IN THE SUPREME COURT OF FLORIDA

NO. SC. 06-1444

ADAM DAVIS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

INITIAL BRIEF OF APPELLANT

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Preliminary Statement

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

"ROA" refers to the original record on appeal.

"App" refers to the appendix for the original 3.851 filed in the lower court.

"TR" refers to the original transcript and order.

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

"PC-R, Vol.*, p.*" refers to the post-conviction record on appeal.

Request for Oral Argument

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

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Statement of the Case

Adam Davis was indicted by the Grand Jury for the 13th Judicial Circuit, Hillsborough County Florida, on July 8, 1998, for one count of first-degree premeditated murder, Grand Theft and Grand Theft Auto. (R. - Vol. I , p. 51-55) Davis was tried by jury before the Honorable Cynthia Holloway in Hillsborough County, Florida and on November 4, 1999 the jury found Davis guilty as charged on all counts (ROA.- Vol. XIII, p. 1271). The jury reconvened for the penalty phase proceedings and on November 5, 1999 recommended by a vote of seven to five that Davis be sentenced to death as to count one. (ROA.- Vol XIV, pp.1387-1388). On December 10, 1999 the Court conducted a Spencer hearing. Davis was sentenced by the Court on December 17, 1999. The Court found the following aggravating circumstances: (1)The crime was committed while the defendant was on felony probation, (2)the crime was heinous, atrocious and cruel; and (3) that the crime was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

The Court found that the age of the defendant at the time the crime was committed as a statutory mitigating circumstance (little weight).

The Court considered the following non-statutory mitigators and accorded them some to little weight: (1) Davis was under ther influence of LSD at the time of the offense (some weight); (2) Davis had no prior convictions for assaultive behavior (some weight); (3) Davis had a deprived childhood and suffered hardships during his

youth (some weight); and (4) Davis is a skilled writer and artist and can be expected to make a contribution to the prison community by sharing his knowledge, skills, and experience (some weight). After considering all aggravating and mitigating circumstances, the Court concluded that death, as recommended by the jury, was the appropriate sentence for the first degree murder of Ms. Vicki Robinson. Davis was sentenced to death (ROA. Vol. XV- pp. 1552-1560, *See: State v. Davis*, No. 98-11873 (Fla. 13th Cir. Ct. Order filed Dec. 17, 1999) (sentencing order).

On direct appeal Davis raised the following arguments: (1) the trial court erred by denying Davis=s motion to suppress statements that he made to the officers during his interview in Texas; (2) the trial court erred by denying Davis=s motions to strike venirepersons for cause; (3) the trial court erred by excluding the confession of codefendant Valessa Robinson; (4) the trial court erred by admitting an autopsy photograph of Ms. Robinson; (5) the trial court erred by refusing to specifically instruct the jury that the disprop9ortionate sentences received by Davis, Whispel, and Valessa Robinson may be considered as a mitigating factor; (6) the trial court erred by finding the heinous, atrocious, or cruel aggravating factor; (7) the trial court erred by finding the cold, calculated, and premeditated aggravating factor; (7) the trial court erred by finding the cold, calculated, an premeditated aggravating factor; (8) imposing a death sentence grounded on a bare majority of the jury=s vote is unconstitutional= and (9) Florida=s death penalty scheme is unconstitutional. The Florida Supreme Court

affirmed Davis=s convictions and sentences at *Davis v. State*,859 So. 2d. 465 (Fla. 2003).

On January 28th ,2005, Mr. Davis filed his Motion to Vacate his convictions and sentence pursuant to Fl.R.Crim.P. 3.851. The trial court conducted a bifurcated evidentiary hearing on February 8-9, 2005 and April 20-21, 2005. On June 21, 2005, the trial court denied all relief.

Statement of the Facts

Mr. Davis respectfully disagrees with the facts as established and accepted by this Court in *Davis v. State*, 859 So.2d 465 (Fla. 2003). Rather, the relevant evidence shows that on June 26th, 1998, Adam Davis, Jon Whispel and Valessa Robinson were three youths, childlike by nature and habit, addicted to drugs and alcohol. All three had ingested large amounts of LSD, marijuana and possibly cocaine and had damaged their sense of judgment - a sense of judgment that was not fully developed. Hatching a poorly planned, and poorly executed scheme to rid themselves of parental control, these three youths were anything but cold, calculated and premeditating murderers. Adam Davis, for his part, was anything but a leader, blindly following the dictates of a shrewd and impaired juvenile. After succumbing to an illegal coercive interrogation procedure described as Aquestion-first@, all three confessed to the murder of Valessa Robinson=s mother. Valessa Robinson, the first to be question, had no reason to fabricate her story when she admitted to law enforcement that she had wanted the

murder, had planned the murder, and committed the murder by stabbing her mother. Adam Davis, the last to be interrogated, heard that his girlfriend had just taken the blame for the murder. In an act that further sheds light on his lack of judgment, Adam Davis admitted to law enforcement that he was responsible for the murder. All three were indicted for murder.

The Constitution=s right to effective assistance of counsel was not applied to Adam Davis=s case as counsel failed to perform their most sacred duty at every critical juncture during the prosecution. Worse yet, the State would violate the rights of all three defendants when it would change its theory of prosecution from case to case in order to get a conviction rather than obtain justice. Finally, Adam Davis was totally abandoned by his counsel during the penalty phase of his trial when important information was never investigated and inaccurate information was presented to the court.

Summary of the Argument

In *Wiggins v. Smith*, 123 S.Ct. 2527 (2003), the United States Supreme Court reiterated the standard established by *Strickland* nearly 20 years ago. That standard today still requires courts to determine whether counsel was deficient in his or her representation and whether that representation prejudiced the defendant=s case. *See Strickland v. Washington*, 466 U.S. 668 (1984).

Wiggins is not new law nor is it a new concept. Rather, *Wiggins* instructs this Court to look at the prevailing norms at the time of the trial to establish whether counsel was ineffective. At the time this case was tried, the prevailing norms for trying a capital case would have been reflected in the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989)(App.1-1).

Counsel for Mr. Davis were ineffective on several occasions. First, during the motion to suppress, it is clear that counsel was attempting to establish that Mr. Davis was still suffering from the effects of LSD at the time of his interrogation, was sleep deprived, was physically abused and was just barely nineteen years old at the time the officers questioned him using illegal interrogation tactics.

For example, counsel elicited various answers during the motion to suppress that supported counsel's theory that the interrogation methods used by law enforcement, specifically Detective Iverson, were the same ones found to be in violation of the Fifth Amendment by the United States Supreme Court. Counsel failed to put on any witnesses that would have created a causal connection between these factors and the coerciveness of the interrogation.

Second, it is clear that defense counsel did not adequately investigate or prepare a defense of voluntary intoxication. Florida law does hold that a reasonable strategic decision whether to utilize a defense of voluntary intoxication can preclude a finding of ineffectiveness of counsel. *See Patton v. State*, 878 So.2d 368 (Fla.2004); *Jones v.*

State, 855 So.2d 611 (Fla. 2003); *Stewart v. State*, 801 So.2d 59, 65 (Fla.2001) (holding that counsel was not ineffective for failing to employ a voluntary intoxication defense where, at an evidentiary hearing, defense counsel testified that he considered an intoxication defense but determined that it was not a viable defense based on the facts of the case); *Kitchen v. State*, 764 So.2d 868, 869 (Fla. 4th DCA 2000) ("Counsel may make a tactical decision not to pursue a voluntary intoxication defense, but a trial court's finding that such a decision was tactical usually is inappropriate without an evidentiary hearing."). However, once counsel has made the decision to employ a voluntary intoxication defense, it is counsel=s duty to do so effectively.

Third, counsel was ineffective for not properly admitting the statement of the co-defendant. A clear reading of this Court=s opinion shows that the statement was excluded for not properly laying the necessary foundation in order to admit evidence under section 90.804(c). In order to admit Ms. Robinson=s statement, it was necessary for counsel to establish that Ms. Robinson was unavailable as a witness. The proper procedure to employ would be to subpoena the witness and have that witness invoke, in person, the privilege. Then, at that point, under 90.804(1)(a), **the trial court would have to make a ruling** as to the unavailability of the witness. *See Perry v. State*, 675 So.2d 976 (Fla. 4th DCA 1996). Had Ms. Robinson properly invoked her privilege, then the statement against interest would have been allowed to come in under 90.804(c).

Fourth, counsel failed to adequately investigate and present a wealth of mitigation. Counsel never fully interviewed the witnesses he planned to present during the penalty phase. He never spoke with his main expert about what areas he wanted to cover in his presentation. He never spoke to the lay witnesses he was going to present until they arrived in town just prior to their penalty phase testimony. Important information about Davis' past child abuse, development and drug addiction was never presented to the jury.

In addition, the rights of Mr. Davis were violated with the introduction of his admission to authorities, an admission that was inconsistent with the confession made by Valessa Robinson and the physical evidence. During the interrogation of all three defendant's, the police used a well established technique called "question first". Under this form of questioning, law enforcement interrogates a suspect without a prior explanation of their rights required by *Miranda*. Once a confession has been obtained, the suspect is then immediately read his Miranda rights and the same confession is then obtained and used in court. In *Missouri v. Seibert*, 124 S.Ct. 2601 (2004), however, the United States Supreme Court struck down this practice. In ruling for the petitioner, the Supreme Court noted that it was not announcing a new rule of law but, rather, it was identifying a practice that had always been disallowed under *Miranda* and its progeny.

Finally, as shown by the record, the State alternated between two different theories

of prosecution when it presented its cases against Valessa Robinson and Adam Davis. Each had a separate trial and each were blamed separately for the killing of Mrs. Robinson.

Standard of Review

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

Argument

ARGUMENT I

MR. DAVIS= COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO INTRODUCE EXPERT TESTIMONY DURING THE MOTION TO SUPPRESS IN VIOLATION OF THE SIXTH, FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

In *Wiggins v. Smith*, 123 S.Ct. 2527 (2003), the United States Supreme Court reiterated the standard established by *Strickland* nearly 20 years ago. That standard today still requires courts to determine whether counsel was deficient in his or her representation and whether that representation prejudiced the defendant=s case. *See Strickland v. Washington*, 466 U.S. 668 (1984). Justice O=Connor, in writing for

the majority in *Wiggins,* as she did in *Strickland,* cautions this Court about how far that deference should be extended.

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

Wiggins, 123 S.Ct at2538.

Wiggins is not new law nor is it a new concept. Rather, *Wiggins* instructs this Court to look at the prevailing norms at the time of the trial to establish whether counsel was ineffective. At the time this case was tried, the prevailing norms for trying a capital case would have been reflected in the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989)(App.1-1). Guideline 11.4.1 states, in pertinent part:

> GUIDELINE 11.4.1 INVESTIGATION
>
> A. Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. **Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.**
> B. The investigation for preparation of the guilt/innocence phase of the trial should be conducted regardless of any admission or statement by the client concerning facts constituting guilt.
> C. The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.
> D. Sources of investigative information may include the following:

1. Charging Documents:

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

A. The elements of the charged offense(s), including the element(s) alleged to make the death penalty applicable;
B. The defenses, ordinary and affirmative, that may be available to the substantive charge and to the applicability of the death penalty;
C. Any issues, constitutional or otherwise, (such as statutes of limitations or double jeopardy) which can be raised to attack the charging documents.

3. Potential Witnesses:

Counsel should consider interviewing potential witnesses, including:

A. Eyewitnesses or other witnesses having purported knowledge of events surrounding the offense itself;
B. Witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), possible mitigating reasons for the offense(s), and/or other mitigating evidence to show why the client should not be sentenced to death;
C. Members of the victim's family opposed to having the client killed.

Counsel should attempt to conduct interviews of potential witnesses in the presence of a third person who will he available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator or mitigation specialist conduct the interviews.

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7. Expert Assistance:

Counsel should secure the assistance of experts where it is necessary or appropriate for:

A. preparation of the defense;

> B. adequate understanding of the prosecution's case;
>
> C. rebuttal of any portion of the prosecution=s case at the guilt/innocence phase or the sentencing phase of the trial;
>
> D. presentation of mitigation. Experts assisting in investigation and other preparation of the defense should be independent and their work product should be confidential to the extent allowed by law. Counsel and support staff should use all available avenues including signed releases, subpoenas, and Freedom of Information Acts, to obtain all necessary information.

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

On several occasions during the motion to suppress, it is clear that counsel was attempting to establish that Mr. Davis was still suffering from the effects of LSD at the time of his interrogation, was sleep deprived, was physically abused and was just barely nineteen years old at the time the officers questioned him using illegal interrogation tactics.

For example, counsel elicited various answers during the motion to suppress that supported counsel's theory that the interrogation methods used by law enforcement, specifically Detective Iverson, were the same ones found to be in violation of the Fifth Amendment by the United States Supreme Court.[1] (App1-2, Pp. 12, 19-22). Further, counsel was able to elicit from Detective Iverson that all three

[1] See argument II

defendants had consumed acid prior to their arrest, some 12 hours prior to their interrogation. (App. 1-2, p. 17). Counsel further established that Mr. Davis appeared tired and was yawning during the interrogation, (App.1-2, p. 16), and that he had been beaten by the Texas authorities. (App.1-2, p. 18-19)

Counsel failed to put on any witnesses that would have created a causal connection between these factors and the coerciveness of the interrogation. One expert could have testified as to the effects of LSD and how ingesting LSD over long and sustained periods would have affected Mr. Davis at the time of the interrogation negating his ability to know and understand his rights and making his statements involuntary. Further, another defense witness would have been able to testify as to the general mental health of Mr. Davis and the ability of a young and mentally tortured individual to fully comprehend the basic rights to refuse to answer any questions.

The failure to utilize trial counsel=s expert during this most critical stage of the prosecution was further proof of deficient performance. Dr. Michael Gamache had testified during his deposition as to the amount of LSD ingested by Mr. Davis and to the effects of LSD on an individual. (App. 1-3, pp. 45-58) Mr. Davis was prejudiced by the admission of the statements because they established his guilt and the CCP and HAC aggravators. Mr. Davis=s statements were specifically referenced by the trial court in its sentencing order. (ROA Vol. XV, pp. 1552-60). Further, testimony regarding Mr. Davis=s susceptibility to coercive techniques would have been one

additional factor that could have been used by the Florida Supreme Court in its discussion of the suppression issue and the way it distinguished the instant case from the facts in *Ramirez v. State*, 739 So.2d 568 (Fla. 1999).

During the evidentiary hearing, the defense called Dr. Robert Smith to testify. Dr. Smith is a clinical psychologist with a sub-specialty in addictive disorders and works for a chemical dependency treatment program. (PC-R Vol14, p. 6) Dr. Smith conducted an evaluation of Mr. Davis to determine whether there were any psychological disorders or addictive disorders relevant to the present case. (Id.) Dr. Smith testified with a reasonable degree of psychological certainty that the LSD consumption by Mr. Davis significantly impaired his ability to knowingly waive his rights before making a statement. (PC-R Vol. 14, pp.10-11)

Dr. Smith testified about the effects LSD has on people. (Id. at 10-12). He also testified about the differences between LSD and other classes of drugs, such as sedatives, the most familiar being alcohol. (Id. at 12-13) Dr. Smith testified that individuals who ingest LSD, unlike sedatives and stimulants, are able to recall events in great detail. (Id. at 13) Thus, in formulating a defense in a criminal case, it is important to understand the three classes of drugs and their effects on a person's cognitive abilities. (Id. at 14)

Charles Traina, one of Mr. Davis' attorneys and the one who investigated the motion to suppress, was called by the defense to testify at the evidentiary hearing. He

testified that one of his arguments during the motion to suppress was based on the consumption of LSD by Mr. Davis. (PC-R Vol. 15, p. 91) He thought that all of the evidence concerning his ingestion of LSD was consistent. (Id. at 91) At no point for the motion to suppress did Mr. Traina retain an expert for the motion. (Id. at 96) The main reason why Mr. Traina did not hire an expert was because of Mr. Davis's ability to recall detail. (Id. at 101-04)

Dr. Gamache testified as a witness for the State. He stated that he was originally contacted by Mr. Terrana, Mr. Davis' other attorney, to work on the case as an expert witness. He stated that Mr. Terrana did not specifically guide him but to generally provide information for the penalty phase. (PC-R Vol. 16, p. 269) When asked whether Mr. Terrana asked him to focus on any drug use, Dr. Gamache testified that he was not asked to investigate this factor. However, when Dr. Gamache brought this up to Mr. Terrana, he was told that it was not going to be useful. (Id at 282) On cross-examination, Dr. Gamache testified that all of the evidence concerning LSD use was consistent, corroborated and there was nothing in the record to contradict its use by Mr. Davis. (Id at 292-93) Dr. Gamache never talked to Mr. Traina. (Id. at 307) He never spoke to either attorney about guilt phase issues. (Id. at 311)

In denying relief, the trial court relied upon the testimony of Mr. Traina. The trial court found that Mr. Traina's decision to not use an expert was a strategic one. However, the trial court ignored the substance of both Dr. Smith and Dr. Gamache

whose testimony was consistent about the level of detail an individual can recall after ingesting a drug such as LSD. (PC-R Vol. 7 1126-28). In addition, the trial court failed to note that Mr. Traina failed to investigate the feasibility of using an expert. His strategic decision was not based on an adequate investigation but on the faulty assumption that alcohol and LSD impair cognitive abilities the same.

ARGUMENT II

MR. DAVIS' STATEMENTS WERE MADE IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS APPLIED IN *MISSOURI V. SEIBERT*. FURTHER, THE STATE VIOLATED THE PROVISIONS OF *GIGLIO V. U.S.* AND *NAPUE V. ILLINOIS* WHEN THE PROSECUTOR KNOWINGLY INTRODUCED FALSE AND MISLEADING EVIDENCE DURING THE SUPPRESSION HEARING IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the United States Supreme Court explained that the "voluntariness doctrine in the state cases ... encompasses all interrogation practices which are likely to exert such pressure upon an individual as to disable him from making a free and rational choice," *id.*, at 464-465, 86 S.Ct. 1602. With the difficulty of judicial enquiry post hoc into the circumstances of a police interrogation, *Dickerson v. United States*, 530 U.S. 428, 444, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000), the Court recognized that "the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk" that the privilege against self-incrimination will not be observed,

id., at 435, 120. Hence the concern that the "traditional totality-of-the-circumstances" test posed an "unacceptably great" risk that involuntary custodial confessions would escape detection. *Id.*, at 442, 120 S.Ct. 2326.

Accordingly, "to reduce the risk of a coerced confession and to implement the Self-Incrimination Clause," the Court in *Miranda* concluded that "the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored," 384 U.S., at 467, 86 S.Ct. 1602. *Miranda* conditioned the admissibility at trial of any custodial confession on warning a suspect of his rights: failure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained. AConversely, giving the warnings and getting a waiver has generally produced a virtual ticket of admissibility; maintaining that a statement is involuntary even though given after warnings and voluntary waiver of rights requires unusual stamina, and litigation over voluntariness tends to end with the finding of a valid waiver. See Berkemer v. McCarty, 468 U.S. 420, 433, n. 20, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) ("[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of Miranda are rare"). To point out the obvious, this common consequence would not be common at all were it not that *Miranda* warnings are customarily given under circumstances allowing for a real choice between talking and

remaining silent.@ *Missouri v. Seibert*, 124 S.Ct. 2601 (2004).

The technique of interrogating in successive, unwarned and warned phases raises a new challenge to *Miranda*. In *Seibert*, an officer of the Rolla police department testified that the strategy of withholding *Miranda* warnings until after interrogating and drawing out a confession was promoted not only by his own department, but by a national police training organization and other departments in which he had worked. Consistently with the officer's testimony, the Police Law Institute, for example, instructs that "officers may conduct a two-stage interrogation .... At any point during the pre-Miranda interrogation, usually after arrestees have confessed, officers may then read the Miranda warnings and ask for a waiver. If the arrestees waive their Miranda rights, officers will be able to repeat any subsequent incriminating statements later in court." *Siebert*, at 2609, *citing*, *Police Law Institute, Illinois Police Law Manual* 83 (Jan.2001-Dec.2003), http://www.illinoispolicelaw.org/training/lessons/ILPLMIR.pdf This practice has been called the Question-First Strategy.

When a confession so obtained is offered and challenged, attention must be paid to the conflicting objects of *Miranda* and question-first. *Miranda* addressed "interrogation practices ... likely ... to disable [an individual] from making a free and rational choice" about speaking, 384 U.S., at 464-465, 86 S.Ct. 1602, and held that a suspect must be "adequately and effectively" advised of the choice the Constitution

guarantees, id., at 467, 86 S.Ct. 1602. **The object of question-first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed.**

Just as "no talismanic incantation [is] required to satisfy [Miranda's] strictures," *California v. Prysock*, 453 U.S. 355, 359, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981) (per curiam), it would be absurd to think that mere recitation of the litany suffices to satisfy *Miranda* in every conceivable circumstance. "The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by Miranda.' " *Duckworth v. Eagan*, 492 U.S. 195, 203, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989) (quoting Prysock, supra, at 361, 101 S.Ct. 2806). The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function "effectively" as *Miranda* requires. Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with Miranda, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment.

In the instant case, the State and the Florida Supreme Court relied upon the

Supreme Court=s decision in *Oregon v. Elstad*, 470 U.S. 298 (1985). In addressing this issue, the United States Supreme Court in *Seibert* stated:

> Missouri argues that a confession repeated at the end of an interrogation sequence envisioned in a question-first strategy is admissible on the authority of *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), but the argument disfigures that case. In *Elstad*, the police went to the young suspect's house to take him into custody on a charge of burglary. Before the arrest, one officer spoke with the suspect's mother, while the other one joined the suspect in a "brief stop in the living room," id., at 315, 105 S.Ct. 1285, where the officer said he "felt" the young man was involved in a burglary, id., at 301, 105 S.Ct. 1285 (internal quotation marks omitted). The suspect acknowledged he had been at the scene. Ibid. This Court noted that the pause in the living room "was not to interrogate the suspect but to notify his mother of the reason for his arrest," id., at 315, 105 S.Ct. 1285, and described the incident as having "none of the earmarks of coercion," id., at 316, 105 S.Ct. 1285. The Court, indeed, took care to mention that the officer's initial failure to warn was an "oversight" that "may have been the result of confusion as to whether the brief exchange qualified as 'custodial interrogation' or ... may simply have reflected ... reluctance to initiate an alarming police procedure before [an officer] had spoken with respondent's mother." Id., at 315-316, 105 S.Ct. 1285. At the outset of a later and systematic station house interrogation going well beyond the scope of the laconic prior admission, the suspect was given *Miranda* warnings and made a full confession. *Elstad*, supra, at 301, 314-315, 105 S.Ct. 1285. In holding the second statement admissible and voluntary, *Elstad* rejected the "cat out of the bag" theory that any short, earlier admission, obtained in arguably innocent neglect of Miranda, determined the character of the later, warned confession, *Elstad*, 470 U.S., at 311-314, 105 S.Ct. 1285; on the facts of that case, the Court thought any causal connection between the first and second responses to the police was "speculative and attenuated," id., at 313, 105 S.Ct. 1285. Although the *Elstad* Court expressed no explicit conclusion about either officer's state of mind, it is fair to read *Elstad* as treating the living room conversation as a good-faith Miranda mistake, not only open to correction by careful warnings before systematic questioning in that particular case, but posing no threat to warn-first practice generally. *See Elstad*, supra, at 309, 105 S.Ct. 1285 (characterizing the officers' omission of *Miranda* warnings as "a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to

> exercise his free will"); 470 U.S., at 318, n. 5, 105 S.Ct. 1285 (Justice Brennan's concern in dissent that *Elstad* would invite question-first practice "distorts the reasoning and holding of our decision, but, worse, invites trial courts and prosecutors to do the same").
>
> The contrast between *Elstad* and this case reveals a series of relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object: **the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.** In *Elstad*, it was not unreasonable to see the occasion for questioning at the station house as presenting a markedly different experience from the short conversation at home; since a reasonable person in the suspect's shoes could have seen the station house questioning as a new and distinct experience, the Miranda warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission.

Seibert, 124 S.Ct. at 2611-12.

I. Analysis under *Seibert*-The Original Record

In the instant case, it is clear from the record produced at the motion to suppress that Detective Iverson and Deputy utilized the question-first strategy. Detective Iverson testified that this is the procedure he uses in most cases, (App.1-2,p.12) and that he did all three in the exact same way. (App 1-2, p.13) In distinguishing the instant case from *Elstad*, using the *Seibert* Court=s analysis, it is clear that the State violated Miranda:

1. **The completeness and detail of the questions and answers in the first round of interrogation**: Detective Iverson testified that the initial statement lasted about 8 to 10 minutes. The initial, unwarned statement was more

detailed than the second Mirandized statement. (App. 1-2,p .20) Finally, the reason Detective Iverson stopped the first unwarned statement was because he had fully confessed. (App1-2,p.21)

2. **The overlapping content of the two statements:** Detective Iverson testified that the first statement was essentially the same with the first, unwarned statement, being more detailed.(App.1-2, p.20)

3. **The timing and setting of the first and the second**: Detective Iverson testified that the second statement began immediately after the first. (App.1-2,p.21-22)

4. **The continuity of police personnel:** Detective Iverson testified that both he and Deputy Marscicano were the only two officers and that they remained in the room immediately following the first unwarned statement.

5. **The degree to which the interrogator's questions treated the second round as continuous with the first**: It is clear from the transcript of Mr. Davis's taped statement that he unsure of where to start and needs prompting by Detective Iverson to begin.(App.2-1)

I. Analysis under *Seibert*-The Post-Conviction Record

During the post-conviction, both James Iverson and John Marsacano were called by Mr. Davis. (The post-conviction record erroneously states that the State called Detective, now Sergeant, Iverson.) Detective Iverson was asked about the specific

questioning technique used in his investigation of the Vicki Robinson case. (PC-R, Vol.16, 215-216) Detective Iverson testified that this technique was developed over time. (Id. at 215) During his career, Detective Iverson has investigated between 20 and 25 homicide cases and has used this technique a majority of the time, (Id. at 218), in "quite a few cases", (Id. at 220), and often. (Id. at 224)

Detective Iverson testified that it is his practice to not give a suspect *Miranda* warnings prior to an interview. (Id. at 216) Instead, it is his practice to start a "conversation" with the individual to build a "rappart" and a "relationship" with the suspect to build a "trust relationship". (Id. at 216) During this "conversation", Detective Iverson generally tells the suspect the information he has that implicates the suspect in the homicide. (Id. at 219) He then continues by asking the suspect to provide more detail or "let me have your account of what happened". (PC-R, Vol. 16, 219-20) Detective Iverson uses this technique purposefully and consciously each time during the interview process. (Id. at 220)

If during the interview process, Detective Iverson feels that the suspect is not being truthful, he will continue to get more information by asking questions to "get more in depth". (Id. at 221) He then let's the suspect finish their statement and then gives them their *Miranda* warnings. (Id. at 223) In evaluating the effectiveness of this technique, Detective Iverson was asked how many suspects refused to speak after a pre-*Miranda* confession, Detective Iverson testified that it has never happened to him.

(Id. at 224)

When asked about the specifics of his interview with Adam Davis, Detective Iverson originally testified that the first unwarned statement was less detailed. (Id. at 213-14) However, when confronted with his prior testimony, Detective Iverson stated that the initial, unwarned interview had "pretty much the same details" and "Then maybe a few other things he talked about earlier he didn't put on tape". (PC-R,Vol. 16, pp. 226-27) The reason why Detective Iverson stopped the initial interview was because he had obtained a full confession. (Id. at 229) Once completed, Detective Iverson read Adam Davis his Miranda rights, started the tape recorder, and proceeded directly into the second interview, never leaving the room. (Id. at 232-33) At no point did Detective Iverson explain that the first, unwarned interview could not be used against him in court. (Id. at 232) This same technique was used on all three co-defendants. (Id. at 243)

Detective Marsacano (now Captain Marsacano) testified next. He testified consistently with Detective Iverson. Detective Marsacano stated that once they arrived, they introduced themselves to Mr. Davis and asked "if he had any information on it." (PC-R, Vol.16, p.256) Detective Marsacono stated that at first, Mr. Davis denied having any involvement in the murder. (Id.) Then, according to Detective Marsacano, they then advised Mr. Davis that they had previously interviewed the other co-defendants and played a portion of Valessa Robinson's confession. (Id. at

256) This was done prior to *Miranda* warnings being given. (id. at 256) After they played the tape, it was then that Mr. Davis confessed. (Id. at 257-58) Again, Detective Marsacano confirmed that the interviews happened in succession without any break. (Id. at 260-61) In addition, Detective Marsacano testified that this technique, this "chronology" of events, had been used in other cases at the Hillsborough County Sheriff's Office. (PC-R, Vol. 16, p.261)

Again, in distinguishing the instant case from *Elstad*, using the *Seibert* Court=s analysis, it is clear that the State violated Miranda:

1. **The completeness and detail of the questions and answers in the first round of interrogation**: Detective Iverson testified at the evidentiary hearing that the initial statement lasted about 8 to 10 minutes. (PC-R Vol.16, p.213) The initial, unwarned statement was more detailed than the second *Mirandized* statement. (Id. at 226-227) Finally, the reason Detective Iverson stopped the first unwarned statement was because he had fully confessed. (Id. at 229)

2. **The overlapping content of the two statements:** Detective Iverson testified that the first statement was essentially the same with the first, unwarned statement, being more detailed.(Id. at 226-27)

3. **The timing and setting of the first and the second**: Detectives Iverson and Marsacono testified that the second statement began immediately after the first. (Id. at 232-33; 260-61)

4. **The continuity of police personnel:** Detective Iverson testified that both he and Deputy Marscicano were the only two officers and that they remained in the room immediately following the first unwarned statement. (Id. at 232-33; 260-61)

5. **The degree to which the interrogator's questions treated the second round as continuous with the first**: It is clear from the transcript of Mr. Davis=s taped statement that he unsure of where to start and needs prompting by Detective Iverson to begin.(App.2-1) The second interview started immediately after the first, (PC-R Vol. 16, p. 232-33), and neither detective informed Mr. Davis that the first, unwarned interview, could not be used against him. (Id. at 232)

As shown above, the use of the "question first" technique by Detective Iverson and Detective Marsacano was not an isolated, accidental event. Both testified that this was their technique, developed over time. Mr. Davis did not confess spontaneously but only after questioning was initiated by the detectives.

The trial court, in denying this claims, failed to take into consideration the substance of the testimony. The trial court relied upon this Court's direct appeal decision denying relief based upon the *Elstad* decision. This Court, however, did not have the information at the time that is now on the record. In denying relief originally, this Court founds the facts surrounding Mr. Davis' statement more like *Elstad*:

unintentional, unplanned and accidental. Now, it is clear from the record that both detectives purposefully utilized the "question-first" technique in this and other cases. Their actions were directed towards obtaining a confession by circumventing the *Miranda* rule. The facts in *Seibert* and the instant case are almost identical. Almost identical, except for the fact that this case presents a more egregious violation than the *Seibert* case.

The applicability of *Seibert* in a post-conviction posture must necessarily be analyzed using Florida law.

In *Linkletter v. Walker*, 381 U.S. 618(1965), the United States Supreme Court first attempted to establish some standards for determining the retroactivity of new rules. The issue was whether *Mapp v. Ohio*, 367 U.S. 643 (1961), which made the exclusionary rule for evidence applicable to the states, applied retroactively. 381 U.S. at 636-40. To answer the question, the Court adopted a three-part test that considered (a) the purpose to be served by the new rule, (b) the extent of reliance on the prior rule, and (c) the effect retroactive application of the new rule would have on the administration of justice. Using that standard, the Court held that *Mapp* would only apply to trials commencing after that case was decided. 381 U.S. at 636-40, 85 S.Ct. 1731. Two years later, in *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), the Court applied the *Linkletter* factors and held that the rule requiring exclusion of identification evidence tainted by exhibiting the accused for identifying

witnesses before trial in the absence of counsel also did not apply retroactively. 388 U.S. at 300, 87 S.Ct. 1967. *Stovall* also held that the new rule would not apply even to cases pending on direct review. Id. at 300-01, 87 S.Ct. 1967.

In *Witt v. State*, 380 So.2d 922 (Fla. 1980), decided in 1980, Florida adopted the *Linkletter* standards. In that case, the Florida Supreme Court held that a change in the law does not apply retroactively "unless the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." 387 So.2d at 931. As to consideration (c), we stated that most major constitutional changes fall into one of two categories: (1) changes "which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties" and (2) those "which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* and *Linkletter* ". 387 So.2d at 929.

As it is usually put: changes of law which constitute a development of fundamental significance will ordinarily fall into one of two categories: (a) changes of law which remove from the state the authority or power to regulate certain conduct or impose certain penalties, or (b) changes of law which are of sufficient magnitude to require retroactive application as ascertained by the three-part test of *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), and *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965). *Witt* 387 So.2d at 929. This test requires

consideration to be given to: (I) the purpose to be served by the new rule; (ii) the extent of reliance on the old rule; and (iii) the effect that retroactive application of the rule will have on the administration of justice. *Ferguson v. State*, 789 So.2d 306 (Fla. 2001) *See State v. Callaway*, 658 So.2d 983, 987 (Fla.1995). "Foremost among these factors is the purpose to be served by the new constitutional rule." *Desist v. United States*, 394 U.S. 244, 249, 89 S.Ct. 1030, 1033, 22 L.Ed.2d 248, 255 (1969) (footnote omitted). Indeed, the other two factors are determinative "only when the purpose of the rule in question (does) not clearly favor either retroactivity or prospectivity." *Brown v. Louisiana*,447 U.S. 323 (1980)(1980).

"Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances." Id. (quoting Williams v. United States, 401 U.S. 646, 653, 91 S.Ct. 1148, 1152, 28 L.Ed.2d 388, 395 (1971) (plurality opinion)). *Thomas v. Blackburn*, 623 F.2d 383, 386 (5th Cir. 1980)(The ruling of the United States Supreme Court that conducting a criminal trial before a jury consisting of only five members deprives the defendant of his right to trial by jury under the Sixth Amendment as applied to the

states is retroactive) . Where the new rule seeks to avoid a fundamentally unfair trial or serious flaws in fact-finding procedure, retroactivity has been favored. *Roberts v. Russell*, 392 U.S. 293 (holding *Bruton* decision to be retroactive).

In *Burch v. Louisiana*, 441 U.S. 130, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979), the US Supreme Court held that a 5-1 verdict convicting the defendant of a non-petty (but noncapital) offense violates the right to jury trial. In *Brown v. Louisiana*, 447 U.S. 323 (1980), the Court held that *Burch* should be applied retroactively. In *Destefano v. Woods*, 392 U.S. 631 (1968), the court held that the rule in *Duncan v. Louisiana*, a noncapital case, that states could not deny a request for trial by jury in Aserious criminal cases,@ would not be applied retroactively. Using the Stovall criteria, the Brown court noted among other things that Aall those convicted of *noncapital* serious crimes@ could apply for relief. (Emphasis added). The state argued *Destefano* in *Brown*, to no avail:

> [R]espondent contends that the question of the retroactive application of *Burch* is controlled by *DeStefano v. Woods* . . . .Respondent argues that if the complete absence of a jury does not impair the factfinding process so substantially as to require retroactivity, then surely the mere presence of a single dissenting juror ought not to compel retroactive application. . . . . [O]ur decision not to grant new trials, with juries to all those who had been convicted of serious criminal offenses in trials without juries does not necessarily mean that a constitutional rule directed toward ensuring the proper functioning of the jury in those cases in which it *has been provided* must also be given only prospective effect.

In the instant case, it is clear that Seibert is a decision that is constitutional in nature emanating from the United States Supreme Court. In addition, the rule announced in *Seibert* constitutes a development of fundamental significance under a *Linkletter* analysis. As such, *Seiber*t is retroactive.

Alternatively, it is necessary to evaluate the Supreme Court=s opinion in *Seibert* in terms of Due Process. As the United States Supreme Court explained in *Bunkley v. Florida*, 538 U.S. 835, 123 S.Ct. 2020, 155 L.Ed.2d 1046 (2003), "[t]he question here is not just one of retroactivity." Id. at 840, 123 S.Ct. 2020 (remanding for this Court to resolve separate due process question of whether defendant's possession of pocketknife satisfied the elements of Florida's first-degree burglary statute). As such,this claim must also be evaluated in light of the due process principles set forth in *Fiore v. White*, 531 U.S. 225 (2001).

Fiore involved a Pennsylvania criminal statute that prohibited the operation of a hazardous waste facility without a permit. 531 U.S. at 226, 121 S.Ct. 712. The Pennsylvania Supreme Court interpreted the statute for the first time after William Fiore's conviction became final. This subsequent interpretation made it clear that Fiore's conduct was not within the statute's scope. *Id.* After *Fiore* was unsuccessful in obtaining collateral relief in the state courts, he brought a federal habeas corpus action. The federal district court granted the habeas writ, but the Third Circuit Court of Appeals reversed on the basis that state courts are under no constitutional obligation to

apply their decisions retroactively. *Id.* at 227, 121 S.Ct. 712. The United States Supreme Court granted Fiore's petition for certiorari to determine whether his conviction was consistent with due process. *Id.* at 228, 121 S.Ct. 712. In response to a certified question from the United States Supreme Court, the Pennsylvania Supreme Court specified that its interpretation of the statute "did not announce a new rule of law," but "merely clarified the plain language of the statute" and furnished a "proper statement of law" in Pennsylvania at the time of Fiore's conviction. *Id.* at 228, 121 S.Ct. 712. Because the statutory interpretation "was not new law," the United States Supreme Court concluded that the case "presents no issue of retroactivity." *Id.* However, the Supreme Court further concluded that Fiore's conviction and continued incarceration violated due process because the Commonwealth of Pennsylvania presented no evidence of the basic element of failure to possess a permit. *Id.* at 229, 121 S.Ct. 712.

Similarly, the same Due Process analysis could be used in Mr. Davis=s case. The United States Supreme Court was not announcing a new rule regarding unwarned confessions which were subsequently followed by Mirandized statements. Rather, the Court was striking down a nefarious practice by law enforcement that relied upon bad faith in sidestepping the requirements of Miranda. After Seibert, the law has not changed. *Elstad* is still viable. What has changed is the analysis a trial court can use in determining whether bad faith is involved in a confession setting. Law

enforcement=s conduct was presumptively coercive before *Seibert* but it took the High Court=s decision to plainly say so.

II. Analysis under *Brady/Giglio*

During testimony concerning the question-first procedure used by Detective Iverson, Mr. Davis=s counsel asked several questions regarding the process:

Q. Is there any strategy decision or procedure you were following in that case to avoid doing that?[giving Miranda warnings]

A. No, sir, I just didn=t think it was necessary during that initial time. If I was going to use what he said at that point in time against him, you know, then I probably would have needed to do that.

Q. So it was never your intention to use the initial portion of the interview then?

A. That=s correct.

(App. 1-2, pp.19-20)

This testimony is fundamentally untrue as highlighted in the Supreme Court=s decision. When asked directly by counsel whether the question-first practice was a Astrategy decision or procedure@, Detective Iverson gave misleading information. Further, the State knew that this testimony was essentially incorrect and misleading.

It has long been established that the prosecution's Adeliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice.@ *Giglio v. United States*, 405 U.S. 150, 153, 92

S.Ct. 763, 31 L.Ed.2d 104 (1972) (quoting *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791 (1935) (per curiam)). AOrdinarily, we presume that public officials have properly discharged their official duties.@ *Bracy v. Gramley*, 520 U.S. 899, 909, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997) (quoting *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15, 47 S.Ct. 1, 71 L.Ed. 131 (1926)). The Supreme Court has several times underscored the Aspecial role played by the American prosecutor in the search for truth in criminal trials.@ *Strickler v. Greene*, 527 U.S., at 281, 119 S.Ct. 1936; accord, *Kyles*, 514 U.S., at 439-440, 115 S.Ct. 1555; *United States v. Bagley*, 473 U.S. 667, 675, n. 6, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *Berger v. Kemp*, 295 U.S., at 88, 55 S.Ct. 629. *See also, Olmstead v. United States*, 277 U.S. 438, 484, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting). Courts, litigants, and juries properly anticipate that Aobligations [to refrain from improper methods to secure a conviction] ... plainly rest[ing] upon the prosecuting attorney, will be faithfully observed.@ Berger, 295 U.S., at 88, 55 S.Ct. 629. Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation. *See Kyles*, 514 U.S., at 440, 115 S.Ct. 1555 (AThe prudence of the careful prosecutor should not ... be discouraged.@).

By contrast to an allegation of suppression of evidence under *Brady*, a *Giglio* claim is based on the prosecutor's knowing presentation at trial of false testimony against the defendant. *See Giglio*, 405 U.S. at 154-55, 92 S.Ct. 763. Under *Giglio*,

where the prosecutor knowingly uses perjured testimony, or fails to correct what the prosecutor later learns is false testimony, the false evidence is material Aif there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.@ *United States v. Agurs,* 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Justice Blackmun observed in *Bagley* that the test Amay as easily be stated as a materiality standard under which the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt.@ 473 U.S. at 679-80, 105 S.Ct. 3375. The State, as the beneficiary of the *Giglio* violation, bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt. *Id.* at 680 n. 9, 105 S.Ct. 3375 (stating that Athis Court's precedents indicate that the standard of review applicable to the knowing use of perjured testimony is equivalent to the *Chapman [v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)] harmless-error standard@).

Thus, while materiality is a component of both a *Giglio* and a Brady claim, the *Giglio* standard of materiality is more defense friendly. The *Giglio* standard reflects a heightened judicial concern, and correspondingly heightened judicial scrutiny, where perjured testimony is used to convict a defendant. *See Bagley*, 473 U.S. at 682, 105 S.Ct. 3375 (explaining that the defense-friendly standard of materiality is justified because the knowing use of perjured testimony involves prosecutorial misconduct and Aa corruption of the truth-seeking function of the trial process@) (citing *Agurs,* 427

U.S. at 104, 96 S.Ct. 2392). Under *Giglio,* once a defendant has established that the prosecutor knowingly presented false testimony at trial, the State bears the burden to show that the false evidence was not material.

Analyzing the materiality component, it is clear that the misleading evidence was essential to the suppression of the evidence. Had the State been truthful concerning the question-first procedure, the deliberate use of such a tactic would have been another factor in the Court=s analysis. The overt use of such procedures by law enforcement would have distinguished the case from *Elstadt* and would have aligned it more closely with *Ramirez v. State*, 739 So.2d 568 (Fla. 1999).

ARGUMENT III

MR. DAVIS= COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO INTRODUCE EXPERT TESTIMONY DURING THE GUILT PHASE TO ESTABLISH THE DEFENSE OF VOLUNTARY INTOXICATION IN VIOLATION OF THE SIXTH, FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

Evidence of voluntary intoxication is admissible as a defense to first-degree murder. See *Thompson v. State*, 818 So.2d 632 (Fla. 1st DCA 2002). The voluntary intoxication defense was available to Mr. Davis because Mr. Davis=s crime predated the statute eliminating the defense. See ' 775.051, Fla. Stat. (1999); *Travaglia v. State*, 864 So.2d 1221 (Fla. 1st DCA 2004). The failure to present expert testimony regarding a specific defense may give rise to a claim of ineffective assistance of

counsel. *Rutherford v. State*, 727 So.2d 216 (Fla. 1998); *Hildwin v. Dugger*, 654 So.2d 107 (Fla. 1995).

In *Wiggins v. Smith*, 123 S.Ct. 2527 (2003), the United States Supreme Court reiterated the standard established by *Strickland* nearly 20 years ago. That standard today still requires courts to determine whether counsel was deficient in his or her representation and whether that representation prejudice the defendant=s case. *See Strickland v. Washington*, 466 U.S. 668 (1984). Justice O=Connor, in writing for the majority in *Wiggins,* as she did in *Strickland*, cautions this Court about how far that deference should be extended.

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

Wiggins, 123 S.Ct at2538.

Wiggins is not new law nor is it a new concept. Rather, *Wiggins* instructs this Court to look at the prevailing norms at the time of the trial to establish whether counsel was ineffective. In 1999, at the time this case was tried, the prevailing norms for trying a capital case would have been reflected in the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989). Guideline 11.4.1 states, in pertinent part:

GUIDELINE 11.4.1 INVESTIGATION

A. Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.

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

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

D. Sources of investigative information may include the following:

1. Charging Documents:

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

A. The elements of the charged offense(s), including the element(s) alleged to make the death penalty applicable;
B. The defenses, ordinary and affirmative, that may be available to the substantive charge and to the applicability of the death penalty;
C. Any issues, constitutional or otherwise, (such as statutes of limitations or double jeopardy) which can be raised to attack the charging documents.

3. Potential Witnesses:

Counsel should consider interviewing potential witnesses, including:

A. Eyewitnesses or other witnesses having purported knowledge of events surrounding the offense itself;
B. Witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), possible mitigating reasons for the offense(s), and/or other mitigating evidence to show why the client should not be sentenced to death;
C. Members of the victim's family opposed to having the client

killed.

Counsel should attempt to conduct interviews of potential witnesses in the presence of a third person who will he available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator or mitigation specialist conduct the interviews.

****

7. Expert Assistance:

Counsel should secure the assistance of experts where it is necessary or appropriate for:

A. preparation of the defense;

B. adequate understanding of the prosecution's case;

C. rebuttal of any portion of the prosecution=s case at the guilt/innocence phase or the sentencing phase of the trial;

D. presentation of mitigation. Experts assisting in investigation and other preparation of the defense should be independent and their work product should be confidential to the extent allowed by law. Counsel and support staff should use all available avenues including signed releases, subpoenas, and Freedom of Information Acts, to obtain all necessary information.

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989)(App.1-1)(emphasis added).

In the instant case, it is clear that defense counsel had the requisite evidence to present a voluntary intoxication defense based on the testimony of the witnesses. First, all three statements made by the co-defendants establish that each individual had ingested LSD and other substances just prior to the offense. Second, the deposition of

Detective Iverson corroborates these statements where he testifies that they admitted to taking acid that day. (App.3-1). Likewise, the deposition of Deputy Marsicano states that Davis admitted to Araging because I was tripping so hard.@. (Appendix 3-2, p.36). During the deposition of the defense=s own expert, who was not called during the guilt phase of the trial, Dr. Gamache testified that on the night of the incident, Mr. Davis had ingested a large amount of Acid. (App.1-3, p.51)) Further, Dr. Gamache testified that the LSD had affected his mental state. (*Id*. at 54), and that Davis and his co-defendants had remained in this state until their apprehension. (*Id.* at 63). Finally, defense counsel pursued this defense at trial by requesting and receiving a jury instruction for voluntary intoxication and arguing this defense in closing. (ROA. V.XIII, p. 1203, *et.seq*.)

It is clear that defense counsel did not adequately investigate or prepare a defense of voluntary intoxication. Florida law does hold that a reasonable strategic decision whether to utilize a defense of voluntary intoxication can preclude a finding of ineffectiveness of counsel. *See Patton v. State*, 878 So.2d 368 (Fla.2004); *Jones v. State*, 855 So.2d 611 (Fla. 2003); *Stewart v. State*, 801 So.2d 59, 65 (Fla.2001) (holding that counsel was not ineffective for failing to employ a voluntary intoxication defense where, at an evidentiary hearing, defense counsel testified that he considered an intoxication defense but determined that it was not a viable defense based on the facts of the case); *Kitchen v. State*, 764 So.2d 868, 869 (Fla. 4th DCA 2000)

("Counsel may make a tactical decision not to pursue a voluntary intoxication defense, but a trial court's finding that such a decision was tactical usually is inappropriate without an evidentiary hearing."). However, once counsel has made the decision to employ a voluntary intoxication defense, it is counsel=s duty to do so effectively. *Reaves v. State*, 826 So.2d 932 (Fla. 2002). The facts in *Reaves* are somewhat similar to the case at bar:

> In Reaves' first subclaim, he asserts that he is entitled to an evidentiary hearing regarding whether trial counsel was ineffective in failing to present a voluntary intoxication defense. The record shows that during the guilt phase, the State introduced Reaves' confession--evidence which could have supported a voluntary intoxication defense since Reaves claimed to be "coked up" when he fired the gun. Defense counsel, however, never argued this defense or presented any evidence which supported voluntary intoxication despite the fact that there was other evidence which could have supported this theory. During the jury charge conference, the trial judge noted that during Reaves' first trial, the jury was informed as to this defense, and it was decided that such a jury instruction should be given again. Notwithstanding this fact, Reaves' counsel never mentioned voluntary intoxication during closing arguments, and never discussed how the evidence could have supported this theory or how cocaine affects the user. During the penalty phase, even more evidence was presented which would have supported a voluntary intoxication defense, including additional testimony that Reaves was on drugs at the time of the crime. Moreover, numerous witnesses testified that Reaves had a history of serious drug abuse dating back to the Vietnam War, that he became involved in "heavy drugs" towards the end of his service in Vietnam, and that his prior convictions were drug-related.This case is similar to *Patton v. State*, 784 So.2d 380 (Fla.2000), a case in which defense counsel knew of but did not present evidence that the defendant had a substantial history of drug and alcohol abuse, that he had taken drugs seven hours prior to the crime, and that the defendant had fresh track marks on his arm at the time he was arrested. Id. at 387. In remanding the case for an evidentiary hearing, this Court held: Because the record does not conclusively refute some of Patton's allegations of ineffective assistance of counsel, the court should have held an evidentiary hearing.

> Specifically, the court should have held a hearing to determine if counsel was ineffective in failing to investigate and present evidence that Patton was intoxicated or insane at the time of the shooting. Instead, the court summarily denied this claim stating a strategy must be presumed. If this were the standard, a strategy could be presumed in every case and an evidentiary hearing would never be required on claims of ineffective assistance of counsel. To the contrary, it was necessary for the court to conduct an evidentiary hearing to determine whether counsel was acting competently when she chose not to present an intoxication or insanity defense to a charge of first-degree premeditated murder, where she had conceded that the defendant shot the victim.

Reaves, 826 So.2d at 937-38.

Counsel=s deficient performance prejudiced Mr. Davis. The failure to provide expert testimony cannot be attributed, again, to strategy in arguing that juries do not favorably consider the voluntary intoxication defense. Rather, the specific question of prejudice centers on counsel=s decision whether to use an expert. To put the question in simpler terms, would counsel have a better chance establishing the defense of voluntary intoxication with or without an expert.

Under Florida=s Evidence Code, Chapter 90, F.S. (1999), the admissibility of opinion and expert testimony is guided by sections 90.701 and 90.702, F.S. (1999). Section 90.701 reads:

> If a witness is not testifying as an expert, the witness's testimony about what he or she perceived may be in the form of inference and opinion when:(1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he or she has perceived to the trier of fact without testifying in terms of inferences or opinions and the witness's use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and (2) The opinions and inferences do not require a special knowledge, skill, experience, or training.

Section 90.702, F.S. reads:

> If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

Generally, lay opinion testimony is admissible if it typically involves matters such as distance, time, size, weight, form and identity. *Fino v. Nodine*, 646 So.2d 746 (Fla. 4th DCA 1994). In addition, lay witnesses may also give testimony regarding impairment due to intoxication. *See State v. Meador*, 674 So.2d 826 (Fla. 4th DCA 1996). However, such opinion testimony must be testimony the witness is capable of giving. *Id.* In addition, such lay opinion testimony is only permitted if based on what the witness has personally perceived. *Nardone v. State*, 798 So.2d 870 (Fla. 4th DCA 2001); Charles W. Ehrhardt, *Florida Evidence* ' 701.1, at 538 (1999 ed.). If both prongs of section 90.701 are not met, the evidence is inadmissible. *Id.*

In the instant case, it is clear that the defense did not present any lay witness testimony that could testify about Mr. Davis=s level of intoxication that night other than the co-defendants. The use of Jon Whispel=s testimony, however, would be fraught with danger due to the fact that he was allegedly intoxicated at the same time as Davis. Thus, his ability to satisfy the requirements of 90.701 would be doubtful to any reasonable attorney.

Further, expert testimony is admissible where the disputed issue is beyond the ordinary understanding of the jury. *Johnson v. State*, 393 So.2d 1069 (Fla.1980). It is proper for an expert to testify as to the effect of a given quantity of an intoxicant on an accused. *Gurganus v. State*, 451 So.2d 817 (Fla.1984). In *Calandra v. State*, 727 So.2d 1028 (Fla. 4th DCA 1999), the Fourth District addressed the matter succinctly:

> We are persuaded by the above cases that whether a defendant is insane because of the long and continued use of intoxicants is not within the ordinary understanding of jurors, and that in the absence of expert testimony, a defendant would not be entitled to an instruction based on *Cirack*.

Id. at 1030.

Calandra, *Gurganus*, and Cirack were all available to the defense at the time of Mr. Davis=s trial. Counsel should have been aware of the law at the time a defense of voluntary intoxication was presented before the jury. Thus, Mr. Davis was prejudiced by counsel=s failure to call expert witnesses because no legally cognizable testimony was before the jury regarding Mr. Davis=s level of intoxication that would have negated his specific intent.

Worse yet, defense counsel did have an expert who would have been able to testify in this manner but counsel did not adequately prepare him for guilt phase or penalty phase. (App.1-3, pp. 12-13)(Expert, in deposition the night before penalty phase testimony, was not asked to offer any opinions concerning defendant nor was his upcoming testimony discussed with counsel).

During the evidentiary hearing Dr. Robert Smith testified as an expert witness in psychology with a sub-specialty in addictive disorders. Dr. Smith evaluated Mr. Davis, interviewed several family members, reviewed numerous records and court documents. (PC-R Vol. 14, pp. 8-9). Based on the evidence in the case, Dr. Smith testified with a reasonable degree of psychological certainty that the ingestion of LSD by Mr. Davis had significantly impaired his ability to form the intent to commit [first-degree] murder. (Id. at 9) Dr. Smith testified extensively about the effects of LSD on people. (Id. at 10-14) He also testified about the record evidence establishing the quantity of LSD ingested by Mr. Davis. (Id. at 15-17) All of the evidence of LSD use was consistent. (Id. at 17). Dr. Smith testified that individuals who ingest LSD, unlike sedatives and stimulants, are able to recall events in great detail. (Id. at 13) Thus, in formulating a defense in a criminal case, it is important to understand the three classes of drugs and their effects on a person's cognitive abilities. (Id. at 14)

Charles Traina, one of Mr. Davis' attorneys and the one who investigated and presented the guilt phase evidence, was called by the defense to testify at the evidentiary hearing. He thought that all of the evidence concerning his ingestion of LSD was consistent. (Id. at 91) At no point for the motion to suppress or the actual trial did Mr. Traina retain an expert to investigate voluntary intoxication. (Id. at 96) The main reason why Mr. Traina did not hire an expert was because of Mr. Davis's ability to recall detail. (Id. at 101-04)

Dr. Gamache testified as a witness for the State. He stated that he was originally

contacted by Mr. Terrana, Mr. Davis' other attorney, to work on the case as an expert witness. He stated that Mr. Terrana did not specifically guide him but to generally provide information only for the penalty phase. (PC-R Vol. 16, p. 269) When asked whether Mr. Terrana asked him to focus on any drug use, Dr. Gamache testified that he was not asked to investigate this factor. However, when Dr. Gamache brought this up to Mr. Terrana, he was told that it was not going to be useful. (Id at 282) On cross-examination, Dr. Gamache testified that all of the evidence concerning LSD use was consistent, corroborated and there was nothing in the record to contradict its use by Mr. Davis. (Id at 292-93) Dr. Gamache never talked to Mr. Traina. (Id. at 307) He never spoke to either attorney about guilt phase issues. (Id. at 311)

In denying relief, the trial court again ignores the substance of the testimony of the expert witnesses and the trial attorneys. The trial court denied relief based upon the argument that it was a strategic decision. This strategic decision to not hire an expert was again based on the erroneous assumption that since Mr. Davis could recall facts, he must not have been intoxicated. This was refuted by the expert testimony and was uncontested by the State. A strategic decision to forgo evidence can only be made after a reasonable investigation. Here, it was clear that counsel performed no investigation.

ARGUMENT IV

MR. DAVIS: COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO INTRODUCE THE STATEMENTS OF VALESSA ROBINSON IN ACCORDANCE WITH SECTION 90.804(2)(c) AND 90.804(1)(a) IN VIOLATION OF THE SIXTH, FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

In *Davis v. State*, 859 So.2d 465 (Fla. 2003), the Florida Supreme Court indirectly addressed this issue:

> Davis next argues that the trial court reversibly erred by not permitting Detective Iverson and Lieutenant Marsicano to testify regarding Valessa Robinson's statements made to them. The assertion is that these statements should have been admitted pursuant to section 90.804(2)(c), Florida Statutes (2002), [FN7] which is the declaration against interest hearsay exception. However, we do not find support in the record for Davis's claim. The entire record upon which this issue is based is the following.
>
> > FN7. Section 90.804, Florida Statutes, provides in pertinent part:
> > (2) HEARSAY EXCEPTIONS.--The following are not excluded under s. 90.802, provided that the declarant is unavailable as a witness:
> > (c) Statement against interest.--A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject the declarant to liability or to render invalid a claim by the declarant against another, so that a person in the declarant's position would not have made the statement unless he or she believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement.
>
> [DEFENSE COUNSEL]: Judge, the reason I've asked to approach the bench at this time is because I want some guidance as to the discretion the Court's going to allow me with respect to questioning Detective Iverson on the specific subject matter is, what type of information I would be allowed to question him about regarding the statements made by Valessa Robinson.
> I'm taking the position that Jon Whispel this morning opened the door to the testimony regarding what Valessa Robinson has said about the incident which I think would then allow me to even ask Detective Iverson what she told him about the incident. I didn't want to do that in open court before we talked about it at the bench and have counsel have an opportunity to respond to that, though.

THE COURT: Ms. Williams?
[PROSECUTOR]: Judge, I would object. It's hearsay and I don't know of any exception to that.
THE COURT: I'm not sure how you think Mr. Whispel opened that door.
[DEFENSE COUNSEL]: Well, I think he did, Judge, and let me at least say what my observation was and maybe the Court doesn't remember this the same way I do. I believe right off the bat Jon Whispel testified using hearsay statements that--regarding Valessa, for example, her explanation at the Denny's. Later on he testified regarding Valessa being willing to take the blame for the incident.
[DEFENSE COUNSEL CO-CHAIR]: She stood up and said, "Let's kill my mother."
[DEFENSE COUNSEL]: That comes out by her--
[DEFENSE COUNSEL CO-CHAIR]: Statements from her.
[DEFENSE COUNSEL]: He also testified very clearly that Adam Davis and Valessa Robinson entered into a conversation in his presence in which they both said they were going to take the blame for this incident. I think again that opens the door for us to proceed further. It's very, very important to our defense, obviously, because we are not in this alone is our projected position of this, so that's why I'm asking the Court to allow me some latitude here.
THE COURT: I don't think it allows you the latitude to have Valessa's statement put in through this witness or to question him concerning that.
[DEFENSE COUNSEL]: Judge, if the Court is making that ruling then I wish to ask Detective Iverson this: If my client had given him a statement indicating that someone else had done it, would that statement have been consistent with what he's learned from other statements.
THE COURT: If your client had told him someone else had done it?
[DEFENSE COUNSEL]: One of the other three. Obviously, what I want to do is preface this because he even said himself--I don't think there is any violation of any sort. Even Detective Iverson indicated that he took a statement from all three people. By having taken the statement and having an idea I believe I can ask him whether or not all of them admitted they were involved in drugs, all of them made the same kind of statements involving that, I can ask him if they were--if all the statements I believe were consistent in one way or the other. He's going to say--I don't see why I can't ask these questions.
[PROSECUTOR]: Judge, the fact that hearsay is admitted at some time during the trial without objection does not open the door.
THE COURT: Allow you to bring in the additional hearsay. I'm not going to allow you tremendous latitude, but I certainly would ask you to make the

appropriate objections.
[PROSECUTOR]: Yes.
[DEFENSE COUNSEL]: So you're not going to let me at least inquire to a certain extent about the statement?
THE COURT: That Valessa made to him?
[DEFENSE COUNSEL]: Well, no. The way I will approach it, given your ruling about what I just asked for is, I would ask Detective Iverson to tell me in ways my client's statement, which I believe I can certainly ask him about, was consistent or inconsistent with that investigation he already acquired from the two statements he took prior to my client's statement. In other words, I would elicit any such testimony directly to, Valessa said this about this, but he might be able to answer in that regard.
THE COURT: No.
[DEFENSE COUNSEL]: You're not going to allow me to do that either?
THE COURT: No, I have no idea what you're asking in that situation so I'm going to ask that you ask the question, I'll allow the State to make the objection. I mean, I can't give you an advisory opinion.
[DEFENSE COUNSEL]: Well, I didn't want to do something in open court without telling you.
[DEFENSE COUNSEL CO-CHAIR]: Tell the Judge what the facts are, what the cold facts are, what you're interested in and then maybe we can get there.
[DEFENSE COUNSEL]: I think the Judge knows what the facts are, Valessa Robinson made a confession to this crime. She admitted she did it.
THE COURT: I understand that, but you are--in this case it is hearsay and it's not coming in through this witness.
[DEFENSE COUNSEL]: All right. Judge, having heard your ruling as to my--
THE COURT: Let me explain this to you, though, Mr. Traina [defense counsel], I can't--you can't give me a list of questions and say, "Judge, check off which ones I can ask and which ones I can't."
[DEFENSE COUNSEL]: I'll go ahead. That will be fine, Judge.
THE COURT: I have no way of doing that in the middle of this trial.
[DEFENSE COUNSEL]: I'll go--
THE COURT: There's no motion in limine and there's no way for me to give you an advisory opinion on what questions you can ask or not ask in a trial.
[DEFENSE COUNSEL]: No. And don't get me wrong, Judge, nine times out of ten I might just go ahead and ask the witness. I didn't want to create a problem that would later cause--
THE COURT: I don't want you to create a problem you know you cannot ask the, question, either but at the point in the middle of this trial with the witness

> on the stand there's no way we can anticipate every question that you may ask.
> [DEFENSE COUNSEL]: Uh-huh.
> THE COURT: Okay.
> A similar request was made when Lieutenant Marsicano was called as witness. **We agree with the trial court that there was no basis in what was presented** to determine whether Detective Iverson or Lieutenant Marsicano could testify as to statements made to them by Valessa Robinson. For statements to be admitted under section 90.804(2)(c), the statements have to meet the requirements of that section. On the bases of the trial record, we find no error by the trial judge in respect to this issue.

Davis, 859 so.2d at 476 (emphasis added)

A clear reading of this Court=s opinion shows that the statement was excluded for not properly laying the necessary foundation in order to admit evidence under section 90.804(c). In order to admit Ms. Robinson=s statement, it was necessary for counsel to establish that Ms. Robinson was unavailable as a witness. The proper procedure to employ would be to subpoena the witness and have that witness invoke, in person, the privilege. Then, at that point, under 90.804(1)(a), **the trial court would have to make a ruling** as to the unavailability of the witness. *See Perry v. State*, 675 So.2d 976 (Fla. 4th DCA 1996). Had Ms. Robinson properly invoked her privilege, then the statement against interest would have been allowed to come in under 90.804(c).[2]

Counsel=s misunderstanding of the rule of hearsay was deficient performance.

[2] There is no proper way to assume Ms. Robinson was unavailable as a witness until she was formally declared unavailable by the trial court.

Counsel=s action=s prejudiced Mr. Davis severely by not negating the evidence presented by State that Mr. Davis was the principal actor and was the individual who stabbed Ms. Robinson.

ARGUMENT V

MR.DAVIS= RIGHTS TO DUE PROCESS WERE VIOLATED WHEN THE STATE ALTERNATED BETWEEN THEORIES OF PROSECUTION WHEN TRYING HIS CASE AND THE CASE OF HIS CO-DEFENDANT RENDERING HIS TRIAL FUNDAMENTALLY UNFAIR

The Constitution's Due Process clause guarantees every defendant the right to a fair trial. *See Lassiter v. Department of Soc. Servs*., 452 U.S. 18, 24-5, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981); *Turner v. Louisiana*, 379 U.S. 466, 471-72, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965). The Supreme Court has also emphasized that "because the prosecutor is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer ..., it is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate method to bring about one." *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935), *overruled on other grounds, Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960).

Drawing on the principle that the Constitution's "overriding concern [is] with the justice of the finding of guilt," *United States v. Agurs*, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), several federal circuits have found, or implied, that the

use of inconsistent, irreconcilable theories to secure convictions against more than one defendant in prosecutions for the same crime violates the due process clause. *See, e.g., Smith v. Groose*, 205 F.3d 1045 (8th Cir.2000); *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir.1997) (en banc) *vacated on other grounds*, 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998); *Drake v. Kemp*, 762 F.2d 1449 (11th Cir.1985) (en banc) (Clark, J., specially concurring).

In *Smith v. Groose*, the Eighth Circuit considered a case in which a prosecutor had used two different, conflicting statements by a co-defendant at successive trials to convict the petitioner at the first trial and a second individual at a second trial. *See Smith*, 205 F.3d at 1049. That case involved a group of four young men who were looking for homes to burglarize one evening. In the course of their search, they saw another group of burglars breaking into a home. They realized they knew these men and decided to help them break into the house. The residents were murdered in the course of the burglary. The primary issue at trial was whether the murders took place before or after the four young men began participating in the offense. One of the four men first told the police that the other group had committed the murders without the participation of the group of four. Two days later, he told police that he had seen one of the four men from his group stabbing the victims with a pocketknife; he later recanted this story. The prosecutor then used both statements to obtain convictions against men in each of the two groups. *See id. at* 1047-49.

Examining the record before it, the Eighth Circuit held that "[t]he use of inherently factually contradictory theories violates the principles of due process." *Id. at* 1052. The court found that in order to amount to a due process violation, an inconsistency in the prosecutor's theories "must exist at the core of the prosecutor's case against defendants for the same crime." *Id.* This constitutes a due process violation because it renders convictions unreliable, given that "[the s]tate's duty to its citizens does not allow it to pursue as many convictions as possible without regard to fairness and the search for truth." *Id. at* 1051.

Finally, the Ninth Circuit considered a similar situation in *Thompson*. In that case, the prosecutor argued at one trial that, based on jailhouse informant testimony, one defendant had committed a rape and murder. At a second trial, the prosecutor used different jailhouse informants to argue that the second defendant had the motive and disposition to commit the crimes. A plurality of the en banc Ninth Circuit, specifically excluding situations where new evidence comes to light, found that a prosecutor cannot use inconsistent theories of the same crime in order to secure multiple convictions. *See id.* at 1058. The court echoed Judge Clark's concurrence in an Eleventh Circuit case which, although it granted habeas relief on alternate grounds, also involved inconsistent theories:

> The prosecutor's theories of the same crime in the two different trials negate one another. They are totally inconsistent. This flip flopping of theories of the offense was inherently unfair. Under the peculiar facts of this case the actions

> by the prosecutor violate the fundamental fairness essential to the very concept of justice ... The state cannot divide and conquer in this manner. Such actions reduce criminal trials to mere gamesmanship and rob them of their supposed search for the truth.

Thompson, 120 F.3d at 1059 (*quoting Drake*, 762 F.2d at 1479 (Clark, J., concurring)).

The American Bar Association also recognizes the special place of prosecutors in our constitutional system. "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict." ABA Model Code of Prof. Responsibility EC 7-13 (1981); see also ABA Standards for Criminal Justice ' 3-5.8(c)(d) (2d ed.1981) (prosecutor has responsibility to guard rights of accused and those of society).

As such, the prosecutor may not "[become] the architect of a proceeding that does not comport with the standards of justice." Id. The prosecutor, therefore, violates the Due Process Clause if he knowingly presents false testimony-- whether it goes to the merits of the case or solely to a witness's credibility. Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935). [FN12] Moreover, the prosecutor has a constitutional duty to correct evidence he knows is false, even if he did not intentionally submit it. Giles v. Maryland, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967).

Nor does it matter which defendant is tried first or second. The due process challenge to the use of inconsistent theories is based on the notion of fundamental

fairness. Because inconsistent theories render convictions unreliable, they constitute a violation of the due process rights of any defendant in whose trial they are used. In *Groose*, as in the instant case, the petitioner was in fact the defendant at the first trial, and the second, inconsistent theory did not come to light until four years after his conviction, at the second trial. *See Groose*, 205 F.3d at 1048. Nevertheless, the Eighth Circuit found that his due process rights had been violated. Logically, "both [defendants' due process rights] were prejudiced by the prosecutor's actions or neither's were." *Drake*, 762 F.2d at 1479 (Clark, J., concurring).

Evidence of this shift in prosecution theories is available by examination of the record from both the Adam Davis trial and Valessa Robinson trial. It is clear from the instant record that Mr. Davis was alleged to be the leader of the three co-defendants and that he was the one who did the actual stabbing of the victim. In the case against Valessa Robinson, the state offered the theory, through Ms. Robinson=s own statement (App.6-1) that she planned the murder and was the one who stabbed her mother. It is clear from the testimony of the medical examiner, Dr. Lee Miller, that the fatal wounds to Ms. Robinson were more consistent with those described by Valessa Robinson(App.6-1) than Adam Davis. (App.2-1)

Further evidence is revealed during the pretrial motions and hearings filed by the state in the Valessa Robinson case. To begin, the State attempted to, and prevailed in, keeping out the many statements made in the Adam Davis case regarding who actually committed the

stabbing. A note contained in the files of the State Attorney shows that this was the strategy of the various motions in limine: A**To prohibit reference to the State=s theory of prosecution in the case against Adam Davis.**@(App.6-2) This course of conduct is then illustrated by the various motions in limine filed designed to keep Adam Davis=s statement out and any comments regarding the credibility or conflicting nature of Valessa Robinson statement and Adam Davis=s statements. Further, the state filed a motion in limine attempting to introduce testimony that Valessa Robinson Aliked knives@ and always possessed knives. (App.6-4)

ARGUMENT VI

MR. DAVIS= COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO ENSURE THAT HIS CLIENT RECEIVED A PROPER MENTAL HEALTH EXAMINATION IN VIOLATION OF THE SIXTH, FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. FURTHER, MR. DAVIS= COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO CONDUCT A PROPER INVESTIGATION INTO POTENTIAL MITIGATION AND FAILED TO PRESENT THE MITIGATION IN A PROPER WAY IN VIOLATION OF THE SIXTH, FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

Defense counsel must discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The United States Supreme Court has held that in a capital case, Aaccurate sentencing information is an

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

State and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration. *See, Phillips v. State*, 17 Fla. L. Weekly S595 (Fla. Sept. 24, 1992); *State v. Lara*, 581 So. 2d 1288 (Fla. 1991); *Stevens v. State*, 552 So. 2d 1082 (Fla. 1989); *Bassett v. State*, 541 So. 2d 596 (Fla. 1989); *State v. Michael*, 530 So. 2d 929, 930 (Fla. 1988); *O'Callaghan v. State*, 461 So. 2d 1154, 1155-56 (Fla. 1984); *Eutzy v. Dugger*, 746 F. Supp. 1492 (N.D. Fla. 1989), aff'd, No. 89-4014 (11th Cir. 1990); *Harris v. Dugger*, 874 F.2d 756 (11th Cir. 1989); *Middleton v. Dugger*, 849 F.2d 491 (11th Cir. 1988).

Where counsel does not fulfill the duty to investigate and prepare, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. *See, e.g., Harris v. Dugger; Middleton v. Dugger*. No tactical motive can be ascribed to attorney omissions which are based on ignorance, *see Brewer v. Aiken*,

935 F.2d 850 (7th Cir. 1991), or on the failure to properly investigate or prepare. *See Harris v. Dugger; Stevens v. State; Kenley v. Armontrout*, 937 F.2d 1298 (8th Cir. 1991).

In *Wiggins v. Smith*, 123 S.Ct. 2527 (2003), the United States Supreme Court reiterated the standard established by *Strickland* nearly 20 years ago. That standard today still requires courts to determine whether counsel was deficient in his or her representation and whether that representation prejudice the defendant=s case. *See Strickland v. Washington*, 466 U.S. 668 (1984). Justice O=Connor, in writing for the majority in *Wiggins,* as she did in *Strickland*, cautions this Court about how far that deference should be extended.

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

Wiggins, 123 S.Ct at2538.

Wiggins is not new law nor is it a new concept. Rather, *Wiggins* instructs this Court to look at the prevailing norms at the time of the trial to establish whether counsel was ineffective. In 1999, at the time this case was tried, the prevailing norms for trying a capital case would have been reflected in the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989).

Guideline 11.4.1 states, in pertinent part:

GUIDELINE 11.4.1 INVESTIGATION

A. Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. **Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.**

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

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

D. Sources of investigative information may include the following:

1. Charging Documents:

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

A. The elements of the charged offense(s), including the element(s) alleged to make the death penalty applicable;
B. The defenses, ordinary and affirmative, that may be available to the substantive charge and to the applicability of the death penalty;
C. Any issues, constitutional or otherwise, (such as statutes of limitations or double jeopardy) which can be raised to attack the charging documents.

3. Potential Witnesses:

Counsel should consider interviewing potential witnesses, including:

A. Eyewitnesses or other witnesses having purported knowledge of events surrounding the offense itself;
B. **Witnesses familiar with aspects of the client's life**

history that might affect the likelihood that the client committed the charged offense(s), possible mitigating reasons for the offense(s), and/or other mitigating evidence to show why the client should not be sentenced to death;

C. Members of the victim's family opposed to having the client killed.

Counsel should attempt to conduct interviews of potential witnesses in the presence of a third person who will he available, if necessary, to testify as a defense witness at trial. **Alternatively, counsel should have an investigator or mitigation specialist conduct the interviews**.

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

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

Wiggins v. Smith, 123 S.Ct. 2527, 2538,(2003).

In *Blanco v. Singletary*, 943 F.2d 1477 (11th Cir. 1991), the Eleventh Circuit granted habeas relief on Blanco's claim that his trial counsel rendered ineffective assistance, in part, by not presenting available mitigating evidence at the penalty phase. Blanco's defense counsel conducted no investigation into possible mitigating evidence until the conclusion of the guilt phase of trial. After the jury returned a guilty verdict,

Blanco told counsel that he did not wish to present witnesses in the penalty phase. The court rejected the argument that Blanco's instruction controlled the issue, noting that counsel may not blindly follow such commands. Rather, counsel A 'first must evaluate potential avenues and advise the client of those offering potential merit.' A *Id.* at 1502 (quoting *Thompson v. Wainwright,* 787 F.2d 1447, 1451 (11th Cir.1986), *cert. denied*, 481 U.S. 1042, 107 S.Ct. 1986, 95 L.Ed.2d 825 (1987)). The court found counsel to be ineffective because:

> [t]he ultimate decision that was reached not to call witnesses was not a result of investigation and evaluation, but was instead primarily a result of counsels' eagerness to latch onto Blanco's statements that he did not want any witnesses called. Indeed, this case points up an additional danger of waiting until after a guilty verdict to prepare a case in mitigation of the death penalty: Attorneys risk that both they and their client will mentally throw in the towel and lose the willpower to prepare a convincing case in favor of a life sentence.

Blanco, 943 F.2d at 1503.

Likewise, again in *Wiggins,* the Supreme Court granted habeas relief based on inadequate investigation:

> The record demonstrates that counsel's investigation drew from three sources. App. 490-491. Counsel arranged for William Stejskal, a psychologist, to conduct a number of tests on petitioner. Stejskal concluded that petitioner had an IQ of 79, had difficulty coping with demanding situations, and exhibited features of a personality disorder. *Id.* at 44-45, 349-351. These reports revealed nothing, however, of petitioner's life history. Tr. of Oral Arg. 24-25. With respect

to that history, counsel had available to them the written PSI, which included a one-page account of Wiggins' Apersonal history@ noting his Amisery as a youth,@ quoting his description of his own background as A 'disgusting,' A and observing that he spent most of his life in foster care. App. 20-21. Counsel also Atracked down@ records kept by the Baltimore City Department of Social Services (DSS) documenting petitioner's various placements in the State's foster care system. *Id*., at 490; Lodging of Petitioner. In describing the scope of counsel's investigation into petitioner's life history, both the Fourth Circuit and the Maryland Court of Appeals referred only to these two sources of information. *See*, 288 F.3d, at 640-641; *Wiggins v. State*, 352 Md., at 608-609, 724 A.2d, at 15.Counsel's decision not to expand their investigation beyond the PSI and the DSS records fell short of the professional standards that prevailed in Maryland in 1989. As Schlaich acknowledged, standard practice in Maryland in capital cases at the time of Wiggins' trial included the preparation of a social history report. App. 488. Despite the fact that the Public Defender's office made funds available for the retention of a forensic social worker, counsel chose not to commission such a report. *Id.*, at 487. Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA)--standards to which we long have referred as Aguides to determining what is reasonable.@ *Strickland*, supra, at 688, 104 S.Ct. 2052; *Williams v. Taylor*, supra, at 396, 120 S.Ct. 1495. The ABA Guidelines provide that investigations into mitigating evidence Ashould comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.@ ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989) (emphasis added). Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of

> sources. *Cf. id.*, 11.8.6, p. 133 (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences) (emphasis added); 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (AThe lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing .... Investigation is essential to fulfillment of these functions@).

Id. at 2536-37.

Further, the Supreme Court stated the following regarding the actual knowledge of counsel:

> The scope of their investigation was also unreasonable in light of what counsel actually discovered in the DSS records. The records revealed several facts: Petitioner's mother was a chronic alcoholic; Wiggins was shuttled from foster home to foster home and displayed some emotional difficulties while there; he had frequent, lengthy absences from school; and, on at least one occasion, his mother left him and his siblings alone for days without food. *See* Lodging of Petitioner 54-95, 126, 131-136, 140, 147, 159-176. As the Federal District Court emphasized, any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of any aggravating factors in petitioner's background. 164 F.Supp.2d, at 559. Indeed, counsel uncovered no evidence in their investigation to suggest that a mitigation case, in its own right, would have been counterproductive, or that further investigation would have been fruitless; this case is therefore distinguishable from our precedents in which we have found limited investigations into mitigating evidence to be reasonable.

In the instant case, counsel had failed to investigate important mitigation, had utterly failed to prepare witnesses to testify and failed to adequately present important mitigation testimony.

The most important witness for the defense would have been their expert, Dr. Michael Gamache. Dr. Gamache should have been utilized during the penalty phase to establish statutory and non-statutory mitigation. As shown from Dr. Gamache=s deposition, the night before his testimony, counsel never properly prepared their expert. Dr. Gamache was never directed to offer any opinions on Mr. Davis behalf nor had he spoken about the questions he was to be asked by counsel. (App. 7-1). Further, when Dr. Gamache testified, he testified in a way that was very inaccurate regarding the development of Mr. Davis.

Dr. Gamache=s testimony essentially divided Mr. Davis=s life into three phases. The first two phases were described by Dr. Gamache as Anormal@.(R. Vol. X, 1325-26). Dr. Gamache only describe Mr. Davis as having difficulty in his third phase, that time after the death of his father. Dr. Gamache interviews no witnesses. He does not talk to any family members or friends concerning Mr. Davis. His only information is from documents and Mr. Davis. This was exactly the same facts as *Wiggins*:

> Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources. *Cf. id.*, 11.8.6, p. 133

> (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences) (emphasis added); 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (AThe lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing .... Investigation is essential to fulfillment of these functions@).

Dr. Janice Stevenson testified after being called by the defense. She was accepted as an expert witness in the field of psychology specializing in child development. (PC-R Vol. 17, p. 365) She conducted an evaluation of Mr. Davis, interviewed several family members and reviewed numerous records. (Id. at 368-70) She testified that Mr. Davis suffered from several emotional disturbances, post-traumatic stress disorder, ADHD and Pervasive Development Disorder. (Id. at 371) Some of the evidence presented is as follows:

Adam=s Father, Kenneth Davis, died in 1994 from a motorcycle accident. Adam was only 15 years old and Adam related that his father was his Abest friend@. They hunted, fished, hiked, and camped together on a regular basis. Adam would sit with his father every night and watch TV with him while his father drank beer.

However, Adam=s father drank heavily, would become violent and abusive at times and would regular smoke marijuana and snort cocaine. Adam=s biological mother, Tamara Elliot, was 16 or seventeen when she gave birth to Adam. Adam=s mother and father had a rocky relationship and severe financial stress. Both would smoke

marijuana on a nightly basis in the presence of Adam and would occasionally do other drugs such as speed.

Adam=s father had started a extra-marital affair with a woman who worked at a restaurant that Adam=s mother worked. Adam=s mother had to quit because of the embarrassment and shot at Adam=s father with a shotgun when he returned one night after being with the woman. Adam was in the next room. Adam=s father called the police and his mother was forced to leave. Adam=s father, who was enlisted in the Air Force, was forced to leave because of his substance abuse problem.

Testimony from witnesses establishes that when Adam was an infant, Adam=s mother would regularly abandon him and leave for days or weeks at a time. On one occasion, Adam=s grandmother heard Adam=s cry as she walked home from work to discover that he had been placed in a crib with four or five sour milk bottles and a note explaining that his mother had left.

Adam=s parents decided to divorce. Adam=s mother received custody of Adam. She attempted to get back on her feet by going to college while her mother watched Adam. However, she would be gone during the week, coming home on weekends. One time, while at school, Ken Davis took Adam and left for Florida. Adam=s mother tried in vain to locate her son, joining a carnival to come to Florida so she could search for Adam.

Adam=s mother also had a difficult life replete with emotional abandonment,

continuing the cycle. As a child, her parents divorced and her mother gave custody to the father. Her mother would occasionally visit them. Her father died in a plane crash and she went to live with her great grandparents who she referred to as her grandparents. Her mother had taken the younger siblings and moved into town, leaving her. Eventually, she was forced to move in with her emotionally detached mother who had married. Her new husband was unemployed and a violent alcoholic. She would be forced to drive members of his family home, at the age of 10, when they became too intoxicated. When she was 13, he took her to a secluded location a raped her. She told her mother who blamed her for the incident. No criminal charges were filed but juvenile proceedings were started. In a gesture of kindness, the Judge advised Tamara=s mother that if she had the new husband move out, that he would simply allow her daughter to come home. At that point, Tamara mother responded AWell, I love him.@ Tamara was placed in foster care where she ran away from at 13. She joined the carnival and met Adam=s father, Ken Davis.

Adam=s father married Donna Davis. Adam was not aware that she was not his biological mother until he was older. He found out when Ken and Donna were arguing about an alleged affair by Donna. There was evidence that, while raising Adam, Donna was very abusive towards him and treated him differently than her own biological child. Donna and Ken were heavy drug abusers and would consume narcotics in the presence of their children. Financially and emotionally, both parents

were unstable as they were forced to move due to non-payment of rent.

Many members of Adam=s maternal family indicate that Adam was having trouble far before the death of his father. Adam, once a excellent student, fell below average and then began to fail his classes suddenly. He would begin to steal and start fights. He began to have trouble with his father. One night, after Adam was taken home by the police for threatening a boy, his father physically disciplined him. Adam called the police and had his father arrested. His father was bailed out of jail and was home shortly thereafter. His uncle discussed the issue with Adam and he admitted that he had made a mistake and that he would apologize to his father. Adam never got to apologize because his father died shortly thereafter. Adam is shocked and grief stricken and filled with guilt. His life begins to spiral downward as he is forced to leave his mother=s house. He attempted to live with his biological mother but things don=t work out. He goes to live with two different uncles but is forced to leave because he cannot control his terrible drug habit at this time. He is homeless and gets arrested several times. Finally, he meets up with Valessa and Jon. (PC-R Vol. 17, pp. 383-404)

Trial counsel never scratched the surface in establishing the required mitigation. Trial counsel had three family members testify. They were never spoken adequately before they took the stand. They were not prepared. Adam=s aunt, Carolyn Clark=s testimony is one page of direct testimony. Adam=s other aunt, Carol Elliot=s testimony

is two pages of direct testimony. Adam=s biological mother and her entire family history is presented in two pages of direct testimony. These three witnesses had more to say, as shown above. In addition, Adam=s stepfather, Tom Elliot was available to testify; Donna Davis, his stepmother was available to testify; Steve Elliot, Adam=s uncle was available to testify; Mike Elliot, Adam=s uncle was available to testify; Larry and Diane Sobek, Adam=s uncle and aunt were available to testify.

Counsel was deficient in not adequately investigating and presenting all the available mitigation evidence. Mr. Davis was prejudiced because his death recommendation was passed on the thinnest of margins: 7 to 5.

ARGUMENT VII

MR. DAVIS= COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO ENSURE THAT HIS CLIENT RECEIVED A PROPER MENTAL HEALTH EXAMINATION TO REBUT THE STATE=S INTRODUCTION OF THE COLD, CALCULATED, AND PREMEDITATED AGGARAVATOR IN VIOLATION OF THE SIXTH, FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

In *Wiggins v. Smith*, 123 S.Ct. 2527 (2003), the United States Supreme Court reiterated the standard established by *Strickland* nearly 20 years ago. That standard today still requires courts to determine whether counsel was deficient in his or her representation and whether that representation prejudice the defendant=s case. *See Strickland v. Washington*, 466 U.S. 668 (1984). Justice O=Connor, in writing for the majority in *Wiggins,* as she did in *Strickland*, cautions this Court about how far that

deference should be extended.

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

Wiggins, 123 S.Ct at2538.

Wiggins is not new law nor is it a new concept. Rather, *Wiggins* instructs this Court to look at the prevailing norms at the time of the trial to establish whether counsel was ineffective. In 1999, at the time this case was tried, the prevailing norms for trying a capital case would have been reflected in the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989)(App.1-1). Guideline 11.4.1 states, in pertinent part:

> GUIDELINE 11.4.1 INVESTIGATION
>
> A. Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. **Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.**
> B. The investigation for preparation of the guilt/innocence phase of the trial should be conducted regardless of any admission or statement by the client concerning facts constituting guilt.
> C. The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.
> D. Sources of investigative information may include the following:
>
> 1. Charging Documents:

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

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

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

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

3. Potential Witnesses:

Counsel should consider interviewing potential witnesses, including:

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

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

C. Members of the victim's family opposed to having the client killed.

Counsel should attempt to conduct interviews of potential witnesses in the presence of a third person who will he available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator or mitigation specialist conduct the interviews.

****

7. Expert Assistance:

Counsel should secure the assistance of experts where it is necessary or appropriate for:

A. preparation of the defense;

B. adequate understanding of the prosecution's case;

C. **rebuttal of any portion of the prosecution=s case at the guilt/innocence phase or the sentencing phase of the trial;**

D. presentation of mitigation. Experts assisting in investigation and other preparation of the defense should be independent and their work product should be confidential to the extent allowed by law. Counsel and support staff should use all available avenues including signed releases, subpoenas, and Freedom of Information Acts, to obtain all necessary information.

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

As stated previously[3], the failure to utilize trial counsel=s expert during this most critical stage of the prosecution was further proof of deficient performance. Dr. Michael Gamache had testified during his deposition as to the amount of LSD ingested by Mr. Davis and to the effects of LSD on an individual. (App. 1-3, pp. 45-58)

In the instant case, it is clear that defense counsel had the requisite evidence to present an voluntary intoxication based on the testimony of the witnesses. First, all three statements made by the co-defendants establish that each individual had ingested LSD and other substances just prior to the offense. Second, the deposition of Detective Iverson corroborates these statements where he testifies that they admitted

[3] *Supra*, Argument I, Argument III.

to taking acid that day. (App.3-1). Likewise, the deposition of Deputy Marsicano states that Davis admitted to Araging because I was tripping so hard.@. (Appendix 3-2, p.36). During the deposition of the defense=s own expert, who was not called during the guilt phase of the trial, Dr. Gamache testified that on the night of the incident, Mr. Davis had ingested a large amount of Acid. (App.1-3, p.51)) Further, Dr. Gamache testified that the LSD had affected his mental state. (*Id*. at 54), and that Davis and his co-defendants had remained in this state until their apprehension. (*Id*. at 63).

Counsel failed to adequately prepare their expert to present testimony under section 921.141(6)(f) which requires less proof than a finding of voluntary intoxication. That section reads:

> (6) Mitigating circumstances.--Mitigating circumstances shall be the following:
>
> *****
>
> (f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.

921.141(6)(f),F.S.(1999).

In *Holsworth v. State*, 522 So.2d 348 (Fla. 1988), the Florida Supreme Court found error when the trial court refused to give a requested jury instruction based on the above statutory mitigating circumstance:

> First, we believe there was sufficient evidence for the jury to have concluded that appellant's conduct was affected by his use of drugs and alcohol. One of the defense theories in the guilt phase was that appellant's voluntary intoxication prevented him from forming the requisite specific intent for first-degree murder. Witnesses testified to appellant's drug and alcohol problem and the jury was instructed on this defense. Although the jury clearly found the appellant capable

> of forming at least the specific intent required to commit the underlying felony (armed burglary with intent to commit a battery), it may also have found that as a result of drugs and alcohol, his capacity to appreciate the criminality of his conduct or conform his conduct to the law was impaired. We find the evidence concerning drugs and alcohol, in conjunction with the testimony of numerous witnesses that Holsworth was generally a quiet, nonviolent person, was sufficient for the jury to reasonably have concluded that he may have been high on PCP and alcohol at the time of the murder. *See Norris v. State*, 429 So.2d 688 (Fla.1983) (override improper where there was evidence that appellant had a drug problem and claimed to be intoxicated at the time of the murder).

Holsworth v. State, 522 So.2d at 354.

During the evidentiary hearing Dr. Robert Smith testified as an expert witness in psychology with a sub-specialty in addictive disorders. Dr. Smith evaluated Mr. Davis, interviewed several family members, reviewed numerous records and court documents. (PC-R Vol. 14, pp. 8-9). Based on the evidence in the case, Dr. Smith testified with a reasonable degree of psychological certainty that the ingestion of LSD by Mr. Davis had significantly impaired his ability to conform his conduct to the requirements of law. (Id. at 10) In addition, ingestion of LSD by Mr. Davis would have invalidated the cold, calculated and premeditated aggravator. (Id. at 25) Dr. Smith testified extensively about the effects of LSD on people. (Id. at 10-14) He also testified about the record evidence establishing the quantity of LSD ingested by Mr. Davis. (Id. at 15-17) All of the evidence of LSD use was consistent. (Id. at 17). Dr. Smith testified that individuals who ingest LSD, unlike sedatives and stimulants, are able to recall events in great detail. (Id. at 13) Thus, in formulating a defense in a criminal case, it is important to understand the three classes of drugs and their effects on a person's cognitive abilities.

(Id. at 14)

Dr. Gamache testified as a witness for the State. He stated that he was originally contacted by Mr. Terrana, Mr. Davis' other attorney, to work on the case as an expert witness. He stated that Mr. Terrana did not specifically guide him but to generally provide information only for the penalty phase. (PC-R Vol. 16, p. 269) When asked whether Mr. Terrana asked him to focus on any drug use, Dr. Gamache testified that he was not asked to investigate this factor. However, when Dr. Gamache brought this up to Mr. Terrana, he was told that it was not going to be useful. (Id at 282) On cross-examination, Dr. Gamache testified that all of the evidence concerning LSD use was consistent, corroborated and there was nothing in the record to contradict its use by Mr. Davis. (Id at 292-93)

In denying relief, the trial court again ignores the substance of the testimony of the expert witnesses and the trial attorneys. The trial court denied relief based upon the argument that Dr. Smith had never testified in a capital case in Florida. There was no other reason to discount his testimony. (PC-R Vol. 7, p.1154) Further, the trial court relies upon the testimony by Mr. Terrana that the decision was a strategic one. This strategic decision was based on the fact that Mr. Davis supported his habit through elicit means. However, Dr. Gamache testified that most substance abusers feed their habit by elicit means.

Again, by not properly investigating and presenting evidence of Mr. Davis=s

impaired capacity, where such evidence clearly existed, counsel acted in a way that was deficient. Mr. Davis was prejudiced because the aggravator of cold, calculated and premeditated was used in the court=s sentencing order which was not rebutted in any substantial way by the statutory mitigator.

Conclusion

Mr. Davis was denied his right to a fair trial and the effective assistance of counsel during that trial. The demands of justice, the hallmark of our free and ordered society, require relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by U. S. Mail, first-class, to the Clerk of the Supreme Court and all counsel of record on this ____ day of February, 2007.

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CERTIFICATE OF COMPLIANCE

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

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