**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC03-865**

**LOWER TRIBUNAL Nos. CRC 84-00578 CFANO,**
**CRC 84-00589 CFANO**

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**JAMES FLOYD,**

**Appellant,**

**v.**

**STATE OF FLORIDA,**

**Appellee.**

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# REPLY BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT

The following abbreviations will be utilized to cite to the record in this cause, with appropriate volume and page number(s) following the abbreviation:

"R." – record on direct appeal to this Court;

"RS." - record on appeal after the second sentencing;

"PC-R1." - record on appeal after postconviction summary denial;

"PC-R." – record on appeal after an evidentiary hearing;

"PC-S." - supplemental record on appeal after an evidentiary hearing.

"D-Ex." - Defense exhibits entered at the evidentiary hearing and made part of the postconviction record on appeal.

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### ARGUMENT I

**THE TRIAL COURT ERRED IN DENYING MR. FLOYD'S CLAIM THAT HE WAS DEPRIVED OF HIS RIGHT TO DUE PROCESS WHEN THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED FALSE OR MISLEADING EVIDENCE.**

**I. The Undisclosed Exculpatory Evidence**

**A. Legal Standard**

During the evidentiary hearing, Mr. Floyd substantiated his Brady/Giglio claim through the introduction of uncontroverted documentary evidence. Included in these documents were police and investigative reports as well as state attorney notes. The State has conceded that these documents were in its possession at the time of trial and were not disclosed to defense counsel.[1]

The only question at issue is whether these nondisclosures were material. Exculpatory and material

[1]See Answer Brief at 52, "The court below did not reject Floyd's Brady claim due to a finding that defense counsel had this information available. Rather, the court assumed, as the State conceded, that the police reports and state attorney notes had not been provided to the defense."(footnote omitted).

evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or sentencing phase of the trial would have been different. Garcia v. State, 622 So. 2d 1325, 1330-31 (Fla. 1993). This standard is met and reversal is required once the reviewing court concludes that there exists a "reasonable probability that had the [unpresented] evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 680 (1985). "The 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." Kyles v. Whitley, 514 U.S. 419, 434 (1995).

**1. *The Tina Glenn Reports***

Two of the undisclosed reports regard statements taken from Tina Glenn, a neighbor of the victim. These statements place two white men, not Mr. Floyd, at the victim's house, the crime scene, at the time of the murder.

In its answer brief, the State attempts to diminish the relevance of these reports through a variety of methods. First, the State tries to cast dispersions upon the

credibility of Ms. Glenn, while ignoring that the time to do so was at the evidentiary hearing. During the evidentiary hearing, the State called no witnesses to impeach the credibility of Ms. Glenn. No officer testified at the hearing that he or she didn't follow up on Ms. Glenn's statement because she wasn't credible. No officer testified that he or she thought Ms. Glenn was lying.

Having presented no witnesses in this regard, the State offers up its personal commentary that the police report account of the interview "sounds skeptical." (Answer Brief at 33). The State's personal opinion mentions the fact that Ms. Glenn apparently carried a large knife to protect herself and her daughters from intruders. (Answer Brief at 33). Again, there was no testimony at the evidentiary hearing that Ms. Glenn was not credible. If anything, what is relevant is the fact that Ms. Glenn was asked to the police station after her first interview, where it was noted that she carried a large knife, because the officer conducting that interview felt "**that she may have possibly seen the perpetrators and wanted to reconduct a more thorough interview**." Def. Ex. 1,

Supplementary Report (five pages) of Det. Gatchel at 3(emphasis added).[2]

The State also makes an effort to identify discrepancies in Ms. Glenn's account, relative to other evidence, in an attempt to show that Ms. Glenn is a liar.[3] The State claims that:

> According to both reports, Glenn-Avant **advised Det. Gatchel that the men she saw get let into the house left very quickly through the front door.** However, it is undisputed that both the front door and the front door screen were bolted from inside the house, and the unlocked back door was the point of exit.

(Answer Brief at 34)(emphasis added).

Appellant is unsure as to where the State is obtaining this information from, as the State has provided no record citations, and an actual review of the reports verifies a far different version. The first report actually states that, "**she heard the door slam** at the house at which time again she peered out and observed both subjects running to the car looking around suspiciously and get into the car and speed

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[2]Considering that her neighbor was murdered by an intruder and that she had quite possibly seen the murder suspects, it is not far fetched that Ms. Glenn would carry a weapon to protect herself and her family.

[3]Interestingly, neither in its brief nor at the evidentiary hearing, has the State offered even the slightest hint of a possible motive as to why Ms. Glenn would have lied about her observations.

off." Def. Ex. 1, Supplementary Report (five pages) of Det. Gatchel at 1-2. There is no mention in this report that Ms. Glenn saw the suspects exit through the front door.

Likewise, the second report states that "**she heard the front door slam**, (indicating the front door and the back door {sic} different noises that she is familiar with, with the back door being louder than the front door)." Def. Ex. 1, Supplementary Report (two pages) of Det. Gatchel at 2. Yet again, there is no statement from Ms. Glenn that she saw the suspects exit through the front door. She merely thought it was the front door, because the slam wasn't that loud.

The State further attempts to weaken the powerful nature of the Tina Glenn reports by referring to the time frames in the reports as "vague and uncertain" and stating that they are "at odds with the other evidence." (Answer Brief at 34).

Without referring to any record citations, the State claims that Ms. Glenn's time frames conflict with those of other witnesses. (Answer Brief at 34). The record, however, demonstrates no such conflict. Reverand Warthen **last saw** the victim at church at approximately 11:00 a.m. Def. Ex. 1, Narrative Continuation Sheet of Officer Olsen at 2. Thereafter, Ms. Glenn saw the victim outside of her house around 11:00 a.m. on the same day. Def. Ex. 1, Supplementary

Report (five pages) of Det. Gatchel at 1. Logically, Ms. Glenn saw the victim upon her return from church. The State has demonstrated no conflict here.

The State then "points out" that the victim cashed a check at her bank at 1:47 p.m. on the same day. Ms. Glenn's statements place the two white males at the victim's residence on January 16, 1984, in the time frame of 1:00 p.m. to 2:30 p.m., a time which is perfectly consistent the check being cashed at 1:47 p.m.[4]

In addition to quibbling about the time frames, the State emphasizes that Ms. Glenn's account "cannot explain the Negroid hair fragments and motorcycle tire track found at the crime scene or Floyd's inability to provide a reasonable explanation of how he obtained the stolen checkbook and bloody sock." (Answer Brief at 34).

The State ignores the fact that Appellant previously, and more than adequately, addressed these issues in his Initial Brief. As Appellant has already explained, there was testimony at trial that motorcycle tire marks by the victim's house were similar in tread design to the ones on Mr. Floyd's

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[4]While the State makes several fruitless attempts to nitpick about the time frames, it never once addresses the fact that Ms. Glenn accurately described the victim's clothing on the day of the murder or that she gave a detailed description of the perpetrators.

motorcycle (R. 673-82). **However, it was acknowledged that the tread design was a quite common one found on Japanese motorcycle street bikes** (R. 680) (emphasis added).[5] There was also testimony that Negroid hair fragments were found on the bed spread, bed sheets and sweater of the victim (R. 701-3). Other than the fact that Mr. Floyd is an African American, no evidence was presented that these hairs belonged to him or, even more tellingly, that these hairs were even similar in nature to Mr. Floyd's hairs.

There was also testimony at trial that, following Mr. Floyd's arrest, a sock with a brown substance on it was found in Mr. Floyd's jacket (R. 514-15). Testing on the sock indicated that it was the same blood type as the victim, type O (R. 687-8). However, no evidence was presented that this was the victim's blood.

The only physical evidence connecting Mr. Floyd to any crime was the victim's checkbook in Mr. Floyd's possession (R. 498-9), along with the forged checks. The Defense never contested these facts, or that Mr. Floyd committed forgery (R.

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[5]In an undisclosed report, a handwritten notation indicated that on March 2, 1984, Oral Woods with FDLE was spoken to and that he indicated that the best he would be able to say regarding the motorcycle tire tracks was "'appears to be similar' type testimony." Def. Ex. 2, 1/27/84 Investigation Report by Joe Episcopo at 5. Oral Woods was not called to testify by the State.

390-1, 520-1). The Defense maintained that Mr. Floyd found the victim's checkbook in a dumpster (R. 390-1).

The State has failed to address any of these facts. Rather, it insists on inferring, without presenting any facts or evidence, that there was physical evidence placing Mr. Floyd at the crime scene. It's argument that the lower court's finding of a lack of materiality was proper is erroneous and unsupported by the record.

Finally, the State argues that "[t]here has been no showing that the two men observed by Glenn-Avant had any connection with Anderson's murder, only speculation provided by the fact that they were in the area on the day of the murder." (Answer Brief at 33). Appellant strongly disagrees with the State's proclamation that the two men observed by Ms. Glenn were only "in the area on the day of the murder." (Answer Brief at 33). In actuality, the two men were observed by the witness as being in the victim's house, at the crime scene, at the time of the murder. This goes far beyond mere speculation. A new trial is warranted.

### 2. Crime Scene Investigation and Undisclosed State Attorney Investigative Notes

The State disputes the relevance of undisclosed crime scene investigation reports as well as undisclosed state

attorney investigative notes. Despite the State's attempts to minimize the importance of these reports, they in fact establish multiple inconsistencies at the crime scene. They demonstrate that the police really don't know what happened; that they don't know how the perpetrator tried to escape, much less that it was through a window; that something was taken from the scene, something which they never connected to Mr. Floyd; and that negroid hairs were taken from inside a made bed.

With regard to the undisclosed report concerning the negroid hairs, the State continues to argue that "Nothing in any report provides any reasonable basis to believe that the unknown hairs were located 'inside' the made bed". (Answer Brief at 35). While acknowledging that the bed was in fact "made", the State refuses to acknowledge that in an undisclosed report, Detective Crotty reported that he had spoken with Steve Drexler of the FDLE lab in Sanford on June 13, 1984, and that Mr. Drexler had located "some negroid body hair fragments" on "**the sheet and the white bedspread** in the victim's bedroom." Def. Ex. 1, Supplementary Report dated 6-14-84 by Det. Crotty at 2 (emphasis added). Despite the State's argument to the contrary, there is nothing speculative in concluding that negroid hairs were obtained on a sheet

inside a made bed. Nor has the State yet to explain how these hairs would be significant in determining who stabbed the victim to death. Nor has the State rebutted the argument that, had this information been disclosed, trial counsel would have been able to undermine the State's assertion that these hairs could possibly have belonged to Mr. Floyd.

These reports demonstrate the overall lack of efficacy in the investigation. Further, without this information, trial counsel was seriously "handicapped" in his representation of Mr. Floyd. Rogers v. State, 782 So.2d 373, 385 (Fla. 2001). Counsel was limited in his ability to impeach the "thoroughness" and "good faith" of the State's investigation of this case. Kyles, 514 U.S. at 446.

This is especially the case when coupled with all of the other undisclosed documentary evidence in this case. A cumulative analysis of all of the withheld evidence undermines confidence in the outcome of the trial and requires that this Court grant a new trial.

**3. Gregory Anderson letters**

While the State acknowledges the lower court's finding that these letters were not disclosed to trial counsel, and that they did in fact possess exculpatory and/or impeachment value to the defense, the State relies on the court's

conclusion that these letters weren't material because Mr. Anderson was thoroughly cross-examined. (Answer Brief at 42).

Mr. Floyd relies upon his previous assertion that either these letters are material, or a cumulative analysis must be conducted without the benefit of Anderson's testimony. Either way, Mr. Floyd is entitled to relief.

The State attempts to have it both ways by later stating that "[T]he fact that a witness was impeached does not mean that his testimony must be disregarded." (Answer Brief at 44).

The State avoids the fact that Mr. Anderson wasn't just impeached. According to the lower court's finding, Mr. Murry had "proceeded to **quite effectively discredit Anderson** by questioning him concerning his letter writing to Judge Walker (the judge assigned to Anderson's case at the time), his prior involvement as a 'snitch' in other cases, and his apparent favorable treatment in prior cases." (PC-R. 2162)(emphasis added).

Thus, according to the finder of fact, Mr. Anderson was quite effectively discredited. As such, his faulty testimony should not be considered. A cumulative analysis without the benefit of Mr. Anderson's testimony, which the lower court

didn't conduct, coupled with the other undisclosed evidence, undermines confidence in the outcome.

Contrary to the State's assertion, evidence of Floyd's guilt has been completely tarnished. Under Kyles and Strickler, confidence is undermined in the outcome, and a new trial is warranted.

## II. The Presentation of False and/or Misleading Evidence Claim

### A. The Legal Standard

In Guzman v. State, 28 Fla. L. Weekly S829, 2003 Fla. LEXIS 1993 *16 (Fla. 2003), this Court stated:

> We recede from Rose and Trepal to the extent that they stand for the incorrect legal principle that the "materiality" prongs of Brady and Giglio are the same.

This Court proceeded to explain, "[t]he State as 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 *18. This Court explained that this is a "more defense friendly standard", Id. at *19, one which, as the State concedes, the lower court failed to utilize. (Answer Brief at 47).[6]

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[6]The State's initial argument that the Giglio and Napue portions of this claim are "not subject to consideration in this appeal" as they were never presented or otherwise argued to the lower court for consideration (Answer Brief at 46) is

**B. Uncorrected False and/or Misleading Testimony**

The testimony by Mr. Anderson that Mr. Floyd had confessed to the stabbing of a white woman was certainly damaging (R. 731-2). The State compounded the damage when it failed to correct the false and/or misleading testimony by Mr. Anderson about why he came forward, about his "limited" contact with the State, and about his "deal". Further, the State failed to correct the false and/or misleading testimony of Detective Pflieger about his "limited" contact and lack of promises with Mr. Anderson.

Additionally, the State knowingly presented a false or at least misleading argument in closing. The prosecutor argued that Anderson had not been offered any deals (R. 862). The prosecutor vouched for the credibility of Anderson and that his story never changed (R. 861).[7]

The aforementioned testimony and the representation in the closing argument were knowingly false. Due process was violated. Miller v. Pate, 386 U.S. 1, 6 (1967) (due process violated where "[t]he prosecution deliberately misrepresented

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belied by the record. See e.g. PC-S. 200-205.

[7]Based upon Anderson's testimony, the prosecutor argued that Mr. Floyd was a racist who bragged about stabbing "the white bitch." (R. 863).

the truth"). Under Guzman, this false testimony and argument was not harmless beyond a reasonable doubt.

Moreover, the prosecutor failed to correct the false and misleading testimony which occurred during the pretrial deposition of Deputy Crotty, when he was asked by Mr. Floyd's trial counsel about the results of a canvass of the victim's neighborhood after the discovery of her body. During the evidentiary hearing, Mr. Love was shown the deposition of Detective Crotty from August 7, 1984:

> Q Midway through, there is a question that Mr. Murray asked Detective Crotty about his house-to-house search in the neighborhood where Ms. Anderson lived.
> Question: After this, did you guys do a house-to-house investigation in the neighborhood? Answer: Uniformed patrol was doing this prior to my arrival. Question: **Does anything come to light that would indicate who was in the neighborhood?** Answer: **I believe the next day some information was developed. There was a black male seen in the neighborhood by investigations done through other detectives**. None of this proved out any farther than that.
> Do you recall seeing that statement of Detective Crotty when you were representing Mr. Floyd?
>
> A I'm sure I did. I don't have a specific recollection of it, but I'm sure I went through the depositions.
>
> Q **Is there any mention of Tina Glenn as somebody who saw two white men going into the victim's house on the day the victim was killed?**
>
> A **Certainly not on page 415.**
>
> Q **Do you recall any information about a black**

**male seen going through the neighborhood, as Detective Crotty indicated in his deposition?**

A **No.**

(PC-S. 319-20)(emphasis added).

The State asserts that because there was no false testimony presented at trial, Giglio has not been implicated. (Answer Brief at 49). However, the United States Supreme Court has held otherwise. In Gray v. Netherland, 518 U.S. 152, 165 (1996), the Supreme Court found deliberate deception of defense counsel qualified as a due process violation under the Giglio line of cases. Here, defense counsel was deliberately deceived. When asked about the neighborhood search, Detective Crotty conveniently omitted any reference to Tina Glenn's statement about two white males, yet he came up with a statement about a black male having been seen in the neighborhood.

Faced with the lower court's failure to use the correct standard with regard to a Giglio violation, the State attempts to rectify the situation by rationalizing that, "Although the court below did not assess this issue under the more defense-friendly materiality standard applicable to Giglio claims, see Guzman, 29 Fla. L. Weekly at S101, it is clear that this standard would not be met on the facts of this case." (Answer Brief at 47).

Although the State seemingly recognizes the standard in Guzman, it thereafter makes no attempt to bear its burden "to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt." Here, a new trial is required.

## ARGUMENT III

### MR. FLOYD RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL.

### A. Deficient Performance

With regard to the penalty phase ineffectiveness claim, the State argues that trial counsel had no duty to conduct a thorough investigation in 1987. The State makes several attempts to support this proposition.

Initially, the State relies upon the lower court's finding that counsel had no reason to investigate Mr. Floyd's mental abilities, as **no one suggested counsel needed to explore this area** and counsel's extensive contact with Floyd did not reveal any signs of mental mitigation. (Answer Brief at 59)(emphasis added).[8]

[8]Similarly, the State argues that "[s]ince no facts have been offered which should have reasonably alerted counsel to the need to further explore mental health issues, no basis of ineffectiveness has been demonstrated." (Answer Brief at 60)(citation omitted).

The State follows this up by adding that "[w]hile resentencing counsel Love testified below that it is a **standard practice *today*** to hire mental health experts and mitigation investigators for capital defendants, **there was no evidence presented that this was a standard practice in 1987, constitutionally compelled by the Sixth Amendment.**" (Answer Brief at 59-60)(emphasis added).

The State would have this Court believe that Mr. Floyd's reliance on United States Supreme Court decisions such as Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527 (2003), is misplaced. The State proclaims that:

> Floyd's reliance on Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527 (2003), is misplaced. In that case, the United States Supreme Court found that Wiggins' penalty phase attorney was deficient in failing to thoroughly investigate possible mitigation. Counsel consulted few sources and ignored clear signs of other mitigation in the limited records he did obtain. The Court cited ABA guidelines and standards adopted in 1989 in finding that counsel had been inattentive, and his actions fell short of the prevailing professional standards. However, Floyd was tried and resentenced prior to promulgation of the ABA standards and guidelines discussed in Wiggins, and Floyd has cited no authority which required counsel to obtain all records and explore possible mental mitigation with an independent expert in every capital case in 1987. To the contrary, Wiggins reiterated that "reasonableness" is context-dependent and requires consideration of the conduct from counsel's perspective at the time. Wiggins, 123 S. Ct. at 2536.

(Answer Brief at 60-61).

The State's hypothesis boils down to the notion that since counsel had no duty to obtain records, ones which would have put counsel on notice as to Mr. Floyd's mental deficiencies, therefore "counsel was not on notice as to the need to investigate mental mitigation." (Answer Brief at 61).

With regard to counsel's duties in 1987, the State somehow overlooks the United State's Supreme Court decision in Williams v. Taylor, 529 U.S. 362, 368 (2000), a case in which the defendant was **convicted in 1986.** Here, the United States Supreme Court **re**emphasized trial counsel's responsibility to investigate and prepare available mitigating evidence for the sentencer's consideration.

In granting relief after finding ineffective assistance of counsel during the penalty phase, the Court illustrated the background evidence never presented at trial.

> **They failed to conduct an investigation that would have uncovered extensive records** graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. Had they done so, the jury would have learned that Williams' parents had been imprisoned for criminal neglect of Williams and his siblings, n19 that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive

> foster home), and then after his parents were released from prison, had been returned to his parents. **Counsel failed to introduce available evidence that Williams was 'borderline mentally retarded' and did not advance beyond sixth grade in school.** *id.* at 595. **They failed to seek prison records** recording Williams' commendations for helping to crack a prison drug ring and for returning a guard's missing wallet, or the testimony of prison officials who described Williams as among the inmates "least likely to act in a violent, dangerous or provocative way." *Id.* at 569, 588. Counsel failed even to return the phone call of a certified public accountant who had offered to testify that he had visited Williams frequently when Williams was incarcerated as part of a prison ministry program, that Williams "seemed to thrive in a more regimented and structured environment," and that Williams was proud of the carpentry degrees he earned while in prison. *Id.* at 563-566.

Williams 529 U.S. at 395-396 (emphasis added)(footnote omitted). The cumulative weight of what was presented at the original trial and the evidentiary hearing, "raised 'a reasonable probability that the result of the sentencing proceedings would have been different' if competent counsel had presented and **explained the significance** of all the available evidence." Id. at 399 (emphasis added).

Contrary to the State's argument, counsel had a duty to conduct a thorough investigation and to obtain records in 1987. As noted by the Court, "the merits of [][Williams']

claim are squarely governed by our holding in *Strickland v. Washington*." (citation omitted).[9]

Similarly, in Wiggins v. Smith, 123 S. Ct. at 2355-6, the Court confirmed that its opinion was not based on new law, but rather on the long-standing holding of Strickland v. Washington:

> Our opinion in *Williams v. Taylor* is illustrative of the proper application of these standards. In finding Williams' ineffectiveness claim meritorious, we applied *Strickland* and concluded that counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision to focus on Williams' voluntary confessions, because counsel had not "fulfilled their obligation to conduct a thorough investigation of the defendant's background." *529 U.S., at 396* (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p 4-55 (2d ed. 1980)). While *Williams* had not yet been decided at the time the Maryland Court of Appeals rendered the decision at issue in this case, cf. *post*, at *156 L Ed 2d, at 497-498* (Scalia, J., dissenting), Williams' case was before us on habeas review. Contrary to the dissent's contention, *post,* at *156 L Ed 2d, at 499*, **we therefore made no new law in resolving Williams' ineffectiveness claim.** See *Williams, 529 U.S., at 390, 146 L Ed 2d 389, 120 S Ct 1495* (noting that the merits of Williams' claim "are squarely governed by our holding in *Strickland*"); see also *id., at 395, 146 L Ed 2d*

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[9]In assessing the deficient performance prong, the Court in Williams stated that "Whether or not those omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a through investigation of the defendant's background. **See 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980)**." Id. at 396 (emphasis added).

> *389, 120 S Ct 1495* (noting that the trial court correctly applied both components of the *Strickland* standard to petitioner's claim and proceeding to discuss counsel's failure to investigate as a violation of *Strickland*'s performance prong). **In highlighting counsel's duty to investigate, and in referring to the ABA Standards for Criminal Justice as guides, we applied the same "clearly established" precedent of *Strickland* we apply today.** Cf. *Strickland, 466 U.S., at 690-691, 80 L Ed 2d 674, 104 S Ct 2052* (establishing that "thorough investigations" are "virtually unchallengeable" and underscoring that "counsel has a duty to make reasonable investigations"); see also *id., at 688-689, 80 L Ed 2d 674, 104 S Ct 2052* ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable").

(Emphasis added). The Court's holdings in Wiggins and Williams clarify exactly what responsibilities trial counsel has **always** had to a client. In Mr. Floyd's case, the postconviction record reflects that prior to this case, Mr. Love had not done any other capital murder trials or penalty phases (PC-S. 305-6). The postconviction record reflects that although Mr. Love believed that at the conclusion of the case he had represented Mr. Floyd to the best of his abilities at the time (PC-S. 384), he did concede that:

> I don't think there is a question of tactics have changed and the law has changed, but **also my ability in handling the case would have changed.**

(PC-S. 385)(emphasis added).

The postconviction record reflects that Mr. Love conceded that he did not obtain any of Mr. Floyd's records, nor did he hire a mental health expert:

> Q I'm showing you what has been marked as Defense Exhibit No. 15, ask you if you recognize that document. Have you seen that document before?
>
> A I think I have seen it recently, **but I did not have this or obtain it.**
>
> Q **What is it?**
>
> A **At the time of my representation of James, it is a psychological report from the Pinellas County Public Schools.**
>
> Q What is the date?
>
> A It says contact date on the corner. I don't know if is {sic} marked 24. It is 1976. It has apparently a contact date of December of 1975.
>
> Q Does it look like a school record of Mr. Floyd?
>
> A Apparently so.
>
> Q I would like you to go down to the evaluation of test data on the first page.
>
> A Yes.
>
> Q Where it indicates that the result of the tests indicate that James' functioning is within the retarded range of intelligence; verbal IQ 55; performance IQ 55; Do you see that?
>
> A Yes, I do.
>
> Q Were you aware when you represented Mr. Floyd that Pinellas County Schools had found him to be mentally retarded - - or in the mentally retarded range?

A **At the time I did not know.**

Q **And you made no effort to get these records from Mr. Floyd, did you?**

A **No, I did not.**

Q **Did you hire anybody in your involvement of Mr. Floyd's case to look into his mitigation?**

A A mitigation specialist?

Q Yes.

A **No.**

Q **How about a mental health expert?**

A **No.**

Q **Did you obtain any records besides the school records on Mr. Floyd, any hospital records?**

A **Not that I can specifically recall.**

Q How about prison records?

A I know that I had discussed those things with James, about how he had been handling things and whatever, that he had done well; but I can't recall specifically, you know.

Q Did you have Mr. Floyd evaluated for mental retardation?

A No, I didn't.

Q Did you have him evaluated for any organic brain damage?

A No.

(PC-S. 338-40)(emphasis added).[10]

Despite the State's argument to the contrary, even without having obtained any of Mr. Floyd's records, the postconviction record reflects that Mr. Love should have been aware of the need for a mental health expert:

> Q Mr. Estelle stated at the resentencing that Mr. Floyd had **extreme mood swings**, staring into space, **suffered a big depression**, and at times **appeared manic**. Do you recall the testimony?
>
> A Not the specific testimony, but I recall testimony about James having some difficulties.
>
> Q Did that raise any concerns that you should, perhaps, hire a health expert or some sort of expert to look into Mr. Floyd's problems that he was having at the time?
>
> A Apparently not.

(PC-S. 344)(emphasis added).

The postconviction record reflects that Mr. Love's inaction was not based on strategy:

> Q Was there a strategic reason not to get his DOC records?
>
> A Not that I can recall.
>
> Q Was there a strategic reason not to hire a mental health expert?
>
> A Strategic reason, no.

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[10]Although Mr. Love was aware that Mr. Floyd had been on death row prior to representing him, he did not obtain Mr. Floyd's prison records, including a Florida State Prison document indicating that Mr. Floyd had an IQ of less than 60 (PC-S. 341).

(PC-S. 378-9).

The postconviction record reflects that Mr. Love's present practice is to utilize mental health experts:

Q Do you represent capital defendants today?

A Yes, I do.

Q Do you regularly hire mental experts in your investigation today?

A Yes, I do.

Q Do you regularly hire investigators?

A Yes, I do.

Q Is that a standard practice of course today?

A Yes, it is.

(PC-S. 345).

In accordance with Wiggins and Williams, it is evident that Mr. Love's performance at the resentencing constitutes deficient performance.

**B. Prejudice**

Having established that the State's argument that trial counsel wasn't obligated to obtain records or conduct a thorough investigation in 1987 is wholly meritless, Mr. Floyd next addresses the State's contention that the "evidence which Floyd submits should have been presented is all consistent

with, and to an extent cumulative to, the evidence Love presented at the resentencing."[11] (Answer at 55).

The State's assertion is inaccurate. The following examples of mitigation established at the evidentiary hearing were not presented at trial: That Mr. Floyd was under the influence of extreme mental or emotional disturbance in 1984 (PC-S. 525); that he suffered from a mental illness of depression from at least the time of early adulthood (PC-S. 525, 531); that he had some difficulty in reasoning, thinking and judgment (PC-S. 525); that he has difficulty with mental flexibility in changing from one concept to another (PC-R. 1808); that he suffers from brain damage (PC-S. 526; PC-R. 1987); that he has difficulty in problem solving (PC-S. 526); that he is socially inhibited (PC-S. 531-2); that he has difficulties with impulse control and has language and arithmetic deficits (PC-S. 526); that he is mentally retarded (PC-S. 526; PC-R. 1839,1998); that he reads at a fifth grade level (PC-S. 506); that he had a dysfunctional familial background (PC-S. 531-2, 1839, 1998); that he was sexually

[11]Despite this edict by the State, it later contradicts this statement by proclaiming, "However, the only additional mitigating factors that could have been developed are low intelligence and depression." (Answer Brief at 59).

abused (PC-S. 531-2); and that Mr. Floyd suffered from severe academic problems (PC-S. 521, 532).

This is a case in which no mitigating circumstances were established and there were only two aggravating circumstances.[12]

It cannot be said that there is no reasonable probability that the results of the sentencing phase of the trial would have been different if the evidence discussed herein had been presented to the sentencer. Strickland, 466 U.S. at 694. The key aspect of the penalty phase is that the sentence be individualized, focused on the particularized characteristics of the individual defendant. Penry v. Lynaugh, 488 U.S. 74 (1989); Gregg v. Georgia, 428 U.S. 153 (1976). This did not occur in Mr. Floyd's case. When considering how close Mr. Floyd's death recommendation was (8-4), and how little was presented at the resentencing, this substantial mitigation would have tipped the scales towards life. Relief is warranted.

## ARGUMENT IV

### THE TRIAL COURT ERRED IN DENYING MR. FLOYD'S CLAIM THAT, BECAUSE OF HIS MENTAL RETARDATION, HIS DEATH

[12]Further, two justices of the Florida Supreme Court voted to vacate Mr. Floyd's death sentence as disproportionate. Floyd v. State, 569 So.2d 1225, 1232 (Fla. 1990)(McDonald, J., dissenting, joined by Barkett, J.).

**SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES' CONSTITUTION AS WELL AS THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.**

## A. Impropriety of the Proceedings

### 1. Selection of Experts

In its attempt to demonstrate that Mr. Floyd was not denied due process when the lower court appointed two experts from the State's list and only one from the defense list to evaluate him, the State asserts that Section 921.137 of the Florida Statutes, which calls for the appointment of two experts, does not apply to postconviction proceedings (Answer Brief at 71).[13] Although the State doesn't indicate what the proper procedures should have been, it condemns Mr. Floyd for not directing the lower court to any written standards which should have been utilized (Answer Brief at 72-3).

Ironically, Appellant has been the one who has consistently objected to the lack of standards and guidance with regard to mental retardation determinations. As Appellant was aware that there were no written standards to date, prior to the evidentiary hearing, Appellant filed in the circuit court a Motion to Stay Proceedings Pending Adoption of

[13]Further, the State asserts it is Mr. Floyd's burden to offer authority demonstrating that the court shouldn't have appointed more state experts than defense experts.

Rules of Procedure by the Florida Supreme Court in relation to mental retardation determinations (PC-R. 1861). The motion was denied (PC-R. 1696).[14]

Recently, this Court issued its Amendments to Florida Rules of Criminal Procedure and Florida Rules of Appellate Procedure, Case No. SC03-685 (May 20, 2004), in which it adopted Florida Rule of Criminal Procedure 3.203, effective October 1, 2004. Within this rule, it is specified as to the number of experts to be appointed in these proceedings. The determination by the lower court to appoint two state-suggested experts and only one defense-suggested expert is not one of the authorized procedures set forth by this rule.

Instead, Rule 3.203(c)(2), which would have been most applicable to Mr. Floyd's case, states:

> The motion shall state that the defendant is mentally retarded and, if the defendant has been tested, evaluated, or examined by one or more experts, the names and addresses of the experts. Copies of reports containing the opinions of any experts named in the motion shall be attached to the motion. The court shall appoint **an expert** chosen by

[14]Appellant also filed in this Court a Petition Seeking to Invoke this Court's All Writs Jurisdiction as well as Motion to Stay Proceedings. These were denied. See Floyd Et Al. V. Charles J. Christ, Jr., Etc., Et Al, Case No. SC02-2295 (March 14, 2003). Additionally, Appellant filed a Motion to Consolidate as well as a Motion to Stay Proceedings, until after oral arguments were heard in the case of Burns v. State, Case No. SC01-166, an argument which concerned mental retardation. These motions were also denied. Floyd v. State, Case No SC03-2 (February 13, 2003).

> the state attorney if the state attorney so requests. **The expert** shall promptly test, evaluate, or examine the defendant and shall submit a written report of any findings to the parties and the court.[15]

This Court's rule confirms that the lower court acted improperly. With this rule in place, the lower court would not have been able to improperly stack the deck against Mr. Floyd.

**2. Lack of Standards**

In his initial brief, Appellant noted that the lower court failed to provide any guidance as to the burden of proof, in that it failed to specify whether Mr. Floyd's burden was by a preponderance of the evidence or by the clear and convincing evidence standard.[16]

In light of this Court's Amendments to Florida Rules of Criminal Procedure and Florida Rules of Appellate Procedure,

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[15]See also Rule 3.203 (C)(3), "if the defendant has not been tested, evaluated, or examined by one or more experts, the motion shall state that fact and the court shall appoint **two experts** who shall promptly test, evaluate, or examine the defendant and shall submit a written report of any findings to the parties and the court." Amendments to Florida Rules of Criminal Procedure and Florida Rules of Appellate Procedure at 16.

[16]Additionally, Appellant noted that the lower court had failed to give any guidance as to what standards, testing and definitions governed the evaluations of Mr. Floyd.

No. SC03-685 (May 20, 2004), it is clear that the lower court's actions were erroneous.[17]

While the Rule does not specify the proper standard to be utilized, Justice Pariente explains this omission in her concurring opinion:

> Because of concerns about whether the burden of proof is a substantive or procedural requirement and further concerns over whether a "preponderance of evidence" burden of proof may be constitutionally required under Atkins and Cooper, it is preferable to omit the burden of proof enunciated by the legislature from our rule of procedure regarding mental retardation. In exercising our rulemaking authority, we have on several occasions declined to adopt proposed rule amendments because of doubts over their constitutionality. See In re Amendments to the Florida Evidence Code, 782 So. 2d 339, 341-42 (Fla. 2000) (citing "grave concerns about the consitutionality" of an amendment to the evidence code); Amendments to the Florida Rules of Criminal Procedure, 794 So. 2d 457, 457 (Fla. 2000)(declining to adopt rule that would have removed requirement of attesting witnesses to out-of-court waiver of counsel "[s]ince all waivers of counsel must be voluntary"). **Our omission of a burden of proof from the rules we adopt today leaves the trial courts obligated to either apply the clear and convincing evidence standard of section 921.137(4), or find that standard unconstitutional in a particular case.** The issue will then come to us in the form of an actual case or controversy rather than a nonadversarial rules proceeding.

Id. at 7 (emphasis added).

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[17]In its Answer Brief, the State does not address the lower court's failure to indicate the proper standard.

Here, the lower court failed to specify the burden of proof. In its order denying relief, the lower court merely states that, "In short, the defendant has not met his burden of showing either that he has significant subaverage general intellectual functioning or that he has significant deficits in adaptive functioning." (PC-R. 2127).

**3. Violation of due process**

In Atkins v. Virginia, the Supreme Court held that the Eighth Amendment's ban on excessive and cruel and unusual punishments prohibits the execution of individuals with mental retardation. 122 S.Ct 2242. Reversing its prior decision in Penry v. Lynaugh, 492 U.S. 3003 (1989), the Court concluded that the Constitution "'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." Atkins, 122 S. Ct. at 2252, quoting Ford V. Wainwright, 477 U.S. 399, 405 (1986).

Since the United States Constitution prohibits the execution of the mentally retarded, then at a minimum, persons subject to that rule must have notice of the controlling standard and the governing rules of procedure. "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" Cleveland Bd.

Of Ed. v. Loudermill, 470 U.S. 532, 542 (1985), quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). "[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause." Ford, 477 U.S. at 424 (Powell, J., concurring in part and concurring in the judgment).

"[T]he procedures by which the facts of the case are determined assume an importance as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." Speiser v. Randall, 357 U.S. 513, 520 (1958).

The United States Supreme Court has recognized the critical need for procedural rules to govern the process by which substantive rights are vindicated:

> [T]he lodestar of any effort to devise a procedure must be the overriding dual imperative of providing redress for those with substantial claims and of encouraging accuracy in the factfinding determination. The stakes are high, and the "evidence" will always be imprecise. It is all the more important that the adversary presentation of relevant information be as unrestricted as possible. Also essential is that the manner of selecting and using experts responsible for producing that "evidence" be conducive to the formulation of neutral, sound, and professional judgments as to the prisoner's ability to comprehend the nature of the penalty. Fidelity to these principles is the solemn obligation of a civilized society.

Ford, 477 U.S. at 417.

Without proper guidelines or standards in place during the evidentiary hearing, Mr. Floyd was denied his rights to due process. At a minimum, Mr. Floyd is entitled to a determination as to mental retardation which conforms to the dictates of the recently promulgated rule.

**B. The Lower Court's Order**

In its answer brief, the State attempts to bolster the credibility of Drs. Merin and Gamache as experts in the field of mental retardation. (Answer Brief at 78-9). Aside from their own proclamations that they are experts, the State fails to provide any valid response to the ample evidence proving otherwise, such as the fact that Dr. Merin has never written any articles on mental retardation, nor has he done any research on mental retardation (PC-R. 1774-5); that Dr. Merin was of the opinion that research hasn't changed much on mental retardation since 1956 (PC-R. 1775); that Dr. Merin never mentioned an onset before age eighteen on direct examination or in his report (PC-R. 1772); that Dr. Merin didn't place a great deal of emphasis on Mr. Floyd's school records (PC-R. 1792); that the closest evidence of Dr. Gamache's research on mental retardation was a publication from 1991 which dealt

with a group of subjects with thyroid or hormone syndromes (PC-R. 1897); that Dr. Gamache didn't use the Stanford-Binet because he considers it to be a less valid and less reliable instrument (PC-R. 1926); that Dr. Gamache asked Mr. Floyd a total of five questions before beginning the testing (PC-R. 1924); that Dr. Gamache did not conduct a clinical interview (PC-R. 1925); and that Dr. Gamache didn't mention any adaptive skills in his report (PC-R. 1934), nor did he mention the onset before age eighteen (PC-R. 1946).

Conversely, unable to refute Dr. Keyes expertise in the area of mental retardation, the State resorts to calling him Floyd's "favorite expert" (Answer Brief at 81). However, the record amply conveys the fact that Dr. Keyes is simply "the most qualified expert in mental retardation" and the State's remark does nothing to change that fact.

Despite the State's attempts to the contrary, the lower court's credibility finding is not supported by objective evidence found in the record. Mr. Floyd is entitled to relief.

## CONCLUSION

Mr. Floyd submits that relief is warranted in the form of a new trial, a new sentencing proceeding, the imposition of a life sentence and/or a remand for a proper mental retardation

determination. As to those claims not discussed in the Reply Brief, Mr. Floyd relies on the arguments set forth in his Initial Brief and on the record.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Reply Brief has been furnished by U.S. Mail, postage prepaid, to Carol Dittmar, Assistant Attorney General, Concourse Center #4, 3507 Frontage Rd., Suite 200, Tampa, Florida 36607 this ___ day of June, 2004.

**CERTIFICATE OF FONT**

This is to certify that this Reply Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

_____
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