IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-656

THOMAS WYATT

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR INDIAN RIVER COUNTY, STATE OF FLORIDA

CORRECTED INITIAL BRIEF OF APPELLANT

RACHEL L. DAY
Assistant CCRC
Florida Bar No. 68535

M. CHANCE MEYER
Florida Bar No. 0056362

CAPITAL COLLATERAL REGIONAL
COUNSEL-SOUTH
101 N.E. 3rd Avenue. Suite 400
Fort Lauderdale, FL 33301
(954) 713-1284

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Wyatt's motion for postconviction relief following a remand by this Court for an evidentiary hearing. The motion was brought pursuant to Fla. R. Crim. P. 3.850.

The following symbols will be used to designate references to the record in this appeal: "R" signifies the record on direct appeal to this Court; "PCR" signifies the record on initial 3.850 appeal to this Court; Supp. PCR signifies the Supplemental record on the 3.850 appeal and, "T" signifies the transcripts of the postconviction proceedings. All other citations and references will be self explanatory.[1]

REQUEST FOR ORAL ARGUMENT

Mr. Wyatt 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 is appropriate in this case, given the seriousness of the claims involved and the issues

[1] The supplemental record constitutes two elements. These are the original supplemental record filed after Mr. Wyatt's original motion ot supplement the record in this Court, and the record created during the relinquishment period. The second part is numbered consecutively from the first, so both parts are designated Supp. PCR.

at stake. Mr. Wyatt, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND FACTS

The Circuit Court of the Nineteenth Judicial Circuit, Indian River County, Florida, entered the judgments of conviction and sentence under consideration. An Indian River County grand jury indicted Mr. Wyatt on one count of first degree murder. Mr. Wyatt's trial was held in Indian River County beginning on November 12, 1991. The jury returned a guilty verdict on November 26, 1991 (R. 2058). At the conclusion of the penalty phase on December 5, 1991, the jury recommended a death sentence by a vote of 11-to-1 (R. 2363). On December 20, 1991, the trial court sentenced Mr. Wyatt to death.

On direct appeal, this Court affirmed Mr. Wyatt's conviction and sentence. Wyatt v. State, 641 So. 2d 335 (Fla. 1994) (cert. denied, 514 U.S. 1023 (1995)).

On March 14, 1997, Mr. Wyatt filed a Rule 3.850 motion in order to toll the time requirements of Mr. Wyatt's federal habeas corpus proceedings. After several years of public records litigation but before all records were properly disclosed to Mr. Wyatt, a Preliminary Amended Rule 3.850 Motion was filed on November 29, 1999. Since that time, additional public records were provided to Mr. Wyatt.

Due to a conflict of interest (and subsequent litigation over that conflict), Mr. Wyatt's prior postconviction counsel at CCRC-Northern Region was first replaced by Registry counsel and finally in December of 2002, the case was assigned to CCRC-South.

On March 24, 2006, Mr. Wyatt filed his Amended Motion to Vacate Judgment of Convictions and Sentence. Following a Huff hearing, the lower court granted an evidentiary hearing.[2] The evidentiary hearing took place on August 6 though 9, 2007. Subsequent to the evidentiary hearing, new grounds to support this motion were discovered that did not exist or were unavailable at the time of the evidentiary hearing. A supplement to the Amended Rule 3.850 motion was filed on February 12, 2008. However the lower court entered an order February 21, 2008 in which it declined to treat this amendment as an amendment and designated it as a successive motion instead. (PCR 6141-44). The lower court also stayed the proceedings in the circuit court relating to the Amended Rule 3.850 motion. On February 29, 2008 the lower court denied the Third Amended Rule 3.850 motion. (PCR. 6145-6204). Mr. Wyatt appealed and an the Initial Brief was filed with this Court on March 25th, 2009.

During the pendency of the appeal, on December 10, 2008, counsel received newly discovered evidence, concerning the Federal Bureau of Investigation ("FBI") testimony in Mr. Wyatt's case.

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[2] The hearing was granted on Claim 3 (ineffective assistance of counsel and prosecutorial misconduct), Claim 4 (newly discovered evidence), Claim 5 (Brady), Claim 6 (ineffective assistance of counsel during jury selection), Claim 7 (ineffective assistance of counsel at penalty phase/Ake), Claim 9 (ineffective assistance of counsel for failure to investigate and prepare for penalty phase), and Claim 26 (newly discovered evidence regarding the FBI crime laboratory).

On January 22, 2009, Mr. Wyatt filed a Motion to Relinquish Jurisdiction with this Court. The Motion was predicated upon the FBI's disclosures regarding the false and misleading testimony of the FBI agent John Riley at Mr. Wyatt's trial. On April 7, 2009 this Court issued an order relinquishing jurisdiction to this Court to conduct a hearing on the evidence disclosed by the FBI in addition to the claims in the amended motion filed on February 12, 2008. The hearing was conducted on August 10 and August 17, 2009. On October 22, 2009 the lower court issued an order denying relief on the newly discovered evidence claims.

Following the reversion of jurisdiction to this Court, on November 24th, 2009 Mr. Wyatt filed an unopposed motion to amend the initial brief, because the evidence and argument discussed in the original Initial Brief had been superseded by the evidence adduced during the relinquishment proceedings. On December 9th, 2009, this court granted the motion. This Amended Initial Brief follows.

SUMMARY OF THE ARGUMENTS

Argument I

Mr. Wyatt is entitled to a new trial because of Brady and Giglio violations, newly discovered evidence relating to the State's presentation of false testimony by Patrick McCoombs and unscientific and unreliable Comparative Bullet Lead Analysis ("CBLA") evidence presented at Mr. Wyatt's capital trial.

Argument II

Mr. Wyatt was deprived of effective assistance of counsel because of counsel's failure to conduct an adequate social history investigation and failure to adequately investigate Mr. Wyatt's mental health mitigation.

Argument III

It was error for the lower court to deny certain of Mr. Wyatt's claims without evidentiary hearing.

Argument IV

Fla. R. Crim. P. 3.852 is unconstitutional.

Argument V

Florida's death penalty statute is unconstitutional.

ARGUMENT I

THE LOWER COURT ERRED WHEN IT DENIED GUILT PHASE RELIEF TO MR. WYATT AFTER HIS EVIDENTIARY HEARING FOLLOWING RELINQUISHMENT OF JURISDICITION BY THIS COURT

a. Comparative Bullet Lead Analysis is not accepted science

i. Introduction

FBI Special Agent John Riley, a metals analyst, testified at Mr. Wyatt's trial on behalf of the FBI Crime Laboratory that comparative bullet lead analysis ("CBLA") was used by the FBI to match bullets retrieved from the crime scene to bullets associated with Mr. Wyatt (R. 1446-47). Agent Riley stated, "[i]t's my

opinion that the bullet from the victim and the bullets of the ten cartridges that I examined came from the same box of ammunition" (R. 1447).That testimony, with the full weight and authority of the FBI behind it, indicated to the jury that the bullets at the scene belonged to Mr. Wyatt and that Mr. Wyatt was thus the shooter.

At Mr. Wyatt's first evidentiary hearing in 2007, Mr. Wyatt presented evidence that a study conducted by the National Research Council into the methodology of CBLA, published in 2004, certain news reports, and a September 1, 2005 press release issued by the FBI, undermined the credibility of CBLA. The State challenged that assertion, challenged the credibility and conclusions of Mr. Wyatt's metallurgy expert and the former *de facto* chief metallurgist at the FBI lab, William Tobin, and defended the practice of CBLA.

Subsequent to that hearing, the FBI lab notified the State by letter dated August 7, 2008 that it had reviewed Agent Riley's testimony in Mr. Wyatt's case and that testimony exceeded the scope of the science of CBLA (Def. Ex. 107B Tab 15).

The letter states in pertinent part:

> After reviewing the testimony of the FBI examiner, it is the opinion of the Federal Bureau of Investigation Laboratory that the examiner stated or implied that the evidentiary specimen(s) could be associated to a single

> box of ammunition. This type of testimony exceeds the limits of the science and cannot be supported by the FBI.
>
> Your office is encouraged to consult appellate specialists in your jurisdiction to determine whether you have any discovery obligations with respect to the finding stated above. As directed by the Department of Justice, we are notifying the Chief Judge of the court in which this case was tried of the results of our review by copying him or her on this letter.
>
> Additionally, you should be aware that the FBI is cooperating with the Innocence Project. The Innocence Project is interested in determining whether improper bullet lead analysis testimony was material to the conviction of any defendant, and, if so, to ensure appropriate remedial actions are taken.

(Def. Ex. 107B Tab 15). The letter is newly discovered evidence because it represents the first time the FBI has admitted to providing false testimony in Mr. Wyatt's case and constitutes an utter recantation of expert testimony used to convict Mr. Wyatt. Prior to the issuance of case-specific letters such as this one the FBI had never admitted to providing false CBLA testimony.

At the 2009 evidentiary hearing, Mr. Wyatt offered evidence on this claim to present Mr. Tobin's challenges to CBLA uncompromised by the State's previous challenges to his conclusions and credibility; to establish that prior to the FBI's case-specific letters there has never been an admission on the part of the FBI that CBLA, as it was employed and testified to by the FBI, was unreliable and misleading; to demonstrate that the state of the scientific community at the time of

Mr. Wyatt's trial was such that Mr. Wyatt's defense attorneys could not have discovered through due diligence the unreliability of the science; and to show that there was knowledge on the part of the FBI and the State that Agent Riley's testimony was false and misleading.

ii. Newly discovered evidence

In order to constitute newly discovered evidence, facts being offered as evidence must have been "unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that the defendant or his counsel could not have known them by use of diligence," Jones v. State, 591 So. 2d 911, 915-16 (Fla. 1991) (citing Hallman v. State, 371 So. 2d 482, 485 (Fla. 1979). The standard of review applied once facts have been determined to constitute newly discovered evidence is whether those facts "would **probably** produce an acquittal on retrial" or result in a lesser sentence. *Id*. at 915 (emphasis in original).

The FBI letter in this case constitutes newly discovered evidence because it marks the first time the FBI has recanted its testimony in this case and admitted to providing false CBLA testimony.

In Ates v. State, Case No. 97-CF-945, the First Judicial Circuit in and for Okaloosa County, Florida determined an FBI letter similar to that in the present case to be newly discovered evidence. Notably, the letter in Mr. Ates's case does not go as far as the letter at hand, stating merely that "the jury could have

misunderstood the probative value" of the CBLA testimony of FBI examiner Kathleen Lundy. *Id*. at 3. However, the court granted Mr. Ates a new trial based on the letter. *Id*. at 4.

In the instant cause, the lower court found that the letter did not constitute newly discovered evidence, "because the letter was not in existence at the time of the 1991 trial and is merely a reevaluation of the FBI's understanding of the opinions that can be dawn from CBLA scientific results based on the National Research Council's (NRC) report published on February 10, 2004 (Supp. PCR, 762). Additionally, the lower court found that "the claim is time-barred because it was presented more than a year after the NRC report was published. The lower court's finding is erroneous in both respects.

First of all, it is not the letter itself that constitutes the newly discovered evidence, but the final acknowledgement by the FBI that the science was flawed. The fact that the letter was not in existence at the time of trial is irrelevant. The testimony of Riley was explicit in its insistence that the CBLA testimony was based on solid science. However, as the evidentiary hearing testimony made plain, there was no scientific study and no scientific basis for that assertion. When a witness testifies as an expert "it is his opinion itself, rather than the underlying basis for it, which is the evidence presented." Souter v. Jones, 395 F.3d 577, 592 (6th Cir. 2005). Thus, when an expert changes their opinion after the trial, such as

the FBI recanting its expert testimony in the present case, "the evidence itself has changed, and can most certainly be characterized as new." *Id*.

The extent of the FBI's error in its use of CBLA and its testimony based on CBLA could not have been known to defense attorneys, or anyone outside the FBI, prior to receipt of an FBI letter recanting that testimony. Thus, the date the letter was received is the date upon which the time to file a newly discovered evidence claim began to run. Construing the FBI letter any other way would make it meaningless. If the letter is not newly discovered evidence, the letter has no legal significance and cannot serve as a mechanism by which a defendant wrongly convicted by the FBI's admittedly misleading testimony can attempt to rectify that injustice. The impact of the letter aside, to find it not to be newly discovered evidence would be devastating to potential for Mr. Wyatt, an individual convicted by expert testimony later recanted, to challenge that plainly unjust result.

` The Court's finding that the claim is time barred is also erroneous. The court predicated this finding on the NRC report of 2004. However, as the testimony of both Dr. Spiegelman and Mr. Tobin made clear, the NRC report was prospective in nature only and had absolutely no relevance to any previous CBLA testimony adduced in previous trials. Dr. Spiegelman and Mr. Tobin made clear that prior to the FBI letters, like the August 7, 2008 letter in this case, regardless of what may have been thought or suspected in the scientific community, the FBI,

(which was the only entity practicing CBLA and testifying to it in courts and thus the only entity responsible for defending or supporting its testimony), had never admitted that its CBLA testimony was unreliable.

The information in the NRC report is qualitatively and case specifically different from the 2008 FBI letter. First, as the State admitted that the NRC Report is irrelevant. While arguing a relevancy objection, the State stated correctly that "it doesn't matter what the NRC knew though, because they're not a party to this" (T. 2737). It does not matter what the NRC knew because the NRC did not testify in this case; the NRC did not make representations to the jury about the reliability of CBLA; the NRC did not act as the State's agent and a member of the investigation team in this case and was not therefore responsible for the CBLA conducted in this case. With regards to Mr. Wyatt's current CBLA claim, relying on the letter as newly discovered evidence, only the FBI's representations and knowledge are relevant.

However, even if the NRC Report was relevant, that report did not provide the basis for a claim that the FBI letter provides. Dr. Spiegelman, was a member of the NRC Committee that conducted the 2004 study. He explained that the NRC study was conducted at the behest of the FBI, to ensure CBLA's reliability going forward, to bolster it, to reinforce it, and not to look at anything the FBI did in the past (T. 2725-28).

> Q: And you stated that the purpose of the Committee to was to look for **essentially improving the FBI's methodology**?
>
> A: Yeah. We asked very specific questions, but basically what they would have to do to get it right . . . and if they need to fix something, tell them what they need to fix.

(T2. 2728) (emphasis). Dr. Spiegelman explained that:

> [A]fter the first hour, we just said we're not gonna deal with what happened in the past . . . . [T]here was a general feeling we didn't want to give a get-out-of-jail free to past defendants and we couldn't anyway do everything in the past, so we were just gonna figure out what we had to do to make it right to going forward. You know, it was either right or if it wasn't right, we were gonna figure out how to fix it so that we're gonna deal with the future and let the courts sort of fair out the past.

(T2. 2726). Thus, Dr. Speigelman made clear that the NRC's mandate was not to address the validity of prior results but to ensure the validity of future results. The NRC would not provide a basis on which to challenge past convictions. It was a deliberate and careful decision on the part of the NRC not to make a retrospective inquiry, even when Dr. Spiegelman requested such an inquiry. Dr. Spiegelman wanted to request that the FBI provide its case files so an analysis of the FBI's prior CBLA findings could inform the NRC's inquiry:

> I wanted to write a minority report because the -- and I furnished, it's okay, I furnished an email to you saying -- being told by the staff that I'd better not because if I filed a minority report, FBI would disregard two years of very

> hard work. And that was because the FBI -- we wanted the case records. I wanted, I specifically -- we all wanted. But I -- my colleagues on the Committee got tired of me haranguing them, saying we need the data. The FBI never provided all their case records, which case bullets matched and which ones they didn't match. And what -- you know, we could tell, if we had the data what procedures were used to match in each case, who was the examiners, maybe some examiners got more matches than others, what percentage of the cases that the FBI was given resulted in a match, how does that compare with what percentage of the cases go to firearm tool marks to get a match. It was just -- we weren't given any of that. And I wanted a minority report to say we weren't given the data, but I was told that, that two years of very hard work would go down the drain if I did that, so just cut it out.

(T2. 2733-34). In other words, Dr. Spiegelman wanted very badly to make the type of inquiry that would be relevant to past cases, and the NRC made a conscious decision not to make such an inquiry and instead only to look forward. At the FBI's request, the NRC produced a report that would serve to strengthen and reinforce CBLA. That Report stands in stark contrast to the FBI letter explicitly rejecting CBLA and the specific CBLA testimony in this case.

To the extent the NRC did request certain FBI records to inform its investigation, the FBI refused to provide complete records (T2. 2734-35).

Further indication that the NRC made no commentary or inquiry relevant to past cases was that the Committee members were disappointed by the FBI's discontinuation of CBLA. Dr. Spiegelman testified as follows:

> Q: Was there any blanket recommendation [by the NRC] that the FBI discontinue comparative bullet lead analysis altogether?
>
> A: No. And we didn't want that. We spent a year figuring out what they had to do to do it right, over a year. And, you know, it was bitter sweet when they discontinued it. There's a comment from Ken McFadden who is the Chair of the Committee in the New York Times when they discontinued it. He said, well, they weren't gonna improve it, but it's probably good that they discontinued it. I think we all hope, we worked very hard to say what they should do to fix it. And we were disappointed that they didn't make the effort to fix it.

(T2. 2732-33). These facts make the point clearly that the NRC Report could not have challenged CBLA in the same way that the FBI letter does. The committee members did not even want the practice to be eliminated. How could their commentary be said to reject past CBLA testimony when it was not the subject of their inquiry? How could the FBI letter, which rejects CBLA, be said to have the same effect as the NRC Report, which was written in an attempt to improve, not discontinue, the practice?

Like the NRC Report, the September 1, 2005 FBI press release does not say the same thing as the August 7, 2008 FBI letter. Put simply, the press release announced the discontinuation of the use of CBLA, which is different from rejecting the prior use of it, regardless of whether the press release may have legitimately raised suspicions to that effect. Dr. Spiegelman, who testified about

interacting with the FBI during the NRC Committee proceedings and observing its representations at the time, stated that the FBI continued to stand by the science of CBLA in the press release (T2. 2742) and that the FBI letter in this case is the first time Dr. Spiegelman has witnessed the FBI admit that prior CBLA testimony exceeded the limits of the science (T2. 2743). Dr. Spiegelman stated flatly that prior to seeing the specific letter in this case he was not aware of the FBI ever making an admission of that kind (T2. 2751). Dr. Spiegelman added that "trying to get the FBI to write a letter. It was very difficult to get them to write the letter. Involved in [*sic*] a lot of negotiation" (T2. 2751). Why would it have been difficult to get the FBI to write the letter if they had already essentially renounced CBLA and their prior testimony and admitted CBLA was bad science? Dr. Spiegelman stated that the FBI's admission in this letter is new:

> Q: All right. And I believe your testimony was that this letter was the first time that you have seen a letter with Wyatt, Lovette and Nydegger on it that says that testimony related to a single box of ammunition couldn't be supported by current science?
>
> A: From the FBI, that's correct.
>
> Q: Okay. That concept though is nothing new; correct, that was what the NRC report dealt with in 2003 and 2004, is it not?
>
> A: Well, we were forward looking. I mean, if you ask me am I surprised, the answer is no. But **the fact**

> **that the FBI admitted it is new**. The fact that they came out and -- I mean, the FBI does not -- is not an organization that falls on its sword easily. And **the fact that they did is new**.
>
> Q: Well -- sorry. Go ahead.
>
> A: No. So if you ask the people on the Committee were there serious flaws, yeah, that's absolutely true. And we knew that, but **the FBI was screaming and saying we were just fine**. I mean, they put out a letter when they discontinued the procedure which was after the report, **they said what we did is just fine**.

(T2. 2743-44) (emphasis added). Thus, Dr. Spiegelman makes clear that the FBI defended CBLA to the NRC Committee and to the public at large after the NRC Report, stating emphatically that it had done just fine in its use of CBLA.

As for the release itself, Dr. Spiegelman "thought they were very cagey about how they worded it" (T2. 2746). He described the FBI's statement in the press release as follows:

> . . . they couldn't find evidence to be sure that they were right, but they didn't say they were wrong. So that's – there's something saying, you know, I'm not sure we're right on this to saying we're flat wrong. And the NRC or at least I think everybody on it, referring to boxes of bullets, was just flat wrong. They didn't say that . . . . They just said, you know, we're having trouble justifying this.

(T2. 2746). That critical distinction reveals the insufficiency of the press release to cover the caliber of statement found in the FBI letter. The simple exercise in logic

of distinguishing between saying something is false and saying it cannot be known for sure that it is true must be made here. But beyond that, even if the press release were read to suggest CBLA testimony was unreliable, that general acknowledgment would be far different, as far as the creation of a legal claim, than a case-specific letter, like the one in this case, saying this **particular** testimony, this **particular** incarnation of a general problem of which we are already aware, represents a **realization** of the potential negative results caused by that problem. The press release announced the discontinuation of CBLA. The letter says that the FBI looked at the testimony **in this case** and determined it had to notify the State that it had to recant its testimony. Those two events are worlds apart.

The difference is, in the former case a defendant has to argue that we can imply CBLA was unreliable as used in his case and produced an unjust result, while the defendant in the latter need not make such an inference and can argue, as Mr. Wyatt can, that an actual recantation of expert testimony has been made in his case.

General understandings of CBLA's reliability prior to the FBI letters are not preclusive of newly discovered evidence claims. Put simply, saying the results of a scientific practice cannot be guaranteed to be accurate is vastly different than saying a bad scientific practice was applied in a particular case in such a way that a bad result occurred. It is not the potential of inaccuracy that is the basis of the

claim, but the actualization of that potential in a particular instance. That is a critical fact, because there would otherwise be no distinction between cases in which the FBI has found its CBLA testimony to be inappropriate and those where the FBI has found its CBLA testimony to be appropriate despite general problems with the practice of CBLA.[3]

In light of the overwhelming volume of testimony by Dr. Spiegelman and Mr. Tobin supporting the proposition that the admission in the FBI letter is new, Mr. Tobin's one response, put in context, is clearly not an unqualified and general affirmation that the FBI letter was of the same nature as the NRC Report and the press release. On the contrary, it is clear that a closer look at the testimony shows the FBI letter to be a drastically new position on the part of the FBI, and thus a drastically new development in this case. Mr. Tobin made clear that while the FBI "stopped the practice in September and made a public announcement even on September the 1st, 2005" it was not until "2008 [that] they confirmed with public announcements that the practice -- the science did not support the practice, the conclusions that were being rendered in the courtroom. That the practice was . . .

[3] While Mr. Tobin did state on cross examination that the FBI letter says essentially the same thing as the NRC Report and the press release (T2. 2706), that response was in the context of the State questioning that asked Mr. Tobin merely whether the NRC Report would call into doubt **future** CBLA testimony, not past (T2. 2704 lns. 13-22), and, as to the press release, Mr. Tobin later clarified that the letter represents the first case-specific inquiry by the FBI relevant to the particular testimony in this case (T2. 2708).

misleading and inappropriate for use in criminal trials . . .” (T2. 2679-80). The FBI discontinued the practice in 2005. However, it took the action in 2008 of recanting its CBLA testimony to translate its determinations as to the reliability of CBLA into the legal arena.

Prior to the letters the FBI had never admitted CBLA was unreliable. The FBI had been careful not to go that far, which, of course, is an indication of the intent of the letters. In other words, the whole purpose of the FBI letters is to finally correct the wrongs of the past and enable defendants to raise challenges to the FBI’s CBLA testimony. The letter recommends consulting appellate specialists and the Innocence Project about assistance in taking remedial action (Def. Ex. 107B Tab 15), making clear that newly discovered evidence claims are the intention of the letters. And while the FBI’s intention for the letters is of course not determinative, it is an indication of the FBI’s position prior to the letters. Why notify defendants that CBLA testimony was unreliable if the FBI had already publically admitted it was unreliable? The fact is, the FBI had not made that admission prior to the case-specific letters.

At no time prior to the case-specific letters, including the publication of the NRC Report in 2004, did the FBI cease to vouch for the propriety of its CBLA testimony. The Ates Court found the FBI letter in that case to constitute newly

discovered evidence despite and notwithstanding the publication of the NRC Report or any discrediting of CBLA prior to the FBI letter.

While the State challenged whether Mr. Tobin had added anything new to his prior testimony, it is not the prior evidence in this case to which the FBI letter must add new significance in order to constitute newly-discovered evidence but the evidence put on at trial.[4]

As the FBI letter constitutes newly discovered evidence in this case, the question becomes whether it would probably produce and acquittal or lesser sentence if admitted at retrial. The lower court found that there was no prejudice "because of the overwhelming evidence of Wyatt's guilt" (Supp. PCR, 763). The lower Court erred for the following reasons.

At Mr. Wyatt's evidentiary hearing, Judge Morgan testified that the CBLA evidence was put on in Mr. Wyatt's case because it was relevant to establish his guilt (T2. 2789). Indeed, that testimony, coming in the form of expert testimony from an iconic federal law enforcement agency, was profoundly influential on the jury.

[4] However, the FBI's recantation of its testimony is evidence extraordinarily different in nature than the evidence admitted at the prior evidentiary hearing, which reflected CBLA's discrediting in the scientific community, due largely to the 2004 NRC Report, and **implied** the FBI's recantation of its testimony based on its discontinuation of the CBLA practice.

Agent Riley testified that FBI CBLA analysts were able to give an opinion as to whether they think a certain bullet originated from a certain box of ammunition (R. 2325). Agent Riley testified that FBI CBLA analysts had conducted voluminous research on the composition of various bullets, including hundreds of boxes of ammunition and tens of thousands of bullets from the same boxes of ammunition, from different boxes of ammunition, comparing one manufacturer to another, and bullets made by the same manufacturer on different days and on different months (R. 2325). Agent Riley testified that the bullets found in Mr. Wyatt's custody came from the same box of ammunition as the bullets recovered from the victims, or from another box of ammunition that was manufactured at the same place, on or about the same date (R. 2335). Agent Riley testified that the FBI had a lot of base data in order to reach conclusions from CBLA (R. 2325). Agent Riley testified that his conclusion in this case was that "the bullets from the scene either came from the same box of ammunition as the ten bullets from the cartridges that I examined, or from another box of ammunition that was manufactured at the same place, on or about the same date." (R. 2335).

It is difficult to imagine how that testimony could not factor heavily into the thinking of the jury. While there was other evidence presented in Mr. Wyatt's case, the jury must have given great weight to the apparently unimpeachable word of the FBI. The agency is an awe-inspiring entity. Most lay people have never met an

FBI agent and have formed their impression of the FBI through its common appearance in high-intrigue film and literature. The very identity of the agency clothes such testimony in almost sacrosanct credibility, such that it would have removed all reasonable doubt from the minds of the jurors. The jury may have easily found Mr. McCoombs to be not credible and instead relied on the word of the FBI. The jury very probably found the CBLA evidence to be a sticking point and not continued past it to question the other evidence. The jury very probably found the CBLA evidence relevant to establishing that Mr. Wyatt and not his cohort was the shooter.

In other words, it is the force of the FBI's official influence that raises its testimony, in terms of importance, above that of lay witnesses with questionable motives and other scientific evidence less related to the issue. A juror would be easily seduced by the sophisticated image of the FBI. Agent Riley is likely the only FBI agent they had ever come in contact with, and his expert opinion would thus take on a quality of professional respectability which would inspire confidence in a way other testimony may not. In short, it cannot reasonably be said that expert FBI testimony asserting that the bullet taken from the victim belonged to the defendant was not of critical importance to the jury. Without that testimony, an acquittal would have been probable. Relief is warranted.

iii. <u>Giglio</u>

To establish a Giglio violation, a defendant must show: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material. Ventura v. State, 794 So. 2d 553, 562 (Fla. 2001). Once a defendant shows that a prosecutor knowingly put on false or misleading evidence, the State, as the beneficiary of the constitutional violation, bears the burden of proving the violation was harmless beyond a reasonable doubt. Guzman v. State, 868 So. 2d 498, 506-07 (Fla. 2003) (citing United States v. Bagley, 473 U.S. 667, 680 n.9 (1985)).

Misleading evidence is included within the meaning of false evidence under Giglio. Tejada v. Dugger, 941 F.2d 1551, 1556 (11th Cir. 1991). "Giglio does not require a lie, but is implicated when testimony creates a false impression by conveying 'something other than the truth.' Tassin v. Cain, 482 F. Supp. 2d 764, 773 (E.D. La. 2007). That distinction is not critical here, as Agent Riley's testimony contained categorical falsehoods. However, to the extent that the exact degree of falsity in Agent Riley's testimony is found by the Court to be unascertainable due to the obscurity of the CBLA process, the fact that his testimony was nevertheless misleading implicates Giglio regardless of its technical falsity. In denying this claim the lower court found that "defendant did not show that the 1991 expert testimony was false and that the prosecutor knew it was false,

only that the current science no longer supports the opinions rendered previously"(Supp. PCR, 765).

Agent Riley testified that FBI CBLA analysts were able to give an opinion as to whether they think a certain bullet originated from a certain box of ammunition (R. 2325). The FBI letter rejects that proposition categorically. Agent Riley testified that FBI CBLA analysts had conducted voluminous research on the composition of various bullets, including hundreds of boxes of ammunition and tens of thousands of bullets from the same boxes of ammunition, from different boxes of ammunition, comparing one manufacturer to another, and bullets made by the same manufacturer on different days and on different months (R. 2325). Mr. Tobin and Dr. Spiegelman testified that no such research was conducted. Dr. Spiegelman testified as follows:

> Q: Okay. Was there any comprehensive or meaningful research studies that were presented to NRC to establish the underlying premises of CBLA?
>
> A: No.
>
> Q: Did you find any evidence of scientific method that would be acceptable in the evidence that they presented to you?
>
> A: Well, the 800 bullet study used the scientific method, but it was not meaningful and not comprehensive, so. In little bits and pieces something here or something there that was

> sensible, but not that justified -- not that remotely came to justify the procedure.

(T2. 2741). Mr. Tobin testified as follows:

> Q: Prior to your research had any comprehensive CBLA studies been conducted?
>
> A: Not that we could find. There were no significant comprehensive or meaningful studies into any aspect of comparative bullet lead analysis other than the analytical instrumentation used to generate the data.

(T2. 2656). He further stated "the practice had never been developed by the scientific method . . . . [T]here should have been an assessment for purposes of litigation or criminal evidence in criminal trials, is there any probative value to a declaration of a claimed match" (T2. 2690-91). Agent Riley testified that the bullets found in Mr. Wyatt's custody came from the same box of ammunition as the bullets recovered from the victims, or from another box of ammunition that was manufactured at the same place, on or about the same date (R. 2335). The FBI letter makes clear that that conclusion cannot be supported by the science. Agent Riley testified that the FBI had a lot of base data in order to reach conclusions from CBLA (R. 2325). Mr. Tobin testified that the data was available to the FBI but they did not request it and utilize it (T2. 2675-76). Agent Riley testified that his conclusion in this case was that "the bullets from the scene either came from the same box of ammunition as the ten bullets from the cartridges that I examined, or

from another box of ammunition that was manufactured at the same place, on or about the same date (R. 2335). The FBI recanted that conclusion.

When comparing the credibility of the evidentiary hearing testimony to Agent Riley's, it is unnecessary to look any farther than the fact that CBLA has been discredited as a junk science. In other words, the FBI could not have done the research Agent Riley testified that it did, ensuring the reliability of CBLA results, because CBLA results are not reliable. Agent Riley's representations were necessarily and categorically false.

Contrary to the lower court's finding, Mr. Wyatt has also established that the State knew the testimony was false. That element of the Giglio analysis is met because Agent Riley knew his testimony to be false, and Agent Riley's knowledge is imputed to the State.

Dr. Spiegelman stated that during the NRC study FBI representatives "came in and said [CBLA] wasn't any good" (T2. 2730). "We got the idea that they knew it wasn't any good" (T2. 2730). They "weren't very accurate and they acknowledged they weren't very accurate" (T2. 2731). That evidence suggests the FBI knew of the flaws in CBLA prior to the NRC Committee. Further, the FBI discontinued CBLA in 2005, again suggesting that it knew about the flaws in CBLA prior to disclosing that to state prosecutors, defendants, and the public. Thus, the issue becomes whether its undisclosed knowledge went back to 1991, the

time of Mr. Wyatt's trial. There is evidence that the FBI had knowledge at that time of CBLA's unreliability.

At the evidentiary hearing, Mr. Tobin testified as follows:

> Q: Mr. Tobin, in 1991 would a competent metallurgist have been aware that there were flaws in CBLA?
>
> A: Yes. Not only a competent metallurgist, but a competent statistician, a competent expert in product distribution. And in fact Dr. Vincent P. Guinn, G-U-I-N-N, who is considered the Godfather or the grandfather, the pioneer of CBLA had tried for several decades to advise the FBI that their practice was very seriously flawed.

(T2. 2694). Dr. Guinn provided the FBI with knowledge of the flaws in CBLA. Mr. Tobin testified that a metallurgist would have known of the flaws in CBLA in 1991, and Mr. Tobin testified that the FBI had a metallurgist in the FBI Crime Lab, Kathleen Lundey (T2. 2688). Agent Lundy, who gave CBLA testimony similar to Agent Riley's in other cases, plead guilty to perjury for falsely testifying to certain details of bullet manufacturing in a 1994 Kentucky murder trial. See Haynes v. United States, 451 F. Supp. 2d 713, 719 n.3 (D. Md. 2006) ("Lundy served as an expert witness who used chemical comparisons to link lead bullets to suspects"). Mr. Tobin testified that a metallurgist in 1991 would have been aware of the flaws in CBLA, and Agent Lundy's metallurgical training was part of the FBI Crime Lab's operations, collective expertise and knowledge.

Mr. Tobin testified that statisticians and experts in product distribution would have been aware of the flaws in CBLA in 1991. As the FBI represented through Agent Riley's testimony that it had such knowledge and expertise, based on Agent Riley's testimony that the FBI had conducted research into those areas to ensure CBLA's reliability, the FBI must be charged with that knowledge in for purposes of proceedings. In other words, it would be inconsistent to allow the jury to rely on representations about the extent of the FBI's expertise and later find the FBI not to have, or not to be responsible for having, such knowledge.

An important consideration is that to the extent the NRC requested certain FBI records to inform its investigation, the FBI refused to provide complete records (T2. 2734-35). The implication of that refusal is that the FBI was aware of its past mistakes but unready to disclose them.

Agent Riley's knowledge is imputable to the State. In Giglio, the United States Supreme Court imputed knowledge of one prosecutor to another to find constructive knowledge sufficient to support a constitutional claim. 405 U.S. at 154. The issue here is whether the knowledge of an expert law enforcement officer testifying on behalf of the State is similarly imputable. There are two analyses for making that determination, both of which result in the conclusion that Agent Riley's knowledge is imputable to the State.

First, there are numerous precedents establishing when knowledge may be imputed between two governmental law enforcement entities, in this case the FBI and the State. In Moon v. Head, the Eleventh Circuit stated:

> This court's predecessor, the Fifth Circuit, held that there was no *per se* rule to determine whether information possessed by one government entity should be imputed to another, but rather, required "a case-by-case analysis of the extent of interaction and cooperation between the two governments." United States v. Antone, 603 F.2d 566, 570 (5th Cir. 1979). In Antone, the court found that information possessed by state investigators should be imputed to the federal prosecutor only because "the two governments, state and federal, pooled their investigative energies [to prosecute the defendants]." *Id*. at 569. There, a joint investigative task force composed of FBI agents and state investigators was formed to solve the murder of a state police officer. See *id*. at 568. Joint meetings were held, tasks were divided, and state officers were "important witnesses in the federal prosecution." *Id*. at 569. Thus, the court found that the state investigators essentially "functioned as agents of the federal government under the principles of agency law." *Id*. at 570.

285 F.3d 1301, 1309 (11th Cir. 2002). Prior to Moon, the Middle District of Florida explained in United States v. Diecidue that "the extent to which third party knowledge should be imputed to the Government in a Brady or Giglio context" is determined by a case-by-case treatment, except where there is evidence that the third party should be considered a member of the prosecution team and that third party actually testified in the case, in which case knowledge is imputed. *See* 448 F.

Supp. 1011, 1017 (M.D. Fla. 1978) (citing Schneider v. Estelle, 552 F.2d 593 (5th Cir. 1977); United States v. Rosner, 516 F.2d 269 (2d Cir. 1975); United States v. Trevino, 556 F.2d 1265, 1272 (5th Cir. 1977)). Moon makes clear that a whether an individual is a member of a prosecution team is determined based on the extent to which that individual's organization shared resources or labor with the state and worked together in their investigation and the extent to which the individual acted as an agent of the state or operated autonomously. See Moon, 285 F.3d at 1310.

Here, Agent Riley testified for the State and thus acted as its agent. Agent Riley was also in an agency role when he, at the State's request provided CBLA testing for this case. It can be said that Agent Riley's testing constituted a sharing of resources between the FBI and the State. Agent Riley's labor as an FBI lab technician and his instruments and time in the lab were shared with the State. Thus, Agent Riley is a law enforcement member of the State's investigative and prosecution team dedicated to Mr. Wyatt's case, and his knowledge as to the falsity of his testimony should be imputed to the State.

Additionally there are precedents finding that where there is a law enforcement witness for prosecutor, regardless of whether that witness is employed by a different governmental entity than that of the prosecutor, the witness's cooperation is sufficient to establish the imputability of his knowledge. See, e.g.,

Bell v. Haley, 437 F. Supp. 2d 1278, 1307-08 (M.D. Ala. 2005). On either analysis, Agent Riley's knowledge should be imputed to the State in this case.

Finally, Mr. Wyatt has established prejudice. Under Giglio, false testimony is material if it could in any reasonable likelihood have affected the judgment of the jury. Occhicone v. Crosby, 455 F.3d 1306, 1309 (11th Cir. 2006). The Eleventh Circuit has analogized the Giglio materiality standard to the "harmless beyond a reasonable doubt" standard of Chapman v. California, 386 U.S. 18 (1967), so that "if there is a reasonable doubt about the effect of the false testimony on the jury verdict, then it may be that there is a reasonable likelihood that the false testimony could have affected the verdict." *Id*.

Agent Riley's testimony would certainly have affected the jury's judgment. His representation that the FBI had conducted extensive research into the reliability of CBLA matches would have inspired the jury with confidence in CBLA that, we now know, was unfounded. As discussed in detail above, the jury could easily have decided that, regardless of the doubtfulness of other evidence in this case, they could surely rely on the FBI's forensic expertise to remove any reasonable doubt from their minds. As Dr. Spiegelman stated, it is "too easy to get fooled" when statistical analyses [are] done improperly (T2. 2721). Mr. Wyatt is entitled to a new trial under Giglio.

iv. Brady

To establish a Brady violation, a defendant must prove: (1) the evidence at issue is favorable to the accused, either because it is exculpatory or for impeachment; (2) the evidence was suppressed by the State, either willfully or inadvertently; and (3) prejudice ensued. Cardona v. State, 826 So. 2d 968, 973 (Fla. 2002) (citing Way v. State, 760 So. 2d 903, 910 (Fla. 2000)).

The lower court found that there was no merit to Mr. Wyatt's Brady claim. The Court found that 'even though the substance of the 2004 report and the 2008 letter could be construed favorable to the defendant, the evidence did not exist at the time of the 1991 trial, thus it could not have been suppressed by the State" However the lower court's analysis is not borne out by the evidence.

The fact that the CBLA technique Agent Riley employed and testified to in Mr. Wyatt's trial was unscientific and unsound is favorable to Mr. Wyatt. It was used to give the jury the false impression that bullets associated with Mr. Wyatt were identical to those found at the crime scene. That evidence was inculpatory and false and prejudiced Mr. Wyatt, as discussed in detail above. The State suppressed that evidence, whether willfully or inadvertently. The fact that the FBI had not conducted comprehensive research necessary to ensure the reliability of CBLA results was not disclosed to the defense. Had it been, the defense could either have excluded this unscientific irrelevant and prejudicial testimony pursuant to Frye, or at the very least, impeached Agent Riley. As described above, there is

ample evidence that the FBI, whose knowledge is imputable to the State, was aware of the flaws in CBLA at the time of Mr. Wyatt's trial and long before sending the August 7, 2008 letter to the State regarding Mr. Wyatt's case.

The lower court also found that any such suppression would not have prejudiced Mr. Wyatt due to the "overwhelming evidence of guilt" (Supp PCR at 765). However this is error. As noted above the unique status of the FBI automatically casts a favorable aura about the credibility of one of its agents testifying at trial. The ability of defense counsel to impeach such testimony assumes a correspondingly greater impact. Because the truth of a witness's testimony and a witness's motive for testifying are material questions of fact for the jury, the improper withholding of information regarding a witness's credibility is just as violative of the dictates of Brady as the withholding of information regarding a defendant's innocence. United States v. Bagley, 473 U.S. 667 (1985). Impeachment evidence of an important State witness is material evidence that must be disclosed by the prosecution. See United States v. Arnold, 117 F.3d 1308 (11th Cir. 1997). As a result, Mr. Wyatt was precluded from effectively cross-examining key State witnesses and from effectively presenting a defense. The jury was deprived of relevant evidence with which to evaluate the evidence. Relief is warranted.

v. Ineffective Assistance of Counsel

To the extent that trial counsel failed to challenge Agent Riley's testimony under based on the scientific understanding of bullet lead evidence in existence in 1991, Mr. Wyatt received ineffective assistance of counsel in violation of Strickland v. Washington, 466 U.S. 668 (1984). Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id*. at 685. To the extent defense counsel could have known that junk science was being used against Mr. Wyatt in his capital trial, counsel was ineffective. The lower court did not address this aspect of Mr. Wyatt's argument below.

b. Testimony of Patrick McCoombs

i. Introduction

The state's star witness against Mr. Wyatt was Patrick McCoombs aka David Bauer. McCoombs testified in graphic terms about various alleged conversations he had had with Mr. Wyatt while incarcerated with him. These conversatios included admissions that he was the actual shooter of the victim Kathy Nydegger, and a description of how and why he allegedly killed her.

At the time of his testimony in the instant case, McCoombs was in federal custody. During his direct examination he stated that he had not been promised anything in return for his testimony, by either the State, any law enforcement

agency that he was not promised any kind of leniency at his sentencing and that no promise of early release was ever made to him (R. 1522-24).

What the jury did not know was that this testimony was false and misleading. The jury was left with the impression that it was not possible for McCoombs to derive a benefit from his testimony. However, the evidence presented at both the 2007 and the 2009 evidentiary hearings demonstrates that mere months after the trial, then-prosecutor David Morgan wrote to the US Attorney's Office requesting a sentence reduction for McCoombs. Based upon Mr. Morgan's letter, Mr. McCoombs did in fact receive a sentence reduction of about 20 months[5] (T. 1470). While Mr. Morgan and Mr. McCoombs both denied that there was any deal in exchange for his testimony, their testimony is not credible. The timing is simply too close. McCoombs is a self-confessed manipulator of the system (Defense Exhibit 108 at 15). Former Assistant State Attorney Lawrence Mirman testified that McCoombs is a manipulator and that he repeatedly used "leverage" to try and improve his situation:

> A: . . . He avoided directly answering the question and **he was essentially telling us that he was avoiding directly answering the question**

[5] According to McCoombs, he was back in custody in New Mexico 10 months later (T. 152). Clearly, had Mr. Morgan not sought a sentence reduction for Mr. McCoombs, he would have been incarcerated and would not have been able to commit the armed robbery 10 months after his sentence reduction.

because he wanted to maintain leverage essentially is how he would describe it.

Q: Do you recall if he used that word?

A: No, I don't recall if he used that word in that meeting. He was quite familiar with that word though. He's used it, I want to even say he used it in the original trial of this case. He understood very well the concept of leverage. And I think if you were to ask him, he considered himself an expert on prisoner leverage in many contexts. But he wanted to use it as leverage. The reasons were not completely clear at that time.

I did also remember another thing happening. After -- I read his testimony too, it was provided to me. And he makes reference in his testimony to the federal prosecution against the Arion [sic] Nations, and that there were people who were in the federal prison who were testifying against Arion [sic] Nations. And he wanted to go into some explanation of how he was now going to be involved in it. And I remember telling him, look, you know, I just want to talk to you about this case, you've given me quite enough, you know, to think about in this case. But that was in the context also of inmates testifying. It's other witnesses and leverages and so forth. He intimated, as I previously testified, he intimated that he was truthful in the original trial. But he, there again, **he didn't want to fully say, fully answer that question nor did he want to say what he would say if he was called as a witness, which was a really, you know, as an attorney, you know, what would you say if you were called as witness. He didn't want to directly say that because he still felt like he needed to use whatever he wanted to use as leverage**.

(T. 2637-39) (emphasis added). McCoombs was in custody for the vast majority of his adult life. It is simply out of character for him to do anything for anyone else without some payback. And while a smoking gun document indicating a clandestine deal between the State and McCoombs has not been uncovered, this should be of no surprise since reducing such a deal to paper would not be beneficial to the State.

ii. Brady

Mr. Morgan allowed the jury to believe that McCoombs's federal sentence was fixed and there was nothing anyone could do about it. This impression was clearly false. Mr. Morgan either knew or had constructive knowledge that this representation was false before giving the misleading information to the jury. He either was, or should have been aware of Rule 35 of the Federal Rules of Criminal Procedure at the time of trial. He certainly became aware of it within a very short time of Mr. Wyatt's trial, because he acted on it and wrote to the Assistant US Attorney involved. However, the jury certainly would not have thought this was possible based on McCoombs's testimony.

Furthermore, events that occurred after Mr. Morgan wrote to the US Attorney suggest some form of *quid pro quo* at play. Ever since his sentence reduction, through his subsequent incarceration and even after his subsequent

release from prison, McCoombs has acted on the assumption that the State owes him. The State in return has responded as if they do indeed owe him. That apparently includes a continued relationship with trial prosecutor, Morgan, even though Mr. Morgan no longer works at the State Attorney's Office. McCoombs testified that he still communicates with Judge Morgan by calling his chambers. He testified that:

> I'll call and say "Hi" to Judge Morgan. You know, let him know how good I'm doing.
>
> He tried his hardest to help me get into the program and get into a rehabilitiation program. You know, he was genuinely interested in the circumstances of my life, and me keeping my life, getting my life together.

(Def. Ex. 108 at 26). McCoombs's testimony as to his continuing contacts with Judge Morgan was backed up by Judge Morgan's testimony (T. 2788). The tone of McCoombs's testimony suggests strongly that he still expects some kind of favor from Judge Morgan. As he testified, "I'll call five or six times, and then 'Yes? What would you like?'" (Def. Exhibit 108 at 27). The apparently cozy relationship that McCoombs continues to have with Judge Morgan also continues with the State. While undersigned counsel sought to have an out of state subpoena served on McCoombs at his residence in Albuquerque, the State, apparently solicitous of Mccoombs's schedule, sought to have him testify by deposition in Albuquerque, rather than travelling to Florida for live testimony.

> They took into consideration the fact that I've been free for a year. I'm involved in a self initiated rehabilitation program. And I think they took into consideration the fact that I'm doing really well with it and they didn't want to interrupt it.

(Def. Ex. 108 at 30). However, McCoombs's attitude towards the State is in marked contrast to his hostility to counsel for Mr. Wyatt. During the deposition he went so far as to threaten Mr. Wyatt's team with a "very big dog" named Thor, after the Nordic god (Def. Ex. 108 at 27). The continuing nature of McCoombs's relationship with the state players in Mr. Wyatt's trial and postconviction proceedings is itself evidence of his lack of credibility. The requirements to establish a Brady violation are set forth in Argument 1a *supra*.

The evidence of Mr. Morgan's intercession with the federal authorities on behalf of McCoombs clearly was favorable to Mr. Wyatt as it constituted impeachment evidence. This evidence is material to the defense and therefore the State's failure to disclose this evidence prejudiced the defense. In Cardona, this Court held:

> For Brady purposes, "the defendant must establish that the defense was prejudiced by the State's suppression of evidence, in other words, that the evidence was material." See Way, 760 So. 2d at 912-13. As we explained in Way, "[a] showing of materiality 'does not require demonstration by a preponderance that disclosure of the suppressed evidence would have ultimately resulted in the defendant's acquittal.'" 760 So. 2d at 913 (quoting Kyles v. Whitley, 514 U.S. 419, 434, 131 L. Ed. 2d 490,

> 115 S. Ct. 1555 (1995)). Rather, as the United States Supreme Court has explained:
>
> The materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is 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."

Cardona, 826 So. 2d at 973-74. Materiality is established and reversal is required once the reviewing court concludes that there exists "a reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 680 (1985). To determine materiality, undisclosed evidence must be considered "collectively, not item-by-item." Kyles v. Whitley, 514 U.S. 419, 436 (1995). Such evidence must be disclosed regardless of a request by the defense, and the State has a duty to evaluate the point at which the evidence collectively reaches the level of materiality. Bagley, 473 U.S. at 682. It is not the defendant's burden to show the nondisclosure "[m]ore likely than not altered the outcome in the case." Strickland v. Washington, 466 U.S. 558, 693 (1984). The Supreme Court specifically rejected such a standard in favor of a showing of a reasonable probability. A reasonable probability is one that undermines confidence in the outcome. Such a probability undeniably exists here. Had trial counsel gained possession of this material, he

would have been able to cast reasonable doubt on the State's theory and impeach the State's witnesses. The outcome of Mr. Wyatt's capital trial would have been different. Because the truth of a witness's testimony and a witness's motive for testifying are material questions of fact for the jury, the improper withholding of information regarding a witness's credibility is just as violative of the dictates of Brady as the withholding of information regarding a defendant's innocence. Bagley, 473 U.S. at 667. Impeachment evidence of an important State witness is material evidence that must be disclosed by the prosecution. See United States v. Arnold, 117 F. 3d 1308 (11th Cir. 1997). As a result of the State's misconduct in this case, Mr. Wyatt was precluded from effectively cross-examining key state witnesses and from effectively presenting a defense.

The testimony of Judge Morgan shows that the testimony of McCoombs was "important" in obtaining both the conviction and death sentence for Mr. Wyatt:

> What Mr. McCoombs did for us is kind of corroborate all that and put Mr. Wyatt's words in front of the jury as to his description of what he had done.
>
> ***
>
> . . . what he did is, we were able to put in front of the jury Mr. Wyatt's words, what he said about it.
>
> Q: And why was that important?
>
> A: It's always important if you have the defendant's words. It's important if they say it to a policeman,

> but I would think it's equally, if not more important if they say it extemporaneously to somebody else. In other words, a policeman you always have the idea that was Miranda read, was blah, blah, blah, but with someone else you're simply stating what happened.
>
> ***
>
> McCoombs became important to me because he was a good piece of evidence.
>
> ***
>
> Q: Do you feel it was important in securing the death sentence in this case?
>
> A: Sure.
>
> Q: And is that in both cases, the Domino's case and the Nydegger case?
>
> A: I think he was important all the way around, conviction and sentence.

(T. 2780-82). This description of Mccoombs's testimony as important is backed up by the content of the letter that he wrote to the US Attorney asking for a sentence reduction in McCoombs's federal sentence. As David Morgan testified, McCoombs's testimony was crucial in obtaining a conviction and death sentence. David Morgan's own words in his letter to Assistant US Attorney Matthew Howley (Def. Ex. 53) show this:

> In the first trial, Mr. McCoombs' testimony was **extremely important** and the Judge relied on portions of

> his testimony in his Sentencing Order. In the second trial, Mr. McCoombs testimony was **absolutely essential** to Wyatt's conviction and sentence and, again, the Judge relied on portions of his testimony in his Sentencing Order.[6]

Similarly, the trial judge's Sentencing Order shows how important McCoombs's testimony was to the establishment of aggravating factors. Clearly, numerous aggravating circumstances could not have been proven beyond a reasonable doubt without accepting McCoombs's testimony as true. Based on David Morgan's own words, as well as the Sentencing Order, it is clear that Mr. Wyatt would not have been convicted had McCoombs's testimony been sufficiently impeached. The importance of McCoombs's testimony is further shown by the extraordinary lengths the State Attorney's Office took in indulging McCoombs with phone calls, letters, and an in-person visit. As demonstrated during Mr. Mirman's testimony, more than 10 years after Mr. Wyatt's trial, and despite the fact that McCoombs was released due significantly to the effort of the State Attorney's Office, and committed another armed robbery, the State Attorney's Office still bizarrely

[6] As Morgan testified at the 2007 evidentiary hearing, "There is no doubt in my mind that PM's graphic emotional and critical testimony in two different trials as he recounted Wyatt's statements is the principal reason why Wyatt received four death sentences, and Lovette received three death sentences. His testimony established the details of the crime, destroyed any insanity/mental health defense, and established several statutory aggravating factors necessary to obtain the death penalty." (T. 1670).

responded to McCoombs's myriad of letters, rants, and complaints. In fact, the taxpayers of Florida improperly had to pay for then-prosecutor Mr. Mirman, a State investigator, and the State Attorney himself, Mr. Colton, to fly across the country to speak with McCoombs in person.[7] By virtue of their expensive and astonishing actions, the State Attorney's Office certainly knows just how crucial McCoombs's testimony is to preserving Mr. Wyatt's convictions and sentences.

iii. Giglio

Additionally, the State may not allow its witnesses to testify falsely, nor knowingly allow false testimony against the defendant to go uncorrected. Giglio v. United States, 405 U.S. 150 (1972). The rrequirements to obtain relief under giglio are set forth in Argument Ia *supra*. Under Giglio, once the defendant established that the prosecutor knowingly presented false testimony at trial, the State bears the burden to show the false evidence was not material. The lack of a smoking gun document indicating a deal with McCoombs is not the end of this Court's inquiry of whether Brady was violated; based upon the totality of information presented, common sense dictates that McCoombs testified in exchange for support from the State, and the evidence proves the State provided the assistance.

[7] The expense of flying three adults from Florida to Colorado, including per diem expenses, airfare, hotel, rental car, etc. is certainly significant.

iv. Newly discovered evidence

Additionally, and in the alternative, newly discovered evidence shows that Mr. Wyatt would probably be acquitted on retrial given the newly discovered evidence of McCoombs's lies.

In order to constitute newly discovered evidence, facts being offered as evidence must have been "unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that the defendant or his counsel could not have known them by use of diligence." Jones v. State, 591 So. 2d 911, 915-16 (Fla. 1991).

> In considering the second prong, the trial court should initially consider whether the evidence would have been admissible at trial or whether there would have been any evidentiary bars to its admissibility. See Johnson v. Singletary, 647 So. 2d 106, 110-11 (Fla. 1994). Once this is determined, an evaluation of the weight to be accorded the evidence includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence. See Williamson v. Dugger, 651 So. 2d 84, 89 (Fla. 1994). The trial court should also determine whether the evidence is cumulative to other evidence in the case. See State v. Spaziano, 692 So. 2d 174, 177 (Fla. 1997); Williamson, 651 So. 2d at 89. The trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence.

Jones v. State, 709 So. 2d 512, 521 (Fla. 1998). The Court has held further that "impeachment evidence could be part of this cumulative analysis, as the Court

stated in Jones I, Jones II, and Williamson v. Dugger, 651 So. 2d 84, 89 (Fla. 1994)." Robinson v.State, 770 So. 2d 1167, 1168-71 (Fla. 2000).

The evidence presented at the evidentiary hearings fulfills the requirements of part one of the Jones two-part test. The evidence could not have been discovered through due diligence and would be admissible at re-trial, even if only for impeachment. Specifically, all of McCoombs's statements, letters,[8] affidavit, threats, recantations, and court testimony would be admissible at re-trial for purposes of impeachment, challenging his credibility, demonstrating bias, and as prior inconsistent statements.[9]

Furthermore, the perpetuated testimony of witnesses Scott Rollins and Dennis Morrison is also newly discovered evidence of impeachment in the form of a prior inconsistent statement. Both Mr. Morrison and Mr. Rollins testified that Mr. McCoombs had been housed with them at the ADX federal prison in Florence Colorado and had spent considerable time with him. They both testified that he bragged how he lied at Mr. Wyatt's trials and explained how the State fed him the information that he based his testimony on at Mr. Wyatt's trials.

[8] While not every letter or statement was admitted into evidence, Mr. Bauer did authenticate every letter and written statement that he was shown as purportedly written by him. Thus, authentication of his written statements is not at issue.

[9] The first part of the Jones two-part test does not reflect the merits of the evidence, only that it could not have been discovered through due diligence. The merit, credibility, and weight of the evidence should be considered in part two of the test.

Scott Rollins testified in his February 2007 perpetuated testimony that McCoombs had told him that he (McCoombs) "was a witness in Mr. Wyatt's case and that they gave him a time reduction and they moved him into the Witness Protection Program after he testified" (Rollins Depo. at 12). Mr. Rollins further testified that McCoombs "said that he didn't think that Wyatt did it, that he testified falsely and that the police talked him into testifying falsely because of the benefits he could get from it" (Rollins Depo. at 13). Mr. Rollins said that Mccoombs was specific in his recollection of what the police had told him to testify about (Rollins Depo. at 21). "They found the gun, that they wanted to place Wyatt with the gun. I don't know if this has any -- and they tried to get the information. They tried to get Bauer -- David Bauer to get the information form Wyatt. Wyatt knew nothing about it. Then they came back and said, well, if you can't get the information from him, just say you got it from him" (Rollins Depo. at 30).

Dennis Morrison also testified that he had spent time with McCoombs in the ADX facility and that McCoombs had said that "he didn't have no conversation [with] Mr. Wyatt, or at least not the conversation with regard to an incriminating statement that Mr. Wyatt supposedly made. He never made it and he readily admitted that" (Morrison Depo. at 14). Mr. Morrison testified that McCoombs had further admitted that he had gotten the information about Mr. Wyatt, not from Mr.

Wyatt but from "investigators, police or detectives, something" (Morrison Depo. at 15). Mr. Morrison detailed the way in which McCoombs described how the detectives told him to testify:

> The gist if what they wanted from Mr. Wyatt was about a gun, and they were interested in where the gun was at and they -– when I say they, this is like the detective he was cooperating with.
>
> They already knew where the gun was at and already had or had access to it, or at least knew where it was at, but they wanted — they needed for Mr. Wyatt to say where it was or they wanted Dave to actually say that he had told Dave where it was, so, they actually arranged for Dave to be next to Mr. Wyatt in some sort of jail somewhere, and at some point, it was like fixed.
>
> When Dave came out of that situation, he was to tell the detectives well he told me the gun was there, but in reality, he didn't. They already had the gun and they told him to say it.

(Morrison Depo. at 17).

Additionally, Mr. Wyatt presented the affidavit of Emilio Bravo which he executed in the ADX facility in Florence, Colorado in July 2009. The affidavit reads as follows:

> I, Emilio Bravo, having been duly sworn or affirmed, do hereby depose and say:
>
> 1. My name is Emilio Bravo. I am 55 years old. I was born in Cuba. I was held as a political prisoner in Cuba. I came to the United States in 1979. I resided in Miami.

2. I've been incarcerated since 1994. In 2002, I was transferred to USP Florence AdMax. Initially, I was housed in D Unit. I was subsequently transferred to J Unit. Following an incident at J Unit, I was returned to D Unit in 2004.

3. In 2002, while on D Unit I encountered a man I knew as David Bauer. After being moved to J Unit and returned to D Unit, I became close friends with David Bauer, who I learned also went by the name of Patrick McCoombs. I found him to be likeable. I thought he was cunning and intelligent. David Bauer confided in me. Bauer has been in custody much of his life and is a professional informant.

4. David Bauer told me he'd once been in jail with an individual called Tommy Wyatt and his codefendant Michael Lovette. David Bauer testified against Tommy Wyatt at his two trials in Florida. David Bauer told me Tommy Wyatt got a death penalty in both trials.

5. David Bauer told me that he testified falsely against Tommy Wyatt. David Bauer testified that Tommy Wyatt shot three people in a pizzeria. However, David Bauer told me that Michael Lovette told David Bauer that Tommy Wyatt was passed out from drugs and alcohol in a car outside the pizzeria, never entered the pizzeria, and did not know about the killings until his indictment. David Bauer told me that Lovette said he committed the crimes.

6. David Bauer told me he was given information and coached by the Florida State Attorney's Office, shown crime scene photos and documents, and told how to testify.

7. David Bauer told me he received benefits from the State for his testimony. To receive those benefits, the prosecutor required him to change his story to say that

> Tommy Wyatt was the shooter. The State helped put him in the witness security program. David Bauer told me the State Attorney gave him money through his wit-sec account.
>
> 8. I contacted Tommy Wyatt's lawyer about what David Bauer told me and an investigator came to see me. I told the investigator what David Bauer told me.
>
> 9. After that, I was told by the administration here not to help with Tommy Wyatt's defense. Two SIS officers visited my cell and told me that I had a big mouth and needed to mind my own business. I asked them what they were talking about and they said I'd been meeting with people and writing letters and that I knew what they were talking about. I was transferred to J Unit even though there was a separation required between me and members of the Aryan Brotherhood housed in J Unit. They housed me next to a member of the AB, who was allowed to attack me with an ice pick. I have scars from the attack. I nearly lost my vision.
>
> 10. I am now afraid of further retaliation in this hostile environment from the administration.
>
> 11. I was asked to give a deposition here. I informed Tommy Wyatt's lawyers that I refuse to testify here because an official of the prison will be present and I fear for my life. I told the prosecutor Ryan Butler that when he visited me a few weeks ago.
>
> 12. I do not expect to ever be released from prison or to gain anything from my statement.
>
> **Further Affiant sayeth not.**

The Court should consider this affidavit as newly discovered evidence of further impeachment of McCoomb's trial testimony. Mr. Bravo, an inmate in federal

custody, was scheduled to be deposed to perpetuate his testimony in this case. The reason he would not give the deposition was his expressed concern that he was being coerced by federal prison authorities not to cooperate in the Wyatt case and that he feared for his safety.

The lower court found that Mr. Bravo's affidavit was not admissible. This was error. The case of Williamson v. Dugger, 961 So. 2d 229 (Fla. 1994) is directly on point in this situation. In Williamson, the trial court denied an evidentiary hearing based on an affidavit of another inmate, Sanchez-Velasco, who declined to participate in a deposition to perpetuate his testimony, precisely like Bravo has done in this case. The Williamson trial court found the affidavit to be inadmissible hearsay, but this Court was clear that the affidavit could be used to impeach even if inadmissible as substantive evidence, and could have been admitted and considered for that purpose. Thus the Court may consider the affidavit of Emilio Bravo in its cumulative analysis of the claim regarding McCoombs's trial testimony.

The evidence presented also meets the second prong of Jones. Numerous diametrically inconsistent statements of McCoombs were presented that destroyed his credibility. Furthermore, it appears plain on the record that McCoombs perjured himself at the evidentiary hearing and at the subsequent deposition to perpetuate testimony. Mr. Wyatt has proven that McCoombs is a liar, a manipulator, and a

life-long felon and con-man. At a re-trial, assuming McCoombs testified to the same effect as he did at Mr. Wyatt's trial, he would be impeached with all of the newly discovered evidence presented at the hearing. Specifically, McCoombs recanted his trial testimony and wrote that it was significantly untruthful. McCoombs then went on to lie to the lower court by giving contradictory and utterly nonsensical reasons for why he wrote his recantation letter:

> Q: So your testimony was that Scott Rollins, Dennis Morrison, maybe some others, told –
>
> A: Cliff Young.
>
> Q: -- Cliff Young that you had told them that you had lied in Mr. Wyatt's trial?
>
> A: That's exactly what led up to this, and that's what -- Young came to me. Really, what led to me writing the first -- the letter that said that I had been significantly untruthful, Cliff Young came up to me and said, you have to stop talking about this case. I'm like what are you talking about? I had no idea what he was talking about. And he said, well, people are saying that you had been significantly untruthful. He made that statement. That's where the phrase came from. He made the statement that people are saying that you were significantly untruthful in your testimony, and if I keep hearing this, I'm going to move you back to D Unit. And I got mad. I said, well, if I'm going to be moved back to D Unit, you're gonna -- well, if I'm going to be moved back for something like this, these people are saying, then here. And I can't recall the exact conversation or the exact moment, but I sat and I wrote it to him. I said, well, if I'm gonna -- if I'm gonna be accused of being

significantly untruthful, then you're going to be the one that I tell.

Why would I be telling them? I would have told Florida, or if I was making the statement that I was significantly untruthful, or untruthful in any extent, then I would have told the State of Florida. This is what I was trying to put across to Cliff Young.

Q: You did not want the State of Florida to know that you were significantly untruthful?

A: I never was signif -- I wasn't untruthful at all in my testimony. Why would I tell Florida that I was untruthful in my testimony? I wasn't.

Q: Okay, so you're getting to why you told this eventually to Mr. Watson.

A: This is what I knew about Mr. Watson. Other inmates had manipulated Watson and Cliff Young by insinuating that they would drag him to Court. That they would get him subpoenaed, and that he would have to go testify for a variety of things, you know, you didn't treat me well, or you didn't do this, or you were involved in, or you heard him say this. The manipulation is beyond explanation. My intent was to -- I wrote down I have been significantly untruthful in my testimony, blah, blah, blah, and I handed it to him. My understanding was based on what I had seen him do in the past, was that he would tear this up and throw it away. There's no way that I expected Cliff Young to send this to Central Office or send this to the State of Florida. There was no intent on my part that this was to reach the State of Florida. All right.

This letter right here was meant -- again, I was still mad because I had been sent back to D Unit. You can see my address. You can see the address here where it says,

> right after my number it says D-05-102. That's my cell number, that's back in D Unit.

(T. 1495-97). When confronted with questions about why his explanation did not make sense, specifically that he thought Cliff Young would tear up the letter and that it was not a serious recantation, McCoombs lied to the court by claiming that, prior to this letter, he never threatened to recant his testimony:[10]

> Q: Mr. Bauer, would it be fair to say that prior to this letter, which is dated December 23rd, 2002, did you ever have contact with officials in the State of Florida where you threatened to recant your testimony?
>
> A: Never. Not that I can recall, no.

(T. 1499). After being cross-examined further on this "reason" why he recanted his trial testimony, McCoombs struggled to maintain a coherent explanation when this Court asked him again why he wrote the recantation letter:

> Q. I'm unclear. Why did you write the letter? I mean, I know you got aggravated, but I'm not sure of the sequence of events.
>
> A. I thought that it would stop Cliff Young from removing me from J Unit. He would automatically think, well, if I do this, then I'm going to end up being subpoenaed to testify. I handed it to him. You know, if they're gonna remove me because these people are saying that I lied, well, then, you go say I lied. And that had been a technique that had been used, a practice that had been

[10] This statement is also contradicted by other evidence presented at the evidentiary hearing, specifically, letters to Mr. Mirman as well as Jeb Bush where he threatened to recant his testimony (Def. Exs. 15, 16, 22).

used by these other inmates successfully. Not the same tactic, but basically the same tactic.

(T. 1501). After denying that he told Scott Rollins and Dennis Morrison that his testimony was untruthful at Mr. Wyatt's trial, and feigning utter dismay that anyone would think such a thing, McCoombs readily admits that at the very same time period, he was threatening to get Mr. Wyatt off of death row to others as well:

Q: Well, here you say "enclosed affidavit"; is that what you're referring to? Okay, have you seen the second paragraph on page 1 starting with, "My conversation with Miss Curran"?

A: Uh-huh.

Q: Do you see where you say, "was lengthy at times"? Was lengthy at times. And at one point I told her that I was not -- if I was not readmitted to WIT/SEC PCU I would get Wyatt off of death row." Did you write those words?

A: Yeah, sure.

Q: So you did tell Miss Curran that if she didn't get you into PCU that you were gonna get Wyatt off of death row?

A: Yes, I did, but again you want to put that into context. You have to talk to Ginger Curran. But Ginger Curran and I had a pretty good relationship. She made it clear to me that the first time I had a problem -- she made it clear to me the first time I had a problem that -- well, just, let me make this statement here. She said that if I ever -- if I ever have a problem, that it -- whatever problem I had, it would stay between her and I, myself and the Office of Enforcement Operations. That they -- that she would never relay documents from me, letters from me, or anything that I intimated to her to the government or to

the State of Florida. This is at one time because I probably made the statement to her I'm tired of this, whatever, through frustration, and she -- I, I called her back and I said, you know, I probably said some things I shouldn't have said and things I didn't mean to say. And she said, well, don't worry about it, I mean, you know, I understand your frustration and I'm not going to relay that information. If you want to relay that, if you want to make those statements to the State of Florida, then you can make those statements to the State of Florida. And from that point on, I could basically say whatever I wanted -- whatever I wanted to her.

Q: Did you tell Miss Curran that if she doesn't get you in WIT/SEC, you were going to get Thomas Wyatt off of death row before or after that whole incident with writing that letter to Randy Watson?

A: Oh, I don't recall.

Q: So throughout that period you were -- would it be fair to say you were using the recantation threat to get Mr. Wyatt off death row to get into WIT/SEC PCU?

A: Oh, sure. Absolutely. I would have -- I would have –

Q: Did you tell anyone else that?

A: Just Ginger Curran or Bruce Colton. Again -- again, in order to understand -- in order to understand why these statements were made and why these things were written, there's a lot of things that were going on that you're not seeing. But if you just wanted me to admit that I wrote this letter and that I made these statements, then, why, certainly, I wrote this letter and I made those statements.

(T. 1503-1505). The lies surrounding McCoombs's recantation letter finally came to a head at the 2007 evidentiary hearing when McCoombs perjured himself by

denying that he wrote the recantation letter in order to manipulate the State of Florida into helping him alleviate the perceived injustices he suffered. At the very same time period he was asking the State Attorney's Office for assistance with veiled threats of recantation, he was writing to Governor Jeb Bush asking for assistance with veiled threats of recantation:

> Q: If I understand your testimony correctly is that that letter you're referring to that you wrote to Randy Watson, you never thought that would reach Mr. Colton and Mr. Mirman?
>
> A: Exactly. That's the truth. I've always known their address, I've always known their phone number, if I wanted to threaten them or if I wanted to extort them, I could have easily called them. The number's 465-3000.
>
> Q: Whose number is that?
>
> A: That's the State Attorney's Office. If I wanted to write to them, I could write to them and I could tell them, do this or I'm going to recant my testimony. It was never my intent to recant my testimony. It was never my intent to insinuate to them that I lied. Whatever I said to the government based on the situation that I was in, government custody, you can make whatever assumptions you want from that. The truth is, it was probably based -- it was probably based on frustration and aggravation and me trying to improve my situation with them.
>
> Q: Mr. Bauer, you mentioned this affidavit attached to this letter. Can you turn to that page, that affidavit.
>
> A: (Complies.)

Q: Did you author this affidavit?

A: Yes, I did.

Q: Would you look at the last page of the affidavit, there's a declaration under penalty of perjury, and then it seems like you got a notary public at the prison to notarize this; is that correct?

A: Yeah.

Q: And it's true you started off the affidavit by saying that, "I, David Bauer a/k/a Patrick David McCoombs, do hereby declare that any and all statements I have made or spoken to the effect that I was in any way untruthful in my statements and testimony of the case of Thomas Wyatt were made falsely. My motivation in making these statements was to incite the attention of the State authorities regarding certain perceived injustices."

A: That was just a misprint -- misprint – I mean, that was just a misstatement on my part. It should have been government authorities. State authorities don't have anything to do with my custody.

Q: Were you writing letters at that time to state authorities asking them to help you?

A: Well, not -- not in a manner. I don't even remember writing as much to the State as -- not in a manner where I was threatening them. Certainly not in a manner of threatening because I was quite aware of the fact that anything I wrote to them would be going, you know, to you.

Q: Let me understand what you're saying. You do write here that you will try to incite the attention of State authorities?

> A: And I'm telling you that that was a misstatement. It was supposed to be government authorities. I should have wrote government authorities.
>
> Q: Okay. And on the next page on the third paragraph, is it not true that you write, "The conditions, restrictions and deprivations relative to long term segregation for protective custody culminated in an attempt to manipulate State authorities to support efforts to alleviate what I perceived was unfair and inhuman treatment as a direct result of my decision to voluntarily provide assistance to the prosecution of Thomas Wyatt"; is that a mistake also?
>
> A: Just a mistake where I said State.
>
> Q: Just where you wrote State authorities?
>
> A: I've never notified the State and never spoken to the State about it, so –
>
> Q: And you never wrote any letters to them asking them for assistance, yet you got it from them?
>
> A: I've never written any letters to them making statements to the effect that I was untruthful in my testimony.

(T. 1507-11). It is apparent that McCoombs perjured himself at the 2007 evidentiary hearing regarding his sworn and notarized affidavit (Ex. 35). First, it is beyond any doubt that McCoombs was attempting to manipulate state authorities, not federal government authorities. This is true because, as seen in his letters leading up to his December 23, 2002 recantation letter, he was attempting to manipulate state authorities in an attempt to alleviate the perceived injustices of

which he complained. He wrote to Jeb Bush (Def. Ex. 22, May 29, 2001 letter to Governor Jeb Bush) requesting assistance with veiled and subtle threats to recant his testimony if the Governor did not help him, and he also wrote a similar threatening letter (Ex. 21) to Mr. Mirman demanding assistance to alleviate these perceived injustices or else:

> Q: Would it be fair to say that, as you discussed your testimony with Mr. Butler, that you had requested certain FOIA documents and they were sent to you; is that correct?
>
> A: Yes, that's correct.
>
> Q: And isn't it true on page 5 of this document you tell Mr. Mirman, "Why have I never threatened to recant? Why in moments of despair, in filthy cells in USB Atlanta, in the heart of Outlaw territory did I not out of desperation switch sides? **Please, Mr. Mirman, do not underestimate my intelligence nor my education by allowing yourself to believe that a box of documents and letters could summarily eliminate the possibility.**" Are those your words?
>
> A: Sure, I wrote them.
>
> Q: And is that not a threat to Mr. Mirman that if he doesn't help you, you're going to recant?
>
> A: Like I said, I've made over the years – that's – that's – that's a -- an illusion. I mean, that's not even a real threat. I've made real threats. Obviously, you're reading and the Court has looked at them. I've written these statements, I've made these statements during times of duress. I'm telling you that I've made these statements when the conditions of my incarceration were such that I

> would try to apply whatever leverage and try to say whatever the hell I had to say in order to relieve those conditions. I know that you want me to say that at some point in time I was going to recant and that there was a purpose behind the threats, that there was something to recant, but it's just not true.

(T. 1632-1634) (emphasis added). Thus, when McCoombs said he meant to say he was trying to incite government authorities instead of state authorities, his assertion is belied by his own record of attempts to blackmail the State. It is true that McCoombs testified that "[t]hat was just a misprint -- misprint – I mean, that was just a misstatement on my part. It should have been government authorities. State authorities don't have anything to do with my custody." However this is clearly untrue, because during the same time period, he was explicitly attempting to manipulate the State. McCoombs's own testimony earlier at the evidentiary hearing is inconsistent with his affidavit and subsequent testimony that he wrote the recantation letter to incite the federal (or state) authorities to help alleviate the conditions of his custody. In fact, McCoombs testified that writing the recantation letter was a strategy:

> My intent was to -- I wrote down I have been significantly untruthful in my testimony, blah, blah, blah, and I handed it to him. My understanding was based on what I had seen him do in the past, was that he would tear this up and throw it away. There's no way that I expected Cliff Young to send this to Central Office or send this to the State of Florida. There was no intent on

> my part that this was to reach the State of Florida. All right.

(T. 1497). If McCoombs expected Cliff Young to tear up the letter and he did not expect the letter to even go to the Central Office, it is preposterous that his testimony at the evidentiary hearing was truthful, even if his lie that he meant "government authorities" as opposed to "state authorities" is accepted as true. When his testimony, letters, affidavits and other evidence are taken together, it is clear that he recanted his testimony as a way to manipulate the State of Florida to help him; that is exactly what he was threatening to do for years. Unlike the State, the federal government has no implicit or explicit reason to care whether McCoombs lied at Mr. Wyatt's trial. McCoombs knows it. The extraordinary actions taken by the State to visit McCoombs in Colorado, improperly send him documents, maintain a polite correspondence with him even after repeated threats, all make the point very clear that the State needs to stand by their manipulative witness or deal with future recantations and threats.

McCoombs's perjured testimony regarding why he wrote the recantation letter is a material lie because it goes to the heart of Mr. Wyatt's conviction. His credibility and the depth to which he would be impeached at re-trial is critical to the State's attempt to uphold Mr. Wyatt's conviction and sentences. No jury should have believed McCoombs's lies and now the newly discovered impeachment

evidence renders him a worthless witness. Furthermore, it is not just his utter lack of credibility that harms the State's case, but his perjured testimony goes to the very heart of his relationship with the State. The bizarre loyalty the State maintains with a career felon, an admitted liar and manipulator, and now a demonstrated perjurer is utterly astounding. Of course, the State knows that if they don't stick by their man, the man their prosecutor said was "absolutely essential," then their case against Mr. Wyatt is jeopardized.

At re-trial, if McCoombs provided the same testimony against Mr. Wyatt as he did in 1991, he would be gravely impeached with the newly discovered evidence. McCoombs would be impeached with prior inconsistent statements from multiple witnesses indicating that he lied about Mr. Wyatt's alleged confessions to him, his motivation to gain leverage to manipulate the State would be laid bare by numerous threatening statements to multiple witnesses demonstrating how he used his testimony against Mr. Wyatt to manipulate the system to his benefit, he would be impeached with his own numerous threats to recant his testimony unless the State assisted him, and of course he would be impeached with his own recantation and subsequent perjury about why he recanted his testimony.

In sum, the State's star witness, the witness who is "absolutely essential" to Mr. Wyatt's convictions and death sentences, would face a cross-examination that would shred his credibility using numerous points of impeachment. An effective

cross-examination would lay bare his pitiful reputation for truthfulness, his motivation in testifying against Mr. Wyatt would be recognized for what it is, a power play to gain leverage, his numerous prior inconsistent statements would demonstrate his limitless dishonesty, and finally, the totality of the newly discovered evidence would make McCoombs a liability to the State's case, a dishonest witness with a motivation to lie with a proven track record of dishonesty. Mr. Wyatt submits that based on all of the newly discovered evidence unavailable at the time of trial, assessed cumulatively with all other claims and evidence in these post-conviction proceedings, demonstrates that Mr. Wyatt would probably receive an acquittal or a lesser sentence on retrial.

The lower court did not touch on the perpetuated testimony of Rollins and Morrison in its order denying relief. Rollins and Morrison's testimony cannot be deemed incredible because their testimony was factually inaccurate as it relates to the crime as they could have known only what McCoombs told them. However, their testimony is credible because it is corroborated by the context in which it was made. McCoombs was in fact telling others, implicitly and explicitly, during this same time period, that he was going to recant and get Mr. Wyatt off of death row. Specifically, McCoombs told this to Ginger Curran, as well as in numerous letters to Mr. Mirman, Mr. Colton, and Governor Bush. Thus, Rollins and Morrison's

testimony is quite consistent with the manipulative actions of McCoombs during this exact time period.

Additionally, in denying relief, the lower court found that the contents of the affidavit of Emilio Bravo would be "negligible". However the court failed to conduct a cumulative analysis of Bravo's evidence together with that of Rollins and Morrison. This was error. See Gunsby v. State, 670 So. 2d 920, 924 (Fla. 1996). Additionally the lower court found that in essence, Mccoombs's testimony was not essential to the guilty verdict in this case.[11] This is erroneous for several reasons. First of all, as noted *supra*, it fails to add in the cumulative impeachment value of Bravo with Rollins and Morrison. Second, it ignores the testimony of David Morgan who found that the testimony of Mccoombs was 'essential" in obtaining, not only a conviction murder but also a death sentence for Mr. Wyatt.

McCoombs gave contradictory and implausible reasons for why he wrote his December 23, 2002 recantation letter. He also stated that prior to that letter he had never threatened to recant his testimony although this statement was contradicted by other evidence presented at the evidentiary hearing, specifically, letters to Mr. Mirman as well as Florida Governor Jeb Bush where he threatened to recant his

[11] The court stated that the "overwhelming evidence of Wyatt's guilt in this acse, much of which was established without the assistance of Mccoombs's testimony would not have been materially affected by an impeachment value of Bravo's allegations" (Supp PCR at 767).

testimony (Def. Ex. 15, 16, 22). Mr. McCoombs also denied that he was trying to manipulate Florida state authorities when he wrote the recantation letter. This denial is implausible because at the same time he had been asking the State Attorney's Office in Florida and Governor Jeb Bush for assistance with veiled threats of recantation.

It was demonstrated that McCoombs perjured himself at the evidentiary hearing regarding his sworn and notarized affidavit (Exhibit 35) when he claimed he had not been trying to incite Florida state authorities. His explanation was clearly belied by his history of veiled attempts to blackmail Florida state authorities into helping him with his custody issues.

c. Cumulative prejudice

The lower court failed to consider the cumulative effect of all the constitutional errors that occurred in this case. See Gunsby v. State, 670 So. 2d 920, 924 (Fla. 1996). This is apparent from the wording of its order denying relief. It is significant that the denial of relief on Claim 1a supra relating to the discrediting of the CBLA evidence at trial was not prejudicial because of the "overwhelming evidence" of Mr. Wyatt's guilt, which evidence included McCoombs's testimony. However the lower court denied relief on the McCoombs claim, in large part because of the CBLA testimony. Not only did the lower court

fail to conduct a proper cumulative prejudice analysis, it was internally inconsistent to the point of oxymoron.

The prejudice attaching to the unreliability of the CBLA together with the false testimony of McCoombs show that there is a reasonable probability of a different outcome. All this evidence must be examined "collectively, not item by item." Kyles, 514 U.S. at 436. Cumulatively the total picture in this case compels this court to grant Mr. Wyatt relief in the instant cause.

ARGUMENT II

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE AT THE PENALTY PHASE

a. Failure to investigate Mr. Wyatt's social history

The United States Supreme Court has affirmed the right of a capital defendant to the effective assistance of counsel. In the case of Wiggins v. Smith, the Court emphasized the principles set forth in Strickland when it restated:

> We established the legal principles that govern claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984) (citations omitted). An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. Id., at 687. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." Id., at 688.

539 U.S.510, 521 (2003). The Supreme Court further held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 668 (citation omitted). Mr. Wyatt has proven both deficient performance and prejudice at the evidentiary hearing, undermining the adversarial testing process at trial. Counsel in a capital case has a duty to conduct a "requisite, diligent investigation" into his client's background for potential mitigation evidence. Williams v. Taylor, 529 U.S. 362, 415 (2000). The "time consuming task of assembling mitigation witnesses [should not wait] until after the jury's verdict." Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991). While an attorney is not required to investigate every conceivable avenue of potential mitigation, the Supreme Court has emphasized that: "In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of known evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Wiggins, 539 U.S. at 527. Furthermore, "[s]trategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgment supports the limitations on investigation." Id. at 2539 (citing Strickland, 466 U.S. at 690-91).

Wiggins specifically addresses the failure by trial counsel to investigate a capital defendant's social history to develop potential mitigation. It clarifies the

fact that applicable professional standards require such investigation. Those standards are in the ABA Standards of Criminal Justice. Wiggins, 123 S.Ct. at 2536-37.[12] As the Wiggins Court further explained, the applicable ABA standards state that "among the topics counsel should consider presenting are medical history, educational history, employment and training history, **family and social history**, prior adult and juvenile correctional experience, and religious and cultural influences." Id. (quoting ABA Standards for Criminal Justice 4-4.1.(1989)) (emphasis in original).

Had trial counsel investigated Mr. Wyatt's social history, he would have discovered a wealth of information that would have both been compelling in its own right and have strengthened the testimony of his mental health expert.

Furthermore, any purported waiver of mitigation by a client does not does not lift the burden from counsel to conduct the requisite diligent investigation into the client's social history cause of counsel's deficient performance in failing to investigate the available mitigation prior to consulting with Mr. Wyatt about the

[12]In Rompilla v. Beard, 125 S.Ct. 2456 (2005) in which case the trial took place in 1989 prior to the promulgation of both the 1989 and the 2003 Guidelines, the Supreme Court applied not only the 1989 Guidelines but also the 2003 Guidelines . As the Sixth Circuit explained in Hamblin v. Mitchell, 354 F.3d 482, (2003) "New ABA Guidelines adopted in 2003 simply explain in greater detail than the 1989 guidelines the obligations of counsel....The 2003 ABA guidelines do not depart in principle or concept from Strickland [or] Wiggins." Hamblin 354 F. 3d at 487.

decision to waive or present mitigating evidence, "[a] defendant's wishes not to present mitigating evidence does not terminate counsel's responsibilities during the sentencing phase of a death penalty trial." Blanco, 943 F.2d at 1502. Eleventh Circuit case law rejects the notion that a lawyer may "blindly follow" the commands of the client. Eutzy v. Dugger, 746 F. Supp 1492, 1499 (N.D. Fla.1989), aff'd, No. 89-4014 (11th Cir. 1990). Furthermore, the Guidelines are explicit in their exhortation that counsel must investigate mitigation whether or not the client wants it.

Mr. Wyatt could not have knowingly and intelligently waived his penalty phase witnesses because due to trial counsel's ineffectiveness, a complete investigation of Mr. Wyatt's social history was never done. Trial counsel was obligated to fully investigate all avenues of mitigation, explain the mitigation to Mr. Wyatt, and fully inform him what mitigation was available in order for him to know what he was waiving. The Commentary to ABA Guideline 10.7 states that "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." Commentary to ABA Guideline 10.7 (2003). Furthermore, ABA Guideline 10.7(A)(2003) is clear that "Counsel at every stage have an obligation to conduct thorough and

independent investigations relating to the issues of both guilt and penalty." Guideline 10.7(A)(2) further states that "[t]he investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be conducted or presented." This requirement is further explained by the 2003 Guidelines which require investigation of, *inter alia*, the client's medical history, family and social history, educational history, military service history, employment and training history and prior adult and juvenile correctional experience. See Commentary to ABA Guideline 10.7 (2003).[13]

Furthermore the obligation to investigate mitigation is not obviated by the possibility that the information obtained might be damaging to the defense case. case. In Williams v. Taylor, 529 U.S. 362 (U.S. 2000), the United States Supreme Court held that trial counsel was not justified in failing to present mitigation evidence because some of the evidence (juvenile records that revealed that Williams had been in the juvenile justice system three times) was not favorable to the defendant. Id. at 396.

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[13] 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 such as 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.

Commentary to ABA Guideline 10.7 p. 84 (2003).

At the evidentiary hearing trial counsel Diamond Litty testified that counsel decided not to call Mr. Wyatt's ex-wife, Christina Hope Powell as a mitigation witness. (T. 1847). This decision was based not on trial counsel's own investigation but based on a report of an interview by a North Carolina state attorney investigator. (T. 1847). Litty testified that there was nothing in the state investigator's report that would have been useful in the penalty phase. (T. 479:20-21).

> She basically indicated that -- that he would beat her. That they had -- this is the woman that he had a child with that died. That, you know, it was – he just -- she thought he was -- they would fight, and she would have been a terrible witness for us.

(T. 1847-1848).

Trial counsel was unreasonable in relying on a state investigator's report to determine the mitigation value of a witness. It was unreasonable for counsel to expect a state investigator to uncover mitigation evidence from a witness, and counsel had an obligation to conduct an independent investigation. Additionally the state investigator's report should have alerted trial counsel that Ms. Powell would be a source of information about Mr. Wyatt's chaotic and violent life and about the effect of the death of their child on Mr. Wyatt.

Litty further testified that counsel decided not to call Sarah Cox, one of Mr. Wyatt's schoolteachers, without doing any type of independent investigation but

solely relying, again on the report of the North Carolina state attorney investigator. Litty testified about what she learned from the state investigator's report about Ms. Cox: "Again, another teacher that was interviewed that basically said that he used to fib to her, and bragged that his daddy was in prison. Nothing, you know, that I thought was beneficial to call her as a witness." (T. 1850).

The lying and bragging about his father being in prison should have been a red flag to trial counsel that Mr. Wyatt was a severely troubled child and that Ms. Cox, who clearly remember Mr. Wyatt from years before, should have been contacted. Instead, trial forestalled the investigation, based on a state interview, and failed to speak to Ms. Cox. Trial counsel's opinion was itself based on inadequate investigation. In fact Ms. Cox was able to address a wealth of mitigation.

At the evidentiary hearing, Dr. Faye Sultan, a clinical psychologist, testified about the wealth of available mitigation about Mr. Wyatt's social history. As part of her investigation into Mr. Wyatt's background, she spoke with Mr. Wyatt as well a number of his family members, friends, and teachers: Sarah Cox, Mr. Wyatt's third grade teacher; Pamela Caudill, Mr. Wyatt's half sister; Darlene Smith, his maternal aunt; Jean Phillips, his mother; Christina Hope Powell, his ex-wife; his daughter Renee; and Wayne Edmonson, his maternal uncle. (T. 2005).

Dr. Sultan's testimony brought out facts about Mr. Wyatt's extremely abusive and traumatic childhood that was not heard by the jury. Mr. Wyatt's father, Tommy Sr., began to physically and emotionally abuse Mr. Wyatt when he was at a very tender age:

> Starting when Tom, Jr. was very, very small, Mr. Wyatt, Sr. apparently decided that the way that you needed to rear a child was to force him out of babyhood so, for example, he took Thomas, Jr. out of his crib when he was nine months old. [Mr. Wyatt's mother] said that what that resulted in was that Tommy Wyatt fell out of his bed over and over and over again, and would get hurt each time he did that.
>
> Thomas Wyatt, Sr. took Tommy's bottle away from him at nine months, and [his mother] would sneak a bottle to him because Tommy would cryand cry for his bottle because he was too young to be without one, was what she said, so that she would sneak it to him.
>
> One of the things that she said was that when Tommy could stand up when he was a tiny boy, when he was three, perhaps four years old, his father would poke him repeatedly in the chest with a finger, and he'd poke him in the chest, or punch him in the chest until he fell down, and that at the time that he was doing this provocation he would be yelling at Tommy, be a man, be a man, you're not a man, stand up, get up.

(T. 2091-92).

On one occasion when Mr. Wyatt was 18 months old he soiled his pants and his father punished him by making sit on the toilet for so long that he fell asleep. (T. 2109). Tommy, Sr. also beat his wife, Mr. Wyatt's mother. One time, Mr.

Wyatt and his sister watched as his father choked his mother into unconsciousness (T. 2092). Mr. Wyatt yelled at his father "Don't kill my mommy." (T. 2092). When Mr. Wyatt was a baby his father forced his mother to leave him alone in his play-pen all day so she would be available to have sex many times a day. (T. 2108). Mr. Wyatt's father was only the first of the abusive father-figures in his life. For part of Mr. Wyatt's childhood, his father was in prison for rape (T. 2089), and Mr. Wyatt's mother, Jean Phillips, became involved with a series of men who were abusive to her and to her children. (T. 2090 -91).

Mr. Wyatt's stepfather, Roger Chipman, with whom Mr. Wyatt lived from the ages of six to around ten or twelve (T. 2089), was extremely cruel to all the children, especially to Mr. Wyatt. He was verbally and emotionally abusive, flying into a rage at the slightest incident, such as Mr. Wyatt spilling milk at the table. (T. 2097). He berated Mr. Wyatt continually, "over and over again you ain't no good, you no good piece of shit, you're just like your daddy." (T. 2103). He also forced the children to fight each other and to kiss each other's buttocks.

> She said that he sometimes forced the children when they were arguing to physically fight with one another, to engage in fisticuffs with one another. And that sometimes during or after these fights he would make the children pull their pants down and kiss one another's butts, as she described it. She would have them kiss one another.

(T. 2096-2097).

After she could no longer tolerate Chipman's abuse, Mr. Wyatt's mother met another man, Arlie, and ran off with him in his car. (T. 2097-98). This happened when Mr. Wyatt was about sixteen years old. Chipman forced Mr. Wyatt to run after the car, jump into it, and try to get his mother to come back home. (T. 2099). His mother and Arlie dropped him off in a strange town and he had to call someone to come pick him up. (T. 2098).

Mr. Wyatt's mother was severely mentally ill. She was diagnosed with schizophrenia (T. 2092) and as a child Mr. Wyatt witnessed her psychotic episodes. Despite institutionalizations, his mother's mental illness was never stabilized during Mr. Wyatt's childhood. (T. 2001). She was first institutionalized after the birth of her first child, Pam, and again soon after she gave birth to Mr. Wyatt. (T. 2001). When his mother's mental illness became so severe that she was unable to care for her children, Mr. Wyatt's maternal grandmother, Ora, took him into her home. (T. 2095). However, even here Mr. Wyatt was not safe as his grandmother would hit him. (T. 2095).

Ms. Cox gave Dr. Sultan information about Mr. Wyatt's childhood of abuse and neglect, his mother's mental illness, his abusive and largely absent father, and his violent stepfather. Dr. Sultan testified at the evidentiary hearing:

> His mother Jean was, according to Miss Cox, mentally ill throughout Tommy Wyatt's life. The kind of mental illness that would have her repeatedly taken from her

> home or from the street where she was wandering, and incarcerated in a psychiatric facility. Sometimes the admission was voluntary; often the admission was involuntary which meant that she was considered dangerous to herself or to other people.
>
> Miss Cox told me that she often was in a position of having Tommy talk to her about how worried he was about his mom. And he had a hard time going to school, she said, because he was worried that she was sick at home and that she might be doing what he called crazy things. Sometimes he would go home and would find his mother throwing plates against the wall, and screaming, or running around the house naked. I mean, startling things for little boys. At that time he talked about it, and Miss Cox was one of the people with whom he talked about those things.

(T. 2085).

Dr. Sultan testified that on one occasion, Mr. Wyatt's mother was so psychotic that she did not recognize Miss Cox:

> One of the things that she [Miss Cox] told me about Jean Phillips was that when Jean was going downhill -- and apparently her illness was cyclical. There were times when she could kind of function, okay, and times when she was blatantly psychotic. On one occasion she's recalling, she passed in her vehicle Miss Phillips walking down a road, Jean was walking down the road, and when Sarah Cox stopped and tried to wave her over, it appeared to her that Jean didn't even recognize her. She was offering Jean a ride home, and she was so disoriented that she didn't have any idea who she was and just kept right on walking by her. That was particularly startling to Miss Cox.

(T. 2087).

Ms. Cox also was a source of information about Mr. Wyatt's history of drug abuse. Dr. Sultan testified that Mr. Wyatt began to use alcohol and drugs at an early age.

> One of the things that Miss Cox told me, As well, is that she knew that Mr. Wyatt had begun To drink alcohol very, very early. That by the time he was in early middle school he was consuming alcohol, and she suspected doing other drugs.
>
> * * *
>
> She saw him drunk on more than one occasion, and stoned, and talked to him about it. She also was aware that he had a friend whose father was a drug dealer, and since everybody else told me about the same guy, I'm beginning to feel like it was sort of commonly known that this boy's dad was a drug dealer.

(T. 2086-87).

Ms. Cox was available to provide this testimony at the time of Mr. Wyatt's trial. However, due to trial counsel's ineffectiveness she was not interviewed by counsel or called as a witness.

Dr. Sultan testified at the evidentiary hearing that she interviewed Ms. Powell (Hope), who knew Mr. Wyatt since he was a teenager, and that Ms. Powell was a source of information about Mr. Wyatt's heavy drug use. She told Dr. Sultan and that she had taken the drugs with him. (T. 2117).

Mr. Wyatt was sexually abused by one of elementary school teachers, Mr. Blackburn. Mr. Blackburn would pick up Mr. Wyatt at his grandmother's house and take him back to his house. (T. 2088). Dr. Sultan testified that Mr. Wyatt told her that Mr. Blackburn gradually built up Mr. Wyatt's trust and eventually performed oral sex on him. In Dr. Sultan's opinion, based on her training and expertise, the sexual abuse had a profound effect on Mr. Wyatt's life (T. 2127-2128) and led to deep feelings of rage, confusion, and shame.[14]

In contrast to this evidence of sexual abuse, trial counsel Litty testified at the evidentiary hearing that defense counsel could find no evidence that Mr. Wyatt had been molested by Mr. Blackburn. This was based, again, on a North Carolina state attorney investigator's report of an interview with Mr. Blackburn, in which Blackburn denied molesting the school-age Mr. Wyatt.

According to Dr. Sultan's testimony, Mr. Wyatt's sister Pam also recalled his very early drug abuse and used drugs herself: "Starting in middle school. They both consumed many substances, lots of marijuana, some LSD, cocaine, basically whatever they could get their hands on. Everybody drank all the time." (T. 2106).

[14] In contrast to this evidence of sexual abuse, trial counsel Litty testified at the evidentiary hearing that defense counsel could find no evidence that Mr. Wyatt had been molested by Mr. Blackburn. This was based, again, on a North Carolina state attorney investigator's report of an interview with Mr. Blackburn, in which Blackburn denied molesting the school-age Mr. Wyatt.

Although trial counsel retained a psychologist, Dr. Rifkin, to evaluate Mr. Wyatt, trail counsel was ineffective in working with the mental health expert as suggested by the ABA Guidelines. When Dr. Rifkin's report showed what trial counsel believed to be damaging findings, trial counsel simply decided not to call Dr. Rifkin as a witness. See Williams *supra*. This decision was not based on a reasonable strategy or tactic.

Counsel should have provided Dr. Rifkin with information about Mr. Wyatt's violent and chaotic childhood, his mother's mental illness, and childhood sexual abuse. Without Dr. Rifkin's evaluation of Mr. Wyatt was essentially performed in a vacuum, with no context to explain the causes of the pathologies uncovered by Dr. Rifkin.

Trial counsel failed to find and present to the jury evidence such as that uncovered by Dr. Sultan's interviews with Mr. Wyatt's family and friends. The testimony of a psychologist was required to help the jury understand how Mr. Wyatt's traumatic childhood and adolescent led to the adult that he became. Dr. Sultan in her evidentiary hearing testimony described how Mr. Wyatt's violent childhood helps explain his own history of violence.

b. Failure to investigate and present mental health mitigation

Trial counsel was ineffective for failing to present the testimony of a mental health expert who could explain the nexus between Mr. Wyatt's long history of abuse and drug use and the crime.[15]

A properly prepared mental health expert could have explained the long-term, serious impact of Mr. Wyatt's history of an abusive and traumatic childhood was objectively unreasonable. At the post-conviction hearing Dr. Sultan was able to tie Mr. Wyatt's experiences as a child and adolescent to his later behavior. The lay witnesses who trial counsel were prepared to present were not capable of nor qualified to provide this explanation of a defendant's behavior. In addition had the family members been presented as mitigation witnesses the jury would have been likely to believe that Mr. Wyatt's family members were biased in favor of the defendant and would say anything just to save his life.

The testimony of a psychologist was required to help the jury understand how Mr. Wyatt's traumatic childhood and adolescence led to the adult that he

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[15] Since an understanding of the client's extended, multi-generational history is often needed for an understanding of his functioning, construction of the narrative normally requires evidence that sets forth and explains the client's complete social history from before conception to the present. **Expert witnesses may be useful for this purpose and, in any event, are almost always crucial to explain the significance of the observations.**

Commentary to ABA Guideline 4.1 (2003) (emphasis added).

became. Dr. Sultan in her evidentiary hearing testimony described how Mr. Wyatt's violent childhood helps explain his own history of violence. Dr. Sultan explained how childhood physical and emotional abuse changes the structure of a child's developing brain, and that violence and other serious behavioral problems are predictable outcomes of abuse:

> The outcomes of child abuse are predictable in that we have an increasing body of knowledge, huge body of knowledge actually at this point, that shows that particular changes to the child's brain occur when a child is abused. That certain parts of their brain develop more than they should in normal children, that certain parts are underdeveloped.
>
> And that what we know about the human brain is that it's kind of use specific, so if certain parts of the brain are activated when a child feels in danger or threatened, those parts are strengthened, that part of the brain remains dominant, and actually physical and chemical changes to the brain occur in response.
>
> Because those follow a pattern that we see over and over and over again in abused kids, the predictable outcome is that boys who were abused in the way that Mr. Wyatt was abused will tend to be in certain ways similar. They will tend to be violent; they will tend to be hyperactive as children; they will tend to be unable to control their impulses; they will tend to be without the mediating capacity that would normally develop later in childhood to modulate their own impulses.

(T. 2125). Dr. Sultan explained how these brain changes in childhood impact adult behavior:

> I think that when we create an environment for children in which their brain stays focused on the lower functions, the brain stem functions of survival, of fear, of ability to react, to startle, we create brains that are underdeveloped and we create people who don't have the adult cognitive and neuro structure that they need to comply with the law.

(T. 2126). She also explained the connection between being a victim of crimes and becoming a perpetrator of crimes: "I believe, and my belief is shared with many experts in the field, that there's a direct connection between the abuse that Mr. Wyatt suffered and the crimes that he later committed." (T. 2128). Dr. Sultan was able to explain the connection between Mr. Wyatt's abusive childhood and the type of crimes he was later involved in:

> In my opinion the kind of abuse, the severity of abuse, the frequency of abuse, the characteristics of abuse that Mr. Wyatt experienced helped to shape the behavior that he later displayed. He was patterned after, in his mind, his father, through the insistence of his father and stepfather and, perhaps, his mother at times. A man who was also extremely violent, who was sexually aggressive and physically violent, who was in prison for most of Mr. Wyatt's childhood for committing that kind of crime. And I think that all of that led him directly into the path that he followed.

(T.2127).

The testimony of a mental health expert was required to explain to the jury why not all victims of childhood abuse become a violent adult. Dr. Sultan provided this explanation in her evidentiary hearing testimony:

> There's certainly a connection, and the research is certainly saying that boys in that circumstance will have a propensity for violence. Some boys, either because of the way they're wired neurologically, or because of the nurturing and the environment in which they then live because they're removed from the abusive environment, or maybe because they're lucky or maybe because they find some other calling, okay, will refrain from violence. But the propensity for dysfunction and violence is a direct consequence of abuse. Not the certainties, but the propensity for it.

(T. 2133). Dr. Sultan also explained that intervention can help prevent victims of child abuse from a life of violence. (T.2135). In Mr. Wyatt's case, there was no intervention or nurturing to reverse the damage. (T. 2136).

Dr. Sultan also opined that in her experience with abuse victims, Mr. Wyatt's history of abuse was extreme: in terms of the three factors that she looks at in evaluating the extent of somebody's abuse and their emotional damage, unpredictability, frequency and severity, Mr. Wyatt was towards the severe end on all of those scales. (T. 2117).

In her testimony, Dr. Sultan, because of her thorough investigation into Mr. Wyatt's social history and her expertise in understanding how abuse and trauma explain violent and otherwise inexplicable behavior, was able to neutralize prior diagnoses of Mr. Wyatt as anti-social by explaining that although Mr. Wyatt may fit the criteria for anti-social personality disorder, a number of factors in his social and medical history, such as organic brain damage and drug abuse would have to

be taken into account before a diagnosis of anti-social personality disorder could be made. (T. 2189). Indeed, generally accepted mental health principle require that an accurate medical and social history be obtained "because it is often only from the details in the history" that organic disease or major mental illness may be differentiated from a personality disorder. R. Strub & F. Black, *Organic Brain Syndrome*, 42 (1981).

Had counsel presented a thorough investigation of Mr. Wyatt's social history to a competent psychologist, this in turn would have led counsel to retain a neuropsychologist. Counsel failure to secure a complete mental health evaluation of Mr. Wyatt rendered ineffective assistance of counsel in violation Given Mr. Wyatt's family history of mental illness and his own history of head injury, an evaluation was necessary to prepare his defense. Although a psychologist and a neurologist were consulted, trial counsel failed to secure a neuropsychological evaluation that would have detected evidence of Mr. Wyatt's brain impairments.[16]

Dr. Ernest Bordini, a psychologist specializing in neuropsychology, completed a neuropsychological examination of Mr. Wyatt. Dr. Bordini testified at the evidentiary hearing that Mr. Wyatt showed brain damage and frontal lobe

[16] At the evidentiary hearing Diamond Litty testified that she does not remember why counsel did not move the court to appoint a neuropsychologist Therefore the failure to consult a neuropsychologist was not based on a defense strategy.

deficits (T. 2480) associated with difficulties with planning, inhibition, and sequencing. (T. 2480).

Dr. Bordini testified that Mr. Wyatt's brain damage most likely occurred as a result of head injuries including a motorcycle accident where Mr. Wyatt suffered a concussion at the age of 20. (T. 2482). This type of brain damage, especially when combined, in Mr. Wyatt's case, with alcohol abuse, increases the risk that a person will act impulsively. (T. 2482).

Dr. Bordini explained the impact of damage to the frontal lobe:

> [T]he frontal lobe, while it my not be the seat of intelligence, they're very important for applying intelligence appropriately. And they're also very important in inhibiting behavior, inhibiting emotions, inhibiting anger, regulating mood.
>
> Also, in terms of paying attention and shifting attention and shifting strategies when they're not working. They're important in motor sequencing and planning.
>
> And they're very important in the very, very basic levels in terms of being able to put on the brakes when you have an impulse, when you're primed to go but you're not supposed to go and you have to hold back, the frontal lobes kind of have a lot to do with that particular function, as well. So they're very important in a variety of behavior and the application of intelligence.

(T. 2481).

Due to trial counsel's ineffectiveness, Mr. Wyatt was not given a neuropsychological examination although the same tests used by Dr. Bordini were

available at the time of trial. Dr. Bordini testified that the same neuropsychological examination administered to Mr. Wyatt in 1991 would have most likely produced the same or even more serious indications of brain damage. (T.2491). Trial counsel's failure to fully investigate all aspects of Mr. Wyatt's physical and mental health, as well as his upbringing, was constitutionally ineffective. Because of this failure, compelling mitigation evidence of brain damage was never presented to the jury charged with the responsibility of whether Mr. Wyatt would live or die.

Mr. Wyatt's long history of drug and alcohol abuse and his history of head injury, it was objectively unreasonable for counsel to fail to obtain neuropsychological testing for Mr. Wyatt. There was a reasonable probability that had this compelling evidence of brain damage, and its effects on Mr. Wyatt's behavior been presented, the outcome of the sentencing phase would have been different. After the jury returned the guilty verdict in the first phase of the trial it is precisely this type of mitigation which explains Mr. Wyatt's difficulty in regulating his behavior. This type of brain damage provides the jury with an understanding of many of Mr. Wyatt's past actions. Therefore, Mr. Wyatt was prejudiced. Trial counsel was ineffective and Mr. Wyatt was denied an adversarial testing. Mr. Wyatt did not receive the fair trial to which he was entitled under the Sixth, Eighth and Fourteenth Amendments.

Even if Mr. Wyatt had knowingly and intelligently waived mitigation, present any mitigation, trial counsel had an obligation to proffer all of the mitigation to the trial court, which trial counsel failed to do. Additionally, trial counsel could have presented the witnesses to the judge at Mr. Wyatt's Spencer hearing. The Commentary to ABA Guideline 10.11 emphasizes counsel's obligation for record preservation of mitigation evidence. In Florida, trial counsel is required to proffer the evidence. See Koon v. Dugger, 619 So. 2d 246, 250 (Fla. 1993). Counsel's failure to proffer the mitigation rendered ineffective assistance.

Mr. Wyatt's trial counsel failed to discover and use this mitigating information despite counsel's duty to investigate possible sources of mitigation. There was a reasonable probability that had this mitigation been presented, the outcome of the sentencing phase would have been different. Dr. Sultan's testimony as described above offers a basis of understanding and explanation for Mr. Wyatt's history of troubled behavior. Even if it would have possibly opened the door to additional damaging information, the jury at this point had already heard an overwhelming amount of damaging evidence. It was imperative that a psychologist testified to the jury to put his behavior in context. Therefore, Mr. Wyatt was prejudiced. Trial counsel was ineffective and Mr. Wyatt was denied an adversarial testing. Mr. Wyatt did not receive the fair trial to which he was entitled under the Sixth, Eighth and Fourteenth Amendments. Wyatt's penalty phase and

the evidence presented at his evidentiary hearing reveal trial counsel made a "less than complete investigation" and that his omissions were the result of either no strategic decision at all, or by a "strategic decision" that was itself unreasonable, being based on inadequate investigation. As a result, counsel's performance was deficient, with regard to both mental health evidence and other mitigation evidence.

ARGUMENT III

IT WAS ERROR TO DENY CERTAIN CLAIMS WITHOUT AN EVIDENTIARY HEARING

a. Introduction

A trial court has only two options when presented with a Rule 3.850 motion: "either grant an evidentiary hearing or alternatively attach to any order denying relief adequate portions of the record affirmatively demonstrating that appellant is not entitled to relief on the claims asserted." Witherspoon v. State 590 So. 2d 1138 (4th DCA 1992). A trial court may not summarily deny without "attach[ing] portions of the files and records conclusively showing the appellant is entitled to no relief." Rodriguez v. State, 592 So. 2d 1261 (2nd DCA 1992). Mr. Wyatt pled substantial factual allegations relating to the guilt phase of his capital trial. These include ineffective assistance of counsel, Brady and Ake violations which go to the fundamental fairness of his conviction. "Because we cannot say that the record

conclusively shows [Mr. Wyatt] is entitled to no relief, we must remand this issue to the trial court for an evidentiary hearing." Demps v. State, 416 So.2d 808 (Fla. 1982).

Under Rule 3.850 and this Court's well settled precedent, a postconviction movant is entitled to evidentiary hearing unless the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief." Fla R. Crim. P. 3.850. Mr. Wyatt has alleged facts relating to the guilt phase, which, if proven, would entitle him to relief. Furthermore, the files and records in this case do not conclusively show that he is entitled to no relief. The lower court did not attach portions of such files and records to its order denying relief on theses claims.

b. Ineffective Assistance of Counsel for failure to object to the introduction of gruesome photographs

Mr. Wyatt was prejudiced by unnecessary, cumulative, and gruesome pictures which were presented to the jury. (R. 1225, 1353, 1490). To prove the existence of a prior violent felony for purposes of an aggravating circumstance, the State may put on some testimony describing what happened. However, it is clearly improper for the State to re-try the prior violent felony, which is exactly what the State did. Here, the State called Richard Tymec to describe in detail how Mr. Wyatt had previously robbed a Taco Bell. (R. 3716-25). The State had copies of the Judgment and Sentence in that case, so all it would have had to do was

introduce those, which it did. But instead the State chose to present witnesses to testify to the details of the scene and the investigation. The State raised an intolerable risk that the jury voted for death not because of what the State alleged occurred in the case involving Domino's, but rather because of the two cases together. This violates the most basic principles in death penalty jurisprudence. The sentence must be individualized in that it must be based on the defendant's character and specific crime at issue. Zant v. Stephens, 462 U.S. 420 (1983). Mr. Wyatt did not receive the fair, individualized sentencing to which he was entitled. To the extent counsel conceded admissibility Mr. Wyatt received ineffective assistance. The prejudice caused individually or cumulatively is sufficient to warrant relief. No strategic or tactical purpose can be ascribed to such concessions or omissions, and Mr. Wyatt was thus prejudiced.

The lower court rejected this claim without an evidentiary hearing. (PCR. 6153). This was error. The lower court should have heard testimony relating to trial counsel's strategy, and considered the failure in conjunction with other errors. A hearing is warranted.

c. Mr. Wyatt's rights were violated when he was improperly shackled during his capital trial

Mr. Wyatt was shackled throughout the guilt and penalty phases of his trial. Although the record does not indicate specific instances where the jury saw Mr.

Wyatt shackled, Because counsel is prohibited from speaking with the jurors, it is simply not possible to investigate whether the jurors did indeed see Mr. Wyatt shackled at the attorney's table or on the witness stand. While post conviction counsel could not plead this claim with more specificity at this time, this claim is included in order to preserve this issue if Mr. Wyatt succeeds in overturning Rule Regulating the Florida Bar 4-3.5(d)(4). To the extent trial counsel did not properly preserve this claim, Mr. Wyatt received ineffective assistance of counsel.

ARGUMENT IV

FLA. R. CRIM. P. 3.852 IS UNCONSTITUTIONAL

Article I, Section 24 of the Florida Constitution states in relevant part:

> Section 24. Access to public records and meetings
>
> (a) Every person **has the right** to inspect or copy **any** public record made or received in connection with the official business of **any** public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution.
>
> * * *
>
> (b) . . . . **Laws enacted** pursuant to this section **shall contain only exemptions** from the requirements of subsections (a) or (b) **and provisions governing the enforcement of this section**, and shall relate to one subject.
>
> (c) All laws **that are in effect on July 1, 1993** that limit public access to records or meetings shall remain in

> force, and such laws apply to records of the legislative and judicial branches, **until they are repealed**. Rules of court **that are in effect on the date of adoption of this section [November 3, 1992]** that limit access to records shall remain in effect **until they are repealed**.

(emphasis added). Article I § 24 and the case law enforcing it are clear that the **only** public records which may be kept from the view of **any** person at **any** time during an agency's normal operating hours are those that are expressly exempt from public records disclosure by the Florida Constitution or a general law that "shall state with specificity the public necessity justifying the exemption" and which is "no broader than necessary to accomplish the stated purpose of the law." Id. Therefore, it is clear that Fla. Stat. s. 119.19 and rule 3.852 are in violation of Mr. Wyatt's rights under Article I, Section 24, of the Florida Constitution, Amendments V and XIV to the U.S. Constitution, and relevant case law in that they all seek to impermissibly restrict his access to public records by requiring Mr. Wyatt to demonstrate *inter alia*: I) that he has made his own search for the records from sources other than the agencies subject to his public records demands.

Section 119.19 and rule 3.852, by prohibiting a capital post-conviction defendant's counsel from seeking public records by means other than those detailed within said section and rule, violate Article I, Section 24 of the Florida Constitution and relevant case law by impermissibly restricting the defendant's right to access the records through his counsel. In requiring Mr. Wyatt to

demonstrate that a public records demand is not "overly broad or unduly burdensome," Fla. Stat. § 119.19 and Fla. R. Crim. P. 3.852 are on their face **and** as applied to Mr. Wyatt in violation of Florida and Fourteenth Amendment due process, by virtue of their vagueness and over breadth. There is no conceivable way for Mr. Wyatt, without intimate knowledge of the record-keeping practices and automation level of a given agency, to know whether his request is "overly broad or unduly burdensome." In fact, in the information age, a capital post-conviction defendant **might** be justified in "guessing" that every state agency **should** be technologically advanced to such a point that **any** public record would be available with the punching of a few keys. However, this is obviously not the case. Different agencies have achieved different levels of automation. Therefore, Mr. Wyatt is left no choice but to guess at vague terms such as "overly broad or unduly burdensome." Furthermore, were a capital post-conviction defendant to guess incorrectly as to what is an "overly broad or unduly burdensome" request, and he were to err on the side of caution (because of, *inter alia*, a concern that a too-far-reaching request might lead a court to impose sanctions or order that a search need not be performed or that records need not be disclosed), the capital post-conviction defendant would be confronted by a procedural bar to later requesting records in support of a facially-valid claim that his conviction be reversed and his life be spared or his sentence reversed. Where the interest at stake

is a capital post-conviction defendant's **life**, the highest interest recognized by our country's judiciary, such unconstitutionally vague language must, of necessity, be struck down.

Article I, Section 24 makes access to public records properly subject to regulation **only** to the extent that certain types of records may be deemed exempt from public disclosure and provided that such exemptions "shall be no broader than necessary." In attempting to restrict the scope of **access** by capital post-conviction defendants to public records, the legislature has gone well beyond the authority granted them by the Florida Constitution and swept far too broadly into the constitutionally protected freedom of access to public records.

Article I, Section 24, in using the language "shall be no broader than necessary" to describe the legislation which may be enacted thereunder, mirrors language from federal First Amendment jurisprudence which holds that, when such a specific right is granted by the Constitution, strict scrutiny is the standard to be applied in determining whether the subject law is constitutional *vel non*. Compare Simon and Schuster, Inc. v. Members of the New York State Crime Victims Board, 502 U.S. 105 (1991) with Fla. Const. Art. I. s. 24. Hence, strict scrutiny should be applied in evaluating Mr. Wyatt's challenges to section 119.19 and rule 3.852 and both should be found unconstitutional.

Matters of substantive law are within the legislature's domain, whereas matters of practice and procedure are within the exclusive authority of this Court to regulate. Haven Federal Savings & Loan v. Kirian, 579 So. 2d 730, 732 (Fla. 1991). Whereas rule 3.852 regulates the rights granted to capital post-conviction defendants, in that it limits their right of access to public records granted by the Florida Constitution, it is a judicial infringement on the province of the legislature and, as such, is an unconstitutional violation of the separation of powers. Whereas section 119.19 regulates the course, form, manner, method, mode, order, process and steps by which a capital post-conviction defendant may seek to enforce his substantive, constitutional right of access to public records, it is a legislative infringement on the province of the judiciary and, as such, is an unconstitutional violation of the separation of powers.

ARGUMENT V

THE PENALTY PHASE JURY INSTRUCTIONS WERE UNCONSTITUTIONAL

Mr. Wyatt's jury was instructed on six aggravating circumstances; Heinous atrocious and cruel (HAC); cold calculated and premeditated (CCP), avoiding arrest, under a sentence of imprisonment; crime committed during the course of a robbery[17], and prior violent felony. Trial counsel did not object to any of these

[17] This was merged with the pecuniary gain aggravator

instructions with the exception of the HAC instruction. This Court vacated the CCP and avoiding arrest aggravators on direct appeal. Mr. Wyatt notes that this Court affirmed the validity of the jury instructions on the remaining aggravators on direct appeal but raises this issue in order to preserve it for future review. Trial counsel was ineffective for failing to object to these instructions.

ARGUMENT VI

FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL

Florida's death penalty statute denies Mr. Wyatt his right to due process of law and constitutes cruel and unusual punishment on its face and as applied to this case. Execution by electrocution and/or lethal injection constitutes cruel and unusual punishment under the constitutions of both Florida and the United States. Mr. Wyatt hereby preserves arguments as to the constitutionality of the death penalty, given this Court's precedents.

CONCLUSION

Mr. Wyatt respectfully requests this Court vacate his conviction and sentence and grant him a new trial and grant any other relief the Court deems appropriate.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

RACHEL L. DAY
Florida Bar No. 0068535
Assistant CCRC-South
101 N.E. 3rd Ave., Ste. 400
Fort Lauderdale, FL 33301
(954) 713-1284
Attorney for Mr. Wyatt

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Leslie Campbell, Office of Attorney General, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, FL 33401 this 20th day of May 2010.

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RACHEL L. DAY
Florida Bar No. 0068535
Assistant CCRC-South
101 N.E. 3rd Ave., Ste. 400
Fort Lauderdale, FL 33301
(954) 713-1284
Attorney for Mr. Wyatt