IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-122

NORMAN GRIM,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR SANTA ROSA COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal is from the denial of Appellant=s motion for post-conviction relief by The Honorable Paul Rasmussen, Circuit Judge, First Judicial Circuit, Santa Rosa County, Florida. This appeal challenges Appellant=s convictions and sentences, including his sentence of death. References in this brief are as follows:

"EHT." refers to the transcript of proceedings held on April 14, 2005.

"EHT2." refers to the transcript of proceedings held on April 15, 2005.

"EHT3." refers to the transcript of proceedings held on September 1, 2005.

"PC-R." refers to the post-conviction record on appeal.

"TT." refers to the trial transcript in this matter.

"R." refers to the record on appeal of the direct appeal in this matter.

All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to develop the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Appellant, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY

On February 16, 1999, Mr. Grim was indicted by a Santa Rosa County Grand Jury for one count each of first-degree murder and sexual battery (R. 9-12). On November 1, 2000, a jury found Mr. Grim guilty of all charges (R. 219). The next day, that same jury recommended death by a vote of 12-0 (R. 2120). Subsequent to the jury=s recommendation, the trial court sentenced Mr. Grim to death on December 21, 2000 (R. 235-48).

Mr. Grim timely sought direct appeal to this Court. This Court affirmed Mr. Grim's convictions and death sentence. Grim v. State, 841 So. 2d 455 (Fla. 2003). The United States Supreme Court denied certiorari. Grim v. Florida, 122 S. Ct. 230 (2003).

Mr. Grim filed his initial post-conviction motion on October 5, 2004 (PC-R. 1-78). A Huff[1] hearing was held in the matter on January 31, 2005 (PC-R. 85-86). On February 8, 2005 the lower court entered an order granting an evidentiary hearing on the factual claims asserted in Mr. Grim's post-conviction motion (PC-R. 87-88). An evidentiary hearing was held in this matter on April 14-15, 2005.[2] The evidentiary hearing was

[1]Huff v. State, 622 So.2d 982 (Fla. 1993)

[2]At the evidentiary hearing, Micheal Rollo, Mr. Grim's penalty-phase counsel at trial, was the last witness called to testify.

continued and completed on September 1, 2005. After the hearing, both Mr. Grim and the state submitted written closing arguments (PC-R. 151-85). The lower court denied all relief on December 20, 2005 (PC-R. 186-215). This appeal follows.

II. STATEMENT OF THE EVIDENTIARY HEARING FACTS

Dr. James Larson was admitted as an expert in forensic psychology (EHT. 11). Dr. Larson stated that he has testified in over fifty death penalty cases (Id.). Dr. Larson was contacted by attorney Michael Rollo in March 2000, regarding his potential involvement in the instant case (EHT. 12). Dr. Larson interviewed Mr. Grim on April 4, 2000, and followed that up with psychological testing on April 11, 2000 (EHT. 13). Dr. Larson reviewed "basic discovery" (Id.). Dr. Larson testified that he reviewed Mr. Grim's psychological treatment records from Avalon Center (Id.). The records revealed that Mr. Grim voluntarily sought treatment at Avalon Center for anger management (EHT.

Rollo brought to the stand with him his files from the case. Rollo asserted that he had recently discovered the files only one month prior to the hearing. Further, Rollo asserted that he was not compelled to disclose the files despite being requested to do so by undersigned counsel. Undersigned counsel moved the court to compel disclosure of the files, suspend the hearing, and allow for amendment of Mr. Grim's post-conviction motion with any claims emanating from the previously withheld files. The lower court suspended the hearing, ordered the files disclosed, and allowed for amendment. After receiving and reviewing the files, undersigned counsel notified Judge Rasmussen that he would not be amending the motion. The lower court then set the continuation of the evidentiary hearing. (PC-R. 150)

14). The records revealed that Mr. Grim was evaluated by Dr. Gushwa whom Dr. Larson considers a "very good evaluator" and "good with medications" (Id.). The records also revealed that Dr. Gushwa diagnosed Mr. Grim with intermittent explosive disorder and anti-social personality disorder (EHT. 14-15). Intermittent Explosive Disorder is a mental illness and is often related to brain damage or exposure to violence as a child (EHT. 29, 38). Dr. Larson agreed with Dr. Gushwa's diagnosis (EHT. 29). Dr. Larson added that, in his opinion, Mr. Grim would not meet the criteria for the "extreme" anti-social personality, or psychopathic personality (EHT. 15-16). Dr. Larson indicated in his testimony that anti-social personalities are the result of either hereditary or environmental factors (EHT. 16-17). Dr. Larson stated that the Avalon records indicated Mr. Grim entered Avalon of his own accord because he was "dissatisfied with his own temper and the way he treated his wife" (EHT. 17-18). Mr. Grim was prescribed, as part of his Avalon treatment, the medications Depakote and Prozac (EHT. 18). Mr. Grim was also abusing alcohol at the time (Id.). When Dr. Larson interviewed Mr. Grim, he found him to be depressed, but not psychotic (EHT. 20). Further, Mr. Grim had been depressed for some time because of marital and economic stressors in his life (Id.). Mr. Grim had a lengthy history of alcohol abuse and experimentation with substances (Id.). Dr. Larson learned that Mr. Grim was a Navy

brat whose parents were divorced when he was eleven (EHT. 21). Mr. Grim's many attempts to contact his father were rebuffed (Id.). Mr. Grim still felt hostile about his father (Id.). Mr. Grim described the unhappiness of his unraveling marriage and the infidelity and dishonesty of his wife (EHT. 22). Dr. Larson stated that Mr. Grim understood Larson to be a mitigation expert and was not enthusiastic about this (EHT. 23). Dr. Larson stated that he felt that Mr. Grim's answers were abbreviated because of this, especially regarding "deprivations in childhood and dysfunctional family" (EHT. 24). Mr. Grim had been to prison before and did not want to go back (EHT. 23). Mr. Grim had an adequate understanding of mitigation and aggravation (EHT. 24-25). There was no evidence that Mr. Grim was "malingering" (EHT. 25). Mr. Grim did not refuse to answer any questions (EHT. 43). Dr. Larson administered an I.Q. test, the WAIS III, which revealed the likelihood of organic brain damage (EHT. 26). Dr. Larson stated his opinion that the I.Q. scores were valid (EHT. 27). In terms of the incident in question, Mr. Grim told Dr. Larson that he had been drinking heavily the night before, was very angry at his wife, and that his anger "came out at the wrong person" (EHT. 27-28). Dr. Larson opined that both statutory mental health mitigating factors apply in this case (EHT. 30). Further, Dr. Larson noted this finding in his file at the time of the Grim trial and in a letter to Mr. Grim's

trial attorneys (EHT. 31). Dr. Larson testified additionally that he made recommendations to Mr. Grim's trial attorneys regarding Mr. Grim's use of the prescribed drugs Prozac and Depakote, as well as alcohol (Id.). Dr. Larson discussed a drug-use defense with Mr. Grim's attorneys and recommended to them that they consult with an expert in that field (EHT. 31-32). Dr. Larson did not recall ever speaking with specially-appointed counsel, Spiro Kypreos, about the Grim case (EHT. 34). Larson would have testified at the Spencer[3] hearing if had been asked to do so (Id.). He would have testified to the opinions given at the evidentiary hearing (EHT. 35). Further, Dr. Larson stated that he would "absolutely" defer to an expert in the field as to the effect of prescribed drugs on Mr. Grim's behavior (EHT. 44).

Dr. Jonathan Lipman testified that he is a Neuropharmacologist and that Neuropharmacology is a field that deals with the effects of drugs and chemicals on the brain and behavior (EHT. 46). Dr. Lipman is also an Associate Clinical Professor of Psychiatry at East Tennessee State University (EHT. 47). Neuropharmacologists like Dr. Lipman develop drugs to treat various mental disorders (EHT. 49). Dr. Lipman stated that he was retained by undersigned counsel to work on the instant case (EHT. 53). Dr. Lipman reviewed numerous records

[3]Spencer v. State, 615 So. 2d 688 (Fla. 1993).

including court orders, police reports, depositions, the autopsy report, trial testimony, sentencing memoranda, the sentencing order, Mr. Grim's records for prior offenses, the PSI, military records, work records, Dr. Larson's deposition, mental-health records, and crime scene photos (EHT. 55-56). Dr. Lipman testified that the effects of drugs varies between individuals, depending on idiosyncracies, biochemistry, mental illness, and physical illness (EHT. 56). Dr. Lipman stated that the Avalon records were critical to understanding the effects of drugs on Mr. Grim (EHT. 57). Dr. Lipman testified that the diagnosis of Intermittent Explosive Disorder has an older name, Episodic Dyscontrol Syndrome (EHT. 57). Dr. Lipman interviewed Mr. Grim at Union Correctional Institution (Id.). The purpose of the interview was to explore how drugs, both prescribed and illicit, affected Mr. Grim (EHT. 58). Mr. Grim was not malingering (Id.). Dr. Lipman testified that Mr. Grim lived the life of a transient Navy brat with an alcoholic father (Id.). The family relocated many times (EHT. 59). Mr. Grim's father was violent towards him, kicking him in the testicles and punching him in the face, causing Mr. Grim's glasses to be broken (Id.). The incidents of violence all happened when Mr. Grim's father was intoxicated (Id.). Mr. Grim's parents divorced when he was between the sixth and seventh grades (Id.). Mr. Grim first used marijuana at twelve years of age and was using it constantly by

age fourteen (EHT. 59-60). Mr. Grim began using alcohol at age thirteen and this became constant by his senior year of high school (EHT. 60). Mr. Grim joined the Navy his senior year of high school and then attended submarine school and sonar-tech training (Id.). Mr. Grim continued to use alcohol and marijuana in the Navy, as well as pharmaceutical amphetamines (Id.). Mr. Grim also used large doses of LSD as often as it was available (Id.). Mr. Grim described alcohol-related difficulties while in the Navy that resulted in his ultimate discharge from the service (EHT. 60-61). Dr. Lipman reviewed the records of Mr. Grim's 1982 offenses in Pensacola and found them "quite remarkable" in that Mr. Grim could not explain why he had committed the offenses for which he was charged (EHT. 62). Mr. Grim served eight years for the 1982 offenses and then violated work release twice due to alcohol and marijuana use (Id.). Mr. Grim's mother was able to document instances of Mr. Grim's alcohol-related explosive violence to Dr. Lipman (EHT. 62-63). Mr. Grim was arrested in 1990 in Temple, Texas, in what was described as a drunken episode of theft (EHT. 63). After incarceration in Texas, Mr. Grim returned to Pensacola (Id.). Mr. Grim began working at Daws Manufacturing and met his future wife, Lynn (Id.). The two were married in 1996 and were married for two years (EHT. 63-64). In two-and-one-half years of marriage, there were only two days when the couple did not drink

to the point of intoxication (EHT. 64). After a drunken episode of violence toward Lynn on Christmas Eve, 1997, Mr. Grim checked himself into Avalon Center on his own initiative (EHT. 64). The treating physician, Dr. Gushwa, prescribed the anti-epileptic drug Depakote (Id.). Depakote is used for grand mal and partial complex seizures (Id.). Later, Mr. Grim was prescribed Prozac (Id.). Dr. Lipman noted that the Depakote seemed to work, as was noted by Dr. Gushwa on July 16, 1998 (Id.). At the time of the offense, Mr. Grim's alcohol use was "prodigious" (EHT. 65). Mr. Grim typically drank ten-to-twelve beers after work on a typical week night and a case of beer and a 1.75 liter bottle of bourbon on weekend days (Id.). Dr. Lipman calculated Mr. Grim's blood-alcohol content at the time of the crime as being twice to four times the legal limit (EHT. 66-68). Mr. Grim would have been demonstrably intoxicated at the time of the crime, "his brain under the influence of large amounts of alcohol" (EHT. 70). Dr. Lipman opined that chronic alcohol use such as engaged in by Mr. Grim causes brain injury with numerous demonstrative symptoms (EHT. 71-72). Mr. Grim's decision-making ability, according to Dr. Lipman, would have been impaired and, further, aggravated by Intermittent Explosive Disorder, which acted in concert with his alcohol impairment (EHT. 71-72). Mr. Grim was impulsive, by diagnosis of IED, which was exacerbated by alcohol use (EHT. 72-73). Impulsive behavior, distinct from compulsive

behavior, is characterized by a lack of forethought (EHT. 72). Mr. Grim was being prescribed Depakote for his IED (EHT. 73). Prozac was prescribed for depression (EHT. 76). Dr. Lipman stated that Depakote "acts on the biochemistry of the brain to blunt electric-like excitability in those parts of the brain that are dysfunctional in explosive dyscontrol syndrome" (EHT. 74). The Depakote seemed to help Mr. Grim (Id.). Dr. Gushwa's notes indicate that he did not believe Mr. Grim had stopped drinking (Id.). Dr. Lipman stated that it would not have been good for Mr. Grim to take Depakote and alcohol together (EHT. 75). Mr. Grim had run out of money at the time of the crime and was rationing his doses of Depakote and Prozac (EHT. 75-76). The effect was that Mr. Grim was weaning himself off of Depakote and Prozac (EHT. 76). However, the Depakote Mr. Grim was taking still would have exacerbated the effects of alcohol, while not having a therapeutic effect on the underlying Intermittent Explosive Disorder (EHT. 77). Dr. Lipman described this as a "sledge hammer effect" (EHT. 92). As to Prozac, Mr. Grim still had the drug in his system at the time of the crime, although not at a therapeutic level, with the result being a re-emergence of the underlying depressive disorder (EHT. 77-78, 89). Dr Lipman opined that there is a biochemical lesion in Mr. Grim's brain that underlies his explosive violence (EHT. 78-79). Dr. Larson's psychological testing supports this conclusion (EHT.

80). Brain-damaged individuals and anti-social individuals suffer greater neurotoxic impairment than non-affected individuals (EHT. 81). Dr. Lipman stated his opinion that, given Mr. Grim's use of alcohol, prescribed drugs, underlying Intermittent Explosive Disorder, and brain damage, Mr. Grim had no intent to commit the crime and that it happened impulsively and without prior thought (EHT. 82). The same is true for Mr. Grim's 1982 crime (Id.). Dr. Lipman further stated that all of the criminal episodes Mr. Grim has been involved in were alcohol related (Id.). Dr. Lipman also stated his opinion that both statutory mental health mitigating factors apply to Mr. Grim (EHT. 83). Dr. Lipman stated that during his interview, Mr. Grim was remorseful, tearful, and visibly shaken about the crime, adding "I see her every day screaming for help" (EHT. 83, 85). Dr. Lipman added on cross-examination that his opinion regarding brain damage is based on Dr. Larson's psychometric testing and the beneficial effects of Depakote (EHT. 87). Further, neuropsychological tests would have added to the opinion (EHT. 88).

John Molchan, the trial prosecutor in this case, testified that the Grim case was probably his eighth, capital prosecution (EHT. 97). Molchan identified Defense Exhibit #2 as a series of documents from the state-attorney file (EHT. 98-99). The documents are a fax transmission sheet and documents indicating

Dr. Michael Berkland's de-licensure in the state of Missouri.[4] Mr. Molchan testified that he received the documents from the 1st Circuit, State Attorney's Office in Ft. Walton Beach (EHT. 99). Further, he faxed the documents to the Pensacola office because he believed that the documents needed to be seen by Curtis Golden, the elected State Attorney (Id.). Mr. Molchan stated that he may have been aware of Dr. Berkland's troubles prior to receiving documents from the Ft. Walton satellite office, but he could not say so with certainty (Id.). Mr. Molchan recalled discussing the facts of the Missouri troubles with Dr. Berkland (EHT. 100). Mr. Molchan agreed that Dr. Berkland's testimony was important in proving the sexual-battery charge against Mr. Grim (EHT. 101) Mr. Molchan agreed that, other than the physical manner effectuating the homicide, there was no indication that Mr. Grim planned the homicide in question (Id.). Mr. Molchan did not have a recollection of providing the documents in Defense Exhibit #2 to Mr. Grim's trial counsel (EHT. 102). Mr. Molchan testified that he recalled Dr. Berkland being questioned about these facts in his deposition (Id.). The deposition was taken by Assistant Public Defender Toni Stitt who represented Mr. Grim prior to Richard Hill and Michael Rollo (Id.). Mr. Molchan agreed that the information in Defense

[4]Dr. Micheal Berkland, at the time of Mr. Grim's trial, was a medical examiner in the 1st Judicial Circuit and performed an autopsy of the victim in this matter.

Exhibit #2 is more detailed than that in the deposition (EHT. 103). Mr. Molchan testified that in hindsight, the information in Defense Exhibit #2 "probably should have been turned over" (Id.). Mr. Molchan did not recall Mr. Grim's trial counsel impeaching Dr. Berkland with the information contained in Defense Exhibit #2 (EHT. 105). Mr. Molchan did not recall Mr. Grim's trial attorneys seeking to exclude any testimony from Dr. Berkland (Id.).

Mr. Molchan identified a letter from Donald Ramsey to Assistant State Attorney Julie Edwards (EHT. 107). The document was admitted as Defense Exhibit #4 (EHT. 108). Mr. Molchan stated that the letter is a document that he would normally disclose to defense counsel (Id.).

Mr. Molchan also identified a document from the state-attorney file that was admitted as Defense Exhibit #5 (EHT. 110-11). The document is a memorandum sent by Judge Ronald Swanson's office with an attached letter from an inmate named Tracy Coffey. The letter, in essence, requests help from Judge Swanson as to Coffey's sentencing based on Coffey's assistance to the Grim prosecution.[5] The memo was sent to Mr. Molchan and Spiro Kypreos (EHT. 111). Mr. Molchan stated that the letter was likely sent to him because of the reference in the letter to

[5]To be clear, Tracy Coffey did not testify against Mr. Grim at either phase of trial. Apparently, was prepared to provide jailhouse snitch testimony against Mr. Grim.

the Grim case (Id.). Mr. Kypreos was appointed by Judge Bell in this matter to represent the public interest in developing mitigation as to Mr. Grim (Id.). Mr. Molchan did not recall advising Mr. Kypreos of Coffey's status as a potential witness against Mr. Grim (EHT. 112). Mr. Molchan testified that he probably did not advise Judge Bell that Mr. Kypreos represented Coffey, a potential witness against Mr. Grim. (EHT. 113). Mr. Molchan did not make Mr. Grim's trial attorneys aware of this fact (Id.). Mr. Molchan stated that in hindsight he probably should have informed the parties of the arguable conflict, but he did not make the connection between Coffey and Mr. Kypreos (EHT. 114).

Judge Ronald Swanson testified and recalled being assigned as the Assistant State Attorney on the Grim case (EHT. 126). Judge Swanson recognized the Berkland documents in Defense Exhibit #2 and had reviewed them prior to the hearing (EHT. 127). Judge Swanson testified that he was aware of the Berkland issue while prosecuting the Grim case (EHT. 128). Judge Swanson recalled the issue being discussed at Berkland's deposition (Id.). Judge Swanson stated his belief that Toni Stitt was representing Mr. Grim at Berkland's deposition (EHT. 128-29). Judge Swanson testified that he has no recollection of disclosing the documents in Exhibit #2 to Mr. Grim's trial counsel (EHT. 129). Further, he has no knowledge that Mr.

Grim's trial attorneys were ever made aware of the information in Exhibit #2 (EHT. 140). Judge Swanson stated his belief that the documents would be something that should be disclosed to the defense (EHT. 130, 136).

Judge Swanson also identified Defense Exhibit #5 and testified that the writer of the memorandum was his judicial assistant, Joni White (EHT. 131). Judge Swanson testified that he believes the memo would have been sent to Mr. Molchan and Mr. Kypreos because they "would have an interest in the

correspondence of some nature" (EHT. 132). Further, the memorandum would have been sent by Ms. White without any specific direction from Judge Swanson himself (EHT. 132). Judge Swanson did state that he recalled the name Tracy Coffey, but was not sure if the recollection was from working as an Assistant State Attorney or as a judge (EHT. 133). Judge Swanson did not recall informing Judge Bell of the facts surrounding the memorandum (EHT. 134). Judge Swanson stated that had he known about the alleged conflict, he thinks he would have informed Judge Bell (Id.).

Richard Hill testified that he was appointed by the trial court to represent Mr. Grim (EHT. 147). Hill had been with the State Attorney's Office from 1986, until he began his private practice in March, 1997 (EHT. 141). Hill began criminal-defense work in 1997 (EHT. 143). Hill testified that Mr. Grim had his own ideas of how he wanted the case handled and that Mr. Grim "basically dictated what we did" (EHT. 159). Hill did what Mr. Grim told him to do (Id.). Michael Rollo was primarily handling the penalty phase (EHT. 161). Hill and Rollo were not partners and had no informal agreement to work together (EHT. 146). Hill had never defended a capital case prior to being appointed in Mr. Grim's case (EHT. 148). Hill's first actions on the case were to review discovery and visit Mr. Grim (EHT. 152). Hill testified that he and Rollo kept their case materials separate

(EHT. 154). The Public Defender's Office had the case prior to Hill and turned their files over to him upon his appointment (EHT. 155-56). Hill did not recall discussing with the Public Defender what their strategy in the case had been and received no memos from them in that regard (EHT. 157-58). Hill stated that he talked with Mr. Rollo and Dr. Larson as part of the penalty-phase development of the case (EHT. 162). He also spoke with Mr. Grim (Id.). As to Dr. Larson's recommendation that a consultation be done with a drug expert, Hill stated that he did not do so because "he [Mr. Grim] did not want any mitigation presented" and, as a result, ***"everything pretty well stopped, we didn't go much further based on his wishes"*** (EHT. 166) (emphasis added). Hill further stated that "we investigated mitigation up to a certain point, but based on his wishes, that's as far as it went" (EHT. 167). However, Hill added that he and Mr. Rollo were "concerned with having the case prepared for trial" (EHT. 169). Further, Hill did not believe that the waiver filed by him and Mr. Rollo absolved them of the duty to investigate (EHT. 215). Hill stated his opinion that the written waivers would have been filed at Mr. Grim's request (EHT. 171). Hill testified that he had used a drug expert in a prior capital case that he defended (EHT. 172). The expert testified in both guilt and penalty phases (Id.). Hill testified that he is unsure why the penalty-phase jury-recommendation was not waived (EHT. 174).

Hill testified that he did not investigate Mr. Grim's prior incarceration history (EHT. 176). Hill stated that he did become aware that Dr. Larson believed that Mr. Grim was brain damaged (EHT. 177). Hill was aware of Mr. Grim's history of alcohol and substance abuse, as well as his being abused as a child (EHT. 178). Hill testified that Mr. Grim was primarily, to the exclusion of other items, interested in pursuing the evidence of Henry Homes' possible involvement (EHT. 178). Hill knew several months in advance of trial that the Henry Homes' evidence was not going to be allowed (EHT. 185). Hill testified that Mr. Grim did not want to use an intoxication defense because he would have to admit guilt (EHT. 179). Hill stated that he, himself, rejected an intoxication defense (EHT. 180).

Hill testified that he would have challenged and attacked the medical examiner's testimony, if he had impeachment evidence to do so (EHT. 186). Hill agreed that the medical-examiner's testimony was the sole evidence of sexual battery (Id.). Hill agreed that the medical-examiner's testimony regarding sexual battery was the sole basis for felony-murder (Id.). Hill was not aware of Berkland's problems in Missouri that are reflected in Defense Exhibit #2 (EHT. 187). No one from the public defender's office told Hill about the information (EHT. 204). Hill did not become aware of the information until after trial (EHT. 188). If Hill had the information, he "certainly would

have used it" (EHT. 187). Hill added that there was no evidence of premeditation (Id.). Hill testified that he would have received the public-defender's file which would have included, ostensibly, all depositions (EHT. 228). Hill testified that he had discussions with Mr. Rollo about waiving the penalty phase jury (EHT. 192). He did not have similar conversations with Mr. Grim (Id.). Hill did not recall he and Rollo making a decision on the issue (Id.).

Hill testified that he recalls discussing with Mr. Grim moving to disqualify Judge Bell (EHT. 194). According to Hill, Mr. Grim "was fine with Judge Bell staying on the case" (Id.). Hill recalled discussing the issue, but was not clear that he informed Mr. Grim of the legal standard for disqualification (EHT. 196).

Hill stated that Mr. Grim told him not to argue for lesser included offenses (EHT. 197). Hill further stated that he put this request on the record to protect himself from an ineffective assistance claim (EHT. 198).

Hill testified that he did not recall anyone from the defense actually looking for mitigation that could be presented (EHT. 200). Hill examined Defense Exhibit #5 regarding Tracy Coffey and stated that he had never seen the document (EHT. 204). Hill added that he was not aware of the conflict between Mr. Kypreos, Mr. Grim, and Tracy Coffey (EHT. 219). Hill added

that he is sure he would have mentioned it, if he had known about it (Id.).

Generally, Mr. Hill could not state a reason why he did not impeach witness Cynthia Wells, who identified Mr. Grim as being at the pier with a shirt on, with the fact that there was allegedly a video showing him with his shirt off (EHT. 209, 211). Hill essentially testified that Wells identification was irrelevant given that the video placed Mr. Grim at the pier (Id.).

Hill testified that the fact that there were two sets of tire tracks leading from Mr. Grim's back yard was not "significant" given the other facts of the case (EHT. 214). Also, Hill did not find it significant that the victim had on socks when her body was discovered, but was reported by law enforcement to have been in bare feet when seen with Mr. Grim earlier in the morning (EHT. 216).

Hill testified that if he had heard the "Amen" comment during the penalty phase, he would have objected to it.

Julie Edwards testified that she is an Assistant State Attorney in the Milton office and has been since 1995 (EHT. 241). Ms. Edwards examined Defense Exhibit #4, a letter addressed to her (EHT. 242). Edwards did not remember receiving the letter (Id.). Edwards did not recognize the name of the letter writer, Donald Ramsey (Id.). Edwards recalled her

office prosecuting the Grim case, but she was not directly involved with it (Id.). Edwards testified that she would have forwarded the letter to the prosecutor on the Grim case (EHT. 243). Edwards would not have independently disclosed the letter to defense counsel (Id.).

Spiro Kypreos testified at the evidentiary hearing and stated that he was appointed by the trial court as public counsel (EHT2. 9). Further, Kypreos stated that Mr. Rollo would not communicate with him about the case because "his client did not want to contest the death penalty" (Id.). Kypreos also stated that Rollo was "opposing me" (EHT2. 10). Kypreos felt that Mr. Grim's interests and the public's interest coincided (EHT2. 10). Kypreos testified that he felt his job was to represent Mr. Grim, "as if he were my client" (Id.). Kypreos stated that he was attempting to get as much information about Mr. Grim's mental health as he could (EHT2. 18). Regarding Mr. Grim's mental health, Kypreos stated that he felt Mr. Grim "was a time bomb waiting to go off, and I think it was for circumstances beyond his control" (Id.). Kypreos believes that he had Dr. Larson's report or deposition (EHT2. 22-23). Kypreos stated that he did not do an independent investigation into mitigation (EHT2. 27). Rather, he took the information that was available from Mr. Rollo and did the best he could (EHT2. 28). There was not enough time for an independent

investigation (EHT2. 27-28). Kypreos testified the investigation he was able to do under the circumstances would not satisfy the criteria for effective assistance of counsel (EHT2. 28). Kypreos was not able to do a full-mitigation investigation (EHT2. 39). Kypreos made it clear that his investigation of the case as public counsel would not satisfy constitutional standards for effective assistance of counsel (EHT2. 38-39). Kypreos understood that he would not be able to consult with experts given the scope of his representation (EHT2. 40-41). Kypreos did not have a budget with resources to call on (EHT2. 40). Kypreos added that based on the limited-mitigation records he was able to see, he felt that a case could have been made to save Mr. Grim's life (EHT2. 41, 45). Kypreos opined that the mitigating factor he felt was most compelling was Mr. Grim's proneness to violent outbursts which were beyond his control (EHT2. 47).

Kypreos testified that he was unaware of Tracy Coffey's status as a witness in the Grim case and did not divulge the arguable conflict of interest (EHT2. 35). Kypreos stated that the arguable conflict did not affect the work he did in the Grim case (EHT2. 36). Kypreos stated that he would have disclosed the arguable conflict if he had realized it existed (EHT2. 37).

Attorney Michael Rollo testified that he was appointed to the Grim case (EHT2. 54). Rollo was called by Richard Hill and

Hill asked him if he would take on “second-chair representation” of Mr. Grim (EHT3. 8). Rollo stated that Hill was responsible for the guilt phase of the case and Rollo “was to handle the penalty phase” (EHT3. 9). Rollo did not recall having an investigator on the case (Id.). This was because Mr. Grim “was not interested in developing any mitigation evidence” (Id.). Rollo also stated that the reason he did not develop mitigation regarding Mr. Grim’s behavior while previously incarcerated was because Mr. Grim wanted to waive mitigation (EHT3. 22). Rollo testified that he advised Mr. Grim against waiving the presentation of mitigating evidence (EHT3. 11). Rollo testified that he was aware that Mr. Grim was using prescribed drugs at the time of the crime (EHT3. 12). Rollo was also aware that Mr. Grim was using illicit drugs and alcohol at the time (EHT3. 13). Rollo stated that he has no specific recollection of discussing a guilt phase defense based on Mr. Grim’s drug and alcohol use, but he believes it was discussed (Id.). Rollo generally recalled Dr. Larson advising in his deposition that an expert in pharmacology or toxicology should be consulted (EHT3. 14). Rollo’s recollection is that this was not followed up on (Id.). Rollo agreed that this suggested consultation could have opened up a line of defense (Id.). Rollo did not recall having a conversation with Mr. Grim about this type of consultation (EHT3. 19). Rollo testified that the reason for not

investigating this type of consultation was because of Mr. Grim's wishes (EHT3. 41-42). Further, Rollo felt that it would be a waste of time and resources (EHT3. 44). Rollo described his efforts at developing mitigation as reading the public-defender file, doing research on "volunteers," and identifying from the file possible mitigating circumstances (EHT3. 15-16). Rollo also spoke with Mr. Grim's mother, sister, and step-father (EHT3. 20). Rollo identified a research memorandum written by Lisa Queen (EHT3. 17). Queen was a paralegal that Rollo used at the time of the Grim trial (Id.). Rollo stated that Queen did the research on the Koon[6], or mitigation waiver requirements (Id.). Rollo stated that he also did some independent research (EHT3. 18).

With regard to the failure to waive the jury sentencing recommendation, Rollo testified that he is not sure he ever had a direct conversation with Mr. Grim about the possibility (EHT3. 23). Rollo asserted his own awareness of case law allowing a capital defendant to waive a jury-sentencing recommendation (EHT3. 24). Rollo also stated that at the time of the Grim trial, he felt like a "passive presentation to the jury was going to required" (EHT3. 26). Rollo added that he felt it would not make any difference to a man who wants to be sentenced to death anyway (EHT3. 28).

[6]Koon v. State, 619 So.2d 246 (Fla. 1993).

SUMMARY OF THE ARGUMENTS

(I) The state withheld valuable, exculpatory and/or impeachment evidence which prejudiced Mr. Grim's right to a fair trial. The state possessed information concerning medical examiner Dr. Michael Berkland which was not disclosed to Mr. Grim or his trial counsel. Specifically, the state possessed information that Dr. Berkland had been stripped of his license to practice in Missouri based on allegations that he had falsified autopsies, some of them in homicide cases. This evidence was especially critical, and its withholding prejudicial, given that Dr. Berkland gave essential testimony that the victim was sexually battered, the only basis for felony-murder in a case where felony-murder was the only theory of first-degree murder. Additionally, the state possessed evidence that a witness had come forward with information regarding Mr. Grim's use of drugs and alcohol. This evidence was relevant to a potential guilt-phase defense and mitigation. Withholding such information was prejudicial.

(II) Trial counsel provided ineffective assistance of counsel to Mr. Grim at the guilt phase of trial. Trial counsel had knowledge that there was a viable guilt phase defense of Mr. Grim related to his poly-use of drugs in concert with his suffering from Intermittent Explosive Disorder and brain damage. Counsel, despite being on notice of this viable defense, never

investigated it and never discussed its potential with Mr. Grim. In addition, trial counsel failed to provide adequate advice, counsel, and guidance by failing to move to disqualify the trial judge. The trial judge had previously represented the alternate suspect in the case and failure to move for his disqualification, as evidenced by the judge's failure to allow evidence of the alternate suspect's possible guilt, was prejudicial. Further, trial counsel needlessly advised the court and the state that Mr. Grim did not desire for him to argue for lesser included offenses to first-degree murder. Such action by trial counsel was, as he admitted, simply an effort to defend against future post-conviction claims when he should have been defending Mr. Grim. Such action was unethical and prejudicial. Finally, trial counsel was ineffective in failing to identify evidence for and argue to the jury reasonable doubt as to Mr. Grim's guilt. Specifically, trial counsel failed to challenge identification of Mr. Grim at the site where the victim's body was recovered, failed to raise and argue evidence indicating that the victim had been somewhere other than Mr. Grim's house the morning of the crime based on the fact that she was found with socks on, and failed to point out that there were multiple sets of tire tracks in Mr. Grim's back yard. This evidence of reasonable doubt should have been raised and argued. Not doing so was prejudicially ineffective.

(III) Trial counsel provided ineffective assistance of counsel at the penalty-phase of trial. Mr. Grim's ostensible waiver of the right to present mitigating evidence to the jury was invalid. Trial counsel failed to adequately investigate mitigating evidence, especially regarding Mr. Grim's poly-use of drugs and its affect in concert with his diagnosis of Intermittent Explosive Disorder and brain damage. Despite counsel clearly being on notice that powerful mitigating information in this regard, and otherwise, existed, counsel failed to follow-up and advise Mr. Grim of its value. As a result, Mr. Grim's waiver and the total lack of mitigation presented to the jury was invalid. Had this information been presented, there is a reasonable probability of a different result. Additionally, trial counsel was prejudicially ineffective in failing to adequately advise Mr. Grim of his right to request waiver of the jury's sentencing recommendation. Counsel's advice was clearly wrong and prejudiced Mr. Grim.

(IV) Specially-appointed counsel, appointed by the court to present mitigation on behalf of the "public interest" operated under a conflict of interest which was not disclosed to Mr. Grim, his trial counsel, or the trial judge. Specially-appointed counsel represented Mr. Grim and the jailhouse snitch who was prepared to testify against him. Specially-appointed counsel failed to divulge this conflict. Additionally, the

Assistant State Attorney was aware of the conflict and failed to divulge its existence to Mr. Grim or the court. Such a conflict presented per se prejudice to Mr. Grim.

ARGUMENT I

MR. GRIM WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING. THE LOWER COURT ERRED IN DENYING APPELLANT RELIEF ON THIS BASIS.

A. DR. BERKLAND

John Molchan, the trial prosecutor in this case, identified Defense Exhibit #2 as a series of documents from the state attorney file (EHT. 98-99). The documents are a fax transmission sheet and documents related to Dr. Michael Berkland's de-licensure in the state of Missouri. Mr. Molchan testified that he received the documents from the 1st Circuit State Attorney's Office in Ft. Walton Beach (EHT. 99). Further, he faxed the documents to the Pensacola State Attorney's Office because he believed that the documents needed to be seen by Curtis Golden, the elected State Attorney (Id.). Mr. Molchan stated that he may have been aware of Dr. Berkland's troubles prior to receiving documents from the Ft. Walton satellite office, but he could not say so with certainty (Id.). Mr. Molchan recalled discussing the facts of the Missouri troubles with Dr. Berkland (EHT. 100). Mr. Molchan agreed that Dr. Berkland's testimony was important in proving the sexual battery charge against Mr. Grim (EHT. 101). Mr. Molchan agreed that,

other than the physical manner of the homicide, there was no indication that Mr. Grim planned the victim's death (Id.). Mr. Molchan did not have a recollection of providing the documents in Defense Exhibit #2 to Mr. Grim's trial counsel (EHT. 102). Mr. Molchan testified that he recalled Dr. Berkland being questioned about these facts in his deposition (Id.). The deposition was taken by Assistant Public Defender Toni Stitt who represented Mr. Grim prior to Richard Hill and Michael Rollo (Id.). Mr. Molchan agreed that the information in Defense Exhibit #2 is more detailed than that in the deposition (EHT. 103). Mr. Molchan testified that in hindsight, the information in Defense Exhibit #2 "probably should have been turned over" (Id.). Mr. Molchan did not recall Mr. Grim's trial counsel impeaching Dr. Berkland with the information contained in Defense Exhibit #2 (EHT. 105). Molchan did not recall Mr. Grim's trial attorneys seeking to exclude any testimony from Dr. Berkland (Id.).

Judge Ronald Swanson testified and recalled being assigned as an Assistant State Attorney on the Grim case (EHT. 126). Judge Swanson recognized the Berkland documents in Defense Exhibit #2 and had reviewed them prior to the hearing (EHT. 127). Judge Swanson testified that he was aware of the Berkland issue while prosecuting the Grim case (EHT. 128). Judge Swanson recalled the issue being discussed at Berkland's deposition

(Id.). Judge Swanson stated his belief that Toni Stitt was representing Mr. Grim at Berkland's deposition (EHT. 128-29). Judge Swanson testified that he has no recollection of disclosing the documents in Exhibit #2 to Mr. Grim's trial counsel (EHT. 129). Further, he has no knowledge that Mr. Grim's trial attorneys were ever made aware of the information in Exhibit #2 (EHT. 140). Judge Swanson stated his belief that the documents would be something that should be disclosed to the defense (EHT. 130, 136).

Richard Hill testified that he would have challenged and attacked the medical examiner's testimony if he had impeachment evidence to do so (EHT. 186). Hill agreed that the medical examiner's testimony was the sole evidence of sexual battery (Id.) Hill agreed that the medical examiner's testimony regarding sexual battery was the sole basis for felony-murder (Id.). Hill was not aware of Berkland's problems in Missouri that are reflected in Defense Exhibit #2 (EHT. 187). No one from the public defender's office told Hill about the information (EHT. 204). Hill did not become aware of the information until after trial (EHT. 188). If Hill had the information, he "certainly would have used it" (EHT. 187). Hill added that there was no evidence of premeditation (Id.). Hill testified that he would have received the public defender's file

which would have included, ostensibly, all depositions (EHT. 228).

The issue presented here is whether or not the state committed a violation of Brady v. Maryland, 373 U.S. 83 (1963). In order to prove a violation of Brady, a claimant must establish that the government possessed evidence that was suppressed, that the evidence was "exculpatory" and/or had "impeachment" value, and that this evidence was "material." United States v. Bagley, 473 U.S. 667 (1985); Kyles v. Whitley, 514 U.S. 419 (1995); Strickler v. Greene, 527 U.S. 263 (1999). Evidence is "material" and a new trial or sentencing is warranted "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles, 514 U.S. at 433-434; Mordenti v. State, 894 So. 2d 161 (Fla. 2004); Hoffman v. State, 800 So. 2d 174 (Fla. 2001); Rogers v. State, 782 So. 2d 373 (Fla. 2001); Young v. State, 739 So. 2d 553 (Fla. 1999). On the other hand, if Mr. Grim's counsel was or should have been aware of the information, his counsel was ineffective in failing to discover and utilize it, Strickland.v Washington, 466 U.S. 668 (1984), and this Court must still weigh the prejudice to Mr. Grim due to counsel's failure. See Cardona v. State, 826 So. 2d 968, 917 (Fla. 2002); Trepal v. State, 836 So. 2d 405 (Fla. 2003) (same test used for prejudice or materiality in Brady and

Strickland claims). A proper materiality analysis under Brady also must contemplate the cumulative effect of all suppressed information. Further, the materiality inquiry is not a "sufficiency of the evidence" test. Id at 434. The burden of proof for establishing materiality is less than a preponderance. Williams v. Taylor, 120 S. Ct. 1495 (2000); Kyles, 514 U.S. at 434. Or, in other words, "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Id. Rather, the suppressed information must be evaluated in light of the effect on the prosecution's case as a whole and the "importance and specificity" of the witness' testimony. United States v. Scheer, 168 F. 3d 445, 452-453 (11th Cir. 1999).

Brady requires disclosure of evidence which impeaches the prosecution's case or which may exculpate the accused "where the evidence is material to either guilt or punishment." The evidence at issue here certainly meets that test.

A criminal defendant is entitled to a fair trial. As the United States Supreme Court has explained:

> . . a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

Strickland v. Washington, 466 U.S. 668, 685 (1984). In order to ensure that an adversarial testing and fair trial occur, certain

obligations are imposed upon both the prosecutor and defense counsel. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment.'" United States v. Bagley, 473 U.S. 667 , 674 (1985), quoting Brady at 87. Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland These allegations raise a reasonable likelihood of a different result. Mr. Grim was denied a reliable adversarial testing. The jury never heard the considerable and compelling evidence that was obviously exculpatory as to Mr. Grim. In order "to ensure that a miscarriage of justice [did] not occur," Bagley, 473 U.S. at 675, it was essential for the jury to hear the evidence. The state failed to disclose exculpatory and impeachment evidence that was in their possession at the time of Mr. Grim's trial. This failure undermines confidence in the reliability of Mr. Grim's convictions, as well as the reliability of his death sentence. Berger v. United States, 295 U.S. 78, 88 (1935).

The lower court found that the evidence demonstrated that neither prosecutor assigned to the case disclosed the information regarding Dr. Berkland (PC-R. 188-89). However, the lower court additionally found that the information was in fact disclosed based on a pre-trial deposition taken by the Assistant

Public Defender (PC-R. 189). The lower court further points to Richard Hill's testimony on cross-examination stating that "I'm sure I did" factor in the deposition when preparing for trial (Id.). This holding by the lower court completely ignores ample and thoroughly more convincing testimony from Hill that he did not have the information that Dr. Berkland had been stripped of his license in Missouri. On direct examination, Hill testified that he was not aware of the Berkland information (EHT. 187), that no one from the Public Defender's Office told him about the information (EHT. 204), that he only became aware of the information post-trial (EHT. 188), and that he would have used the information to impeach Dr. Berkland if he had it (EHT. 187). This far more emphatic testimony from Hill belies the lower court's finding that Hill knew of the information. Frankly, Hill's testimony on cross-examination, after being confronted with the deposition form his file, seems to be an after-the-fact construction. The lower court's finding is unreasonable. In a conclusory fashion, the lower court finds no prejudice (PC-R. 189). The lower court's analysis seems to be that if the defense knows of the information, there can be no prejudice under Brady or ineffective assistance of counsel analysis. The court's finding in this regard is legally inaccurate. There is no syllogistic relationship between knowledge and a conclusion of lack of prejudice. Notably, Richard Hill testified that if

he had the information, he certainly would have used it. Any effective lawyer would have tried to use it. Not doing so was prejudicial. The lower court's analysis, taken to its logical extreme, would hold that if a defense attorney had indisputable knowledge that someone other than his client committed the charged crime and did not use it, there could be no prejudice because defense counsel had knowledge of it. This is nonsensical. The lower court erred in this regard.

Dr. Michael Berkland was the state's pathologist in this case and testified to various issues regarding the victim's death (TT. 566-93). In addition to giving opinion testimony about the victim's cause of death, Berkland also testified that the victim was sexually battered by her killer (Id.). The testimony regarding sexual battery was dubious, but crucial. The state had a tenuous, at best, case for premeditated murder in this matter. There simply was no real evidence of premeditation and none was presented. Both prosecutors and trial counsel effectively acknowledged this. The evidence of sexual battery was exclusively the opinion of Dr. Berkland that the victim had been vaginally penetrated with an object. Because the state had no case for premeditated murder, in order to secure a first-degree murder conviction, they had to have a basis for felony-murder. Dr. Berkland's sexual battery testimony was that basis. Without that basis, this case is

second-degree murder at most, and possibly less. Thus, Dr. Berkland's testimony was extra-critical.

As the evidentiary hearing evidence demonstrated, the state possessed valuable, detailed exculpatory and/or impeachment evidence regarding Dr. Berkland's background and suspension while in the state of Missouri. Dr. Berkland was, following fairly extensive legal proceedings, suspended from medical practice (Defense Exhibit #2, PC-R. 270-71). This suspension was based on the testimony of more than one fellow pathologist, one of which was his supervisor (Id.). In an order from Judge Thomas Clark of Jackson County, Missouri, it was found that Dr. Berkland deliberately falsified eight different autopsies and "poses a substantial probability of serious danger to the health, safety, and welfare of his patients, clients, and/or the residents of this state" (Id.). In a letter dated November 22, 1996, Dr. Thomas Young, Berkland's Missouri supervisor, writes to the prosecuting attorney that Berkland falsified twelve autopsies, two of which were homicides (Defense Exhibit #2, PC-R. 274). Additionally, Berkland was fired by Dr. Young in a memorandum dated January 10, 1996 (Defense Exhibit #2, PC-R. 277).

The state was in possession of this obviously crucial information. Dr. Berkland's arguably criminal activities in Missouri should have been disclosed to defense counsel. As Mr.

Molchan, Judge Swanson, and trial counsel testified, and the lower court found, they were not. Further, even if counsel was in possession of this information, he, apparently, failed to even read Dr. Berkland's deposition. This conclusion is based on the fact that Mr. Hill's testimony was clearly that he did not know of the information and that if he had it, he would have used it. Had counsel possessed and utilized this crucial information, the result of Mr. Grim's proceedings would have been different.

B. DONALD RAMSEY LETTER

Prosecutor John Molchan identified a letter from Donald Ramsey to Assistant State Attorney Julie Edwards (EHT. 107). The document was admitted as Defense Exhibit #4 (EHT. 108). Mr. Molchan stated that the letter is a document that he would normally disclose to defense counsel (Id.).

Julie Edwards testified that she is an Assistant State Attorney in the Milton office and has been since 1995 (EHT. 241). Ms. Edwards examined Defense Exhibit #4, a letter addressed to her (EHT. 242). Edwards did not remember receiving the letter (Id.). Edwards did not recognize the name of the letter writer, Donald Ramsey (Id.). Edwards recalled her office prosecuting the Grim case, but she was not directly involved with it (Id.). Edwards testified that she would have forwarded the letter to the prosecutor on the Grim case (EHT. 243).

Edwards would not have independently disclosed the letter to defense counsel (Id.).

The issue presented here is whether or not the state committed a violation of Brady v. Maryland, 373 U.S. 83 (1963). The precedent and applicable law regarding the claim as to Dr. Berkland is equally applicable here.

The lower court erroneously found that because Mr. Grim himself had knowledge that he was a drug addict, this precludes the possibility of a Brady violation (PC-R. 191-92). As the court correctly noted, neither Mr. Molchan or Ms. Edwards disclosed the information to defense counsel (PC-R. 191).

The letter in question states that Donald Ramsey worked and was friends with Mr. Grim and his former wife (Defense Exhibit # 4, PC-R. 318-19). Apparently, Ramsey knew Mr. Grim and his ex-wife from their respective jobs at Daws Manufacturing (Id.). The letter outlines Ramsey's knowledge of Mr. Grim (Id.). Specifically, Ramsey details his knowledge of Mr. Grim's excessive drug and alcohol use (Id.). Ramsey states that Mr. Grim took so much L.S.D. and drank so much alcohol that it was causing him [Grim] to lose his home (Id.).

As argued infra, Mr. Grim had viable defenses, both as to conviction and sentence, predicated on his poly-use of drugs, their interaction, and their effect on his behavior. The information is crucial in that it comes from an independent

source, someone who did not necessarily paint a glaring portrait of Mr. Grim. The lower court simply misses this point in holding that Mr. Grim's knowledge of the information precludes a Brady violation. Further, drug and alcohol related defenses are common, especially in murder cases. The state knew, or should have known, that this information was at least potentially exculpatory. As it turns out, the information was crucially exculpatory. Despite the state's knowledge of this information, it was not turned over to defense counsel. As a result, the provisions of Brady were violated.

ARGUMENT II

MR. GRIM WAS DEPRIVED OF HIS CONSTITUTIONALLY GUARANTEED RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT HIS CAPITAL TRIAL WHEN HIS ASSIGNED ATTORNEY FAILED TO ADEQUATELY INVESTIGATE AND/OR PRESENT EXCULPATORY AND IMPEACHMENT EVIDENCE AND TESTIMONY, AND FAILED TO ADEQUATELY PREPARE FOR AND CHALLENGE THE EVIDENCE PRESENTED BY THE STATE. AS A RESULT, CONFIDENCE IN THE JURY'S VERDICT IS UNDERMINED. THE LOWER COURT ERRED IN DENYING THIS CLAIM AFTER AN EVIDENTIARY HEARING.

A. FAILURE TO PRESENT A VIABLE MENTAL HEALTH DEFENSE

Dr. James Larson was admitted as an expert in forensic psychology (EHT. 11). Dr. Larson was contacted by attorney Michael Rollo in March, 2000 regarding his potential involvement in the instant case (EHT. 12). Dr. Larson interviewed Mr. Grim on April 4, 2000 and followed that up with psychological testing on April 11, 2000 (EHT. 13). Dr. Larson reviewed "basic discovery" (Id.). Dr. Larson testified that he reviewed Mr. Grim's psychological treatment records from Avalon Center (Id.). The records revealed that Mr. Grim voluntarily sought treatment at Avalon Center for anger management (EHT. 14). The records revealed that Mr. Grim was evaluated by Dr. Gushwa who Dr. Larson considers a "very good evaluator" and "good with medications" (Id.). The records also revealed that Dr. Gushwa diagnosed Mr. Grim with intermittent explosive disorder and anti-social personality disorder (EHT. 14-15). Intermittent Explosive Disorder is a mental illness and is often related to

brain damage or exposure to violence as a child (EHT. 29, 38). Dr. Larson agreed with Dr. Gushwa's diagnosis (EHT. 29). Dr. Larson added that in his opinion Mr. Grim would not meet the criteria for the "extreme" anti-social personality, or psychopathic personality (EHT. 15-16). Dr. Larson indicated in his testimony that anti-social personalities are the result of either hereditary or environmental factors (EHT. 16-17). Dr. Larson stated that the Avalon records indicated Mr. Grim entered Avalon of his own accord because he was "dissatisfied with his own temper and the way he treated his wife" (EHT. 17-18). Mr. Grim was prescribed, as part of his Avalon treatment, the medications Depakote and Prozac (EHT. 18). Mr. Grim was also abusing alcohol at the time (Id.). When Dr. Larson interviewed Mr. Grim, he found him to be depressed, but not psychotic (EHT. 20). Further, Mr. Grim had been depressed for some time because of marital and economic stressors in his life (Id.). Mr. Grim had a lengthy history of alcohol abuse and experimentation with substances (Id.). Dr. Larson learned that Mr. Grim was a Navy brat whose parents were divorced when he was eleven (EHT. 21). Mr. Grim's many attempts to contact his father were rebuffed (Id.). Mr. Grim still felt hostile about his father (Id.). Mr. Grim described the unhappiness of his unraveling marriage and the infidelity and dishonesty of his wife (EHT. 22). Dr. Larson stated that Mr. Grim understood Larson to be a mitigation expert

and was not enthusiastic about this (EHT. 23). Dr. Larson stated that he felt that Mr. Grim's answers were abbreviated because of this, especially regarding "deprivations in childhood and dysfunctional family" (EHT. 24). There was no evidence that Mr. Grim was "malingering" (EHT. 25). Mr. Grim did not refuse to answer any questions (EHT. 43). Dr. Larson administered an I.Q. test, the WAIS III, which revealed the likelihood of organic brain damage (EHT. 26). Dr. Larson stated his opinion that the I.Q. scores were valid (EHT. 27). In terms of the incident in question, Mr. Grim told Dr. Larson that he had been drinking heavily the night before, was very angry at his wife, and that his anger "came out at the wrong person" (EHT. 27-28). Dr. Larson opined that both statutory mental health mitigating factors apply in this case (EHT. 30). Further, Dr. Larson wrote such in his file at the time of the Grim trial and in a letter to Mr. Grim's trial attorneys (EHT. 31). Dr. Larson testified additionally that he made recommendations to Mr. Grim's trial attorneys regarding Mr. Grim's use of the prescribed drugs Prozac and Depakote, as well as alcohol (Id.). Dr. Larson discussed a drug use defense with Mr. Grim's attorneys and recommended to them that they consult with an expert in that field (EHT. 31-32). Dr. Larson would have testified, at trial, to the opinions he gave at the evidentiary hearing (EHT. 35). Further, Dr. Larson stated that he would "absolutely" defer to

an expert in the field as to the effect of prescribed drugs on Mr. Grim's behavior (EHT. 44). Dr. Jonathan Lipman testified that he is a Neuropharmacologist and that Neuropharmacology is a field that deals with the effects of drugs and chemicals on the brain and behavior (EHT. 46). Dr. Lipman is also an Associate Clinical Professor of Psychiatry at East Tennessee State University (EHT. 47). Neuropharmacologists like Dr. Lipman develop drugs to treat various mental disorders (EHT. 49). Dr. Lipman stated that he was retained by undersigned counsel to work on the instant case (EHT. 53). Dr. Lipman reviewed numerous records including court orders, police reports, depositions, the autopsy report, trial testimony, sentencing memoranda, the sentencing order, Mr. Grim's records for prior offenses, the PSI, military records, work records, Dr. Larson's deposition, mental health records, and crime scene photos (EHT. 55-56). Dr. Lipman testified that the effects of drugs varies between individuals, depending on idiosyncracies, biochemistry, mental illness, and physical illness (EHT. 56). Dr. Lipman stated that the Avalon records were critical to understanding the effects of drugs on Mr. Grim (EHT. 57). Dr. Lipman testified that the diagnosis of Intermittent Explosive Disorder has an older name, Episodic Dyscontrol Syndrome (EHT. 57). Dr. Lipman interviewed Mr. Grim at Union Correctional Institution (Id.). The purpose of the interview was to explore how drugs,

both prescribed and illicit, affected Mr. Grim (EHT. 58). Mr. Grim was not malingering (Id.). Dr. Lipman testified that Mr. Grim lived the life of a transient Navy brat with an alcoholic father (Id.). The family relocated many times (EHT. 59). Mr. Grim's father was violent towards him, kicking him in the testicles and punching him in the face, causing Mr. Grim's glasses to be broken (Id.). The incidents of violence all happened when Mr. Grim's father was intoxicated (Id.). Mr. Grim's parents divorced when he was between the sixth and seventh grades (Id.). Mr. Grim first used marijuana at twelve years of age and was using it constantly by age fourteen (EHT. 59-60). Mr. Grim began using alcohol at age thirteen and this became constant by his senior year of high school (EHT. 60). Mr. Grim joined the Navy his senior year of high school and then attended submarine school and sonar-tech training (Id.). Mr. Grim continued to use alcohol and marijuana in the Navy, as well as pharmaceutical amphetamines (Id.). Mr. Grim also used large doses of LSD as often as it was available (Id.). Mr. Grim described alcohol-related difficulties while in the Navy that resulted in his ultimate discharge from the service (EHT. 60-61). Dr. Lipman reviewed the records of Mr. Grim's 1982 offenses in Pensacola and found them "quite remarkable" in that Mr. Grim could not explain why he had committed the offenses for which he was charged (EHT. 62). Mr. Grim served eight years for

the 1982 offenses and then violated work release twice due to alcohol and marijuana use (Id.). Mr. Grim's mother was able to document instances of Mr. Grim's alcohol-related explosive violence to Dr. Lipman (EHT. 62-63). Mr. Grim was arrested in 1990 in Temple, Texas, in what was described as a drunken episode of theft (EHT. 63). After incarceration in Texas, Mr. Grim returned to Pensacola (Id.). Mr. Grim began working at Daws Manufacturing and met his future wife, Lynn (Id.). The two were married in 1996 and were married for two years (EHT. 63-64). In two and one-half years of marriage, there were only two days when the couple did not drink to the point of intoxication (EHT. 64). After a drunken episode of violence toward Lynn on Christmas Eve, 1997, Mr. Grim checked himself into Avalon Center on his own initiative (EHT. 64). The treating physician, Dr. Gushwa, prescribed the anti-epileptic drug Depakote (Id.). Depakote is used for grand mal and partial complex seizures (Id.). Later, Mr. Grim was prescribed Prozac (Id.). Dr. Lipman noted that the Depakote seemed to work, as was noted by Dr. Gushwa on July 16, 1998 (Id.). At the time of the offense, Mr. Grim's alcohol use was "prodigious" (EHT. 65). Mr. Grim typically drank ten to twelve beers after work on a typical week night and a case of beer and a 1.75 liter bottle of bourbon on weekend days (Id.). Dr. Lipman calculated Mr. Grim's blood-alcohol content at the time of the crime as being twice to four

times the legal limit (EHT. 66-68). Mr. Grim would have been demonstrably intoxicated at the time of the crime, "his brain under the influence of large amounts of alcohol" (EHT. 70). Dr. Lipman opined that chronic alcohol use such as engaged in by Mr. Grim causes brain injury with numerous demonstrative symptoms (EHT. 71-72). Mr. Grim's decision making ability, according to Dr. Lipman, would have been impaired and, further, aggravated by Intermittent Explosive Disorder, which acted in concert with his alcohol impairment (EHT. 71-72). Mr. Grim was impulsive, by diagnosis of IED, which was exacerbated by alcohol use (EHT. 72-73). Impulsive behavior, distinct from compulsive behavior, is characterized by a lack of forethought (EHT. 72). Mr. Grim was being prescribed Depakote for his IED (EHT. 73). Prozac was prescribed for depression (EHT. 76). Dr. Lipman stated that Depakote "acts on the biochemistry of the brain to blunt electric-like excitability in those parts of the brain that are dysfunctional in explosive dyscontrol syndrome" (EHT. 74). The Depakote seemed to help Mr. Grim (Id.). Dr. Gushwa's notes indicate that he did not believe Mr. Grim had stopped drinking (Id.). Dr. Lipman stated that it would not have been good for Mr. Grim to take Depakote and alcohol together (EHT. 75). Mr. Grim had run out of money at the time of the crime and was rationing his doses of Depakote and Prozac (EHT. 75-76). The effect was that Mr. Grim was weaning himself off of Depakote and

Prozac (EHT. 76). However, the Depakote Mr. Grim was taking still would have exacerbated the effects of alcohol, while not having a therapeutic effect on the underlying Intermittent Explosive Disorder (EHT. 77). Dr. Lipman described this as a "sledge hammer effect" (EHT. 92). As to Prozac, Mr. Grim still had the drug in his system at the time of the crime, although not at a therapeutic level, with the result being a re-emergence of the underlying depressive disorder (EHT. 77-78, 89). Dr. Lipman opined that there is a biochemical lesion in Mr. Grim's brain that underlies his explosive violence (EHT. 78-79). Dr. Larson's psychological testing supports this conclusion. (EHT. 80). Brain-damaged individuals and anti-social individuals suffer greater neurotoxic impairment than non-affected individuals (EHT. 81). Dr. Lipman stated his opinion, given Mr. Grim's use of alcohol, prescribed drugs, underlying Intermittent Explosive Disorder, and brain damage, that Mr. Grim had no intent to commit the crime and that it happened impulsively and without prior thought (EHT. 82). The same is true for Mr. Grim's 1982 crime (Id.). Dr. Lipman further stated that all of the criminal episodes Mr. Grim has been involved in were alcohol-related (Id.). Dr. Lipman also stated his opinion that both statutory mental health mitigating factors apply to Mr. Grim (EHT. 83). Dr. Lipman stated that during his interview, Mr. Grim was remorseful, tearful, and visibly shaken

about the crime, adding "I see her every day screaming for help" (EHT. 83, 85). Dr. Lipman added on cross-examination that his opinion regarding brain damage is based on Dr. Larson's psychometric testing and the beneficial effects of Depakote (EHT. 87). Further, neuropsychological tests would have added to the opinion (EHT. 88).

Richard Hill stated that he talked with Mr. Rollo and Dr. Larson as part of the penalty phase development of the case (EHT. 162). He also spoke with Mr. Grim (Id.). As to Dr. Larson's recommendation that a consultation be done with a drug expert, Hill stated that he did not do so because "he [Mr. Grim] did not want any ***mitigation*** presented" and, as a result, ***"everything pretty well stopped, we didn't go much further based on his wishes"*** (EHT. 166) (emphasis added). Hill further stated that "we investigated mitigation up to a certain point, but based on his wishes, that's as far as it went" (EHT. 167). However, Hill added that he and Mr. Rollo were "concerned with having the case prepared for trial" (EHT. 169). Further, Hill did not believe that the waiver filed by he and Mr. Rollo absolved them of the duty to investigate (EHT. 215). Hill stated his opinion that the written waivers would have been filed at Mr. Grim's request (EHT. 171). Hill testified that he had used a drug expert in a prior capital case that he defended (EHT. 172). The expert testified in both guilt and penalty

phases (Id.). Hill was aware of Mr. Grim's history of alcohol and substance abuse, as well as his being abused as a child (EHT. 178). Hill stated that he, himself, rejected an intoxication defense (EHT. 180).

Michael Rollo testified that he was aware that Mr. Grim was using prescribed drugs at the time of the crime (EHT3. 12). Rollo was also aware that Mr. Grim was using illicit drugs and alcohol at the time (EHT3. 13). Rollo stated that he has no specific recollection of discussing a guilt phase defense based on Mr. Grim's drug and alcohol use, but he believes it was discussed (Id.). Rollo generally recalled Dr. Larson advising in his deposition that an expert in pharmacology or toxicology should be consulted (EHT3. 14). Rollo's recollection is that this was not followed up on (Id.). Rollo agreed that this suggested consultation could have opened up a line of defense (Id.). Rollo did not recall having a conversation with Mr. Grim about this type of consultation (EHT3. 19). Rollo testified that the reason for not investigating this type of consultation was because of Mr. Grim's wishes (EHT3. 41-42). Further, Rollo felt that it would be a waste of time and resources (EHT3. 44).

At trial, defense counsel presented a defense of reasonable doubt. Although defense counsel presented no witnesses, it is clear from the cross-examination that the defense was one of reasonable doubt. However, a viable defense based on Mr. Grim's

voluntary intoxication and poly-use of prescribed drugs was viable and would have been effective in securing an acquittal or, at the least, a less than first-degree conviction.

As the testimony at the evidentiary hearing demonstrated, prior to trial, defense counsel became aware that Mr. Grim was exposed to various drugs, both elicit and prescribed, in the time period leading up to the victim's death. Specifically, trial counsel was aware that Mr. Grim was drinking excessively, in part due to an acrimonious divorce, smoking marijuana, and taking the prescribed drugs Prozac and Depakote. Prior to trial, Mr. Grim and defense counsel discussed the possibility of a quasi-intoxication defense. Counsel's response was one of indifference if not hostility, as Mr. Hill's testimony showed. Counsel believed, as Mr. Rollo stated, that it was not worth looking into. This, of course, was without ever examining the potential of such a defense. Trial counsel conceded this. Had counsel simply investigated the issue, even to a marginal extent, they would have discovered a powerful and viable defense. Trial counsel should have investigated the issue by consulting with an expert in neuropharmacological issues, including drug interaction and intoxication. Dr. Lipman was such an expert. Such an expert was essential to determine the viability of any drug-related defense and to develop those issues for the jury and the court. Had counsel consulted with

such an expert, he would have been able to develop a multi-faceted defense based on Mr. Grim's intoxication, use of prescribed and illicit drugs, brain damage, and intermittent Explosive Disorder, a disorder akin to epilepsy. The effect of these factors made Mr. Grim psychotic and unable to premeditate the alleged crime. Had that evidence been presented, Mr. Grim would have been able to show that he was psychotic and unable to premeditate any alleged murder. Inexplicably, trial counsel failed to even investigate the potential of this defense. This action was not tactical, but simply a failure to investigate.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court explained that under the Sixth Amendment:

> . . a fair trial is one which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

466 U.S. 668, 685 (1984). In order to insure that a constitutionally adequate adversarial testing, and hence a fair trial, occur, defense counsel must provide the accused with effective assistance. Accordingly, defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 685. Where defense counsel renders deficient performance, a new trial is required if confidence is undermined in the outcome. Therefore, Strickland requires a defendant to

plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice.[7]

The lower court's order denying relief as to this claim is grounded in the notion that Mr. Grim prevented his trial attorneys from presenting such a defense (PC-R. 196-97). Such a notion is, as the testimony at the evidentiary hearing demonstrated, incomplete and inaccurate. While Mr. Grim's attorneys did testify that in general Mr. Grim wanted an acquittal defense, they also testified that they never investigated the possible defense suggested by Dr. Larson and that Mr. Grim never rejected such a defense. The lower court's broad statement that "defense counsel did not neglect his duty to investigate" (PC-R. 197), is in direct contrast to both Hill's and Rollo's testimony. As Mr. Rollo testified, he felt that an investigation of this defense was a waste of time and resources (EHT3. 44). Hill himself stated that he personally rejected an intoxication defense. Further, it is apparent from Hill's testimony that he viewed a drug expert as mitigating evidence and that because Mr. Grim "did not want any mitigation presented. . . everything pretty much stopped. . ." (EHT. 166).

[7]Various types of state interference with counsel's performance may also violate the Sixth Amendment and give rise to a presumption of prejudice. Strickland v. Washington, 466 U.S. at 686, 692 . See United States v. Cronic, 466 U.S. 648, 659-660 (1984). Mr. Grim would argue that the state misconduct detailed in Argument I, supra, qualifies for the presumption of prejudice enunciated by the United States Supreme Court in these cases.

Neither attorney recalled any conversation with Mr. Grim regarding such a defense. There is no evidence that Mr. Grim ever rejected such a defense. Counsel's decision not to investigate this defense was neither "sufficient" or "reasonable" as the court found (PC-R. 197). The fact is that there was no investigation in this regard. Trial counsel rejected Dr. Larson's suggestion completely and testified that they did so. The lower court's finding is not supported by the testimony or the evidence.

The instant case, on this point, is similar to Lewis v. State, 838 So. 2d 1102 (Fla. 2002). Lewis, like the instant case, dealt with a defendant's ostensible waiver of mitigation. On appeal, Lewis asserted that his waiver of the presentation of evidence was invalid because counsel failed to conduct an adequate investigation and thus did not properly advise him of the evidence that could be presented on his behalf. Like trial counsel for Mr. Grim, counsel for Lewis, as found by this court, "was not diligent" in contacting witnesses and discovering potential evidence. Id at 1109. Further, this Court found, in Lewis, based on the evidentiary hearing testimony, that there was viable evidence that could have been presented at trial. Like Mr. Grim in the instant case, Lewis "had his own ideas about what should be presented. . . ." Id at 1110. Lewis "did not want any testimony that would implicate him in the

commission of this crime." Id However, in spite of the waiver and apparent steadfastness of the same, this Court, citing a similar factual scenario in Deaton v. Dugger, 635 So. 2d 4 (Fla. 1993), found that trial counsel's failure to adequately investigate and prepare prejudiced Lewis. Notably, this Court rejected, in Lewis, an argument made by the state and accepted by the lower court in the instant matter that the defendant was to blame for the failure to present viable evidence. Lewis at 1113.

In Wiggins v. Smith, 123 S.Ct. 2527 (2003), the United States Supreme Court expanded on the duties of counsel to conduct a "reasonable investigation." Wiggins involved a decision by trial counsel to limit the scope of investigation. Id. at 2533. In rejecting counsel's decision in Wiggins not to present significant evidence, the Court, citing its opinion in Williams v. Taylor, 529 U.S. 362 (2000), held that before counsel may limit the presentation of evidence, counsel must fulfill the obligation to *conduct a thorough investigation*. Id. at 2535. Wiggins further held that a limitation on the scope of investigation must be reasonable in order to be considered legitimately strategic. Id at 2536.

Subsequent to Wiggins the Court held that:

> '**It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction** The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. **The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt** or the accused's stated desire to plead guilty.' 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.).

Rompilla v. Beard, 125 S. Ct. 2456, 2466 (2005)(emphasis added). Here, trial counsels' role was to challenge the inculpatory evidence by investigation and preparation. They failed in this regard.

Similar to the defendants in Lewis and Deaton, Mr. Grim cannot be blamed for his attorneys' failure to investigate and adequately inform him of a viable avenue of defense. Mr. Grim's attorneys simply never investigated the possibility of a multi-faceted drug intoxication defense. Rather, they rejected the defense out of hand. Rather than the hamstringing by Mr. Grim that is implied in the lower court's order, the failure to present this valid defense was the result of the failure of Mr. Grim's trial attorneys. Had they investigated and presented such a defense, there is a reasonable probability of a different outcome.

B. FAILURE TO MOVE FOR DISQUALIFICATION OF TRIAL JUDGE

Richard Hill testified that he recalls discussing with Mr. Grim moving to disqualify Judge Bell (EHT. 194). According to Hill, Mr. Grim "was fine with Judge Bell staying on the case" (Id.). Hill recalled discussing the issue, but was not clear that he informed Mr. Grim of the legal standard for disqualification (EHT. 196).

Judge Kenneth Bell presided over Mr. Grim's trial proceedings from beginning to end.[8] Judge Bell sentenced Mr. Grim to death (R. 235-48). Prior to trial, and in fact fairly early in their investigation, law enforcement authorities were advised of an alternate suspect to Mr. Grim. That alternate suspect was Henry and Company Homes and its President and CEO, Edwin Henry. The basis for the suspicion of Henry Homes were statements the victim made to friends and associates. The victim was an attorney and had instituted various litigation, both personal and as a representative of clients, against Henry Homes based on alleged negligence in the construction of homes. Several friends, clients, and associates of the victim informed law enforcement that the victim's interaction with Henry Homes was acrimonious, at best. Further, the victim stated on more than one occasion that if she were killed, Henry Homes should be the prime suspect. Beyond that, she even stated to one

[8]Justice Bell is now a member of this Court.

associate that if she "were found in the Bay, look to Henry Homes." As Mr. Grim argued at trial, the victim's statements were, according to witnesses, based on actual threats, not speculation or inference. Obviously, the victim was, and felt, threatened by Edwin Henry or some representative of his corporate entity. Prior to trial, the defense made its intent to use this information in Mr. Grim's defense clear (R. 132). The state objected to the use of the statements (R. 137). At a motion hearing on July 20, 2000, Judge Bell disclosed to the state and defense that he, prior to taking the bench, represented Henry Homes in real-estate cases (R. 449-50). Further, Judge Bell disclosed that he had recused himself from several cases because of that prior relationship with Henry Homes. Judge Bell's timely and appropriate disclosure arose in the context of argument regarding the admissibility of statements by the victim about Henry Homes and their possible involvement in her death. Thus, counsel was on notice that Judge Bell had a possible preexisting bias in favor of the interests of Henry Homes. At a minimum, the relationship Judge Bell disclosed created a fear in Mr. Grim that Judge Bell could not be fair. Counsel continued to allow Judge Bell to sit on the case when a Motion to Disqualify was obviously warranted. On October 23, 2000, Judge Bell issued an order disallowing the statements implicating Henry Homes, bringing Mr. Grim's fears to

fruition. In a decision that was obviously discretionary, Judge Bell disallowed any evidence implicating Henry Homes, crippling Mr. Grim's defense. Mr. Grim had an absolute right to move for disqualification under Florida Rule of Judicial Administration 2.160. Trial counsel denied Mr. Grim this right with detrimental consequences. Had counsel filed a motion for disqualification, Judge Bell, under the rule, would have been obligated to recuse himself without ruling on the existence *vel non* of any actual bias or prejudice. There is a greater than "reasonable probability" that another judge would have allowed the Henry Homes' statements, changing the complexion of the case to such an extent as to place the outcome of Mr. Grim's trial in doubt.

The issue presented here is whether or not the dictates of Strickland v. Washington were complied with. The precedent and applicable law regarding the sub-claim A equally applicable here.

The lower court's finding that "there was no direct relationship" between then Judge Bell and Henry Homes (PC-R. 196), is belied by Judge Bell's statement on the record that he handled real estate closings for Edwin Henry. Obviously, Judge Bell felt there was a significant enough relationship to disclose it on the record to Appellant and his counsel. The lower court's order is factually unsupportable on that point.

Florida Rule of Judicial Administration 2.160, which deals with the disqualification of trial judges, states that if the motion "is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action." Fla. R. Jud. Admin. 2.160 (f). The aforementioned circumstances of this case are of such a nature that they were "sufficient to warrant fear on [Mr. Grim's] part that he would not receive a fair hearing by the assigned judge." Suarez v. Dugger, 527 So. 2d 191, 192 (Fla. 1988). The proper focus of this inquiry is on "matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his [or her] ability to act fairly and impartially." Chastine v. Broome, 629 So. 2d 293, 294 (Fla. 4th DCA 1993). In capital cases, the trial judge "should be especially sensitive to the basis for the fear, as the defendant's life is literally at stake, and the judge's sentencing decision is in fact a life or death matter." Id. Canon 3E, Fla. Code Jud. Conduct, and Rule 2.160, Fla. R. Jud. Admin., mandate that a judge disqualify himself in a proceeding "in which the judge's impartiality might reasonably be questioned," including, but not limited to, instances where the judge has a personal bias or prejudice concerning a party, has personal knowledge of disputed evidentiary facts concerning the proceeding, or where the judge has been a material witness

concerning the matter in controversy. Canon 3E(1)(a) & (b), Rule 2.160(d)(1) & (2). To establish a basis for relief, a movant on a motion to disqualify:

> need only show "a well grounded fear that he will not receive a fair trial at the hands of the judge. It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling." State ex rel. Brown v. Dewell, 131 Fla. 566, 573, 179 So. 695, 697-98 (1938). See also Hayslip v. Douglas, 400 So. 2d 553 (Fla. 4th DCA 1981). The question of disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his ability to act fairly and impartially.

Livingston, 441 So. 2d at 1086.

Clearly, in the instant matter, contrary to the lower court's finding, Judge Bell had a conflict of interest in the mind of *Mr. Grim.* Whether Judge Bell had an actual conflict is irrelevant to an initial motion to disqualify. Under the above-cited precedent, Judge Bell would have had to recuse himself on a motion from Mr. Grim. In fact, Judge Bell's candid disclosure suggests he would have done so.

Trial counsel for Mr. Grim should have moved to disqualify Judge Bell based on the appearance of a conflict of interest. The failure to do so arguably brought the fear of conflict to fruition when evidence of Henry Homes possible involvement in the victim's murder was disallowed by Judge Bell. Mr. Grim was prejudiced by counsel's failure.

C. COMMENT TO COURT REGARDING LESSER INCLUDED OFFENSES

At the evidentiary hearing, Hill stated that Mr. Grim asked him not to argue for offenses less than first-degree murder (EHT. 197). Hill further stated, unequivocally, that he put this request on the record to protect himself from an ineffective assistance claim (EHT. 198).

Prior to trial, counsel told the trial court on the record that Mr. Grim had advised him not to argue for lesser charges than the highest charged, first-degree murder. This comment to the court was unnecessary and detrimental. If that was Mr. Grim's ostensible wish, certainly there was no need to advise the court and the state of this. There is no doubt that this comment breached attorney-client privilege. As to opposing counsel, it simply allowed the state to concentrate on proving first-degree murder without accounting for any of the lesser included charges. As to the court, Judge Bell was an alternate trier of fact in the case. Conceding the lack of any possibility of lesser-included offenses was completely unnecessary. Also, it must be remembered that Judge Bell was truly the ultimate sentencer in the case. Although certainly bound by the jury's recommendation, Judge Bell made the ultimate decision. To abandon the possibility of a lesser included on the record, explicitly, makes no sense and has no strategic value. Counsel achieved nothing in his advocacy of Mr. Grim by

explicitly waiving lesser-included offenses. There is nothing in the record demonstrating that Mr. Grim asked counsel to put this curious exchange on the record. Doing so was an unauthorized breach of attorney-client privilege and prejudicially deficient performance.

The issue presented here is whether or not the dictates of Strickland v. Washington were complied with. The precedent and applicable law regarding the sub-claim A equally applicable here.

The lower court's holding is that because Mr. Grim did not want his trial counsel to argue for lesser included offenses, there was no prejudice (PC-R. 198-99). The lower court's analysis misses the point. Simply because Mr. Grim did not want certain arguments made gave Mr. Hill no reason to disclose this fact to the trial court and the state. Whether or not Mr. Grim did or did not ask his trial counsel not to argue for lesser included offenses is mostly irrelevant. Counsel's breach of attorney-privilege, disclosing the information to the court and the state, was unnecessary and prejudicial. The lower court's order erroneously misses this point.

Mr. Hill's disclosure was a breach of the attorney-client privilege. Hill's efforts to place on the record conversations between he and Mr. Grim was an effort to defend himself against anticipated ineffective assistance of counsel claims. However,

Hill was defending himself, obviously, while he still represented Mr. Grim, i.e. in the middle of the trial. Attorney-client privilege, for purposes of responding to ineffective-assistance-of- counsel claims is not waived until such claims have been filed. Reed v. State, 640 So. 2d 1094 (1994); Turner v. State, 530 So. 2d 45 (Fla. 1987). Hill, by placing his conversations with Mr. Grim on the record, breached the attorney-client privilege and, in the process of doing so, prejudiced his client. Strickland.

D. FAILURE TO CHALLENGE STATE'S EVIDENCE AND TO PRESENT REASONABLE DOUBT EVIDENCE

The state relied on various items of evidence to theorize that Mr. Grim disposed of the victim's body on the Pensacola Bay bridge. Those items included a surveillance tape from a bait shop, testimony from witnesses in the bait shop, and an alleged eyewitness, Cynthia Wells. This evidence was critical in making the case against Mr. Grim. Beyond dispute was that the victim's body was found in the Bay by two fishermen on the afternoon of July 28, 1998. By using evidence to link Mr. Grim to the Bay bridge, the state was able to argue Mr. Grim's opportunity to dispose of the victim's body. However, there was ample opportunity for defense counsel to neutralize this evidence. Obviously, defense counsel could have suggested that Ms. Wells misidentified the person she saw as Mr. Grim and thus, the person with their trunk open on the bridge was not him. Also,

defense counsel failed to point out critical aspects of the surveillance tape. The state's theory was that Mr. Grim drove his car onto the Bay fishing bridge and dumped the body of the victim into Pensacola Bay. However, the tape shows Mr. Grim arriving and exiting the bait shop on foot. The tape shows the parking lot and entry and exit points for the bridge. Mr. Grim's car is never seen in the lot, entering the bridge, or exiting the bridge. Although the jury may have seen this aspect of the tape, trial counsel never made this point of evidence clear to them. It was crucial in that, quite obviously, it shows that Mr. Grim never took his car onto the bridge. This not only calls Cynthia Wells' alleged identification into question, but also it directly refutes the notion that Mr. Grim drove his car onto the bridge with the victim's body in the trunk and disposed of the body in the Bay. Trial counsel certainly should have made this point. There was no reason not do so.

Again, on the issue of Cynthia Wells' alleged identification, trial counsel missed a crucial point. At Mr. Grim's house on the morning of July 28, 1998, law-enforcement officers who had contact with Mr. Grim described him as having on a pair of cutoff denim shorts and ***no*** shirt. Grim v. State, 841 So. 2d 455, 457 (Fla. 2003). Further, that when he left the house (to dispose of the body on the bridge under the state's

theory), he still did not have a shirt on. Id. None of the officers who searched Mr. Grim's car that morning stated that there was a shirt in Mr. Grim's car. In Cynthia Wells' alleged identification, she describes the person she saw as having a shirt on. Id. Trial counsel never pointed out or argued this discrepancy to the jury. Again, there was no conceivable reason not to do so.

Additionally, on the morning of July 28, 1998, the victim called law enforcement and reported a potential attempted burglary to the Santa Rosa County Sheriff' Office. Id Deputy Lynch responded to the scene and took a statement from the victim and Mr. Grim. Id In his report and testimony, Lynch described the victim as having on shorts and a night shirt. The victim did not, according to Lynch, have shoes or socks on (TT. 284). Also, according to Deputy Lynch's report and testimony, the victim was invited by Mr. Grim to come over for coffee and the victim stated she might as well do so (TT. 276). Apparently, the victim went to Mr. Grim's house. When the victim's body was found, she had socks on. This places some doubt on the state's theory that the victim went to Mr. Grim's house and was murdered there. If she went there without shoes and socks and was ultimately found with socks on, she arguably left Mr. Grim's house unharmed. Counsel should have, but did not, make this argument to the jury.

Further, one of the Deputies investigating the victim's disappearance, Deputy McCauley, reported that he found two different sets of tire tracks going into Mr. Grim's back yard. The state argued that it was Mr. Grim who backed his car into the yard which, according to neighbors, they had not seen Mr. Grim do, and placed the victim's body in the trunk. Counsel should have brought forth the information from Deputy McCauley indicating the presence of another vehicle. This would have placed doubt on Mr. Grim's guilt and lent credence to a defense theory that the crime scene was unsecured and compromised. Counsel should have, but did not, make this argument.

Generally, Richard Hill, at the evidentiary hearing, could not state a reason why he did not impeach witness Cynthia Wells, who identified Mr. Grim as being at the pier with a shirt on, with the fact that there was a video showing him with his shirt off (EHT. 209, 211). Hill essentially testified that Wells' identification was irrelevant given that the video placed Mr. Grim at the pier (Id.). Hill stated no strategic reason for failing to challenge Wells' identification or the general fact that Mr. Grim was allegedly on the pier disposing of the victim's body. Hill testified that the fact that there were two sets of tire tracks leading from Mr. Grim's back yard was not "significant" given the other facts of the case (EHT. 214). Also, Hill did not find it significant that the victim had on

socks when her body was discovered, but was reported by law enforcement to have been in bare feet when seen with Mr. Grim earlier in the morning (EHT. 216). Essentially, Mr. Hill's testimony was that these points of potential, reasonable doubt, his stated defense in the case, were of no value.

The issue presented here is whether or not the dictates of Strickland v. Washington were complied with. The precedent and applicable law regarding the sub-claim A equally applicable here.

The lower court's ruling on the alleged Wells' identification notes, and gives weight to, Mr. Hill's erroneous assertion that more than one witness identified Mr. Grim on the pier and that Wells' identification was, thus, not very significant (PC-R. 201). The fact is that Cynthia Wells was the only witness to identify Mr. Grim on the bridge. The entire basis of the lower court's ruling is founded on erroneous testimony by Mr. Hill. The lower court's order fails to address Mr. Grim's claim that trial counsel should have used the surveillance tape to dispute the allegation that Mr. Grim went onto the bridge. As to the socks and tire tracks, the lower court found that Hill's assessment of the socks and the tire tracks as insignificant was an exercise of sound, professional judgment (PC-R. 203). The lower court's ruling lacks any real analysis that would, for instance, take into consideration that

Hill's stated defense was one of reasonable doubt and that, further, Hill believed the case, from a defense standpoint, was an uphill battle. Even by Hill's own assessment, he needed all the evidence he could attacking and challenging the state's case. The points related to the socks and tire tracks, while individually of limited significance, could have added to what needed to be a critical mass of reasonable-doubt evidence. Hill provided no reasonable explanation, and the lower court cites none, for not using this evidence.

Counsel's stated defense of Mr. Grim was, by his own testimony, one of reasonable doubt. Counsel stated that he believed Mr. Grim had a difficult case in which to prevail. Given these circumstances, counsel's failure to present and argue the foregoing evidence and argument is inexplicable. In a case as difficult as trial counsel believed this to be, he should have expended all efforts to make the case for reasonable doubt as to Mr. Grim's guilt. The evidence and argument suggested herein would have resulted in a different outcome. Counsel's failure to present such to the jury resulted in a prejudice to Mr. Grim's trial proceedings.

ARGUMENT III

MR. GRIM WAS DENIED AN ADEQUATE ADVERSARIAL TESTING AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. EITHER THE STATE FAILED TO DISCLOSE OR TRIAL COUNSEL AND SPECIALLY APPOINTED COUNSEL WERE RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS. TRIAL COUNSEL AND SPECIALLY APPOINTED COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE MITIGATING EVIDENCE AND TO ADEQUATELY CHALLENGE THE STATE'S CASE. AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE.

A. FAILURE TO PRESENT AVAILABLE MITIGATION

First, counsel clearly failed to fully investigate the extent of Mr. Grim's use of drugs, both legal and illicit. As stated supra, there was not only mitigating evidence to be gained from an investigation into Mr. Grim's use of drugs, but there was a viable guilt phase defense. Mr. Grim himself inquired of counsel the ramifications of his drug use, but counsel ignored the possibility of such a defense. This aspect of mitigation was never investigated. One note to point out is that Dr. Larson, who evaluated Mr. Grim at trial, testified that he felt Mr. Grim may have been suffering from intermittent explosive disorder. A neuropharmalogical expert could have explained how Mr. Grim's use of Depakote, Prozac, LSD, and excessive amounts of alcohol affected that condition. Further, a drug expert, like Dr. Lipman, could have explained that intermittent explosive disorder is a form of epilepsy and that

withdrawal from Depakote may have prevented the effects from being held at bay.

Additionally, trial counsel failed to fully investigate non-statutory mitigation and advise Mr. Grim and the court fully of what that mitigation would be. Mr. Grim suffered not only emotional, but physical abuse at the hands of his father when he was a child. Mr. Grim was in the throes of an emotionally wrenching divorce at the time of his arrest. Counsel never explained to Mr. Grim that this was valuable mitigation that could be presented. Mr. Grim had been incarcerated prior to this arrest He had an exemplary discipline record in prison and at the county jail while awaiting trial. Counsel never investigated or explained this to either Mr. Grim or the court. Mr. Grim served in the United States Navy. Apparently, the court was never informed of this and counsel never explained to Mr. Grim that it was mitigating evidence that could have been presented to the jury. Dr. Lipman and Dr. Larson were able to present all of this evidence at the evidentiary hearing.

In sum, counsel had the responsibility to fully investigate mitigation, to inform Mr. Grim what mitigation was available, and further, inform the court of what mitigation was available. In order to comply with Koon v. Dugger, 619 So. 2d 246 (Fla. 1993), and make Mr. Grim's waiver of mitigation valid, this responsibility had to be fulfilled. It was not. Had it been,

there would not have been a waiver of mitigating evidence. Further, the jury would have heard the powerful mitigation available and there is a reasonable probability that the jury's recommendation would have been different.

Richard Hill testified that Mr. Grim "had his own ideas" of how he wanted the case handled and that Mr. Grim "basically dictated what we did" (EHT. 159). Hill did what Mr. Grim told him to do (Id.) Michael Rollo was primarily handling the penalty phase (EHT. 161). Hill stated that he talked with Mr. Rollo and Dr. Larson as part of the penalty phase development of the case (EHT. 162). He also spoke with Mr. Grim (Id.). As to Dr. Larson's recommendation that a consultation be done with a drug expert, Hill stated that he did not do so because "he [Mr. Grim] did not want any mitigation presented" and, as a result, ***"everything pretty well stopped, we didn't go much further based on his wishes"*** (EHT. 166) (emphasis added). Hill further stated that "we investigated mitigation up to a certain point, but based on his wishes, that's as far as it went" (EHT. 167). However, Hill added that he and Mr. Rollo were "concerned with having the case prepared for trial" (EHT. 169). Further, Hill did not believe that the waiver filed by he and Mr. Rollo absolved them of the duty to investigate (EHT. 215). Hill stated his opinion that the written waivers would have been filed at Mr. Grim's request (EHT. 171). Hill testified that he

had used a drug expert in a prior capital case that he defended (EHT. 172). The expert testified in both guilt and penalty phases (Id.). Hill stated that he did become aware that Dr. Larson believed that Mr. Grim was brain damaged (EHT. 177). Hill was aware of Mr. Grim's history of alcohol and substance abuse, as well as his being abused as a child (EHT. 178). Hill testified that Mr. Grim did not want to use an intoxication defense because he would have to admit guilt (EHT. 179). Hill stated that he, himself, rejected an intoxication defense (EHT. 180). Hill testified that he did not recall anyone from the defense actually looking for mitigation that could be presented (EHT. 200).

Attorney Michael Rollo testified that he was appointed to the Grim case (EHT2. 54). Rollo was called by Richard Hill and Hill asked him if he would take on "second chair representation" of Mr. Grim (EHT3. 8). Rollo stated that Hill was responsible for the guilt phase of the case and Rollo "was to handle the penalty phase" (EHT3. 9). Rollo did not recall having an investigator on the case (Id.). This was because Mr. Grim "was not interested in developing any mitigation evidence" (Id.). Rollo also stated that the reason he did not develop mitigation regarding Mr. Grim's behavior while previously incarcerated was because Mr. Grim wanted to waive mitigation (EHT3. 22). Rollo testified that he was aware that Mr. Grim was using prescribed

drugs at the time of the crime (EHT3. 12). Rollo was also aware that Mr. Grim was using illicit drugs and alcohol at the time (EHT3. 13). Rollo generally recalled Dr. Larson advising in his deposition that an expert in pharmacology or toxicology should be consulted (EHT3. 14). Rollo's recollection is that this was not followed up on (Id.). Rollo agreed that this suggested consultation could have opened up a line of defense (Id.). Rollo did not recall having a conversation with Mr. Grim about this type of consultation (EHT3. 19). Rollo testified that the reason for not investigating this type of consultation was because of Mr. Grim's wishes (EHT3. 41-42). Further, Rollo felt that it would be a waste of time and resources (EHT3. 44). Rollo described his efforts at developing mitigation as reading the public defender file, doing research on "volunteers," and identifying from the file possible mitigating circumstances (EHT3. 15-16). Rollo also spoke with Mr. Grim's mother, sister, and step-father (EHT3. 20).

Spiro Kypreos testified at the evidentiary hearing and stated that he was appointed by the trial court as public counsel (EHT2. 9). Further, Kypreos stated that Mr. Rollo would not communicate with him about the case because "his client did not want to contest the death penalty" (Id.). Kypreos felt that Mr. Grim's interests and the public interest coincided (EHT2. 10). Kypreos testified that he felt his job was to represent

Mr. Grim "as if he were my client" (Id.; EHT2. 22-23). Kypreos stated that he did not do an independent investigation into mitigation (EHT2. 27). Rather, he took the information that was available from Mr. Rollo and did the best he could (EHT2. 28). There was not enough time for an independent investigation (EHT2. 27-28). Kypreos testified the investigation he was able to do under the circumstances would not satisfy the criteria for effective assistance of counsel (EHT2. 28). Kypreos was not able to do a full mitigation investigation (EHT2. 39). Kypreos made it clear that his investigation of the case as public counsel would not satisfy constitutional standards for effective assistance of counsel (EHT2. 38-39). Kypreos understood that he would not be able to consult with experts given the scope of his representation (EHT2. 40-41). Kypreos did not have a budget with resources to call on (EHT2. 40). Kypreos added that based on the limited mitigation records he was able to see, he felt that a case could have been made to save Mr. Grim's life (EHT2. 41, 45). Kypreos opined that the mitigating factor he felt was most compelling was Mr. Grim's proneness to violent outbursts which were beyond his control (EHT2. 47).

The lower court's disposition of the claim as to the failure to present evidence of Mr. Grim's drug use, illicit and prescribed, is a re-statement of the court's holding as to Argument II (PC-R. 206). As stated supra, the lower court's

order denying relief as to this claim is grounded in the notion that Mr. Grim prevented his trial attorneys from investigating such evidence (PC-R. 196-97). Such a notion is, as the testimony at the evidentiary hearing demonstrated, incomplete and inaccurate. While Mr. Grim's attorneys did testify that in general Mr. Grim did not want mitigation presented, they also testified that they never investigated viable mental health mitigation (the affect of drugs and alcohol on Mr. Grim's behavior), suggested by Dr. Larson and that Mr. Grim never rejected such. The lower court's broad statement that "defense counsel did not neglect his duty to investigate" (PC-R. 197), is in direct contrast to both Hill's and Rollo's testimony. As Mr. Rollo testified, he felt that an investigation of this defense was a waste of time and resources (EHT3. 44). Counsel's decision not to investigate this mitigation was neither "sufficient" or "reasonable" as the court found (PC-R. 197). The fact is that there was no investigation in this regard. Trial counsel rejected Dr. Larson's suggestion completely and testified that they did so. The lower court's finding is not supported by the testimony or the evidence.

The lower court also makes much of Hill's and Rollo's testimony that Mr. Grim instructed them "not to present mitigation" (PC-R. 208). The court finds that it would be "contradictory" to deem Mr. Grim's attorneys ineffective for

failing to investigate when Mr. Grim had effectively waived mitigation. This finding is not in accord with precedent on the issue. Florida law has clearly established that effective assistance of counsel and the duty to investigate are mutually exclusive subjects. To the extent that the lower court rested its finding on this principle, the court erred.

When the lower court points out that Mr. Grim's waiver, and the colloquy that ostensibly verified that waiver, were sound, the court ignores the requirement that such waiver be informed (Id.). Thus, the lower court simply does not account for the fact that trial counsel never fully investigated mitigation, especially concerning the combined effect of drugs and alcohol on Mr. Grim's behavior. The lower court erred.

In order to prevail on his claim of ineffective assistance of counsel, Mr. Grim must prove two elements, deficient performance by counsel and prejudice. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In order to establish that counsel's performance was deficient, Mr. Grim "must show that counsel's representation fell below an objective standard of reasonableness" based on "prevailing professional norms." Id. at 688. To establish prejudice, Mr. Grim "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability

is a probability sufficient to undermine confidence in the outcome." Id at 694. Based on the evidence presented at the evidentiary hearing below, Mr. Grim has proven both elements of Strickland.

Further, a criminal defendant is entitled to expert psychiatric assistance when the state makes his or her mental state relevant to the proceeding. Ake v. Oklahoma, 105 S.Ct. 1087 (1985). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, F. 2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessell, 531 F. 2d 1278, 1279 (5th Cir. 1979). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental-health background and to ensure that the client is not denied a professional and professionally- conducted mental-health evaluation. See Fessell; O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Cowley v. Stricklin, 929 F. 2d 640 (11th Cir. 1991); Mason v. State, 489 So.2d 734 (Fla. 1986); Maudlin v. Wainwright, 723 F.2d 799 (11th Cir. 1984).

The aforementioned testimony verifies that Mr. Grim's penalty phase proceedings did not serve to individualize him in the eyes of the jury, the very purpose of mitigation evidence

and essence of a reliable penalty phase. See Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995). In its order denying relief, the lower court found that the deficient performance and prejudice prongs of Strickland had not been met. However, the lower court erred in failing to follow this Court's Strickland precedent.

Rather than a valid waiver of mitigation, such as that found in this Court's opinion in Koon v. Dugger, 619 So. 2d 246 (Fla. 1993), the "waiver" in this case was bogus. The instant case is similar to Blanco v. Singletary, 943 F. 2d 1477 (11th Cir. 1991). In Blanco, the 11th Circuit found counsel's representation "objectively deficient" and prejudicial where counsel failed, with his client's acquiescence, to present witnesses at the penalty phase of trial. Id. at 1499. In further rejecting Blanco's waiver of mitigation as valid, the 11th Circuit noted that "'the lawyer must first evaluate potential avenues and advise the client of those offering potential merit.'" Id. (quoting Thompson v. Wainwright, 787 F. 2d 1447, 1451 (11th Cir. 1986)). Clearly, counsel in the instant matter, by their own admission, did not fully investigate the avenue of defense/mitigation presented by Dr. Larson's recommendation.

Again, the instant case is similar to that of Lewis v. State, 838 So. 2d 1102 (Fla. 2002), a case in which this Court found a waiver of mitigation not valid where counsel failed to

adequately investigate and fully inform his client. Lewis, like the instant case, dealt with a defendant's ostensible waiver of mitigation. On appeal, Lewis asserted that his waiver of the presentation of mitigation was invalid because counsel failed to conduct an adequate investigation and thus did not properly advise him of mitigating evidence that could be presented on his behalf. Like trial counsel for Mr. Grim, counsel for Lewis, as found by this court, "was not diligent" in discovering potential mitigation. Id at 1109. Further, this Court found, in Lewis, based on the evidentiary hearing testimony, that there was viable mitigation that could have been presented at trial. Like Mr. Grim in the instant case, Lewis "had his own ideas about what should be presented. . . ." Id at 1110. However, in spite of the waiver, this Court, citing a similar factual scenario in Deaton v. Dugger, 635 So. 2d 4 (Fla. 1993), found that trial counsel's failure to adequately investigate and prepare prejudiced Lewis. In Deaton, as in this case, trial counsel acknowledged that he had not investigated the avenues suggested by post-conviction counsel. Deaton at 9. Notably, this Court rejected, in Lewis, an argument made by the state and accepted by the lower court in the instant matter that the defendant was to blame for the failure to present viable evidence. Lewis at 1113. The instant case is virtually indistinguishable from Lewis and Deaton. This conclusion is inescapable despite trial

counsel's assertion, and the lower court's acceptance of the assertion, that Mr. Grim was to blame for viable evidence not being presented.

In Wiggins v. Smith, 123 S. Ct. 2527 (2003), the United States Supreme Court expanded on the duties of counsel to conduct a "reasonable investigation." Wiggins involved a decision by trial counsel to limit the scope of mitigation investigation. Id at 2533. In rejecting counsel's decision in Wiggins not to present significant mitigating evidence, the Court, citing its opinion in Williams v. Taylor, 529 U.S. 362 (2000), held that before counsel may limit the presentation of mitigating evidence, counsel must fulfill the obligation to *conduct a thorough investigation of the defendant's background*. Id at 2535. Wiggins further held that a limitation on the scope of mitigation investigation must be reasonable in order to be considered legitimately strategic. Id at 2536. Although Wiggins did not involve a waiver, counsel's duty to investigate fully is certainly applicable, under both Wiggins and this Court's established precedent regarding the validity of waivers. See Rompilla v. Beard, 125 S. Ct. 2456, 2466 (2005).

Mr. Grim's ostensible waiver of the presentation of mitigation was invalid. Neither trial counsel nor Mr. Kypreos adequately investigated mitigating evidence. Rather, counsel simply took Mr. Grim's unknowing desire to waive as a stopping

point. Had the case for mitigation been adequately investigated, especially regarding Mr. Grim's use of drugs and alcohol, combined with the effect of Intermittent Explosive disorder, there would have been no waiver. Further, the result of the jury's recommendation regarding sentence, and the judge's sentencing determination, would have been different. Prejudice is the result.

B. FAILURE TO PROPERLY ADVISE MR. GRIM AS TO WAIVER OF JURY SENTENCING RECOMMENDATION

A defendant in a capital murder trial has the right to request waiver of a penalty phase jury and the effect of that jury's recommendation. Muhammad v. State, 782 So.2d 343 (Fla. 2001); State v. Hernandez, 645 So.2d 432 (Fla. 1994); Palmes v. State, 397 So.2d 648 (Fla. 1981); Holmes v. State, 374 So. 2d 944 (Fla. 1979); State v. Carr, 336 So. 2d 358 (Fla. 1976). Although within the court's discretion to deny a defendant's waiver of a penalty phase jury, there is nothing else, legally or otherwise, which would prevent such a waiver. Further, Florida case law abounds with defendants who have waived a penalty phase jury recommendation.

Mr. Grim did not, based on what he knew, want to present mitigating evidence in his case. At a pre-trial hearing, penalty phase counsel for Mr. Grim advised the trial court that Mr. Grim wanted to waive the right to a penalty phase jury, but that the law did not allow for it (TT. 5). Clearly, counsel was

wrong in his assessment of the law. Failing to understand the state of the law thwarted Mr. Grim's wishes and anchored him to the recommendation of a jury he essentially asked to sentence him to death. Such advice from counsel was clearly incorrect and ultimately prejudicial in this case. In its sentencing order, the trial court gave, as required, great weight to the jury recommendation in this case (R. 227). However, had counsel given Mr. Grim the appropriate legal advice, the jury recommendation would have been waived altogether and not influenced, as it clearly did, the trial court's decision as to sentencing. The jury recommendation in this case was essentially a fraud. It should never have been rendered, given the circumstances. That recommendation was prejudicial to Mr. Grim and was the result of counsel's deficient performance in advising Mr. Grim that a jury recommendation could not be waived.

With regard to the failure to waive the jury sentencing recommendation, Michael Rollo testified that he is not sure he ever had a direct conversation with Mr. Grim about the possibility (EHT3. 23). Rollo asserted his own awareness of case law allowing a capital defendant to waive a jury sentencing recommendation (EHT3. 24). Rollo also stated, in seeming contradiction, that at the time of the Grim trial, he felt like a "passive presentation to the jury was going to required"

(EHT3. 26). Rollo added that he felt it would not make any difference to a man who wants to be sentenced to death anyway (EHT3. 28). Richard Hill testified that he had discussions with Mr. Rollo about waiving the penalty phase jury (EHT. 192). He did not have similar conversations with Mr. Grim (Id.). Hill did not recall Rollo and himself making a decision on the issue (Id.).

The lower court correctly found that Florida law allows a defendant to waive the sentencing recommendation of the jury in a capital case (PC-R. 210). Although the lower court found that the trial court's sentencing was done, in the alternative, without considering the jury's recommendation and thus neutralizing the prejudice asserted, such a deficient action is more akin to a per se error. Mr. Grim had a constitutionally founded right that he wanted to assert. Trial counsel, through their deficient performance, caused Mr. Grim to waive that right. The lower court's failure to recognize the magnitude of such a right was error.

Stated simply, there is no way of knowing what the trial court's sentencing recommendation would have been without the jury's unanimous death recommendation. Clearly, counsel gave Mr. Grim inaccurate legal advice regarding the ability vel non to waive the jury's recommendation. By doing so, counsel tethered Mr. Grim to a recommendation that was, in fact, a sham.

No mitigation was presented and the waiver that precipitated this empty presentation was uninformed and illegitimate. Prejudice is the result. Strickland.

ARGUMENT IV

SPECIALLY-APPOINTED PENALTY-PHASE COUNSEL HAD A CONFLICT OF INTEREST WHICH HE FAILED TO DISCLOSE AND WHICH VIOLATED MR. GRIM'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. FURTHER, THE STATE WAS AWARE OF THE CONFLICT AND FAILED TO DISCLOSE THAT CONFLICT EITHER TO MR. GRIM OR THE COURT.

Prior to trial and the sentencing proceedings in this matter, Mr. Grim indicated to his trial counsel, and ultimately the trial court, that he wished to waive the presentation of mitigation evidence to a jury. As a result of that decision, the trial court appointed Spyro Kypreos as special counsel to present mitigating evidence at the Spencer hearing (R. 221-22). This appointment was made on November 2, 2000, after the jury's death recommendation. Although the order of appointment states that Kypreos was to represent "the public interest", clearly he was representing the interests of Mr. Grim as well.

In or about the first week of December, 1999, Detective Sandra de la Cruz interviewed an inmate in the Santa Rosa County Jail by the name of Tracy Coffey. Detective de la Cruz conducted this interview with Assistant State Attorney Ronald Swanson. In the interview, Coffey, told de la Cruz and Swanson that Mr. Grim, with some detail, admitted complicity in the murder of the victim. Notably, Coffey never testified at Mr. Grim's trial. Apparently, Coffey, according to a Notice of Deposition filed by Mr. Grim's counsel, gave a deposition on

April 6, 2000. The deposition was given at the Santa Rosa County Jail. Tracey Coffey was represented by Spyro Kypreos. In a memorandum dated June 2000, and sent by the judicial assistant of Judge Ronald Swanson to ASA John Molchan and Spyro Kypreos, a letter from Coffey to Judge Swanson is attached. In the letter, Coffey asks Judge Swanson to give him some sort of assistance with his sentencing. It must be noted that the memorandum from Judge Swanson's judicial assistant indicates that the letter was unread by Judge Swanson. Also in the letter, Coffey writes, "I have already written my attorney (Spiro T. Kypreos) and asked him to file the motion for a Sentence Modification and told him to speak with you." It is clear that Kypreos knew of Coffey's relationship to the Grim case. It is clear that the State Attorney's Office, Mr. Molchan, and former ASA now Judge Swanson, knew of the Kypreos-Coffey-Grim relationship. The memorandum and attached letter were admitted at the evidentiary hearing as Defense Exhibit #5.

Also clear is that none of these parties to the Grim case ever disclosed to Mr. Grim's trial counsel, or Judge Bell, that a blatant conflict of interest existed. The failure to disclose this relationship was a violation of Mr. Grim's constitutional right to conflict-free counsel, due process, and effective representation. Kypreos never should have taken the appointment from Judge Bell. Certainly Mr. Molchan should have disclosed

the conflict when he realized it existed. It was obvious that an inherent conflict existed and Mr. Grim should have at least been informed of the conflict. Further, Judge Bell should have been informed of the conflict to determine if appointing Kypreos was appropriate, which it certainly was not. Kypreos' inherent conflict of interest is underscored by his failure to investigate the existing mitigation in Mr. Grim's case. As demonstrated in Argument III supra, Mr. Kypreos provided inadequate representation to Mr. Grim and inadequate guidance to the Court. The inherent conflict of interest in this case deprived Mr. Grim of constitutional rights. He was deprived of those rights due to the nature of the conflict and his counsel's and the state's failure to disclose the conflict.

Prosecutor John Molchan identified the aforementioned document from the state attorney file that was admitted as Defense Exhibit #5 (EHT. 110-11). The document is a memorandum sent by Judge Ronald Swanson's office with an attached letter from inmate Tracy Coffey. The letter, in essence, requests help from Judge Swanson as to Coffey's sentencing based on Coffey's assistance to the Grim prosecution. The memo was sent to Mr. Molchan and Spyro Kypreos (EHT. 111). Mr. Molchan stated that the letter was likely sent to him because of the reference in the letter to the Grim case. (Id.) Mr. Kypreos was appointed by Judge Bell in this matter to represent "the public interest"

in developing mitigation as to Mr. Grim (Id.). Mr. Molchan did not recall advising Mr. Kypreos of Coffey's status as a potential witness against Mr. Grim (EHT. 112). Mr. Molchan testified that he probably did not advise Judge Bell that Mr. Kypreos represented Coffey, a potential witness against Mr. Grim (EHT. 113). Mr. Molchan did not make Mr. Grim's trial attorneys aware of this fact (Id.). Mr. Molchan stated that in hindsight he probably should have informed the parties of the arguable conflict, but he did not make the connection between Coffey and Mr. Kypreos (EHT. 114).

Judge Ronald Swanson also identified Defense Exhibit #5 and testified that the writer of the memorandum was his judicial assistant, Joni White (EHT. 131). Judge Swanson testified that he believes the memo would have been sent to Mr. Molchan and Mr. Kypreos because they "would have an interest in the correspondence of some nature" (EHT. 132). Further, the memorandum would have been sent by Ms. White without any specific direction from Judge Swanson himself (EHT. 132). Judge Swanson did state that he recalled the name Tracy Coffey, but was not sure if the recollection was from working as an Assistant State Attorney or as a judge (EHT. 133). Judge Swanson did not recall informing Judge Bell of the facts surrounding the memorandum. (EHT. 134) Judge Swanson stated

that had he known about the alleged conflict, he thinks he would have informed Judge Bell (Id.).

Richard Hill examined Defense Exhibit #5 regarding Tracy Coffey and stated that he had never seen the document (EHT. 204) . Hill added that he was not aware of the conflict between Mr. Kypreos, Mr. Grim, and Tracy Coffey (EHT. 219). Hill added that he is sure he would have mentioned it if he had known about it (Id.).

Kypreos testified that he was unaware of Tracy Coffey's status as a witness in the Grim case and did not divulge the arguable conflict of interest (EHT2. 35). Kypreos stated that the arguable conflict did not affect the work he did in the Grim case (EHT2. 36). Kypreos stated that he would have disclosed the arguable conflict if he had realized it existed (EHT2. 37).

A defendant is deprived of the sixth amendment right to counsel where (i) counsel faced an actual conflict of interest, and (ii) that conflict "actually affected" counsel's representation of the defendant. Strickland v. Washington, 466 U.S. 668, 692 (1984)(quoting Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)); LoConte v. Dugger, 847 F. 2d 745, 754 (8th Cir.), cert. denied, 488 U.S. 958 (1988).

Because the right to counsel's undivided loyalty "is among those constitutional rights so basic to a fair trial . . ., [its] infraction can never be treated as harmless error."

Holloway v. Arkansas, 435 U.S. 475, 489 (1978). Although the general rule is that a criminal defendant who claims ineffective assistance of counsel must show both a lack of professional competence and prejudice, the prejudice test is relaxed where counsel is shown to have had an actual conflict of interest. Strickland, 466 U.S. at 693; Kimmelman v. Morrison, 477 U.S. 365, 381 n.6 (1986); Cuyler v. Sullivan, 446 U.S. 335, 345-50 (1980). Where an actual conflict is present, the defendant need not show that the lack of effective representation "probably changed the outcome of his trial." Walberg v. Isreal, 766 F.2d 1071, 1075 (7th Cir.), cert. denied, 474 U.S. 1013 (1985). Rather, the defendant need only show that the conflict had "some adverse effect on counsel's performance." McConico v. Alabama, 919 F.2d 1543, 1548-49 (11th Cir. 1980); Buenoano v. Dugger, 559 So. 2d 1116, 1120 (Fla. 1990).

Some conflicts are so invariably pernicious, so without the possibility of any redeeming virtue that they are "always real, not simply possible, and . . . by [their] nature, [are] so threatening as to justify a presumption that the adequacy of representation was affected." United States v. Cancilla, 725 F.2d 867, 870 (2nd Cir. 1984). In those kinds of conflicts, courts refrain from searching the record to determine what could or should have been done differently, and instead invoke a rule

of per se illegality. See United States v. Cronic, 466 U.S. 648 (1984).

Murphy further notes that in cases of actual conflict, there is no need to go into the issue of prejudice. 349 F. Supp at 823-24. The compromise of the lawyer is too significant in our system. The cases involving an attorney's representation of co-defendants in a criminal trial make this point. See United States v. Mers, 701 F. 2d 1321, 1328 (11th Cir.), cert. denied, 52 U.S.L.W. 3422 (Nov. 29, 1983); United States v. Benavidez, 664 F. 2d 1255, 1259 (5th Cir.), cert. denied, 457 U.S. 1135 (1982); Baty v. Balkcom, 661 F.2d 391, 395 (5th Cir. 1981), cert. denied, 456 U.S. 1011 (1982). The defendant need only show that there is an "actual conflict." To prove this, he must show: (1) "inconsistent interests" and (2) that the attorney "made a choice between possible alternative courses of action." United States v. Mers, 701 F. 2d at 1328. Then, prejudice is presumed. Id. at 1327; accord Baty v. Balkcom, 661 F. 2d at 395.

In Guzman v. State, 644 So.2d 996 (Fla. 1994), this Court, in finding a reversible conflict of interest, found that there are "few instances where a conflict is more prejudicial than when one client is being called to testify against another." Id at 999. Additionally, this Court cited in Guzman R. Regulating Fla. Bar 4-1.7(a) which states that "[a] lawyer shall not represent a client if the representation of that client will be

directly adverse to the interests of another client." Clearly, the facts of this case bring it within the analysis of Guzman.

The lower court's order is grounded on the erroneous conclusion that Mr. Grim was not entitled to conflict-free representation by Mr. Kypreos (PC-R. 213). As argued supra, Kypreos, as he explained himself, was representing Mr. Grim's interests. Any semantic distinction is just that, mere technical differentiation without substantive difference. Furthermore, in the lower court's alternative substantive analysis, the court requires a showing by Mr. Grim of actual prejudice, a requirement which the legal precedent on the issue, as demonstrated herein, does not require (Id.)

Mr. Grim was denied the right to conflict-free counsel in this case. When the trial court made the decision to assign Mr. Kypreos to the case, the appointment had to be free of conflict. As the facts demonstrate, a clear conflict was present and prejudice to Mr. Grim is presumed.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing, Mr. Grim respectfully urges this Court to reverse the Order of the Lower Court and to grant him relief on the arguments as this Court deems proper, including vacating his convictions and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Counsel for Mr. Grim certifies that all parties were served with a true copy of this Initial Brief of Appellant on this 8th day of August, 2006, by U.S. Mail.

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel certifies that this Initial Brief was generated in a Courier New non-proportional 12-point font.

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