IN THE SUPREME COURT OF FLORIDA

NO. SC 05-1613

WILLIAM MELVIN WHITE,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

INITIAL BRIEF OF APPELLANT

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Preliminary Statement

This appeal involves a lower court order denying postconviction relief under Fl.R.Crim.P. 3.851. The following citations are utilized when referencing the record.

"GT" refers to the original guilt phase transcript and order.

"PT" refers to the resentencing transcript and order.

"EH" refers to the evidentiary hearing transcript and order for the 2003 3.851 motion.

Request for Oral Argument

Mr. White is presently under a sentence of death. The issues involved are complex and in order to fully present his case before this Court, Mr. White respectfully requests oral argument.

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Statement of the Case

In 1978, a grand jury indicted Mr. White for First Degree murder for the death of Gracie Mae Crawford along with two co-defendants, Richard DiMarino and Guy Ennis Smith. Mr. White entered a plea of not guilty. He went to trial and was convicted on November 30, 1978. An advisory jury returned a sentence of death on December 20, 1978. The trial court, finding that the three aggravating circumstances outweighed the sole statutory mitigating circumstance, sentenced appellant to death in accordance with the unanimous jury recommendation. This Court affirmed the conviction and sentence of death. *White v. State*, 415 So.2d 719, 719-20 (Fla.1982) (White I). Mr. White filed this initial rule 3.850 motion in 1983. In 1987, while appellant's rule 3.850 motion was pending, the United States Supreme Court issued its opinion in *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). The trial court stayed further proceedings in this postconviction motion until final disposition of the habeas petition. This Court rejected Mr. White's claim for relief, concluding that "[t]he charge which may have limited the jury to a consideration of statutory mitigating circumstance was clearly harmless." *White v. Dugger*, 523 So.2d 140, 141 (Fla.), cert. denied,488 U.S. 871, 109 S.Ct. 184, 102 L.Ed.2d 153 (1988). The trial court subsequently held an evidentiary hearing on most of appellant's claims and denied relief on all claims by order dated April 16, 1996. This Court affirmed the trial court's order as it relates to appellant's conviction but based on *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821,

95 L.Ed.2d 347 (1987), vacated appellant's death sentence and remanded for a new sentencing proceeding before a jury. *White v. State*, 729 So.2d 909 (Fla. 1999) (White II).After new sentencing hearing before jury, the Circuit Court, Orange County, Margaret T. Waller, J., the circuit court again imposed a death sentence. Mr. White appealed and this Court affirmed his sentence. *White v. State*, 817 So.2d 799 (Fla. 2002) (White III).

On December 16, 2003, Mr. White filed a new motion to vacate his judgment of conviction and sentence pursuant to Fla.R.Crim.P. 3.851. Twelve grounds for relief were submitted. A case management conference was held on June 28, 2004 after which the court denied a request for an evidentiary hearing summarily except as to a portion of Claim V. An evidentiary hearing was held as to this portion of Claim V. The trial court denied Mr. White’s motion on August 1, 2005. A timely notice of appeal was filed.

Statement of the Facts

This Court and the lower courts have repeatedly used the facts as stated in the original 1982 opinion to uphold Mr. White’s conviction and sentence of death. Since that time we have learned a lot about the facts that transpired the night Ms. Crawford was killed. It would be inappropriate to recite those facts as true, for they are not.

What has been discovered since Mr. White’s original trial challenges any confidence one may have in the verdict and sentence. Every favorable fact found of Mr. White’s innocence since the original trial has never been refuted by the evidence. Each and every time the

courts have rejected the true facts of what occurred on procedural or statutory grounds. (see PT Order 4-13).

The facts today, stripped of any procedural posturing, show that Richard DiMarino confessed to three different individuals that he killed Ms. Crawford. While Richard DiMarino admitted to his involvement in the murder at the original trial, he has consistently denied be the actual person who stabbed the victim. This fact alone, cited over and over again, is what keeps Mr. White on death row. Frank Marasa, Joseph Watts and John DiMarino all provided evidence that Richard DiMarino killed Ms. Crawford. Further, it is uncontroverted that Richard DiMarino corrupted the truth seeking process of the criminal justice system when he perjured himself during the original trial. (EH ROA Vol. II 3-26).

Even during Mr. White's resentencing, many of the true facts concerning the night in question were kept from the jury. Error by the trial court and ineffective assistance of counsel all but guaranteed a new death sentence for Mr. White.

Summary of the Argument

The lower court committed error when it summarily denied many of Mr. White's claims based on procedural bar. This Court has repeatedly held since Fl.R.Crim.P. 3.851 was amended that factual claims not refuted by the record should receive an evidentiary hearing. *Lightbourne v. State*, 742 So. 2d 238, 249 (Fla. 1999)(remanding for an evidentiary hearing to evaluate the reliability and veracity of trial testimony).

The summary denial of several factual claims also affected Mr. White's claim that this court conflated the *Brady* and *Giglio* materiality standards in its 1999 opinion denying post-conviction relief. Even though this Court has subsequently admitted its error in the *Guzman* decision, the trial court compounded this error when it did not analyze the newly discovered evidence in a proper materiality analysis.

The trial court did conduct an evidentiary hearing on one-half of one claim involving ineffective assistance of counsel under *Strickland* and *Wiggins* when evidence was heard regarding Mr. Markham. Under *Rompilla*, a strategic decision to withhold evidence that otherwise mitigates an aggravator is deficient performance. In the instant case, Mr. White's resentencing attorney failed to introduce the testimony of Mr. Markham that would have severely challenged the prior violent felony aggravator that was introduced by the state. Although this testimony was introduced at the *Spencer* hearing, Mr. White's resentencing was flawed due to the unique structure of Florida's capital sentencing scheme. Under *Tedder*, a jury's recommendation must be given great weight by the court in sentencing an individual to life or death. If that jury did not receive the necessary information to render a reliable advisory sentence, then the entire sentencing scheme is compromised. This is what happened in Mr. White's case.

Standard of Review

The appropriate standard of review is discussed as it relates to the individual arguments.

Argument

ARGUMENT I
NEWLY DISCOVERED EVIDENCE OF FRANK MARASA=S STATEMENT REGARDING THE MURDER OF GRACIE MAE CRAWFORD EXCULPATES MR. WHITE OF THE CRIME OF FIRST DEGREE MURDER AND MAKES HIM INELIGIBLE FOR THE DEATH PENALTY

In Mr. White's 2003 motion to vacate judgment and sentence, he presented information to the post-conviction court that constituted newly discovered evidence regarding his conviction for First Degree Murder. Frank Marasa was a member of the Outlaws Motorcycle club at the time of the murder of Gracie Mae Crawford. Mr. Marasa was a close acquaintance of Richard and John Dimarino because he was dating their sister at the time of the offense. On several occasions, he would stay at their house. In fact, in 1985, Mr. Marasa married Patricia Dimarino and became in-laws to the Dimarino brothers. On the night of the murder, Mr. Marasa had lent Richard Dimarino his Econoline Ford van and then went home with his then girlfriend and eventually passed out. (EH Vol. II 3-4)

The next day, Mr. Marasa had his girlfriend drive him to the home of Joseph Watts to pick up his van who was also a member of the Outlaws Motorcycle Club and lived nearby. When Mr. Marasa pulled up to the front yard of Mr. Watts home, he saw Richard and John Dimarino in the front yard. Richard Dimarino was holding a wig in his hand. During a brief conversation, Richard DiMarino told Mr. Marasa that he had to get rid of a girl last night. Mr. Marasa told Richard Dimarino that he did not want to hear anymore about it and just

wanted to know if his van was used to commit any crimes. Richard Dimarino responded that his van was not used for the murder. Mr. Marasa was arrested later along with Mr. White, Mr. Smith and Mr. Dimarino for the murder of Gracie Mae Crawford. Law enforcement had seized his van and Mr. Marasa had consented to a search of the vehicle. No evidence was found in the van. Mr. Marasa was eventually released. In a statement given to law enforcement, Mr. Marasa denied having any knowledge of the murder of Gracie Mae Crawford in exercising his right to remain silent and following the "code" of the Outlaw Motorcycle Club to not inform on other members. (EH Vol. II 3-4).

There was not an absolute prohibition to second post-conviction motions at the time that Mr. White filed his original post-conviction motion in 1983. Thu,s had Mr. White not received a new penalty phase from the United State=s Supreme Court he could have filed a second post-conviction motion after completing the course of litigation to that Court. Following the United States Supreme Court=s opinion in *Hitchcock v. Dugger*, 481 U.S.1168 (1987), Mr. White received a new sentencing due to the State=s repeated denial of his constitutional rights.

This current appeal was Mr. White=s first opportunity to fully investigate through counsel, these present post-conviction claims, some of which were discovered well after Mr. White had received his last sentencing hearing. Accordingly, because the instant motion was filed within the time requirement of the current rule, Mr. White was not barred from raising claims concerning his 1978 guilt phase.

The evolution of the post-conviction rules showed that Mr. White could properly bring the claims argued in this motion under Florida Rule of Criminal Procedure 3.851. Specifically, Rule 3.851 provides in part:

> (d) Time Limitation.
> (1) Any motion to vacate judgment of conviction and sentence of death shall be filed by the prisoner within 1 year after the judgment and sentence become final. For the purposes of this rule, a judgment is final:. . .
> (A) on the expiration of the time permitted to file in the United States Supreme Court a petition for writ of certiorari seeking review of the Supreme Court of Florida decision affirming a judgment and sentence of death (90 days after the opinion becomes final)
> (B) on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed.

Fla.R.Crim.P. 3.851(d).

Mr. White filed this motion within one year of his judgment and sentence becoming final. Moreover, this motion was not a successor motion. Paragraph E subparagraph 2 defines a motion as successive Aif a state court has previously ruled on a postconviction motion challenging the same judgment and sentence.@ Considering that Mr. White=s judgment and sentence did not become final until the United States Supreme Court disposed of his certiorari petition in 2002, Mr. White was within the relevant time provisions of this Rule. The rules simply do not provide for different rules when the defendant=s guilt phase and sentencing phase occur at different times.

Mr. White=s original 3.850 motion was filed before 1984 when successor motions were addressed for the first time. Accordingly, when his attorneys filed that motion they did so with the understanding that they could later file an additional motion. The rule in effect

when Mr. White filed this motion in 1983, Rule 3.850(1977), provided:

> RULE 3.850. MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE; HEARING: APPEAL A prisoner in custody under sentence of a court established by the laws of Florida claiming the right to be released upon the ground that the judgment was entered or that the sentence was imposed in violation of the Constitution or Laws of the United States, or of the State of Florida, or that the court was without jurisdiction to enter such judgment or to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or that his plea was given involuntarily, or the judgment or sentence is otherwise subject to collateral attack, may move the court which entered the judgment or imposed the sentence to vacate, set aside or correct the judgment or sentence.A motion for such relief may be made at any time. The motion shall be under oath and include the following information:(a) The judgment or sentence under attack and the court which rendered the same;(b) Whether there was an appeal from the judgment or sentence and the disposition thereof;(c) Whether a previous post-conviction motion has been filed, and if so, how many;(d) The nature of the relief sought;(e) A brief statement of the facts (rather than conclusions) relied upon in support of the motion.The court will refuse to receive any motion filed pursuant to this rule which is not in substantial compliance with the requirements hereof.If the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief, the motion shall be denied without a hearing. In those instances when such denial is not predicated upon the legal insufficiency of the motion on its face, a copy of that portion of the files and records which conclusively shows that the prisoner is entitled to no relief shall be attached to the other. Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the prosecuting attorney of the court, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or is otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant him a new trial or correct the sentence as may appear appropriate.
> A court may entertain and determine such motion without requiring the production of the prisoner at the hearing. The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.
> An appeal may be taken to the appropriate appellate court from the order entered on the motion as from a final judgment on application for writ of habeas corpus. All

> orders denying motions for post-conviction relief shall include a statement that the movant has the right to appeal within thirty days of the rendition of the order. The prisoner may file a motion for rehearing of an order denying a motion under this rule within fifteen days of the date of service of the order. The clerk of the court shall promptly serve upon the prisoner a copy of any order denying a motion for post-conviction relief or denying a motion for rehearing noting thereon the date of service by an appropriate certificate of service.
> An application for writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this rule, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Re Florida Rules of Criminal Procedure, 343 So. 2d 1247, 1264-65 (Fla. July 1, 1977).

Nothing in this rule prohibited Mr. White from returning to post-conviction and raising new issues concerning his guilt. He could not do so however until his judgment *and* sentence were again final. This same issue was addressed by this Court recently in the case concerning Mr. Hithcock's newest 3.851 motion. In Mr. Hitchcock's case, the trial court denied his guilt phase post-conviction claims based on procedural bar because, as the court reasoned, he was entitled only to challenge his newest resentencing. This Court, in a written order dated May 3, 2005, reversed and remanded for consideration of the guilt phase issues. This Court stated it had determined that the circuit court erred in holding that guilt phase issues were procedurally barred.

> "In order for this Court to review the guilt phase issues on the merits, the jurisdiction of the above case is hereby relinquished to the circuit court for an evidentiary hearing and decision on the merits of all guilt phase claims raised by petitioner in petitioner's 3.851 motions. This includes all claims raised as to the guilt phase trial held in 1977 and all newly discovered evidence claims. In contemplation of these claims, the circuit court shall permit the parties to present additional evidence. Any additional evidence

> shall be considered together with evidence previously presented at the evidentiary hearing held in support of petitioner's claims. Based on this evidence, the circuit court shall prepare and file an order making specific findings on the merits of each guilt phase issue. In respect to petitioner's newly discovered evidence claim concerning witnesses who have come forward to testify that a third person has confessed to the crime, the circuit court shall determine and express in the order among the issues determined whether such evidence would be admissible at a new trial applying section 90.804(2)(c), Florida Statutes (statement against interest hearsay exception), and *Jones v. State*, 709 So. 2d 512 (Fla. 1998)."

Hitchcock v. State, SC03-2203 (Order dated May 3, 2005).

Mr. White's case is in the exact same procedural posture as Mr. Hitchcock's case. In fact, Mr. White and Mr. Hitchcock were tried within a short time span of each other. The trial court summarily denied Mr. White's claim of newly discovered evidence based on the exact same procedural bar used in Mr. Hitchcock's case. (EH Order at 4). The trial court continues, however, in attempting to explain that this claim would fail on the merits. (EH Order at 4-6). However, Mr. White was not given the opportunity to present this claim fully before the trial court.

This Court has long held that a postconviction defendant is "entitled to an evidentiary hearing unless 'the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief.'" *Lemon v. State*, 498 So. 2d 923 (Fla. 1986), quoting Fla. R. Crim. P. 3.850. Similarly situated capital postconviction defendants have received evidentiary hearings based on newly discovered evidence. *State v. Mills*, 788 So. 2d 249, 250 (Fla. 2001)(noting that lower court held an evidentiary hearing on allegations that co-defendant had made inculpatory statements to an individual while incarcerated); *Lightbourne v. State*,

742 So. 2d 238, 249 (Fla. 1999)(remanding for an evidentiary hearing to evaluate the reliability and veracity of trial testimony); *Melendez v. State*, 718 So. 2d 746(Fla. 1998)(noting that lower court held an evidentiary hearing on defendant's allegations that another individual had confessed to committing the crimes with which defendant was charged and convicted); *Swafford v. State*, 679 So. 2d 736, 739 (Fla. 1996)(remanding for an evidentiary hearing to determine if evidence would probably produce and acquittal); *Roberts v. State*, 678 So. 2d 1232, 1235 (Fla. 1996)(remanding for evidentiary hearing because of trial witness recanting her testimony); *Scott v. State*, 657 So. 2d 1129, 1132 (Fla. 1995)(holding that lower court erred in failing to hold an evidentiary hearing and remanding); *Johnson v. Singletary*, 647 So. 2d 106, 111 (Fla. 1994)(remanding case for limited evidentiary hearing to permit affiants to testify and allow appellant to "demonstrate the corroborating circumstances sufficient to establish the trustworthiness of [newly discovered evidence]"); *Jones v. State*, 591 So. 2d 911, 916 (Fla. 1991)(remanding for an evidentiary hearing on allegations that another individual confessed to the murder with which Jones was charged and convicted and was seen in the area close in time to the murder with a shotgun). Additionally, this Court, like the lower court must accept that Mr.White's allegations are true at this point in the proceedings. *Lightbourne v. State*, 549 So. 2d 1364, 1365 (Fla. 1989). This Court should remand the case back to the trial court so that a full and fair evidentiary hearing may be held on this matter.

ARGUMENT II

MR. WHITE WAS DENIED HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION WHEN TRIAL COUNSEL FAILED TO CALL JOSEPH WATTS AS A WITNESS.

Joseph Lee Watts was a member of the Outlaws Motorcycle Club at the time of the murder of Gracie Mae Crawford and his home was used as a gathering place for members of the Outlaws. At the time of the murder, Richard Dimarino came to the home of Mr. Watts. During this time, Mr. Watts was in the bathroom when Richard Dimarino came in and confessed to the murder of Gracie Mae Crawford. Richard Dimarino admitted to Mr. Watts that he, himself, had killed Gracie Mae Crawford. (EH Vol. II 67)

The United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 LED.2d 674 (1984), set forth the standards to be applied by courts in analyzing claims of ineffective assistance of counsel. First, the defendant must show that counsel's performance was deficient. As to the first prong of the Strickland test, "the defendant must show that counsel's representation fell below an objective standard of reasonableness" based on "prevailing professional norms." *Strickland*, 466 U.S. at 688. Under the second prong of the test, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. The Supreme Court defined "reasonable probability" as "a probability sufficient to undermine confidence in the outcome."

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 prejudiced the defendant=s case. *See Strickland v. Washington*, 466 U.S. 668 (1984). Justice O=Connor, in writing for the majority in *Wiggins,* as she did in *Strickland*, cautions this Court about how far that deference should be extended.

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

Wiggins, 123 S.Ct at2538.

There can be no rationalization as to why Mr. Kaplan would not call Mr. Watts to the witness stand in 1978. Mr. Watts is a decorated war veteran of Vietnam and would have been an excellent witness considering the era. This clearly prejudiced Mr. White because of the circumstantial evidence in the case and the fact that only Richard Dimarino puts him at the actual murder scene committing the actual murder. Further, while Mr. White has never confessed to the murder, Mr. DiMarino confessed to several individuals that he was the one who stabbed Gracie Mae Crawford *and* sliced her neck. Mr. Watts would have been able to provide this important information to Mr. White's and would have also been able to impeach Mr. DiMarino's trial testimony.

The trial court, in reviewing this claim in post-conviction, committed error by not granting an evidentiary hearing on this issue. The trial court denied the claim based on the same procedural bar as outlined in Argument I of this brief. (EH Order at 6). For the same

reasons cited in Argument I, and fully incorporated herein, this Court should remand the case back to the trial court so that a full and fair evidentiary hearing may be held on this matter.

ARGUMENT III

MR. WHITE WAS DENIED HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION WHEN RE-SENTENCING COUNSEL FAILED TO CALL JOSEPH WATTS AS A WITNESS BEFORE THE RE-SENTENCING JURY.

Trial counsel was ineffective in failing to present the testimony of Mr. Watts to the jury during his resentencing to mitigate the offense for which Mr. White was convicted. The testimony of Mr. Watts, a decorated war veteran, would have influenced the jury in considering the impact of the aggravating circumstances of the offense when considering their recommendation to the Court. (PT-Order at 1-2) In addition, it would have been useful contrast to the picture normally painted of the Outlaws Motorcycle Club. By failing to present this testimony to the jury, counsel denied Mr. White his sixth and fourteenth amendment rights to the U.S. Constitution and the corresponding provisions of the Florida constitution.

In Florida, the sentencing scheme requires that, first, the jury weighs the aggravating and mitigating factors and recommend to the court, by a majority vote, whether life or death is the appropriate sentence. Next, the court must independently consider the aggravating and mitigating circumstances and reach its decision on the appropriate penalty, giving *great weight* to the jury's advisory sentence. *Tedder v. State,* 322 So.2d 908 (Fla.1975).

In *Tedder,* the Florida Supreme Court held "[a] jury recommendation under our trifurcated death penalty statute should be given great weight" and, in order to sustain an override by the trial judge of a jury recommendation of life "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Tedder,* 322 So.2d at 910.

Under Florida's capital sentencing statute, as explained in *Bottoson v. Moore*, once a defendant has been convicted of a capital felony, the court conducts a penalty proceeding before a jury. If a majority of jurors find from the facts that *at least one* aggravating circumstance is present, i.e., a "death qualifying" aggravator, they then may decide upon death as the appropriate sentence, or six or more jurors may decide upon life imprisonment as the appropriate sentence. The jury then renders its advisory sentence to the judge, who must give it great weight.

The proper effect of the presentation of mitigation can be illustrated in *Muhammad v. State*, 782 So.2d 343 (Fla. 2001). In *Muhammad*, the appellant waived the presentation of mitigation evidence to the advisory jury. The jury recommended a sentence of death. The trial court gave great weight to the jury=s recommendation. The Supreme Court found reversed and stated:

> We do find, however, that the trial court erred when it gave great weight to the jury's recommendation in light of Muhammad's refusal to present mitigating evidence and the failure of the trial court to provide for an alternative means for the jury to be advised of available mitigating evidence. In determining whether the court erred in this case in giving the jury's recommendation great weight, we must consider the role of

> the advisory jury. Pursuant to section 921.141(2), Florida Statutes (1995), the jury's advisory sentence must be based on "[w]hether sufficient aggravating circumstances exist as enumerated in subsection (5)" and "[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist." ' 921.141(2)(a)-(b), Fla.Stat. (1995). "The jury's responsibility in the process is to make recommendations based on the circumstances of the offense and the character and background of the defendant." *Herring v. State,* 446 So.2d 1049, 1056 (Fla.1984). The failure of Muhammad to present any evidence in mitigation hindered the jury's ability to fulfill its statutory role in sentencing in any meaningful way.

Muhammad, 782 So.2d 343.

The United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 LED.2d 674 (1984), set forth the standards to be applied by courts in analyzing claims of ineffective assistance of counsel. First, the defendant must show that counsel's performance was deficient. As to the first prong of the Strickland test, "the defendant must show that counsel's representation fell below an objective standard of reasonableness" based on "prevailing professional norms." *Strickland*, 466 U.S. at 688. Under the second prong of the test, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. The Supreme Court defined "reasonable probability" as "a probability sufficient to undermine confidence in the outcome."

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

668 (1984). Justice O=Connor, in writing for the majority in *Wiggins,* as she did in *Strickland*, cautions this Court about how far that deference should be extended.

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

Wiggins, 123 S.Ct at2538.

Joseph Watts, as stated above in Argument II, would have made an excellent witness. His testimony would have negated the culpability of Mr. White=s involvement. In addition, because the HAC aggravator was used, Mr. Watts=s testimony would have directly refuted this important evidence causing prejudice. (PT Order at 2-3). As stated previously, Mr. DiMarino admitted to stabbing and slicing the neck of Gracie Mae Crawford to other people, in contrast to his original trial testimony. (GT 490-492) Several photographs of the victim were introduced during Mr. White's resentencing. These photographs would have had a profound impact on the jury.

In applying the HAC aggravator, the resentencing court referred to the fatal wounds inflicted upon the victim. (PT Order at 2-3). The un-refuted testimony regarding the HAC aggravator greatly influenced the resentencing court. (PT Order at 2-3). In addition, the jury's recommendation of death, likewise was given great weight by the resentencing court. (PT Order at 10).

The post-conviction court committed error by summarily denying this claim. (EH Order at 6-8). In reviewing the merits of the claim, the court committed additional error by stating

the wrong standard of review for ineffective assistance of counsel claims in penalty phase. The court, in its order, states that "it is unlikely that the testimony would have resulted in a recommendation of life by the penalty phase jury." (EH Order at 7). This statement of the prejudice prong of *Strickland* is inexact. First, the correct standard is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the *result of the proceeding would have been different*." *Strickland*, 466 U.S., at 694 (emphasis added). Because of Florida's unique sentencing scheme, which does not require a unanimous jury recommendation, a vote of six jurors would have resulted in a different outcome. The court, by implication, is requiring a vote of seven jurors for life. Further, a defendant does not actually have to show that the outcome would have had to be different. This incomplete statement of the prejudice prong under *Strickland* elevates it to the higher standard required for newly discovered evidence. Instead, a reasonable probability of a different result is one that is "sufficient to undermine confidence in the outcome" actually reached at sentencing, *Strickland*, 466 U.S., at 694, 104 S.Ct. 2052.

Finally, the trial court abused it discretion by stating in its order that the testimony of Mr. Watts would not have been credible. (EH Order at 7-8). First, the court states, incorrectly, that the testimony would have been cumulative. This statement contradicts the court's credibility finding because if it is indeed "cumulative", the evidence would have actually been corroborated. Second, the court finds that the testimony of Mr. Watts would not have been credible because "DiMarino's motivation for telling him that he killed Gracie Mae Crawford

was to brag." (EH Order at 7). This is not a valid reason for finding the testimony not credible. Unfortunately, many such statements made against interests are made for the sole purpose to "brag" about committing a homicide. The trial court in its order cites to no other reason for discounting this credible and weighty testimony. This Court should remand the case back to the trial court to conduct a full and fair evidentiary hearing on this issue.

ARGUMENT IV

MR. WHITE WAS DENIED HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION WHEN RE-SENTENCING COUNSEL FAILED TO CALL JOHN DIMARINO AS A WITNESS.

John DiMarino is the brother of Richard DiMarino, the real killer. Richard DiMarino admitted to his brother John that he killed Gracie Mae Crawford. More importantly, however, he admitted to stabbing her *and* slicing her neck. This evidence is very important because Richard Dimarino claims in his trial testimony that only Mr. White stabbed the victim. (GT 490-492). The testimony introduced by the state indicates that the stabbing wounds were inflicted in a manner that would have caused death and that the slicing of the victim's neck, done after, was not necessary to kill Ms. Crawford. (GT 249).

Taken as true, this testimony is powerful impeachment against Richard DiMarino. For years, Mr. White has languished for a crime that was committed by Richard DiMarino. In the original opinion denying relief, this Court relied upon the testimony of Richard DiMarino who would have been the only person to recount the events.

> White then straddled her, took out his knife, stabbed her fourteen times and slit her throat. He handed the knife to DiMarino who also cut her throat. Crawford died as a result of the wounds inflicted upon her.

*White v. Stat*e, 415 So.2d 719 (Fla. 1982).

In each of this Court's subsequent opinions, reliance upon the testimony of Richard DiMarino has been the loadstone of the conviction. While it may be argued that such testimony constitutes inadmissible evidence of "residual doubt", John DiMarino's testimony would have negated the HAC aggravator and provided a basis for relief under a proportionality review. For example, this Court in White III used the testimony of Richard DiMarino to uphold the sentence of death against a proportionality claim.

> White's fourth claim is that his death sentence is disproportionate. Specifically, White first argues that his death sentence is impermissibly disparate from the fifteen-year sentence received by his codefendant DiMarino, who White contends instigated the beating of the victim, escorted her to a deserted area, and slit her throat with the intent to kill her. White's second proportionality subclaim is that his death sentence is disproportionate to other cases in which the death penalty was not imposed. We first address the alleged disproportionate treatment of DiMarino. "When a codefendant is equally as culpable or more culpable than the defendant, the disparate treatment of the codefendant may render the defendant's punishment disproportionate." *Sexton v. State*, 775 So.2d 923, 935 (Fla.2000). If the defendant, however, is the more culpable participant in the crime, disparate treatment of the codefendant is justified. *See id.* "A trial court's determination concerning the relative culpability of the co-perpetrators in a first-degree murder case is a finding of fact and will be sustained on review if supported by competent substantial evidence." *Puccio v. State*, 701 So.2d 858, 860 (Fla.1997).In its sentencing order, the trial court carefully considered and rejected White's argument that DiMarino was equally culpable for this murder:
>
> > Defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor. Defendant argues that because there was evidence that he was not a leader and that he may have been easily influenced by others, it follows that on the night of the homicide he was following the lead of others, particularly DiMarino. Even if this were true (and the Court finds no evidence to support Defendant's argument), the Court

> cannot conclude those facts establish that Defendant's participation was relatively minor. In fact, quite the contrary is true. The evidence clearly establishes that Defendant delivered the fatal stab wounds to the victim's body, and handed the knife to DiMarino to slit her throat. Further, an employee from Sea World testified that he observed no blood on DiMarino, yet noticed what appeared to be a spot of blood on Defendant's forearm. Therefore, the Court rejects the existence of this mitigating circumstance.....
>
> Sentences of co-defendants to life or a lesser term of imprisonment.
>
> In denying Defendant's Petition for Writ of Habeas Corpus, the Florida Supreme Court rejected the issue of disproportionate treatment of DiMarino, stating:
>
> White's co-perpetrator, Richard DiMarino, was convicted of only third-degree murder. In White's original appeal we noted this fact and stated: "While this is fortunate for him [DiMarino], it does not require the reduction of White's sentence." The two juries found different culpabilities. It is permissible to impose different sentences on capital co-defendants where their various degrees of participation and culpability are different from one another. (citations omitted).
>
> The Court finds that the lesser sentence of DiMarino is not a mitigating circumstance. Co-defendant Guy Ennis Smith was convicted of first degree murder and was sentenced to life imprisonment. As quoted above, the Florida Supreme Court stated that capital co-defendants may receive different sentences based on their varying degrees of participation and culpability. The evidence clearly established that it was Defendant, not Smith, who repeatedly stabbed Crawford, causing her death. Therefore, the Court finds that the life sentence of Smith is not a mitigating circumstance.

State v. White, order at 5, 9. The testimony from DiMarino, the Sea World employees, and the medical examiner constitute competent, substantial evidence to support the trial court's findings. *See Sexton*, 775 So.2d at 935-36; *Howell v. State*, 707 So.2d 674, 682-83 (Fla.1998) (rejecting claim of disparate sentencing where codefendant pled to second-degree murder and received sentence of forty years); *Cardona v. State*, 641 So.2d 361, 365 (Fla.1994) (rejecting claim of disparate sentencing where codefendant pled guilty to second-degree murder and testified against defendant); *Cook v. State*, 581 So.2d 141, 143 (Fla.1991) (rejecting claim of disparate sentencing where codefendants pled guilty to second-degree murder and received sentences of twenty-three and twenty-four years); *Hayes v. State*, 581 So.2d 121, 127 (Fla.1991) (rejecting claim of disparate sentencing where codefendant pled guilty to second-degree murder and testified against defendant); *Brown v. State*, 473 So.2d 1260, 1268 (Fla.1985) (rejecting claim of disparate sentencing where

> codefendant pled guilty to second-degree murder). We find no error in the trial court's ruling on this issue.

White v. State, 817 So.2d 799 (Fla. 2002).

Counsel=s failure to call John Dimarino was clearly ineffective. As stated *supra*, the state relied upon the HAC aggravator, using the stabbing as the basis. According to Richard Dimarino, Mr. White stabbed the victim. However, according to his own brother, a witness who has nothing to gain from his testimony, Richard Dimarino was the cause of the HAC aggravator. This clearly prejudicial aggravator would have been refuted by the testimony of Richard DiMarino. Further, this reliable evidence, corroborated by the testimony of Joseph Watts and now Frank Marasa, would have shown that Mr. White's sentence was disproportionate.

The trial court erred when it summarily denied this claim without giving counsel an opportunity to develop John DiMarino's whereabouts during the resentencing. John DiMarino was listed as a witness by current counsel for the post-conviction evidentiary hearing. His testimony could have provided important evidence to this Court regarding his availability at the time of the 1999 resentencing. Further, had the court held an evidentiary hearing on this issue, counsel would have been able to develop evidence through cross-examination regarding the quality of trial counsel's investigation. In its order denying post-conviction relief, the Court relied upon the unchallenged testimony from the resentencing as the only reason for denying this claim. (PT Order at 8). This Court should remand Mr. White's case back to the trial court so a full and fair evidentiary hearing may be held on this

claim.

ARGUMENT V

MR. WHITE=S FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISION OF THE FLORIDA CONSTITUTION WERE VIOLATED WHEN THE STATE USED A PRIOR CONVICTION FROM TENNESSEE AS AN AGGRAVATING CIRCUMSTANCE IN SUPPORT OF MR. WHITE=S DEATH SENTENCE. MR. WHITE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO PROPERLY CHALLENGE MR. WHITE=S PRIOR CONVICTION FROM TENNESSEE OR PRESENT TESTIMONY TO THE JURY THAT WOULD HAVE MITIGATED THE OFFENSE FOR WHICH MR. WHITE WAS CONVICTED.

On March 4, 1980, Mr. White was convicted for the 1978 murder of Jim Valentino in Memphis Tennessee. Prior to the continuation of jury selection on March 4, 1980, Mr. White and the co-defendant, Michael Markham entered guilty pleas to second degree murder. Mr. White was sentenced to 30 years incarceration to run concurrent with his Florida sentence and Mr. Markham received a sentence of 20 years incarceration. Each defendant was credited for time served.

The selected references establish the plea colloquy that transpired on the record in Nashville, Tennessee, and were also read in its entirety into the record. (PT 614-637).

The sentencing record indicates Mr. White did not make a knowing, intelligent, and voluntary waiver of his Fifth, Sixth, and Fourteenth Amendment rights to the United States Constitution and the corresponding provisions of the Florida Constitution. Additionally, the State failed to establish a factual basis supporting Mr. Whites= plea. Mr. White=s resentencing

counsel was ineffective for failing to properly challenge the constitutionality of Mr. Whites= plea and/or present testimony to the jury that would have mitigated the offense for which Mr. White was convicted in Tennessee.

Trial by jury is a fundamental right for a criminal defendant. *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Floyd v. State*, 90 So. 2d 105, 106 (Fla. 1956). To waive any right guaranteed by the United States Constitution the defendant must be able to make a "knowing and intelligent" waiver of these rights. *Johnson v. Zerbst*, 304 U.S. 458 (1938), *Floyd v. State*, 90 So. 2d 105 (Fla. 1956).

The determination of whether there has been an intelligent waiver of a constitutional right. . . "must depend in each case, upon the **particular facts and circumstances surrounding that case",** *Johnson* 304 U.S. at 464 (1938) (emphasis added).

Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 1712 (1969) citing, *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653. Second, is the right to trial by jury. *Boykin*, at 1712 *citing*, *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491. Third, is the right to confront one's accusers. *Boykin* at 1712 *citing, Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923. A waiver of these three important federal rights cannot be assumed from a silent record. *See also*, *McCarthy v. United States*,

394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418. In challenging the constitutionality of Mr. White=s plea, trial counsel failed to challenge that there was valid waiver of Mr. White=s Fifth Amendment rights against self incrimination when he entered a guilty plea to the Court in Tennessee. The record is clear that Mr. White was not advised by either the Court or counsel during those proceedings that he would be waiving his privilege against self incrimination in these proceedings and in any future proceedings. Thus absent a clear showing that Mr. White made a knowing and intelligent waiver, Counsel should have challenged the constitutionality and submission of this conviction as an aggravating circumstance. Failure to do so by counsel denied Mr. White his Fourth, Fifth, Sixth, and Fourteenth Amendment rights to the U.S. Constitution.

Trial counsel also rendered ineffective assistance of counsel in failing to move to suppress the conviction based upon the trial court=s plea colloquy. It is only through this plea colloquy that the Court can make a factual determination of the knowing, intelligence, and voluntariness of the plea. In Mr. White=s case, there is no clear showing that the Court conducted a sufficient plea colloquy to determine the knowing, intelligence, and voluntary requirements of Mr. White=s guilty plea. The record is clear that the Court did not inquire into Mr. White=s background, his mental status, his education, his experience in the criminal justice experience, his understanding of the crime for which he was charged, his understanding of the role of the jury and the trial proceedings, his understanding of the maximum sentence that he could face if convicted, his understanding that this conviction

could be used to enhance any future sentences for crimes, his understanding of any waivers of appellate rights by entering his plea, or inquiry into whether he had been threatened, pressured, or intimidated in any manner in which to get him to enter into his plea. The failure of the Court in conducting an adequate plea colloquy established a basis for counsel in attacking the constitutionality of Mr. White=s plea. Therefore, failure of counsel to move to suppress this Tennessee conviction violated Mr. White=s sixth, fourth, and fourteenth amendment rights to the U.S. Constitution and the corresponding provisions of the Florida Constitution.

Trial Counsel was also ineffective in failing to move to suppress Mr. White=s plea based upon the voluntariness of Mr. White=s plea. The State indicated on the record that Mr. White and Mr. Markham=s **pleas were contingent upon each other**. This statement proves that for Mr. Markham to plead guilty, he would have to rely on Mr. White=s plea of guilt to the charges as well. The failure of the trial court in inquiring into any pressure, threat, or intimidation by Mr. Markham to Mr. White for him to plead guilty also undermines the constitutionality of Mr. White=s guilty plea. Absent any refutation on the record, this statement alone would indicate that there was pressure on Mr. White to plead guilty to the crime charged. The Court=s failure to inquire into the pressures that may have influenced and impacted Mr. White=s decision to plea guilty undermines the voluntariness of Mr. White=s plea. Failure of counsel to challenge the Tennessee conviction based upon voluntariness denied Mr. White his Fourth, Fifth, Sixth, and Fourteenth Amendment rights to the U.S.

Constitution and the corresponding provisions of the Florida constitution.

Trial counsel was also ineffective in failing to move to suppress the Tennessee conviction based upon the factual basis that the court relied upon in accepting the plea. The plea colloquy shows that the factual basis supporting the plea was based entirely on circumstantial evidence. The only testimony presented against Mr. White was that he was seen at an apartment with the victim and the victim was in the back room yelling. This alleged event occurred late evening on the 18th or the early morning hour of the 19th. However, after this incident, the record would indicate that the victim had contact with his neighbor between the hours of 1:30 am and 2:00 am on the morning of the 19th and there was no indication that the victim was under strain or pressure during this contact. There was no physical evidence, testimony from eye witnesses, or confessions, other than Mr. White=s guilty plea, that would corroborate the testimony of this unidentified person or establish that Mr. White was involved in the death of Mr. Valentino. Before any confession or admission of criminal guilt is admissible into evidence, the State must first prove the *corpus delicti* of the crime by independent *prima facie* evidence, which the State failed to do. In addition, the State failed to state that the death of Mr. Valentino was effected by or under the direction or in conformity of Mr. White. The failure of counsel in failing to move to suppress this Tennessee conviction because it lacked the necessary factual basis to support a plea, absent Mr. White=s admission in pleading guilty, denied Mr. White his fourth, sixth, and fourteenth amendment rights to the U.S. Constitution and the corresponding provisions of the Florida

constitution.

Trial counsel was ineffective in failing to present the testimony of Mr. Markham to the jury to mitigate the offense for which Mr. White was convicted. The testimony that Mr. Markham would have provided would have impacted the jury in considering this aggravating circumstance when considering their recommendation to the Court. By failing to present this testimony to the jury denied Mr. White his sixth and fourteenth amendment rights to th U.S. Constitution and the corresponding provisions of the Florida constitution.

In Florida, the sentencing scheme requires that, first, the jury weighs the aggravating and mitigating factors and recommend to the court, by a majority vote, whether life or death is the appropriate sentence. Next, the court must independently consider the aggravating and mitigating circumstances and reach its decision on the appropriate penalty, giving *great weight* to the jury's advisory sentence. *Tedder v. State,* 322 So.2d 908 (Fla.1975).

In *Tedder,* the Florida Supreme Court held "[a] jury recommendation under our trifurcated death penalty statute should be given great weight" and, in order to sustain an override by the trial judge of a jury recommendation of life "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Tedder,* 322 So.2d at 910.

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circumstance is present, i.e., a "death qualifying" aggravator, they then may decide upon death as the appropriate sentence, or six or more jurors may decide upon life imprisonment as the appropriate sentence. The jury then renders its advisory sentence to the judge, who must give it great weight.

The proper effect of the presentation of mitigation can be illustrated in *Muhammad v. State*, 782 So.2d 343 (Fla. 2001). In *Muhammad*, the appellant waived the presentation of mitigation evidence to the advisory jury. The jury recommended a sentence of death. The trial court gave great weight to the jury=s recommendation. The Supreme Court found reversed and stated:

> We do find, however, that the trial court erred when it gave great weight to the jury's recommendation in light of Muhammad's refusal to present mitigating evidence and the failure of the trial court to provide for an alternative means for the jury to be advised of available mitigating evidence. In determining whether the court erred in this case in giving the jury's recommendation great weight, we must consider the role of the advisory jury. Pursuant to section 921.141(2), Florida Statutes (1995), the jury's advisory sentence must be based on "[w]hether sufficient aggravating circumstances exist as enumerated in subsection (5)" and "[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist." ' 921.141(2)(a)-(b), Fla.Stat. (1995). "The jury's responsibility in the process is to make recommendations based on the circumstances of the offense and the character and background of the defendant." *Herring v. State,* 446 So.2d 1049, 1056 (Fla.1984). The failure of Muhammad to present any evidence in mitigation hindered the jury's ability to fulfill its statutory role in sentencing in any meaningful way.

Muhammad, 782 So.2d 343.

In the instant case, it is clear from the sentencing order by the Court that the testimony of Mr. Markham was rejected:

> At the November, 1999 penalty phase hearing, the transcript of the Davidson County,

> Tennessee proceeding wherein Defendant, under oath, admitted to, and was convicted of the second degree murder of Jim Valentino in case number C4214, was entered into evidence.
> This aggravating factor has been proven beyond all reasonable doubt.

(PT Order at 2)

No mention is made at all regarding the testimony of Mr. Markham. Mr. Markham=s *Spencer* hearing testimony, however, did shed light on the actual facts of the Tennessee murder. This testimony, which was not rebutted by the state, clearly shows that Mr. White was not a participant in the murder.[1]

The Court=s use of the plea transcript alone magnifies the ineffectiveness claim contained herein for the plea, as argued above, was constitutionally infirm. Mr. White did not waive his Fifth Amendment right so the testimony is inadmissable. Without that testimony, Mr. Markham=s testimony would have been the only testimony available.

The mere evidence of the plea, in itself, would not be enough for the aggravator for the law does not allow for automatic aggravators. Testimony from Mr. Markham before the jury would have lessened the evidentiary value of the plea testimony. Further, defense counsel should have highlighted the evidence that one plea was contingent on the other. This would have corroborated Mr. Markham=s testimony in the eyes of the jury. Trial courts have found that the willfulness of a prior murder can be a mitigating factor in addition to

[1] The facts, at most, show that he may have been guilty perhaps of an accessory after the fact offense.

disproving an aggravator. *Green v. State*, 688 So.2d 301 (Fla. 1997).

The United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 LED.2d 674 (1984), set forth the standards to be applied by courts in analyzing claims of ineffective assistance of counsel. First, the defendant must show that counsel's performance was deficient. As to the first prong of the Strickland test, "the defendant must show that counsel's representation fell below an objective standard of reasonableness" based on "prevailing professional norms." *Strickland*, 466 U.S. at 688. Under the second prong of the test, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The Supreme Court defined "reasonable probability" as "a probability sufficient to undermine confidence in the outcome."

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

Wiggins, 123 S.Ct at2538.

Wiggins is not new law nor is it a new concept. Rather, *Wiggins* instructs this Court to look at the prevailing norms at the time of the trial to establish whether counsel was ineffective. In 1999, 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.

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

Further, guideline 11.8.5 admonishes the capital trial attorney to fully investigate impermissible or improper evidence:

> GUIDELINE 11.8.5 THE PROSECUTOR=S CASE AT THE SENTENCING PHASE.
> A. Counsel should attempt to determine at the earliest possible tine what aggravating factors the prosecution will rely on in seeking the death penalty and what evidence will be offered in support thereof (Guideline 11.3). If the jurisdiction has rules regarding notification of these factors, counsel should object to any non-compliance, and if such rules are inadequate, should consider challenging the adequacy of the rules.
> B. If counsel determines that the prosecutor plans to rely on or offer arguably improper, inaccurate or misleading evidence in support of the request for the death penalty, counsel should consider appropriate pretrial or trial strategies in response.

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

More recently, the United States Supreme Court reiterated the *Wiggins* standard for determining deficient performance. In *Rompilla v. Beard*, 125 S.Ct. 2456 (2005), a federal habeas petitioner challenged a Pennsylvania state court ruling denying his penalty phase ineffective assistance of counsel claim. At trial, the state relied upon a prior conviction for

use as an aggravator. Defense counsel failed to adequately investigate and challenge the prior conviction. The Court held that such a failure violated the petitioner's Sixth Amendment Right.

In holding that Rompilla's counsel did not satisfy the Sixth Amendment's guarantee of counsel, the Supreme Court analyzed each prong under *Strickland*. Addressing the performance prong, the Court stated

> There is an obvious reason that the failure to examine Rompilla's prior conviction file fell below the level of reasonable performance. Counsel knew that the Commonwealth intended to seek the death penalty by proving Rompilla had a significant history of felony convictions indicating the use or threat of violence, an aggravator under state law. Counsel further knew that the Commonwealth would attempt to establish this history by proving Rompilla's prior conviction for rape and assault, and would emphasize his violent character by introducing a transcript of the rape victim's testimony given in that earlier trial.

Rompilla, at 2464.

The Court continued with this line of reasoning:

> With every effort to view the facts as a defense lawyer would have done at the time, it is difficult to see how counsel could have failed to realize that without examining the readily available file they were seriously compromising their opportunity to respond to a case for aggravation. The prosecution was going to use the dramatic facts of a similar prior offense, and Rompilla's counsel had a duty to make all reasonable efforts to learn what they could about the offense. Reasonable efforts certainly included obtaining the Commonwealth's own readily available file on the prior conviction to learn what the Commonwealth knew about the crime, to discover any mitigating evidence the Commonwealth would downplay and to anticipate the details of the aggravating evidence the Commonwealth would emphasize.FN4 Without making reasonable efforts to review the file, defense counsel could have had no hope of knowing whether the prosecution was quoting selectively from the transcript, or whether there were circumstances extenuating the behavior described by the victim. The obligation to get the file was particularly pressing here owing to the similarity of the violent prior offense to the crime charged and Rompilla's sentencing strategy

> stressing residual doubt. Without making efforts to learn the details and rebut the relevance of the earlier crime, a convincing argument for residual doubt was certainly beyond any hope.

Id. at 2465.

Equally instructive to this current analysis is the response to one of the state's arguments that introduction of the transcript in question would have been more harmful to the defense. This common argument, utilized by defense counsel in the instant case, is addressed by the Court in footnote 5 of the opinion.

> This requirement answers the dissent's and the United States's contention that defense counsel provided effective assistance with regard to the prior conviction file because it argued that it would be prejudicial to allow the introduction of the transcript. Post, at 2476; Brief for United States as Amicus Curiae 29. ***Counsel's obligation to rebut aggravating evidence extended beyond arguing it ought to be kept out.*** As noted above, *supra*, this page, counsel had no way of knowing the context of the transcript and the details of the prior conviction without looking at the file as a whole. Counsel could not effectively rebut the aggravation case or build their own case in mitigation. Nor is there any merit to the United States's contention that further enquiry into the prior conviction file would have been fruitless because the sole reason the transcript was being introduced was to establish the aggravator that Rompilla had committed prior violent felonies. Brief for United States as Amicus Curiae 30. ***The Government maintains that because the transcript would incontrovertibly establish the fact that Rompilla had committed a violent felony, the defense could not have expected to rebut that aggravator through further investigation of the file. That analysis ignores the fact that the sentencing jury was required to weigh aggravating factors against mitigating factors. We may reasonably assume that the jury could give more relative weight to a prior violent felony aggravator where defense counsel missed an opportunity to argue that circumstances of the prior conviction were less damning than the prosecution's characterization of the conviction would suggest.***

Id. at 2465 fn.5.

It is clear from the record of the colloquy that was introduced at the re-sentencing hearing that Mr. White=s plea was constitutionally infirm. Although a *prima facie* case could possibly

be made from the plea itself, no attempt was ever made to collaterally attack the plea or have the evidence suppressed. The above referenced ABA Guidelines, at force at the time of Mr. White=s re-sentencing, clearly indicate that every aspect of the aggravator must be investigated and challenged. The attorney for Mr. Markham, James Havron, was not fully questioned about the plea and his deposition was not even taken until **after** the *Spencer* hearing was conducted, where Mr. Markham testified.[2]

During the evidentiary hearing, Mr. White's resentencing counsel testified as to a portion of this claim. Mr. Chan Muller testified that at the time of Mr. White's resentencing, he was aware of the Tennessee conviction and knew that the state would use it as an aggravator. (EH-ROA Vol. II 113). He also testified that factually, it was a problematic or "bad" aggravator. (EH-ROA Vol. II 115-116). Mr. Muller had the information on the Tennessee conviction (EH-ROA Vol. II 119) and had listed Mr. Markham as a witness. (EH-ROA Vol. II 120, 123). Mr. Muller had sent an investigator to Tennessee to interview Mr. Markham. In that interview, Mr. Markham takes full responsibility for the crime. (EH-ROA Vol. II 124). In addition, Mr. Markham also conveyed information regarding the voluntary nature of Mr. White's Tennessee plea. (EH-ROA Vol. II 133). Mr. Muller was aware of this information before he listed Mr. Markham as a witness. (EH-ROA Vol. II 124). Mr. Muller,

[2] Mr. Havron=s deposition was taken March 14, 2000. This is some two months after the *Spencer* hearing and five months after the resentencing hearing before the jury.(EH-ROA Vol. I 168)

based on the information provided by Mr. Markham, had him flown to Florida for the resentencing. (EH-ROA Vol. II 131). Mr. Muller would have presented Mr. Markham in front of the jury also to show that Mr. White was a “follower” in the Tennessee case, consistent with the argument he made that Mr. White was a “follower” in the Florida case. (EH-ROA Vol. II 134).

Mr. Markham was a useful and credible witness for the defense because Mr. Muller chose to put him on at the *Spencer* hearing. (EH-ROA Vol. II 142). The only reason why Mr. Muller chose not to put Mr. Markham on in front of the jury was because he wanted to focus on Mr. White’s life circumstances and did not want to present this aspect of his past. (EH-ROA Vol. II 140-43). There was no other reason (*see* EH-ROA Vol. II 142). Mr. Muller chose to not put Mr. Markham in front of the jury even though he was aware of his duty to mitigate the aggravator presented by the Tennessee conviction. (EH-ROA Vol. II 141-42).

Counsel’s performance was deficient in this regards. Arguably, this case is more egregious than the one presented in Rompilla because Mr. Muller did investigate the Tennessee murder, listed Mr. Markham as a witness and had him flown down to Florida in anticipation of his testimony. Mr. Muller’s sole reason for not putting Mr. Markham on in front of the jury is almost identical to the reason proffered by the state in Rompilla. Counsel=s deficient performance prejudiced Mr. White. Mr. White=s prior conviction for second degree murder was found to exist beyond a reasonable doubt and was used as one of

four aggravators to sentence him to death. (PT Order at 1-2).

Further, a proper understanding of Florida's unique sentencing scheme under *Tedder* illustrates the further prejudice caused by not attacking this aggravator. In weighing the evidence for or against death, the sentencing judge must give great weight to the jury recommendation. What the jury heard regarding the Tennessee conviction was that Mr. White committed a prior murder and the means to commit the murder (stabbing) was the same way Ms. Crawford was killed (stabbing). This evidence would have had a substantial influence on the jury. (EH-ROA Vol. II 115-17).

In its sentencing order, the Court states AThe Court has also considered the jury=s advisory sentence of death. After hearing all the additional mitigating evidence that the first jury did not hear, this jury recommended death 10 to 2.@ This is an incorrect statement of the facts as proffered above. The second jury was denied the right to hear all of the evidence when the testimony of Mr. Markham was not proffered. The jury did not get to decide whether Mr. White=s prior conviction was a valid conviction because no evidence was offered. As a result, weight and consideration was given to a jury verdict that was incomplete.

ARGUMENT VI

THE STATE OFFERED TESTIMONY IN VIOLATION OF *BRADY* AND *GIGLIO* AT THE GUILT PHASE OF MR. WHITE=S ORIGINAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS WHEN IT INTRODUCED UNDISCLOSED AND PERJURED TESTIMONY FROM THE CO-DEFENDANT RICHARD DIMARINO THAT MATERIALLY AFFECTED THE OUTCOME OF MR. WHITE=S CASE.

Richard DiMarino was indicted for the murder of Gracie Mae Crawford along with William White and Guy Ennis Smith. Richard DiMarino went to trial and was convicted of a lesser charge. Consistent with his past conduct, Richard Dimarino agreed to testify against William White and Guy Ennis Smith shortly after his conviction in order to receive a benefit from the state. The reasons for his decision to testify were not fully disclosed to Mr. White=s defense counsel as required by *Brady v. Maryland,* 373 U.S. 83 (1963).

During Mr. White=s trial, the state asked Richard DiMarino a series of questions regarding any consideration given in exchange for his testimony:

Mr. Hart: Mr. DiMarino, you have already been tried and convicted for your part in the slaying of Gracie Mae Crawford, is that correct?
Richard Dimarino: Yes.
Q. And, you have been sentenced to that?
A. Yes, I have.
Q. Have you given a statement, after your trial and conviction?
A. Yes, I have.
Q. Was the statement taped?
A. Yes.
Q. Was the statement given in the presence of your attorney?
A. Yes.
Q. Who is your attorney?
A. Marc Lubet.
Q. Present here in Court today?
A. Yes, he is.
Q. At the time you gave your statement, was he present when that statement was given?
A. Yes.
Q. And was this statement later reduced to writing?
A. Yes.
Q. Did you see a copy of that statement?
A. Yes.
Q. Have you had an opportunity to read it over and examine it?

A. Yes.
Q. Does the written statement accurately reflect your taped statement?
A. Yes.
Q. After your trial and your conviction, and your sentence, did anyone at any time threaten or coerce or promise you anything in order for you to makeB?
Mr. Kaplan: (Interposing) Judge, may I make an objection?
The Court: Yes, sir, I=ll overrule the objection.
The Witness: Yes and no.
Q. Well, will you tell the Jury exactly what you mean?
A. ***I was offered to be sent somewhere else, away from the Outlaws. And, immunity or safe keeping for my fiancé and little boy.*** (GT. 1281-83)

After an objection by defense counsel, the state continued its direct examination of Richard DiMarino. It is clear from this continuation that the state attorney, Mr. Hart, knew that Mr. DiMarino was being untruthful as evidenced by his repeated attempts to clarify his answer.

Mr. Hart: Now, Mr. DiMarino was there anything else that you wanted to tell the Jury about the statement?
A. You mean, start from the beginning of the statement?
Q. I mean, about anything other than what you have already said, fact that you would be sent somewhere else to serve time?
A. Other than the two charges against me were to run concurrent with my fifteen years.
Q. Were those chargesBdid you go to trial on those charges?
A. No.
Q. Were you sentenced on those charges?
A. Yes.
Q. What were you sentenced on those charges?
A. Five years on each one to run concurrent with my fifteen years.
Q. Other than that, was there anything else that was discussed?
A. No.
(GT 1283-84)

During cross examination, Richard DiMarino reiterated, after some time, those same conditions:

Q. No other promises?
A. Well, that I would be shipped out of state.
Q. Take care of your little boy and your old lady, you are going to be shipped out of state; what other promises were made?
A. Time to be run concurrent.
(GT 1335)

Nowhere else does the state or Richard DiMarino offer any testimony that is different from the testimony cited above. This testimony remained uncorrected by the state in violation of *Giglio v. United States*, 405 U.S. 150 (1972).

In October of 1983, Mr. White filed his original Motion To Vacate Judgement and Sentence under Fl.R.Crim.P. 3.850. In it, Mr. White alleged that other benefits were given to Richard DiMarino in exchange for his testimony which were not revealed to his attorney. In the order denying relief, the trial court applied the materiality prong of the *Giglio* standard relying on prior precedent of the Florida Supreme Court as guidance.

This Court, affirmed the trial court's order regarding the *Brady/Giglio* claim. *White v. State*, 729 So.2d 909 (1999). Its is abundantly clear that this articulation of the two standards in *Brady* and *Giglio* were conflated. The correct standards have been clearly established by the United States Supreme Court and the lower federal courts for quite some time. A correct elucidation of the standards, and their differences, can be found in the Eleventh Circuit's decision in *United States v. Alzate*, 47 F.3d 1103 (11th Cir.1995).

> Because of the undisputed facts and the government's concessions in light of those facts, this case comes down to the matter of materiality. Where there has been a suppression of favorable evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the nondisclosed evidence is material: "if there is

> a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985). **A different and more defense-friendly standard of materiality applies where the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony. Where either of those events has happened, the falsehood is deemed to be material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."** *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976) (emphasis added); *accord Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972); *Napue v. Illinois*, 360 U.S. 264, 271, 79 S.Ct. 1173, 1178, 3 L.Ed.2d 1217 (1959). As the Supreme Court has held, this standard of materiality is equivalent to the *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967), "harmless beyond a reasonable doubt" standard. *Bagley*, 473 U.S. at 679 n. 9, 105 S.Ct. at 3382 n. 9.

Alzate, 47 F.3d at 1109-10(emphasis added).

It is clear in Mr. White's case that the factual prongs of both the *Brady* and *Giglio* claims have been adjudicated in his favor. *See White*, 729 So.2d at 913. The only question remaining is whether the violations were material under *Brady* or *Giglio.* This Court when it affirmed the trial courts order denying relief in Mr. White's case conflated the *Brady/Giglio* standards when it discussed the issue of Mr. DiMarino's testimony. In *White II*, this Court stated

> In this claim, appellant contends that the State failed to disclose all the essential details of the deal with DiMarino, the State's chief witness, in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and then in violation of *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), allowed DiMarino to testify falsely when he omitted several aspects of the agreement.
> We address each claim seriatim. At trial, the State presented the testimony of DiMarino. By this time, DiMarino had been convicted of third-degree murder and other felonies in connection with this crime and sentenced to concurrent terms of fifteen years' imprisonment. DiMarino testified that it was appellant who stabbed Ms.

Crawford fourteen times and slit her throat. On cross-examination, DiMarino testified that in exchange for his testimony the State promised protection from the Outlaws gang and that sentences on pending charges would run concurrently with his sentence on Crawford's murder. Appellant now claims that the State failed to disclose: (1) a written memorandum in which the State agreed not to seek enhanced punishment although DiMarino qualified as a habitual offender and to drop other charges; and (2) a $1,000 payment to DiMarino's wife. Appellant claims that the failure to provide this information, which would have been used to impeach DiMarino, resulted in prejudice. We disagree.

The trial court's order denying relief on this issue focused on the materiality of the evidence. To demonstrate materiality, **the defendant must establish** a reasonable probability that the outcome of the case would have been different. *See Kyles v. Whitley*, 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (*citing United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). In analyzing this issue the court explained that courts must focus on whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. *Id.* at 435, 115 S.Ct. 1555. The trial court below concluded that this additional information was not material.

> [D]efense counsel conducted an excellent cross-examination of DiMarino. [Appellant's] attorney showed the jury that DiMarino had much to gain by his testimony. Defense counsel brought out that DiMarino lied when it was to his benefit, that he obtained a better sentencing deal via his testimony, that he would be kept safe from the Outlaws and that his girlfriend and child would be taken care of. Even though some of the details of the agreement were not presented to the jury, counsel more than sufficiently acquainted the jury with the fact that there was an agreement between DiMarino and the State and counsel introduced most of the agreement's major components. The additional material of which [appellant] now complains would not have added to DiMarino's impeachment. Consequently, this court finds there is no reasonable probability that this evidence, if it had been presented at trial, would have changed the outcome.

Order at 7-8. We agree with the trial court's analysis of this issue and, after reviewing the entire trial record, find that the cumulative effect of the State's failure to disclose the memorandum does not undermine our confidence in the jury's conviction. For this same reason, we do not find any error under *Giglio*. *See Craig v. State*, 685 So.2d 1224, 1226 (Fla.1996). Therefore, we affirm the trial court's order with respect to this issue.

White, 729 So.2d at 9113 (emphasis added).

While this Court did identify the correct case for the *Giglio* claim, it erred by not correctly identifying and applying the correct *Giglio* standard. This error is not one where an injudicious use of language, the difference between "probability" and "likelihood", was involved. Rather, it is an egregious error that structurally changes the application of *Giglio* to such claims.

This Court's historical use of the Giglio standard has been erroneously stated and applied at least since its use in *Routly v. State*, 590 So.2d 397 (Fla. 1992). On three separate occasions in *Routly* this Court incorrectly stated the *Giglio* materiality standard as a "reasonable probability". *Routly*, 590 So.2d at 400, 401. In that decision, however, it did not delve too far into a *Giglio* materiality analysis, finding that the testimony complained of was not false. *Id*. at 400. That same year this Court again used the incorrect "reasonable probability" standard in *Phillips v. State*, 608 So.2d 778 (Fla. 1992). Citing *Routly* as authority, the *Phillips* court again denied relief based on the first two prongs of *Giglio* without any meaningful materiality analysis. *Id*. at 781.

By this time, there is doubt as to whether this Court understood the critical difference between the two and correctly applied the more lenient *Giglio* standard. We have further evidence of this error in *Craig v. State*, 685 So.2d 1224 (Fla. 1997), a case cited by this Court in Mr. White's case, where this Court granted relief but articulated the *Brady* materiality standard as opposed to the more lenient *Giglio* standard: "Because the conduct of the prosecutor undermines our confidence in the outcome of this sentencing proceeding

before a jury, we vacate Craig's sentence of death and remand for a new sentencing proceeding before a new judge and jury." *Craig*, at 1229(emphasis added). The next year, this Court decided *Robinson v. State*, 707 So.2d 688 (Fla. 1998), an opinion that cites to *Routly* and *Craig*. There is no extensive *Giglio* materiality analysis nor is there any indication yet at this time that this Court understood the critical difference between the two standards and correctly applied the more lenient *Giglio* standard.

The next year, however, it is becoming more evident that this Court's *Giglio* materiality error is more egregious than a simple mistake in phraseology when it decided Mr. White's first postconviction case. In *White v. State*, 729 So.2d 909 (Fla. 1999), this Court was confronted with both *Brady* and *Giglio* claims. The lower court in White combined the *Brady* and *Giglio* analysis and found "no reasonable probability that this evidence, if it had been presented at trial, would have changed the outcome." This Court agreed with this analysis, likewise combined the two different materiality analyses, and denied relief. *White*, at 913. "In analyzing this issue ... courts must focus on whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* The Florida court then cited its own erroneous *Craig* decision.

By this time, this Court has markedly confused *Giglio's* standard with *Brady's*. With the *Craig* and *White* decisions, not only has this Court failed to track precisely the language used by the Supreme Court it has also embarked on a journey producing an erroneous line of

precedent. Beyond the "reasonable probability" and "likelihood" phraseology debate, there is no articulation of the correct *Giglio* analysis in Florida law. There is no reference to *Giglio* being "more defense friendly", having a lower materiality standard than Brady, or any identification that the State bears the burden proving harmlessness beyond a reasonable doubt in the materiality prong.

The timing of these cases up to this point is critical to this analysis. On June 29, 2000, this Court released two decisions involving *Brady* and *Giglio* claims: *Occhicone v. State* and *Asay v. State*, 769 So.2d 974 (Fla. 2000). While denying *Brady* and *Giglio* relief on other grounds, the Florida court does conduct a materiality analysis where it combines the two. Again the court cites to its *Routly* decision along with *Robinson*.

Four months later, this Court removed all doubt as to its understanding of the *Giglio* materiality prong when it issued its opinion in *Rose v. State*, 774 So.2d 629 (Fla. 2000). In *Rose*, the Court stated

> For these same reasons, we also affirm the trial court's denial of Rose's Giglio claim. In order to establish a Giglio violation, a defendant must show that: (1) the prosecutor or witness gave false testimony; (2) the prosecutor knew the testimony was false; and (3) the statement was material. *See Robinson v. State*, 707 So.2d 688, 693 (Fla.1998); *Routly v. State*, 590 So.2d 397, 400 (Fla.1991). **The standard for determining whether false testimony is "material" under *Giglio* is the same as the standard for determining whether the State withheld "material" evidence in violation of *Brady*.** *See Giglio*, 405 U.S. at 154, 92 S.Ct. 763. False testimony is "material" if there is a reasonable likelihood that it could have affected the jury's verdict. *See id.* Even assuming that Rose's allegations that the State misled both Rose and the jurors about the motives of Borton and Poole for testifying were true, we find that Rose cannot satisfy the "materiality" prong of *Giglio* because such evidence does not put the case in such a different light as to undermine confidence in

> the jury's verdict. Therefore, we affirm the trial court's denial of postconviction relief on this issue. FN10
>
> FN10. Having rejected Rose's *Brady* and *Giglio* claims on the grounds that Rose failed to establish prejudice, we do not address the merits of his corresponding ineffective assistance of counsel claim pertaining to his attorney's failure to discover this impeachment evidence against Borton and Poole and to present this evidence to the jury. Even if Rose's trial counsel's performance was deficient because he should have discovered this impeachment evidence, Rose's ineffective assistance of counsel claim is without merit because Rose would not be able to satisfy the prejudice prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See Downs v. State*, 740 So.2d 506, 513 n. 10 (Fla.1999); *Mills v. State*, 684 So.2d 801, 804 n. 4 (Fla.1996).

Rose v. State, 774 So.2d at 635 (emphasis added).

The *Rose* case is a clear example of this Court's misunderstanding of *Giglio* materiality. While the Court utilized the "likelihood" terminology, it essentially eviscerated its substance. *Rose* predictably, unambiguously and erroneously equated *Brady* and *Giglio* materiality. It omitted any notion that it is a more defense friendly, less onerous standard. It placed the burden on the defendant to prove *Giglio's* materiality. It contradicted the notion that the State bears the burden beyond a reasonable doubt to show "no reasonable likelihood". Finally, it further conflated *Giglio* materiality with *Strickland* prejudice. This was this Court's understanding of *Giglio* materiality before and after it decided Mr. White's case in 1999.

Some members of this Court first began to question its prior *Giglio* analysis in *Trepal v. State*, 846 So.2d 405 (Fla. 2003). In *Trepal*, as it was in *White*, this Court was confronted with a post-conviction motion alleging both *Brady* and *Giglio* violations. In it analysis, the Court again repeated its understanding of *Giglio* materiality:

> He also claims a violation of *Giglio* for use of false testimony at trial. *Giglio v. United States*, 405 U.S. 150 [92 S.Ct. 763, 31 L.Ed.2d 104] (1972). The problems with test procedures are so wrapped up with the false testimony issues that they must be dealt with here. Claims 16-21 raise the issue of false testimony presented at trial under *Giglio*. *Giglio* holds that a conviction based on false or perjured testimony, which the prosecution knew or should have known was false, violates due process when such information is material. **The materiality prong is the same as that used in Brady. *See Rose v. State*, [774 So.2d 629] WL 1508576 (Fla.2000).** False information is material if "there is a reasonable likelihood that it could have affected the jury verdict." *Id*.

Trepal, 846 So.2d at 425 (emphasis added).

Thus, while the Court now appears to use the correct "likelihood" terminology, it has completely misunderstood the meaning of that term. Two members of the Court agreed in a concurrence by Justice Pariente:

> The legal standard for a court to utilize in evaluating the effect of errors on the reliability of the outcome of criminal proceedings differs depending on the nature of the legal claim asserted. Thus, the standard by which the effect of an error is evaluated is not common to all of Trepal's claims, nor is the materiality prong of *Giglio* the same as *Brady*, as the trial court stated in its order. FN20 See majority op. at 425-426.
>
> > FN20. It is understandable that the trial court was misled as to the correct legal standard by our statement in *Rose v. State*, 774 So.2d 629, 635 (Fla.2000), that the materiality standard under *Giglio* was the same as under *Brady*. We should take this opportunity to clarify the misstatement in *Rose*.

Trepal, 846 So.2d at 439.

Nine months later, 18 years since *Bagley* was first decided, this Court corrected its *Giglio* materiality analysis in *Guzman v. State*, 868 So.2d 498 (2003) where it stated:

> The postconviction court stated and applied the *Giglio* standard of materiality from our decisions in *Ventura v. State*, 794 So.2d 553 (Fla.2001), *White v. State*, 729 So.2d 909, 913 (Fla.1999), and *Routly v. State*, 590 So.2d 397 (Fla.1991). Having reviewed these decisions, as well as our other *Giglio* and *Brady* decisions, we

> conclude that our precedent in this area has lacked clarity, resulting in some confusion and improper merging of the *Giglio* and *Brady* materiality standards. For example, in *Rose v. State*, 774 So.2d 629, 635 (Fla.2000), we said: "The standard for determining whether false testimony is 'material' under *Giglio* is the same as the standard for determining whether the State withheld 'material' in violation of *Brady*." In reliance on *Rose*, the trial court's order that we approved in *Trepal* erroneously stated that in addressing a *Giglio* claim "[t]he materiality prong is the same as that used in *Brady*." *Trepal v. State*, 846 So.2d 405, 425 (Fla.2003). We recede from *Rose* and *Trepal* to the extent they stand for the incorrect legal principle that the "materiality" prongs of *Brady* and *Giglio* are the same. We now clarify the two standards and the important distinction between them.

Guzman, 868 So.2d 505-06.

The assertion that this Court's prior decisions "lacked clarity" is not an understatement. Rather, it is inaccurate. The standards announced in *Rose* and *Trepal*, while egregiously wrong, are stunningly clear. They illustrate the unambiguous culmination of a line of *Giglio* jurisprudence that is clearly at odds with the decisions of the United States Supreme Court.

This conflation clearly denied Mr. White his right to Due Process. This Court imposed a higher standard than the more defense friendly *Giglio* "likelihood" standard. Worse yet, it shifted the burden to Mr. White to prove the materiality of the error when it is the state, which benefited from the error, that is required to prove the harmlessness of the error beyond all reasonable doubt.

Finally, in conducting a proper *Giglio* materiality analysis, it is error for the courts to discern whether, absent the error, there was enough evidence to convict. The difference between showing "harmfulness" and "harmlessness" is equivalent to having a defendant

ascend a mountain path and the state having to pass through the eye of a needle. Use of the word "harmfulness" has traditionally meant that the burden is on the defendant to show the harm of the error as it relates to the trial record. "Harmlessness" has traditionally imposed the burden on the prosecutor for it would be nonsensical for the defendant to show how the error did not create harm, the very thing he or she is attempting to prove. Because this Court did not recognize the correct allocation of the burden, it follows that the Court did not conduct a proper "harmless beyond a reasonable doubt" inquiry under *Giglio vis-à-vis Chapman*.

A proper harmless-error analysis must comport with the requirements of the 6th Amendment. *Sullivan v. Louisiana*, 508 U.S. 275 (1993). In a decision by Justice Scalia, the court held:

> *Chapman* itself suggests the answer. Consistent with the jury-trial guarantee, the question it instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. *See Chapman*, *supra*, 386 U.S., at 24, 87 S.Ct., at 828 (analyzing effect of error on "verdict obtained"). Harmless-error review looks, we have said, to the basis on which "the jury *actually rested* its verdict." *Yates v. Evatt*, 500 U.S. 391, 404, 111 S.Ct. 1884, 1893, 114 L.Ed.2d 432 (1991) (emphasis added). The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered--no matter how inescapable the findings to support that verdict might be--would violate the jury-trial guarantee.

Sullivan, 508 U.S. at 279(original emphasis).

Richard DiMarino's testimony, and thus his credibility, were material to Mr. White's case. His testimony is the only evidence that establishes Mr. White as the individual who stabbed Ms. Crawford. His testimony is the only evidence that establishes the HAC aggravator. Without this evidence, there is no direct evidence that Mr. White stabbed the victim. Thus, the proper analysis here is not whether there is enough evidence to convict Mr. White without the perjured statements but what was the effect Richard DiMarino's testimony had on the actual jury.

An integral part of the *Giglio* materiality analysis is the inclusion of all the suppressed and excluded evidence. The testimony of Mr. Masara, Mr. Watts and John DiMarino, three witnesses who state that Richard DiMarino confessed to stabbing the victim, weigh heavily in the materiality analysis. This evidence has never been considered by this Court in a proper *Giglio* analysis. To paraphrase the Eleventh Circuit in *Alzate*, it is uncertain whether Mr. White would prevail in a new trial. What is clear, however, is that Mr. White has yet to receive a fair one.

ARGUMENT VII

MR. WHITE=S RE-SENTENCING COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE AGREED TO STRIKE FOR CAUSE A JUROR BASED ONLY ON THE FACT THAT ENGLISH WAS NOT HER PRIMARY LANGUAGE IN VIOLATION OF THE SIXTH, FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

On November 15, 1999, jury selection began for the re-sentencing of Mr. White.

Presiding over the proceedings was Judge Margaret Waller. Mr. Chris Lerner represented the State of Florida. Appearing on behalf of Mr. White was Mr. Muller and Mr. Parks.[3] The entire venire panel was asked to complete a questionnaire that was specific to Mr. White=s case. After group *voir dire* by Judge Waller, individual voir dire was conducted based on the answers given in the questionnaire. One venire person was Ms. Fuentes, juror 102.[4] She had previously indicated to the Court that English was not her primary language. (PT 31-33) Ms. Fuentes=s voir dire lasted nearly ten pages of the record. (PT. 90-99). During this individual voir dire, Ms. Fuentes was asked questions pursuant to *Witherspoon* and *Wainwright v. Witt*.

During her examination by Mr. Lerner, the following dialogue took place:

> The Court: So you consider life in prison to be worse than death?
> Juror Fuentes: Yes, I think so. Yes.
> The Court: Mr. Lerner?
> Mr. Lerner: Does that mean based upon these feelings you=re opposed to the death penalty?
> Juror Fuentes: Well, I=m not opposed, you know, because if the law decided to do that, you know, I can=t be opposed to it myself.
> Mr. Lerner: Would your feelings on the death penalty interfere, get in the way of your following the judge=s instructions of law on what you=re supposed to consider?
> Juror Fuentes: No. If they decided to do that, you know, it=s up to them what they want to do. I don=t want to say okay. This is what they value, you know.

(PT 89-90)

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[3] An attorney from the State of Georgia assisted counsel.

[4] She was also referred to as juror 112.

During this exchange, it is clear that Juror Fuentes, regardless of her beliefs, indicated that she could follow the law. It may be argued by the state that during this *voir dire*, Ms. Fuentes indicated that she had personal problems with the death penalty if the person was later found to be innocent. (PT 90) The state should not be able to argue, however, that this should have been a basis to exclude Ms. Fuentes for all jurors, if asked, should have this concern under our system of justice. Even the state.

Further on during *voir dire*, Juror Fuentes indicated that she was not opposed to the death penalty completely.

That=s what I=ve been thinking my beliefs would be because one of the commandments is thou should not kill somebody. This guy killed somebody. The law here in this world is different. Right, you kill, we have to kill you. That=s it. Do you understand what I mean? (PT. 97).

Ms. Fuentes=s comment clarifies her position on the death penalty, satisfying the dictates of Witherspoon. In addition, Ms. Fuentes=s understanding of the law was no different than a vast majority of those venire persons who appeared before the court and not struck. Mr. Muller later began to ask questions regarding Ms. Fuentes=s ability to understand English. She had previously indicated that read the Orlando Sentinal (PT 32) and read and spoke both in English and Spanish. (PT 32, 33) Finally, when asked by the Court if she understood everything said so far, Ms. Fuentes indicated that she did. (PT 33)

Mr. Muller: Let me ask you about this, Ma=am: would, do you feel the language barrier is such that, like you were talking about it there when people start talking and everything, and like we=re doing right now, it would make it hard for you to be on the jury?
Juror Fuentes: Yes, it is hard for me.

Mr. Muller: Do you think it would be so hard thatB
Juror Fuentes: I don=t feel comfortable.
(PT 98)

At the end of the *voir dire* of Ms. Fuentes, the state moved that she be struck for cause based on the fact that she said she could not be fair and impartial. However, upon closer examination of the record, it is clear that Ms. Fuentes could be fair and impartial, save for the concern about an innocent person. However, that concern was rectified when she discussed that Mr. White was guilty and that she could follow the law and sentence an individual to death if that is what the law required. What is clear is that Mr. Lerner, acting on behalf of the state, requested that she be struck for cause because of her language skills. (PT 99, line 15-16). In addition, Mr. Muller agreed, Areluctantly@, with the state. This reluctance is only because of the language barrier. As a result, Ms. Fuentes was struck for cause.

Section 913.03, F.S. lists only those grounds for which a venire person may be struck for cause. It reads:

A challenge for cause to an individual juror may be made only on the following grounds:

> (1) The juror does not have the qualifications required by law;(2) The juror is of unsound mind or has a bodily defect that renders him or her incapable of performing the duties of a juror, except that, in a civil action, deafness or hearing impairment shall not be the sole basis of a challenge for cause of an individual juror;(3) The juror has conscientious beliefs that would preclude him or her from finding the defendant guilty;(4) The juror served on the grand jury that found the indictment or on a coroner's jury that inquired into the death of a person whose death is the subject of the indictment or information;(5) The juror served on a jury formerly sworn to try the defendant for the same offense;(6) The juror served on a jury that tried another person for the offense charged in the indictment, information, or affidavit;(7) The juror served as a juror in a civil action brought against the defendant for the act charged as an offense;(8) The juror is an adverse party to the defendant in

> a civil action, or has complained against or been accused by the defendant in a criminal prosecution;(9) The juror is related by blood or marriage within the third degree to the defendant, the attorneys of either party, the person alleged to be injured by the offense charged, or the person on whose complaint the prosecution was instituted;(10) The juror has a state of mind regarding the defendant, the case, the person alleged to have been injured by the offense charged, or the person on whose complaint the prosecution was instituted that will prevent the juror from acting with impartiality, but the formation of an opinion or impression regarding the guilt or innocence of the defendant shall not be a sufficient ground for challenge to a juror if he or she declares and the court determines that he or she can render an impartial verdict according to the evidence;(11) The juror was a witness for the state or the defendant at the preliminary hearing or before the grand jury or is to be a witness for either party at the trial;(12) The juror is a surety on defendant's bail bond in the case.

913.03, F.S. (1999 Supp.)

This list is both exhaustive and exclusive of the grounds for which a cause challenge may be granted. *See Boykins v. State*, 783 So.2d 317 (Fla. 5th DCA 2001); See *Alen v. State*, 596 So.2d 1083 (3rd DCA 1992)fn 10. Ms. Fuentes=s ability to speak or understand English is not one of the ten grounds for which a for cause challenge may be granted by the court.[5]

Section 40.01, F.S. (1999 Supp.) Lists the qualifications of jurors.[6] It reads:

> Jurors shall be taken from the male and female persons at least 18 years of age who are citizens of the United States and legal residents of this state and their respective counties and who possess a driver's license or identification card issued by the Department of Highway Safety and Motor Vehicles pursuant to chapter 322 or who have executed the affidavit prescribed in s. 40.011.

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[5] It should be noted that since this a cause challenge to a juror, the *Batson* standard should not apply. Rather, a higher standard should apply in this case due to the specific delineation of the grounds for cause.

[6] Section 913.12 lists the qualifications for criminal petit juries as being the same as in civil cases.

Further, Chapter 40 lists those reasons for which a juror may be excused or disqualified from service. Section 40.013, F.S. (1999 Supp.) reads:

> (1) No person who is under prosecution for any crime, or who has been convicted in this state, any federal court, or any other state, territory, or country of bribery, forgery, perjury, larceny, or any other offense that is a felony in this state or which if it had been committed in this state would be a felony, unless restored to civil rights, shall be qualified to serve as a juror.(2)(a) Neither the Governor, nor Lieutenant Governor, nor any Cabinet officer, nor clerk of court, or judge shall be qualified to be a juror.(b) Any full-time federal, state, or local law enforcement officer or such entities' investigative personnel shall be excused from jury service unless such persons choose to serve.(3) No person interested in any issue to be tried therein shall be a juror in any cause; but no person shall be disqualified from sitting in the trial of any suit in which the state or any county or municipal corporation is a party by reason of the fact that such person is a resident or taxpayer within the state or such county or municipal corporation.(4) Any expectant mother and any parent who is not employed full time and who has custody of a child under 6 years of age, upon request, shall be excused from jury service.(5) A presiding judge may, in his or her discretion, excuse a practicing attorney, a practicing physician, or a person who is physically infirm from jury service, except that no person shall be excused from service on a civil trial jury solely on the basis that the person is deaf or hearing impaired, if that person wishes to serve, unless the presiding judge makes a finding that consideration of the evidence to be presented requires auditory discrimination or that the timely progression of the trial will be considerably affected thereby. However, nothing in this subsection shall affect a litigant's right to exercise a peremptory challenge.(6) A person may be excused from jury service upon a showing of hardship, extreme inconvenience, or public necessity.(7) A person who was summoned and who reported as a prospective juror in any court in that person's county of residence within 1 year before the first day for which the person is being considered for jury service is exempt from jury service for 1 year from the last day of service.(8) A person 70 years of age or older shall be excused from jury service upon request. A person 70 years of age or older may also be permanently excused from jury service upon written request. A person who is permanently excused from jury service may subsequently request, in writing, to be included in future jury lists provided such person meets the qualifications required by this chapter.(9) Any person who is responsible for the care of a person who, because of mental illness, mental retardation, senility, or other physical or mental incapacity, is incapable of caring for himself or herself shall be excused from jury service upon request.

As evidenced above, nowhere in Chapter 40 is there a requirement that a juror have a minimum English language proficiency.[7] Nor is there the disqualification of a juror because that person does not speak English. Interpreters are authorized in Florida for the hearing impaired under section 90.6063, F.S. (1999 Supp.). That section reads, in pertinent part:

> (2) In all judicial proceedings and in sessions of a grand jury wherein a deaf person is a complainant, defendant, witness, or otherwise a party, or wherein a deaf person is a juror or grand juror, the court or presiding officer shall appoint a qualified interpreter to interpret the proceedings or deliberations to the deaf person and to interpret the deaf person's testimony, statements, or deliberations to the court, jury, or grand jury. A qualified interpreter shall be appointed, or other auxiliary aid provided as appropriate, for the duration of the trial or other proceeding in which a deaf juror or grand juror is seated.[8]

(Section 90.6063(2))

As such, Florida recognizes, and provides for, the use of interpreters during petit jury deliberations. Because Florida uses sign interpreters, there can be no argument that the use of language interpreters would disrupt the jury deliberation process. Sign interpreters must participate in the exact same manners as language interpreters. Sign interpreters must

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[7] *Compare* 28 U.S.C. '' 1865(b)(2), (3) (English language ability required for federal jury service).

[8] It should be noted that the creation of 90.6063 was for the express right of deaf individuals as defined by the statute, not for the right of the individual defendant to have a deaf juror. The Legislature states specifically in section 1: AThe Legislature finds that it is an important concern that the rights of deaf citizens be protected. It is the intent of the Legislature to ensure that appropriate and effective interpreter services be made available to Florida's deaf citizens.@

interpret the cacophony of argument that can occur in a jury room, with multiple jurors speaking at the same time. Any sort of cautionary instruction by the judge to the jury regarding sign interpreters would be the same for language interpreters.

With regards to the grand jury, the appointment of a language interpreter is allowed. Section 905.15 reads:

> The foreperson shall appoint an interpreter to interpret the testimony of any witness who does not speak the English language well enough to be readily understood. The interpreter must take an oath not to disclose any information coming to his or her knowledge, except on order of the court.

Because of the similar nature of the grand jury, the presence of a language interpreter during petit jury deliberations would pose no additional inconvenience or hardship. Questions are posed to the witnesses who respond back. Grand jury deliberations are secret just as they are for petit juries. Finally, the grand jurors deliberate among themselves. With respect to language interpreters, there is no discernable difference in form between the two juries.

In *Hernandez v. New York*, the United States Supreme Court upheld a conviction under a *Batson*[9] challenge where two Latinos were struck from the jury panel due to their inability to follow the court interpreter=s version of what was being said by the witnesses. *Hernandez* does not hold that jurors may be struck based on their language skills alone. Rather, *Hernandez* Asignals an extension of *Batson* and *Powers* by stating that it would prohibit

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[9] *Batson v. Kentucky*, 476 U.S. 79 (1986).

exclusion from a petit jury on the basis of national origin, in addition to race.@ Juan F. Perea, *Hernandez v. New York: Courts, Prosecutors, and the Fear of Spanish*, 21 Hoffstra L. Rev. 1, 7 (1992). In discussing language and peremptory strikes, the Hernandez court stated:

> Language permits an individual to express both a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond. Bilinguals, in a sense, inhabit two communities, and serve to bring them closer. Indeed, some scholarly comment suggests that people proficient in two languages may not at times think in one language to the exclusion of the other. The analogy is that of a high-hurdler, who combines the ability to sprint and to jump to accomplish a third feat with characteristics of its own, rather than two separate functions. Grosjean, The Bilingual as a Competent but Specific Speaker-Hearer, 6 J. Multilingual & Multicultural Development 467 (1985). This is not to say that the cognitive processes and reactions of those who speak two languages are susceptible of easy generalization, for even the term "bilingual" does not describe a uniform category. It is a simple word for a more complex phenomenon with many distinct categories and subdivisions. Sánchez, *Our Linguistic and Social Context, in Spanish in the United States* 9, 12 (J. Amastae & L. Elías-Olivares eds. 1982); Dodson, Second Language Acquisition and Bilingual Development: A Theoretical Framework, 6 J. Multilingual & Multicultural Development 325, 326-327 (1985).Our decision today does not imply that exclusion of bilinguals from jury service is wise, or even that it is constitutional in all cases.It is a harsh paradox that one may become proficient enough in English to participate in trial, see, *e.g.*,28 U.S.C. '' 1865(b)(2), (3) (English-language ability required for federal jury service), only to encounter disqualification because he knows a second language as well. As the Court observed in a somewhat related context: "Mere knowledge of [a foreign] language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable." Meyer v. Nebraska, 262 U.S. 390, 400, 43 S.Ct. 625, 627, 67 L.Ed. 1042 (1923).Just as shared language can serve to foster community, language differences can be a source of division. Language elicits a response from others, ranging from admiration and respect, to distance and alienation, to ridicule and scorn. Reactions of the latter type all too often result from or initiate racial hostility. In holding that a race-neutral reason for a peremptory challenge means a reason other than race, we do not resolve the more difficult question of the breadth with which the concept of race should be defined for equal protection purposes. We would face a quite different case if the prosecutor had justified his peremptory challenges with the explanation that he did not want Spanish-speaking jurors. It may well be, for certain

> ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis. Cf. *Yu Cong Eng v. Trinidad,* 271 U.S. 500, 46 S.Ct. 619, 70 L.Ed. 1059 (1926) (law prohibiting keeping business records in other than specified languages violated equal protection rights of Chinese businessmen); *Meyer v. Nebraska, supra* (striking down law prohibiting grade schools from teaching languages other than English). ***And, as we make clear, a policy of striking all who speak a given language, without regard to the particular circumstances of the trial or the individual responses of the jurors, may be found by the trial judge to be a pretext for racial discrimination.***

(Emphasis added)

Re-sentencing counsel was ineffective under Strickland when he moved to strike for cause juror Fuentes. Counsel should have been aware of the statute at the time which governed cause strikes. Further, counsel should have been aware of the *Hernandez* decision which condemns wholesale strikes of jurors based on language. Counsel should have objected, stating that the State=s strike was a thinly veiled racial elimination of jurors. Counsel=s performance was deficient. This error was fundamental error for the defense had a juror who morally did not like the death penalty but could follow the law as instructed. The Ninth Judicial Circuit, In and For Orange County, does provide language interpreters.

The lower court committed error when it summarily denied this claim. Counsel had listed personnel from the court interpreter's office to testify about this procedure of automatic exclusion. The trial court's reason for denying this claim is based on a partial reading of the juror's responses and shown by her full answer the very next page. (EH Order at 14), *compare with*, (PT 97). Further, it is impossible to give a full and fair meaning to Ms. Fuentes's understanding of the law without the aid of an interpreter. This Court should

remand the case back to the trial court so a full and fair evidentiary hearing may be held on the issue.

ARGUMENT VIII

MR. WHITE WAS DENIED THE EQUAL PROTECTION OF THE LAWS DURING HIS 1999 RE-SENTENCING UNDER THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION AND WHEN A JUROR WAS STRUCK BASED ONLY ON THE FACT THAT ENGLISH WAS NOT HER PRIMARY LANGUAGE.AS A RESULT, MR. WHITE=S RE-SENTENCING WAS DONE IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

On November 15, 1999, jury selection began for the re-sentencing of Mr. White. Presiding over the proceedings was Judge Margaret Waller. Mr. Chris Lerner represented the State of Florida. Appearing on behalf of Mr. White was Mr. Muller and Mr. Parks.[10] The entire venire panel was asked to complete a questionnaire that was specific to Mr. White=s case. After group voir dire by Judge Waller, individual *voir dire* was conducted based on the answers given in the questionnaire. One venire person was Ms. Fuentes, juror 102.[11] She had previously indicated to the Court that English was not her primary language. (PT 31-33) Ms. Fuentes=s voir dire lasted nearly ten pages of the record. (PT 90-99). During this individual *voir dire*, Ms. Fuentes was asked questions pursuant to *Witherspoon* and *Wainwright v. Witt*. During her examination by Mr. Lerner, the following dialogue took

[10] An attorney from the State of Georgia assisted counsel.

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place:

The Court: So you consider life in prison to be worse than death?
Juror Fuentes: Yes, I think so. Yes.
The Court: Mr. Lerner?
Mr. Lerner: Does that mean based upon these feelings you=re opposed to the death penalty?
Juror Fuentes: Well, I=m not opposed, you know, because if the law decided to do that, you know, I can=t be opposed to it myself.
Mr. Lerner: Would your feelings on the death penalty interfere, get in the way of your following the judge=s instructions of law on what you=re supposed to consider?
Juror Fuentes: No. If they decided to do that, you know, it=s up to them what they want to do. I don=t want to say okay. This is what they value, you know.

(PT 89-90)

During this exchange, it is clear that Juror Fuentes, regardless of her beliefs, indicated that she could follow the law. It may be argued by the state that during this voir dire, Ms. Fuentes indicated that she had personal problems with the death penalty if the person was later found to be innocent. (PT 90) The state should not be able to argue, however, that this should have been a basis to exclude Ms. Fuentes for all jurors, if asked, should have this concern under our system of justice. Even the state.

Further on during *voir dire*, Juror Fuentes indicated that she was not opposed to the death penalty completely.

That=s what I=ve been thinking my beliefs would be because one of the commandments is thou should not kill somebody. This guy killed somebody. The law here in this world is different. Right, you kill, we have to kill you. That=s it. Do you understand what I mean? (PT 97).

Ms. Fuentes=s comment clarifies her position on the death penalty, satisfying the dictates of Witherspoon. In addition, Ms. Fuentes=s understanding of the law was no different than a

vast majority of those venire persons who appeared before the court and not struck. Mr. Muller later began to ask questions regarding Ms. Fuentes=s ability to understand English. She had previously indicated that read the Orlando Sentinal (PT 32) and read and spoke both in English and Spanish. (PT 32, 33) Finally, when asked by the Court if she understood everything said so far, Ms. Fuentes indicated that she did. (PT 33)

Mr. Muller: Let me ask you about this, Ma=am: would, do you feel the language barrier is such that, like you were talking about it there when people start talking and everything, and like we=re doing right now, it would make it hard for you to be on the jury?
Juror Fuentes: Yes, it is hard for me.
Mr. Muller: Do you think it would be so hard thatB
Juror Fuentes: I don=t feel comfortable.
(PT 98)

At the end of the *voir dire* of Ms. Fuentes, the state moved that she be struck for cause based on the fact that she said she could not be fair and impartial. However, upon closer examination of the record, it is clear that Ms. Fuentes could be fair and impartial, save for the concern about an innocent person. However, that concern was rectified when she discussed that Mr. White was guilty and that she could follow the law and sentence an individual to death if that is what the law required. What is clear is that Mr. Lerner, acting on behalf of the state, requested that she be struck for cause because of her language skills. (PT 99, line 15-16). In addition, Mr. Muller agreed, Areluctantly@, with the state. This reluctance is only because of the language barrier. As a result, Ms. Fuentes was struck for cause.

10. Section 913.03, F.S. lists only those grounds for which a venire person may be struck for cause. It reads:

A challenge for cause to an individual juror may be made only on the following grounds:

> (1) The juror does not have the qualifications required by law;(2) The juror is of unsound mind or has a bodily defect that renders him or her incapable of performing the duties of a juror, except that, in a civil action, deafness or hearing impairment shall not be the sole basis of a challenge for cause of an individual juror;(3) The juror has conscientious beliefs that would preclude him or her from finding the defendant guilty;(4) The juror served on the grand jury that found the indictment or on a coroner's jury that inquired into the death of a person whose death is the subject of the indictment or information;(5) The juror served on a jury formerly sworn to try the defendant for the same offense;(6) The juror served on a jury that tried another person for the offense charged in the indictment, information, or affidavit;(7) The juror served as a juror in a civil action brought against the defendant for the act charged as an offense;(8) The juror is an adverse party to the defendant in a civil action, or has complained against or been accused by the defendant in a criminal prosecution;(9) The juror is related by blood or marriage within the third degree to the defendant, the attorneys of either party, the person alleged to be injured by the offense charged, or the person on whose complaint the prosecution was instituted;(10) The juror has a state of mind regarding the defendant, the case, the person alleged to have been injured by the offense charged, or the person on whose complaint the prosecution was instituted that will prevent the juror from acting with impartiality, but the formation of an opinion or impression regarding the guilt or innocence of the defendant shall not be a sufficient ground for challenge to a juror if he or she declares and the court determines that he or she can render an impartial verdict according to the evidence;(11) The juror was a witness for the state or the defendant at the preliminary hearing or before the grand jury or is to be a witness for either party at the trial;(12) The juror is a surety on defendant's bail bond in the case.

913.03, F.S. (1999 Supp.)

This list is both exhaustive and exclusive of the grounds for which a cause challenge may be granted. *See Boykins v. State*, 783 So.2d 317 (Fla. 5th DCA 2001); See *Alen v. State*, 596 So.2d 1083 (3rd DCA 1992)fn 10. Ms. Fuentes=s ability to speak or understand English is not one of the ten grounds for which a for cause challenge may be granted by the court.[12]

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[12] It should be noted that since this a cause challenge to a juror, the *Batson* standard should not apply. Rather, a higher standard should apply in this case due to

Section 40.01, F.S. (1999 Supp.) Lists the qualifications of jurors.[13] It reads:

> Jurors shall be taken from the male and female persons at least 18 years of age who are citizens of the United States and legal residents of this state and their respective counties and who possess a driver's license or identification card issued by the Department of Highway Safety and Motor Vehicles pursuant to chapter 322 or who have executed the affidavit prescribed in s. 40.011.

Further, Chapter 40 lists those reasons for which a juror may be excused or disqualified from service. Section 40.013, F.S. (1999 Supp.) reads:

> (1) No person who is under prosecution for any crime, or who has been convicted in this state, any federal court, or any other state, territory, or country of bribery, forgery, perjury, larceny, or any other offense that is a felony in this state or which if it had been committed in this state would be a felony, unless restored to civil rights, shall be qualified to serve as a juror.(2)(a) Neither the Governor, nor Lieutenant Governor, nor any Cabinet officer, nor clerk of court, or judge shall be qualified to be a juror.(b) Any full-time federal, state, or local law enforcement officer or such entities' investigative personnel shall be excused from jury service unless such persons choose to serve.(3) No person interested in any issue to be tried therein shall be a juror in any cause; but no person shall be disqualified from sitting in the trial of any suit in which the state or any county or municipal corporation is a party by reason of the fact that such person is a resident or taxpayer within the state or such county or municipal corporation.(4) Any expectant mother and any parent who is not employed full time and who has custody of a child under 6 years of age, upon request, shall be excused from jury service.(5) A presiding judge may, in his or her discretion, excuse a practicing attorney, a practicing physician, or a person who is physically infirm from jury service, except that no person shall be excused from service on a civil trial jury

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> solely on the basis that the person is deaf or hearing impaired, if that person wishes to serve, unless the presiding judge makes a finding that consideration of the evidence to be presented requires auditory discrimination or that the timely progression of the trial will be considerably affected thereby. However, nothing in this subsection shall affect a litigant's right to exercise a peremptory challenge.(6) A person may be excused from jury service upon a showing of hardship, extreme inconvenience, or public necessity.(7) A person who was summoned and who reported as a prospective juror in any court in that person's county of residence within 1 year before the first day for which the person is being considered for jury service is exempt from jury service for 1 year from the last day of service.(8) A person 70 years of age or older shall be excused from jury service upon request. A person 70 years of age or older may also be permanently excused from jury service upon written request. A person who is permanently excused from jury service may subsequently request, in writing, to be included in future jury lists provided such person meets the qualifications required by this chapter.(9) Any person who is responsible for the care of a person who, because of mental illness, mental retardation, senility, or other physical or mental incapacity, is incapable of caring for himself or herself shall be excused from jury service upon request.

As evidenced above, nowhere in Chapter 40 is there a requirement that a juror have a minimum English language proficiency.[14] Nor is there the disqualification of a juror because that person does not speak English. Interpreters are authorized in Florida for the hearing impaired under section 90.6063, F.S. (1999 Supp.). That section reads, in pertinent part:

> (2) In all judicial proceedings and in sessions of a grand jury wherein a deaf person is a complainant, defendant, witness, or otherwise a party, or wherein a deaf person is a juror or grand juror, the court or presiding officer shall appoint a qualified interpreter to interpret the proceedings or deliberations to the deaf person and to interpret the deaf person's testimony, statements, or deliberations to the court, jury, or grand jury. A qualified interpreter shall be appointed, or other auxiliary aid provided as appropriate, for the duration of the trial or other proceeding in which a deaf juror or grand juror is

[14] *Compare* 28 U.S.C. '' 1865(b)(2), (3) (English language ability required for federal jury service).

seated.[15]
(Section 90.6063(2))

As such, Florida recognizes, and provides for, the use of interpreters during petit jury deliberations. Because Florida uses sign interpreters, there can be no argument that the use of language interpreters would disrupt the jury deliberation process. Sign interpreters must participate in the exact same manners as language interpreters. Sign interpreters must interpret the cacophony of argument that can occur in a jury room, with multiple jurors speaking at the same time. Any sort of cautionary instruction by the judge to the jury regarding sign interpreters would be the same for language interpreters.

With regards to the grand jury, the appointment of a language interpreter is allowed. Section 905.15 reads:

The foreperson shall appoint an interpreter to interpret the testimony of any witness

[15] It should be noted that the creation of 90.6063 was for the express right of deaf individuals as defined by the statute, not for the right of the individual defendant to have a deaf juror. The Legislature states specifically in section 1: AThe Legislature finds that it is an important concern that the rights of deaf citizens be protected. It is the intent of the Legislature to ensure that appropriate and effective interpreter services be made available to Florida's deaf citizens.@

> who does not speak the English language well enough to be readily understood. The interpreter must take an oath not to disclose any information coming to his or her knowledge, except on order of the court.

Because of the similar nature of the grand jury, the presence of a language interpreter during petit jury deliberations would pose no additional inconvenience or hardship. Questions are posed to the witnesses who respond back. Grand jury deliberations are secret just as they are for petit juries. Finally, the grand jurors deliberate among themselves. With respect to language interpreters, there is no discernable difference in form between the two juries.

In *Hernandez v. New York*, 500 U.S. 352 (1991), the United States Supreme Court upheld a conviction under a *Batson*[16] challenge where two Latinos were struck from the jury panel due to their inability to follow the court interpreter=s version of what was being said by the witnesses. *Hernandez* does not hold that jurors may be struck based on their language skills alone. Rather, *Hernandez* Asignals an extension of *Batson* and *Powers* by stating that it would prohibit exclusion from a petit jury on the basis of national origin, in addition to race.@ Juan F. Perea, *Hernandez v. New York: Courts, Prosecutors, and the Fear of Spanish*, 21 Hoffstra L. Rev. 1, 7 (1992). In discussing language and peremptory strikes, the *Hernandez* court stated:

> Language permits an individual to express both a personal identity and membership in

[16] *Batson v. Kentucky*, 476 U.S. 79 (1986).

a community, and those who share a common language may interact in ways more intimate than those without this bond. Bilinguals, in a sense, inhabit two communities, and serve to bring them closer. Indeed, some scholarly comment suggests that people proficient in two languages may not at times think in one language to the exclusion of the other. The analogy is that of a high-hurdler, who combines the ability to sprint and to jump to accomplish a third feat with characteristics of its own, rather than two separate functions. Grosjean, The Bilingual as a Competent but Specific Speaker-Hearer, 6 J. Multilingual & Multicultural Development 467 (1985). This is not to say that the cognitive processes and reactions of those who speak two languages are susceptible of easy generalization, for even the term "bilingual" does not describe a uniform category. It is a simple word for a more complex phenomenon with many distinct categories and subdivisions. Sánchez, *Our Linguistic and Social Context, in Spanish in the United States* 9, 12 (J. Amastae & L. Elías-Olivares eds. 1982); Dodson, Second Language Acquisition and Bilingual Development: A Theoretical Framework, 6 J. Multilingual & Multicultural Development 325, 326-327 (1985).Our decision today does not imply that exclusion of bilinguals from jury service is wise, or even that it is constitutional in all cases.It is a harsh paradox that one may become proficient enough in English to participate in trial, see, *e.g.,*28 U.S.C. '' 1865(b)(2), (3) (English-language ability required for federal jury service), only to encounter disqualification because he knows a second language as well. As the Court observed in a somewhat related context: "Mere knowledge of [a foreign] language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable." Meyer v. Nebraska, 262 U.S. 390, 400, 43 S.Ct. 625, 627, 67 L.Ed. 1042 (1923).Just as shared language can serve to foster community, language differences can be a source of division. Language elicits a response from others, ranging from admiration and respect, to distance and alienation, to ridicule and scorn. Reactions of the latter type all too often result from or initiate racial hostility. In holding that a race-neutral reason for a peremptory challenge means a reason other than race, we do not resolve the more difficult question of the breadth with which the concept of race should be defined for equal protection purposes. We would face a quite different case if the prosecutor had justified his peremptory challenges with the explanation that he did not want Spanish-speaking jurors. It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis. Cf.*Yu Cong Eng v. Trinidad,* 271 U.S. 500, 46 S.Ct. 619, 70 L.Ed. 1059 (1926) (law prohibiting keeping business records in other than specified languages violated equal protection rights of Chinese businessmen); *Meyer v. Nebraska, supra* (striking down law prohibiting grade schools from teaching languages other than English). ***And, as we make clear, a policy of striking all who speak a given language, without regard to***

the particular circumstances of the trial or the individual responses of the jurors, may be found by the trial judge to be a pretext for racial discrimination.
(Emphasis added)

There is no statutory basis allowing a language interpreter into petit jury deliberations. Interpreters routinely sit on jury panels during *voir dire* but are legally excluded from participating in deliberations as a language interpreter. In *Dilorenzo v. State*, 711 So.2d 1362 (Fla. 4th DCA 1998), the Fourth District reversed the appellant=s conviction when a Spanish language interpreter was allowed into the jury room over objection. In reversing the appellant=s conviction, the *Dilorenzo* Court commented about the legality of allowing language interpreters into the jury room to aid individuals who require the use of interpreters:

> In 1993, section 90.6063(2), Florida Statutes (1993) was amended to afford to a deaf person called to jury service the assistance of an interpreter in the jury room during deliberations. Thus, while the law which we have reaffirmed above is now subject to that exception, we think it is otherwise so ingrained in our jurisprudence that any changes in or exceptions to the law necessarily would come from express legislative or judicial authorization rather than by implication or analogy. Consequently, we hold that only in a circumstance expressly authorized by statute or rule is it proper in a criminal trial to send an interpreter into the jury room with the jurors during their deliberations.

Dilorenzo, 711 So.2d at 1363.

The effect of the *Dilorenzo* decision is the wholesale exclusion of those individuals who require the use of a language interpreter. This is exactly the evil the United States Supreme Court stated in *Hernandez* that it was condemning. The effect of *Dilorenzo* is to violate the rights of jurors Anot [to] be excluded from [a petit jury] on account of...race.@ *Powers v. New York*, 111 S.Ct. 1364, 1369 (1991).

The Ninth Judicial Circuit, In and For Orange County, does provide language interpreters. The Court Interpreters Division is located at 425 North Orange Avenue in Orlando, Florida. Representatives of this office do confirm that language interpreters are prohibited by law from participating in jury deliberations. Further, the director of this division, Mr. Augustin De La Mora confirms that during the 7 years he has been with the office, he cannot remember any language interpreters from his office being used in deliberations. Further, as a language interpreter in the State of Florida for over 20 years, he confirms that he has never interpreted during jury deliberations.

The trial court erred when it summarily denied this claim. (PT Order at 14-15). This Court should remand the case back to the trial court so a full and fair evidentiary hearing may be held on this issue.

ARGUMENT IX

MR. WHITE WAS DENIED HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE RE-SENTENCING COUNSEL WAS INEFFECTIVE BY NOT FULLY EXPLORING JUROR WILLIAMS=S RESPONSE OR NOT CHALLENGING HIM FOR CAUSE BASED ON HIS RESPONSE DURING VOIR DIRE.

On November 15, 1999, jury selection began for the re-sentencing of Mr. White. Presiding over the proceedings was Judge Margaret Waller. Mr. Chris Lerner represented the State of Florida. Appearing on behalf of Mr. White was Mr. Muller and

Mr. Parks.[17] The entire venire panel was asked to complete a questionnaire that was specific to Mr. White=s case. After group voir dire by Judge Waller, individual *voir dire* was conducted based on the answers given in the questionnaire. One prospective juror was Juror Williams. He was initially asked questions by the Court and Mr. Lerner. Eventually, he was asked questions by Mr. Muller. Mr. Muller, aware of the facts of his trial, attempted to determine whether Mr. Williams could be fair and impartial given the racial overtones involved in the murder of Ms. Crawford. Mr. Muller asked:

> Q. Okay. Let me ask you this question: Would, there are certain things that are right at the core of our being. And if there was evidence that in the whole circumstance of this situation in 1978 that there were racial overtones in this homicide involving blacks and whites, would that factor cause you to think oh, my gosh, and it would substantially affect ability to apply the law as the judge instructs?
> A. Not a racial situation.
> Q. Please understand, sir, I=m not trying toB
> A. Yes, sir. I meanC

(PT 320)

There is no further dialogue on this issue between counsel and Juror Williams. Even though the crime was racially motivated and juror Williams is African American, there is no ***further*** inquiry even after this answer. The failure of counsel to ensure that the jury could be fair and impartial was a serious error. Counsel=s error in this regard is fundamental and, as such, no prejudice need be established.

Conclusion

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[17] An attorney from the State of Georgia assisted counsel.

Mr. White is innocent and the demands of justice, the hallmark of our free and ordered society, require relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by U. S. Mail, first-class, to all counsel of record on this ____ day of April 2006.

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CERTIFICATE OF COMPLIANCE

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

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