IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-651

ERNEST WHITFIELD,

Appellant,

v.

STATE OF FLORIDA, ET. AL.,

Appellee,

AMENDED BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Whitfield's Motion to Vacate Judgement and Sentence. The motion was brought pursuant to Fla. R. Crim. Proc. 3.851. The Defendant filed a timely motion for post-conviction relief in the Circuit Court of the Twelfth Judicial Circuit. The Court conducted a *Huff* hearing pursuant to *Huff v. State*, 622 So.2d 982 (Fla. 1993), on November 20, 2002. At the conclusion of the hearing, the Court determined that the Defendant was entitled to a hearing on claims I, II, III, IV, V, VII, XII, XIII, XIV, and XVI, and that the Court would hear argument only on claims VI, XV, XIX, and XX. Prior to the beginning of the evidentiary hearing on May 22, 2003, the Court granted counsel's motion to proceed with testimony as to claim VI..

The following symbols will be used to designate references to the record in the instant case:

"R." -- The record on direct appeal to this Court followed by the appropriate page number.

"PC-R." -- The post-conviction record on appeal followed by the appropriate page number.

"Order" – The lower court order denying postconviction relief.

REQUEST FOR ORAL ARGUMENT

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

STANDARD OF REVIEW

The appropriate standard of review is *de novo* where the trial court has abused its discretion by basing its judgment on an erroneous view of the law. Further, all ineffective assistance of counsel issues raised herein are mixed questions of law and fact. Such matters require *de novo* review.

STATEMENT OF THE CASE

On June 19, 1995, Mr. Whitfield was arrested for the murder Claretha Reynolds. A grand jury indicted Mr. Whitfield for first degree murder and subsequently charged by information for armed burglary and sexual battery with a deadly weapon. Mr. Whitfield was convicted on all counts. A penalty phase was conducted for the first degree murder conviction. Mr. Whitfield was sentenced to death by a jury vote of 7-5, one vote shy of a life sentence. This Court affirmed Mr. Whitfield's

convictions. *Whitfield v. State*, 706 So.2d 1 (1998).

STATEMENT OF THE FACTS

> *No constitutional right is celebrated so much in the abstract and observed so little in reality as the right to counsel.* - Stephen Bright.

Ernest Whitfield was arrested and tried for first degree murder in 91 days, the same time it would take a court to adjudicate a traffic case. Mr. Whitfield's case was rushed to judgement because his attorneys completely abdicated their duty to advocate. Defense counsel did not conduct a meaningful investigation, lost crucial evidence that was available to them, and presented a defense that had no chance of prevailing. Worse yet, they failed to call lay witnesses and presented inaccurate information to the jury during the penalty phase hearing. As a result of counsel's deficient performance, the rights of Mr. Whitfield and the jury were violated.

Mr. Whitfield's case is a tragic example of bad judgement. His attorneys were highly trained and competent and had prevailed in trying cases with similar factual scenarios. Mr. Whitfield's attorneys knew the law in the area of death penalty litigation. However, in those 91 days, Mr. Whitfield's attorneys did not act as an attorney that is guaranteed by the Sixth and Fourteenth Amendment to the United States Constitution. Mr. Whitfield's attorneys allowed their client

to dictate the strategy to be followed, which is reserved for the attorney. Both attorneys surrendered their duties to a man under the influence of chronic and sustained crack cocaine abuse, a man who his attorneys agreed suffered from a major mental disorder, and a man with low intelligence. Defense counsel allowed Mr. Whitfields to run the show and as a result of their inaction, Mr. Whitfield did not received the benefit of effective assistance of counsel.

At trial, this once Baker Act-ed mentally ill, brain damaged individual literally removed himself entirely from the trial and left the courtroom. *See Whitfield v. State*, 706 So.2d at 3-4. He attempted to discharge his attorneys. The trial court conducted both *Nelson*[1] and *Faretta*[2] inquiries. While the trial court found Mr. Whitfield's counsel competent, it recognized his right to represent himself regardless of the actions of his attorneys. The only hurdle in Mr. Whitfield's path was the *Faretta* inquiry. Mr. Whitfield failed the test. The trial court found that "he was not competent to represent himself", a fact this court recognized. *Whitfield*, 706 So.2d at 3. Whitfield stated that "he could not think rationally".

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[1] *Nelson v. State*, 274 So.2d 256 (Fla. 4th DCA 1973).

[2] *Faretta v. California*, 422 U.S. 806 (1975).

Id. Thus, the trial court recognized what the post-conviction court did not: that Ernest Whitfield did not have the competence to direct the strategy in his case.

Nowhere in the lower court's fifty-eight page denial of post-conviction relief does it cite to the United States Supreme Court's seminal case of ***Wiggins v. Smith***, 123 S.Ct 2527 (2003). This despite the fact that at every instance, at every opportunity counsel had to act as counsel, they failed to live up to the standards of *Wiggins* and the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989).

Further, the lower court's highly deferential standard when reviewing trial counsel's actions does not survive the mandate in *Wiggins* to "discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins* at 2537. Clearly, the lower court's interpretation and application of established United States Supreme Court and this Court's precedent is wrong.

SUMMARY OF THE ARGUMENT

Ernest Whitfield did not receive the benefit of counsel as guaranteed by the Sixth Amendment to the United States Constitution. Mr. Whitfield's trial counsel failed to properly investigate and present a defense of voluntary intoxication that

would have made him ineligible for the death penalty. Further, counsel abdicated their roles as lawyers when they allowed their client to demand speedy trial when it was obvious that the lawyers and witnesses were not ready for trial. Lastly, counsel failed to investigate and present the wealth of mitigation evidence that was easily available to them.

The most recent case on ineffective assistance, ***Wiggins v. Smith***, 123 S.Ct. 2527(2003), the United States Supreme Court held by a 7-2 vote that counsel's investigation and presentation "fell short of the standards for capital defense work articulated by the American Bar Association ... standards to which we have long referred as 'guides to determining what is reasonable.' " 123 S.Ct. at 2536-37. In its discussion of the 1989 ABA Guidelines for counsel in capital cases, the Court held that the Guidelines set the applicable standards of performance for counsel:

> [I]nvestigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989).... Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources.

Id. at 2537 (emphasis in original). The Court then also adopted

ABA guideline 11.8.6, which it described as stating:

> that among the topics counsel should consider presenting are medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences.

Id. Thus, the *Wiggins* case now stands for the proposition that the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the "prevailing professional norms" in ineffective assistance cases.

Finally, prejudice has to evaluated in light of the advisory jury verdict of 7-5. This Court has, on several occasions, evaluated prejudice and related issues when the jury vote is 7 to 5. *See Harris v. State,* 843 So.2d 856 (Fla. 2003)*; Crook v. State*, 813 So.2d 68 *(*Fla. 2002*); Almeida v. State*, 748 So.2d 922 (Fla. 1999); *Phillips v. State*, 608 So.2d 778 (Fla. 1992) In *Phillips v. State*, 608 So.2d 778 (Fla.1992), this Court determined that the defendant was prejudiced by counsel's failure to present "strong mental mitigation" at trial. *Id.* at 783. In that case, two experts opined in the postconviction proceeding that the defendant was suffering from an extreme emotional disturbance at the time of the crime, was unable to conform his conduct to the requirements of law, and could not form the requisite intent to fall under the aggravating factors of CCP or heinous, atrocious, or cruel. *See id.* Also important

this Court's analysis of that case was the fact that the mental mitigation was essentially unrebutted and that the jury had recommended the death sentence by the slim majority of seven to five. *See id.* Based on those factors, this Court concluded that there was a reasonable probability that "but for counsel's deficient performance ... the vote of one juror would have been different, ... resulting in a recommendation of life." *Id.*

ISSUE I

THE LOWER COURT ERRED WHEN IT DENIED MR. WHITFIELD'S CLAIM DEFENSE COUNSEL WAS INEFFECTIVE DURING THE GUILT PHASE OF HIS TRIAL FOR FAILING TO ADEQUATELY INVESTIGATE AND PRESENT A VOLUNTARY INTOXICATION DEFENSE TO THE OFFENSE OF FIRST DEGREE MURDER, BURGLARY AND ARMED SEXUAL BATTERY AND FOR FAILING TO HIRE A DEFENSE EXPERT IN THE FIELD OF TOXICOLOGY. .[3]

> *Of the questions that are before the American people, I regard no one as more important than the administration of justice. We must make it so that a poor [person] will have as nearly as possible an equal opportunity in litigating as the rich [person], and under present conditions, ashamed as we may be of it, that is not the fact.* - President William Howard Taft.

Ernest Whitfield did not commit first degree murder. However, his lawyers, the judges and everyone in the criminal justice system either acted or failed to act in ways that

[3] While the three substantive crimes were separate in the original motion to vacate, counsel has joined them together in Issue I for the sake of judicial economy as well as a claim of ineffectiveness for failing to hire a toxicologist. The evidence presented at the evidentiary hearing was for all three charges.

ensured his conviction and ultimate sentence of death. Ernest Whitfield is a very severe crack cocaine addict. He has been abusing drugs since the age of 15 and using cocaine as a child at 17. As a result of Mr. Whitfield's severe crack cocaine use, he has suffered serious brain damage. (PC-R 216) Mr. Whitfield did not commit first degree murder because he was unable to form the requisite intent due to his drug use.

The ineffectiveness of counsel during the appellant's guilt phase is outlined below. As recognized by this court, there was very little evidence disputing that Ms. Reynolds died and that Mr. Whitfield was responsible for her murder. There was no self-defense argument. No alibi defense. No defense of mistaken identity. Clearly, the only viable theory of defense from the beginning of the case focused on the defense of voluntary intoxication. Everything they gathered, all the evidence obtained, every expert retained was designed to present this affirmative defense. The result of their work is best illustrated during the exchange between Ms. Scott and Dr. Regnier regarding the only and ultimate issue of the case:

> Q. [Ms. Scott] Now do you have an opinion, Doctor, based upon your background and your review of the Baker Act records, the Sarasota Memorial Hospital records, your conversations with the defendant, his sister, reading the sworn testimony of the witnesses who saw Mr. Whitfield immediately after the event, whether or not Mr. Whitfield could possess premeditated design to effect the murder of Ms.

> Reynolds?
> A. Charlie Ann, **this is one of those questions I really can't answer** because I've been unable to get the kind of data from the defendant that I need to make such a determination. I can say from reviewing all of the records I've seen, that I have, I have a reasonable amount of doubt that he could have, but **I don't know for sure**.
> Q. Okay. And what other records would you have wanted?
> A. Well, I wanted to test the defendant with certain psychological instruments and have been unable to do so.[4]
> Q. If you had – was it more likely that he was unable to have the premeditated design than unlikely?
> A. I would think that it's probably more that he was unlikely than likely. **But again I don't know for sure**.
> Ms. Scott: Thank you, I don't have any further questions.

(R. 12221-22)

The end result was no evidence for a defense of voluntary intoxication ***as testified by Mr. Whitfield's own court appointed expert***.

During the evidentiary hearing, the appellant presented several witnesses. Two witnesses were recognized by the court as experts in their respective fields. The State presented no expert testimony.

The lower court, in it's order, denied the appellant's claim for several reasons. First, it found that the decision not to call his sister to corroborate the drug abuse evidence

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[4] Mr. Whitfield was tested by his current defense team.

was a strategic decision. (Order at 42) Defense counsel testified that they believed that the family members were "not good historians, were inarticulate, and the defense had concerns how they would testify when cross-examined." Id.

Dinah Giles testified at the evidentiary hearing. She was a very articulate and emotional witness. At one point during her testimony, the courtroom became quiet, the voices hushed as the sadness of her and her brother's family journey brought her to tears. The judge handed her a tissue and her story continued. The meaning of that episode was not lost on anyone present in the courtroom, especially since the defense had just testified prior that she would not make a "good" witness.

Dinah Michelle Giles, who is the younger sister of Ernest Whitfield, is 10 months younger than Mr. Whitfield and that her sibling group includes a total of 3 brothers and 2 sisters all a year apart (PC-R 349-50). Ms. Giles testified that Pam, Mr. Whitfield, and herself all have the same father but Pam has always lived with her godparents since she was a baby (PC-R 351). Ms. Giles testified that from her earliest memory she has always lived with her grandmother and her mother would stay back and forth with her boyfriend (PC-R 351). Her grandmother was their primary caretaker (PC-R 352). Ms. Giles could not recall a time when she moved with her mother to Sarasota leaving Mr.

Whitfield with their father (PC-R 352). Although she did recall when the children stayed with their mother for a short period of time before returning to live with their grandmother (PC-R 352). Ms. Giles testified that it was alright staying with her mother and her boyfriend but the guy she was with used to get drunk and he and her mother would always wind up fighting (PC-R 352). She also stated that while her mother's boyfriend was chasing her at night down the road, she would tell the kids to run with her because he would be chasing her to actually fist fight her (PC-R 352). Ms. Giles testified that sometimes he would catch her and he used to beat her real bad (PC-R 352). Ms. Giles testified that these events were ongoing while she and Ernest where 10 or 11 and that they were present during some of these beatings (PC-R 353). Ms. Giles further testified that the frequency of these beatings would happen every time they went over there on the weekends (PC-R 353). While the children were living with their grandmother, Mr. Whitfield's mother would come probably twice a week and then on the weekend to check on the children (PC-R 355).

Ms. Giles also testified regarding the relationship that Mr. Whitfield had with their father. Mr. Whitfield's father was verbally abusive to him (PC-R 354). When he would get upset he would threaten to knock Mr. Whitfield out or do this or that to

Mr. Whitfield (PC-R 354). Mr. Whitfield's father also threatened to take his pistol and blow his brains out (PC-R 354). Ms. Giles testified that these were regular occurrences during their weekend visits with their father (PC-R 355).

Ms. Giles further testified that while they were living with their grandmother, they attended school regularly, they had enough to eat, their clothing was appropriate and clean, and there was enough room in the house. Ms. Giles was then asked what changed things in your life? As Ms. Giles began to testify, she was visibly upset and crying as the court handed her a box of tissue when recalling the devastating impact on their lives with the passing of their grandmother. She testified that "after their grandma died, it's like our whole life changed, it's like this stuff - - I can't say. It's like after my grandma had died, it's like our life had went down because it's like we was running here, here to there, to Leola, and it's like my mom was all about her boyfriends. So it's like the love and attention that we used to get, we didn't get it anymore. Q: And so your mom was not available to nurture you as children? A: Right" (PC-R 356). Ms. Giles recalls at one point she was with her mother and stepbrother and other times they were here to there with different family members, "it was like everywhere" (PC-R 357). She estimates that they lived at

more than five different places with various relatives for short periods of time after their grandmother died and with each move caused a change in schools (PC-R 357). Ms. Giles testified that during this time they were not able to maintain any type of regular school attendance (PC-R 358). While the children were moving from place to place, their mother was somewhere else (PC-R 359). Of the children, Ms. Giles testified that Pam and Riley had the most stable places to lived because they were living with their godparents and they were good godparents to them (PC-R 358).

Ms. Giles recalls that the children eventually came to live with their mother when they were teenagers, approximately 15 or 16 (PC-R 359). She went to live with her mother and her mother's boyfriend and she does not recall where Mr. Whitfield was staying at that time (PC-R 360). Ms. Giles recalls entering Mr. Atkins program because her mother was an alcoholic (PC-R 360). She would drink on a regular basis (PC-R 360). When the family entered Mr. Atkins' program, Ms. Giles testified that she and Leroy attended school regularly but Mr. Whitfield did not attend as much (PC-R 361). When asked if her mom was there and able to get them up for school every day or do something about Ernest not attending school, Ms. Giles testified that "at times she was there. But the majority of the time, by her not having

a washing machine, sometimes we really didn't have clothes to wear to school" (PC-R 361). Testifying from Defense exhibit C, Ms. Giles noted the apartment where they used to live for a few years (PC-R 362, 363). She describes the home as "little, two bedroom, kind of small inside, and it wasn't a nice place, it was just somewhere" (PC-R 362). Ms. Giles testified that they did not have nice housing while staying with their mother (PC-R 362). Ms. Giles recalls that while staying with her mother they would have to go to Coins where there mother was having drinks. If there was something they wanted they had to go where she was (PC-R 365).

Ms. Giles further testified that prior to 1995 she was aware that her brother used drugs (PC-R 367). "He wasn't hisself anymore because it's like I noticed things had changed about him. [H]e'll go off and stay for a couple of days and when he'd come back his were a little glossy and he'll look dirty and he'll be smelling, and he just wasn't the type person because he's always stayed neat and clean" (PC-R 367-8). "His whole personality had changed. He wasn't the same person anymore" (PC-R 368). Ms. Giles testified that when Mr. Whitfield would come with glossy eyes, dirty, and not neat he would take a bath, go in the room and sleep the rest of the day and get up and watch TV. He would stay home for a couple of days and then he

would be gone again" (PC-R 368). During these times, Mr. Whitfield was not able to maintain a job (PC-R 368).

Ms. Giles was present during her brother's trial in 1995 and was leaving work to go to his trial in Sarasota (PC-R 370). Ms. Giles was told that she was going to testify by Defense Counsel Williams. Ms Giles testified that Defense Counsel Williams on the day of the court date asked her how she would feel about speaking on her brother's behalf (PC-R 373). However after a break during the proceedings, she was informed that she would not be testifying (PC-R 371, 373). Ms. Giles was prepared to testify that day and would have answered questions to the best of her ability (PC-R 371). After Mr. Whitfield's conviction and sentence, Ms. Giles continued to be involved in Mr. Whitfield's case and was present at the Florida Supreme Court for oral arguments in his case at a sacrifice to herself as noted by the lower court. (PC-R 371-2).

While testimony above goes beyond the issue addressed here, her entire testimony was encapsuled to illustrate that Ms. Giles was a very good and articulate witness.

Harriet Miller, the appellant's ex-wife, testified for Mr. Whitfield at the evidentiary hearing. The court noted in its order that the decision to not call Ms. Miller was strategic based on the fact that she was the victim of an earlier crime

perpetrated by the appellant. Order at 43.

Ms. Miller testified that she was married to Mr. Whitfield for six months after dating for a year. While they were dating "he was real good." He worked and provided for her and helped out with her four children (PC-R 389-390). Ms. Miller testified that their relationship began to change when Mr. Whitfield had mood swings and sometimes he'd go on like a little binge and leave for three days, come home, he wouldn't remember nothing he done" (PC-R 390). It would take about three days before he was right again (PC-R 390). After he recovered the mood swings would begin and he went back to doing the same thing (PC-R 390). This pattern of behavior happened off and on during the course of their marriage (PC-R 390). Ms. Miller testified that she was a former victim of Mr. Whitfield and that he was convicted of committing a criminal act against her (PC-R 391), which was presented as an aggravating circumstance in Mr. Whitfield's penalty phase hearing. Ms. Miller further testified that she holds no animosities or hatred against Mr. Whitfield (PC-R 391). Although Ms. Miller has never seen Mr. Whitfield do any kind of drugs, she has found drug paraphernalia in her home (PC-R 391). Ms. Miller described finding a can, like a beer can, a hole punched can, which is used for ingesting crack (PC-R 391). When Mr. Whitfield would return from his binges he would be dirty,

his eyes were big, his speech was husky, it changed, and he was hyper (PC-R 392). Ms. Miller testified that she was never contacted by Mr. Whitfield's defense attorneys or anybody representing Mr. Whitfield and there is no indication in the billing record from counsel or the defense investigator regarding attempts to locate Mr. Whitfield's ex-wife. Ms. Miller also testified that she was never contacted by the State Attorneys Office to give a statement regarding the prior act against her (PC-R 392-3).

Evelyn Ford testified at the evidentiary hearing that she first met the Whitfield family when they became her neighbors at Maple Manor around 1983 (PC-R 381). Ms. Ford testified that Mr. Leola would babysit for her and that she would be at their house everyday. Sometimes Ms. Leola would not be available to babysit because she would drink a lot. And sometimes this drinking habit would last two to three months (PC-R 383). While visiting at the Whitfield home, Ms. Ford had the opportunity to observe Mr. Whitfield and "sometimes when he came home he'd look like he'd been out all night, he'd be looking like he's sad" (PC-R 381). Ms. Ford testified that he would come home, talk, laugh, lay down, go to sleep, sleep for a couple of days and then he'd be all right (PC-R 381-2). This would be a pattern that she observed every now and then. Ms. Ford testified that

she thought that Mr. Whitfield was high. She also thought that he was high when he got mad with his mother and kicked the window out and another time when he was mad with his stepfather and hit him (PC-R 382). Ms. Ford further testified that she has picked Mr. Whitfield up "behind the grass trail (msp Brass Rail), which is a bar where drugs are sold and people be drinking all the time, just doing stuff they shouldn't be doing and that he was high" (PC-R 382). She testified that she thought that Mr. Whitfield was high because "when he is high he'll just talk, talk, talk" (PC-R 383).

The testimony of Evelyn Ford would have been important in corroborating Mr. Whitfield's pattern of drug use. Evelyn Ford had personal knowledge of her observations of Mr. Whitfield under the influence of drugs. She would have been able to relay to the jury how Mr. Whitfield's personality and behavior changes when he is under the influence.

Peggy LaRue testified at the evidentiary hearing that she is the sister of Estella, Mr. Whitfield's former girlfriend (PC-R 384). Peggy LaRue testified that when Mr. Whitfield came to her house the morning of the crime he appeared "hyper, big eyes, glossy eye" (PC-R 385). She thought that Mr. Whitfield was high and that she has seen him like this before and thought he was high (PC-R 385). Ms. LaRue further testified that Mr. Whitfield

appeared agitated (PC-R 385), talkative (PC-R 386), and hyper (PC-R 387). From all indications of knowing Mr. Whitfield, Ms. LaRue testified that she thought that he was on drugs (PC-R 387). Ms. LaRue further testified that she was never contacted by the defense experts, the investigator, or defense counsels (PC-R 387-8).

Ms. LaRue was a guilt phase witness that could have been called by the defense during the penalty phase hearing to corroborate Mr. Whitfield's statements that he was under the influence of drugs at the time of the crime. Further, Ms. LaRue could have established that Mr. Whitfield's cocaine addiction was readily apparent and noticeable to those people familiar with his demeanor. In describing Mr. Whitfield's appearance on that morning, Ms. LaRue's testimony is independent and further corroborates the testimony of Ms. Giles and Ms. Ford regarding the changes in Mr. Whitfield when he is under the influence of drugs.

In *Wiggins v. Smith*, 123 S.Ct. 2527 (2003), the United States Supreme Court reiterated the standard established by *Strickland* nearly 20 years ago. That standard today still requires courts to determine whether counsel was deficient in his or her representation and whether that representation predjudiced the defendant's case. *See Strickland v. Washington*, 466 U.S. 668

(1984). The once common mantra, cited by the court on page six of its order, attempts to give the impression that courts must be highly deferential to a trial attorney's performance. However, Justice O'Connor, in writing for the majority in *Wiggins,* as she did in *Strickland*, cautions this Court about how far that deference should be extended.

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

Wiggins, 123 S.Ct at 2538.

Wiggins is not new law nor is a new concept. Rather, *Wiggins* instructs this Court to look at the prevailing norms at the time of the trial to establish whether counsel was ineffective. It is clear by any legal standard that counsel was ineffective in their representation of Mr. Whitfield. At the time this case was tried, the prevailing norms for trying a capital case would have been reflected in the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989). Guideline 11.4.1 states, in pertinent part:

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

case and should be pursued expeditiously.

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

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

D. Sources of investigative information may include the following:

1. Charging Documents:

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

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

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

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

3. Potential Witnesses:

Counsel should consider interviewing potential witnesses, including:

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

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

C. members of the victim's family opposed to having the client killed. Counsel should attempt to conduct interviews of potential witnesses in the presence of

> a third person who will he available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator or mitigation specialist conduct the interviews.
>
> 5. Physical Evidence
>
> Where appropriate, counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or sentencing.
>
> 7. Expert Assistance
>
> Counsel should secure the assistance of experts where it is necessary or appropriate for:
>
> A. preparation of the defense;
>
> B. adequate understanding of the prosecution's case;
>
> C. rebuttal of any portion of the prosecution’s case at the guilt/innocence phase or the sentencing phase of the trial;
>
> D. presentation of mitigation. Experts assisting in investigation and other preparation of the defense should be independent and their work product should be confidential to the extent allowed by law. Counsel and support staff should use all available avenues including signed releases, subpoenas, and Freedom of Information Acts, to obtain all necessary information.

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

“In assessing the reasonableness of an attorney’s investigation, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must

consider the reasonableness of the investigation said to support the strategy." *Wiggins v. Smith*, 123 S.Ct. 2527, 2538,(2003).

In *Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003)[5], the Sixth Circuit Court of appeals reiterated the polestar of *Wiggins*.

> Thus, the *Wiggins* case now stands for the proposition that the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the "prevailing professional norms" in ineffective assistance cases. This principle adds clarity, detail and content to the more generalized and indefinite 20-year-old language of *Strickland* quoted above.

Hamblin, 354 F.3d at 486.

The Sixth Circuit went on further to explain that

> The ABA standards are not aspirational in the sense that they represent norms newly discovered after *Strickland*. They are the same type of longstanding norms referred to in Strickland in 1984 as "prevailing professional norms" as "guided" by "American Bar Association standards and the like." We see no reason to apply to counsel's performance here standards different from those adopted by the Supreme Court in *Wiggins* and consistently followed by our court in the past. The Court in Wiggins clearly holds at --- U.S. at ----, 123 S.Ct. at 2535, that it is not making "new law" on the ineffective assistance of counsel either in *Wiggins* or in the earlier case on which it relied for its standards, *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).
>
> New ABA Guidelines adopted in 2003 simply explain in greater detail than the 1989 Guidelines the obligations of counsel to investigate mitigating evidence. The 2003 ABA Guidelines do not depart in

[5] *Hamblin* should be considered persuasive authority by this Court because Ohio, like Florida, is a weighing state.

> principle or concept from *Strickland, Wiggins* or our court's previous cases concerning counsel's obligation to investigate mitigation circumstances.

Id. at 487 (footnote omitted).

Thus, the ABA standards were the prevailing norms at the time of Mr. Whitfield's trial and the duty to investigate fully all claims regarding guilt and mitigation was required. Where counsel does not fulfill the duty to investigate and prepare, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. *See, e.g., Harris v. Dugger*, 874 F.2d 756 (11th Cir. 1989); *Middleton v. Dugger*, 849 F.2d 491 (11th Cir. 1988). No tactical motive can be ascribed to attorney omissions which are based on ignorance, *See Brewer v. Aiken*, 935 F.2d 850 (7th Cir. 1991), or on the failure to properly investigate or prepare. *See Harris v. Dugger; Stevens v. State; Kenley v. Armontrout*, 937 F.2d 1298 (8th Cir. 1991).

Here, in the appellant's case, there can be no tactical reason for not calling the above listed witnesses since no investigation was done. Harriet Miller, Evelyn Ford and Peggy LaRue all testified at the evidentiary hearing that no one from the defense ever contacted them regarding Mr. Whitfield's case. These three available witnesses would have been able to corroborate the appellant's self report.

It is clear that counsel failed to ensure that the case was adequately investigated in accordance with Guideline 11.4.1 prior to the trial proceedings. A request to appoint investigator Steele had been filed on June 22, 1995 (R1820-22), 2 days after counsel was appointed to the case (PC-R 102). Judge Williams[6] testified that Mr. Steele would have had the job of contacting witnesses at the beginning stages of the case (PC-R 38). However, counsel's first consultation with Mr. Steele does not occur until July 21, 1995, one month later (PC-R 102). Thirty days have now elapsed and Mr. Whitfield is sixty days from trial. Fourteen days later counsel files a demand for speedy trial. It is further evident in the record from counsel's and Mr. Steele's billing records that there was no investigation done by Mr. Steele or counsel during the entire month of August in terms of identifying and contacting witnesses. Mr. Steele does not begin an investigation into Mr. Whitfield's case until September 5, when he begins to review discovery. Trial is now scheduled to began in less than two weeks and there have been no attempts by counsel nor Mr. Steele to obtain background information and records on Mr. Whitfield. This lack of attention to the investigative aspects of Mr.

[6] Charles Williams, one of Mr. Whitfield's lawyers, was appointed to the bench as a circuit court judge in 1998.

Whitfield's case are troubling when considering that Mr. Whitfield had not been a lifelong resident of Sarasota but had been raised in St. Augustine and spent some time in Jacksonville, Florida. This lack in investigation shows that neither counsel nor the investigator were in a position to obtain all background records on Mr. Whitfield within two weeks and therefore all information could not be provided to assist Dr. Regnier in his evaluation of Mr. Whitfield. The limited amount of information that could be obtained in two weeks was nothing more than a brief interview with some of Mr. Whitfield's family, retrieving the medical records from Sarasota Hospital where Mr. Whitfield was treated after being shot, and obtaining the criminal records from Mr. Whitfield that would eventually be used as aggravating factors.

The failure to corroborate evidence of voluntary intoxication was deadly to Mr. Whitfield's defense. During the cross examination of the defense expert, Dr. Eddy Regnier, the State elicited very damaging testimony.

> Q. [THE STATE] Okay. You testified before lunch that criminal defendant's often lie to you when you talk to them?
>
> A. That's correct.
>
> Q. And that you don't really trust a person who is in prison and you've not met one yet who told you the truth; are those pretty accurate statements, Doctor?
>
> A. It's pretty accurate.

> Q. And the reason that don't do that, of course, is that the defendant is sitting here charged with first degree murder and he has every reason to exaggerate his testimony, especially of drug use.[7]
>
> A. That's correct.
>
> Q. So the testimony that you relied upon, particularly the defendant's statement, if that that information was wrong or exaggerated or not accurate, certainly your opinion would be different; is that correct?
>
> A. After reviewing all the evidence, I might change my opinion, yes.

(R.1227)

Prior to the above exchange, the State elicited testimony regarding the lack of corroborating evidence of intoxication.

> Q. Doctor, based on all that information that you reviewed, isn't a fact that there was very little, very little what I would call hard evidence information for you to determine how much, if any, cocaine the defendant actually had in his system on the day these crimes were committed?
>
> A. I think you're correct. I simply have not been able to get all the materials I needed from the defendant to make that determination.

(R. 1224)

This lack of corroborating evidence, this inability to adequately present such evidence was used by the State in it's closing.

> They say when he entered the house he did not intend to rape Mae and they say he did not intend to Kill Claretha in front of her children and they say he did not intend to do this because he was so intoxicated on cocaine that he could not do that. And we've heard

[7] One has to wonder whether such an expert was beneficial at all to the appellant.

> from their doctor, Dr. Regnier. Of course he didn't tell you that. He didn't tell you he was so intoxicated that he couldn't form the specific intent.

(R. 1309)

Nor did the defense attempt to obtain any physical evidence of Mr. Whitfield's level of intoxication to corroborate his statements. In addition, no steps were taken to consult or hire a toxicologist (PC-R 37). As the billing records of Judge Williams' office indicates, much of the trial preparation occurred during trial (PC-R 40) and only a limited amount of time was dedicated to the investigation and preparation for the penalty phase hearing.

Judge Williams admitted unequivocally during the evidentiary hearing that he was not ready when he went to trial in Mr. Whitfield's case. (PC-R 22) The reason he was not prepared was because of speedy trial. (PC-R 22) Judge Williams was an experienced trial attorney (PC-R 9-13). He knew how to present a case to a jury, file motions, use investigators and utilize experts. (PC-R 9-13) In his only prior first degree murder case, he sat second chair attorney but also helped in the preparation of the case. (PC-R 14) The preparation of that case took two years and the client was ultimately found guilty of a lesser offense (PC-R 15). Judge Williams' experience in this prior case was with the defense of voluntary intoxication (PC-R 35), which was the same defense that was being used in Mr.

Whitfield's case (PC-R 35).

Judge Williams knew that filing a demand for speedy announced to the court that counsel was prepared for trial (PC-R24-25). Counsel was not prepared for trial at the filing of the demand for speedy trial. The record is clear that the motion to appoint Dr. Regnier was filed on August 3, 1995. (PC-R 42) The order appointing Dr. Regnier was signed on the same day the demand for speedy was filed and discovery was still ongoing. Depositions had not ensued. Witnesses had not been interviewed. And the investigator had recently opened his file on July 21, 1995 and had conducted no investigation. Considering the order of events, it is inconceivable that counsel was prepared for trial upon the filing of the demand for speedy trial. The resulting events occurred not because Mr. Whitfield sent a letter to the court asking for a speedy trial. A speedy trial was ordered because Defense counsel Williams filed a motion in court demanding a speedy trial.

Dr. Regnier testified both at trial and at the hearing that he was not ready for trial. (R. 1221, 1226; PC-R 132) Dr. Regnier was not ready for guilt phase. (PC-R 132) Nor was Dr. Regnier ready for the penalty phase hearing. (PC-R 132) The demand for speedy trial was filed on August 4, 1995, but Dr. Regnier did not evaluate Mr. Whitfield until August 11, 1995

(PC-R 128). Dr. Regnier was concerned about not being ready for trial and expressed these concerns. (PC-R 129)

Dr. Regnier had experience in presenting issues relating to voluntary intoxication. Important evidence for him to review would have been toxicology reports (PC-R 134). However because of the failure of counsel in obtaining a blood draw from Mr. Whitfield, even after his repeated insistence, coupled with the limitations on time, hindered Dr. Regnier's to offer an opinion regarding the voluntary intoxication defense (PC-R 137, 139).

Ms. Syprett[8] was Mr. Whitfield's second defense counsel and testified at the evidentiary hearing. She was an experienced attorney (PC-R 417-18). It should be conceded by all parties and recognized by the court that **Ms. Syprett has no independent recollection** of Mr. Whitfield's case (PC-R 464-66, see also 432, 433, 436, 437, 438, 439, 441, 444, 445, 446, 450, 451, 452, 453, 455, 456, 459, 460, 461, 462, 464). Ms. Syprett could not accurately add much testimony in the way of evidence that is helpful in these proceedings. She does not recall calling a toxicologist (PC-R 444). There are no notes of a toxicologist offered by the State at the evidentiary hearing. There are no indications in her billing statements and no testimony. The

[8] Ms. Syprett was formally known as Ms. Scott and was one of two defense attorneys assigned to Mr. Whitfield.

majority of her testimony was based on her assumptions after reviewing her billing records and looking at an excerpt of a transcript.

What should be noted is the apparent conflict in the evidence between the testimony of Judge Williams and Ms. Spryett. As stated above, Judge Williams unequivocally testified that they were unprepared for any portion of the trial. His testimony is consistent with the other evidence presented at the hearing. First, the time line of the trial. The billing records which indicate when work was actually being done. The motion to continue filed immediately before trial and contemporaneously with the demand for speedy trial. (PC-R 454) All this evidence contradicts her testimony, which was cited by the court, which states that counsel was "definitely prepared" for trial. Order at 40.

As stated supra, the appellant called two experts to testify at the evidentiary hearing. One witness, Dr. Deborah Mash, is an expert in neurology, toxicology and pharmacology. (PC-R 197) Dr. Mash has a specific expertise in dealing with the effects of cocaine (PC-R 188-97). Dr. Mash did not testify at the original trial but gave her opinion after a review of all of the evidence in this case.

Dr. Mash testified that chronic cocaine use, such as that

experienced by Mr. Whitfield, changes your brain. (PC-R 201) It dramatically changes the executive functioning of the brain. (PC-R 203) This executive function is where a person's judgement resides (PC-R 205-07). After chronic use such as Mr. Whitfield's, it takes at least 90 days for an individual to think rationally and cognitively (PC-R 206). This 90 day stage indicates a transformation from one level of toxicity to another (PC-R 207). As a professional, the standard of care in the community with an individual with such chronic use is to refrain from assigning a psychiatric diagnosis (PC-R 208). As such, in her uncontested opinion, it is essential that individuals not make important decisions within the first 90 days and that it is best to let the effects of cocaine wear off (PC-R 209).

Dr. Mash also testified about the importance of obtaining a toxicology report (PC-R 209). She testified that it is possible to test for cocaine markers in hair and biological fluids (PC-R 210). Using these markers, Dr. Mash testified that one can "definitely" demonstrate cocaine exposure and the amount (PC-R 210-12).

Dr. Mash testified that Mr. Whitfield was a chronic cocaine user (PC-R 215) and as a result of that use, Mr. Whitfield suffered from serious brain damage (PC-R 216, 217). This damage caused limbic frontal communication detachment (PC-R 217). As

a result, Mr. Whitfield's ability to help counsel was diminished (PC-R 218). It was ultimately Dr. Mash's uncontested expert opinion that Whitfield was unable to make strategic decisions involving his case (PC-R 219).

Dr. Brad Fisher was the second expert who testified at the evidentiary hearing The lower recognized Dr. Fisher as an expert in clinical forensic psychology (PC-R 245). Further, the court also recognized Dr. Fisher as a clinical forensic psychologist with an expertise in death penalty litigation (PC-R 248, 251). Dr. Fisher has extensive experience in the presentation of both guilt and penalty phase mental health issues (PC-R 238-48) and is familiar with the voluntary intoxication defenses (PC-R 248-49).

Dr. Fisher testified specifically about the requirements of a defense of voluntary intoxication (PC-R 255-57). In using this defense, Dr. Fisher testified that using other experts, such as toxicologists, was critical (PC-R 257). In addition, in dealing with mental health issues, it was Dr. Fisher's expert opinion that it complicates the process (PC-R 258) and that it takes more time and work to investigate the issue (PC-R 258-59). Dr. Fisher testified regarding the effects of drugs on a person who may have a mental illness (PC-R 260-61). It was Dr. Fisher's expert opinion that it was not optimal, especially in

such cases, to make a mental health diagnosis while an individual was detoxing (PC-R 263).

Dr. Fisher diagnosed Mr. Whitfield with a severe drug problem (PC-R 266) and post traumatic stress disorder (PC-R 268). It was his opinion that both diagnoses were critical to Mr. Whitfield's behavior (PC-R 275). Based on this information, it was Dr. Fisher's uncontested opinion that Mr. Whitfield did not have the requisite intent to commit first-degree murder (PC-R 278). Further, it was Dr. Fisher's expert and uncontested opinion that Mr. Whitfield did not have the ability to help in his defense and form his defense strategy (PC-R 281-82). Lastly, Dr. Fisher testified in his uncontested expert opinion that the amount of time, 91 days, was not enough to adequately prepare such a case (PC-R 282-83) and that the preparation of the case fell below the standard of care in the psychiatric community (PC-R 283, 289).

In its order denying relief, the lower court made several observations aimed at the prejudice prong of *Wiggins*, essentially stating that Dr. Fisher and Dr. Mash did not have any additional information that Dr. Regnier did not already have. Order at 45. This is categorically untrue. To begin with, both experts had more time to obtain information and formulate their opinions. Dr. Regnier testified that he was not

ready due to speedy trial.[9] (R. 1221, 1226; PC-R 132) Next, Dr. Fisher had the services and expertise of Dr. Mash, a nationally recognized expert in the field of neuropharmacology.[10] Dr. Regnier did not.[11] Actually, as stated before, both Williams and Spryett had experience using toxicologists but failed to get one in this case. Both Dr. Fisher and Dr. Mash had the information provided by Harriet Miller, Evelyn Ford and Peggy LaRue. Trial counsel never even spoke to these witnesses. Dr. Fisher conducted psychological testing of Mr. Whitfield. Dr. Regnier testified that he would have wanted to conduct testing. (R. 12221-22) Further, Dr. Fisher had the report of Dr. Negroski which Dr. Regnier was unaware. Corroborating the evidence that Mr. Whitfield blacked-out during the episode was the observation that Mr. Whitfield suffers from such cocaine induced blackouts and auditory hallucinations. (PC-R 46-49) Relevant evidence to both guilt and penalty phase.

In dealing with the single issue, it is difficult treating the ineffectiveness of counsel regarding the investigation and presentation of a voluntary intoxication defense in a vacuum.

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[9] Dr. Regnier was still reviewing records during the lunch break at the time of the trial. *(See* R. 1220)

[10] Dr. Mash's extensive experience was recognized by the court in its order. Order at 20-21.

[11] Dr. Regnier, an expert in juvenile psychology, gave inaccurate information regarding the effects of cocaine in addition to inaccurate mitigation information. *See* R. 1613.

A proper understanding of the events is necessary. The timeline of the trial clearly demonstrates the enormous pressure these two attorneys were under to adequately investigate, prepare and present a defense to first degree murder. As stated *supra*, Judge Williams testified that both counsel were preparing for trial as it was proceeding.

> Q. Were you prepared prior to going to trial or were you prepared during trial?
>
> A. He was – we were preparing during trial. We actually had him examined by a neurologist in the middle of trial.
>
> Q. Okay. We'll get to that in a second. So is it fair to say that you're preparing for penalty phase, even guilt phase, simultaneously with the trial?
>
> A. Yes.
>
> Q. Even after the guilty verdict comes in?
>
> A. Yes.
>
> Q. You're preparing for the penalty phase?
>
> A. Yes.
>
> Q. And that is because of speedy?
>
> A. Yes.

(PC-R 40-41).

This manner of representation is clearly deficient in any case, especially a case in which the State is seeking death. The *ABA Guidelines* address the general standards needed in death penalty cases.

> GUIDELINE 11.2 MINIMUM STANDARDS NOT SUFFICIENT
>
> A. Minimum standards that have been promulgated concerning representation of defendants in criminal cases generally, and the level of adherence to such standards required for noncapital cases, should not be

> adopted as sufficient for death penalty cases.
>
> B. Counsel in death penalty cases should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, zealously committed to the capital case, who has had adequate time and resources for preparation.

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

Here in the instant case, it is clear that counsel did not meet the standards established by the ABA and Wiggins.

ISSUE II

MR. WHITFIELD WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL PRETRIAL AND AT THE GUILT/INNOCENCE PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS WHEN COUNSEL FAILED TO ADEQUATELY INVESTIGATE, PREPARE AND PRESENT THE DEFENSE CASE IN AN EFFORT TO PRESENT MR. WHITFIELD'S CASE UNDER THE TIME LIMITATIONS PURSUANT TO Fl.R.Crim.P. 3.191, et. Seq.

Pervading this whole hearing in each and every claim is the manner in which Defense counsels handled the question of speedy trial. The lower court, at the original *Huff* hearing, did not grant and evidentiary hearing with regards to the speedy trial issue. It has only now become all too apparent to all parties involved that the issue of speedy trial is a major theme in these proceedings. Speedy trial itself, arguably, would not give rise to a claim of ineffective assistance of counsel without something more. In Mr. Whitfield's case, we see the

effect of that abdication of the traditional and historical role of the attorney to decide matters of strategy (PC-R 96). Speedy trial is a question of strategy and all questions of strategy, absent ineffectiveness, are decided by the attorney. *See Link v. Wabash R. Co.*, 370 U.S. 626 (1962); *Jones v. Barnes*, 463 U.S. 745 (1983); *Henry v. Mississippi*, 379 U.S. 443 (1965); *United States v. McGill*, 11 F.3d 223 (C.A.1 1993).

In Florida, the law is clear that an attorney can waive speedy trial under FL.R.Crim.P. 3.191. *See also, Gutierrez v. State*, 276 So.2d 470 (Fla. 1973); *State v. Kruger*, 615 So.2d 757 (Fla. 4th DCA 1993).

> The principle is well established that the right to a speedy trial is waived when the defendant or his attorney requests a continuance. **The acts of an attorney on behalf of a client will be binding on the client even though done without consulting him and even against the client's wishes (emphasis added)**.

State v. Abrams, 350 So.2d 1104 (Fla. 4th DCA 1977).

Defense counsel Charles Williams knew the law as it related to speedy trial. He knew that he could waive speedy trial (PC-R 29-30). But more importantly, he knew that he should have waived speedy trial in this case and allowed himself the opportunity to fully investigate and prepare for trial in this case (PC-R 27-28). ***Judge Williams candidly conceded that there was no strategic reason to demand speedy*** (PC-R 31, 33, 96). The

only reason he offered as to why he filed the demand for speedy was because Mr. Whitfield wanted the demand (PC-R 31) because he wanted to get out of the Sarasota County jail (PC-R 32).

Most critically, the demand for speedy trial devastated the case. Defense expert, Dr. Regnier was their most important witness in the guilt and penalty phase hearing (PC-R 43). Dr. Regnier was the only defense witness that would deliver the ultimate opinion in the guilt phase whether Mr. Whitfield was so intoxicated that he was not able to form the requisite intent to commit first-degree murder (PC-R 56). When asked on direct examination (R. 1221) whether he had an opinion if Mr. Whitfield could form the requisite intent to commit the first degree murder of Ms. Reynolds, Dr. Regnier responded he didn't know (R. 1221; PC-R 57). When asked on cross examination why he was not able to provide an opinion, Dr. Regnier responded that it was because he did not have enough time (R1226; PC-R 58). Dr. Regnier did not have an appropriate amount of time because of the demand for speedy trial (R1226; PC-R 58). In fact Defense counsel Williams acknowledges that he is certain that Dr. Regnier discussed with him that he needed more time, that he couldn't be ready that quickly (PC-R 51). Additionally, counsel did not seek to have Dr. Regnier appointed until August 3rd and the court signed the order on August 4, 1995 which was

the same day that the demand for speedy trial was made. Further, Dr. Regnier did not have his first meeting with counsel or Mr. Whitfield until August 11, 1995, which was a little over a month before the trial would commence. Needless to say, the demand for speedy trial devastated Mr. Whitfield's case.

The demand for speedy trial affected Mr. Whitfield's case so much that it is best to refer to the record produced at the evidentiary hearing for much of the evidence. However, this Court should note this argument with regards to Issue VI. If failure to waive speedy trial is by itself evidence of deficient performance, then every aspect that followed would be the resulting prejudice. For example, if failing to waive speedy was deficient, then the prejudice that followed was the inability of Dr. Regnier to offer an opinion with regards to the defense theory of voluntary intoxication.

In denying this claim, the lower court in its order stated that:

> The court is ever mindful that when a defendant demands speedy trial, a trial court should not second guess trial strategy and strike the demand "simply because the defendant who filed the demand has been charged with first degree murder and will have to forgo discovery in exchange for a speedy trial" or a first-degree murder defendant "effectively would never be able to demand speedy trial."

(Order at 50)(citation omitted)

The court relied upon two assumptions in denying this claim. First, that Mr. Whitfield had the fundamental right to demand

speedy trial.[12] Second, that the demand for speedy was within the sole discretion of Mr. Whitfield because it was a "strategic decision". Not only are both of these assumptions wrongs, both experts testified at the evidentiary hearing that the appellant was not mentally capable of making any strategic decisions.

Dr. Mash testified extensively about the effects of severe crack use on the executive function of the brain. In her expert opinion, which is also the standard of care in the field, it is improper to rely upon severe crack abusers for up to 90 days after they quit ingesting cocaine.(PC-R 207) It is only after 90 days do individuals begin to transition from one level of toxicity to the next. Specifically, this long term severe cocaine use resulted in Mr. Whitfield having serious brain damage, (PC-R 216), resulting in his inability to make important decisions regarding speedy trial. (PC-R 220). Thus, as elicited during Dr. Mash's testimony:

> Q. Okay. Would someone in Mr. Whitfield's position be able to not only aid [in their] defense, but actively participate in trial in a meaningful way, make strategic decisions using this frontal lobe to reason, [use] judgement and be able to say, if I do A and B, C is going to happen?
>
> A. No, it is my expert opinion, absolutely not, and that is consistent, as I have stated already here today, with the standard of care in our industry for

[12] Speedy trial under the ***Rules*** should not be confused with constitutional speedy trial.

> chronic substance abusers, specifically crack cocaine abusers like Mr. Whitfield.

(PC-R 219).

Dr. Fisher also testified about Mr. Whitfield's ability to make strategic decisions such as demand speedy trial. Due to the effects of Whitfield's post traumatic stress disorder and chronic cocaine use, Dr. Fisher testified that the appellant was not able to direct the actions or the strategy of his trial during the period in question effectively. (PC-R 281-82) Further, in Dr. Fisher's opinion as an expert in death penalty litigation, that the amount of time from August 11 to September 18 was not enough time for Dr. Regnier to prepare the case. (PC-R 282-83) Essentially, because of the speedy trial issues, preparing Mr. Whitfield's case in such a short period of time fell below the standard of care in the psychological community. (PC-R 283)

In addition to the evidence presented above, Judge Rapkin also ruled that Mr. Whitfield was not competent to represent himself and thus not competent to conduct the strategy in his case. The trial court conducted both *Nelson*[13] and *Faretta*[14] inquiries. While the trial court found Mr. Whitfield's counsel competent, it recognized his right to represent himself

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[13] *Nelson v. State*, 274 So.2d 256 (Fla. 4th DCA 1973).

[14] *Faretta v. California*, 422 U.S. 806 (1975).

regardless of the actions of his attorneys. The only hurdle in Mr. Whitfield's path was the *Faretta* inquiry. Mr. Whitfield failed the *Faretta* test. The trial court found that "he was not competent to represent himself", a fact this court recognized. *Whitfield*, 706 So.2d at 3. Whitfield stated that "he could not think rationally". *Id.* Thus, the trial court recognized what the post-conviction court did not: that Ernest Whitfield did not have the competence to direct the strategy in his case.

The prejudice in this case is apparent at every critical stage of the prosecution. Dr. Regnier, the defense's most critical witness, was not prepared because of the speedy trial demands. (PC-R 43) Dr. Regnier was to testify regarding the defense of voluntary intoxication. (PC-R 43) Further, he was the main witness during the penalty phase. (PC-R 44) Dr. Regnier told Judge Williams that he was unprepared for trial. (PC-R 51) During trial, Dr. Regnier testified that he was not prepared to give an opinion regarding the defense of voluntary intoxication because of speedy trial.

> Q. [State] I understand. And you said you'd like to corroborate that but you didn't have enough time because of the speedy trial in this case; is that correct?
>
> A. That's correct.

(R. 1226)

Likewise, Dr. Regnier was constrained in preparing for the

penalty phase.
(R. 1630).

Ultimately, prejudice has to evaluated in light of the advisory jury verdict of 7-5. This Court has, on several occasions, evaluated prejudice and related issues when the jury vote is 7 to 5. *See Harris v. State,* 843 So.2d 856 (Fla. 2003)*; Crook v. State*, 813 So.2d 68 *(*Fla. 2002*); Almeida v. State*, 748 So.2d 922 (Fla. 1999); *Phillips v. State*, 608 So.2d 778 (Fla. 1992) In *Phillips v. State*, 608 So.2d 778 (Fla.1992), this Court determined that the defendant was prejudiced by counsel's failure to present "strong mental mitigation" at trial. *Id.* at 783. In that case, two experts opined in the postconviction proceeding that the defendant was suffering from an extreme emotional disturbance at the time of the crime, was unable to conform his conduct to the requirements of law, and could not form the requisite intent to fall under the aggravating factors of CCP or heinous, atrocious, or cruel. *See id.* Also important this Court's analysis of that case was the fact that the mental mitigation was essentially unrebutted and that the jury had recommended the death sentence by the slim majority of seven to five. *See id.* Based on those factors, this Court concluded that there was a reasonable probability that "but for counsel's deficient performance ... the vote of one juror would have been

different, ... resulting in a recommendation of life." *Id.*

ISSUE III[15]

MR. WHITFIELD WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.[16]

> *Arbitrary results, which are all too common in death penalty cases, frequently stem from inadequacy of counsel. The process of sorting out who is most deserving of society's ultimate punishment does not work when the most fundamental component of the adversary system, competent representation by counsel, is missing. Essential guarantees of the Bill of Rights may be disregarded because counsel failed to assert them, and juries may be deprived of critical facts needed to make reliable determinations of guilt or punishment. The result is a process that lacks fairness and integrity.*- Stephen B. Bright, *Counsel for the Poor: The Death Penalty Not For the Worst Crime but for the Worst Lawyer*, 103, YALE LAW JOURNAL, 1835 (1994).

Defense counsel must discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The United States Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of

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[15] For purpose of judicial economy, the several claims of ineffectiveness of counsel during the penalty phase listed in the motion to vacate judgment and sentence have been consolidated here.

[16] This original claim was drafted somewhat specific but contained several subclaims. All parties were on notice that the claim was a general ineffectiveness claim regarding non-statutory mitigation that compliments claim XII.

whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) (plurality opinion). In *Gregg* and its companion cases, the Court emphasized the importance of focusing the sentencer's attention on "the particularized characteristics of the individual defendant." *Id.* at 206. *See also Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

State and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to *investigate* and *prepare* available mitigating evidence for the sentencer's consideration. *See Phillips v. State*, 17 Fla. L. Weekly S595 (Fla. Sept. 24, 1992); *State v. Lara*, 581 So. 2d 1288 (Fla. 1991); *Stevens v. State*, 552 So. 2d 1082 (Fla. 1989); *Bassett v. State*, 541 So. 2d 596 (Fla. 1989); *State v. Michael*, 530 So. 2d 929, 930 (Fla. 1988); *O'Callaghan v. State*, 461 So. 2d 1354, 1355-56 (Fla. 1984); *Eutzy v. Dugger*, 746 F. Supp. 1492 (N.D. Fla. 1989), *aff'd*, No. 89-4014 (11th Cir. 1990); *Harris v. Dugger*, 874 F.2d 756 (11th Cir. 1989); *Middleton v. Dugger*, 849 F.2d 491 (11th Cir. 1988).

Where counsel does not fulfill the duty to investigate and prepare, the defendant is denied a fair adversarial testing

process and the proceedings' results are rendered unreliable. *See, e.g., Harris v. Dugger; Middleton v. Dugger*. No tactical motive can be ascribed to attorney omissions which are based on ignorance, *See Brewer v. Aiken*, 935 F.2d 850 (7th Cir. 1991), or on the failure to properly investigate or prepare. *See Harris v. Dugger; Stevens v.State; Kenley v. Armontrout*, 937 F.2d 1298 (8th Cir. 1991).

Mr. Whitfield's was denied the benefit of the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution and the corresponding provisions of the Florida Constitution because his Attorneys failed to adequately investigate and prepare for the penalty phase. His attorneys failed to locate witnesses, challenge state witnesses, and fully develop known testimony and psychological reports. At the evidentiary hearing conducted May 22, 23, and 26, the following testimony was elicited:

Freddy Lewis Stanley Atkins testified at the evidentiary hearing. He is a lifelong resident of Sarasota for 47 years of his life (PC-R 317). He lives in the predominantly African/American community called Newtown, where he has primarily remained (PC-R 317). Mr. Atkins went to elementary and high school within Sarasota County and eventually obtained

a degree from the University of South Florida, Sarasota campus (PC-R 318). Mr. Atkins aspired to reach political office in 1985 and was the first African/American ever elected in the city of Sarasota as a commissioner. Mr. Atkins served on the city commission from 1985 to 1995 and was recently reelected to the city commission for District 1 on April 11, 2003 (PC-R 318-9).

Prior to being elected to the City commission in 1985, Mr. Atkins worked with Storefront, Inc, which was a substance abuse and family counseling program that had a satellite office in the Newtown area (PC-R 319) This program was a family life intervention program and families were either court ordered or they volunteered to participate in the counseling program (PC-R 319). During his employment with Storefront, Inc, Mr. Atkins came in contact with Mr. Whitfield's family as their family counselor and outreach worker. Mr. Whitfield's family had been court-ordered to the Family Life Intervention Program because of problems within the family that were identified by the court system and they had been in the program six or seven months before he joined the organization (PC-R 320-1, 344). Mr. Atkins places this time period around late 1983 to early 1984 (PC-R 321). In assessing the family needs, Mr. Atkins noted a "plethora of issues. Everything from delinquency by Leroy,

tardiness, truancy, absenteeism by the kids, older sister had run away several times, and their mother was absent quite frequently" (PC-R 322). "Definitely, without a doubt...she admitted that basically she drank too much, come to find out that she was a binge drinker, she would two, three, four days be too drunk to really function" (PC-R 322). Mr. Atkins reported that the mother would not keep her scheduled appointments for herself or the kids (PC-R 322). In addition "there was a boyfriend, or two, three according to what time of the month it was" (PC-R 323). Mr. Whitfield's family received welfare money and food stamps at the beginning of the month but by the middle of the month they were in crisis (PC-R 323). His family was often in trouble with Mr. Powell, who owned the apartments were they lived. There were tremendous problems with managing the household (PC-R 323).

Mr. Atkins further testified from photographic pictures, which were admitted into evidence as Defense Composite Exhibit C (PC-R 333), which depicted the area of town on Leonard Reid road where Mr. Whitfield resided with his family while involved in the Family Life Intervention Program (PC-R 324). From the composite exhibit, Mr. Atkins testified that in 1985, the area in which Mr. Whitfield was being raised didn't have any signs and the area was always grown-up (PC-R 326). "This area has

always had a problem with people dumping, always." "The county hauled away loads of garbage and stuff from that particular area right there, and it was always, during the time I was working with the Whitfield/Garner family, this was like the hole where the new crack cocaine was being sold." [A]nd it was a drive around down there that you could just drive through. It was like a drive-through" (PC-R 326). Mr. Atkins was asked on direct if the pictures are depicted of where Mr. Whitfield lived in 1985. He responded: "it looked worse, because when you look at that, they've got garbage cans and recycling bins." This particular area was a dumping ground (PC-R 327). Mr. Atkins pointed to the apartment in which Mr. Whitfield and his family resided and described the place having a rickety porch, the roof was leaking, part of the wall was gone in the kitchen, bathroom always had problems." "It was like the apartment that Mr. Powell gave to people that he don't expect them to pay and he's just doing his duty to give somebody somewhere to stay" (PC-R 328). "The apartment was a duplex with 2 bedrooms and a little small kitchen, a small bathroom, and a very small living room" (PC-R 328). At least five people lived there including the primary mate of Ms. Garner, Mr. Ossi, but four kids when Tracy is there, haven't disappeared, so maybe five, six mostly" (PC-R 328). Mr. Atkins further testified that the apartment look much

better than they did in 1984. They've been painted with a whole door" (PC-R 329) When asked if they didn't have doors back then, Mr. Atkins testified that Mr. Powell wasn't a very particular very good landlord. These apartments were the first ones he built, so these were in the worst shape" (PC-R 329). Mr. Atkins further pointed out that the furniture outside depicted in the photos usually meant that somebody had been put out. "This was common for those apartments because Mr. Powell moved you in there, you bring in a minimum amount of money and you go out if you don't pay in a reasonable period of time. Every month or so you can see somebody had been put out" (PC-R 330). Mr. Atkins further testified that it was common to see abandoned homes in that area (PC-R 330). Mr. Atkins also noted from the photographs the graveyard which adjoins the area off Leonard Reid Road which was a common crossover to the community recreation center and 301 (PC-R 331). When asked if this area of Leonard Reid was a particularly safe environment for children, Mr. Atkins responded: "No. As a matter of fact, we encouraged them to take the long way around" (PC-R 332). "First...after you leave the front of that graveyard...you have very little sidelines from the street to be visible...plus that was the trail that older people used, plus that was the trail that the drug addicts were using and the alcoholics were using

because we had, you know, a bootleg liquor house back that way too" (PC-R 332).

Mr. Atkins also was asked: "[D]escribe one major issue that Mr. Whitfield's family was enduring, what would that issue be, or the major issue that the family had to overcome in order for them to be a sustaining family?" Mr. Atkins: Their mother. (PC-R 333). "She was an alcoholic, is now" (PC-R 333). Mr. Atkins further testified that "[t]his family is probably, over my 30 years of interdisciplinary social sciences, this is the most dysfunctional family I've ever seen in my entire experience in this process. And it was primarily because of her need to have alcohol, and because of that, they never had money other than one, two, three days around the beginning of the month. After the first week or two, the food was gone. Mr. Powell was always asking me are they going to pay the rent this month" (PC-R 334). "The family also had problems with individual kids from having difficulties in the classroom to not being able to get to school, not having clothes to wear, you could bring them clothes and when they get dirty, they weren't getting washed. Plus Ms. Garner (a.k.a. Leola Rich) was having difficulties being at home with them. They were young people that were basically raising themselves most of the time, and they'd go and find her where she'd be and make her come home" (PC-R 334). Mr.

Atkins also testified that he has personally been involved in "Leola's hunt several times, and that you'd usually find her at one of the places either where one of the guys that she's seeing, but also going to the little joints, going to some of the little shot house, basically bring her out of there, take her home, that's if she lets you. Sometimes she would get obnoxious and decide she didn't want to leave ant there was nothing you can do at that time" (PC-R 334-5). Mr. Atkins also testified that he has found Ms. Leola out unconscious during these times. Ms. Garner suffers from a type of epilepsy or seizure (PC-R 335). "[A]s long as she's drinking and having fun with the fellows they're doing fine. But if she got drunk and have some kind of medical situation they're either rushing her to the hospital or sometimes, when she'd feel them coming home, she'd leave. Mr. Atkins testified that he's been contacted by the school and asked why the kids weren't in school and he would find Mr. Whitfield's mother in one of the ditches alongside Leonard Reid, several times he has taken her home" (PC-R 335). Mr. Atkins testified that he has counseled Ms. Garner about her alcohol problem but he could never get her to commit herself and she was in denial of her problem (PC-R 336). Mr. Atkins was also asked how Ms. Leola got money when she did not have any. Mr. Atkins responded: "[I]t was apparent that Ms. Leola had

several mates, and the money was coming from those person...that's where you would go and find her at different people's houses, she had Mr. Ossi who was the old man and she had Mr. Rich who was working for the department of transportation (PC-R 343-4). And then when you go to the bootleg house, she was in somebody's arms there (PC-R 344). Mr. Atkins was also asked if Ms. Leola was prostituting herself and he responded: "I never saw the money exchange, but it was apparent, based on my experiences and knowledge of those experiences, I was raised in a situation similar as related to being and living near shot houses and I know what women and men do there (PC-R 344). While Mr. Atkins was working with the family, their situation never improved, if anything they were worse (PC-R 336). The family never graduated from the program during the year and a half that Mr. Atkins worked at the program (PC-R 337).

After leaving Storefront, Mr. Atkins testified that he still had contact with the family. Ms. Garner moved in with Ossi across the street from his mother without her kids and while Mr. Whitfield was still a minor (PC-R 337-8). There also came a time in late 1985 early 1986 when Mr. Whitfield came to live with Mr. Atkins. Mr. Atkins recall being approached by Mr. Whitfield and telling him that he needed somewhere to stay.

Knowing his situation, Mr. Atkins allowed Mr. Whitfield to stay with him and his wife (PC-R 338). When Mr. Whitfield came to live there he had very little. Mr. Atkins recall he had a brown bag and gave him the run of the house, and he brought a few more clothes as the days and weeks went on (PC-R 339). Mr. Whitfield stayed with Mr. Atkins five or six months while he was a minor (PC-R 339). The only problem that Mr. Atkins had while Mr. Whitfield stayed with him was that Mr. Whitfield would bring people to the home and show the home to them because they couldn't believe he stayed there (PC-R 340). After leaving Mr. Atkins' home, Mr. Atkins would have sporadic contact with Mr. Whitfield (PC-R 341). Mr. Atkins further testified on direct that when he learned that Mr. Whitfield was being charged with this crime, he was expecting a phone call from his attorney...but he never got that call (PC-R 342).

On cross examination, Mr. Atkins acknowledges that he took no affirmative steps to reach Mr. Whitfield, his attorney or his family to offer assistance but he wasn't sure he had assistance (PC-R 345-6). Mr. Atkins also testified that he wasn't surprised that Mr. Whitfield's mother allegedly arrived to court intoxicated. On redirect, Mr. Atkins testified that alcohol was the problem in Mr. Whitfield's family. Whenever there's a crisis going on, she was drunk. She has a way of getting drunk

when something is about to take place (PC-R 346). Mr. Atkins testified that he did not think that he had a duty to take any affirmative actions to identify himself. He thought that he was close enough to the family and that case that there was no way that he was going to avoid it (PC-R 347). Mr. Atkins also testified that he wished that he had the opportunity to expound on his experiences in that family. When he was contacted in post-conviction he was more than willing to assist. He conducted some investigation and tried to get information from the schools, find old principals and teachers that might have responded, but the information had not been maintained over the years (PC-R 347).

Mr. Whitfield's attorneys failed to obtain and review Mr. Whitfield's juvenile history. Had counsel conducted a reasonable investigation into Mr. Whitfield's background they would have learned that Mr. Whitfield and his family were court-ordered to attend a family life intervention program through Storefront, Inc. While in that program, their outreach family counsel was Mr. Fred Atkins, who according to the testimony of Mrs. Charlie Ann Syprett, formerly Scott, is a celebrity in Sarasota (PC-R 428). Mr. Atkins would have been able to tell the court and the jury of the horrendous neglect that Mr. Whitfield endured because of his mother's alcoholism and

absenteeism from the family. The jury would have been informed that Mr. Whitfield grew up in a degraded area in Newtown off Leonard Reid road where the road dead ends and the children use a drug infested passageway through a graveyard to exit. Mr. Atkins described this area as a dumping ground and an area that was not kept clean by the city. The housing conditions that Mr. Whitfield were exposed were poor and filthy and at least once a month you could see people's personal belongings thrown outside because they had not been able to pay their rent. The jury would have been informed by the middle of the each month, Mr. Whitfield and his family lacked food and the family was in constant crisis. The jury would have been informed that because Mr. Whitfield lacked clean clothing that prevented him from attending school many days. Had counsel looked into Mr. Whitfield's juvenile background and contacted Mr. Atkins, the jury could have been informed that Mr. Whitfield's mother did not provide the nurturing and care that her children needed which further led to delinquency and truancy. Mr. Whitfield and his siblings were forced to raise themselves and often had to look for their mother in shot houses to make her come home where she prostituted herself for money. Mr. Whitfield's family was the most dysfunctional family that Mr. Atkins had contact with in 30 years of social work and the problems in Mr. Whitfield's

family during his tenure with the program for a year and a half never improved but worsened.

Defense counsel Williams acknowledges that if somebody mentioned the name of Fred Atkins as having knowledge of Mr. Whitfield he would have been interested in that fact (PC-R 88). Defense counsel Williams also stated that the name never came to his attention either by Mr. Whitfield, his family, nor his investigator (PC-R 89). In fact Mr. Steele's billing records never indicate any attempts to obtain Mr. Whitfield's juvenile records and he only began obtaining background information beginning on September 12, 1995, which was less than a week before the beginning of trial. When asked if Mr. Atkins, who was a city commissioner at the time of Mr. Whitfield's trial, would have been good in the eyes of the jury, Defense counsel Williams responded "I am certain" (PC-R 108). Defense counsel Williams was also asked that by looking at Mr. Whitfield's juvenile record would he have been able to discover that the obtained services? Defense counsel Williams responded possibly (PC-R 111). Defense counsel Williams was asked if he knew that Mr. Whitfield was entered into Mr. Atkins program as a juvenile? Defense counsel Williams responded no (PC-R 111). Defense counsel Williams further advised that he did not know who Mr. Atkins was as it related to Mr. Whitfield (PC-R 111).

Defense counsel Syprett testified that Mr. Atkins served on Sarasota's city commission for a long time and was just recently elected (PC-R 428). She also responded that she would have absolutely followed up on contacting Mr. Atkins if his name had been discovered during the course of Mr. Whitfield's case (PC-R 428). Mr. Atkins was the very first African/American mayor of Sarasota so certainly if she had been given his name she would have definitely followed through with contacting him (PC-R 428). Mr. Whitfield's counsels acknowledged that Mr. Atkins would have been a good witness to follow through with obtaining information about Mr. Whitfield's background had this information been discovered. However, the Court should note that during the testimony of defense expert Dr. Regnier at the penalty phase hearing at R1623, Dr. Regnier testifies that Mr. Whitfield's mother would go to her and Mr. Whitfield's counseling sessions under the influence of alcohol. Therefore, counsel had knowledge that there were counseling records as it related to the Whitfield family and Mr. Whitfield's attorneys also failed to obtained these records that would have disclosed Mr. Atkins involvement with Mr. Whitfield and his family. Counsel had a duty to investigate and prepare available mitigating evidence on Mr. Whitfield's behalf. Because counsel failed to obtain and review Mr. Whitfield's juvenile history or obtain his family

counseling records, which is commonly investigated in the preparation of mitigation, Mr. Whitfield was denied a fair adversarial process and the resulting proceedings are thus unreliable.

"In assessing the reasonableness of an attorney's investigation, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support the strategy." *Wiggins v. Smith*, 123 S.Ct. 2527 (2003). Additionally, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Id at 2539. As the Supreme Court has also held in *Williams v. Taylor* when applying *Strickland*, that counsel's failure to uncover and present mitigating evidence at sentencing could not be justified as a tactical decision because counsel had not fulfilled their obligation to conduct a thorough investigation of the defendant's background. *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389, 68 USLW

4263, 2000 Daily Journal D.A.R. 3949, 00 CJ C.A.R. 2064, 13 Fla. L. Weekly Fed. S 225 (2000). In the present case, Mr. Whitfield's counsel could not exercise reasonable professional judgment in forming a tactical decision not to investigate Mr. Whitfield's juvenile court records or followup on locating the family counselor, Mr. Atkins because the investigation by the defense investigator who was responsible for this task did not began investigation until September 12, 1995 and never sought to obtain Mr. Whitfield's juvenile court records. At the evidentiary hearing counsel offered no explanation of their trial strategy and/or investigation that would justify and/or explain their failure to investigate, review and present the testimony of Fred Atkins. In fact, both conceded that had they discovered Mr. Atkins' name during their investigation they would have definitely followed up and presented all beneficial testimony. As a result of counsel's failure to conduct a thorough investigation, Mr. Whitfield was prejudiced during the penalty phase hearing because the jury was not given a complete and accurate description of apparent mitigating circumstances that could have been presented through the testimony of City Commissioner Fred Atkins.

In its order denying relief, the lower court erroneously stated that "the court determines that trial counsel did not

know of Atkins and could not have learned of him based upon Whitfield's lack of cooperation and insistence on a speedy trial, coupled with the family's inability to provide relevant information." Order at 54. This is incorrect and both the original record and postconviction record bear this fact out. Had trial counsel followed the dictates of the *ABA Guidelines*, they would have obtained his juvenile records and counseling records. The fact that Mr. Whitfield was uncooperative did not stop them from obtaining school and hospital records. The same records could have been discovered. The lower court's reliance on the speedy trial situation bolsters the appellant's argument. If speedy trial demands blocked counsel's ability to obtain the information regarding Mr. Atkins, then failure to waive speedy trial would have been deficient performance. The resulting prejudice would then become the failure to obtain Mr. Atkins's information and present his testimony to the jury.

Dinah Michelle Giles, who is the younger sister of Ernest Whitfield, testified. She is 10 months younger than Mr. Whitfield and that her sibling group includes a total of 3 brothers and 2 sisters all a year apart (PC-R 349-50). Ms. Giles testified that Pam, Mr. Whitfield, and herself all have the same father but Pam has always lived with her godparents since she was a baby (PC-R 351). Ms. Giles testified that from

her earliest memory she has always lived with her grandmother and her mother would stay back and forth with her boyfriend (PC-R 351). Her grandmother was their primary caretaker (PC-R 352). Ms. Giles could not recall a time when she moved with her mother to Sarasota leaving Mr. Whitfield with their father (PC-R 352). Although she did recall when the children stayed with their mother for a short period of time before returning to live with their grandmother (PC-R 352). Ms. Giles testified that it was alright staying with her mother and her boyfriend but the guy she was with used to get drunk and he and her mother would always wind up fighting (PC-R 352). She also stated that while her mother's boyfriend was chasing her at night down the road, she would tell the kids to run with her because he would be chasing her to actually fist fight her (PC-R 352). Ms. Giles testified that sometimes he would catch her and he used to beat her real bad (PC-R 352). Ms. Giles testified that these events were ongoing while she and Ernest where 10 or 11 and that they were present during some of these beatings (PC-R 353). Ms. Giles further testified that the frequency of these beatings would happen every time they went over there on the weekends (PC-R 353). While the children were living with their grandmother, Mr. Whitfield's mother would come probably twice a week and then on the weekend to check on the children (PC-R

355).

Ms. Giles also testified regarding the relationship that Mr. Whitfield had with their father. Mr. Whitfield's father was verbally abusive to him (PC-R 354). When he would get upset he would threaten to knock Mr. Whitfield out or do this or that to Mr. Whitfield (PC-R 354). Mr. Whitfield's father also threatened to take his pistol and blow his brains out (PC-R 354). Ms. Giles testified that these were regular occurrences during their weekend visits with their father (PC-R 355).

Ms. Giles further testified that while they were living with their grandmother, they attended school regularly, they had enough to eat, their clothing was appropriate and clean, and there was enough room in the house. Ms. Giles was then asked what changed things in your life? As Ms. Giles began to testify, she was visibly upset and crying as the court handed her a box of tissue when recalling the devastating impact on their lives with the passing of their grandmother. She testified that "after their grandma died, it's like our whole life changed, it's like this stuff - - I can't say. It's like after my grandma had died, it's like our life had went down because it's like we was running here, here to there, to Leola, and it's like my mom was all about her boyfriends. So it's like the love and attention that we used to get, we didn't get it

anymore. Q: And so your mom was not available to nurture you as children? A: Right" (PC-R 356). Ms. Giles recalls at one point she was with her mother and stepbrother and other times they were here to there with different family members, "it was like everywhere" (PC-R 357). She estimates that they lived at more than five different places with various relatives for short periods of time after their grandmother died and with each move caused a change in schools (PC-R 357). Ms. Giles testified that during this time they were not able to maintain any type of regular school attendance (PC-R 358). While the children were moving from place to place, their mother was somewhere else (PC-R 359). Of the children, Ms. Giles testified that Pam and Riley had the most stable places to lived because they were living with their godparents and they were good godparents to them (PC-R 358).

Ms. Giles recalls that the children eventually came to live with their mother when they were teenagers, approximately 15 or 16 (PC-R 359). She went to live with her mother and her mother's boyfriend and she does not recall where Mr. Whitfield was staying at that time (PC-R 360). Ms. Giles recalls entering Mr. Atkins program because her mother was an alcoholic (PC-R 360). She would drink on a regular basis (PC-R 360). When the family entered Mr. Atkins' program, Ms. Giles testified that she

and Leroy attended school regularly but Mr. Whitfield did not attend as much (PC-R 361). When asked if her mom was there and able to get them up for school every day or do something about Ernest not attending school, Ms. Giles testified that "at times she was there. But the majority of the time, by her not having a washing machine, sometimes we really didn't have clothes to wear to school" (PC-R 361). Testifying from Defense exhibit C, Ms. Giles noted the apartment where they used to live for a few years (PC-R 362, 363). She describes the home as "little, two bedroom, kind of small inside, and it wasn't a nice place, it was just somewhere" (PC-R 362). Ms. Giles testified that they did not have nice housing while staying with their mother (PC-R 362). Ms. Giles recalls that while staying with her mother they would have to go to Coins where there mother was having drinks. If there was something they wanted they had to go where she was (PC-R 365).

Ms. Giles further testified that prior to 1995 she was aware that her brother used drugs (PC-R 367). "He wasn't hisself anymore because it's like I noticed things had changed about him. [H]e'll go off and stay for a couple of days and when he'd come back his were a little glossy and he'll look dirty and he'll be smelling, and he just wasn't the type person because he's always stayed neat and clean" (PC-R 367-8). "His whole

personality had changed. He wasn't the same person anymore" (PC-R 368). Ms. Giles testified that when Mr. Whitfield would come with glossy eyes, dirty, and not neat he would take a bath, go in the room and sleep the rest of the day and get up and watch TV. He would stay home for a couple of days and then he would be gone again" (PC-R 368). During these times, Mr. Whitfield was not able to maintain a job (PC-R 368).

Ms. Giles was present during her brother's trial in 1995 and was leaving work to go to his trial in Sarasota (PC-R 370). Ms. Giles was told that she was going to testify by Defense Counsel Williams. Ms Giles testified that Defense Counsel Williams on the day of the court date asked her how she would feel about speaking on her brother's behalf (PC-R 373). However after a break during the proceedings, she was informed that she would not be testifying (PC-R 371, 373). Ms. Giles was prepared to testify that day and would have answered questions to the best of her ability (PC-R 371). After Mr. Whitfield's conviction and sentence, Ms. Giles continued to be involved in Mr. Whitfield's case and was present at the Florida Supreme Court for oral arguments in his case at a sacrifice to herself as noted by this Court (PC-R 371-2).

Defense counsels rendered ineffective assistance of counsel for not presenting the testimony of Mr. Whitfield's sister,

Dinah Giles. Ms. Giles would have been able to correctly detail the lifestyle that they enjoyed while under the nurturing care of their grandmother and upon her death how their lives went down. Even as Ms. Giles cried on the stand, it is apparent that this was a tragic event in their lives which still causes emotional pain. The death of their grandmother ultimately changed the course of their lives and their future. Their grandmother was the one person that Mr. Whitfield and his siblings could depend on to provide a nurturing and stable environment. Under her care the children had appropriate and clean clothing, they were fed, they attended school regularly, and the home was large enough to accommodate the children. When left in the care of Leola Rich for a brief period of time while their grandmother was still alive, the children were exposed to extreme domestic violence between their mother and her current boyfriend and were often running down the street in the middle of the night after their mother who was fleeing from another abusive attack. The only children to survive Leola Rich were Pam and Riley because they lived with their godparents who were good to them. The devastating impact of losing their grandmother forced Mrs. Leola Rich (formerly Garner) to begin the task of becoming a mother. And with this responsibility, Mrs. Rich relinquished her parental duties to more than 5

different relatives while she stayed with her boyfriend. As Ms. Giles indicated, Leola Rich was about her boyfriends and therefore she was ***not available to nurture*** her children whom she had grown accustomed to seeing only once or twice a week. When Leola Rich is finally in a position to allow her children to come live with her in Sarasota, the children are teenagers and have not been attending school regularly because of various relocations with their relatives. Unfortunately, Mrs. Rich is still not capable of being a mother to her children and is not their to ensure that they have the basic necessities in life: decent shelter, clean clothing, and food. In fact, when the children needed something, they had to go and find their mother at Coins, which was where she was having drinks. Ms. Giles testimony was crucial because she had personal knowledge of the extreme parental neglect that Mr. Whitfield had to endure. Ms. Giles also would have been able to testify regarding her observations of Mr. Whitfield while he was under the influence of drugs and how his personality changed when he was doing drugs. Ms. Giles remembers Mr. Whitfield as a neat and clean person but when he was on a binge, he was dirty and smelly, his eyes were glossy, he could not maintain a job, and he would be away from home for days.

Defense Attorney Williams testified at the evidentiary

hearing from his billing statements that he had written a letter to Ms. Giles on June 26, 1995 and had a conference with Mr. Whitfield's sister and Mr. Whitfield's mother on July 13, 1995; however there is no indication as to the nature of the conversations which occurred during this meeting. The only other reference as to contact with Mr. Whitfield's sister occurred on September 9, 1995 in a telephone conference and September 15, 1995, a telephone conference with defendant's sister and mother. These contacts were a little over a week before the beginning of trial. Also defense counsel's billing records do not indicate any contact or attempts to contact Mr. Whitfield's family during the month of August 1995. Ms. Giles testified that she contacted Mr. Whitfield's attorney on several occasions to check on the status of his case. The billing records also indicate that on at least one court occasion on July 12, 1995, defense counsel had a conference with Mr. Whitfield, his mother, and sister. Ms. Giles also testified that she was present during her brother's trial and would take off work to attend the trial. In attempting to show that Mr. Whitfield's family was not as cooperative as other families, he uses for example the family not readily responding to his request to bring clothing for Mr. Whitfield. The fact that Mr. Whitfield's family did not readily bring clothing for him is not

proof positive that they were not willing to assist in any manner that they could. As defense counsel Williams admits, the Whitfield family were not opulent and they were quite poor and he did not want to infer that they were uncooperative (PC-R 76, 109). In fact, this has been a consistent problem in the Whitfield family as noted by Ms. Giles and Mr. Atkins, Mr. Whitfield's mother was incapable of making sure that her children had clean and appropriate clothing because of her personal problems. Defense counsel Williams also admits that the family met with the defense attorneys and were interviewed by Mr. Steel, the court appointed investigator, which did not include Ms. Giles, and with Dr. Regnier, the court appointed psychologist and provided family background (PC-R 98, 109). Defense counsel Williams testified that he specifically recalls deciding not to call Ms. Giles as a witness however he gives no further indication as to why this decision was made (PC-R 79). He also indicates that he met with the Defendant's sister on several occasions but again this is not reflected in his billing records (PC-R 79-80).

Defense counsel Syprett testified at the evidentiary hearing that after meeting with Mr. Whitfield's mother and sister, she and Defense counsel Williams conferred and concluded that they weren't... "good historians, they were inarticulate,

and the real problem with them was that they were, what I call malleable, I mean they would say one thing but it would have been very easy for a prosecutor to take what they said and have them unsay it in the cross-examination. So they did not feel comfortable with relying upon them as their star witnesses" (PC-R426). Defense counsel Syprett also testified that they were not what she would call "sympathetic witnesses, they would not have helped Mr. Whitfield. There were well intentioned, they wanted to help, but they believed that Dr. Regnier could present the exact same information in a much more articulate, convincing, firmer manner that would hopefully persuade the jury" (PC-R 426). This is also the same theory that was carried over to the penalty phase hearing (PC-R 426).

Defense counsel Williams and Syprett testified that they decided to use Dr. Regnier to get in all of Mr. Whitfield's family background, all of his history, and all of the interviews with family members and other persons involved in his life (PC-R 81, 425). Reviewing the testimony of Dr. Regnier at R 1591, it would appear that Dr. Regnier interviewed Mr. Whitfield's mother during the trial proceedings and his sister. Additionally, Dr. Regnier reviewed the interview of Mr. Whitfield's step-father, mother, and sister Tracy , as well as the depositions of Dinah Giles and Leola Rich which were taken at the request of the

Office of the State Attorney for guilt phase issues (R1624, 1626). During Dr. Regnier's testimony he describes the infliction of pain and suffering by every adult in Mr. Whitfield's life (R1593). Dr. Regnier also describes how Mr. Whitfield's mother would leave them with babysitters and not return for days or leave them with relatives and they would not know where she was so the children would be shifted around (R1595). Dr. Regnier further testified that Mr. Whitfield's mother abandoned him with his father while she moved to Sarasota taking the girls with her so they were able to enjoy some of their mother's love and nurturing despite her drinking problem (R1599). Mr. Whitfield's father, not wanting to raise a child on his own also abandons him with other relatives (R1599). Dr. Regnier further testifies at R1601-2 regarding the poverty that Ernest grew up in with several children sleeping on one mattress and Mr. Whitfield had been infected with worms so severely that he had to be hospitalized. Dr. Regnier testified that Mr. Whitfield's mother most times went to their family counseling sessions under the influence of alcohol (R1623). Dr. Regnier further testified that he had reviewed the depositions of Ms. Giles and Ms. Rich and they indicated that they never saw Mr. Whitfield use drugs nor did they provide him money to obtain drugs (R1622-6). In addition, Mr. Whitfield's mother in her

deposition did not see him use drugs before leaving the house after the murder. Dr. Regnier testified that Mr. Whitfield's sister and mother were not good historians. They could not tell basic things about their childhood e.g. hospitalizations, what schools or churches they attended (R1633-5). Nor could Mr. Whitfield's mother tell them where Mr. Whitfield's other siblings were located.

Although Dr. Regnier provided some information to the jury regarding Mr. Whitfield's background, his accounting was inaccurate and incomplete. Ms. Giles would have been able to relay to the jury the true facts surrounding their childhood. Mr. Whitfield was not enamored with his father during his abuse of him. Ms. Giles did not enjoy for a period of time the love and nurturing of her mother. Mr. Whitfield was not abandoned with his father and then moved from placed to place with relatives. Mr. Whitfield did not mourn the passing of his abusive stepfathers. Mr. Whitfield was impoverished when he was in his mother's care in Sarasota and as a result he was hospitalized, he did not attend school regularly and his home was dilapidated. Further, Mr. Whitfield and his siblings were forced to raise themselves and when they needed something they had to go find their mother at the local shot house where she was having drinks. Dr. Regnier did not obtain the important

background information to present to the jury because his attorneys failed to conduct a proper investigation into mitigation. Mr. Whitfield's life changed for the worse at the passing of his grandmother. His mother was not a good historian to provide information as to aspects regarding his childhood because she was more concerned with her boyfriends than she was with raising her children. Ms. Rich could not provide information as to the location of all her children because she did not raise two of her children, Pam and Riley. Further until their grandmother died, Mr. Whitfield had a stable home where he could return after witnessing countless acts of domestic violence between his mother and her boyfriend at the time or enduring the abuse by his father. He attended school and received good grades, was properly clothed and feed, was a cub scout, and he attended church. There was one adult in Mr. Whitfield's life that loved and nurtured him as a child: his grandmother. When she passed Mr. Whitfield was no longer a cub scout, he did not attend school regularly, and he lived in impoverished conditions upon returning to his mother.

Dr. Regnier was also not effective in presenting the testimony of Ms. Giles as it related to her observations of Mr. Whitfield while he has under the influence of drugs. In Ms. Giles deposition and her evidentiary hearing testimony she

testifies that she has never observed Mr. Whitfield ingest drugs and she has never used drugs with him. However, she was aware of the changes in Mr. Whitfield's personality, his behaviors, and his inability to maintain a job. She would have been able to assist counsel in developing from a lay witnesses' observations, the drug usage and patterns of Mr. Whitfield that would corroborate Mr. Whitfield's statements regarding his drug addiction.

Mr. Whitfield was prejudiced by counsel's failure to present the testimony of Dinah Giles. The jury decision in Mr. Whitfield's case was seven to five. The harm is evident. Had one additional juror been given the opportunity to listen to the emotional testimony of Ms. Giles, there is a reasonable probability that Mr. Whitfield would have received a life recommendation from the jury. If counsel's claim was that Ms. Giles would have been malleable, it was the duty of counsel to ensure that the witness was properly prepared for cross examination. The ad hoc manner in which Ms. Giles was handled on the day of the sentencing further establishes counsel's lack of preparation for the penalty phase hearing. Ms. Giles testified that she was asked on the day of the hearing whether she would speak on behalf of her brother, only to be later informed that she would not be called as a witness. According

to counsel's and defense investigator Steele's billing records there were no contacts or attempts to contact Mr. Whitfield's family to prepare them for trial testimony during the entire month of August. In fact, the first substantive interview of family members does not occur by the defense investigator until September 12, 1995, which was less than a week before the beginning of trial, and Ms. Giles was not present during this interview. Additionally, the only other investigative contact with the Whitfield family occurred on September 28, 1995, the same day as the penalty hearing, at the courthouse.

William Peterson was Mr. Whitfield's employer at the time of his arrest. Mr. Peterson testified at the evidentiary hearing that Mr. Whitfield worked in his roofing business providing driving and labor work (PC-R 377). He describes Mr. Whitfield as a good worker and he was very pleased with his work (PC-R 377). He further testified that he never had any disciplinary problems with Mr. Whitfield and that he was always on time, early for work and never was missing in action from work (PC-R 377-8). In 1995, Mr. Peterson testified that we was still working in Sarasota with his business and would have provided any information asked of him (PC-R 378). Mr. Peterson recalled remembering learning of Mr. Whitfield's arrest in 1995 when reading the paper. He was "surprised, very surprised,

shocked" (PC-R 378).

Defense counsels were ineffective in failing to investigate potential mitigation and locate Mr. Peterson who was an available witness conducting business in Sarasota in 1995. In not presenting the testimony of Mr. Peterson the jury and the court were not informed that Mr. Whitfield was a good worker. He was always early for work and never had any disciplinary problems while employed with Mr. Peterson. Defense counsel Williams testified at the evidentiary hearing that Mr. Whitfield *did not* provide him with any names of prior employers (PC-R 70). He further testified that the name William Peterson sound familiar, but he could not recall specifically (PC-R 87). Defense counsel Williams provides conflicting testimony that he recalls discussing employment history with Mr. Whitfield and that he discussed it with the investigator and other persons who had knowledge. He further testified that he chose not to put on Mr. Peterson or anyone else whose name came to his attention (PC-R 88). It is evident that Defense counsel's were aware of Mr. Whitfield's employment records because on two separate occasions, June 26 and July 3, 1995, defense counsels had a telephone conference with the defendant regarding his paycheck. "In assessing the reasonableness of an attorney's investigation, a court must consider not only the quantum of evidence already

known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id* at 2538. It is common practice in handling capital cases that one area of investigation covers prior employment history. This was an area made known to Mr. Whitfield's counsel, yet they failed to conduct a reasonable investigation into his background and offered no testimony that would support a tactical decision not to pursue an investigation into Mr. Whitfield's employment history. Additionally, the defense investigator records offers no indication of attempts to locate Mr. Whitfield's previous employers. The resulting prejudice to Mr. Whitfield is that the trial and penalty phase testimony depicted Mr. Whitfield as a man unwilling to work but would snatch his girlfriend's purse after being refused in attempting to borrow money. Had counsel investigated Mr. Whitfield's employment background, which is common in the investigation of mitigation, the juror would have been given an opportunity to consider that Mr. Whitfield was a good worker and weigh this factor against the aggravating factors presented in his case.

Evelyn Ford testified that she first met the Whitfield family when they became her neighbors at Maple Manor around 1983 (PC-R 381). Ms. Ford testified that Mr. Leola would babysit for her and that she would be at their house everyday. Sometimes

Ms. Leola would not be available to babysit because she would drink a lot. And sometimes this drinking habit would last two to three months (PC-R 383). While visiting at the Whitfield home, Ms. Ford had the opportunity to observe Mr. Whitfield and "sometimes when he came home he'd look like he'd been out all night, he'd be looking like he's sad" (PC-R 381). Ms. Ford testified that he would come home, talk, laugh, lay down, go to sleep, sleep for a couple of days and then he'd be all right (PC-R 381-2). This would be a pattern that she observed every now and then. Ms. Ford testified that she thought that Mr. Whitfield was high. She also thought that he was high when he got mad with his mother and kicked the window out and another time when he was mad with his stepfather and hit him (PC-R 382). Ms. Ford further testified that she has picked Mr. Whitfield up "behind the grass trail (msp Brass Rail), which is a bar where drugs are sold and people be drinking all the time, just doing stuff they shouldn't be doing and that he was high" (PC-R 382). She testified that she thought that Mr. Whitfield was high because "when he is high he'll just talk, talk, talk" (PC-R 383).

The testimony of Evelyn Ford would have been important in corroborating Mr. Whitfield's pattern of drug use. Evelyn Ford had personal knowledge of her observations of Mr. Whitfield

under the influence of drugs. She would have been able to relay to the jury how Mr. Whitfield's personality and behavior changes when he is under the influence. Ms. Ford would also have provided information regarding Ms. Rich and her continued pattern of alcoholism that Mr. Whitfield had to continually endure.

Peggy LaRue testified that she is the sister of Estella, Mr. Whitfield's former girlfriend (PC-R 384). Peggy LaRue testified that when Mr. Whitfield came to her house the morning of the crime he appeared "hyper, big eyes, glossy eye" (PC-R 385). She thought that Mr. Whitfield was high and that she has seen him like this before and thought he was high (PC-R 385). Ms. LaRue further testified that Mr. Whitfield appeared agitated (PC-R 385), talkative (PC-R 386), and hyper (PC-R 387). From all indications of knowing Mr. Whitfield, Ms. LaRue testified that she thought that he was on drugs (PC-R 387). Ms. LaRue further testified that she was never contacted by the defense experts, the investigator, or defense counsels (PC-R 387-8).

Ms. LaRue was a guilt phase witness that could have been called by the defense during the penalty phase hearing to corroborate Mr. Whitfield's statements that he was under the influence of drugs at the time of the crime. Further, Ms. LaRue could have established that Mr. Whitfield's cocaine addiction

was readily apparent and noticeable to those people familiar with his demeanor. In describing Mr. Whitfield's appearance on that morning, Ms. LaRue's testimony is independent and further corroborates the testimony of Ms. Giles and Ms. Ford regarding the changes in Mr. Whitfield when he is under the influence of drugs.

The resulting prejudice to Mr. Whitfield is that with a jury recommendation of seven to five, if one additional juror had been persuaded that Mr. Whitfield had actually been under the influence of effects of drugs at the commission of this crime, they would have weighed this factor against the aggravating factors presented in his case and there is a reasonable probability that the recommendation would have been different.

Harriet Miller is Mr. Whitfield's ex-wife. Ms. Miller testified that she was married to Mr. Whitfield for six months after dating for a year. While they were dating "he was real good." He worked and provided for her and helped out with her four children (PC-R 389-390). Ms. Miller testified that their relationship began to change when Mr. Whitfield had mood swings and sometimes he'd go on like a little binge and leave for three days, come home, he wouldn't remember nothing he done" (PC-R 390). It would take about three days before he was right again

(PC-R 390). After he recovered the mood swings would begin and he went back to doing the same thing (PC-R 390). This pattern of behavior happened off and on during the course of their marriage (PC-R 390). Ms. Miller testified that she was a former victim of Mr. Whitfield and that he was convicted of committing a criminal act against her (PC-R 391), which was presented as an aggravating circumstance in Mr. Whitfield's penalty phase hearing. Ms. Miller further testified that she holds no animosities or hatred against Mr. Whitfield (PC-R 391). Although Ms. Miller has never seen Mr. Whitfield do any kind of drugs, she has found drug paraphernalia in her home (PC-R 391). Ms. Miller described finding a can, like a beer can, a hole punched can, which is used for ingesting crack (PC-R 391). When Mr. Whitfield would return from his binges he would be dirty, his eyes were big, his speech was husky, it changed, and he was hyper (PC-R 392). Ms. Miller testified that she was never contacted by Mr. Whitfield's defense attorneys or anybody representing Mr. Whitfield and there is no indication in the billing record from counsel or the defense investigator regarding attempts to locate Mr. Whitfield's ex-wife. Ms. Miller also testified that she was never contacted by the State Attorneys Office to give a statement regarding the prior act against her (PC-R 392-3).

Defense counsel Williams testified that he knew of Ms. Miller and her prior victimization by Mr. Whitfield (PC-R 81). Counsel testified that he knew her testimony had negative impact value and the he consciously chose not to call her as a witness (PC-R 81). In assessing the reasonableness of an attorney's investigation, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Id at 2538. "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation on investigation." Id at 2535. In the present case, Mr. Whitfield's attorneys did not attempt to contact Ms. Miller to determine the impact of her testimony. Had Defense counsel conducted a reasonable investigation into Mr. Whitfield's background they would have learned that Ms. Miller holds no animosity towards Mr. Whitfield. Her testimony could also have been used by the defense in establish Mr. Whitfield's drug history and patterns of behavior while under the influence of drugs. Ms. Miller could also have provided additional mitigation that while they were dating, Mr. Whitfield was good

to her, he worked and he helped her take care of her children. Counsel's failure to contact Ms. Miller and minimize the impact of the State's use of an aggravating circumstance involving Ms. Miller prejudiced Mr. Whitfield. In weighing this aggravating circumstance involving Ms. Miller, the jury and the Court would have been given additional mitigating circumstances to consider and there is a reasonable probability that the resulting recommendation and sentence would have been different.

Leola Elizabeth Rich is the mother of Ernest Whitfield and his father was Ernest Whitfield, Sr. now deceased (PC-R 394). Ernest was the third child born to Leola Rich and she was not married to Ernest's father when he was born (PC-R 394). Ernest's father was abusive to Ms. Rich during her pregnancy. One time he beat her with a board but normally he would beat her with his fists (PC-R 395). While pregnant with Ernest, Ms. Rich had to be hospitalized because she fell on her stomach in a cabbage field while running from his father (PC-R 395). Ms. Rich testified that Ernest was always staying with her mother, Leila Mae Elbert, and that she would stay there as well (PC-R 396). Ms. Rich stayed with Ernest's father 2 more years and subsequently conceived two more children from him (PC-R 396). Mr. Whitfield, Sr. continued to beat Ms. Rich during her subsequent pregnancies. Ms. Rich testified that her mother

helped her out and she relied on her mother to take care of her kids (PC-R 397). When Ms. Rich married Phillip Garner she moved away from her kids. Mr. Garner was also and abusive man (PC-R 397). Ms. Rich testified that her children would observe this abuse and that she would tell them to run (PC-R 398). At one point in time, Ms. Rich had her children living with her and Mr. Garner but when he kept beating her up, they wanted to go back and stay with their grandmother and she allowed them to go back (PC-R 398). Ms. Rich testified that her mother passed in March of 1980 and the children were still staying with her mother at the time (PC-R 398-9). When her mother passed, Mr. Whitfield was sent to Jacksonville to live with Ms. Rich's niece (PC-R 399). Only when Ms. Rich's husband, Phillip Garner, dies does she finally make arrangements to bring her children to Sarasota (PC-R 399). Ms. Rich recalls living in Mr. Powell's apartments with her children Dinah, Ernest and Leroy off Leonard Reid road (PC-R 399). In addition, Ossi, Ms. Rich's then boyfriend also lived in the two bedroom apartment (PC-R 400). Ms. Rich testified that Mr. Atkins was their counselor because they were having some family problems (PC-R 400). "The kids were making friends with some boys and they boys got in some trouble, and by her boys being with them, the judge...that they were responsible too" (PC-R 400). The court sent them to this

program (PC-R 400). Ms. Rich indicates that her problems with alcohol began after her mother and husband died (PC-R 401). Although she drank some before their deaths, her drinking got worse, because she was busy trying to raise her kids. But when she moved down here (Sarasota) it got worse, and she apologized (PC-R 401). Ms. Rich indicated that she never had any problems out of Mr. Whitfield in school. However, the teachers would write her letters that Mr. Whitfield, who at the time was 13, "had a child mind, sometimes he would act like a four-year old kid or a six-year old kid, a three-year old kid" (PC-R 402). In school Mr. Whitfield was involved in "speech therapy because he couldn't talk plain with full understanding" (PC-R 402). Ms. Rich testified that Mr. Whitfield talks kind of slow because of his speech problem (PC-R 403). "After living on Leonard Reid and by her drinking and her older son, it was hard for her to get the kids to high school, they weren't going to school down her, so the kids (Ernest, Dinah, and Leroy) wanted to go back home and they went to live with her niece-in-law" (PC-R 403). Ernest came back to Ms. Rich in 1983 then the rest of the kids followed. Ms. Rich was still living with Ossi at the time and she reports that he was a nice husband (PC-R 404). By 1995, Ms. Rich is married to Johnny Rich and Ernest was living with them off and on. Ms. Rich reports that she called the police on

Ernest because he would steal from her to buy drugs (PC-R 404-5). Ms. Rich testified that she found out that he was smoking reefer and was introduced to drugs by her stepchildren, Mr. Garner's children (PC-R 404). Ms. Rich testified that when Mr. Whitfield was doing drugs she would worry about him because he wouldn't come home for a couple of days (PC-R 405). When he would return home he would go to bed and take a bath, he would appear half clean half dirty (PC-R 405). Ms. Rich thought that he was on drugs when he acted different because he would just want to lay down and sleep or want something to eat (PC-R 406). He was also sometimes more agitated (PC-R 406). Ms. Rich testified that Mr. Whitfield was almost a year before she knew that he was walking and that he developed a little behind the other kids. Ms. Rich further testified that she would sometimes go get Mr. Whitfield from school because they would find him outside sitting by trees (PC-R 407). Ms. Rich testified that Mr. Whitfield was 12 or 13 before she stopped helping him with his baths. Ms. Rich reports that she still drinks sometimes but it's not as bad as it was before because she now takes too much medication (PC-R 407). Ms. Rich recalls speaking with Mr. Williams and Ms. Syprett in 1995; however, she does not recall Mr. Whitfield having an investigator (PC-R 408). Ms. Rich testified that before Mr. Whitfield was arrested in 1995, he was

shot. After he was shot she testifies that he was different. He was scared and that was different than he had been before (PC-R 409). On the morning of the murder when Mr. Whitfield comes home, he had been gone from home since the previous day and had not slept at home (PC-R 410). When he returned she testified that he was nervous and stated that he did something that he was sorry for doing (PC-R 410). He did not stay home long because he said he was going to his sister's house (PC-R 410). When she asked him what he was talking about he stated that he had done something bad and he was sorry about it (PC-R 411).

Defense counsel Williams testified at the evidentiary hearing that he sent a letter to Ms. Rich on June 29, 1995 regarding contacting Defense counsel Williams or Scott (PC-R 75). On July 13, billing records indicate that there was a conference with Ms. Rich and Mr. Whitfield's sister but there is no documentation as the nature of this meeting. Defense counsel Williams further testified that two days later he had a conference with Ms. Rich and reviewed some personal papers (PC-R 75). Counsel testified that they were attempting to contact the family early to establish the information they needed in terms of Mr. Whitfield's history and background (PC-R 75). Counsel further testified that he met with Ms. Rich on

several occasions and she was interviewed by the investigation and Dr. Regnier (PC-R 79-80). Counsel testified that he made a conscious decision not to call Ms. Rich as a witness (PC-R 80). Counsel testified that he received very little in terms of getting information from Mr. Whitfield's family (PC-R 110).

Defense counsel Syprett testified that after meeting with Mr. Whitfield's mother and sister counsel conferred and concluded that "they were not good historians, they were inarticulate, and malleable," meaning that the state could make them unsay their testimony on cross-examination (PC-R 426). In addition, they would not have helped Mr. Whitfield. They were well intentioned, they wanted to help, but they believed that Dr. Regnier could present the exact same information in a much more articulate, convincing, firmer manner that would hopefully persuade the jury" (PC-R 426)

Defense counsel's failure to present the testimony of Mr. Whitfield's mother was ineffective and prejudicial to his case. Counsel indicates that the family were not good historians and were inarticulate and malleable. Additionally, the jury would not have been sympathetic. Ms. Rich's testimony was also emotional as the court handed her a tissue when she apologized because she drank too much after the passing of her mother and

husband. Dr. Regnier was inaccurate and incomplete in detailing the neglect and abandonment that Mr. Whitfield endured while in the care of his mother. Although he testifies in summary fashion regarding the violence that Mr. Whitfield witnessed between his mother and father, Mr. Whitfield was 4 years of age when his parents separated. The violence that Mr. Whitfield continued to witness was between his mother and her then boyfriend/husband, Philip Garner. It was because of this constant fighting that Mr. Whitfield was told to run through the streets in hopes of getting away from witnessing another violent to his mother by Mr. Garner. Dr. Regnier also was incorrect in testifying that Mr. Whitfield was left with his father while Ms. Rich moved the girls with her. Ms. Giles testified that Ernest had always lived with their grandmother and for a brief period of time they stayed with their mother and Mr. Garner, until they could take no more of the abuse. Although Dr. Regnier testifies regarding Ms. Rich's excessive use of alcohol he did not indicate why Ms. Rich began to use alcohol in excess. Ms. Rich testified that her usage increased after the passing of her mother and husband. Not only did Mr. Whitfield's life go down from that point, Ms. Rich's life also continued to change for the worse which made her unavailable to care for her children. Dr. Regnier also did not provide any trial testimony regarding

how Mr. Whitfield's school attendance changed or why his teachers would send notes to his mother indicating that he had the mind of a young child. Ms. Rich was in a position to provide personal accounts of her observations of Mr. Whitfield while he was under the influence of drugs. She further could have testified that Mr. Whitfield began to steal from her and how he first became involved with drugs. This information would have been beneficial to the jury's understanding and consideration for mitigation.

Dr. Mash testified that Whitfield was a chronic cocaine user, (PC-R 215) and as a result of that use, Whitfield suffered from serious brain damage. (PC-R 216, 217) This damage was severe causing limbic frontal communication detachment. (PC-R 217) Her testimony would not only have provided testimony regarding the appellant's drug use, but would also have provided evidence of brain damage and statutory mitigators.

Dr. Fisher testified not only to the guilt phase evidence but also to the wealth of mitigation now properly investigated and presented. Dr. Fisher testified that Dr. Regnier did an incomplete mitigation investigation. (PC-R 289) He testified that he was able to find additional information not discovered by Dr. Regnier. (PC-R 291) While Dr. Regnier did testify somewhat to the environment that Mr. Whitfield grew up in, Dr.

Fisher was able to establish more relevant information as to the Newtown area through the information provided by Fredd Atkins. (PC-R 292) Environmental information was also obtained through data compiled by the Office of the Juvenile Justice Delinquency Programs regarding risk factors in the Sarasota area. (PC-R 292)(Defense exhibit B)[17] He testified to several mitigating factors, (PC-R 297) and found the existence of the statutory mitigator that Mr. Whitfield was under the influence of extreme mental or emotional mental disturbance at the time of the murder.(PC-R 298)

As stated previously throughout, the most recent case on ineffective assistance, ***Wiggins v. Smith***, 123 S.Ct. 2527(2003), the United States Supreme Court held by a 7-2 vote that counsel's investigation and presentation "fell short of the standards for capital defense work articulated by the American Bar Association ... standards to which we have long referred as 'guides to determining what is reasonable.' " 123 S.Ct. at 2536-37. In its discussion of the 1989 ABA Guidelines for counsel in capital cases, the Court held that the Guidelines set

[17] The defense proffered the governments documents into evidence when the court sustained the State's objection regarding their admission. It is the position of current counsel that these documents are properly part of the record and before this court pursuant to section 90.803(8), F.S. (2003).

the applicable standards of performance for counsel:

> [I]nvestigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989).... Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources.

Id. at 2537 (emphasis in original). The Court then also adopted ABA guideline 11.8.6, which it described as stating

> that among the topics counsel should consider presenting are medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences.

Id. Thus, the *Wiggins* case now stands for the proposition that the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the "prevailing professional norms" in ineffective assistance cases.

The relevant guidelines applicable to Mr. Whitfield's case are 11.8.3 and 11.8.6.[18]

In 2003, the ABA Guidelines were updated. The 2003 ABA Guidelines at section 10.7 contain discussion about counsel's "obligation to conduct thorough and independent investigations

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[18] The Guidelines have been removed from the brief in order to comply with this Court's order of September 30, 2004. They have been added as an attachement.

relating to the issues of both guilt and penalty." The description of counsel's obligation to investigate mitigating evidence for the sentencing phase of the case is as follows:

> Counsel's duty to investigate and present mitigating evidence is now well established. The duty to investigate exists regardless of the expressed desires of a client. Nor may counsel sit idly by, thinking that investigation would be futile. Counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions unless counsel has first conducted a thorough investigation with respect to both phases of the case. Because the sentences in a capital case must consider in mitigation, anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant, penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history.

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ¶ 10.7 (2003).

It is clear from the three guidelines quoted extensively above that the appellant’s counsel fell far short of those standards. While those areas emphasized are relevant to the appellant’s case, they are not exclusive. There are some sections, however, worth discussing.

The 1989 *Guideline* 11.8.3 makes it generally clear that the investigation of mitigation evidence should begin immediately. As stated *supra*, Mr. Steele did not begin investigating the case until two weeks prior to the start of the case. In addition,

as Judge Williams testified, counsel was still investigating the case during the trial and after the verdict. Not only does this violate the ABA Standards but also established Supreme Court and 11th Circuit precedent. *See Blanco v. Singletary*, 943 So.2d 1477 (11th Cir. 1991). Deviations from the 1989 *Guideline* 11.8.6 are also apparent. Section A states "Counsel should present to the sentencing entity or entities all reasonably available evidence in mitigation unless there are strong strategic reasons to forego some portion of such evidence." While counsel and the lower court attempted to offer "strategic reasons", it is apparent that the failure to call Harriet Miller, Evelyn Ford, Dinah Giles, Peggy LaRue, Fredd Atkins and Leola Rich cannot be based on anything other than ineffectiveness. Counsel never invested or bothered to learn of Harriet Miller, Evelyn Ford, or Peggy LaRue. Fredd Atkins could have been found with a minimum of investigation. Dinah Giles was an excellent witness but counsel failed to call her because they were unprepared. Leola Rich would have been an excellent witness, too, with proper preparation.

A proper mental health mitigation investigation would have discovered brain damage as was discovered by Dr. Mash and Dr. Fisher. However, counsel failed to properly investigate the case pursuant to paragraph B of the guideline.

Ultimately, again, prejudice has to be evaluated in light of the advisory jury verdict of 7-5. This Court has, on several occasions, evaluated prejudice and related issues when the jury vote is 7 to 5. *See Harris v. State,* 843 So.2d 856 (Fla. 2003)*; Crook v. State*, 813 So.2d 68 *(*Fla. 2002*); Almeida v. State*, 748 So.2d 922 (Fla. 1999); *Phillips v. State*, 608 So.2d 778 (Fla. 1992) In *Phillips v. State*, 608 So.2d 778 (Fla.1992), this Court determined that the defendant was prejudiced by counsel's failure to present "strong mental mitigation" at trial. *Id.* at 783. In that case, two experts opined in the postconviction proceeding that the defendant was suffering from an extreme emotional disturbance at the time of the crime, was unable to conform his conduct to the requirements of law, and could not form the requisite intent to fall under the aggravating factors of CCP or heinous, atrocious, or cruel. *See id.* Also important this Court's analysis of that case was the fact that the mental mitigation was essentially unrebutted and that the jury had recommended the death sentence by the slim majority of seven to five. *See id.* Based on those factors, this Court concluded that there was a reasonable probability that "but for counsel's deficient performance ... the vote of one juror would have been different, ... resulting in a recommendation of life." *Id.*

ISSUE IV[19]

MR. WHITFIELD WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS FOR FAILING REQUEST A SPECIAL JURY INSTRUCTION PURSUANT TO *SIMMONS*. COUNSEL'S PERFORMANCE WAS DEFICIENT AND AS A RESULT THE DEATH SENTENCE IS UNRELIABLE.

Simmons v. South Carolina, 512 U. S. 154 (1994) held that capital defendants have a due process right to rebut a prosecution claim of future dangerousness by informing the jury that the jury's life imprisonment alternative mean life without the possibility of parole. During the penalty phase of Mr. Whitfield's trial, the jury inquired as to whether Mr. Whitfield would be released from prison by sending a note to the court. Six members of the jury signed the note requesting this information. It was well established at the time of Mr. Whitfield's trial that a vote by six members of the jury for life would result in a jury recommendation of life to the court. The final vote by the jury was 7-5 for death.

Subsequently, the United States Supreme Court reiterated the holding of *Simmons v. South Carolina*, that when "a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life

[19] Combined Claims VIII, IX, X.

imprisonment without possibility of parole, due process entitles the defendant 'to inform the jury of [his] parole ineligibility, either by a jury instruction or in arguments by counsel.' " *Shafer v. South Carolina*, 532 U.S. 36, 39, 121 S.Ct. 1263, 149 L.Ed.2d 178 (2001) (quoting *Ramdass v. Angelone*, 530 U.S. 156, 165, 120 S.Ct. 2113, 147 L.Ed.2d 125 (2000) (plurality opinion)).

In *Kelley v. South Carolina*, 122 S.Ct. 726 (2002), the United States Supreme Court went even further, explaining away the *Simmons* rule from the South Carolina statutory scheme. The Court stated that:

> A trial judge's duty is to give instructions sufficient to explain the law, an obligation that exists independently of any question from the jurors or any other indication of perplexity on their part. *Cf.* C. Wright, FEDERAL PRACTICE AND PROCEDURE § 485, p. 375 (3d ed. 2000) ("It is the duty of the trial judge to charge the jury on all essential questions of law, whether requested or not"). Time after time appellate courts have found jury instructions to be insufficiently clear without any record that the jury manifested its confusion; one need look no further than *Penry v. Johnson*, 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001), for a recent example. While the jurors' questions in *Simmons* and *Shafer* confirmed the inadequacy of the charges in those cases, in each case it was independently significant that "[d]isplacement of 'the longstanding practice of parole availability' remains a relatively recent development [in South Carolina], and 'common sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole.' " 532 U.S., at 52, 121 S.Ct. 1263 (quoting *Simmons*, supra, at 177-178, 114

S.Ct. 2187 (O'CONNOR, J., concurring in judgment)). *Kelley*, 122 S.Ct at 733.

Here, in the instant case, six juror sent a note to the court requesting information whether Mr. Whitfield would ever be released from prison if he was given a life sentence. Counsel and the court failed to give a proper instruction, violating the dictates of ***Simmons*** and its progeny. Counsel was deficient and the resulting prejudice was the jury considering whether Mr. Whitfield would be released from prison, a non-statutory aggravator, rather than weighing the mitigators and aggravators.

ISSUE V[20]

MR. WHITFIELD WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS WHEN COUNSEL FAILED TO OBJECT TO THE PROSECUTIONS USE OF NON-STATUTORY AGGRAVATORS IN ARGUING THAT THE PRIOR OFFENSES COMMITTED BY MR. WHITFIELD WERE DONE IN THE PRESENCE OF CHILDREN AND ALL WERE FEMALE VICTIMS. IN ADDITION, THE PROSECUTOR'S ARGUMENTS AT THE PENALTY PHASE PRESENTED IMPERMISSIBLE CONSIDERATIONS TO THE JURY AND WERE DELIBERATELY DESIGNED TO BE INFLAMMATORY AND IMPROPER.

During the penalty phase, the prosecution presented several prior offenses for which Mr. Whitfield was convicted. These prior convictions included convictions for aggravated battery which were originally charged as sexual battery. During the

[20] Consolidated Claims.

direct examination of the investigating officers, counsel for the prosecution asked repeatedly as to whether any children were present when these prior acts of violence occurred. During the direct examination of the investigating officers, counsel for the prosecution asked repeatedly as to whether any children were present when these prior acts of violence occurred and whether women were the victims. Law enforcement responded that children were present when the prior acts of violence occurred and that the victims were all women.

In addition, the State elicited testimony from Dr. Regnier that Mr. Whitfield was angry, violent and took his anger out on women. Dr. Regnier testified affirmatively.

During the instant offense, children were present during the armed sexual battery and first degree murder. The prosecution elicited this information for no other reason to establish a non-statutory aggravator and to inflame the passion of the jury against Mr. Whitfield. Counsel for Mr. Whitfield never objected to this line of questioning. As a result, the State was allowed to argue prejudicial and non-statutory aggravators.

ISSUE VI

MR. WHITFIELD WAS DENIED HIS RIGHTS UNDER *AKE V. OKLAHOMA* AT THE GUILT AND PENALTY PHASE OF HIS TRIAL WHEN COUNSEL FAILED TO ENSURE THAT THE DEFENDANT

OBTAIN AN ADEQUATE MENTAL HEALTH EXAMINATION BY FAILING TO PROVIDE THE NECESSARY TIME AND INFORMATION TO THE MENTAL HEALTH EXPERT.

The United States Supreme Court held in *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) that where an indigent defendant demonstrates to the trial judge that his sanity at the time of the offense will be a significant factor at trial, the state must "assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83, 105 S.Ct. 1087.

As presented supra, Dr. Regnier testified that he was not prepared for trial.(R. 1221, 1226; PC-R 132). Dr. Regnier was not ready for guilt phase (PC-R 132). Nor was Dr. Regnier ready for the penalty phase hearing (PC-R 132). The demand for speedy trial was filed on August 4, 1995, but Dr. Regnier did not evaluate Mr. Whitfield until August 11, 1995 (PC-R 128).

Dr. Fisher, an expert in the field of clinical psychology and an expert clinical psychologist with an expertise in death penalty litigation, testified. (PC-R 247-48) Dr. Fisher's professional experience is extensive. (PC-R 238-45) In Dr. Fisher's opinion as an expert in death penalty litigation, that

the amount of time from August 11 to September 18 was not enough time for Dr. Regnier to prepare the case. (PC-R 282-83) Essentially, because of the speedy trial issues, preparing Mr. Whitfield's case in such a short period of time fell below the standard of care in the psychological community. (PC-R 283) This evidence was uncontroverted by the State.

The prejudice in the instant case is clear. Both Ms. Spryett and Judge Williams testified that Dr. Regnier was their most important witness for both the guilt and penalty phase. It was incumbent upon Dr. Regnier to gather data and present a voluntary intoxication defense. As recognized by this Court, there was very little evidence disputing that Ms. Reynolds died and that Mr. Whitfield was responsible for her murder. There was no self-defense argument. No alibi defense. No defense of mistaken identity. Clearly, the only viable theory of defense from the beginning of the case focused on the defense of voluntary intoxication. Everything they gathered, all the evidence obtained, every expert retained was designed to present this affirmative defense. The result of their work is best illustrated during the exchange between Ms. Scott and Dr. Regnier regarding the only and ultimate issue of the case:

> Q. [Ms. Scott] Now do you have an opinion, Doctor, based upon your background and your review of the Baker Act records, the Sarasota Memorial Hospital

> records, your conversations with the defendant, his sister, reading the sworn testimony of the witnesses who saw Mr. Whitfield immediately after the event, whether or not Mr. Whitfield could possess premeditated design to effect the murder of Ms. Reynolds?
>
> A. Charlie Ann, **this is one of those questions I really can't answer** because I've been unable to get the kind of data from the defendant that I need to make such a determination. I can say from reviewing all of the records I've seen, that I have, I have a reasonable amount of doubt that he could have, but **I don't know for sure**.
>
> Q. Okay. And what other records would you have wanted?
>
> A. Well, I wanted to test the defendant with certain psychological instruments and have been unable to do so.[21]
>
> Q. If you had – was it more likely that he was unable to have the premeditated design than unlikely?
>
> A. I would think that it's probably more that he was unlikely than likely. **But again I don't know for sure**.
>
> Ms. Scott: Thank you, I don't have any further questions.

(R. 12221-22)

The end result was no evidence for a defense of voluntary intoxication ***as testified by Mr. Whitfield's own court appointed expert***.

CONCLUSION

If the life of Ernest Whitfield was a book and if all we read was the beginning and the middle, there would be no reason

[21] Mr. Whitfield was tested by his current defense team.

to read the end for the final chapter would be readily apparent. This should come as no surprise to those involved in the criminal justice system. It is not surprising to those who work for the federal government's Office of the Juvenile Justice Delinquency Programs in the Department of Justice. (PC-R 292) As entered into evidence, the OJJDP report has identified several risk factors that can lead to increased criminality in communities such as Newtown in Sarasota. While the identification of those risk factors may help prevent future crime, they are also instructive in explaining what went wrong in Ernest Whitfield's life.

The wealth of mitigation discovered by postconviction counsel shed some light on Mr. Whitfield's life. Everybody agrees that witnesses such as Fredd Atkins would have been extremely helpful in telling the jury who Mr. Whitfield was. People such as Mr. Atkins, a city councilman and mayor at the time of trial, would have been able to humanize Mr. Whitfield and explain what went terribly wrong in his life. Witnesses like Mr. Atkins would have been able to tell the jury how a pleasant young man spiraled down as a result of the numerous risk factors such as child abuse, neglect, violence, poverty and drug abuse cut into his core and eroded any protective factors. Mr. Atkins would have been able to tell how his family, how his

community and how the social service system failed in his case.

However, there was no one there to tell Mr. Whitfield's story. No one to protect Mr. Whitfield from himself and the system. His lawyers abdicated their role as lawyers at the most critical time: when Mr. Whitfield took control of his own case. Instead of leading Mr. Whitfield's defense, they followed the dictates of a seriously ill man who could not be trusted with making a single decision on his own. His attorneys violated all professional norms established not only bu this Court but by the United States Supreme Court and the American Bar Association.

There is no confidence in this verdict. We cannot say for sure, as members of the criminal justice system and as citizens of Florida, that Mr. Whitfield's crime is the most aggravated and least mitigated. We cheapen the criminal justice system and demean its power when we turn a blind eye to its failings. This is our last chance to correct the wrongs visited upon Mr. Whitfield by members of the Florida Bar. We should not fail as did so many before us. As such, this Court should grant relief.

Respectfully submitted,
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_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Amended Brief has been furnished by United States Mail, first class postage prepaid, to counsel of record, this 11th day of October, 2004.

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I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant was generated in Courier New, 12 point font, pursuant to Florida Rule of Appellate Procedure 9.210.

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