is an integral part of the system of justice and a representative of the State, it is repugnant to the tenets of due process and fundamental fairness that the State would purposefully present differing renditions of the same factual scenario during separate proceedings, simply to obtain a particular result against codefendants. This principle may prevent the State from taking differing positions at separate trials on the same facts; however, this limitation is necessary to ensure fundamental fairness to all those who stand accused of criminal activity. A review of the record here indicates that the State did present a version of the acts at issue here in direct conflict with the view presented in Hunt's proceedings, and Fotopoulos's trial counsel, although having full knowledge of such conduct, did not attempt to even explore the matter for the benefit of his client." *Fotopoulos v. State*, 838 So. 2d 1122, 1137 (Fla. 2002)

Mr. Alexander tries to downplay his closing argument as advocacy.

> A Well, you know, it's not basically up to the attorneys to decide what the truth is. I know I made that statement, I'm not going to run away from it, but the Judge fives basically an instruction at the conclusion of all the lawyers' arguments that tells the jury that they can decide which statements to believe and which statements not to believe and the credibility of the witnesses, you know, the credibility of witness instruction. So, I mean, it's basically the trier of fact, which is the jury in this case, to decide who's telling the truth and who's not. As far as I'm concerned, it was probably a poor choice of words on my part, but, nevertheless, I was advocating the case on behalf of the State and those are the words I apparently used.

(R. 322-14-323-2)

The Amended Motion to Vacate Plea, Judgment of Conviction and Sentence, at pages 15-24, sets out the contrasting arguments in Mr. Raleigh and Mr. Figueroa's legal proceedings. Such a different rendition of the same factual scenario during separate proceedings is the identical tactic that Justice Lewis condemned in *Fotopoulos*. As a result of Mr. Raleigh's due process being violated, this Court should grant Mr. Raleigh a new penalty phase.

ARGUMENT IV

THE LOWER COURT ERRED IN FAILING TO FIND DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE ADMISSION OF THE CO-

DEFENDANT'S TAPED STATEMENT IN VIOLATION OF SECTION 921.141(1), FLORIDA STATUTES

Mr. Raleigh argues that the State introduced Co-Defendant, Domingo Figueroa's taped statement to the police in Mr. Raleigh's penalty phase proceeding without an objection by defense counsel. Mr. Raleigh was greatly prejudiced by the introduction of Mr. Figueroa's statement. Not only did the statement cast great doubt on Mr. Raleigh's veracity as a witness, but Mr. Figueroa's unrebutted testimony strengthened the State's argument that the cold, calculated premeditated aggravator applied and weakened the defense arguments concerning mental health mitigation. The admission of these hearsay statements of Co-Defendants in the penalty phase violated the Confrontation Clause. *See Donaldson*, 722 So. 2d at 186; *Gardner*, 480 So. 2d at 94; *Engle*, 438 So. 2d at 813-14. *Rodriguez v. State*, 753 So. 2d 29 (Fla. 2000)

The Lower Court characterized the evidence and testimony presented at the evidentiary hearing, at PCR. 586.

> "At the evidentiary hearing, Defendant's trial counsel, Michael Teal and James Clayton, both testified that they did not want Domingo Figueroa to testify personally at Defendant's penalty phase proceeding because they would not have any control over what he testified to. They believed his live testimony may have been *more* damaging than his recorded statement. Instead, they preferred that the statement come in because

> parts of it could be used to support Defendant's case, i.e., to show the control or influence Domingo Figueroa had over Defendant."

The Lower Court then found that defense counsel's failure to object amounted to nothing more than a disagreement over defense strategy. (PCR 587) This finding is in error.

Mr. Clayton specifically addressed the matters in the tape that would be beneficial:

> A Well, you're asking me to recall and I read their amended motion. But in my opinion, the taped statements that Figueroa made have enhanced our position again that he was the ringleader. I hate to use the word ringleader because it was really just the two of them. But I felt due to the age difference and the fact he was Bobby's uncle, I just felt he was more experienced, sophisticated, if you will. And I thought the tape helped us in that position. (PCT 335-336)

A review of the taped statement leads overwhelmingly to the conclusion that Mr. Raleigh was the ringleader. Mr. Clayton was even incorrect on the relationship between Raleigh and Figueroa because Figueroa was his cousin, not his uncle. (R. 726)

Mr. Figueroa was not involved when his aunt got in the verbal altercation with Douglas Cox. (R. 727) However, Bobby Raleigh was told by a girl about the problem and Bobby exchanged words with Cox. (R. 728) Domingo didn't take part in the

conversation with Mr. Raleigh and Mr. Cox. (R. 728) Domingo relayed that Mr. Cox said to Mr. Raleigh:

> "You don't know who the fuck your fuckin' with. He told him like that." (R. 729)

Not only does Domingo portray the initial problem between Janice, Bobby and Cox, but he portrays Bobby as reacting on his own to the events in the bar:

> "We go and look for my aunt. And we go to the house to look for her and she ain't there. And he thinks something mighta happened to her because the guy was talking a lot of shit to his mom. And he went in the house and got the guns." (R. 729-730)

Domingo indicated that Bobby retrieved a 9 millimeter and a .380 from the house. (R. 730) Domingo indicated that Bobby owned the .380 and Domingo owned the Ruger 9. (R. 731) Although Domingo indicated that Domingo was driving his Maroon Olds to Douglas' house, but Bobby was directing Domingo because he didn't know where Douglas lived. (R. 731-732) Domingo remained in the car while Bobby went over to a Ford Fairmont by Cox's house. (R. 733) Bobby is gone for fifteen or twenty minutes and Domingo sees Bobby show the guy with a Fairmont a gun. (R. 734-735)

Not only does Domingo's taped statement depict Bobby as being the initiator, but Domingo portrays himself as the antithesis of a ringleader:

Q Who shows the gun?

A Bobby.

Q What did he do with it?

A Just shows it to the guy.

Q Does he say anything that you know of?

A I wasn't really paying attention. I just wanted to get out of there.

(R. 735)

Domingo follows the Fairmont down Reynolds Road to 17. The Fairmont turns towards DeLand. (R. 735) The next exchange clearly illustrates who was calling the shots:

Q Towards DeLand? What do you do?

A He said, let's go back.

Q Who said, let's go back?

A Bobby.

Q Bobby did. Did you as him why?

A He said he wanted to talk to the guy.

Q Did he mention who he wanted to talk to?

A He said Doug.

Q Doug? Okay. So you turn the car around?

A Yeah.

Q And what do you do?

A We pull up on the side of the road, and he says come on. And I went over there with him.

(R.735-736)

Although both men are armed as they approach the house, Domingo remains behind pieces of tarp next to the house while Bobby goes in and talks to the guy. (R. 736-737)

Q Did he tell you to wait at that particular location, or did you just elect to stay there?

It is difficult to conceive how it was helpful for Mr. Raleigh's defense to inform the jury that Mr. Raleigh asked Mr. Eberlin to get Mr. Cox to come out, but Mr. Eberlin refused because Mr. Cox was so messed up on drugs that he almost shot somebody. (R. 738) Despite Mr. Eberlin advising Mr. Raleigh not to go see Mr. Cox because Mr. Cox might shoot Mr. Raleigh, Mr. Raleigh went to the back of the trailer. (R. 740)

Mr. Figueroa describes hearing shots then Mr. Raleigh came running out. (R. 740) Mr. Eberlin is screaming. Bobby then shoots Mr. Eberlin. According to Mr. Clayton, the alleged ringleader - Figueroa states:

Q Do you know how many times Bobby shoots Timothy? You remember hearing how many gunshots?

A I don't know. He just turned around and says shoot him, shoot him. And I'm just standing there, you know.

Q Bobby told you to shoot Timothy?

HUDSON: And how many times did you shoot?

THE WITNESS: Once

BY INVESTIGATOR HORZEPA:

Q Just once?

A I don’t know if I hit him or not.

(R. 741)

Mr. Figueroa is adamant that Mr. Figueroa shot Mr. Eberlin only one time. (R. 742) To the contrary, Mr. Figueroa stated that Mr. Raleigh unloaded his weapon on Mr. Eberlin. (R. 742) While Mr. Raleigh is wreaking havoc in the trailer, Mr. Figueroa is outside looking through the door. (R. 742) Mr. Figueroa repeats his story that Mr. Figueroa shot Mr. Eberlin only one time after Bobby tells him to shoot. On his third telling of the shooting, Mr. Figueroa adds a critical detail:

A He looked at me. He went like this, and looks at me, and he says, shoot him, shoot him. <u>And I didn’t want to.</u> And I shot it once.

(R. 744)

Mr. Clayton testified incredibly that he “thought law enforcement officers had not done a really good job with his taped statement.....” (PCT 335)

Investigator Horzepa appeared to do a very effective job of summarizing Mr. Figueroa’s statement in the following exchange. (R. 746)

Mr. Figueroa, certainly does not portray himself as a ringleader when he takes off running after firing his round. (R. 747)

Q Where did you run to?

A To the car. I was scared. (R. 747)

Mr. Figueroa stated that Bobby stayed back at the trailer for a while and Mr. Figueroa could not estimate for how long because he was scared. (R. 748) Not only does Bobby still have a gun, but he takes the other gun from Mr. Figueroa. (R. 748)

Mr. Figueroa's behavior and thought process after the shooting does not fit the image of a ringleader.

Q He hasn't spoken about it? You haven't asked him why he did this?

A I don't wanna ask him.....

THE WITNESS: Nothing. I was at home. He said you want to come over and have a cookout? And I didn't really want to go, but we went anyway. (R. 750, 751)

If the admission of this tape was to support the conclusion that Mr. Figueroa had control or influence over Mr. Figueroa, then it cannot be viewed as an informed and reasoned decision. The tape depicted Mr. Raleigh being the instigator and perpetrator and Mr. Figueroa as a reluctant, frightened individual being directed by Mr. Raleigh. In fact, a review of the limited six page cross-examination of Investigator Horzepa

concerning the taped statement does not establish any control or influence that Mr. Figueroa had over Mr. Raleigh. (R. 601-607) Mr. Teal did not even have to question Mr. Horzepa about the taped statement to establish that Mr. Figueroa purchased one of the firearms used in the killing.

It is illogical to sever trials and as a result be able to object to the admission of Mr. Figueroa's statement, then allow this devastating statement to be played. The last rationalization offered and reflected in the Court's order is that Michael Teal and James Clayton, both testified that they did not want Domingo Figueroa to testify personally at Defendant's penalty phase proceeding because they would not have any control over how he testified. They believed his live testimony may have been more damaging than his recorded statement.

It may have been persuasive if trial counsel could have pointed to specific areas of testimony that could have been inculpatory to Mr. Raleigh that were not contained in his statement. However, the speculative conclusion that his live testimony may have been more damaging than his recorded statement does not constitute an informed and reasoned basis.

Nevertheless, even if their objective was to prevent Mr. Figueroa from testifying, this admission would not have

prevented the State from calling Mr. Figueroa as a witness. (PCT 231) However, the State had no intention of resolving Mr. Figueroa's case through a plea where he would not testify until after Mr. Raleigh's case was concluded. (PCT 306, 307) Right before the admission of Mr. Figueroa's statement, Mr. Teal learned in cross-examination of Investigator Horzepa the following:

> Q Has Mr. Figueroa's case been disposed of to your knowledge?
>
> A No, sir.
>
> MR. TEAL: Thank you. I don't have anything further, Your Honor.
>
> THE COURT: Ma'am Redirect.

Shortly, thereafter, Mr. Teal does not object to the admission of the taped statement. (R. 723)

Reasonable, professional judgment was behind the decision to sever trial, because trial counsel could not cross-examine the taped statement. (PCT 229) It is a ludicrous rationalization to assert that hopefully, Mr. Raleigh's testimony could rebut the taped statement. (PCT 230) The jury was given what should have been inadmissible testimony that discredited Mr. Raleigh before Mr. Raleigh even testified. Therefore, trial counsel were deficient in not objecting to Mr. Figueroa's taped statement.

The prejudice to Mr. Raleigh is set out in the amended 3.850 motion. Pg. 363-373 of the Post-Conviction Record. The motion cites many previously mentioned excerpts from Mr. Figueroa's statement and contrasts Mr. Figueroa's statements with Mr. Raleigh's testimony in the penalty phase. Mr. Figueroa's statement casts great doubt on Mr. Raleigh's veracity as a witness. In addition, Mr. Figueroa's unrebutted testimony strengthened the State's argument that the cold, calculated and premeditated aggravator applied and weakened the defense arguments concerning mental health mitigation.

The best evidence of prejudice can be found in the acceptance of Mr. Figueroa's version as reflected in the Court's two sentencing orders.

The Court's rendition of the facts was consistent with Mr Figueroa's statement as evidenced by the following characterization of the facts in the trial court's ruling:

> THE COURT'S FINDINGS OF FACT IN SUPPORT OF THE DEATH PENALTY FOR COUNT I, DOUGLAS ALLEN COX
>
> 2....If Defendant initially gained entrance with Eberlin's permission it was through false pretenses and any permission was certainly withdrawn when Defendant shot Cox three times in the head and remained in the trailer <u>to kill Tim Eberlin</u>. (R. 720)
>
> 3....After Baker, Pendarvis, and Chalkley leave the Defendant doubles back and enters the locked trailer. He executes a sleeping

> Cox, then eliminates Eberlin.
>
> .....
>
> These facts clearly establish a cold, calculated and premeditated murder. There was ample time to reflect. There was opportunity to abandon the plan, especially when Defendant first left with Baker. Instead, the Defendant doubled back and went to the trailer a second time. There is no doubt but that the Defendant had a prearranged plan to go to Cox's trailer and murder him. (R. 720)

III MITIGATING FACTORS

> 2..... He acted too purposefully and competent in getting the guns, going to the trailer, doubling back after encountering Baker, et al, in executing Cox, physically beating Eberlin, and in disposing of evidence afterwards. (R. 721)
>
> 5. Looking to the murders, it was Raleigh and Raleigh alone who killed Cox in his sleep. It was Raleigh who finished off Eberlin at close range. (R. 722)
>
> II. Sentence of Co-Defendant: The Co-defendant, Domingo Figueroa received two life sentences for the same murders. While this could be a mitigating factor, the Court does not find it to be so in this case. As previously pointed out, Raleigh was the principal perpetrator in these killings. Figueroa, while a participant, played a lesser role. So the distinction in the sentences is logical and warranted. (R.724)

Two additional aggravators were found in Mr. Eberlin's count that reflected the Court's findings of facts consistent with Mr. Figueroa's statement. (Aggravators 2 and 3 at R. 727)

ARGUMENT V

THE COURT ERRED BY DENYING THAT TRIAL COUNSEL WERE INEFFECTIVE FOR RECOMMENDING THAT MR. RALEIGH PLEA TO TWO COUNTS OF FIRST DEGREE MURDER

The Court erred by denying claim six that trial counsel were ineffective for recommending that he plea to two counts of first degree murder. The Court, in it Order at PCR 597 addressed a change in the law pertinent to Mr. Raleigh's case:

> "Also, Defendant cites to *State v. Delgado*, 25 Fla. L. Weekly S79 (Case No.: SC88638, Feb, 3, 2000), superceded by *Delgado v. State*, 776 So. 2d 233 (Fla. 2000), for the proposition that his actions are not now considered the type of conduct for which the crime of burglary was intended to punish. The Court in *Delgado* stated that its ruling receded from *Raleigh v. State,* 705 So. 2d 1324 (Fla. 1997), the instant Defendant's direct appeal case. Defendant argues that since the Court in *Delgado* found as a matter of law that burglary was not proved in his case, his plea to felony murder is void and must be vacated. However, the Florida Supreme Court held in *Delgado* that its holding was <u>not</u> retroactive and did <u>not</u> apply to convictions that have become final. *Delgado*, 776 So. 2d 233, 241. In the instant case, Defendant's conviction became final on November 13, 1997 - almost three years prior to the *Delgado* opinion. *See Raleigh*, 705 So. 2d at 1324; *Delgado,* 776 So. 2d at 233. Therefore, any *Delgado* argument, based on the Florida Supreme Court's deviation from its earlier opinion in Defendant's direct appeal case, is irrelevant. Defendant's case is unaffected by the *Delgado* opinion."

Nevertheless, federal courts have not addressed whether *Delgado* is retroactive and appellant asserts the trial court was incorrect in its analysis and *Delgado* should be applied retroactively to Mr. Raleigh's case.

Consequently, Mr. Raleigh's trial counsel were deficient in failing to object to an inadmissible statement. As a result, Mr. Raleigh was greatly prejudiced. Thus, this Court should grant Mr. Raleigh a new penalty phase.

CONCLUSION

Mr. Raleigh's penalty phase was an unreliable and unfair proceeding. The mental health expert, Dr. Upson, conducted a deficient examination, and trial counsel failed to adequately prepare Dr. Upson. In addition, trial counsel made an ill informed decision not to object to a devastating inculpatory statement by the co-defendant, Domingo Figueroa, and an objection to the statement would have been sustained. However, the greatest injustice to Mr. Raleigh is that the State later argued Mr. Figueroa's statement was false in a subsequent proceeding. Each claim alone merits Mr. Raleigh a new penalty phase.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant has been furnished by U.S. Mail to: Kenneth S. Nunnelley, Esq., Senior Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, FL 32118-3958; Rosemary

Calhoun, Esq., Assistant State Attorney, Office of the State Attorney, 251 N. Ridgewood Avenue, Daytona Beach, FL 32114-3275 this 29th day of December, 2003.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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