IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-378

ALEX PAGAN,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

References to the original record on appeal are cited as "ROA" followed by the volume number and the page. References to the post-conviction hearing are referenced as "EH" followed by the page. Exhibits introduced during post-conviction are cited by reference to the exhibit.

REQUEST FOR ORAL ARGUMENT

Mr. Pagan has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Pagan, through counsel, urges the Court to permit oral argument.

STATEMENT OF THE CASE AND OF THE FACTS

Alex Pagan was indicted by the Grand Jury for the 17th Judicial Circuit, Broward County Florida, on March 25, 1993, for two counts of first-degree premeditated murder, two counts of attempted first-degree premeditated murder, armed burglary and armed robbery (ROA Volume I, 5-7). Pagan was tried by jury on November 4, 1996 through December 17, 1996, before the Honorable Susan Lebow in Broward County, Florida. On

December 20, 1996, the jury found Pagan guilty as charged on all counts (ROA Volume I, 912-17). On February 26, 1997, the jury reconvened for the penalty phase proceedings. On March 5, 1997, the jury recommended by a vote of seven to five that Pagan be sentenced to death as to counts one and two (ROA Volume I, 1058-1061). On June 30, 1997 and July 31, 1997, the Court conducted a Spencer hearing. Pagan was sentenced by the Court on October 15, 1998. Reading from a prepared Order (ROA Volume I, 1114-1126), the Court found the following aggravating circumstances: the defendant was previously convicted of another capital felony or a felony involving the use and/or threat of violence (great weight); the capital felonies were committed during the course of/or attempt to commit armed burglary and armed robbery (significant weight); the capital felony was committed for the purpose of avoiding or preventing a lawful arrest. The Court declined to find the existence of this aggravating circumstance; and the murder was cold, calculated, and premeditated (great weight).

The Court considered the following statutory mitigating circumstances: the defendant's age at the time of the crime. The Court declined to find the existence of this mitigating circumstance.

The Court considered the following non-statutory mitigators and accorded them some to little weight: childhood deprivation (some weight);

the Defendant suffers from attention deficit disorder (little weight); the Defendant has a borderline personality disorder (some weight); the Defendant was emotionally abused as a child. The Court declined to find the existence of this mitigating circumstance; the Defendant has a history of emotional problems including suicide attempts. The Court did not find this mitigating circumstance to vary from the finding that the Defendant suffered from borderline personality disorder (some weight); the Defendant is a loving brother (little weight); the Defendant is a loving son, grandson, and great grandson (little weight); the Defendant engaged in good contact while in custody awaiting trial (some weight); and the Defendant is a loving friend (little 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 Michael Lynn and Freddie Lafayette Jones. Pagan was sentenced to life on counts 3, 4, 5, and 6.

On direct appeal Pagan raised the following arguments: (A) the evidence was insufficient to support Alex Pagan's convictions; (B) the trial court reversibly erred in allowing Williams Rule evidence concerning a January 23, 1993 burglary that was dissimilar factually and temporally; (C)

the trial court erred in denying the defendant's motion to suppress physical evidence; (D) the trial court reversibly erred by refusing to grant a new trial and refusing to declare a mistrial when the prosecutor impermissibly bolstered the credibility of a state witness; (E) the trial court reversibly erred by allowing a surreptitiously recorded hearsay conversation in violation of Alex Pagan's state and federal constitutional rights; (F) the trial court reversibly erred by denying Alex Pagan's motion for a new trial and upholding the state's *Batson* challenge to a juror; (G) the trial court reversibly erred in refusing to order a new trial; (H) the trial court reversibly erred in refusing to grant one or more of Alex Pagan's motions for mistrial; (I) the trial court reversibly erred in permitting prejudicial inflammatory photographs of the deceased to be shown to the jury; (J) the trial court reversibly erred by denying a motion for new trial upon a Richardson violation when testimony concerning a voice line-up was permitted; (K) the trial court reversibly erred by denying the defendant's motion for mistrial when the prosecutor in closing argument made references to the "Golden Rule" with respect to improper inflammatory references preventing the defendant from committing crimes again; (L) the trial court reversibly erred in denying the defendant's motion for mistrial when the prosecutor in closing argument made references to a camouflage jacket from the Desert

Storm War which was not in evidence, and which was highly prejudice to the defense; (M) the trial court reversibly erred by permitting over defense objections testimony of Keith Jackson concerning the death of a six (6) year old child; (N) the trial court reversibly erred in overruling objections and permitting the medical examiner to express expert opinions on glass without any predicate when the medical examiner lacked the qualifications to give expert opinions on the characteristics of the glass manufacturer, its composition, and whether someone would be injured breaking through glass; (O) the trial court reversibly erred in granting the State's motion for a voice line-up and in allowing testimony relating to the voice line-up; (P) cumulative errors require reversal and remand; and (Q) reversal is required as Alex Pagan's death sentence is disproportionate.

The Florida Supreme Court affirmed Pagan's convictions and sentences in *Pagan v. State*, 830 So.2d 792 (Fla. 2002), *cert. denied*, 539 U.S. 919, 123 S.Ct. 2278, 156 L.Ed.2d 137, 71 USLW 3758 (2003). The Office of Capital Collateral Regional Counsel-Southern Region was appointed on November 7, 2002 to represent Pagan in post-conviction proceedings. On January 10, 2003, the Office of Capital Collateral Regional Counsel-Southern Region filed a Motion to Withdraw based upon a conflict of interest, which was granted by this Court on January 14, 2003. The

Office of Capital Collateral Regional Counsel-Middle Region accepted appointment of counsel and filed a Notice of Appearance on March 4, 2003.

On June 8, 2004, Mr. Pagan filed a motion for post-conviction relief. On January 18, 2005, the lower court entered an order addressing the 21 claims for relief. An evidentiary hearing was held on February 7th, 8th, and 9th in 2005. A year later on February 7, 2006, the lower court entered an order denying relief. Mr. Pagan timely filed his appeal.

The life of Alex Pagan resembles a Greek tragedy. A tragic drama where the central character, the protagonist, the "hero", suffers misfortune which is not accidental but is significant. This misfortune is logically connected with the protagonist's actions. Tragedy stresses the vulnerability of human beings whose suffering is brought on by a combination of human and divine architects and their actions, but is generally undeserved with regard to its harshness. *Brady* and *Wiggins* error cases, such as Mr. Pagan's, are classic examples of the tragic drama played out where events occur that are beyond the control of the defendant. As the "past is prologue", Mr. Pagan's past, unknown and unexplored by his jury, illustrates how difficult his life was to become from the minute he was born.

The son of Miguel Pagan and Maria Rivera, Alex Pagan was born out-of-wedlock in New York City. His father, Miguel Pagan was using cocaine

heavily and became extremely drug dependant. He would leave his family at night to consume drugs. As his drug habit got worse, Miguel Pagan would deal drugs to buy what he needed most: cocaine. Nothing else mattered to him. Not Maria, not his two children, not even his freedom. As a result of his severe addiction, Miguel Pagan would be arrested and incarcerated in state and federal prisons for drug offenses. Tragically, Alex Pagan's first and most important male role model, his father, was a convicted drug dealer and drug addict.

His mother, Maria, was inadequately prepared to handle the responsibility of parenthood on her own. Living in what has been described as a "war zone", she would befriend numerous male partners that controlled the criminal activity in her neighborhood as a means of support and protection. These local crime lords would shower attention and money on Maria Rivera. They would also bring drugs and guns into her home. Ladies floral arrangements and fatherly neckties were replaced by table centerpieces of cocaine kilos and gunbelts. Selfish of her own needs and wants, Maria did nothing to protect her impressionable son from such corrupting influences. Rather, she welcomed them into her home and criminals into her family. Alex Pagan's most enduring and lasting male role model was "Poppy Joe", a violent career criminal. For Alex, the attention was mistaken

for affection which turned into idolization. When "Poppy Joe" was sent to prison for a violent felony, Maria dragged her children on the six hour bus trip to see him in prison. This was the man Alex Pagan grew up calling "father".

People outside of his family continued this tragic drama. While only 10 years old, Alex was sexually abused by an older female. This abuse would continue for years until he, in turn repeated this cycle on a 14 year old girl. While no one stood up for Alex when he was 10 - no one proclaimed that sexual abuse of children was wrong when he suffered it - Alex paid a heavy burden for his actions. Locked up and sent to prison, Alex suffered physical and emotional abuse at the hands of older and more powerful prison inmates.

By the time he had reached his early 20's, a time when many young people look to the future, Alex withdrew to the world of drugs and alcohol. Combined with his ADHD and brain damage, Alex once again found himself in trouble facing the most serious sanction this, or any society, can give: the death penalty. However, instead of correcting this tragic drama, the criminal justice system perpetuated it. His conviction was slowly engineered by prosecutors and lying witnesses while the only person who could save his life, his attorney, did little or nothing to change the tragic

conclusion. From conception to his sentence of death, Alex Pagan was driven by events beyond his control and abandoned by every meaningful individual. It is no surprise, based on everything we know now, how the past would have played out. It would have ended in tragedy.

SUMMARY OF THE ARGUMENT

The past few years have witnessed a subtle but tremendous change in the United States Supreme Court's jurisprudence as it relates to mitigation in death penalty cases. Under the old standards announced in *Strickland,* very little could be argued on post-conviction if the trial attorney invoked the protective shield of "strategy". Today, many of the old notions of "strategy" are gone. Beginning with *Williams v. Taylor*, 529 U.S. 362 (2000), through *Wiggins v. Smith*, 539 U.S 510 (2003) to the decision in *Florida v. Nixon*, 125 S.Ct. 551 (2004), the concept of mitigation has become more broad and more inclusive than ever before. The duty to fully and thoroughly investigate facts must be done before an attorney can claim that he did not present certain mitigation as part of his trial strategy. *Wiggins.* Strategic reasons not to present certain mitigation because possible unfavorable evidence may surface as a result, is no longer reasonable and constitutes deficient performance. *Williams.* Failure to investigate mitigation because of the client's demands is no longer acceptable. *Rompilla v. Beard*, 545 U.S.

374 (2005); *see also, Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003), *cert. denied*, 125 S.Ct. 344 (2004). Finally, an attorney's claim that he or she would simply not have presented that particular mitigation to the jury is now deficient performance. *Williams.*

The scope of mitigation has also been defined, or more appropriately, returned to its original definition. The United States Supreme Court in *Tennard v. Dretke*, 124 S.Ct. 2562 (2004) and *Smith v. Texas*, 125 S.Ct. 400 (2004) reiterated that mitigation must be defined "in the most expansive terms", rejecting state court attempts to create a "nexus" of mitigation to the crime or a threshold of relevance beyond "any fact that is of consequence" which a fact-finder may "deem to have mitigating value". This "low threshold of relevance" fully incorporates the necessity to conduct a complete biopsychosocial history of the accused, including past family history. Thus, "virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances."

With the Supreme Court's decision in *Wiggins*, the importance of the ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (2003) cannot be emphasized enough. Recently, in the Supreme Court's *Nixon* decision, the Court utilized the newest 2003

Guidelines and the *Commentary* in granting the State of Florida's appeal from a 1984 trial. With the adoption of the *ABA Guidelines*, *Wiggins* is now applicable to all stages of Florida's trifurcated capital trial.

This Court has been busy as well in the area of prosecutorial misconduct. Two cases underscore this Court's concern over non-disclosure of evidence by the State. In both *Mordenti v. State*, 894 So.2d 161 (Fla. 2004), and *Floyd v. State*, 902 So.2d 775 (Fla. 2005), this Court reversed capital convictions based on *Brady* violations. While this Court worked within existing state and federal constitutional law, the Court's application of the prejudice prong of *Brady* appears to be a more expansive threshold than previously used. For example in *Mordenti*, the Court found two main *Brady* violations and, in *Floyd*, one. These violations were analyzed against a myriad of evidence presented and upheld on direct appeal. The *Floyd* court went so far as to turn a direct evidence case, with a confession, a bloody sock and possession of the decedent's stolen property, to a circumstantial case. Neither defendant, like Mr. Pagan, had any direct physical evidence connecting them to the crime.

The legal error in Mr. Pagan's case does resemble Greek tragedy where shadow - powers, prosecutors and parents, lawyers and experts - controlled the outcome of Mr. Pagan's life more than he could himself.

ARGUMENT

ISSUE I

THE STATE VIOLATED THE PROVISIONS OF BRADY V. MARYLAND, KYLES V. WHITLEY AND THEIR PROGENY WHEN THEY SUPPRESSED EVIDENCE CONCERNING THE IDENTITY OF AN ALTERNATE SUSPECT CONTAINED IN A POLICE REPORT IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.[1]

It is clear from the outset of these proceedings that the prosecutor in this case, Peter LaPorte, played the role of architect in the case against Alex Pagan with a host of willing characters. One character, Detective Learned, received information that co-defendant Willie Graham had been soliciting the murder of Detective Peluso, one of the lead detectives in Mr. Pagan's case, on April 2, 1993. This was from "reliable information" from a reliable informant gathered by law enforcement. This information was memorialized in a suppressed police report and introduced into evidence as defense exhibit 1 (EH - 17). Contained in this report is a reference to an "Alex Ramirez" who resides in "Turtle Bay". Alex Ramirez was the original name obtained by law enforcement as one of the two people who

[1] Originally presented as Claim III in the Motion to Vacate.

committed this crime. It was this name that was on the search and arrest warrant (EH - 35). The State Attorney did not turn over this April 2, 1993, report (EH - 18). This report was furnished to collateral counsel pursuant to a request made under Fl.R.Crim.P. 3.852.

Post-Conviction counsel called Mr. Pagan's trial attorney, Dennis Colleran, as a witness for Claim III of the motion alleging that the State had committed a *Brady* violation when it failed to turn over the police report introduced as defense exhibit 1. To establish a *Brady* violation, a defendant must demonstrate: "(1) the State possessed evidence favorable to the accused because it was either exculpatory or impeaching; (2) the State willfully or inadvertently suppressed the evidence; and (3) the defendant was prejudiced." *Allen v. State*, 854 So.2d 1255, 1259 (Fla.2003) (citing *Strickler v. Greene*, 527 U.S. 263, 281 82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)); *see also Banks v. Dretke*, 540 U.S. 668, 124 S.Ct. 1256, 1272, 157 L.Ed.2d 1166 (2004).

Mr. Colleran testified during the evidentiary hearing as to the importance of the information contained in the suppressed police report. Mr. Colleran's theory of defense was that Keith Jackson, an individual originally arrested for this offense, was more involved in the case than he led others to believe and that the police believed he was more involved than what was

disclosed during discovery and trial. (EH - 16). Mr. Colleran's defense theory was consistent throughout the entire proceedings. He testified that he filed a motion to obtain grand jury testimony, motion to dismiss, a motion to suppress physical evidence and a motion to suppress statements. (EH - 17). All of these motions were premised on the fact that Mr. Jackson was a major participant in the offense and that he had falsely implicated Mr. Pagan to save himself. (EH - 17).

After reviewing the suppressed police report, Mr. Colleran testified that the information it contained was more detailed than the information that he possessed. (EH - 21). At the time of the trial, "Alejandro" or "Alex" Ramirez was implicated by Jackson and the police as one of the individuals responsible for the offense. (EH - 20-21). The name Alex Pagan does not become part of the case until after the defendant is arrested. The suppressed report could have been used by Mr. Colleran in several ways.

In attacking the credibility of law enforcement and its investigation, the suppressed report would have been used by Mr. Colleran to bolster his argument in his motion to suppress. He described the suppressed information as "pivotal" because one of his main arguments was that Jackson, and thus law enforcement, was not being truthful when he stated that he did not know of the last name of the individual cited in the arrest and

search warrants. (EH - 24). Mr. Colleran could have testified that law enforcement did have "reliable information" regarding an "Alex Ramirez" who resides in "Turtle Bay". A very detailed description of an individual's name and location, information very different from that used by law enforcement to obtain the physical evidence and arrest warrant.

Mr. Colleran could have used the report to impeach Mr. Jackson and implicate him further in the offense. As further established by the State in the introduction of State's exhibits 2, 3, 4, and 5, Mr. Colleran was aware of an individual named Alex Ramirez from the pleadings and discovery. (EH - 35-36). On two occasions, Mr. Colleran requested that his investigators investigate a connection between Keith Jackson and Willie Graham, the co-defendant in the case. (EH - 40). On July 26, 1993, in a letter introduced as State's Exhibit 4, Mr. Colleran requested that his investigator investigate the name of Alex Ramirez. Again, on August 8, 1995, Mr. Colleran, requested information that may have lead to a connection between Jackson, Graham and Ramirez. (EH 41-42). When asked by the State how the suppressed report could have been used to connect all three individuals, Mr. Colleran replied:

> To me it would have meant Mr. Graham, either Anthony or Willie, was associating with the man that Keith Jackson identified as the perpetrator of these crimes. And since Graham had been convicted as the co-defendant, or in the case of his brother, Anthony as a suspect in

> my book, it would have meant that Alex Ramirez could have been the perpetrator of the, of this crime with, with Mr. Graham and therefore Alex Pagan didn't commit it, would be my reasoning.

(EH - 44).

Mr. Colleran emphasized the importance of the suppressed report during this line of questioning from the State:

> Well, it is the difference from going from a, a person who is a work associate to somebody who is possibly running in the same game and maybe the closest associate to the co-defendant in this case. It is apples and oranges. It is just, it makes a tremendous difference. Now, I don't say that lightly. If I had seen this, this would have put me on a much heavier harder trail against Mr. Ramirez and I would have been able to argue my motions much more strongly if I had known that he was out there with the man who was attempting to buy, solicit somebody to murder the lead detective in this case.

(EH - 44-45).

Finally, the importance of the suppressed report would have gone beyond impeaching law enforcement, Keith Jackson and attacking the credibility of the investigation. The suppressed report shows that an individual named Alex Ramirez, the same person named throughout all of the police reports and warrants, was still associating with Anthony and Willie Graham after the arrest of Alex Pagan. (EH - 21). The suppressed report would have shown that by April 2, 1993, law enforcement had actually arrested the wrong individual, with a different name, who lived at a different address than Alex Pagan.

Thus, the exculpatory or impeaching nature of the report is twofold. First, if all the information in the suppressed report is correct, accurate and

"reliable" as sworn to by the officer, then it clearly demonstrates that there was a connection between Willie Graham, Anthony Graham and Keith Jackson and that the individual arrested, Alex Pagan, was the wrong individual. On the other hand, if the information is not "reliable", then it discredits the reliable informant, Keith Jackson, to show that he was still misleading the police, even after Mr. Pagan's arrest. In either case, both of which could have been used by Mr. Colleran at the same time during the proceedings, clearly establishes that the defense has met the burden in establishing the first prong of *Brady.*

The State does not dispute that Defense Exhibit 1 was suppressed. The State's main argument, as presented at the evidentiary hearing, was that the name "Alex Ramirez" was known to Mr. Colleran. This point is irrelevant. The information contained in the suppressed report, as well as the date of the information, is the basis of this claim. Mr. Colleran never had any of the specific information contained in the suppressed report nor did he have any of the explosive evidentiary value of the date of the report. The second prong of *Brady* has been met.

In establishing materiality, or prejudice, under *Brady,* the United States Supreme Court has emphasized that prejudice is measured by determining "whether 'the favorable evidence could reasonably be taken to

put the whole case in such a different light as to undermine confidence in the verdict.'" *Strickler*, 527 U.S. at 290 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). Confidence is undermined when "there is a reasonable probability that had the information been disclosed to the defendant, the result of the proceeding would have been different." *Young v. State*, 739 So.2d 553, 559 (Fla.1999). The Florida Supreme Court has recognized that "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 557 (quoting *Kyles*, 514 U.S. at 434). When the suppressed evidence undermines confidence in the result of the trial the defendant is entitled to have his conviction set aside. In reviewing the impact that withheld materials might have on defendants, courts must assess the cumulative effect of the evidence. *See Kyles*, 514 U.S. at 441, 115 S.Ct. 1555, 131 L.Ed.2d 490. In other words, courts should assess the importance of the suppressed materials taken together. *See id.* In addition, courts should consider not only how the State's suppression of favorable information deprived the defendant of direct relevant evidence but also how it handicapped the defendant's ability to investigate or present other aspects of the case. *See United States v. Bagley*,

473 U.S. 667, 683, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) (reviewing court may consider directly any adverse effect that prosecutor's failure to respond to request for information from defendant might have had on preparation or presentation of defendant's case).

In assessing the evidence presented against Mr. Pagan, it is clear that the suppressed report would have played a major role in undermining the reliability of the verdict. In his motion to suppress, Mr. Colleran argued, among other things, that the information contained in the affidavit contained false information. In its opinion, this Court addressed some the issues regarding the motion to suppress:

> In determining whether probable cause exists to justify a search, the trial court must make a judgment, based on the totality of the circumstances, as to whether from the information contained in the warrant there is a reasonable probability that contraband will be found at a particular place and time. *See Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). As the Court in *Gates* put it:
> The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him ... there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for ... conclud[ing]" that probable cause existed.
> 462 U.S. at 238 39, 103 S.Ct. 2317. This determination must be made by examination of the four corners of the affidavit. *See Schmitt v. State*, 590 So.2d 404 (Fla.1991); *Delacruz v. State*, 603 So.2d 707 (Fla. 2d DCA 1992). The affidavit must state that the affiant has personal knowledge of the confidential informant's veracity or the affidavit must contain sufficient independent corroborating evidence. As this Court said in *State v. Peterson*, 739 So.2d 561 (Fla.1999):
> Hearsay information provided by a confidential informant can be

sufficient to support a search warrant, *see State v. Wolff*, 310 So.2d 729, 733 (Fla.1975), provided the affidavit satisfies the *Gates* test. *See State v. Butler*, 655 So.2d 1123, 1126 30 (Fla.1995). "Veracity" and "basis of knowledge" are among the factors to be considered in assessing the reliability of an informant's information. *See Vasquez v. State*, 491 So.2d 297, 299 (Fla. 3d DCA 1986).
739 So.2d at 564.
When properly challenged, the affidavit must also be examined for omissions made with intent to deceive or with reckless disregard of whether such information should have been revealed to the magistrate. *See Johnson v. State*, 660 So.2d 648 (Fla.1995). The reviewing court must determine whether the omitted facts, if added to the affidavit, would have defeated probable cause and whether the omission resulted from intentional or reckless police conduct that amounts to deception. *See State v. Van Pieterson*, 550 So.2d 1162 (Fla. 1st DCA 1989). The inclusion of statements by innocent mistake is insufficient to defeat the authenticity of an affidavit. *See Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). Even where a court finds the police acted deceptively, it must excise the erroneous material and determine whether the remaining allegations in the affidavit support probable cause. If the remaining statements are sufficient to establish probable cause, the false statement will not invalidate the resulting search warrant. *See Terry v. State*, 668 So.2d 954 (Fla.1996). If, however, the false statement is necessary to establish probable cause, the search warrant must be voided, and the evidence seized as a result of the search must be excluded. *See id.* (citing *Franks*, 438 U.S. at 156, 98 S.Ct. 2674); *see also Thorp v. State*, 777 So.2d 385 (Fla.2000). In this case, an evidentiary hearing was held on the defense motion to suppress. Several witnesses testified at the hearing including Tameka Roberts, Anthony Graham's girlfriend. Roberts testified that detectives questioned her about statements allegedly made by her mother, Sharon Foster, and about her knowledge of the homicides. She denied making the statement that according to Anthony Graham, Willie and Alex committed the murders. However, Detectives Manzella and Peluso testified that Anthony told Roberts that Willie and Alex had committed the murders and this information was relayed to Sharon Foster. Detective Manzella testified that the two confidential sources indicated in the affidavit for the search warrant were Sharon Foster and Wanda Jackson, Keith Jackson's wife. Foster called the police station anonymously on

February 23, 1993, and indicated she had information about the homicides. The next day she met with Manzella and gave him information she heard "on the street" and from her daughter concerning Willie and Alex (Willie Graham and Alex Pagan). Foster told Manzella that Eric Miller planned the January and February burglaries of the Jones residence, and said her nephew, Darell Featherstone, received some proceeds from the burglary and a man named Alex was a participant. Manzella admitted that he failed to put Eric Miller's name in the affidavit or to indicate that a source of information was "from the streets" when referring to the information provided by Foster. Basically, the information Foster gave the police was first heard "on the streets," then obtained from her daughter, Tameka Roberts, and while Foster indicated Miller planned the burglaries, she stated he did not commit the murders. The omission of these two minor details from the affidavit does not negate the fact that the information which was contained in the affidavit gave the magistrate a substantial basis for concluding that probable cause existed to search the Pagan's residence. *See Illinois v. Gates.*

Detective Peluso testified he met with Wanda Jackson in the presence of Detective Manzella and showed her pictures of several individuals. She identified Willie Graham and said her husband told her Graham was involved in the murders. According to Detective Peluso, Wanda Jackson described the perpetrators as a Latin male named Alex who was between twenty one and twenty three and wore nice clothes; the other individual was a black male named Willie Graham. She had met both men at a party three weeks before the murders. Detective Peluso believed that Wanda Jackson's information was credible because her husband was a known associate of the defendants. The detectives were told that both Alex and Willie lived in Miramar, and this information was independently verified prior to application for the search warrant. The detectives opined that the information received from the confidential sources as well as the information received from Keith Jackson, a person named in the affidavit, was consistent with the known facts and with information obtained from the surviving adult victim.Pagan complains the police failed to say in the affidavit that Keith Jackson was both a source of information and a potential suspect and failed to name the two independent sources (Sharon Foster and Wanda Jackson). However, these claims are without merit. Keith Jackson was in fact named in the affidavit, and Detective Peluso admitted that although Keith Jackson was a suspect at the start of the

> investigation, he was no longer one when he finished giving his statement to the police on the evening of February 26, 1993. The affidavit did include the information that Keith Jackson initially denied any knowledge of the murders, and it included the information that Keith Jackson had been a codefendant with Willie Graham in a prior homicide. The omission of the fact that at one point Jackson was a suspect does not alter the fact that the information contained in the affidavit established probable cause for the search and the arrest. See Power v. State, 605 So.2d 856 (Fla.1992); State v. Schulze, 581 So.2d 610 (Fla. 2d DCA 1991).Pagan has failed to demonstrate that the trial court's ruling on the motion to suppress was error.

Pagan v. State, 830 So.2d 792 (Fla. 2002).

Mr. Colleran testified that the suppressed report would have been "pivotal" in his motion to suppress. As illustrated by the facts from the Florida Supreme Court opinion, there is no mention of Alex "Pagan". Rather, the only reference is to an "Alex" by Sharon Foster and Tameka Roberts, both of which denied knowing Mr. Pagan. Darrell Featherstone only mentioned an "Alex". Wanda Jackson testified only to an "Alex" and her information was given to her by her abusive husband, Keith Jackson.

The suppressed report could have been used to not only impeach the information of several of these witnesses but also to corroborate the information that an associate of Willie Graham, an "Alex", was responsible for the murders but that this "Alex" was Alex Ramirez, not Alex Pagan. This would have strengthened Pagan's case for an alternative suspect who was still at large.

The evidence presented by the State for conviction consisted only of

three items: the jewelry and clothing seized from Mr. Pagan's residence, the statements of Keith Jackson and the statements of Antonio Quezada.

The statements and general credibility of Keith Jackson have been in doubt from the very beginning of these proceedings. Keith Jackson, after being arrested for these two murders and then "released", helped the police investigate the case, provided names and addresses to law enforcement, testified before the grand jury that indicted Alex Pagan and testified at both co-defendant's trials. However, just prior to the incident for which Mr. Pagan was convicted, Mr. Jackson was also arrested for the attempted first degree murder with a firearm and robbery with a firearm involving a known drug dealer. One year prior to trial in Mr. Pagan's case, Mr. Jackson entered in a plea agreement with the State of Florida in which he gave a formal statement, agreed to a polygraph examination and the admissibility and veracity of the results of the examination, agreed to meet with a Detective Starkey of the Metro-Dade police weekly, agreed to testify for the state and to attend to all conferences or depositions required by the state. (*See* "Exhibit A", *Plea Agreement for Keith Jackson* filed with Defendant's Motion to Vacate Judgment and Sentence). Mr. Jackson's failure to perform any or all conditions of the plea agreement, including being arrested for any new crimes, would have resulted in a 40 year prison sentence. In exchange

for his testimony and other forms of cooperation, Mr. Jackson was to be sentenced between 5 years probation and 10 years in prison. Mr. Jackson was sentenced to 10 years probation one month after Mr. Pagan was sentenced to death. He received a withhold of adjudication. 5 years later, Mr. Jackson's probation was terminated early.

Wanda Jackson's deposition (See "Exhibit D", *Deposition of Wanda Jackson November 3, 1993*, filed with Defendant's Motion to Vacate Judgment and Sentence) likewise impeached the credibility of her husband Keith Jackson. Her sworn testimony was that weeks prior to the murders, Keith Jackson began to repeatedly tell Ms. Jackson that he was coming into a lot of money that he would share with her for their daughter. Ms. Jackson was under the impression that this was a large sum of money. The first time that Ms. Jackson learned of this money windfall was through overhearing a conversation between Keith Jackson and Eric Miller at Mr. Jackson's grandmother's home where he stayed. Afterwards, Ms. Jackson was called to the bedroom by Keith Jackson who then assaulted her with a gun by placing a gun to her head and threatened to kill her if she told anyone of his plans. He also then informed Ms. Jackson that he was coming into a lot of money and that she would be taken care of. Ms. Jackson was repeatedly told about the money prior to the murders and after the murders Mr. Jackson

never mentioned the money windfall again. Ms. Jackson also provided testimony that Mr. Jackson would leave the home in the middle of the night dressed in army fatigues. He would also darn black paint on his face. Mr. Jackson would stay gone for several hours. At one point, Mr. Jackson told her that he was "casing" a big drug dealer's house.

Unfortunately for this Court, the lower court summarily denied Claim IV and Claim V of Mr. Pagan's Motion to Vacate. The evidence that would have been presented by post-conviction counsel would have added to the considered evidence for materiality purposes under *Brady.* For example, Ms. Jackson could provide further testimony including: that Mr. Jackson informed her that he was seeing a big time drug dealer's wife from Miramar. After the murders, Ms. Jackson believed that Latosha Jones was the woman he was seeing because when he spoke of her his conversation was very familiar and unlike one speaking regarding a stranger. Ms. Jackson provided testimony that on the night of the murders she received a phone call from Keith Jackson. (Although Ms. Jackson indicated that the time was at 12:00 midnight, she now believes the call could have been later than 12 midnight.) Ms. Jackson recalls her mother complaining regarding the lateness of the call the following morning. Ms. Jackson stated that the call from Mr. Jackson was unusual that evening and that Mr. Jackson had called later than

unusual as he knew that she went to bed at 10 pm and her parents did not like her receiving calls past 9 pm. Ms. Jackson could also testify that Mr. Jackson appeared to be nervous on the phone and that he was engaging her in conversation longer than usual as if he was trying to keep her on the phone. The next morning after arriving at work, Ms. Jackson received a phone call from Mr. Jackson. Ms. Jackson estimates the time to be sometime before 9:30 am, as she had just gotten to work between 8:30am and 9:00 am. Mr. Jackson asked her if she had seen the news regarding the murders and then stated that he knew who had committed the murders. Ms. Jackson testified regarding the attempted murder charges against Mr. Jackson. Mr. Jackson informed Ms. Jackson after he returned from Georgia, the victim of a drug related aggravated battery that he believes he was set up by his friend Benjamin Pressely. Mr. Jackson also informed Ms. Jackson that he was going to retaliate. After Mr. Jackson was arrested, he informed Ms. Jackson that he had lured Mr. Pressely into town under false pretenses of closing a big drug deal. Once Mr. Pressely was alone and cornered he was shot. Ms. Jackson would have provided further testimony regarding Mr. Jackson's propensity for violence as referenced by the numerous assaults and battering of her person and her children during periods of their marriage and separation. After her interview with Detective Peluso, Ms. Jackson

began to consider all the evidence regarding Mr. Jackson and began to conclude that she believes that Mr. Jackson was involved in the planning of the crime. This was based upon his repeated statements regarding coming into a lot of money, his leaving late in the evening to go stake out a house of a big drug dealer, his relationship with a big time drug dealer's wife, his meticulous planning habits, and his propensity for violence.

Likewise, the statements of Antonio Quezada are questionable and impeachable with the suppressed report. Like Keith Jackson, Quezada was arrested and charged in connection with the murders. Quezada denied for months that Alex Pagan was involved until after he entered into a plea agreement with the State and only after he was beaten by law enforcement. The only reference to another individual is to an "Alex".

Finally, as to the evidence found during the execution of the search warrant, it is clear that the items found were not so unique as to be only from the victim. In addition, the watch identified by the victim's wife was actually incorrectly identified. In a 2005 decision, this Court conducted a materiality analysis with much stronger evidence against the defendant:

> In the case at bar, Floyd maintained his innocence of the murder throughout the trial in his defense. There was no direct evidence of Floyd's guilt, such as eyewitness testimony or DNA blood evidence or fingerprint evidence at the victim's home. Rather, this was a circumstantial case in which the most damaging evidence was arguably Floyd's confession through a jailhouse informant. It is

apparent that the Tina Glenn information would be of great importance to the defense because it identified other suspects and would have been consistent with Floyd's innocence defense. Although we upheld the defendant's conviction on appeal, Floyd v. State, 497 So.2d 1211, 1212 (Fla.1986), it is clear that the case against the defendant was not among the strongest we have encountered. The only physical evidence specifically linking the defendant to the crime was the victim's checkbook, which the defendant used to forge checks on the afternoon of the murder and again two days later. The remainder of the physical evidence only linked the defendant to the crime at a high level of generality. For example, the sock found in the defendant's jacket was stained with type O blood, which was the victim's blood type but is also the blood type of roughly 45 percent of the American population. Similarly, the hair fragments found in the victim's bedroom were identified only as "Negroid," which applies to a large percentage of the population. And the tire tracks on the victim's driveway were identified only as being similar to the treads of Japanese motorcycles, which were so popular in the mid 1980s that they became the target of a federal antitrust investigation.The jury may have been justified in finding the defendant guilty of first degree murder because all of this circumstantial evidence, together with the defendant's alleged confession and his false alibi, pointed uniformly in the direction of guilt, whereas very little (if any) evidence pointed in the direction of innocence. But that is no longer the case. The defendant has now identified important information that was withheld from him by the State and that would have been favorable to his defense. The most important evidence that the State withheld from the defendant is the eyewitness account of Tina Glenn, a neighbor of the victim who was interviewed twice only days after the murder. According to the report from the first interview, Glenn told a detective that she last saw the victim standing outside of her home at 11 a.m. on the day of the murder. Then, while watching the show "All My Children" between 1:30 and 2 p.m., Glenn heard a car pull up to the victim's house. Two white males emerged from the car and with a "fast stride" approached the house. They knocked on the door, and "although [Glenn] did not see the victim they were led into the house." About thirty to forty five minutes later, Glenn heard a door slam at the victim's house. She watched as the two males returned to their car and, after "looking around suspiciously," sped off. The second interview, which was conducted at the police station, revealed

> slightly different information. According to the report, Glenn claimed that she heard a car pull up to the victim's house between 1 and 1:30 p.m. on the day of the murder. Two white males stepped out of the car, walked "fairly fast" to the front door of the house, and knocked. They then "walked into the residence," although Glenn "did not see the victim actually answer the door." Glenn then went outside to walk her dog, at which time she observed one of the men on the victim's back porch. She also heard what she called "scrambling noises" inside the victim's house, which sounded "like people were going through drawers and other things in the house." About an hour after the two men arrived, Glenn heard the sound of the front door slamming (which she distinguished from the sound of the back door) and watched as the men went back to their car "almost running and looking around very suspicious." One said to the other, "Come on. Let's go." Glenn recalled that the vehicle sped off with its tires squealing, possibly running a nearby stop sign. Glenn's eyewitness account is unsettling, given the circumstantial nature of this case. She places two white men in a car as contrasted with the defendant, a black man who was allegedly driving his motorcycle at the victim's house within the estimated time frame of the murder. She also identifies "very suspicious" behavior that would be consistent with the crime. In fact, all of the Brady evidence elicited below, including impeachment evidence of the jailhouse informant, could have been persuasive for the defense when weighed against the State's case, especially when considered in the light of the heavy burden upon the State to prove guilt in a criminal case beyond any reasonable doubt and the legal requirement that the jury's verdict be unanimous. In effect, this means that only one juror finding reasonable doubt would change the outcome. Glenn's evidence not only identified other suspects, but it also failed to include the defendant or anyone meeting his description as being present at the victim's residence at the time of the crime.

Floyd v. State, 902 So.2d 775 (Fla. 2005).

As in Mr. Floyd's case, there was no physical evidence linking Mr. Pagan to the crime. No fingerprints, no DNA, no eyewitness identification. While the Florida Supreme Court stated that Mr. Pagan's case was not

circumstantial, it remains no less circumstantial than Floyd.

The possibility of an alternative suspect, an alternative suspect closely connected to Keith Jackson and Willie Graham, is similar to the facts in *Kyles*. The examination of the suppressed evidence under the materiality prong of Brady led the Supreme Court to make the following observations:

> The defense could have further underscored the possibility that Beanie was Dye's killer through cross examination of the police on their failure to direct any investigation against Beanie. If the police had disclosed Beanie's statements, they would have been forced to admit that their informant Beanie described Kyles as generally wearing his hair in a "bush" style (and so wearing it when he sold the car to Beanie), whereas Beanie wore his in plaits. There was a considerable amount of such Brady evidence on which the defense could have attacked the investigation as shoddy. The police failed to disclose that Beanie had charges pending against him for a theft at the same Schwegmann's store and was a primary suspect in the January 1984 murder of Patricia Leidenheimer, who, like Dye, was an older woman shot once in the head during an armed robbery. (Even though Beanie was a primary suspect in the Leidenheimer murder as early as September, he was not interviewed by the police about it until after Kyles' second trial in December. Beanie confessed his involvement in the murder, but was never charged in connection with it.) These were additional reasons for Beanie to ingratiate himself with the police and for the police to treat him with a suspicion they did not show. Indeed, notwithstanding Justice SCALIA's suggestion that Beanie would have been "stupid" to inject himself into the investigation, post, at 1579, the Brady evidence would have revealed at least two motives for Beanie to come forward: he was interested in reward money and he was worried that he was already a suspect in Dye's murder (indeed, he had been seen driving the victim's car, which had been the subject of newspaper and television reports).

Kyles, 514 U.S. at 442 fn.13.

In closing, the suppressed report meets all the requirements

announced in *Brady* and its progeny. The impact of the suppressed report on the jury would have been powerful in its ability to corroborate the defense's claim of an alternate suspect, impeach the credibility and implicate Keith Jackson for the murders, impeach the various officers who testified that they did not know of "Alex's" last name when they investigated the case, and to place into doubt the credibility of the entire police investigation and prosecution of Alex Pagan during a time when they had knowledge of the original Alex Ramirez who they failed to investigate. Further, counsel would have been able to investigate better and argue more persuasively the various motions, including the motion to suppress.

ISSUE II

MR. PAGAN'S 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. PAGAN'S 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.[2]

[2] Originally presented as Claim X in the Motion to Vacate.

Mr. Pagan was never allowed to present all of his important and powerful mitigating evidence to the jury in an effort to save his life. Mr. Pagan never exercised his right because his trial counsel took it away from due to his ineffectiveness. Current counsel called several witnesses to testify as to the ineffectiveness of Mr. Pagan's trial attorney during the sentencing phase of his capital trial. As presented and argued to the lower trial court, there are numerous issues that relate to the trial attorney's ineffectiveness. First, by not properly preparing and investigating Mr. Pagan's mitigation, important facts were never presented to any finder of fact. Second, by not properly preparing and investigating the mitigation, the trial attorney failed to properly present important and crucial mitigation to the jury during the penalty phase.

As is evident from the record, none of the testimony of defense expert Dr. Jacobson was ever presented to the jury. This was substantial ineffectiveness since the judge is required to give great weight to the jury's recommendation. By failing to give this evidence to the jury, the lower court's weighing process was flawed. Mr. Pagan's jury voted for death on the slimmest of margins: By a vote of 7 to five, one vote away from a life recommendation.

A. The Role of the Jury in Capital Sentencing

The Supreme Court ruled in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), that the principle of law announced in Apprendi had application in the death penalty context. In so holding, the Supreme Court found unconstitutional a death penalty scheme where the jury did not participate in the penalty phase of a capital trial. To date, similar *Ring* claims in Florida have survived similar challenges because the trial court and the jury are co-sentencers under our capital scheme. *See Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992).

An examination of Florida case law indicates that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give "great weight" to the jury's recommendation, whether that recommendation be life, *see Tedder v. State*, 322 So.2d 908, 910 (Fla.1975), or death, *see Smith v. State*, 515 So.2d 182, 185 (Fla.1987), *cert. denied*, 485 U.S. 971, 108 S.Ct. 1249, 99 L.Ed.2d 447 (1988); *Grossman v. State*, 525 So.2d 833, 839, n. 1 (Fla.1988), *cert. denied*, 489 U.S. 1071, 109 S.Ct. 1354, 103 L.Ed.2d 822 (1989). Thus, Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing

aggravating and mitigating circumstances. *Espinosa*.

Historically, Florida case law has placed great importance on the jury's recommendation. Florida has held that the ability to have a jury consider factors in mitigation "an essential right of the defendant under our death penalty legislation." *Lamaldine v. Florida*, 303 So.2d 17 (1974). In *Smith v. State*, 515 So.2d 182 (Fla. 1987), this Court stated:

> Although we find that one of the five aggravating circumstances relied on by the trial court was invalid, we approve the death sentence on the basis that a jury recommendation of death is entitled to great weight and there were no mitigating circumstances to counterbalance the four valid aggravating circumstances. *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); *Clark v. State*, 443 So.2d 973 (Fla.1983), cert. denied, 467 U.S. 1210, 104 S.Ct. 2400, 81 L.Ed.2d 356 (1984); *Ross v. State*, 386 So.2d 1191, 1197 (Fla.1980); *LeDuc v. State*, 365 So.2d 149, 151 (Fla.1978), *cert. denied*, 444 U.S. 885, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979).

Similarly, the United States Supreme Court has recognized the jury's unique and important role in Florida's death penalty system in numerous cases. In *Barclay v. Florida*, 463 U.S. 939 (1983), the Court stated:

> The Florida Supreme Court has placed another check on the harmless error analysis permitted by Elledge. When the jury has recommended life imprisonment, the trial judge may not impose a death sentence unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Tedder v. State, supra*, 322 So.2d 908 at 910. In *Williams v. State*, 386 So.2d 538, 543 (Fla.1980), and *Dobbert v. State*, 375 So.2d 1069, 1071 (Fla.1979), the Florida Supreme Court reversed the trial judges' findings of several aggravating circumstances. In each case at least one valid aggravating circumstance remained, and there were no mitigating circumstances. In each case, however, the Florida Supreme

Court concluded that in the absence of the improperly found aggravating circumstances the *Tedder* test could not be met. Therefore it reduced the sentences to life imprisonment.

In *Sochor v. Florida*, 504 U.S. 527 (1992), the Supreme Court reiterated this importance:

> Similarly, a jury's recommendation of a death sentence must also be given great weight. [FN12] For example, in *Stone v. State*, 378 So.2d 765, cert. denied, 449 U.S. 986, 101 S.Ct. 407, 66 L.Ed.2d 250 (1980), the Florida Supreme Court discussed a challenge to a death sentence imposed after a jury had recommended a sentence of death. The petitioner had based his challenge on a similar case, *Swan v. State*, 322 So.2d 485 2129 (Fla. 1975), in which the court had reversed the death sentence. In affirming Stone's sentence, however, the court pointed out that the critical difference between Stone's case and Swan's case was that "Swan's jury recommended mercy while Stone's recommended death and the jury recommendation is entitled to great weight. *Tedder v. State*, 322 So.2d 908 (Fla.1975)." 378 So.2d, at 772. [FN13]
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> FN12. *Smith v. State*, 515 So.2d 182, 185 (Fla.1987) ("[W]e approve the death sentence on the basis that a jury recommendation of death is entitled to great weight"), *cert. denied*, 485 U.S. 971, 108 S.Ct. 1249, 99 L.Ed.2d 447 (1988); *see also LeDuc v. State*, 365 So.2d 149, 151 (Fla.1978) ("The primary standard for our review of death sentences is that the recommended sentence of a jury should not be disturbed if all relevant data w[ere] considered, unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation"), *cert. denied*, 444 U.S. 885, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979); *Ross v. State*, 386 So.2d 1191, 1197 (Fla.1980) (same); *Middleton v. State*, 426 So.2d 548, 552 553 (Fla.1982) (approving trial court's imposition of death sentence and reiterating that jury had recommended death), *cert. denied*, 463 U.S. 1230, 103 S.Ct. 3573, 77 L.Ed.2d 1413 (1983); *Francois v. State*, 407 So.2d 885, 891 (Fla.1981) (same), *cert. denied*, 458 U.S. 1122, 102 S.Ct. 3511, 73 L.Ed.2d 1384 (1982); *cf. Grossman v. State*, 525 So.2d, at 839, n. 1 ("We have ... held that a jury recommendation of death should be given great weight").
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> FN13. The Florida courts have long recognized the integral role that

the jury plays in their capital sentencing scheme. *See, e.g., Messer v. State*, 330 So.2d 137, 142 (Fla.1976) ("[T]he legislative intent that can be gleaned from Section 921.141 ... [indicates that the legislature] sought to devise a scheme of checks and balances in which the input of the jury serves as an integral part"); *see also Riley v. Wainwright*, 517 So.2d 656, 657 (Fla.1988) ("This Court has long held that a Florida capital sentencing jury's recommendation is an integral part of the death sentencing process"); *Lamadline v. State*, 303 So.2d 17, 20 (Fla.1974) (right to sentencing jury is "an essential right of the defendant under our death penalty legislation").

As a matter of fact, the jury sentence is the sentence that is usually imposed by the Florida Supreme Court. The State has attached an appendix to its brief, see App. to Brief for Respondent A1 A70, setting forth data concerning 469 capital cases that were reviewed by the Florida Supreme Court between 1980 and 1991. In 341 of those cases (73%), the jury recommended the death penalty; in none of those cases did the trial judge impose a lesser sentence. In 91 cases (19%), the jury recommended a life sentence; in all but one of those cases, the trial judge overrode the jury's recommended life sentence and imposed a death sentence. In 69 of those overrides (77%), however, the Florida Supreme Court vacated the trial judge's sentence and either imposed a life sentence itself or remanded for a new sentencing hearing. Two conclusions are evident. First, when the jury recommends a death sentence, the trial judge will almost certainly impose that sentence. Second, when the jury recommends a life sentence, although overrides have been sustained occasionally, the Florida Supreme Court will normally uphold the jury rather than the judge. It is therefore clear that in practice, erroneous instructions to the jury at the sentencing phase of the trial may make the difference between life or death. Further, in *Riley v. Wainwright*, 517 So.2d 656 (1988), the Florida Supreme Court analyzed the jury's role when it addressed the issue of erroneous exclusion of mitigation evidence:

This Court has long held that a Florida capital sentencing jury's recommendation is an integral part of the death sentencing process. *Lamadline v. State*, 303 So.2d 17, 20 (Fla.1974) (jury recommendation can be "critical factor" in determining whether or not death penalty should be imposed). Under *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975), a jury's recommendation of life must be given "great weight" by the sentencing judge. A recommendation of life may be overturned only if "the facts suggesting a sentence of death

[are] so clear and convincing that virtually no reasonable person could differ." *Id.*

This Court also has recognized that the jury's determination of the existence of any mitigating circumstances, statutory or nonstatutory, as well as the weight to be given them are essential components of the sentencing process. In Floyd v. State, 497 So.2d 1211 (Fla.1986), we held that it was error for the trial judge not to give any instructions on what could be considered in mitigation because such failure may have precluded from the jury's consideration relevant nonstatutory mitigating circumstances:

Under our capital sentencing statute, a defendant has the right to an advisory opinion from a jury.... In determining an advisory sentence, the jury must consider and weigh all aggravating and mitigating circumstances... The jury must be instructed either by the applicable standard jury instructions or by specially formulated instructions, that their role is to make a recommendation based on the circumstances of the offense and the character and background of the defendant.

Id. at 1215 (citations omitted, emphasis added). Because Floyd was denied his right to a fair advisory opinion, we vacated his death sentence and remanded for resentencing before a properly instructed jury. Floyd made clear that improper, incomplete or confusing instructions relative to the consideration of both statutory and nonstatutory mitigating evidence does violence to the sentencing scheme and the jury's fundamental role in that scheme. As we pointed out:

The Legislature intended that the trial judge determine the sentence with advice and guidance provided by a jury, the one institution in the system of Anglo American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors. If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. *Cooper v. State*, 336 So.2d 1133, 1140 (Fla.1976) (emphasis added), *cert. denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977).

In Lucas v. State, 490 So.2d 943 (Fla.1986), we held that there should be a complete new sentencing proceeding before a newly empaneled jury where the trial took place before this Court's decision in *Songer v. State*, 365 So.2d 696 (Fla.1978), *cert. denied*, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979), which held that mitigating factors are

not restricted to those listed in the statute. Our decision in *Lucas* was based upon a review of the record, which indicated that the trial judge instructed the jury only on the statutory mitigating circumstances. In reaching our conclusion, we noted that resentencing without the benefit of a new jury recommendation is not always error but that a new jury is required when the original jury recommendation is invalid. *See Menendez v. State*, 419 So.2d 312, 314 (Fla.1982) (new jury recommendation not required where no error at original sentencing trial with regard to evidence and instructions to jury); *Mikenas v. State*, 407 So.2d 892, 893 (Fla.1981), *cert. denied*, 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982) (trial judge did not err in resentencing without further jury deliberations where evidence itself was not improper but only the manner in which it was considered by the court). *But see Harvard* (allowing the trial court discretion to empanel a new sentencing jury).

And in *Valle v. State*, 502 So.2d 1225 (Fla.1987), we held that a defendant is entitled to a new jury recommendation on resentencing subject to the harmless error rule:

The jury's recommended sentence is given great weight under our bifurcated death penalty system. It is the jury's task to weigh the aggravating and mitigating evidence in arriving at a recommended sentence. Where relevant mitigating evidence is excluded from this balancing process, the scale is more likely to tip in favor of a recommended sentence of death. Since the sentencer must comply with a stricter standard when imposing a death sentence over a jury recommendation of life, a defendant must be allowed to present all relevant mitigating evidence to the jury in his efforts to secure such a recommendation. Therefore, unless it is clear beyond a reasonable doubt that the erroneous exclusion of evidence did not affect the jury's recommendation of death, the defendant is entitled to a new jury recommendation on resentencing.

Id. at 1226

Clearly, our prior cases indicate that the standards imposed by Lockett bind both judge and jury under our law. We reject the state's argument that a new advisory jury upon resentencing is not constitutionally required under Florida's sentencing scheme. If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure.

(Emphasis added)

Of interest and instructive to this analysis is the Eleventh Circuit's discussion of Florida's death penalty scheme and the role of the jury in *Mann v. Dugger*, 844 F.2d 1446 (11th Cir. 1988). In *Mann*, the Eleventh Circuit stated:

> A review of the case law shows that the Supreme Court of Florida has interpreted section 921.141 as evincing a legislative intent that the sentencing jury play a significant role in the Florida capital sentencing scheme. See Messer v. State, 330 So.2d 137, 142 (Fla.1976) ("[T]he legislative intent that can be gleaned from Section 921.141 [indicates that the legislature] sought to devise a scheme of checks and balances in which the input of the jury serves as an integral part."); see also Riley v. Wainwright, 517 So.2d 656, 657 (Fla.1987) ("This Court has long held that a Florida capital sentencing jury's recommendation is an integral part of the death sentencing process."); Lamadline v. State, 303 So.2d 17, 20 (Fla.1974) (right to sentencing jury is "an essential right of the defendant under our death penalty legislation"). In the Supreme Court's view, the legislature created a role in the capital sentencing process for a jury because the jury is "the one institution in the system of Anglo American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors." Cooper v. State, 336 So.2d 1133, 1140 (Fla.1976), cert. denied, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977); see also McCampbell v. State, 421 So.2d 1072, 1075 (Fla.1982) (the jury's recommendation "represent [s] the judgment of the community as to whether the death sentence is appropriate"); Chambers v. State, 339 So.2d 204, 209 (Fla.1976) (England, J., concurring) (the sentencing jury "has been assigned by history and statute the responsibility to discern truth and mete out justice").
>
> To give effect to the legislature's intent that the sentencing jury play a significant role, the Supreme Court of Florida has severely limited the trial judge's authority to override a jury recommendation of life imprisonment. In Tedder v. State, 322 So. 2d 908, 910 (Fla.1975), the court held that a trial judge can override a life recommendation only when "the facts [are] so clear and convincing that virtually no reasonable person could differ." That the court meant what it said in

Tedder is amply demonstrated by the dozens of cases in which it has applied the Tedder standard to reverse a trial judge's attempt to override a jury recommendation of life. See, e.g., Wasko v. State, 505 So.2d 1314, 1318 (Fla.1987); Brookings v. State, 495 So.2d 135, 142 43 (Fla.1986); McCampbell v. State, 421 So.2d 1072, 1075 76 (Fla.1982); Goodwin v. State, 405 So.2d 170, 172 (Fla.1981); Odom v. State, 403 So.2d 936, 942 43 (Fla.1981), cert. denied, 456 U.S. 925, 102 S.Ct. 1970, 72 L.Ed.2d 440 (1982); Neary v. State, 384 So.2d 881, 885 88 (Fla.1980); Malloy v. State, 382 So.2d 1190, 1193 (Fla.1979); Shue v. State, 366 So.2d 387, 390 91 (Fla.1978); McCaskill v. State, 344 So.2d 1276, 1280 (Fla.1977); Thompson v. State, 328 So.2d 1, 5 (Fla.1976).

The attorney general argues that although the trial court may be required under Tedder to give deference to a jury recommendation of life, it is in no way similarly bound to give deference to a jury recommendation of death. Since a Florida sentencing jury can therefore never play a substantive role in imposing a death sentence, the attorney general contends, Caldwell can never be implicated in a Florida case.

One problem with this argument is that its central premise that the sentencing jury plays no substantive role in imposing a death sentence is contradicted by numerous pronouncements by the Supreme Court of Florida. The issue of what deference is due a jury recommendation of death would arise most directly when the jury recommends death and the trial judge rejects the recommendation and imposes life imprisonment. Such cases never appear before the Supreme Court, however, because the state cannot appeal a sentence of life imprisonment. See State v. Dixon, 283 So.2d 1, 8 (Fla.1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Nonetheless, the issue has arisen in cases where the jury recommends death, the trial court imposes death, and the defendant contends on direct appeal that the trial court improperly weighed the aggravating and mitigating circumstances. In one such recent case, Smith v. State, 515 So.2d 182 (Fla.1987), the supreme court held that "[a]lthough we find that one of the five aggravating circumstances relied on by the trial court was invalid, we approve the death sentence on the basis that a jury recommendation of death is entitled to great weight and there were no mitigating circumstances to counterbalance the four valid aggravating circumstances." Id. at 185 (emphasis added). In LeDuc v. State, 365 So.2d 149 (Fla.1978), cert. denied, 444 U.S. 885, 100 S.Ct.

175, 62 L.Ed.2d 114 (1979), the supreme court stated that "[t]he primary standard for our review of death sentences is that the recommended sentence of a jury should not be disturbed if all reasonable data was considered, unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation." Id. at 151 (citing Tedder). See also Middleton v. State, 426 So.2d 548, 552 53 (Fla.1982) (approving trial court's imposition of death sentence and reiterating in conclusion that jury had recommended death), cert. denied, 463 U.S. 1230, 103 S.Ct. 3573, 77 L.Ed.2d 1413 (1983); Francois v. State, 407 So.2d 885, 891 (Fla.1982) (same), cert. denied, 458 U.S. 1122, 102 S.Ct. 3511, 73 L.Ed.2d 1384 (1982); Enmund v. State, 399 So.2d 1362, 1373 (Fla.1981) (same), rev'd on other grounds, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); cf. Grossman v. State, 525 So.2d 833, 839 n. 1, 13 Fla.L.Weekly 127, 133 n. 1 (Fla. 1988) ("We have ... held that a jury recommendation of death should be given great weight."). On one occasion, the Supreme Court went so far as to suggest that the trial judge's role in sentencing is merely to articulate findings in support of the jury's sentencing decision. See Provenzano v. State, 497 So.2d 1177, 1185 (Fla.1986) ("[T]he trial judge does not consider the facts anew. In sentencing a defendant, a judge lists reasons to support a finding in regard to mitigating or aggravating factors."), cert. denied, U.S., 107 S.Ct. 1912, 95 L.Ed.2d 518 (1987).

The issue of what deference is due a jury recommendation of death has also arisen in cases where the jury recommends death, the trial judge imposes death, and the defendant claims on direct appeal that the trial judge gave undue deference to the jury's recommendation. The Supreme Court of Florida has consistently indicated in such cases that no error occurs when the trial judge gives due weight to the jury recommendation of death. In Garcia v. State, 492 So.2d 360 (Fla.), cert. denied, U.S., 107 S.Ct. 680, 93 L.Ed.2d 730 (1986), for instance, the judge stated in his instructions to the jury that their recommendation "would not be overruled unless there was no reasonable basis for it." Id. at 367. The jury returned a recommendation of death and the trial court entered a sentence of death. On direct appeal, the defendant claimed, citing the trial court's instructions to the jury, that the judge had mistakenly given weight to the jury's recommendation of death. The Supreme Court disagreed and affirmed the death sentence: "There is no error; this is the law. It is appropriate to stress to the jury the seriousness which it should

attach to its recommendation and, when the recommendation is received, to give it weight." Id. (emphasis added). See also Rogers v. State, 511 So.2d 526, 536 (Fla.1987) (no merit to appellant's contention that trial court gave undue weight to jury's recommendation of death where record reflects that "the court has weighed relevant factors and reached its own independent judgment about the reasonableness of the jury's recommendation."), cert. denied, U.S., 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). [FN6]

> FN6. Ross v. State, 386 So.2d 1191 (Fla.1980), is not inconsistent with the proposition that the trial judge must give great weight to a jury recommendation of death. In Ross, the jury recommended death and the trial judge imposed a death sentence, indicating in his findings that he was bound by the jury's recommendation. Id. at 1197. The Supreme Court of Florida ordered resentencing, stating that although a jury recommendation of death "should be given great weight and serious consideration," id., this trial judge had given the recommendation "undue weight," id. at 1193, by abdicating his statutory duty to make an "independent judgment" about the aggravating and mitigating circumstances. Id. at 1198.

The Supreme Court's understanding of the jury's sentencing role is illustrated by the way it treats sentencing error. In cases where the trial court follows a jury recommendation of death, the Supreme Court will vacate the sentence and order resentencing before a new jury [FN7] if it concludes that the proceedings before the original jury were tainted by error. Thus, the supreme court has vacated death sentences where the jury was presented with improper evidence, see Dougan v. State, 470 So.2d 697, 701 (Fla.1985), cert. denied, 475 U.S. 1098, 106 S.Ct. 1499, 89 L.Ed.2d 900 (1986), or was subject to improper argument by the prosecutor, see Teffeteller v. State, 439 So.2d 840, 845 (Fla.1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984). The Supreme Court has also vacated death sentences where the trial court gave the jury erroneous instructions on mitigating circumstances or improperly limited the defendant in his presentation of evidence of mitigating circumstances. See Thompson v. Dugger, 515 So.2d 173, 175 (Fla.1987); Downs v. Dugger, 514 So.2d 1069, 1072 (Fla.1987); Riley v. Wainwright, 517 So.2d 656, 659 60 (Fla.1987); Valle v. State, 502 So.2d 1225, 1226 (Fla.1987); Floyd v. State, 497 So.2d 1211, 1215 16 (Fla.1986); Lucas v. State, 490 So.2d 943, 946 (Fla.1986); Simmons v. State, 419 So.2d

316, 320 (Fla.1982); Miller v. State, 332 So.2d 65, 68 (Fla.1976). In these cases, the Supreme Court frequently focuses on how the error may have affected the jury's recommendation. See, e.g., Riley, 517 So.2d at 659 ("If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure."); Valle, 502 So.2d at 1226 ("[U]nless it is clear beyond a reasonable doubt that the erroneous exclusion of evidence did not affect the jury's recommendation of death, the defendant is entitled to a new jury recommendation on resentencing."); Dougan, 470 So.2d at 701 (death sentence vacated and resentencing ordered where supreme court could not "tell how the improper evidence and argument may have affected the jury"); Teffeteller, 439 So.2d at 845 (death sentence vacated and resentencing ordered where supreme court could not "determine that the needless and inflammatory comments by the prosecutor did not substantially contribute to the jury's advisory recommendation of death"). Such a focus would be illogical unless the Supreme Court began with the premise that the jury's recommendation must be given significant weight by the trial judge. Once that premise is established, a focus on how the error may have affected the jury's recommendation makes sense: if the jury's recommendation is tainted, then the trial court's sentencing decision, which took into account that recommendation, is also tainted.

> FN7. The Supreme Court of Florida has permitted resentencing without a jury where the error in the original proceeding related to the trial court's findings and did not affect the jury's recommendation. See, e.g., Menendez v. State, 419 So.2d 312, 314 (Fla.1982); Mikenas v. State, 407 So.2d 892, 893 (Fla.1981), cert. denied, 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982); Magill v. State, 386 So.2d 1188, 1191 (Fla.1980), cert. denied, 450 U.S. 927, 101 S.Ct. 1384, 67 L.Ed.2d 359 (1981); Fleming v. State, 374 So.2d 954, 959 (Fla.1979). Such were the circumstances in this very case. See supra note 2.

Finally, we note that the Supreme Court of Florida has ordered resentencing in cases where the trial court excused a prospective juror in violation of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). See, e.g., Chandler v. State, 442 So.2d 171, 173 75 (Fla.1983). Under Witherspoon and its progeny, a state violates a capital defendant's right to trial by impartial jury when it

excuses for cause a prospective juror who has voiced conscientious objections to the death penalty, unless the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412, 433, 105 S.Ct. 844, 857, 83 L.Ed.2d 841 (1985). Witherspoon assumes, of course, that the jury will play a substantive role in the sentencing decision. By applying Witherspoon to vacate death sentences, then, the Supreme Court of Florida implicitly acknowledges that the jury plays a substantive role under the Florida capital sentencing scheme.Thus, in various ways, the Florida case law evinces an interpretation of the death penalty statute that requires a trial judge to give great weight to a jury's sentencing recommendation. As our review of the case law shows, that requirement applies as to both recommendations of life imprisonment and recommendations of death.In analyzing the role of the sentencing jury, the Supreme Court of Florida has apparently been influenced by a normative judgment that a jury recommendation of death carries great force in the mind of the trial judge. This judgment is most clearly reflected in cases where an error has occurred before the jury, but the trial judge indicates that his own sentencing decision is unaffected by the error. As a general matter, reviewing courts presume that trial judges exposed to error are capable of putting aside the error in reaching a given decision. The Supreme Court of Florida, however, has on occasion declined to apply this presumption in challenges to death sentences. For example, in Messer v. State, 330 So.2d 137 (1976), the trial court erroneously prevented the defendant from putting before the sentencing jury certain psychiatric reports as mitigating evidence. The jury recommended death and the trial judge imposed the death penalty. The Supreme Court vacated the sentence, even though the sentencing judge had stated that he had himself considered the reports before entering sentence. The Supreme Court took a similar approach in Riley v. Wainwright, 517 So.2d 656 (Fla.1987). There, the defendant presented at his sentencing hearing certain nonstatutory mitigating evidence. The trial court instructed the jury that it could consider statutory mitigating evidence, but said nothing about the jury's obligation under Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), to consider nonstatutory mitigating evidence. The jury recommended death and the trial judge imposed the death penalty. In imposing the death sentence, the trial judge expressly stated that he had considered all evidence and

testimony presented. [FN8] On petition for writ of habeas corpus, the Supreme Court ordered the defendant resentenced. The court held that the jury had been precluded from considering nonstatutory mitigating evidence, and that the trial judge's consideration of that evidence had been "insufficient to cure the original infirm recommendation." Id. at 659 n. 1.

> FN8. The trial judge made this statement on a resentencing. On Riley's direct appeal of his original sentence, the supreme court ordered resentencing on the ground that the trial judge had considered nonstatutory aggravating factors, in violation of state law. Riley v. State, 366 So.2d 19 (Fla.1978). The resentencing was accomplished without empaneling a new jury. At the resentencing, the trial judge permitted Riley to introduce additional mitigating evidence. The resentencing was affirmed on direct appeal. Riley v. State, 413 So.2d 1173 (Fla.), cert. denied, 459 U.S. 981, 103 S.Ct. 317, 74 L.Ed.2d 294 (1982).

In light of the disposition of these cases, it would seem that the Supreme Court of Florida has recognized that a jury recommendation of death has a sui generis impact on the trial judge, an impact so powerful as to nullify the general presumption that a trial judge is capable of putting aside error. We do not find it surprising that the Supreme Court would make this kind of normative judgment. A jury recommendation of death is, after all, the final stage in an elaborate process whereby the community expresses its judgment regarding the appropriateness of a death sentence. The process begins with the legislature, which broadly defines the class of cases for which capital punishment is appropriate. Then, in the particular case, the prosecutor, who is electorally accountable to the community, makes the decision whether to request the death penalty. Finally, the jury, traditionally depicted as the conscience of the community, makes a judgment about the appropriateness of death in light of aggravating and mitigating circumstances. Thus, by the time the case comes before the judge for the actual imposition of sentence, it has already been filtered through three levels of community sentiment, each level less porous than the preceding one. [FN9] It would indeed be surprising were the trial judge, who in Florida is also an electorally accountable official, not powerfully affected by the result of that process.

> FN9. It is at least partly because of these dynamics, we may surmise, that the Supreme Court of Florida has interpreted the legislative intent underlying the death penalty statute as

> requiring the trial judge to give great weight to the jury's recommendation.
>
> In light of the case law, we conclude that the Florida jury plays an important role in the Florida capital sentencing scheme. The case law reflects an interpretation of the death penalty statute that requires the trial court to give significant weight to the jury's recommendation, whether it be a recommendation of life imprisonment or a recommendation of death. The case law also reflects, we think, an insightful normative judgment that a jury recommendation of death has an inherently powerful impact on the trial judge.
>
> (Footnotes retained).

Of special relevance is one case cited by the *Mann* court in analyzing the importance of the jury. In *Messer v. State*, 330 So.2d 137 (Fla. 1976), this Court addressed a very similar issue to the case at bar. In *Messer*, the attorney attempted to offer two expert psychiatric reports to the jury in support of the statutory mitigator '(t)he capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.' *Id.* The judge declined to allow counsel to offer the expert evidence to the jury but stated that he would consider it as evidence when the court sentenced the defendant. This Court stated:

> Counsel, for the appellant represented to the court that, if given the opportunity, he would come forward with evidence establishing such condition. The expression by the trial court that the verdict of the jury is merely advisory and that he could consider psychiatric reports at the time he performed the actual sentencing, in our opinion, violates the legislative intent which can be gleaned from Section 921.141, Florida Statutes. It is clear that the Legislature in the enactment of Section 921.141, Florida Statutes, sought to devise a scheme of checks and balances in which the input of the jury serves as an integral part. The validity of the jury's recommendation is directly related to the

information it receives to form a foundation for such recommendation. *Messer v. State*, 330 So.2d at 142.

Ultimately, this statement by the *Messer* Court is one of the main issues before this Court as it decides Mr. Pagan's case. The importance and the role of the jury in Florida's sentencing scheme is well established. Any arguments to the contrary by the State should be ignored for these are the very same arguments advanced by the State in its attempt to uphold the sentencing scheme under a *Ring* analysis.

B. Evidence Not Investigated or Presented Effectively

As stated in defense exhibit 7:

> The defense arguments [at trial] regarding mitigation, as well as the associated mental health expert testimony and conceptualizations that occurred during Mr. Pagan's capital sentencing hearing were characterized by a number of omissions. There was no articulation by defense counsel of the fundamental moral culpability basis of mitigation conceptualizations, particularly as these relate to the issue of "choice" and/or wrongful awareness in the capitally charged conduct. Further, these basic moral culpability conceptualizations were not brought to bear in the direct/redirect of Dr. Martha Jacobson, defense-retained mental health expert, or in cross-examination of Dr. Harley Stock, the State-retained mental health expert.
>
> To capsule the testimony of Dr. Jacobson at trial, her primary focus was on Mr. Pagan's alleged Borderline Personality Disorder. This led to a predictable and irrelevant battle of the experts regarding whether Mr. Pagan suffered from this personality disorder or Antisocial Personality Disorder. By contrast, only a portion of the adverse developmental factors present in Mr. Pagan's life were noted, and these were grouped under a catch-all category of having had a deprived childhood. Most of the specific developmental injuries and deficiencies that made up this deprived childhood were variously not described, not illustrated in anecdotal detail sufficient to convey the

> reality of the experience, and/or not accompanied by delineation of their nexus to a criminally violent adult outcome. These deficiencies appear substantially related to the failure of defense counsel to conduct an investigation adequate to the discovery of this information, and/or the failure to develop the relevant nexus through expert testimony.
>
> Deposition and/or trial testimony of the State's expert, Dr. Harvey Stock, was deficient in numerous respects, including: making conclusions regarding the childhood experiences and conduct of Mr. Pagan in the absence of third party interviews of contemporaneous observers or adequate records, employing idiosyncratic and inadequately substantiated evidence of Conduct Disorder prior to the age of 15, minimizing adverse developmental experiences and factors experienced by Mr. Pagan, misapplication, ignoring or discounting data inconsistent with pejorative opinions of Mr. Pagan, erroneously describing the course and testing results associated (or not associated) with Attention Deficit Hyperactivity Disorder (ADHD), and erroneously attributing organized and disorganized offenses to Antisocial Personality Disorder and ADHD respectively. Though these defects in Dr. Stock's evaluation methodology and conclusions were apparent in his deposition, they were inadequately preempted on direct examination of Dr. Jacobson, and inadequately confronted on cross-examination of Dr. Stock. This also appears to have been occasioned by a failure to engage in an adequate investigation of historical background regarding Mr. Pagan, and a failure to adequately seek and secure scholarly references and conceptualizations, as well as perspectives regarding professional standards.

Through the testimony of lay and expert witnesses, post-conviction counsel established that trial counsel was ineffective in both investigating and presenting the mitigation in Mr. Pagan's trial. Dr. Mark Cunningham, one of the defense experts, reviewed an enormous amount of records in this case and talked to numerous witnesses. (Def.Ex. 7 at 3; EH 338-40). This investigation and review was more extensive than the one conducted by Mr.

Pagan's trial expert. (EH 148-49; Def.Ex. 2)

During his direct examination, Dr. Cunningham testified as an expert, as to the concept of mitigation. (EH 343-44). During this portion of his testimony, Dr. Cunningham revealed to the court numerous instances where the State, the defense and the court referred to the wrong standard of criminal responsibility rather than moral culpability. (EH 344-46). *See Atkins v. Virginia*, 122 S.Ct. 2242 (2002) (Discussion of criminal responsibility versus moral culpability). During the State's closing argument, Dr. Cunningham found sixteen different references to this incorrect standard. (EH 345-46) Worse yet, Dr. Cunningham testified that trial counsel, likewise, committed the same error when addressing the jury by using the wrong standard of criminal responsibility rather than moral culpability. (EH 348). Lastly, even the court committed error in its sentencing order when it utilized this incorrect standard: "This testimony did not reasonably convince the Court that the defendant was unable to take responsibility for his acts and appreciate the consequences thereof at the time of the murder." (ROA 3841). Thus, as illustrated, none of the actors involved in Mr. Pagan's trial understood the constitutionally defined and protected concept of mitigation.

The ABA Guidelines are very specific in dealing with the correct

standard to be given to the jury. Guideline 10.11 states, in pertinent part:

> K. Trial counsel should request jury instructions and verdict forms that ensure that jurors will be able to consider and give effect to all relevant mitigating evidence. Trial counsel should object to instructions or verdict forms that are constitutionally flawed, or are inaccurate, or confusing and should offer alternative instructions. Post conviction counsel should pursue these issues through factual investigation and legal argument.

The Comments to this guideline explain the duties of trial counsel in this respect:

> It is essential that counsel object to evidentiary rulings, instructions, or verdict forms that improperly circumscribe the scope of the mitigating evidence that can be presented or the ability of the jury to consider and give effect to such evidence. Counsel should also object to and be prepared to rebut arguments that improperly minimize the significance of mitigating evidence or equate the standards for mitigation with those for a first phase defense. At the same time, counsel should request instructions that will ensure that the jury understands, considers, and gives effect to all relevant mitigating evidence. It is vital that the instructions clearly convey the differing unanimity requirements applicable to aggravating and mitigating factors.

ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (2003)(footnotes omitted).

Generally, such arguments confusing the standards for a first phase defense and mitigation also violate the Eighth Amendment. *See generally Eddings v. Oklahoma*, 455 U.S. 104, 113 14 (1982) (trial court improperly rejected mitigating evidence of defendant's emotional disturbance on ground that defendant "knew the difference between right and wrong"); Phyllis L. Crocker, CONCEPTS OF CULPABILITY AND DEATHWORTHINESS:

DIFFERENTIATING BETWEEN GUILT AND PUNISHMENT IN DEATH PENALTY CASES, 66 FORDHAM L. REV. 21 (1997); *see also* Craig Haney, THE SOCIAL CONTEXT OF CAPITAL MURDER: SOCIAL HISTORIES AND THE LOGIC OF MITIGATION, 35 SANTA CLARA L. REV. 547 (1995); ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (2003)fn.315(hereinafter ABA Guidelines).

As introduced into evidence during the hearing, Mr. Pagan's developmental history demonstrates many of the risk factors and few of the protective factors identified in relevant scholarly studies. To illustrate, developmental risk and protective factors related to chronic youth delinquency and violence by early adulthood were identified in a 1995 Department of Justice study. These factors are listed below with those present in Alex Pagan's history indicated by italics:

Risk Factors:

Conception to age 6:

? Perinatal difficulties
? Minor physical abnormalities
? *Brain damage*
? *Family history of criminal behavior and substance abuse*
? *Family management problems*
? *Family conflict*
? *Parental attitudes favorable toward, and parental involvement in, crime and substance abuse*

Age 6 through adolescence:

? Extreme economic deprivation
? *Community disorganization and low neighborhood attachment*
? Transitions and mobility
? *Availability of firearms*
? *Media portrayals of violence*
? *Family management problems*
? *Family conflict*
? *Parental attitudes favorable toward, and parental involvement in, crime and substance abuse*
? *Early and persistent antisocial behavior*
? *Academic failure*
? *Lack of commitment to school*
? Alienation and rebelliousness
? *Association with peers who engage in delinquency and violence*
? *Favorable attitudes towards delinquent and violent behaviors*
? *Constitutional factors (e.g. low intelligence, hyperactivity, attention-deficit disorders)*

Protective Factors:

Individual characteristics:

? Female gender
? Intelligence
? *Positive social orientation*
? Resilient temperament

Social bonding to positive role models:

? *Family members* (+)
? Teachers
? Coaches
? Youth leaders
? Friends
? Healthy beliefs and clear standards for behavior, including those that promote nonviolence and abstinence from drugs.
? Effective early interventions

(Def.Ex. 7)

As established in Dr. Cunningham's testimony, Mr. Pagan had numerous risk factors and few protective factors. Application of this well-

respected DOJ research thus points to his being significantly at risk for a criminal and violent adult outcome - an outcome that was obviously realized. There was no testimony at trial regarding this DOJ sponsored research or its application to Mr. Pagan's development.

Dr. Cunningham testified to a number of broad damaging developmental factors in Mr. Pagan's background that could have been identified, illustrated in anecdotal detail, and detailed in their implications. These include the following:

Wiring	*Family*	*Community*
? Attention Deficit Hyperactivity Disorder	? Multigenerational family dysfunction	? Corruptive community influences
? Genetic predisposition to psychological disorder	? Paternal rejection and abandonment	? Sexual abuse
? Genetic predisposition to alcohol and drug dependence	? Chronic tension between primary parent figures	? Community violence exposure
? Alcoholism and drug abuse	? Paternal neglect	? Incarceration in an adult prison in late adolescence and early adulthood
? Youthfulness	? Physical and emotional abuse	? Absence of post-prison community reintegration or effective interventions
	? Corruptive influence of male role models	

(Def.Ex. 7)

Dr. Cunningham testified that Attention Deficit Hyperactivity Disorder (ADHD) is a condition characterized by three primary symptom clusters: excessive motor activity, impulsivity, and inattention. The retrospective diagnosis of ADHD in childhood is most reliable when based

on behavioral descriptions regarding this developmental period and on childhood records. While Dr. Martha Jacobson referred briefly to notations in Alex's school records (ROA 3694-3695; 3750-3751), these symptom descriptions and their implications were only partially elicited by defense counsel during her testimony.

As described by Dr. Cunningham, ADHD symptoms in childhood are most evident at school, as this is a setting where the ability to focus attention and control behavior is consistently required. Children suffering from ADHD exhibit school behaviors characterized by immaturity, disruptiveness, lack of self control, inattentiveness, requiring more supervision or encouragement, seeming unmotivated, not completing their work, failing to return to school with homework, and other problems. Not uncommonly, school records describe these symptoms in a pejorative and simplistic fashion, such as "being lazy" or unmotivated. Such pejorative interpretations were particularly prevalent 25-30 years ago when this disorder was much more poorly understood. Alex's school records reflect just this sort of symptom pattern, described with the unfortunately typical labels of this era. A notation in Alex's school records dated 10-30-74 described him as "helpful but at times inattentive." A notation dated 09-76 indicated that he was receiving special programming (i.e. Title I B ECP B

Strengthening Early Childhood). "Guidance Data" notations in the school records also point to ADHD-type behaviors:

> 1st grade: Generally interested but needs encouragement, attention.
> 2nd grade: Alex has matured considerably this year. He needs someone to keep after him, but is eager to please.
> 3rd grade: [retained]
> 3rd grade: Alex does not carry out his responsibilities concerning his school work.
> 4th grade: Poor effort regarding work habits. Bright boy, lazy!
> 5th grade: Poor study habits. Bright boy B still lazy!!
> 6th grade: I am disappointed in Alex's level of self control and effort in my class.

(Def.Ex. 7)

During the examination of trial counsel, Mr. Malnik, it was shown that he did very little with regards to requesting and gathering records. (EH 87). It was nearly four years after the offense, and after the guilty verdict was returned, that Mr. Malnik obtained the school records. (EH 88, 136). These records were not given to Dr. Jacobson before she completed her report. (EH 88) and only right before the *Spencer* hearing. (EH 136). Even so, contrary to Dr. Cunningham's expert analysis, Mr. Malnik felt that they were not relevant for a diagnosis of ADD or ADHD. (EH 103). In addition, the school records given to the defense during the hearing, (Def. Ex. 3) are also consistent with a diagnosis of ADHD.

Evidence was presented, (Def.Ex. 7) to show that Dr. Harley Stock disputed a diagnosis of ADHD while acknowledging the historic presence of

two of the three necessary symptom clusters and ignoring the third. On direct examination by the State, Dr. Stock acknowledged that the school records did "suggest that he might have had some problems paying attention in school" (ROA Volume 2, page 139). Inexplicably, given his dispute of this diagnosis, Dr. Stock also acknowledged that Alex had a longstanding pattern of impulsivity:

> Yes, impulsiveness or failure to play ahead. I think that was evident throughout his school and his adult life, that he would often engage in behaviors [sic] spur of the moment that would bring him pleasure, and he would not necessarily think through the logical consequences of his actions.

(ROA Volume 2, page 134)

Dr. Stock also acknowledged that Alex was "emotionally immature". (ROA Volume 2, page 147)

Contrary to Dr. Stock's representation, Dr. Cunningham testified that ADHD in adulthood is typically not accompanied by the degree of distractibility that is evident in childhood. Thus it would not be surprising that an adult with ADHD would be able to attend well to an extended evaluation interview or focus on a particular subtest (e.g. WAIS-R block design). In fact, Alex's WAIS-R performance pattern was consistent with ADHD, as subtests measuring "freedom from distractibility" were significantly weaker than his other intellectual abilities. Dr. Jacobson noted this relative weakness in her testimony (page 3693). Not elicited by defense

counsel regarding the WAIS-R (intellectual assessment) is that someone can be very bright and thus obtain high scores on many subtests, and still have ADHD.

Dr. Cunningham testified that the scholarly literature does not support Dr. Stock's opinion that a high score on the Block Design subtest is inconsistent with or contraindicates the presence of ADHD. He testified, for example that one article, Sattler (1988), summarized that no particular pattern of scores on the WISC-R (child version of the WAIS-R) had been found to be associated with ADHD. Another, Barkley (1990), reported that while the Digit Symbol and Arithmetic subtests from the WAIS-R have been associated with deficits consistent with ADHD, diminished performance on the Block Design has not. What Dr. Stock refers to as "spike nine immaturity" (ROA Volume 2, page 146) reflected in impulsivity in the service of self-gratification cannot be differentiated as to etiology as he represented, and again is not inconsistent with ADHD.

Further, Dr. Cunningham stated that Dr. Stock was incorrect in his representation that criminal offenses committed by adults who had suffered ADHD in childhood would be disorganized or random as opposed to intentional and relatively straightforward. Though they may be plagued by impulsivity and other problems, adults suffering from ADHD can and do

engage in organized conduct in most areas of their lives. They marry, work, raise children, and maintain social relationships. In any case, the offense was not well conceived or executed. Since the assailants were wearing masks, there was little reason to expose any facial features and accordingly no logical reason to kill the victims. The drug trafficking activities of one of the victims rendered it unlikely that the home invasion would have been reported to law enforcement, had a shooting not taken place. The killings were not carried out in a fashion that would insure that all of the victims were dead. Further, Mr. Pagan's purported talking of the offense to others obviously reflected impulsivity and poor judgment. None of these perspectives were utilized by defense counsel in cross examination of Dr. Stock. (Def.Ex. 7)

Mr. Malnik testified during the evidentiary hearing that he did not have any strategic reason for not requesting any of Mr. Pagan's important social history records or why he waited until after the guilt phase to obtain copies of his school records. (EH 155). Nor did he have any strategic reason for retaining the services of Dr. Jacobson until 2 weeks before trial, roughly three years after the offense. (EH 155). Mr. Malnik could offer no strategic reason why he did not give any witness contact information to Dr. Jacobson to help her complete a full evaluation of Mr. Pagan's mitigation.

(EH 154). Mr. Malnik never even turned over copies of his limited interviews with the witnesses. Mr. Malnik testified that he knew better. That the better practice would have been to obtain all of the necessary records, to retain the services of an expert early in the case, and to have the expert interview important witnesses personally. (EH 91, 98, 99). Finally, in addition to not retaining the services of an expert until right before the trial started, Mr. Malnik never requested the services of an investigator or a mitigation specialist. (EH 67).

As for preparing his case to rebut the testimony of the State expert, Mr. Malnik testified that he deliberately waited until the very last "possible minute" to notice his intent to present an expert. (EH 115). While this was done strategically to possibly put the State at a disadvantage, (EH 115), his own delay put himself and the case in jeopardy. This caused Mr. Malnik to not be prepared for the State's case, conducting a deposition after the penalty phase started and the day before the experts were set to take the stand. (EH 114-115). Mr. Malnik had even promised in his opening statement to the jury that he would present expert evidence to show how different Mr. Pagan's world was from the norm. (EH 102).

The Guideline 10.7 of the *ABA Guidelines* and the *Comments* herein are very specific as to the duties of an attorney in investigating and preparing

a case.

> B. 1. Counsel at every stage have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel.

In the *Commentary*, the *ABA Guidelines* clarify counsel's duties:

> Counsel's duty to investigate and present mitigating evidence is now well established. The duty to investigate exists regardless of the expressed desires of a client. Nor may counsel "sit idly by, thinking that investigation would be futile." Counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions, unless counsel has first conducted a thorough investigation with respect to both phases of the case. Because the sentencer in a capital case must consider in mitigation, "anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant," "penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history." In the case of the client, this begins with the moment of conception. Counsel needs to explore: (1) Medical history (including hospitalizations, mental and physical illness or injury, alcohol and drug use, pre natal and birth trauma, malnutrition, developmental delays, and neurological damage); (2) Family and social history (including physical, sexual or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (e.g., failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities); (3) Educational history (including achievement, performance, behavior, and activities), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities; (4)

Military service, (including length and type of service, conduct, special training, combat exposure, health and mental health services); (5) Employment and training history (including skills and performance, and barriers to employability); (6) Prior juvenile and adult correctional experience (including conduct while under supervision, in institutions of education or training, and regarding clinical services); The mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase defenses (e.g., by suggesting additional areas for questioning police officers or other witnesses), decisions about the need for expert evaluations (including competency, mental retardation, or insanity), motion practice, and plea negotiations. Accordingly, immediately upon counsel's entry into the case appropriate member(s) of the defense team should meet with the client to: 1. discuss the alleged offense or events giving rise to the charge(s), and any improper police investigative practice or prosecutorial conduct which affects the client's rights; 2. explore the existence of other potential sources of information relating to the offense, the client's mental state, and the presence or absence of any aggravating factors under the applicable death penalty statute and any mitigating factors; and 3. obtain necessary releases for securing confidential records relating to any of the relevant histories.Counsel should bear in mind that much of the information that must be elicited for the sentencing phase investigation is very personal and may be extremely difficult for the client to discuss. Topics like childhood sexual abuse should therefore not be broached in an initial interview. Obtaining such information typically requires overcoming considerable barriers, such as shame, denial and repression, as well as other mental or emotional impairments from which the client may suffer. As noted supra in the text accompanying note, a mitigation specialist who is trained to recognize and overcome these barriers, and who has the skills to help the client cope with the emotional impact of such painful disclosures, is invaluable in conducting this aspect of the investigation. It is necessary to locate and interview the client's family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation or parole officers, and others. Records - from courts, government agencies, the military, employers, etc. - can contain a wealth of mitigating evidence, documenting or providing clues to

> childhood abuse, retardation, brain damage, and/or mental illness, and corroborating witnesses' recollections. Records should be requested concerning not only the client, but also his parents, grandparents, siblings, and children. A multi generational investigation frequently discloses significant patterns of family dysfunction and may help establish or strengthen a diagnosis or underscore the hereditary nature of a particular impairment. The collection of corroborating information from multiple sources - a time consuming task - is important wherever possible to ensure the reliability and thus the persuasiveness of the evidence. Counsel should use all appropriate avenues including signed releases, subpoenas, court orders, and requests or litigation pursuant to applicable open records statutes, to obtain all potentially relevant information pertaining to the client, his or her siblings and parents, and other family members, including but not limited to: a. school records b. social service and welfare records c. juvenile dependency or family court records d. medical records e. military records f. employment records g. criminal and correctional records h. family birth, marriage, and death records i. alcohol and drug abuse assessment or treatment records and j. INS records. If the client was incarcerated, institutionalized or placed outside of the home, as either a juvenile or an adult, the defense team should investigate the possible effect of the facility's conditions on the client's contemporaneous and later conduct. The investigation should also explore the adequacy of institutional responses to childhood trauma, mental illness or disability to determine whether the client's problems were ever accurately identified or properly addressed. The circumstances of a particular case will often require specialized research and expert consultation. For example, if a client grew up in a migrant farm worker community, counsel should investigate what pesticides the client may have been exposed to and their possible effect on a child's developing brain. If a client is a relatively recent immigrant, counsel must learn about the client's culture, about the circumstances of his upbringing in his country of origin, and about the difficulties the client's immigrant community faces in this country.

ABA Guidelines Comments to Guideline 10.7.

As shown above, Mr. Malnik's failure to obtain many important records is contrary to the *ABA Guidelines*. Mr. Malnik testified that

pursuing school records would not have helped in his presentation of ADHD because the diagnosis "didn't necessarily explain the crime to a jury". (EH 102). As stated in United States Supreme Court law, this is the wrong standard in evaluating mitigation. The United States Supreme Court in *Tennard v. Dretke*, 124 S.Ct. 2562 (2004) and *Smith v. Texas*, 125 S.Ct. 400 (2004) reiterated that mitigation must be defined "in the most expansive terms", rejecting state court attempts to create a "nexus" of mitigation to the crime or a threshold of relevance beyond "any fact that is of consequence" which a fact-finder may "deem to have mitigating value". This "low threshold of relevance" fully incorporates the necessity to conduct a complete biopsychosocial history of the accused, including past family history. Thus, "virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." Mr. Malnik's failure to present mitigation evidence of ADHD was based on the wrong standard. More importantly, based on Dr. Cunningham's testimony, the diagnosis of ADHD did help explain much of Mr. Pagan's conduct, especially in mitigating the State's violent prior felony aggravator.(EH 415)

Dr. Cunningham testified extensively about the relevance of ADHD. (EH 371-74). He also testified that Dr. Stock's testimony was incorrect and

refuted by the large body of literature that was available at the time of Mr. Pagan's trial. (EH 374-75). However, because of the situation that Mr. Malnik put Dr. Jacobson in by waiting until the very last "possible minute", Dr. Jacobson did not have the time to research this literature to rebut Dr. Stock's assertions. (EH 375). As such, Mr. Malnik's testimony that the evidence of ADHD and other mental health mitigation was weak was not only incorrect but due to his own ineffectiveness.

Mr. Malnik failed to explore many areas of mitigation such as the social history of Alex's biological father Miguel Pagan. Mr. Malnik failed to ask basic questions regarding Mr. Pagan's prior criminal record and substance abuse. (EH 145); *See Williams v. Taylor*, 529 U.S. 362, 395 (2000). This fell below the standard of care in the scientific community as well as the legal community. (EH 378-79, 387). Mr. Malnik failed to discover crucial information concerning Mr. Pagan's prior sexual abuse. (EH 356-58; 415).

Mr. Malnik failed to investigate or properly present this genetic susceptibility to drugs and alcohol to the jury. As presented by Dr. Cunningham:

> The presence of alcohol dependence in Alex's family history had significant implications for his risk of substance abuse and dependence. The incidence of alcoholism among first degree relatives of alcoholics is 3-5 times the rate in the general population (Cotton,

> 1979; DSM-IV, 1994). Twin and adoption studies across 20 years of research have provided evidence of significant genetic influences on the familial transmission of alcoholism (Schuckit, 1987). A large scale, multidisciplinary study of 2,551 adult male biological relatives of alcoholics involving six research centers across the U.S. reported that two-thirds were heavy drinkers or severely affected alcoholics (Begleiter, 1995). Consistent with Alex's abuse of alcohol, marijuana, and cocaine; clinical findings point toward a common biological vulnerability to dependence on alcohol and other drugs. Research findings clearly support a uniform theory for a neurochemical basis of alcohol and drug addiction (Miller & Gold, 1993). In a study of 150 cocaine addicts: 90% were alcoholic; half were cannabis dependent; and half had family history of alcoholism (Miller, Gold, & Belkin, 1989). In a study of 82 subjects: there was an 89% chance the cocaine addict was also an alcoholic; and half of the cocaine addicts had a family history of a first or second degree relative with alcoholism (Kosten, Rounsaville, & Kleber, 1987)

(Def.Ex. 7).

Dr. Cunningham also discovered evidence of dysfunctional family processes that extend back generations in Alex's family. These include chaotic family structure, parental separation and abandonment, child abuse and neglect, sexual irresponsibility and infidelity, substance dependence, mental illness, and criminality.

Alex's maternal grandmother, Viola Medina (DOB 2-18-27), was the out-of-wedlock product of a relationship between Ramon Rossnnello and Providencia Santiago. Ramon fathered five children with five women, all while married to one of these women. Viola reported that she was effectively abandoned by her mother, Providencia; and reared by her maternal grandmother until age 12. Viola's childhood contact with her mother was so

infrequent that when her Providencia came for her at age 12, Viola did not recognize her. Viola reported that Providencia was quite controlling, and further described that as a teen she was verbally and physically abused by Providencia.

Viola reported that Maria (Alex's mother, DOB 3-24-47), was the product of a relationship between Viola and Jorge Rivera. Viola characterized this relationship as one where she was sexually molested, she was a completely sexually naïve teen and Jorge Rivera was a married man and friend of the family in his forties who had been enlisted by Providencia to teach Viola to drive. Viola reported that during the relationship with Jorge, which continued for a period of time, he was quite possessive and violent with her. Viola reported that at Providencia's insistence to extricate Viola from this relationship, she moved at age 19 to the mainland with Providencia and Maria (age 2 months). Viola subsequently married Hymie Miranda Murphy, and had three children with him: William, Carmello, and Doris. There was discussion among family members in front of Alex, however, that the oldest of these three children was not fathered by Hymie Miranda. Alex also reported that he became aware during childhood that Viola was engaged a long term extramarital affair. Maria described never meeting her paternal grandmother, as she died in childbirth with Jorge.

Maria reported that she was principally reared by her maternal grandmother, Providencia, rather than Viola. Maria had little contact with Jorge Rivera, first meeting him at age 10. Similarly, she has had little contact with her paternal half-siblings. Maria reported that she dropped out of high school and went to work in a factory with Viola. There she met Miguel Pagan (DOB 2-25-44) in 1968. Alex (DOB 3-25-69) and his sister Yvette (DOB 5-31-70) are products of this union. Miguel and Maria moved in together after approximately a month of courtship. Miguel went to sea with the merchant marines when Alex was approximately 6 months old and never returned to reside in the household. Maria reported that Miguel did not pay child support and visited the children only episodically.

Miguel reported that he is the product of the marriage of Juanita Trevino and Miguel Pagan, Sr. Miguel described that his maternal grandfather "lost his mind: in middle adulthood. This breakdown followed the conviction and imprisonment of one of Juanita's brothers for killing a police officer who had been beating the maternal grandfather. Miguel described that his father (i.e. Alex's paternal grandfather), was an alcoholic who abandoned the family when Miguel was approximately age 6 and Alex's younger brother, Dennis, was an infant. Miguel described that his father was psychiatrically discharged from the U.S. Army in WW-II and was

psychiatrically treated/medicated by the V.A. for many years. Miguel described his father as incoherent at times, and occasionally violent. Miguel reported that his father additionally produced three children out of wedlock, two of whom were abandoned to the foster care system in Chicago. He has little knowledge of his paternal extended family. Miguel reported that his mother raised him and Dennis as a single parent.

Miguel acknowledged that he had himself been cocaine dependent from 1971 to 1992. Miguel described that he supported this habit by trafficking in cocaine. He was convicted of drug trafficking and served two years (1976-1978). He resumed trafficking in cocaine and was again convicted of this offense. He served a second prison sentence from 1985-1988. He described discontinuing drug abuse in 1992 following a heart attack and a 5-way by-pass surgery. Miguel reported that he had a son, Eric, from a marriage that predated Maria. He described losing contact with this child while incarcerated. Miguel reported that his younger brother, Dennis, was dependent on alcohol and cocaine, as well as abusing heroin, pills, and virtually any other drug that was available. He described that Dennis, who had been close to Alex, was beaten to death in New York City approximately six years ago.

Dr. Cunningham discussed the importance of investigating and

presenting such a social history. (EH 387-89) which he did not see adequately presented in either the penalty phase or the *Spencer* hearing. (EH 389). Family history is critically important to character and background through several fundamental processes. First, some personality characteristics, behavior patterns, and social vulnerabilities are genetically transmitted. For example, there is evidence of genetic predisposition to schizophrenia, mood disorders, personality traits and disorders, other psychological disorders, and substance dependence. Second, parental substance abuse, personality disorder and instability often intrudes on parenting attitudes and behaviors, increasing the likelihood of neglect and/or abuse. Miguel, Alex's father, acknowledged that his functioning as a father was severely compromised by his drug addiction and associated criminal activity. Third, other characteristics and behaviors are transmitted across generations by family scripts. Family scripts are broad outlines of behavior and life sequence that are conveyed both verbally and more importantly by example in the lives of parents, grandparents, siblings, and extended family. School dropout, early pregnancy, early marriage, criminal activity, domestic abuse, substance abuse, and/or many other maladaptive behaviors may be extensively represented in a family system from one generation to the next. Fourth, modeling of specific behaviors or coping responses are also

important aspects of family influence - for good or ill. In Alex's childhood, adverse parental modeling included poor role boundaries, criminal activity, alcoholism, exploitation, irresponsibility, violence, and other deviant processes. Fifth, other maladaptive behaviors may be the result of sequential emotional damage. In other words, individuals who have been significantly emotionally damaged in childhood come into adulthood with limited emotional resources, and as a result may not parent their own children humanely or effectively - who are then emotionally damaged themselves and thus at greater risk for broad adverse adult outcomes including substance dependence and criminal activity.(see Def. Ex. 7).

Dr. Cunningham testified about the total absence of parental abuse and neglect testimony presented at trial. (Def.Ex.7) Dr. Cunningham stated that the parenting that Alex received was characterized by several forms of neglect. His father's rejection, abandonment, and failure to provide either relationship or financial support for Alex have already been described. The mothering that Maria provided was also characterized by neglect. First, Alex described that in early and middle childhood, he routinely spent weekends with his great grandmother while his mother went to clubs and/or pursued her own interests and activities. This is problematic in light his mother being absent working during the day on weekdays, as well as in the face of the

redundant adverse developmental factors facing Alex. That Maria sought to routinely free herself of the responsibilities of childcare on weekends also raises questions regarding her parental capacities and the quality of maternal bond that she had with Alex and Yvette.

Second, school records reflect an extraordinary level of absences:

K = 70 absences	3rd = 30 absences
1st = 30.5 absences	3rd = 43 absences [second year]
2nd = 26 absences	4th = 15 absences

(see Def. Ex. 7).

As responsibility for school attendance at this age falls entirely on parents, Dr. Cunningham stated at the hearing and in his report, Maria's failure to consistently get Alex to school is presumptive neglect. Thus while Alex's school absences were noted in the testimony of Dr. Jacobson, the neglect implications of these absences were not elicited by defense counsel. Third, Maria brought into the home men who were actively involved in criminal activity who then became active influences and role models for Alex. This failure to exercise a protective role constitutes another form of maternal neglect. (see Def. Ex. 7).

Dr. Cunningham further presented evidence to the lower court that child neglect may be physical or emotional. Regardless of its form, neglect has been identified as more psychologically and developmentally damaging

than physical abuse. Dr. Cunningham described neglected children as being at greater risk for adult violence than abused children. This is a function of insufficient stability and/or security in parental attachments (see earlier section), daily life, or practical care; as well as unmet physical and emotional needs. The long term impact of child neglect includes distorted cognitive, perceptual, emotional, and interpersonal capacities; pervasive anxiety; identity disturbance; insufficient capacity for emotional self regulation and behavioral control; psychological disorder; behavior disturbance; and violent and criminal conduct. (see Def. Ex. 7).

Dr. Cunningham also presented evidence regarding parental neglect. Parental neglect can also involve the failure to provide supervision, appropriate discipline, and moral guidance. Healthy child development requires not only practical nurturance in the context of a stable and secure relationship with a parent, but also limit setting and guidance through structure and discipline. In the absence of ample structure and consistent, appropriate discipline and limit setting, there is grave risk to psychological health and positive socialization. According to Dr. Cunningham, these fundamental tenets are supported by research. Quite simply, lack of parental structure and discipline contributes to aggressiveness and predisposes to violence in the community. In the absence of guidance, "self control does

not develop and aggression can unfold and bring instrumental gain". Children need order and external structures to develop internal structures and capacity for self guidance. (see Def. Ex. 7).

Dr. Cunningham also testified that Alex had described that his mother would beat him with whatever object that she had in her hand: pot, dish, or belt. He described being hit "wherever she could hit," and reported suffering welts and bruises from these beatings. He reported that these occurred at an approximate frequency of twice monthly. Alex described that on one occasion his mother's boyfriend, Richie, threw him down on a bed and threatened to beat him. (see Def. Ex. 7).

Alex described conduct of his mother that constituted emotional abuse as well. He reported that she cursed him when angry. Much of the emotional abuse though involved her expectations that he assume an adult male role in the home. He described that she referred to him as the "man of the house." This might be regarded as benign, except that it was accompanied by a brutally enforced expectation that comport himself as an adult male. Alex described that on one occasion his mother reacted to his tone of voice "being like a girl" by throwing him to the floor and cutting his lip. A similar failure to recognize Alex's child status occurred when Alex was in the care of maternal great grandmother Providencia. Alex reported that during

childhood Providencia taught him how to smoke cigars, as well as how to drink rum and "Anasett." (see Def. Ex. 7).

Dr. Cunningham testified about the implications of physical and emotional abuse which was absent from the trial proceedings. The conclusions of the *American Psychological Association Presidential Task Force on Violence and the Family* (1996) summarized that abused children may show a variety of initial and long term psychological, emotional, physical, and cognitive effects including low self esteem, depression, anger, exaggerated fears, suicidal feelings, poor concentration, eating disorders, excessive compliance, regressive behavior, health problems, withdrawal, poor peer relations, acting out, anxiety disorders, sleep disturbance, lack of trust, secretive behavior, excessively rebellious behavior, drug or alcohol problems. (see Def. Ex. 7).

Dr. Cunningham also testified that the majority of male role models in Alex's life were corruptive and this was not presented adequately to the jury or the court. (EH 399-407) As has been described, his father was rejecting, irresponsible in his parenting, domestically abusive of Maria, womanizing, and abandoning. Further, Miguel was arrested on drug charges during one of Alex's summer visits with him. His mother's subsequent partner, Jose "Poppy Joe" Vasquez was a "gangster" (i.e. career criminal) who was

repeatedly incarcerated and is now serving a life sentence for murder. Alex described that he became particularly attached to and looked up to Poppy Joe because of the attention that Poppy Joe directed toward him when he was present in the household. Alex characterized Poppy Joe as more of a father to him than Miguel. Maria took the children to visit Poppy Joe in prison in upstate New York, which acted to normalize this setting. Alex reported that he also had contact with Poppy Joe's brothers, Freddie and Tommy, who were also involved in criminal activity. Alex reported that Freddie has been a fugitive from murder and drug conspiracy warrants for years. (see Def. Ex. 7).

Alex reported that his mother was friends from childhood with males who were career criminals and were routinely in the household. Maria referred to two of these men as "uncles," so that Alex thought they were her biological brothers until he was an adult. "Yogi" Sambino was a "gangster" who Alex described as very smooth. Alex reported that he was enamored with Uncle Yogi's money, power, status, and access to beautiful women. He described observing and emulating Yogi's way of carrying himself and conducting business. Another of these "uncles" was Sammy Cobassa, a drug dealer who at one time was grossing $50,000 a week. Alex reported that he was closer to Sammy because Sammy was only 10 years older and took

Alex to hang out with him. He described that Sammy instructed him in how to be a man, including the importance of family. He observed that Sammy was protective and helpful to family, but "ruthless" to anyone who presented a threat to Sammy or his family. (see Def. Ex. 7).

Other men who Maria was romantically involved with were also characterized by Alex as gangsters. Richie was a member of Uncle Yogi's crew who was also married. On one occasion when Richie became angry at Alex and threw him on the bed, Richie's gun fell out and almost hit Alex in the head. Maria was involved with Joey Perez for approximately 2 3 years in the late 1970's and early 1980's. This relationship ended after Joey was incarcerated. (see Def. Ex. 7).

Contrary to the deposition testimony of Dr. Stock, corruptive influence from male role models and mentors extends well beyond direct instruction in criminal enterprise. As Alex was exposed to and admired men who were career criminals, and as his mother valued and respected these men, his value system and perception of a male role were being formed along deviant lines. Perhaps Dr. Stock should have been asked whether he would have any apprehensions about Yogi Sambino and Sammy Cobassa actively befriending and mentoring his own sons/grandsons during their childhoods as long as they did not take these youths along on their criminal

offenses.

Dr. Cunningham testified as to the implications of corruptive influence of male role models. Alex's models for manhood in the home were predominantly criminals. His mother's romantic involvements and friendships with these men further reinforced the message that a criminal career and lifestyle were appropriate and even attractive. That some of these individuals spent time with Alex and seemed "smooth" and powerful served to increase their corruptive influence by making them seem desirable models to emulate. It is hardly surprising that Alex's lifestyle, values, and criminal involvement would be consistent with what these men modeled and what his mother endorsed. (see Def. Ex. 7).

The critically important role of the family and home environment in shaping lifelong attitudes and behaviors, for good or ill, is widely accepted. There is extensive empirical research on the role of relationship, modeling, instruction, structure, and reinforcement on socialization and behavior acquisition within the family. Socialization of children and adolescents is integrally influenced by the value system and behavioral modeling of their parents and other role models in the home. Corruptive parental models contribute to a faulty moral compass in the child, with much increased risk of unethical conduct and criminal outcome.

According to Dr. Cunningham, the U.S. Department of Justice in their comprehensive review of research identified parental criminality and parental attitudes favorable to substance abuse and violence as significant risk factors in the development of serious youth delinquency and violence. This makes intuitive sense. The value systems and behavior patterns of children are strongly impacted by the behaviors and attitudes of family members and other adults routinely present in the household. Strong positive male role models and relationships are a particularly important part of male child development. In adolescence this assumes additional significance as the teenage male is creating a more adult identity and as the presence of an older male to whom the male teen is well bonded provides limit setting guidance. Alex's father and stepfather, as well as other adult males routinely in the household, modeled criminality, irresponsibly, exploitation, and/or violence. (see Def. Ex. 7).

As presented to the lower court during the evidentiary hearing through exhibits and testimony, there were numerous omissions in mitigation that could have, and should have been presented to the jury. However, apart from the evidence not presented, Mr. Malnik repeatedly emphasized that he would have presented Dr. Jacobson's testimony, and what little information she had, to the jury were it not for the testimony of Dr. Stock. (EH 113, 115,

116, 117, 118). However, Mr. Malnik was terrified of Dr. Stock's testimony that Mr. Pagan had an antisocial personality disorder. (EH 116).

Dr. Cunningham presented extensive evidence about the role of personality disorders in capital mitigation. Much of the testimony of Dr. Jacobson (defense retained expert) and Dr. Stock (State retained expert) focused on whether Alex Pagan suffered from a Borderline Personality Disorder (BPD) or an Antisocial Personality (APD) Disorder. This differential is irrelevant to an analysis of mitigation and moral culpability. Quite simply, both of these disorders are the result of genetic, neurochemical, and/or damaging developmental factors that the individual does not chose. Rather BPD or APD is the label assigned to describe the maladaptive personality features that have resulted from these adverse factors. The occurrence of either BPD or APD is independent of volitional choice. In other words, no one wakes up one day when they are 22 years old and decides: "I think I will be an Antisocial Personality Disorder." Instead, this is a deeply ingrained maladaptive perspective and pattern of behavior that develops from childhood in response to factors and influences that are largely independent of volitional choice. APD is a disorder in the structure of the personality, not simply choosing to behave badly.

While a diagnosis of APD in no way negates mitigation, the presence

of this disorder was not supported in Dr. Stock's testimony. More specifically, Dr. Stock failed to support his conclusion that Alex met criteria for a Conduct Disorder before the age of 15 beyond unspecified "interpersonal conflicts":

> It appears he was having problems in his neighborhood before the age of 15 in interpersonal conflicts. While I don't know that there was ever a diagnosis of conduct disorder, his history would certainly suggest the presence of a conduct disorder, although undiagnosed.

(ROA Volume 2, page 138)

This issue was critical as the presence of a *Conduct Disorder* prior to the age of 15 is required in order to make a diagnosis of Antisocial Personality Disorder (DSM IV). Conduct Disorder entails much more than "interpersonal conflicts" in the neighborhood. Dr. Stock's subsequent testimony indicated that he did not have evidence of the level of antisocial conduct prior to age 15 to reach a diagnosis of Conduct Disorder:

> And it seems like, at least what I recall, is that after his grandfather's death is really when all the criminal activity he moved to Florida and all the criminal activity started.

(ROA Volume 2, page 149)

In his trial testimony, Dr. Stock identified no specific Conduct Disorder criteria that Alex exhibited prior to age 15. The absence of a Conduct Disorder before the age of 15 is not simply "splitting hairs" as Dr. Stock characterized in cross examination (Volume 2, page 151). Rather, evidence of Conduct Disorder prior to the age of 15 is one of the essential

diagnostic prongs of a diagnosis of Antisocial Personality Disorder in both DSM III R and DSM IV. Thus while Mr. Pagan certainly exhibited antisocial conduct in the community, this is not synonymous Antisocial Personality Disorder as contemplated and codified by DSM IV. Diagnostic criteria exist so that professionals can communicate in a common classification language in research and clinical activities. When Dr. Stock ignores an essential diagnostic prong, the associated "diagnosis" is no longer a professionally recognized classification. Rather, it is no more than an idiosyncratic conceptualization of Dr. Stock of uncertain meaning or implication.

Further, as a personality disorder is by definition a deeply ingrained and pervasive pattern of maladaptive behavior that is evident in most arenas of life, Alex's demonstrations of loyalty and/or empathy to his family members and friends does constitute evidence that contraindicates a diagnosis of APD. Application of these diagnoses requires careful, thorough confirmation that a pervasive pattern has extended from childhood. An APD diagnosis cannot be based on isolated incidents or a particular instant offense. Descriptions by family members of Alex's behavior as a child and teen are inconsistent the above detailed Conduct Disorder symptoms prior to age 15. Both Alex's mother and grandmother described him as having been

quite close to step grandfather and assisting him during the grandfather's lengthy illness. Viola, Alex's maternal grandmother, described him as a "beautiful person as a child." She characterized him as a "small gentleman" who was polite and respectful with her, and was never a management problem for her. Maria (his mother) and Yvette (his sister), described Alex as a "wonderful brother" who was protective of Yvette during childhood.

Descriptions of Alex as a teen by both peer and adult observers of him are also inconsistent with a Conduct Disorder diagnosis. Michelle Hancock, mother of a peer age high school friend of Alex, described him as a "very nice boy" who "tried to do the right thing." She indicated that he was "not too much into mischief," and was consistently respectful of her. Ms. Hancock reported that Alex was quite helpful to his mother, protective of his sister, and as a teen assumed a role of the responsible male figure (i.e. "man of the house") in his family. Ms. Hancock described being shocked by the capital charges against Alex. Yolanda Esbri, mother of another peer age childhood friend of Alex, described meeting Alex in 1975 - 76 (Alex age 6 to 7). She reported that Alex and her son, Anthony, were best friends and that Alex was frequently in their home. She described Alex as a respectful, nice kid. She reported that Alex aspired to be in the FBI when he grew up. She reported that Alex and Anthony were well liked by both peers and adults

in the neighborhood. Ms. Esbri also described being shocked by the capital charges. Phillip Hancock, friend of Alex from high school, described Alex as a normal teen who was helpful to his mother and sister. He described Alex as being concerned with and empathetic to the needs of children. Mr. Hancock reported that the capital offense was "completely out of character." To the extent that both Conduct Disorder and Antisocial Personality Disorder represent a failure to adequately bond, relate, or empathize with others and thus act with disregard to their welfare or feelings; Alex's close relationship and protective stance with his mother and sister, as well as enduring relationships with non family, are inconsistent with such inadequate attachment and these diagnoses. Micky Rocque, prior defense counsel for Alex, described him as in close contact with Maria and Yvette (mother and sister). He also noted that Alex took a genuine interest in Mr. Rocque's family and welfare. Mr. Rocque's characterizations of Alex were quite consistent with the above individuals who interacted extensively with Alex during Alex's childhood and teen years. (see Def. Ex. 7).

Even if applicable to Alex, such a diagnosis does not reflect a particularly malignant or violent prone defendant. Indeed, NIMH Epidemiologic Catchment Area data revealed that 53% of community residents who met DSM III criteria for Antisocial Personality Disorder had

no significant arrest record (Robins et al., 1991). APD is also a much more common diagnosis among a prison inmate population than a jury or Court is likely to be aware of. (see Def. Ex. 7).

Not elicited by the defense from either Dr. Jacobson or Dr. Stock is that Antisocial Personality Disorder as a diagnostic construct has been criticized in the professional literature for multiple weaknesses, raising questions regarding whether the diagnosis has sufficient reliability and validity for forensic applications. (see Def. Ex. 7).

According to evidence presented by Dr. Cunningham, without expert testimony regarding these critically important perspectives, a jury or court would be at grave risk to view the presence of APD as somehow negating mitigation. As described regarding the presence of an APD diagnosis in capital cases: ". . . the danger of undue prejudice flowing from testimony which includes such a diagnosis may be exceptionally great". (See EH 340-43).

Dr. Henry Dee also testified for the defense as an expert in neuropsychology. (EH 280). Dr. Dee concluded from his testing that there was no evidence of malingering on Mr. Pagan's part. (EH 292). Further, based on his results, Dr. Dee testified that there was evidence that Mr. Pagan suffered from some form of organic brain damage. (EH 294) and the results

it would have on Mr. Pagan. In reviewing the testing and results of Dr. Jacobson, Dr. Dee testified that she had not done an adequate neuropsychological evaluation. (EH 297-99). This would have been important with Mr. Pagan's history of head injury. (EH 294-95). Thus, Mr. Malnik did not ensure that Mr. Pagan had an adequate neuropsychological evaluation when the clinical history and testing results indicated a possibility of brain damage.

The *ABA Guidelines and Comments* also discuss the importance of obtaining the services of an expert and making sure that the right expert is utilized. Further, the *Comments* clearly illustrate the duty counsel has in ensuring a proper mental health evaluation.

In conclusion, the failure of Mr. Malnik to adequately investigate or present the powerful mitigating evidence to the jury was not due to strategic choices or evidentiary concerns. Rather, as the evidence indicates, the failure to adequately ensure that a proper mental health evaluation and mitigation investigation was due only to the ineffectiveness of Mr. Malnik by either not requesting important records and information and by not retaining and preparing his expert early in the case. His actions, as shown, violate governing state and federal standards of effectiveness.

ISSUE III[3]

MR. PAGAN'S COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO CALL WITNESSES TO MITIGATE THE FACTS OF THE PRIOR VIOLENT FELONY AGGRAVATOR IN VIOLATION OF THE SIXTH, FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Mr. Malnik failed to adequately investigate and present any evidence to rebut the prior violent felony introduced by the State as an aggravator. This aggravator was presented through the testimony of the investigating officer and by certified copies of conviction. It was also noticed in the Court's sentencing order.

Mr. Malnik testified that he received the file containing Mr. Pagan's prior violent felony but failed to investigate any information contained in it. (EH 86-87). Further, counsel testified that he had received the case file very early on but did not read its contents until October 26, 1996, right before the start of trial. (EH 85-86). The prosecutor argued in his opening statement that Mr. Pagan had forced sex with Linda Berry who was a juvenile at the time. (EH 126) The victim's statement is also read into the record. (EH 127). Finally, Mr. Pagan's statement is read into the record. (EH 127). Mr. Malnik did nothing to rebut or mitigate the force of this powerful aggravator.

[3] Originally presented as Claim XIII in the Motion to Vacate.

(EH 127-28). He did not present any evidence to corroborate Mr. Pagan's version nor did he cross examine the lead detective. (EH 127-28).

Introduced as defense exhibit 4 were numerous witness interviews regarding the sexual assault committed by Mr. Pagan against Linda Berry. (EH 234). Mr. Malnik testified that based on the evidence he reviewed, it would have been a defensible case at trial. (EH 221). He even admitted that there was evidence against it being a forcible felony. (EH 222). He failed to investigate information contained in defense exhibit 4 that stated that Linda Berry had given a false statement to the police. (EH 226). He did not ask Yvette Pagan any questions about the case, even though she was listed as a witness, gave a statement and testified at the penalty phase. (Def. Ex. 4). He never interviewed Phillip Howard who had also given a statement. Mr. Howard testified at the evidentiary hearing and corroborated much of the information contained in Mr. Pagan's statement as well as impeached the statement of Linda Berry. (EH 240-46, 248-49).

Again the *ABA Guidelines* and the comments are very instructive on this point. The Comments to Guideleine 10.7 state, in pertinent part:

> Counsel must also investigate prior convictions, adjudications, or unadjudicated offenses that could be used as aggravating circumstances or otherwise come into evidence. If a prior conviction is legally flawed, counsel should seek to have it set aside. Counsel may also find extenuating circumstances that can be offered to lessen the weight of a conviction, adjudication, or unadjudicated offense.

ABA Guideline 10.7 Comment.

Also, Mr. Malnik's failure to investigate other areas of mitigation prejudiced Mr. Pagan by not being able to rebut the aggravator. As stated previously, Alex described a number of instances beginning as a preadolescent and recurring as a minor of being engaged in intercourse and/or oral genital stimulation by a significantly older female. He reported that the first of these incidents occurred when he was age 10 and a 14 year old female, Rosa, initiated intercourse with him. At age 12 he was engaged in a sexual exchange that culminated in intercourse with an adult married female who resided across the street on Virginia Avenue. At age 14- 15 he was repeatedly involved in intercourse by a 17- 18 year old female, Frances (aka "Cha Chi"), over the course of a month. Alex reported that at age 14-15 he was engaged in cunnilingus and intercourse with an adult married female friend of his mother. Alex reported that at age 14 - 15 he was engaged in intercourse with an adult female who he had assisted by carrying her groceries to her apartment. (Def.Ex. 7).

While Dr. Cunningham presented extensive evidence concerning the effects of such abuse, he also testified the impact it would have had on the aggravator. (EH 415-17). Because the victim of the indecent assault was 14 years old, Dr. Cunningham testified that the presentation of Mr. Pagan's past

sexual abuse would have been able to explain somewhat the dynamics of the Linda Berry incident. (EH 416). Counsel would have been able to present evidence showing that Mr. Pagan was perpetuating the cycle of abuse and that the sexual barriers that did not exist in his past did not exist in the case of Ms. Berry. (EH 416). According to Dr. Cunningham, this would have been very important to present to the jury. (EH 416-417).

Thus, the failure by Mr. Malnik to adequately investigate and present evidence to rebut the State's aggravator was deficient performance. The prejudice that resulted was the introduction of a de facto automatic aggravator of a forcible rape on a child. This would have been disturbing to a jury since, as the prosecutor illustrated in the closing arguments, that Mr. Pagan had just been convicted of another forcible felony on a child: murder. The presentation of the evidence would have separated the sexual assault from the guilt phase evidence by impeaching the fact that it was a forced rape rather than consensual and then by explaining the incident in light of Mr. Pagan's own sexual abuse. The prejudice of this failure cannot be underscored since Mr. Pagan was sentenced to death by the barest of margins: one vote. Thus, confidence in this outcome cannot stand.

ISSUE IV

THE TRIAL COURT ERRED WHEN IT SUMMARILY DENIED MR. PAGAN'S *BRADY* CLAIM.

Originally presented as Claim I in the Motion to Vacate, the trial court erred when it summarily denied the issue. The court in its Order states that the "Defendant failed to plead what 'favorable evidence' was allegedly withheld. (Order at 3). As detailed in the Motion to Vacate: "The documentation regarding the terms of Mr. Jackson's plea agreement, notes regarding his performance of the terms of the plea agreement, [and] violations that were noted but not filed, were suppressed and not disclosed to Mr. Pagan's trial counsel. Such evidence would have been material to the defense in impeaching the testimony of Mr. Jackson." (Motion to Vacate at 7-8). This Court should reverse the trial court's order and remand the case so an evidentiary hearing may be held on this claim.

ISSUE V

THE TRIAL COURT ERRED WHEN IT SUMMARILY DENIED MR. PAGAN'S *GIGLIO* CLAIM.

Originally presented as Claim II in the Motion to Vacate, the trial court erred when it summarily denied the issue. The court in its Order states "the Defendant's claims are conclusory, and the Defendant has not shown the statements were 'material'". (Order at 5).

Contrary to the court's Order, adopting the State's position in its brief (Order at 5), Mr. Pagan's Motion to Vacate contained a detailed recitation of

the facts counsel wanted to present. For example on pages 10 through 12 of the Motion to Vacate, counsel alleged:

> During his testimony, Mr. LaPorte inquired directly into Mr. Jackson=s prior deal with the state:
>
> Q. Now, I want to take you back to February of 1992, February 25th. Did you have occasion to be arrested on that date?
>
> A. Yes.
>
> * * *
>
> Q. What happened to the charges?
>
> A. They were, they said they were dropped, the charges were dropped but we had six months, they had like a couple of months to reinstate those charges.
>
> Q. Okay. Now did the charges ever get reinstated?
>
> A. This year.
>
> Q. 1996?
>
> A. Yeah.
>
> * * *
>
> Q. Were you surprised when they were reinstated in 1996?
>
> A. Yeah.
>
> (T. 3080-82)
>
> 5. This testimony was patently false and misleading. The charges were "reinstated" before 1996 because Mr. Jackson had entered a plea agreement with the state in exchange for testimony in 1995.
>
> 6. The state misled the judge, jury and counsel for the defense because he did not want the defense to learn of the pending charges and the deal Mr. Jackson had obtained in exchange for testimony. The state knew that the charges were actually not just Areinstated@ but that in 1995 Mr. Jackson was re-arrested for the offenses and was facing a life sentence. Further, the state did not want the jury, judge or the defense to know that he had been asked this same question and answered it differently in the Dade County case. Lastly, Mr. LaPorte did not want the jury and the judge to know that Mr. Jackson refused to tell the defense attorneys in Dade that he was working for the state in Broward. (*See exhibit C,* Deposition of Keith Jackson, November 7th 1996).
>
> 7. Previously, on October 13, 1994, Defense Counsel had attempted to introduce evidence of the pending charges as impeachment evidence against Mr. Jackson. He also wanted to

introduce this evidence as "reverse *Williams Rule* evidence".

8. Once the charges were dropped, however, Defense Counsel was precluded from going into the facts and circumstances of the case. Mr. LaPorte did not want to give notice to the defense that the charges had been "reinstated" nearly a year prior.

9. Further, Mr. Laporte did not want to notice to the defense the actual parameters of the deal that Mr. Jackson received. Mr. LaPorte did not want the jury to know that:

- Mr. Jackson was charged with attempted murder out of a incident in which drugs were stolen.
- That Mr. Jackson had kidnapped and attempted to execute the victim in the case with a firearm.
- That Mr. Jackson was arrested with two other co-defendants.
- That Mr. Jackson entered into an agreement with the state in exchange for his testimony against his co-defendants.

10. The state did notice the defense of this deal through supplemental discovery but did not give the full extent of the deal. This is an obligation that the state is bound by law to do. *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir. 1995); *DeMarco v. U.S.*, 928 F.2d 1074 (11th Cir. 1991); *Boss v. Pierce*, 263 F.3d 734 (7th Cir. 2001). The state provided no notice that an actual statement was made and a plea agreement was actually filed relying upon that statement. *U.S. v. Payne*, 63 F.3d 1200 (2nd Cir. 1995). As is clear from the argument made prior to the start of trial, Defense Counsel was unaware of the actual terms of the agreement. (T. 1396-97). Under *Kyles*, Mr. LaPorte had an obligation to investigate the full terms of that deal and to notice the defense fully of those terms.

(Motion to Vacate at 10-12).

Additionally, counsel presented in the Motion to Vacate a detailed materiality analysis. (See Motion to Vacate at 12-14). The trial court erred when it denied the claim without having a hearing on the issue, denying Mr. Pagan the opportunity to present the "material evidence." This Court should reverse the trial court's order and remand the case so an evidentiary hearing may be held on this claim.

ISSUE VI

THE TRIAL COURT ERRED WHEN IT SUMMARILY DENIED MR. PAGAN'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

Originally presented as Claim IV in the Motion to Vacate, the Court in its Order briefly analyzes the issue under Strickland. The court then denies the issue on the basis of fact evidence which counsel would have established through testimony.

In its Order, the trial court states "the Defendant has not shown whether Wanda Jackson's deposition testimony was taken pursuant to Fl.Rule of Crim. P. 3.190(j), (deposition to perpetuate testimony). If her deposition was not taken pursuant to that rule, a discovery deposition would not have been admissible." (Order at 7).

The Motion to Vacate filed on Mr. Pagan's behalf clearly addresses this issue:

> 3. Prior to trial, the State filed a motion in limine to exclude the testimony of Wanda Jackson, much of which was based on the marital privilege contained in 90.504, F.S.
> 4. Important testimony of Wanda Jackson was withheld from the jury concerning the actual knowledge and participation of Mr. Jackson based on the state improperly invoking the marital privilege.
> 5. Generally, a deposition is not admissible evidence. However, if a declarant is unavailable, as defined in 90.804(1)(a), then such depositions may become admissible under 90.804(2)(a).
> 6. In the instant action, when the court declared Ms. Jackson unavailable, defense counsel should have introduced those portions of the deposition that were relevant and useful to Mr. Pagan.

(Motion to Vacate at 16-17)

By summarily denying this claim, the trial court prevented counsel from establishing the very facts the court found to be deficient. This Court should reverse the trial court's order and remand the case so an evidentiary hearing may be held on this claim.

ISSUE VII

THE TRIAL COURT ERRED WHEN IT SUMMARILY DENIED MR. PAGAN'S CONFRONTATION AND PROSECUTORIAL MISCONDUCT CLAIMS.

Originally presented as Claim VI and VII in the Motion to Vacate, the trial court in its Order denied the claim without affording Mr. Pagan the ability to present evidence regarding this claim. In its Order, the court states that the Defendant cannot show where in the record the state 'successfully' invoked the marital privilege at trial. Additionally, the record reveals that the issue was not fully addressed because Wanda Jackson was never offered as a witness." (Order at 10).

In the Motion to Vacate, counsel alleged:

> 2. Keith Jackson's statements to Wanda Jackson concerning this incident were not privileged marital communications. The record was clear that at the time he made these statements, the marriage between the two was defunct.
> 3. At a deposition taken in November of 1993, Wanda Jackson testified that in over three years of marriage, she and Keith Jackson had lived together for only two three-month periods and had not lived together in over two years. (See exhibit D, Deposition of Wanda Jackson November 3, 1993 at 9-10) She stated that she had already

> initiated divorce proceedings against him. (Id. at 7) Furthermore, she testified throughout the course of her deposition that Keith had abused her and that she still feared him. (See, e.g., id. at 16-18).
>
> 4. At Willie Graham's trial, Keith Jackson testified that he filed for divorce in Dade County in July of 1994. (ROA Willie Granham at 154). Although this was well after this incident and after his statements to Wanda, he also testified that Wanda filed for divorce in December of 1992 or January of 1993, contemporary with his statements. (Id. at 154-56) In fact, he thought in February or March of 1993 that he was already divorced. (Id. at 156).

(Motion to Vacate at 23-24).

In addition, counsel plead in the previous claim that the state filed a motion *in limine* to exclude the testimony of Wanda Jackson pursuant to the marital privilege contained in section 90.504, Fla.Stats. (Motion to Vacate at 21). Thus the two stated reasons for the court's denial of the claim are not refuted by the recorded ***but supported by the record***. This Court should reverse the trial court's order and remand the case so an evidentiary hearing may be held on this claim.

ISSUE VIII

THE TRIAL COURT ERRED WHEN IT SUMMARILY DENIED MR. PAGAN'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM REGARDING THE CROSS EXAMINATION OF DETECTIVE PELUSO.

Originally presented as Claim VIII, the trial court erred when it summarily denied the issue. (Order at 10-11). As shown in the Motion to Vacate (26-28), counsel detailed testimonial evidence that contradicted the evidence presented to the jury (attached as "Exhibit E"). This Court should

reverse the trial court's order and remand the case so an evidentiary hearing may be held on this claim.

ISSUE IX

THE TRIAL COURT ERRED WHEN IT SUMMARILY DENIED MR. PAGAN'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM REGARDING THE CROSS EXAMINATION OF KEITH JACKSON.

Originally presented as Claim IX in the Motion to Vacate, the trial court summarily denied this claim. (Order at 11-12). The court in its order explains several deficiencies not required to be plead in a Motion to Vacate. (Order at 11).

Counsel, in the Motion to Vacate, alleged:

> 2. Keith Jackson was an essential witness, a Astar@ witness for the state in the prosecution of both Willie Graham and Alex Pagan.
> 3. Keith Jackson helped the police investigate the case, provided names and addresses to law enforcement, testified before the grand jury that indicted Alex Pagan and testified at both co-defendant's trials.
> 4. On October 13, 1994, Defense Counsel attempted to introduce evidence of the pending charges as impeachment evidence against Mr. Jackson. He also wanted to introduce this evidence as "reverse *Williams Rule* evidence." It was Defense Counsel's theory of defense that Mr. Jackson was indeed one of the perpetrators of the offense.
> 5. Although the defense motion to introduce reverse Williams Rule was previously denied, it was granted just prior to the start of the trial. (T. 1396-97)
> 6. However, during Mr. Jackson's cross, Defense Counsel did not attempt to introduce any of the facts concerning the prior attempted murder in the first degree even though he had leave of the court to do so. Further, Defense Counsel did nothing by way of his cross examination to argue that Keith Jackson committed this offense.

> Rather, Defense Counsel changed his theory of defense to one of showing that law enforcement gave all of the facts to Mr. Jackson. This theory is inconsistent with one which claims that the witness is the actual perpetrator of the crime and would thus have first hand knowledge of the offense.
> 7. Defense Counsel did not cross examine Mr. Jackson about the attack on Mr. Pressely, his prior and admitted drug dealing activities, his relationship with Eric Miller, Anthony Graham, Daryl Featherstone or DeDe Mosley.
> 8. The United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 LED.2d 674 (1984), set forth the standards to be applied by courts in analyzing claims of ineffective assistance of counsel. First, the defendant must show that counsel's performance was deficient. As to the first prong of the Strickland test, "the defendant must show that counsel's representation fell below an objective standard of reasonableness" based on "prevailing professional norms." Strickland, 466 U.S. at 688. Under the second prong of the test, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. The Supreme Court defined "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." In the instant action, defense counsel was deficient in his performance by not effectively cross examining Keith Jackson. This deficient performance prejudiced Mr. Pagan by not sufficiently impeaching the states main witness and by showing that Mr. Jackson had a motive and the ability to commit the instant crime.
> 9. In the instant action, defense counsel was deficient in his performance by not introducing reverse *Williams Rule* evidence. This deficient performance prejudiced Mr. Pagan by not sufficiently impeaching the states main witness and by showing that Mr. Jackson had a motive and the ability to commit the instant crime.

(Motion to Vacate at 29-31).

The trial court erred when it relied upon an unreasonable standard not contained in Fla.R.Crim.P. 3.851 when it summarily denied this claim. This Court should reverse the trial court's order and remand the case so an

evidentiary hearing may be held on this claim.

CONCLUSION

For the aforementioned reasons and argument, counsel requests that relief be granted.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Initial Brief of Appellant was furnished by U.S. Mail, first class postage prepaid, to Leslie T. Campbell, Assistant Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401 and to Alex Pagan, DOC# 668630, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, Florida 32026 on this ____Day of July, 2007.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fl.R.App.P. 9.210, I hereby certify that this brief is prepared in Times New Roman 14 point font and complies with the requirement of Rule 9.210.

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