**IN THE SUPREME COURT OF FLORIDA**
**CASE NO. SC11-219**

**JOHN STEVEN HUGGINS,**
**Appellant,**

**v.**

**STATE OF FLORIDA,**
**Appellee.**
_____/



ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

# INITIAL BRIEF OF THE APPELLANT

David R. Gemmer
Assistant CCRC-Middle
Florida Bar Number 370541
Office of The Capital
Collateral Regional Counsel
3801 Corporex Park Drive
Suite 210
Tampa, Fl 33609-1004
gemmer@ccmr.state.fl.us
(813) 740-3544

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## PROCEDURAL HISTORY

After Mr. Huggins' first trial in 1999, the trial court ordered a new trial based on prosecutor Ashton's violation of *Brady v. Maryland*, 373 U.S. 83 (1963). *State v. Huggins*, 788 So.2d 238, 244 (Fla. 2001). Mr. Huggins was sentenced to death after the second trial, with a nine-to-three death recommendation.[1] The court found thirteen nonstatutory mitigating factors proven at the first trial.[2] Affirmed. *Huggins v. State*, 889 So.2d 743 (Fla. 2004). The Rule 3.851 motion was filed on June 5, 2006. ROA 1/32-75.

## FACTS RELATING TO COMPETENCY

### Diagnosed and Ruled Psychotic and Incompetent in 2006

CCRC counsel filed a competency motion when Mr. Huggins proved unable to assist due to his delusional beliefs about the case. ROA 1/175-85.

The court-appointed panel unanimously found Mr. Huggins incompetent -- actively psychotic, paranoid delusions, and a decades-long history of serious mental illness. ROA 2/222-31, 300-17. The court ordered treatment. ROA 13/1-57, ROA 2/332-73. After a single meeting DCF staff reported that Mr. Huggins did not

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[1] The first trial jury recommended death eight to four. ROA 1999Supp 11/194, Citations to postconviction proceedings are designated "ROA vol./page." Records of prior appeals include the year to distinguish from the current ROA.

[2] Mr. Huggins presented essentially no evidence of mitigation at the second trial.

require the treatment and medication recommended by the court panel because he competent. Judge Perry again ordered DCF to treat Mr. Huggins. ROA 3/404. A month later, DCF staff advised that Mr. Huggins' abnormal behavior "could be under the willful control of the prisoner," but he remained competent. ROA 3/407-10. 426.

**Diagnosed and Ruled Psychotic and Incompetent 2007**

The court ordered a new evaluation by the court panel which found Mr. Huggins to still be incompetent. ROA 3/414-19, 516-17. Mr. Huggins had a factual but not rational understanding of the proceedings. ROA 3/498.

At the next hearing, Dr. Thornton, the DCF psychiatrist, conceded that a prisoner can be "mentally ill and malinger," ROA 18/101, and that Mr. Huggins' belief that "the death penalty is a conspiracy by the elite to oppress the poor" was within the norm. ROA 18/85. The DCF staff withheld documents from the defense at the hearing until compelled to produce. A suppressed report by DCF psychologist Dr. Bilak revealed the staff only reviewed the reports of court panelists Dr. Danziger and Dr. McClaren, the State-recommended experts, and ignored the report by defense-recommended expert Dr. Dee. ROA 3/350-67). ROA 18/121-22.

Dr. Thornton omitted a critical portion of Dr. Bilak's suppressed report when he referred to it in his own report to the court. The suppressed opinion of Dr. Bilak included:

> Mr. Huggins does manifest delusional belief symptoms that was [sic] only apparent and only appears to make rational sense to him, attempts of questioning him about this only lead to more tangential associations and other delusions ... that do not appear connected. ...

ROA 18/122. Dr. Thornton conceded his agency was not equipped to restore death row inmates to competency. ROA 18/113.

Judge Perry found Mr. Huggins remained incompetent and ordered treatment by the Department of Corrections (DOC). ROA 3/512-21. The DOC later found no need to treat. ROA 19/passim. The court again ordered the DOC to treat Mr. Huggins. ROA 3/535-36.[3]

Ultimately, Mr. Huggins was committed to the DCF's Florida State Hospital (FSH) for residential treatment. ROA 4/605-80, ROA 21.

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[3] The DOC filed a petition with this Court challenging the circuit court's authority to order treatment. This Court ordered the Governor, the Attorney General, and DCF to file written comments. *Florida Department of Corrections v. John Steven Huggins*, Case No. SC08-1022, Order of February 24, 2009. Shortly thereafter, the DOC voluntarily dismissed the petition. Order of March 10, 2009.

## Ruled competent 2009

At FSH, Dr. Stephen Kopetskie found Mr. Huggins was malingering[4] and competent. ROASUPP 1/27-39 ("Kopetskie Report"). CCRC counsel filed an emergency motion seeking another evaluation by the court panel. ROA 4/691-98. The motion also sought to have a new defense-recommended expert appointed to the panel after the death of Dr. Dee. *Id.* The court denied the motion and proceeded immediately to the competency hearing. ROA 22/4-14.

Dr. Kopetskie, the sole witness, appeared by telephone. Dr. Kopetskie did not have his records and did not know how many hours he spent evaluating Mr. Huggins. ROA 22/20, 29. Mr. Huggins exhibited his delusional thinking only in the formal interviews. ROASUPP 1/32. The other meetings Dr. Kopetskie claimed to show Mr. Huggins was malingering because he failed to manifest his delusions were actually with a "Recovery Team" limited solely to day-to-day living issues. ROA 22/37-38.

Dr. Kopetskie administered only one psychological test, the Personality Assessment Inventory (PAI), designed to diagnose psychiatric symptoms, not malingering. ROA 22/24, 46. Dr. Kopetskie said he had wanted to give Mr. Huggins the SIRS test (the "gold standard" for diagnosing malingering). *Id.* at

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[4] "Malingering" is "the intentional production of falsely or grossly exaggerated physical or psychological symptoms, motivated by external incentives ... " DSM-IV-TR at 739 (2000).

66.However, the doctor's colleagues advised him to withhold the test because the report finding Mr. Huggins was competent because he was malingering was already circulating for review. *Id.* at 25, 70.[5]

Dr. Kopetskie falsely claimed superior knowledge to that of Dr. Dee based on his "extensive" experience with Mr. Huggins in less than a month. ROASUPP 1/38. "

> ... Dr. Dee was at a disadvantage in that he evaluated Mr. Huggins during a one-shot interview. I had the opportunity to interview him multiple times over an extended time period.

*Id.* at 53. Dr. Dee was not a one-hit wonder. He had multiple contacts over a six year period in 2001, 2006, and 2007. ROA 18/16. Dr. Kopetskie also ignored Dr. Dee's undisputed neuropsychological diagnosis of frontal lobe brain damage. ROA 2/383. The history was in the records Dr. Kopetskie claimed to be familiar with. ROA 22/53.

Court expert Dr. Danziger also had a long history with Mr. Huggins, evaluating him in 1998, 2006, and 2007. ROA 18/54-56. Mr. Huggins' extensive psychiatric history prior to the homicide confirmed genuine mental illness. In 1992, Mr. Huggins was involuntarily committed (by Baker Act) to a psychiatric facility with undisputed psychotic symptoms. He was also diagnosed as suffering

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[5] The defense advised the court on July 15, 2010, that when Dr. Danziger was told that Dr. Kopetskie had been instructed to not administer the SIRS test, Dr. Danziger found that act "questionable." ROA 26/10-12.

substantial mental illness in 1995 when he claimed he was the victim of a conspiracy by his ex-wife's family. ROA 18/56-57.

The extended experience of the court experts belies Dr. Kopetskie's claim superior knowledge. Dr. Kopetskie conducted only 5-6 interviews over less than a month between June 26 and July 23, 2009, ROA 22/29, 78.

Dr. Kopetskie diagnosed paranoid personality and antisocial personality disorder, but discounted their effect on competence because he believed Mr. Huggins was malingering. ROA 22/77. Dr. Kopetskie conceded that if he did not discount for malingering, then Mr. Huggins' sincere beliefs could explain why Mr. Huggins refused to cooperate with counsel. ROA 22/39-40. In other words, if he was not malingering, he was indeed incompetent to proceed.

The trial court found Mr. Huggins competent to proceed. ROA 4/706-15. Mr. Huggins filed a Petition Seeking Review in this Court. This Court granted the State's Motion to Dismiss Unauthorized Appeal. *Huggins v. State*, Case No. SC09-2097 (dismissed January 27, 2010).

**SIRS Test Eliminates Malingering, Incompetence Continues**

Defense expert Dr. Richard Carpenter administered the definitive SIRS test in November 2009. The test conclusively proved Mr. Huggins was not malingering. ROA 5/857-69. However, the only other material Dr. Carpenter had was a 2006 report that Mr. Huggins passed another test specific for malingering,

the reports and orders in the case, and the Kopetskie report. He had no records from the Florida State Hospital, which he needed to review before rendering a final opinion. *Id.*

CCRC counsel served a records request on Florida State Hospital in November 2009, ROA 5/850-70, and a renewed demand in April 2010. The hospital agreed to produce the records and the motion was withdrawn at the motion hearing. ROA 25/passim. The judge inquired why the records were sought and counsel advised there was, *inter alia*, a "continuing issue of whether [Mr. Huggins] is competent or not." ROA 25/19. After Dr. Carpenter confirmed a diagnosis of incompetence and another unsuccessful attempt by counsel at visitation, counsel sought a hearing on a competency motion as soon as possible. ROA 5/850-70. The earliest date the court made available was four weeks later, on July 15, 2010. ROA 5/854-55.

**Evidentiary Hearing Compelled Before Competency Determined**

At the July 15, 2010, hearing, the judge found the evidence sufficient to order evaluations by the surviving court panelists. ROA 26/1-66. But the court set the deadline for the reports for two weeks after the scheduled evidentiary hearing. ROA 4/760. The judge wrote: "[T]he Court finds it quite disturbing that this information concerning Dr. Carpenter's testing and analysis was in the hands of defense counsel for approximately five months and that they sat on it all that time."

ROA 4/759-60. The judge had voiced a similar concern at the hearing: "And here we are at the ninth hour." ROA 26/57. The Judge's displeasure with the timing of the motion became a recurring theme.

At a July 30, 2010, hearing, the court denied a defense motion to correct factual errors in the order for competency review. ROA 5/850-70, ROA 4/759-64, ROA 35/passim. Responding to the court's displeasure with the timing of the competency motion, counsel reminded the court that he had informed the court of the "continuing issue, whether he's competent or not,"at the April 13, 2010, hearing. ROA 25/19. Counsel explained that the law set a high bar to succeed on a renewed competency motion. ROA 35/9-10. "We didn't want to keep coming back to the court with constant updates ... we wanted to wait until we had a complete package to present to your honor so we didn't establish a pattern of insufficient evidence ... ." ROA 35/10.

The judge commented that if the defense had "not presented ample evidence before this court, the court would have never entered the order and would have simply denied your request, but after looking at what you presented, I granted your motion." ROA 35/16-17. The court agreed with defense counsel that Mr. Huggins might not be competent for the evidentiary hearing. ROA 35/17.

The judge said he would identify the claims for the evidentiary hearing "today [July 30, 2010], no later than Monday [August 2, 2010]." ROA 35/41. The

court's order did not timely issue. It was filed two weeks later, at 5:59 pm August 12, 2010, a Thursday evening. Postconviction counsel received the order by regular mail postmarked August 13, 2010, on August 16, 2010, seven days before hearing. *In re Huggins*, Petition for Writ of Prohibition, Case SC10-1614 page 1 note 1 (denied Aug. 23, 2010).[6] The order required all claims be presented. ROA 4/770-72.

## COMPETENCY ISSUES AT THE EVIDENTIARY HEARING

### Compelled Attendance at Evidentiary Hearing

The court ordered that, although Mr. Huggins' input was not required on any evidentiary hearing issue, his presence was required by Rule 3.851(c). ROA 4/770-72. The court authorized "any and all necessary force" to compel Mr. Huggins' presence because "it is imperative that he be physically present for the evidentiary hearing." ROA 4/796. On the other hand,

> This Court has carefully reviewed the Rule 3.851 motion and has determined that none of the claims raised require Mr. Huggins' input. Therefore, the hearing scheduled for August 23,2010 can go forward regardless of Mr. Huggins' competency status . . . .

ROA 4/799.

These facts and more were alleged and supported in the defendant's Petition for Writ of Prohibition. The petition was denied after the hearing began.

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[6] The delay in receipt is corroborated by the State's Exhibit 1 filed in the State's Consolidated Response to the Petition for Writ of Prohibition.

## Delusional at Evidentiary Hearing

At the start of the evidentiary hearing, Mr. Huggins presented the court with two documents. ROA 31/7-10. The first was a copy of an ethics complaint alleging Judge Perry imposed his personal beliefs to punish Mr. Huggins for uncharged crimes, suppressed evidence of a murder (apparently referring to Mr. Huggins' delusional belief that his first wife was murdered), and appointed defense attorneys for personal reasons. He alleged that the trial judge and defense counsel engineered the timing of the first trial so that it went to the jury on his first wife's birthday. ROASUPP 1/51-58. The complaint included Mr. Huggins' letter to an assistant state attorney containing delusional threats. ROA 4/604. The other exhibit was a letter claiming his family had some connection to the Oklahoma City bombing plot. ROASUPP 1/59-61. He claimed he was railroaded to death row by the people behind his wife's murder and the Oklahoma City bombing.

## *Nelson* Motions Denied

At the hearing, Mr. Huggins repeatedly sought to discharge CCRC counsel and vacate the postconviction motion to allow him to file his own motion. ROA 31/10; ROA 31/15;[7] ROA 31/64-65; ROA 32/197-200.

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[7] Mr. Huggins filed a motion to discharge counsel on June 23, 2008, while he was deemed incompetent. ROA 3/583. The court denied the motion without prejudice to renew it after Mr. Huggins was competent. ROA 3/587-88; ROA 20/1-8.

The trial court denied the motions because Mr. Huggins had refused to appear at the July 30, 2010, *Nelson* hearing. The court said it would re-entertain the motion after the competency issue was resolved. ROA 31/16. The judge said Mr. Huggins was "still presumed to be competent under the law." ROA 31/156-59. He again accused the defense of being dilatory in filing its renewed competency motion. ROA 31/159.[8]

The judge further confused the issue by saying that Mr. Huggins "refuses to cooperate with the State's expert ... ." ROA 31/161-62.[9] There was never a state expert, although the two surviving members of the court panel were de facto the State's experts. [10]

Mr. Huggins said the incompetency issue arose when he advised postconviction counsel that he had been railroaded because of what happened to his first wife, Marianne Huggins and the Oklahoma City bombing. ROA 31/11-15.

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[8] The delay in the defense expert's final opinion caused by Florida State Hospital's failure to timely respond to a records request is discussed elsewhere in this brief. A more detailed time line outlining all the delays chargeable to the state is offered in the Motion to Correct Errors, ROA 5/850-69.

[9] The court experts had been rebuffed when they tried to meet with Mr. Huggins at death row, but had not prepared reports prior to hearing.

[10] Dr. Dee was the expert appointed based on the input of the defense pursuant to Rule 3.851(g)(5). Upon his death, the remaining experts were Dr. Danziger and Dr. McClaren. Those two experts had been appointed upon the express suggestion of the State. ROA 2/198, ROA 11/6.

After the court ordered CCRC counsel to advise Mr. Huggins of the consequences of refusing to be evaluated, counsel confirmed the advice was given but that Mr. Huggins spent the rest of the time advising counsel of issues he wanted presented, all of them based on his delusions. ROA 31/99.

The court refused to revisit the 2009 competency ruling vis-a-vis Mr Huggins' present competence, It responded erroneously at ROA 31/163-64 that the October 2009 ruling was "res judicata" because this Court had denied the Petition to Review Non-final Order. *Huggins v. State*, Case No. 09-2097 (Fla., dismissed, Jan. 27, 2010). The court also erroneously believed the court, not Mr. Huggins, had sought the review. ROA 31/163-64. This Court granted the State's Motion to Dismiss without reaching the merits. There was never "res judicata."

Counsel advised the court of the delusional claims Mr. Huggins wanted to pursue: his ex-wife, Angel Huggins, conspired with the Dixie Mafia to frame him; Walt Disney World needed a scapegoat and Mr. Huggins filled the bill; Senator Nelson was involved in framing Mr. Huggins, which somehow related to the Oklahoma City bombing; Judge Perry and Public Defender Wesley conspired to railroad him to death row; and the judge and Wesley were carrying out the wishes of the Democratic Party of Florida and Senator Nelson. Counsel advised this was only a sampling of the delusional issues. ROA 32/208-09. Mr. Huggins' claims

were the same claims the court experts had found were the delusional belief system which rendered him incompetent. ROA 32/228.

## ***Faretta***[11] **Motions**

Immediately after denial of the last *Nelson* motion, Mr. Huggins made an unequivocal request to proceed pro se. The court denied the motion. ROA 32/32. When the judge reminded Mr. Huggins that he had refused to leave his cell for the July 30, 2010, teleconference hearing (apparently implying waiver), Mr. Huggins said he had not been told why he was being called from his cell, ROA 32/241. This is consistent with the prison guard's statements to the court. ROA 35/25.

When defense counsel advised they needed input from a competent defendant to assist in presenting the claim then before the court, the court noted that Mr. Huggins had been articulate about his likes and dislikes. Counsel responded that what Mr. Huggins was articulating were his delusional claims. ROA 32/243.

Mr. Huggins made another unconditional request to discharge counsel and to proceed pro se. The court denied the motion. ROA 32/283.

Mr. Huggins renewed his request to discharge CCRC counsel at the start of the third day of the evidentiary hearing. ROA 33/356-58. Mr. Huggins submitted Court Exhibits 1 & 2, ROASUPP 3/57-66, two letters he said proved violation of

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[11] *Faretta v. California*, 422 U.S. 806 (1975)

the attorney/client privilege. He claimed they had been written by his wife, although the first letter was signed by his stepdaughter. ROA 33/358-64. The court denied the motion. ROA 33/363-64.

At the close of the evidence, the court denied Mr. Huggins' renewed *Nelson* and *Faretta* motions. ROA 34/544.

## FACTS DEVELOPED AT EVIDENTIARY HEARING RELATING TO THE 3.851 CLAIMS

### DR. RICHARD CARPENTER

Dr. Carpenter said Mr. Huggins was under extreme mental or emotional distress at the time of the murder. ROA 31/27-45. Defense Exhibit 1, ROASUPP 3/1-47 (misidentified in clerk's index as "Copy of Correspondence from Defendant"). A Baker Act petition five years before the murder established a history of a severe mental illness. *Id.* Dr. Dee's neuropsychological testing established brain damage consistent with the history. *Id.* Dr. Danziger's 1998 report indicated a history of mood swings, suicide attempts, and a belief that people were present who were not actually there. *Id.* A 1995 report by a Dr. Tressler indicated Mr. Huggins was paranoid, confirmed by an MMPI test. *Id.*

Dr Carpenter concluded that Mr. Huggins suffered from bipolar disorder, with a history of psychotic thinking and choking in domestic violence situations. His wife said he was acting strangely the morning of the murder. Mr. Huggins was in an extreme state of unresolved emotional and psychological conflict about his

wife after an argument before the murder when he choked her. He displaced the conflict on the victim. After the murder, he acted in a conciliatory manner towards his wife, consistent with a domestic violence pattern. ROA 31/38-45.

**ILLENE MANNING**

Ms. Manning worked at the deli where the victim had last been seen alive and was familiar with her. ROA 31/66. The day of the murder, a man called the deli and ordered a sandwich for Mrs. Larson. Ms. Manning handed the order to a man at the deli counter. ROA 31/68-69. Her view was partially blocked by the deli counter. ROA 31/70. However, when she saw Mr Larson on television news a few days after the murder:

> ... I said, oh, my gosh, he look just like the person, you know. ... And I was, like, oh, no, just the eyes. ... It was her husband. I mean, just what I'm saying. I'm not saying it was him, but the eyes. ... You know, like you seeing a ghost, you see someone, you get chills, or whatever.

ROA 33/ 31/76-77. Ms. Manning said she saw Mr. Larson in the courthouse hallway before the hearing and that he looked like the man who picked up the sandwich. ROA 31/73. Ms. Manning was available at trial. ROA 31/78. She said she told police about what she saw. ROA 31/86-87.

**FOREST THOMAS SPARKS, SR.**

Mr. Sparks had testified at trial that he came across Carla Larson's co-worker, John Ricker, and another construction employee in a wooded area the day

the body was found. ROA 31/107. Mr. Sparks had been a Walt Disney World supervisor responsible for the security of the property where the body was found. ROA31/106. Mr. Sparks testified at the postconviction hearing that Ricker was in a area only accessible through a locked gate with high security locks four to five miles from the construction site where Ricker and Mrs. Larson worked. Someone working on the site would not have had one of the strictly controlled high security keys. ROA 31/111-15.

**TAMMY CREIGHTON**

Tammy Creighton is Angel Huggins' sister. ROA 31/117. She testified at the evidentiary hearing that she had been visiting with her mother, Faye Blades, at the time Mrs. Larson died. She went to Disney World with John Huggins, her traveling companion, Lillian Brandell, and others. ROA 31/118-19. At trial, Brandell had said that this occurred June 21, 1997, and that they had rented two rooms for that night. ROA 1999 6/967-68. Ms. Brandell said that they moved to a condominium apartment the next day, June 22, 1997, where they stayed until Friday, June 27, 1997. ROA 1999 6/969, 974.

Ms. Creighton said Mr. Huggins was with her beginning Sunday, June 22, 1997. ROASUPP 11/1231. She and Mr. Huggins had not been apart on Tuesday

and Wednesday, June 24 and 25, 1997. ROA 31/120.[12] On Tuesday, June 24, 1997, she accompanied Mr. Huggins to Kevin Smith's house to buy marijuana. Ms. Creighton said they pulled into the back of the property where she saw a motorcycle, but no white Ford Explorer. ROASUPP 11/1232-34.[13]

Ms Creighton said she returned to the apartment with Mr. Huggins and her friend and she went to sleep. She woke up before eleven p.m. that night. Mr. Huggins came in carrying a Taco Bell drink cup. ROASUPP 11/1237, 1242-43. This evening was significant because it is the evening the victim's SUV was found burning in a county park near the house where Mr. Huggins had bought the marijuana. Creighton's testimony provided an alibi for the burning of the SUV.

The order denying postconviction relief found that trial counsel's decision not to call Creighton because she had reconciled with her sister and would be unreliable was a "reasonable, strategic reason." ROA 5/931. However, Ms. Creighton had already reconciled with her sister when she provided the alibi at her pretrial deposition. ROASUPP 11/97. There was no strategic reason.

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[12] After the State objected that additional testimony by Ms. Creighton was the result of her reading her deposition in the hearing, the defense introduced the deposition. ROA 31/130-31. The remainder of the testimony is taken from the deposition.

[13] Smith claimed Mr. Huggins had parked the victim's SUV behind his house where it remained until it was set on fire a block away. If the SUV was not there, then Smith's story is impeached, lending credence to the defense theory that Smith was implicated.

## CHARLOTTE GREEN

Ms. Green reiterated her trial testimony that she saw Mr. Huggins driving a white truck with the rear door spray painted black on June 24, 1997. She said she had heard reports that the SUV was white. ROA 31/134. Then she said that she did not see news about the truck until after her claimed second and third sightings of the truck, ROA 31/135. Then she said she saw a television report on the search the day after she first saw the truck. ROA 31/138.

She said saw the truck the second time while delivering a bill to Shawny Kronfield for contracting work. Ms. Green said seeing the truck the second time caused her to have "a scary feeling." ROA 31/137-39. When Ms. Green returned to Ms. Kronfield's the next day, which she said was June 27, 1997, to pick up her payment, she said saw the truck, now burned out. ROA 31/145-46.

Ms. Green could not explain the discrepancy between her evidentiary hearing testimony that she had seen the news report about the SUV the day after her first sighting, and her trial and deposition testimony that she had seen no TV reports until after she saw the burned out vehicle. ROA 31/149.

Although she testified at the hearing that she recognized Mr. Huggins when she saw his picture after he was arrested, ROA 31/139, confronted with her inconsistent statements about when she saw news reports, she volunteered that she never saw a news report about his arrest. Reminded of her earlier testimony in the

hearing that she recognized Mr. Huggins from the story about his arrest, she agreed that she had seen a report of his arrest. ROA 31/149-50.

**MARK THORNTON**

Mr. Thornton was a corrections officer on the Orange County Jail cell block where Mr. Huggins was held for trial. The State had introduced trial evidence suggesting guilty knowledge on the theory that Mr. Huggins shaved his body to avoid having hair samples taken. The defense had called Thornton to prove Mr. Huggins shaved because of a lice outbreak.

Officer Thornton said at the evidentiary hearing that Mr. Huggins had shaved himself about the same time as a lice infestation. ROA 32/169-73. He did not recall whether Mr. Huggins was one of the inmates who proved he had a lice infestation, but that when some inmates were found to be infested, "The other inmates were paranoid," ROA 32/172.

The same week as the lice infestation, Officer Thornton saw Mr. Huggins step out of the shower with a shaved pubic region. ROA 32/176. Thornton said that he "believed" Mr. Huggins told him the reason he shaved was because of lice. ROA 32/176. Mr. Huggins' lawyer, Robert Wesley, spoke to him about the shaving episode. ROA 32/179.

Officer Thornton said that he went to Jacksonville to testify at the first trial and discussed his testimony with Wesley at Hooters. ROA 32/180. At the second

trial he briefly spoke with defense counsel Hill outside the courtroom before he testified. ROA 32/181-82. Officer Thornton did not tell Hill that the only way he knew Mr. Huggins shaved because of lice was because Mr. Huggins verbally informed him. ROA 32/182.

As to the critical question by attorney Hill at trial,[14] Officer Thornton reviewed his trial testimony, i.e.:

> Q To your knowledge, did Mr. Huggins ever shave his pubic region after complaining of lice?
> Mr. Ashton: Objection. Hearsay. Basis of knowledge.
> The Court: Overruled. You can answer the question, if you have personal knowledge. Not what someone else told you.
> A Yes, I did.

ROA2002 26/1469. Officer Thornton testified in the 2010 evidentiary hearing that he interpreted the instruction from the court thus:

> My understanding or my meaning was that it wasn't someone else who told me, it was Huggins who told me. Someone else to me would be someone other than Mr. Huggins himself.

ROA 33/ 32/184-85. Defense counsel Hill never told him to not use any hearsay from Mr. Huggins ("No. I wouldn't know what hearsay was, actually."), or to not tell the court or jury anything that Mr. Huggins told him. ROA 32/189.

**RAUDEL VITIER**

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[14] This Court held on appeal that this opened the door to introduction of Mr. Huggins' prior felony conviction.

Mr. Vitier was a public defender investigator. ROA 32/234-35. The defense learned Mr. Larson was on the road near the scene when Ricker found the body. ROA 32/239. Mr. Larson spontaneously asked "does she have a blue towel wrapped around her head," before that fact had been made known outside the police investigation. ROA 32/245-46. Mr. Vitier worked at the same Home Depot store as Mr. Larson and said Larson worked in an area where it was possible to go off the premises without clocking out. ROA 32/246-47.

Mr. Vitier said Mr. Huggins expressed delusional paranoid beliefs. ROA 32/258-59. Mr. Huggins believed that he was being framed by "Centex Rooney [Mrs. Larson's employer], Disney, the powers that be." ROA 32/260.

Vitier said Preston Ausley was available for trial. Ausley was the man who saw someone who looked like Angel Huggins driving the victim's SUV after the murder. Prosecutor Ashton's failure to disclose Ausley was the *Brady* violation forcing a new trial. ROA 32/265-66.

Mr. Vitier said that Mr. Ricker had been considered an alternate suspect by the defense, but he never retrieved Ricker's court files from a rape prosecution. ROA 32/266-67.

**GREGORY HILL**

Mr. Hill was second chair at the second trial but only examined Thornton. ROA 32/284-86. Mr. Wesley handed him the file the evening before saying the

witness was called "to establish the lice issue at the jail." ROA 32/286. Mr. Wesley did not tell him about conversations between Wesley and Thornton. *Id.*\

Avoiding hearsay was a priority in the examination of Thornton. ROA 32/288. When Hill asked Thornton if Mr. Huggins shaved his pubic region after complaining of lice, ROA 2002 26/1469, he anticipated a yes or no answer not based on hearsay. ROA 32/289.

Hill understood the court's instruction to prohibit hearsay. Because of the instruction he did not withdraw the question. He would withdraw any question that could disclose hearsay when he was trying to avoid hearsay. ROA 32/291. Had he known the question would elicit hearsay, he would have established that there was a lice problem at the jail at the time Mr. Huggins was there, and that inmates shaved their body hair to rid themselves of lice. ROA 32/292.

**CAMERON WEIR**

Detective Weir was the lead detective. He interviewed John Ricker shortly after Ricker found the body, by the road near the crime scene. ROA 32/312-13. He specifically asked Mr. Ricker if he had made any trips to the scene other than the ones Mr. Ricker had told him about when he had been accompanied by coworkers. Ricker did not mention any other trips. ROA 32/318.

Detective Weir never learned about two trips Mr. Ricker made by himself to the area, within yards of the body, the night of the murder. Ricker mentioned the

trips in his deposition. Weir was not in the courtroom during the first trial in 1999 when Ricker mentioned the trips, nor did he read the deposition. ROA 32/318.

Detective Weir testified that he participated in the decision to immediately publicize the information that the recovered, burned out, SUV appeared to have been spray painted black, hoping a store clerk would recall selling a large quantity of black spray paint. ROA 32/319-22.

Detective Weir never learned the identity of the person Mr. Larson had told investigators might have had a relationship with the victim during a separation in the marriage. ROA 32/322. No one investigated Mr. Ricker's whereabouts after he returned to the work site from lunch. ROA 32/324.

Detective Weir said that at the time of the murder, a guard rail separated east and west bound lanes of Osceola Parkway in the area where the body was found. A driver exiting the dirt road exiting the wooded area would have to turn right, westbound on Osceola, drive to the end of the barrier, and then do a u-turn to go eastbound. ROA 32/327-28. The end of the dirt road was four to six road stripes east of where the guard rail terminated. ROA 32/330-31.[15]

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[15] This refuted trial witness Christopher Smithson. Smithson came forward only after he learned a new trial was ordered. Smithson said he saw Mr. Huggins drive a white SUV directly across westbound Osceola from the dirt road where the body was found. ROA2002 23/914-15. Detective Weir's testimony about the median barrier shows it was impossible for any vehicle to have driven in the manner Smithson claimed to have witnessed. The barrier was removed after the murder, suggesting Smithson fabricated or altered his testimony based on the road

## ROBERT WESLEY

Robert Wesley testified that he was in private practice when Judge Perry appointed him to the case. ROA 33/365-66. His associate, Tyrone King, assisted in the 1999 trial. Mr. Wesley had intended to do the penalty phase of the 1999 trial, but at the last minute swapped assignments with King. ROA 33/376-77.

Mr. Wesley said his strategy was to show Mr. Huggins' involvement in the Save-the-Child ministry in Haiti, his commitment to his faith, photographs of his involvement in baptisms, and the fact that his children "were great kids that loved their dad very much." ROA 33/375.

Mr. Wesley was responsible for providing all materials to his mental health experts. He withheld the file on the 1992 Baker Act proceeding from his mental health experts because he believed the report reflected a domestic feud rather than a mental disorder. "If I missed it, I missed it." ROA 33/370-74. Mr. Wesley withheld the documents from the 1995 custody proceeding showing Mr. Huggins' mental health problems. ROA 33/374. Wesley also withheld from the experts Mr. Huggins' recollections of childhood sexual abuse involving step siblings, "a period of great shame," because Mr. Huggins would not allow him to. Mr. Wesley did not seek the advice of another attorney or mental health expert regarding the dilemma

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configuration when he decided to aid the State.

of being told by his client to conceal this essential information. "I take my directions from my client." ROA 33/378-79.

Mr. Huggins also told Wesley that he was suspected in the death of his first wife, Ruth Ann. She died in a car crash and had a high blood alcohol level, but Mr. Huggins maintained he had been under suspicion. ROA 33/370.

Mr. Wesley kept the case when he became the public defender before the second trial. ROA 33/379. Mr. Huggins had fired Mr. King. ROA 33/368. Wesley made no preparations for the penalty phase. Mr. Huggins intended to fire him at some point. He "hoped" Mr. Huggins would fire him before the penalty phase – "had Mr. Huggins not fired me before penalty phase, I would have been absolutely unprepared to go forward. There was nothing done." ROA 33/379-80.

Mr. Wesley testified that he knew of Dr. Henry Dee's July 2002 diagnosis of an organic mental disorder, brain damage with markedly impaired memory functioning and difficulty in executive functioning, and a long history of psychiatric abnormality with cognitive and affective features. Dr. Dee's conclusions were "Vastly different from what I understood in 1999." ROA 33/388.

Wesley did not proffer Dr. Dee's report to the court because he was worried that Dr. Dee might seek brain imaging. ROA 33/391. If imaging failed to corroborate Dr. Dee's diagnosis, it would give "fodder" to the State. ROA 33/389. Wesley did not explain how a trial proffer would lead to imaging or how a

complete absence of evidence of brain damage was better than disputed evidence of brain damage.

Mr. Hill had been brought into the case in a mentoring capacity. Wesley gave Hill a witness "as a reward for putting up with me ... ." Wesley said he and Officer Thornton were from the same hometown and they had a jocular relationship, a familiarity he felt made it "a perfect place to let Greg Hill take a witness on a very simple matter." ROA 33/391-92. Wesley said he assigned Hill to examine Thornton the day of his testimony. ROA 33/392-93.

Wesley expected Thornton was just going to talk about how inmates proved they had lice. ROA 33/395. He had not discussed with Thornton the limited scope for which he was being called, i.e. procedure only. ROA 33/395. He thought Thornton was a safe witness because Thornton saw Mr. Huggins frequently and he was supposed to only talk about procedures. ROA 33/396. Mr. Wesley did not recall telling Mr. Hill about Thornton's limited purpose. ROA 33/396.

Wesley said he would not have asked Mr. Thornton how he knew Mr. Huggins had shaved because of lice.

> Thornton is not the kind of witness you want to give him too much leeway. ... [I]t was a difficult line of questioning anyway. It was a difficult topic.

ROA 33/396.

Mr. Wesley had no recollection of the critical testimony that this Court found opened the door to introducing the nine prior felony convictions. He reviewed the trial transcript during a break,[16] but then testified unresponsively of mixed recollections of later in the trial – when the State asked Thornton how he knew Huggins shaved because of lice, ROA2002 26/1471, and when the State submitted the prior convictions, ROA2002 26/1551 et seq.

When Mr. Wesley's attention was again drawn to the fatal testimony at ROA2002 26/1469-79, he could only say he had reviewed the transcript and was present when the question was asked. He had no present recollection – "Just on the transcript." ROA 33/400. He conceded that he "guessed" he should have intervened to withdraw the question. He said he should have done a lot of things differently that day. ROA 33/399-400. Mr. Hill was discharged from the case after the lice debacle. The incident was "a pretty corrosive act ... ." ROA 33/380. Mr. Huggins was "livid, ... pretty disturbed by it." ROA 33/380-81.

Mr. Wesley said that he knew Shawny Kronfield's records, deposition and police interview proved that the earliest Charlotte Green could have picked up any

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[16] The transcript of the evidentiary hearing at ROA 33/398-399 reports incorrect page numbers for the references to the 2002 ROA. It is clear from the context that ROA2002 26/1469 et seq. are the correct page numbers as the numbers reported in the hearing transcript reference irrelevant material. The transcripts of the postconviction proceedings contain numerous mis-transcriptions. Should the Court's decision turn on a particular turn of phrase, counsel respectfully urges the Court to consider the context or to seek clarification from the parties.

check from Ms. Kronfield was July 2, 1997. ROA 33/402-07. He did not recall making a decision to not present Ms. Kronfield's testimony. ROA 33/407.[17]

Mr. Wesley knew Tammy Creighton provided an alibi for Mr. Huggins. However, he volunteered that she had reconciled with her sister, Angel Huggins, by the time of trial and that she was unreliable (implying the unreliability arose because of her reconciliation). He did not mention that Creighton was already reconciled when she was deposed. ROASUPP 11/97.[18]

Asked about the publicizing of the black spray paint, Mr. Wesley answered unresponsively to reveal that Mr. Huggins had insisted to him that the Ford Explorer had never been painted. ROA 33/405. Mr. Wesley pounded another nail in his client's coffin when he later volunteered unresponsively that "the problem I had, of course, as counsel, is the client making statements, definitive statements, about the condition of the vehicle." ROA 33/410.[19]

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[17] Evidence Green picked up the check July 2, 1997, negated her inculpating testimony. Green had based her timeline on when she picked up the check. July 2, 1997 was a full week after any opportunity for Green to have seen Mr. Huggins.

[18] If Tammy Creighton became unreliable because she was reconciled with her sister, the question arises why Ms. Creighton might change her story to harm Mr. Huggins. This suggests that Angel Huggins was, indeed, out to get Mr. Huggins. However, presenting this theory at the evidentiary hearing was impossible because Mr. Huggins did not cooperate in developing the facts or offer insight about the family dynamics which could have allowed effective presentation of the claim that Angel Huggins framed Mr. Huggins to avoid prosecution.

[19] Mr. Huggins' incompetence prevented collateral counsel from confirming or rebutting this damaging unsolicited testimony.

The absence of black paint would have refuted Charlotte Green's story and supported Preston Ausley's likely sighting of Angel Huggins driving the victim's SUV. Mr. Wesley said Ausley was available for the 2002 trial but he became a moot point when the State did not call Angel Huggins at the second trial. He also had concerns about Mr. Ausley's credibility. ROA 33/411. He did not volunteer why evidence Angel Huggins drove the victim's SUV was irrelevant at the second trial.

Mr. Wesley reviewed his trial file on Mr. Ricker at and his 2002 testimony. ROA 33/413-16. Defense Exhibit 5. ROASUPP 5/67-200. Wesley said he knew Mr. Ricker's accounts showed gaps the afternoon of the murder, but he did not think Ricker had time to do the murder. ROA 33/417 and Exhibit 5, ROASUPP 3/70-72 (saw Carla en route to lunch), & 3/99 (meeting at 1:30).

Mr. Wesley knew at trial there were questions about Ricker's relationship with and access to the victim, and that only later did he learn (apparently from CCRC counsel) of Ricker's conviction years before the Larson murder involving a kidnap and rape in a secluded area. ROA 33/412, 418.[20] He did not point the finger at Ricker at the second trial because at the first trial he had focused on Angel

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[20] In the 1998 deposition taken by co-counsel King, Ricker disclosed he had been charged with sexual battery and kidnaping of an acquaintance in 1983 in Seminole County, that there had been a mistrial for witness tampering, and that he pled down to simple battery. ROASUPP 3/95-97. The deposition was in the defense file.

Huggins and Kevin Smith, an acquaintance of both John and Angel Huggins who lived very close to where the victim's SUV was found burning: "I know that there is due process limitation on me in a subsequent proceeding from taking an entirely new approach." ROA 33/414. He said that if he had known of Ricker's prior conviction involving abduction and rape at a secluded place, he would have used the evidence at trial, if he had chosen to point the finger at Ricker. ROA 33/418.

Wesley did no recall Ricker's deposition testimony. Ricker had said that the day of the murder he went by himself twice to the area where Ms. Larson's body was later found. ROA 33/423. Exhibit 5, ROASUPP 3/111-13 (6:30 pm night of murder, drove alone to the area); 3/118 (returned to office alone after 15-20 minutes); 3/116-18 (returned to wooded area within yards of where body later found, alone for ten minutes until joined by fellow workers where he claimed to have found fresh tire tracks). Mr. Wesley also did not recall Detective Weir's interview of Ricker the evening of June 12, 1997, where Ricker failed to mention the solo visits. Exhibit 5, ROASUPP 3/83.

Mr. Wesley said that the Weir interview and the deposition were inconsistent, but that he was unaware of the inconsistency during his preparation for trial. ROA 33/425. He said the inconsistency would have been useful to develop Ricker as a suspect. ROA 33/426.

Mr. Wesley did not recall Manning telling him that Mr. Larson resembled the man who picked up the sandwich. ROA 33/421-22.

Mr. Wesley admitted he missed prosecutor Ashton's closing argument that the witnesses could have not have known about the black paint unless they had actually seen the vehicle. He said he should have taken action when the argument was made. ROA 33/427. A motion for mistrial or curative instruction would have also been options. ROA 33/428.

Mr. Wesley knew Mr. Huggins wore a leg brace at the Jacksonville trial. It was chrome plated, hinged at the knee, fixed with a key closure and a locking pin that required release to bend at the knee. ROA 33/434. Wesley did not recall whether Mr. Huggins wore a brace in Tampa. His brother wore a brace and he was accustomed to seeing Mr. Huggins wearing the brace in Jacksonville. ROA 33/434-36.

When the State asked Wesley why he didn't call Mr. Huggins to testify, CCRC counsel objected because the issue went beyond the scope of direct examination. Counsel had avoided direct examination on the claim because of Mr. Huggins' incompetence. The court's hearing order specifically said Mr. Huggins' input was not necessary. Counsel was therefore powerless to refute or rebut Mr. Wesley's testimony without input or rebuttal from Mr. Huggins. The objection was overruled. ROA 33/440-41.

Over continuing objection, the State elicited that Wesley had concerns about an allegation of perjury, about discussions he had with Mr. Huggins about taking the stand, that he would not have prohibited Mr. Huggins from testifying and that he would have assisted in the presentation. ROA 33/ 442-43.

The State was allowed, over objection, to ask if Mr. Huggins ever told him what happened. Wesley said Mr. Huggins told him he walked to a 7-Eleven but he was vague about what happened after that. Over objection the State asked if Mr. Huggins ever admitted driving Carla Larson's vehicle to Brevard (where it was later found burned). Mr. Wesley said "Not with specificity. It's sort of an assumption. ... [S]ome things were assumed and some things – and I don't know whether to take a nod as an admission. . . . I don't think he was being cautious of counsel. I think he was engaging in an intellectual exercise." ROA 33/ 443-45.

Over objection, Mr. Wesley said Mr. Huggins repeatedly told him the victim's SUV had never been spray painted which he took that as an admission of direct knowledge. Mr. Huggins said there was no ligature, contrary to the medical examiner's finding, taken by Wesley as " a statement of fact rather than a statement of speculation." ROA 33/447.

Mr. Wesley testified he vacillated about implicating Ricker. He thought it would look like the defense was slinging mud. The State asked if the evidence Mr.

Wesley had was that Mr. Ricker returned from lunch 1:00 pm and then had a meeting at 1:30 pm and on. Mr. Wesley agreed.[21]

Mr. Wesley said he could have done better attacking Charlotte Green's credibility. She "wanted to be on the six o'clock news." Her credibility was "a big point of contention to the defense." Ms. Green had no more knowledge about the black paint "than most of us did." ROA 33/451-52.

Mr. Wesley said in cross examination that he thought Corrections Officer Thornton was going to talk about the procedure at the jail for lice infestations. Wesley thought the lice infestation was so bad that everyone was using Quell or shaving their body hair. "[W]hat I was hoping is that Thornton would say it's chronic, epidemic, and acute, you know." Then he would have argued in closing that shaving body hair was reasonable under the circumstances. ROA 33/ 453-55. He did not think he advised Mr. Hill to stay away from the issue. ROA 33/457. He considered Thornton to be "not a significant witness. Mr. Hill, you take him and I'll think deep thoughts and that's – [cut off by State]." ROA 33/457.

**TYRONE KING**

[21] This is contrary to the actual knowledge of the defense from its deposition Ricker. Ricker said he had a meeting from 1:30 to 2:30 pm, then he walked the site from 2:30 to 4:00 pm. There was no indication he had an alibi for the time period. Defense Exhibit 5, ROASUPP 3/100.

Tyrone King was defense co-counsel at the 1999 trial. After Mr. Huggins represented himself in the 2002 penalty phase and provided no mitigation, the judge relied on the mitigation evidence King presented at the 1999 trial in the sentencing order. ROA 33/2002 15/1174, 1181, 1184-87. CCRC counsel called King to address the ineffective assistance of penalty phase counsel in presenting mitigation to the sentencer. When King took the stand, the court asked Mr. Huggins if he waived the attorney/client privilege "as far as the first trial since this motion only addresses the second trial?" Collateral counsel objected that Mr. Huggins was not competent to waive the privilege. The court noted that "The last time I checked he was still ruled competent." Mr. Huggins refused to waive. ROA 33/461-62. The court ruled:

> The motion is directed to the second trial, and Mr. Huggins has not waived his privilege of confidentiality. So unless you're going to ask Mr. King something about something else, you know, what he had for breakfast this morning and other general topics, his hobbies and things, which has absolutely no relevancy to the four corners of your motion, and your client has refused to waive confidentiality.
>
> Mr. King, you are hereby excused.

ROA 33/462.

**ROBERT M. BERLAND**

Dr. Berland is a forensic psychologist. Mr. Huggins met the criteria for the statutory mental health mitigators. He was psychotic at the time of the offense. ROA 33/491. Mr. Huggins suffered from a long-standing psychotic disturbance

involving delusional, paranoid thinking. The psychosis was biological, i.e. a life-long malady. ROA 33/466-68.

Mr. Huggins told Dr. Berland that he was being prosecuted because the judge knew that Mr. Huggins knew "the dirt on the mob and Disney." Mr. Huggins believed Disney and the mob conspired because Mr. Huggins knew they had done something wrong to Angel Huggins. Mr. Huggins said he knew what the mob had done and the mob, Disney, and ABC did not want the information to come out. ROA 33/473. The Baker Act proceeding in 1992 indicated bad mood swings, a violent temper and inflicted beatings, especially when he had been drinking. He thought rooms were bugged. This was typical for persons with delusional paranoid thinking exacerbated by alcohol and a biologically caused mood disturbance as part of psychosis or paranoid delusional thinking. ROA 33/480-81. The opinion was also based on reports of suicide attempts in 1992 and 1993. ROA 33/482.

Dr. Berland also commented on an MMPI test administered during the child custody proceedings in the mid 1990's. The test showed only an Axis II antisocial personality disorder. ROA 33/485. However, Dr. Berland said that a mental health professional who was aware that Mr. Huggins was talking about a conspiracy against him during preparation for the trial, the Baker Act report, the antisocial personality disorder diagnosis, and a history of the two suicide attempts, would need to look beyond the old MMPI results to investigate further for mental health

issues. ROA 33/486-88. Sexual abuse by an older sibling would also impact the evaluation. ROA 33/488.

## THE SHACKLING CLAIM

The court denied a defense request to order evidence relating to the leg brace be produced by the Hillsborough County Sheriff's office, which refused to provide the evidence otherwise. Counsel argued that the necessity of developing the information was not apparent until the defense received the order 7 days prior to the evidentiary hearing requiring all claims be presented. Counsel advised he had been relying on consultation with Mr. Huggins and possibly presenting Mr. Huggins' testimony to develop the shackling claim. However, given that Mr. Huggins was subject to a pending competency evaluation, counsel's continuing belief that Mr. Huggins was not competent, and the court's repeated allegation of impropriety or ethical violation should predecessor collateral counsel have obtained Mr. Huggins' oath on the 3.851 verification while believing him to be incompetent, counsel was not free to put Mr. Huggins on the stand to establish the claim. Nor, for that matter, could counsel rely on an incompetent Mr. Huggins to advise counsel regarding the shackling. The court refused to continue the hearing to allow the defense to develop the shackling facts. ROA 33/508-12. The court denied a renewed motion at the end of the proceeding. ROA 34/554.

## RICKER'S SEXUAL BATTERY VICTIM[22]

Ricker's 1983 rape victim testified that she had been the victim in a criminal case against John Ricker in Seminole County in the mid-1980's. She said that she was available at the time of Mr. Huggins' 2002 trial. She said she would have testified consistently with depositions she gave at the time of Ricker's trial and in 2006. ROA 34/519-20. By arrangement with the State, to save the witness from the trauma of repeating her testimony, ROA 34/516-18, the court accepted the transcripts of the depositions as evidence. ROA 34/522. Exhibits 7 & 8, ROASUPP 4/242-376 (1984 deposition of victim incorrectly indexed in this ROA as Deposition of John Ricker) and 4/378-405 (2006 deposition of victim, name unredacted).

The victim said Ricker drove her to a secluded undeveloped area 60 feet down a dirt road. ROASUPP 4/292. A blue blanket was used in the assault. ROASUPP 4/399. Ricker held a knife to her throat and injured her there. ROASUPP 4/391. Ricker had his hands all over her and grabbed her face. ROASUPP 4/400. Ricker put a flashlight into her vagina, then made her do it to herself while he held a knife to her throat. ROASUPP 4/307. Ricker took pictures.

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[22] The trial court instructed the press at hearing not to publish the identity or a picture of the witness. ROA 34/518. However, the judge declined to seal the depositions after the State overcame its normal predisposition to vigorously protect a rape victim's identity when Ashton asserted that the 2006 deposition had been a public record since it was filed.

ROASUPP 4/307. Ricker tore her shirt off, pulled her jeans down to her ankles, took off her shoes and tore off her panty hose. ROASUPP 4/297-300. Evidence that Ricker penetrated her with his penis was indeterminate. ROASUPP 4/302. Ricker told the victim that "things would never work" when he took girls out, "so, this is the way it had to be done . . . ." ROASUPP 4/303.

**PROSECUTOR ASHTON'S EXERCISE OF PRIVILEGE**

Prosecutor Ashton committed prosecutorial misconduct when he argued that Charlotte Green "had absolutely no way of knowing that the car had been painted black other than by seeing it." ROA 2002 at 1618-19), compounding the sin when he generalized the argument: "there's no way these witnesses could have known about that lousy black spray paint job unless they had seen it." ROA 2002 at 1619.

The black spray paint facts had been publicized as soon as the SUV was discovered in hopes of locating witnesses, as testified to by Detective Weir. ROA 32/321-22. Articles dated June 20, 1997, and July 2, 1997, from the Orlando Sentinel, reported that the SUV had been spray painted black and police were looking for witnesses. ROA 34/527-28. Defense Exhibit 9. ROASUPP 5/406-78.

Prosecutor Ashton exercised the work product privilege in deposition to avoid saying whether he would have made the closing argument about the paint if he had read a press account establishing that the black paint had been publicized. ROA 2/271. The privilege was challenged and the court sustained the privilege in a

motion hearing. ROA 2/251-99, 13/36-54. Ashton exercised the privilege again at the evidentiary hearing. ROA 34/542-43.

## DENIAL OF WRITTEN CLOSING

The court advised on the first day of the hearing that collateral counsel would be allowed to file a written closing. ROA 31/156. The court reneged at the end of the hearing. ROA 34/550. Collateral counsel argued that the upcoming competency hearing might affect the argument on the evidentiary hearing, ROA 34/552, but the court ordered immediate oral closings. It granted a 30 minute recess to prepare and denied a motion for leave to also file a written argument within seven days. ROA 34/554. Collateral counsel objected to going forward without the transcript and without the ruling on competency. ROA 34/555.

## SUMMARY OF THE ARGUMENT

1. IMPROPER DETERMINATION OF COMPETENCY IN 2009.

Mr. Huggins was denied constitutional protections when he was forced to proceed with the 2009 competency hearing without access to Florida State Hospital records, re-examination by the court panel, appointment of the defense-recommended expert to the panel, or the opportunity for a defense expert to examine Mr. Huggins prior to hearing. The improper determination resulted in denial of rights at all subsequent proceedings including the evidentiary hearing,

2. FAILURE TO DETERMINE COMPETENCY BEFORE THE POSTCONVICTION EVIDENTIARY HEARING.

The trial court deprived Mr. Huggins of his constitutional protections when it went forward with the evidentiary hearing without determining competency. Mr. Huggins had the right and necessity to be competent. The court's determination that Mr. Huggins' input was unneeded conflicted with numerous rulings at the evidentiary hearing. Rule 3.851(g) produces the unacceptable charade of an incompetent prisoner being compelled to attend a hearing he is, by definition, incapable of participating. He is not even competent to waive his presence, a right recognized for a competent prisoner.

The court deliberately and knowingly delayed a competency determination until after the evidentiary hearing. It impossible for postconviction counsel to properly present the claims in the postconviction motion. Because the court delayed identifying the claims to be heard until one week before hearing, because counsel believed Mr. Huggins to be incompetent, and because the court was adamant that knowingly placing an incompetent client under oath was unethical, counsel was unable to impeach or rebut witnesses. Erroneous rulings by the court allowed inculpatory testimony by trial counsel to be elicited by the State with no ability to respond. Finally, the failure to rule on competency deprived Mr. Huggins the fundamental constitutional right to choose to discharge counsel or to represent himself in the proceedings.

3. INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT AND PENALTY PHASE OF THE TRIAL.

A. GUILT PHASE - Trial counsel failed to properly investigate Ricker's criminal record, resulting in unfounded tactical decisions.

The postconviction court found that trial counsel fell below the standard of representation required by *Strickland* in the presentation of Officer Thornton's testimony, but erroneously found no prejudice.

Counsel failed to present the testimony of eight witnesses who would have raised a reasonable doubt. Counsel failed to adequately address the testimony and evidence presented by the State, and failed to call Mr. Huggins to advance his claims of innocence.

B. PENALTY PHASE - Trial counsel failed to develop mental health evidence establishing statutory and nonstatutory mental health mitigation. The postconviction court wrongfully barred examination of the trial counsel.

4. PROSECUTORIAL MISCONDUCT/*GIGLIO*

Prosecutor Jeffrey Ashton knew that witnesses who said they saw the victim's SUV painted black could have learned this from media reports instigated by investigators. Closing argument to the contrary was false and violated *Giglio*. The postconviction court erred in allowing Mr. Ashton to use privilege to avoid admitting actual knowledge of the falsity of the argument.

5. *BRADY* VIOLATION

The claim could not be developed or waived due to the court's failure to determine competency prior to hearing..

VI. LEG BRACE

Counsel was ineffective for failing to object and have the shackles removed. The State conceded that portions of the leg brace were readily visible. The court had personal knowledge that the brace was used, yet denied the claim for lack of evidence. The court's finding of procedural bar is incorrect – the record on appeal did not establish that Mr. Huggins was compelled to wear a brace in the guilt phase.

## THE STANDARD OF REVIEW

All of the issues should be reviewed under the principles set forth by this Court in *Stephens v. State*, 748 So.2d 1028 (Fla. 1999), The claims are a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court supported by the record.

## ARGUMENT

The Appellant disputes some of the factual statements in the Order Denying Motion to Vacate Judgment of Conviction and Sentence ("Order").

The court blamed Mr. Huggins for the lack of a competency determination before the evidentiary hearing: "If Mr. Huggins had agreed to be evaluated by the doctors, the issue might have been resolved prior to the evidentiary hearing, but his

own actions thwarted such an outcome." ROA 5/917. The court ignores its own order, which set the deadline for expert reports for two weeks after the evidentiary hearing. There was absolutely no way for competency to have been resolved prior to hearing, and the fault lies solely with the court. No date has ever been set for a competency hearing.[23] The court set a deadline after the hearing that thwarted justice, due process, and common sense.

The court indicates at ROA 5/917 that the court reminded Mr. Huggins that he refused to participate when he had the opportunity to have his motion to discharge counsel heard on July 30, 2010. The court ignores Mr. Huggins' response to that assertion at the evidentiary hearing, "No one told me what that motion was that day. No one told me why I was being called out of my cell." ROA 32/241. This is consistent with the prison guard's statement when the court questioned him by teleconference the day of the refusal: "I approached inmate Huggins' cell and I told him that he had a video conference and that he needed to get dressed, and for me to apply full restraints on him. ... He told me that he refused." ROA 35/25.

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[23] The order also finds Mr. Huggins refused to cooperate with the court-appointed mental health experts. ROA 5/915. While correct at the time of the order, Mr. Huggins ultimately cooperated with Dr. McClaren, who transmitted a report dated February 2, 2011. When the court sought to schedule a competency hearing, CCRC counsel advised that filing of the notice of appeal divested the circuit court of jurisdiction. A copy of the letter was provided to this Court and docketed in this proceeding on March 14, 2011.

At ROA 5/917, the court writes that it "entered an Order on Claims to be Heard at Evidentiary Hearing" on August 11, 2010. However, an order is not deemed "entered" until it is filed with the clerk, and the clerk's copy of the order shows it was "entered" a day later at the last possible moment, 5:59 PM on Thursday, August 12, 2010. ROA 4/770.[24] The court also omits the fact that it had promised the order would be issued two weeks earlier. ROA 35/41. Counsel asserted in the motion for stay filed the week before the evidentiary hearing that the list of claims was not forthcoming until seven days before the hearing, despite repeated inquiries by counsel to chambers.[25] ROA 4/785.

## ISSUE 1

**MR. HUGGINS WAS DENIED DUE PROCESS AND A FAIR HEARING WHEN HE WAS FORCED TO PROCEED WITH THE 2009 COMPETENCY HEARING. THIS DEPRIVED MR. HUGGINS OF RIGHTS PROTECTED UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE EQUIVALENT FLORIDA PROVISIONS THEN AND AT ALL SUBSEQUENT PROCEEDINGS.**

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[24] The machine-generated postage on the envelope to CCRC shows an August 13, 2010, postmark, consistent with delivery the following Monday, August 16.

[25] Counsel advised the court it had inquired the week of August 2, 2009, after the order was not forthcoming, and on August 10 and 16, 2010. ROA 4/785. The delay between the court's August 11, 2010, order date (with a certificate of service of August 12, 2010, and a clerk's indication of receipt of the document at 5:59 PM August 12, 2010, ROA 4/771) and the receipt by counsel August 16, 2010, is corroborated by the State's copy of the order, attached as Exhibit 1 in its Consolidated Response to the Petition for Writ of Prohibition in Case SC10-1614, bearing a stamped date of receipt by the State of August 16, 2010.

After the circuit court improperly found Mr. Huggins to be competent in October 2009, counsel for Mr. Huggins filed a Petition for Review in this Court. *Huggins v. State*, Case No. 09-2097 (Fla., dismissed, Jan. 27, 2010). The State moved to dismiss the petition as an unauthorized appeal, arguing that Mr. Huggins would be "free to seek review of the competency finding on appeal." Motion to Dismiss, Case No. 09-2097, at 2. This Court granted the State's Motion to Dismiss. Mr. Huggins urges the Court to take judicial notice of its file.

Mr. Huggins was deprived of all treatment to restore him to competency after he was ruled incompetent in 2006. ROA 2/332-73. The repeated unanimous opinions of the three court-appointed experts were that Mr. Huggins required treatment. The state facilities were incapable of recognizing Mr. Huggins' incompetence and failed to administer the drug therapies the court panel indicated were necessary to attempt to restore competence. See record generally from ROA 2/395 through ROA 4/715, and hearings at ROA 15 (6/6/07 hearing on objections to treatment plan), ROA 16 (8/15/07 hearing with DCF mental health providers), ROA 17 (11/28/07 competency hearing), ROA 18 (1/25/08 competency hearing), ROA 19 (5/2/08 competency hearing), ROA 5/1/09 (hearing in which Department of Children and Family Services agrees to treat Mr. Huggins, resolving the issues raised by the Department of Corrections' 9.142 Petition to Review non-Final

Order, Florida Supreme Court Case #SC08-1022 (voluntarily dismissed March 10, 2009).

In the October 2009 competency proceeding, the court erred by denying the Emergency Motion For Competency Evaluations by the court panel and refusing to appoint the new expert proffered by the defendant to balance the to State-recommended panel members. The court also erred in denying production of the Florida State Hospital records before addressing competency. The Kopetskie report and the hearing were insufficient to establish Mr. Huggins to be competent. The report on its face was insufficient and the testimony adduced at the hearing buttressed the conclusion that Kopetskie rushed to judgment based on insufficient and contradictory clinical findings including the deliberate withholding of the single key test which ultimately proved Mr. Huggins was not malingering and was, therefore, incompetent.

The October 2009 sequence of rulings denied Mr. Huggins due process and a fair hearing on the question of his competency protected by the federal Fifth, Sixth, Eighth and Fourteenth Amendment and the equivalent state protections.

While "trial by ambush" normally refers to discovery violations, the actions of a court can also lead to an ambush:

> Although Dr. Sanchez filed a motion in limine to preclude the testimony of this witness, the motion was not heard until the witness was actually called to testify. Thus, while cross examination was permitted, the sequence of the trial court's rulings effectively precluded any meaningful opportunity for Dr. Sanchez to adequately

> prepare for this expert's testimony or to take those steps that would put Dr. Sanchez on equal footing with his adversaries.

*Sanchez v. Mondy*, 936 So.2d 35, 39 (Fla. 3d DCA 2006).

In this case, the denial of access to the Florida State Hospital Records, immediately before being forced to deal with the expert, denied counsel the opportunity to prepare or to have a defense expert evaluate the client and review the hospital records to place the defense on an equal footing with its adversaries. As in *Sanchez*, "[t]he unfairness of what occurred is heightened by ... the sheer implausibility of the expert's conclusions ... ."*Id.*

The cross examination of Dr. Kopetskie showed that:

- he based his conclusions in ignorance of the nature and extent of the decades-long experience the court's experts had with Mr. Huggins;
- he denied irrefutable findings of brain damage;
- he could not determine the timing or extent of his interviews; and
- he knowingly and deliberately withheld the definitive test for malingering, yet diagnosed malingering;
- he agreed that if Mr. Huggins' delusional thinking was not discounted for malingering, he was incompetent to proceed.

The circuit court erred by finding Mr. Huggins competent based on the faulty report and testimony of a single expert. The subsequent SIRS results, the test Dr. Kopetskie believed to be the best possible test for malingering, and Dr.

Kopetskie's own belief that "the test data don't lie," ROA 22/26, belied any claim to the legitimacy of the competency finding.

The trial court never had the benefit of judicial review by this Court to correct the errors. The trial court even misinterpreted the order dismissing the appeal as unauthorized as a ruling on the merits and res judicata. ROA 31/163-64. On that basis, the court justified treating the defendant as competent when it suited the court's purposes after finding good cause to believe the defendant was incompetent at the time of hearing.

Mr. Huggins has been incompetent since he was first found to be incompetent. The DCF staff agreed Mr. Huggins had mental health problems which would render him incompetent, but for a discounting of symptoms for malingering which lowered the dysfunction to below the bar set for incompetence. Yet the DCF staff failed to administer the definitive SIRS test. A defense expert gave the test which conclusively established that Mr. Huggins was not malingering. The additional testing and review of the Chattahoochee records were sufficient to cause the trial court to order a new competency hearing, overcoming the high bar to a renewed competency claim.

The State-recommended members of the court panel found Mr. Huggins to be incompetent at every turn before the hearing. Dr. Danziger declined to elect for

competence or incompetence when he presented a written report in the middle of the evidentiary hearing., leaving undisturbed his prior diagnoses of incompetence.

Even Dr. Kopetskie refused to vouch for Mr. Huggins' competency within the time frame of the evidentiary hearing. At a status hearing one month after the evidentiary hearing, Dr. Kopetskie, now aware of the SIRS results, stated:

> DR. KOPETSKIE: ... I have no current opinion regarding Mr. Huggins' competency to proceed. The Court is aware that forensic evaluations have a shelf life and that over time they've become increasingly unreliable. It's been over a year since I've interviewed or met with Mr. Huggins, and, therefore, I would have no confidence in rendering any opinion as to his competency at this particular point in time.

ROA 29/10.

It is now impossible to determine whether Mr. Huggins was competent at the hearing:

> In this case, a post-guilt phase competency hearing was held, at which Tennis was found to be competent. However, this hearing is not relevant to the present issue because a determination of competency cannot be retroactive. *See Tingle v. State*, 536 So.2d 202, 204 (Fla. 1988); *Hill v. State*, 473 So.2d 1253, 1259 (Fla.1985).

*Tennis v. State*, 997 So.2d 375, 382 n.7 (2008) (Pariente, J., concurring). Mr. Huggins had an absolute right to have his competency determined before the evidentiary hearing and when he demanded to proceed pro se.

> Tennis alleges that the trial court erred in failing to conduct a hearing under *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), after Tennis made multiple requests to represent himself. We agree that this failure constituted error. Because of this error,

> which is of constitutional magnitude and not subject to a harmless error analysis, we are compelled to reverse and remand for proceedings consistent with this opinion.

997 So.2d at 375.

## ISSUE 2

**THE TRIAL FAILED TO CONDUCT A COMPETENCY HEARING BEFORE THE EVIDENTIARY HEARING, DEPRIVING MR. HUGGINS OF HIS RIGHTS PROTECTED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE FLORIDA EQUIVALENTS.**

This claim was first presented to this Court in the defendant's Petition for Writ of Prohibition, No. SC10-1614 (denied Aug. 23, 2010).[26] Filed August 18, 2010, five days before the hearing was to start, the State's response cited to *Breedlove v. State*, 13 So.3d 1056 (Fla. 2009), as an example of a case allowing a postconviction hearing to go forward while the defendant was incompetent. But Breedlove's claims were disposable on purely legal grounds.

This Court denied the Petition the day the evidentiary hearing started, word coming second hand from the assistant attorney general during examination of the last witness of the day. ROA 31/143. Mr. Huggins respectfully urges the Court to take judicial notice of the prohibition proceedings.

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[26] The circuit court had denied an emergency motion to continue. ROA 4/798-99.

Unlike *Breedlove*, none of Mr. Huggins' claims were based on purely legal issues. The irreparable harm Mr. Huggins alleged in the Petition came to flower in the evidentiary hearing. Mr. Huggins' competency was variable, depending on how it served the court's purposes.

Postconviction counsel could not place Mr. Huggins on the stand. The court repeatedly threatened that if counsel had placed Mr. Huggins under oath to verify the Rule 3.851 motion suspecting he was incompetent, then counsel should have "some action, some severe action, taken against him by The Florida Bar." ROA 27/43. "If [counsel] did suspect Mr. Huggins was incompetent [when he signed the 3.851 oath], the Court would recommend that the Florida Bar take severe action against him." ROA 4/798 n. 1 (order denying emergency motion to stay or continue). Placing a client under oath when counsel is on record believing his client is incompetent would surely trigger a report to the Bar and possible discipline.

The bizarre circumstance in this case is that the competency hearing was postponed to an indefinite date after the evidentiary hearing. When a trial court rules that there is a question whether a criminal defendant is competent, the court must determine competency before an evidentiary hearing. While the rule is excepted in the case of capital postconviction proceedings, claims that require client input must be abated until the defendant is competent.

This Court in *Carter v. State*, 706 So.2d 873 (Fla. 1997), set out the parameters for the types of claims which could be heard in the absence of a competent defendant:

> FN4. A vagueness challenge to the heinous, atrocious or cruel instruction ... is an example of the type of collateral claim that is of record and does not require the defendant's input. ... A newly discovered evidence claim based on the fact that an equally culpable codefendant was given a life sentence after the defendant's death sentence had been affirmed is another example of the type of claim that does not require the defendant's input.

*Carter*, 706 So.2d at 876 n. 4.

Most of the instant claims are based on ineffective assistance of trial counsel. When Mr. Wesley testified to comments and input Mr. Huggins had in preparation and presentation at trial, Mr. Huggins was unavailable to consult on the accuracy or completeness of trial counsel's representations at the evidentiary hearing. Even had Mr. Huggins had advise collateral counsel, his incompetence rendered it impossible to rely on Mr. Huggins' input or to place Mr. Huggins under oath to testify.

Despite the fiction that Mr. Huggins' input was unnecessary, the court proceeded to compel his attendance under threat of force to observe his demeanor for a later competency determination. ROA 4/796-97; ROA 28/passim. However, the experts who found Mr. Huggins to be incompetent agreed that his surface

demeanor and non-case related communications were unremarkable. As Dr. Carpenter said:

> His thought processes were in many ways rational save for the paranoid, delusional beliefs that he has ... . A delusional disorder is characteristically noted for the individual's otherwise rational and logical thought processes except for the delusional belief system. A noted reference from the annals of psychology has referred to this as "an island of insanity" which connotes the rationality that surrounds the delusional thinking disorder.

ROA 5/867.

Thus, observations of Mr. Huggins' unremarkable demeanor are valueless. On the other hand, Mr. Huggins' repeated demonstrations of his delusional beliefs during the evidentiary hearing reinforced the conclusion that he was incompetent. The judge's observations throughout the evidentiary hearing that Mr. Huggins appeared to be behaving rationally, and appeared to be consulting with his attorneys, were entirely consistent with Mr. Huggins' continuing incompetence. The court ignored Mr. Huggins' expressed irrational beliefs and collateral counsel's reports that client communications with counsel were delusional.

Mr. Huggins' communications at hearing were as hampered by his delusional beliefs as they ever were. Collateral counsel attempted to make the record on this throughout the evidentiary hearing. The court cut off counsel at one point when counsel attempted to put into the record the fact that the "consultations" with counsel merely manifested the delusional disorder

MR. GEMMER: [Objecting to the State cross examining Wesley about whether the client had complained to jail authorities about lice]. Same oversight [sic] Mr. Wesley did at the points we explored [sic - apparently referring to earlier objection to inquiry into client communications. ROA 33/440-41)]. I would object, Your Honor, that it calls for a statement I'm impowerless [sic] to rebut and refute in any way because my client is incompetent, because the Court has ruled his input is irrelevant in this proceeding, therefore, that question is irrelevant.

THE COURT: The objection is overruled. And you've communicated off and on with your client during this entire proceeding.

MR. GEMMER: Your Honor, if I could advance that a bit further?

THE COURT: No, sir.

Next question, Mr. Ashton.

ROA 33/455.

Counsel was unable to develop the mental health claims because of Mr. Huggins' incompetence, For instance, Dr. Berland testified that he was not able to determine whether Mr. Huggins killed Carla Larson as the result of displaced aggression directed towards his wife, Angel Huggins, without talking to Mr. Huggins after he was properly treated and medicated. ROA 33/502.

The court's failure to resolve the competency issue before the evidentiary hearing caused Mr. Huggins irreparable harm. The trial judge found that the high bar to a renewed competency determination had been met. He also knew that collateral counsel had a well-founded belief that Mr. Huggins was presently incompetent, which placed counsel under the shadow of the judge's repeated

statements that placing Mr. Huggins under oath when suspecting him to be incompetent merited a report to The Florida Bar and severe sanction.

The court therefore had the benefit at the evidentiary hearing of a defendant it had consigned to limbo. As a result of the unresolved question of competency:

- Mr. Huggins' input was deemed unnecessary;[27]
- All of Mr. Huggins' claims were forced to hearing;
- The court had an excuse to force Mr. Huggins' attendance at the hearing, purportedly solely to allow the court to assess Mr. Huggins' competence but also allowing the court to purport to find Mr. Huggins was participating in the proceeding, raising the specter that said attendance might "cure" error in holding the hearing without a competency ruling;
- The court used the open question of competency to deny Mr. Huggins' repeated motions to fire counsel and to proceed pro se;
- The court kept Mr. Huggins muzzled – the court's repeated observation that putting Mr. Huggins under oath when counsel believed he was incompetent was an ethics violation worthy of discipline by the Bar and this Court, prevented counsel from presenting any testimony from the defendant, or, as a practical matter, from relying on the defendant for any meaningful input.

Postconviction counsel was also hampered by the fact that the court's determination of what would be heard if the defendant were incompetent was a moving target which exploded one week before the hearing. The court initially issued an order the day after the case management conference of October 3, 2006, directing that an evidentiary hearing in the event of incompetence on only Claim 1A (limited to Ricker) and Claim II (prosecutorial misconduct in closing argument) "as these claims do not require the defendant's input." ROA 1/196. Eight days

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[27] How an unresolved question of competence leads to the conclusion that proceedings should continue as if the client is incompetent is unexplained.

later, the court added Claim III (*Brady* violation regarding reward paid to Angel Huggins). ROA 2/204.

Compare this with the court's final order for hearing:

> All claims set form in the Motion to Vacate Judgment of Conviction and Sentence, filed June 5,2006, will be addressed at the evidentiary hearing that begins August 23,2010. Although Mr. Huggins' presence would be required under Florida Rule of Criminal Procedure 3.851(c)(3), the Court finds that none of these claims require his input and therefore, the hearing may proceed under Florida Rule of Criminal Procedure 3.851(g)(1).

ROA 4/770 (footnote referencing attached list of claims omitted). Counsel, preparing to address the limited matters set out in the amended order of 2006, suddenly had to prepare for a hearing on all claims.

**Constitutional Protection to be Competent at Evidentiary Hearing**

The right to be competent in a capital postconviction evidentiary hearing is a fundamental right guaranteed by the Florida Constitution and the Due Process Clause of the Fourteenth Amendment of the United States Constitution, as well as the Fifth, Sixth, and Eighth Amendments.

In *Ferguson v. State*, 789 So.2d 306 (Fla. 2001), this Court recognized that a competent capital postconviction defendant is required and grounded in the federal constitution's due process protections. 789 So.2d at 311.

The right is guaranteed regardless of any prior determinations of competency:

> Florida Rule of Criminal Procedure 3.210 unambiguously requires the trial court to order a competency examination and conduct a hearing when it "has reasonable ground to believe that the defendant is not mentally competent to proceed." **This obligation is a continuing one.**
>
> In *Pridgen v. State,* 531 So.2d 951 (Fla.1988), we quoted from *Drope v. Missouri,* 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975), wherein the United States Supreme Court recognized:
>
> > Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.
>
> *Pridgen,* 531 So.2d at 954 (quoting *Drope,* 420 U.S. at 180-81, 95 S.Ct. at 908). We then noted:
>
> > Florida courts have also held that **the determination of the defendant's mental condition during trial may require the trial judge to suspend proceedings and order a competency hearing.** *Scott v. State,* 420 So.2d 595 (Fla.1982); *Holmes v. State,* 494 So.2d 230 (Fla. 3d DCA 1986). *See Lane v. State,* 388 So.2d 1022 (Fla.1980) (finding of competency to stand trial made nine months before does not control in view of evidence of possible incompetency presented by experts at hearing held on eve of trial).
>
> *Pridgen,* 531 So.2d at 954.
>
> Thus, a prior determination of competency does not control when new evidence suggests the defendant is at the current time incompetent. *See also Lane,* 388 So.2d at 1022.

*Nowitzke v. State*, 572 So.2d 1346, 1349 (Fla. 1990) (emphasis added). *Lane v. State,* 388 So.2d 1022 (Fla.1980), cited in the preceding quotation, echoes the circumstances in this case, that a "finding of competency to stand trial made nine months before does not control in view of evidence of possible incompetency presented by experts at hearing held on eve of trial."

It is not enough to simply present to the court "more of the same" when pressing for a new competency determination.

> Once a defendant is declared competent, the trial court must still be receptive to revisiting the issue if circumstances change. However, **only if bona fide doubt is raised as to a defendant's mental capacity is the court required to conduct another competency proceeding.** *Pericola v. State,* 499 So.2d 864, 867 (Fla. 1st DCA 1986), *review denied,* 509 So.2d 1118 (Fla.1987); *see also Drope v. Missouri,* 420 U.S. 162, 180-81, 95 S.Ct. 896, 908, 43 L.Ed.2d 103, 118-19 (1975). **A presumption of competence attaches from a previous determination of competency to stand trial.** *Durocher v. Singletary,* 623 So.2d 482, 484 (Fla.), *cert. dismissed,* --- U.S. ----, 114 S.Ct. 23, 125 L.Ed.2d 774 (1993).

*Hunter v. State*, 660 So.2d 244, 248 (Fla. 1995), *cert. denied*, 516 U.S. 1128 (1996) (emphasis added).

Nor does due process allow the State to proceed in a capital case merely because the defendant has been incompetent for too long. The settled law of the United States Supreme Court requires a court to make a determination of competency before proceeding. *Bishop v. United States,* 350 U.S. 961 (1956); *Dusky v. United States,* 362 U.S. 402 (1960); *Pate v. Robinson,* 383 U.S. 375 (1966); and *Drope v. Missouri,* 420 U.S. 162 (1975).

The Eleventh Circuit weighed in on the *Ferguson* matter by finding the due process right to be competent during postconviction proceedings arises from the right to postconviction counsel. *Ferguson v. Sec'y for Dept. of Corr.*, 580 F.3d 1183, 1221, n. 54 (11th Cir. 2009). Subsequent to the *Ferguson* decision, the

Supreme Court recognized that the right to postconviction counsel includes federal due process considerations analogous to those on direct appeal. *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012).

As to the judge's repetitive sniping about the timing of the competency motion, the instant case is in a far better procedural stance than *Nowitzke* and *Lane,* where new evidence of incompetency was presented on the eve of hearing. In this case, the competency motion was filed eight weeks before the evidentiary hearing and the hearing on the motion (the timing of which was dictated solely by the court) was five weeks before evidentiary hearing.

The timing of the defendant's motion raising incompetency in *Drope* is similar to the timing in this case. In *Drope*, a month before trial counsel filed a motion to continue the trial to address competency. The court did not act on the motion until it denied it the day of trial, forcing the defendant to go to trial. 420 U.S. at 164-65. The Court held that "resolution of the issue of competence to stand trial at an early date serves both the interests of fairness and of sound judicial administration." 420 U.S. at 177 n. 12 (citations deleted). A competency motion a month before hearing is a motion brought at "an early date." Compelling a hearing before the defendant's mental status is determined is the same as denying a mental evaluation.

## Compelling Presence at Evidentiary Hearing

If Rule 3.851 is deemed to allow or require an evidentiary hearing with a defendant whose competence is unknown, then it does not adequately protect capital defendants. 3.851(c)(3) requires the defendant to be present "at the evidentiary hearing on the merits of any claim." But Rule 3.851(g)(1) requires the court to proceed on all "claims that do not require the prisoner's input . . . notwithstanding the prisoner's incompetency." Read in pari materia, the rules appear to require the court to compel an incompetent defendant to be physically present (but not mentally present) at an evidentiary hearing on the merits of claims that do not require the defendant's input. It would appear that this was a rationale for the court in this case to compel Mr. Huggins' attendance. The presence of an incompetent defendant is a nullity. *Drope.*

This Court should interpret the requirement that proceedings go forward is limited to claims the defendant has designated as not requiring an evidentiary hearing, i.e. legal or constitutional claims under Rule 3.851(e)(1) (E). Additional claims which the trial court rules do not require an evidentiary hearing, despite the defendant's designation pursuant to 3.851(e)(1)(D), would also be subject to resolution by the court, since there would be no evidentiary hearing (unless remanded for hearing on appeal).

In the instant case, the majority of Mr. Huggins' claims were based on ineffective assistance of counsel at trial. Mr. Huggins' input was critical. In addressing the guilt phase claims, Mr. Huggins' input was essential for, inter alia: the lice issue; failure to raise a reasonable doubt as to witnesses Lillian Brandell, Tammy Creighton, Angel Huggins, Jonathan Huggins, and Robin Mansfield; failure to effectively challenge the state's case as to Kevin Smith, the reward money paid to Angel Huggins, the jewelry found in the shed, and failure to call Mr. Huggins as a witness on his own behalf. In the penalty phase claims, Mr. Huggins' input was essential to understand the circumstances which led to his discharge of counsel for the penalty phase of the second trial, the relationship with trial counsel at the first trial, and the manner in which the mitigation evidence for that trial was developed.

Claim two, relating to prosecutorial misconduct in the improper closing argument, did not necessarily require input from Mr. Huggins. However, trial counsel asserted over objection that Mr. Huggins insisted that the vehicle had not been painted black. Postconviction counsel was powerless to either guard against the revelation or rebut it because Mr. Huggins was incompetent.

Trial counsel's testimony shows he was not even aware of the improper closing argument about the witnesses who reported seeing a black-painted SUV. Had Mr. Huggins been competent postconviction counsel might well have

developed facts to amend the postconviction motion to claim ineffective assistance for failure to object to the improper argument in closing.

Claim three alleged a *Brady* violation for failure to disclose rewards paid for tips in the case. It is impossible to say whether Mr. Huggins would have had any input which might have allowed further development of this claim. Also, postconviction counsel was unable to discuss waiving the claim.

Claim four, relating to the leg brace, obviously required Mr. Huggins' input.

When the state was allowed to elicit testimony about attorney client communications, postconviction counsel was stymied on several fronts. First, the trial court had specifically found Mr. Huggins' input was not relevant to the proceeding. If that were so, then by definition trial counsel's testimony about attorney client communications was irrelevant and impermissible. Second, postconviction counsel was unable to consult with Mr. Huggins to understand what areas to avoid to prevent opening the door to the state's inquiry into attorney client communications, or to consult with Mr. Huggins to develop a strategy for redirect examination of trial counsel to deal with damaging statements disclosed during cross examination. Third, postconviction counsel could not impeach trial counsel's testimony based on input from Mr. Huggins or by putting Mr. Huggins on the witness stand to directly rebut.

**Evidentiary Hearing Not Necessary,**
**Leaves Motion Unresolved**

The trial judge noted that one reason to go forward with an evidentiary hearing was because witnesses could die or forget. ROA 35/34-35. That concern can be addressed by depositions to perpetuate testimony.

If an evidentiary hearing is bifurcated to stay some claims until the defendant is competent, the court will be powerless to enter a final order after the initial hearing. The judge's concern that incompetency leaves a case in limbo is, in fact, well-founded. The case will always remain in limbo so long as the defendant is incompetent. See, e.g., *Florida Department of Corrections v. Watts*, 800 So.2d 225 (Fla. 2001) (postconviction proceedings indefinitely postponed due to defendant's long-term incompetence)[28].

Much as the court may have believed this is an unacceptable outcome, it is precisely the outcome required by Rule 3.851(g). Given that a case will have to remain pending if there are any issues requiring input from the defendant, there is little if anything to be gained from pursuing the claims which purportedly do not require input. The legal claims will never "expire," witnesses will not disappear. In

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[28] Nothing in the *Watts* decision suggests that the trial court in the case had gone forward on any claims during the prisoner's incompetence pursuant to Rule 3.851(g)(1). If there were such partial proceedings, the results of those proceedings remain in limbo.

fact, the legal claims may benefit from clarification of the law that may occur during the pendency of the incompetent's motion.

Staying all claims designated by the defendant for an evidentiary hearing would also avoid forcing the defendant to go forward on a claim which may ultimately be determined to have required the defendant's input and should have been postponed. In the instant case, trial counsel testified to some severely damaging communications with his client which the court somehow considered to be relevant to claims which did not require the client's input. The moment trial counsel was allowed to disclose privileged damaging communications, the client's input became essential. The client might well have chosen to waive a claim by exercising the attorney-client privilege to prevent inculpatory testimony by counsel.

Thus, even if a claim at first blush does not appear to require client input, going forward with testimony at an evidentiary hearing can result in irreparable damage. And, of course, an incompetent client is legally incapable of taking the stand to rebut, refute, or explain. The circumstances of this case also raise the question whether the waiver of the attorney-client privilege when alleging ineffective assistance of counsel remains in effect when the client is incompetent to affirm the waiver or withdraw it.

Unresolved competency status also raises the question of compelling Mr. Huggins' attendance. A competent defendant is free to waive attendance by peacefully refusing. *Nixon v. State*, 572 So.2d 1336 (Fla. 1990). An incompetent defendant is not competent to waive his presence. If Rule 3.851(c) mandates attendance at the evidentiary hearing while incompetent to waive, then those most likely to suffer cruel and unusual punishment and least able to benefit from attending an evidentiary hearing are the only ones who can be forced to attend.

Mr. Huggins was compelled, under the threat of physical force, to sit through a hearing that his delusions caused him to believe was a "railroading" – his own counsel in league with the state and the court to lead him to the execution chamber. Because he was in limbo regarding his competency, he could not have his *Nelson* motions heard, he could not have his *Faretta* motions heard, and he could not present matters to the court he believed advanced the case he wanted to make.

**Failure of Leg Brace Claim Because of Inability to Call Client to Support the Claim**

The court's repeated reliance on purported attorney/client communications during the hearing also negates the court's erroneous ruling that all issues had to be heard because Mr. Huggins' input was not needed. Indeed, when the court was asked to issue an order to law enforcement to provide photographs of the leg braces used at trial, the court inquired:

THE COURT: Who is going to testify that they were the same leg braces used at the time?

MR. GEMMER: Well, that's why we need our client, Your Honor. Your Honor also expressed a familiarity with the leg braces, and so I believe there are four different kinds that were used. And we'll get photographs of all of them and provide them for review by the Court. I would like my client to explain it to me, but Your Honor ruled his input is unnecessary. The State on this leg brace issue specifically -- may I finish this?

THE COURT: No, sir.

MR. GEMMER: Thank you.

THE COURT: You have been talking with your client ad nauseam in this case. You consulted with him back there in the interview room for over nearly a half an hour. He has given you questions to ask. So I find it rather perplexing for you to say that you can't talk with him. You talk to him about different things and you have not chose, one, to talk to him about his recollection of a leg brace, and, two, this motion that was filed under oath in good faith June 5, 2006. There was a hearing to exchange evidence where you were to exchange witness lists and evidence, and now at the ninth hour you're talking about obtaining a photograph of something that should have been obtained, if not years ago, weeks ago.

MR. GEMMER: May I respond?

THE COURT: Yes, sir.

MR. GEMMER: I have spoken to my client about it. My client has told me he wore a leg brace throughout the trial, including the guilt phase. ... However, if Your Honor is saying that the participation of my client at this point during this hearing in some way obviates that, the only reason that Your Honor gave for compelling the hearing to go forward in the order of -- the order compelling us to go forward on all issues was because the client's input was not necessary for any single issue, including the leg brace issue. If Your Honor is going to start bringing in the input from the client as to which leg brace was used or such or to establish that the leg brace was worn during the trial, then that abrogates the legitimacy of the order that was entered and the legitimacy of the order that was reviewed by the Florida Supreme Court for the writ of prohibition. Therefore, if Your Honor wants to expand it to that, I think we need to go back on the writ with your modified order and allow the Court another opportunity to determine whether it's proper to compel the need for

this proceeding to go forward when the client's input is necessary and the client's competency is unresolved.

ROA 32/332-34.

If the court was going to rely on the purported ability of counsel to consult with Mr. Huggins to deny the motion to obtain proof of the type shackling from the Hillsborough Sheriff, then the rationale of forcing the hearing to go forward on all issues was lost. The legitimacy of the order and the rationale for dismissal of the Petition for Writ of Prohibition were abrogated.

**The Court Should Have Granted Mr. Huggins' Repeated Motions to Discharge Counsel or Proceed Pro Se**

If Mr. Huggins was competent at the time of the evidentiary hearing, then the court should have granted each and every one of his several motions to discharge counsel, if appropriate grounds existed. If grounds did not exist, then each and every one of Mr. Huggins' repeated clear and unequivocal *Faretta* motions to proceed pro se should have been granted. The time has passed to determine competence retrospectively. Should Mr. Huggins be deemed competent at a future date, then would be the time to consider such motions.

## ISSUE 3

**MR. HUGGINS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT AND PENALTY PHASE OF THE TRIAL WHICH VIOLATED MR. HUGGINS' RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES**

**CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.**

Ineffective assistance of counsel is comprised of two components: deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). This Court is well versed in *Strickland* jurisprudence.

The *Strickland* Court also noted that "Prevailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable." 466 U.S. at 688-89.

**GUILT PHASE INEFFECTIVENESS**

**A. Failure to adequately present evidence of viable alternative suspects.**

Trial counsel was ineffective for failing to introduce evidence that John Ricker was involved in the murder of Carla Larson.

John Ricker was Mrs. Larson's coworker who "discovered" her body on June 12, 1997. This "discovery" was in a wooded area adjacent to the Osceola Parkway area that had already been thoroughly searched by the police.

The afternoon of Ms. Larson's disappearance, Mr. Ricker went to lunch, The circuit court judge found as fact that Ricker returned to the job site about 1:00 p.m. ROA 5/918. Ricker had a meeting at the job site at 1:30 p.m.. He was never asked about the time between he returned from lunch and the 1:30 pm meeting. An hour later, he was alone again, between 2:30 pm and 4:00 pm. The only time this

information ever came out was when Mr. Ricker was deposed by defense counsel on June 23, 1998. ROASUPP 3/99-100.

Mr. Ricker drove alone to the area where Ms. Larson's body was later discovered and was close to where her body was found. He described his route in detail in his pretrial deposition. ROASUPPP 3/26-33. At the 1999 trial he only said he drove by himself to the area, ROA1999SUPP 4/600-03.

In the depo Ricker said that after a brief return to the office from his first solo venture, he returned to the area a second time by himself. Coworkers called Ricker and he went to the road to meet them. They drove to an area of fresh tire tracks and foot tracks in the grass Ricker told them he had found, and walked into the woods to a point Ricker estimated was only twenty feet from where the body was found two days later. ROASUPP 3/31-33.

Ricker never told lead detective Weir about the solo visits to the scene, despite being asked in the first interview if there was anything else important he had to say. ROASUPPP 3/ 73-74. In the second interview, roadside near the area where Ricker had led a coworker to Carla Larson's body, Ricker disclosed only the search he conducted with his coworkers when they met up with him after his second solo visit to the area. ROASUPP 3/77-78. At the end of the interview, Detective Weir gave Ricker a chance to tell about his solo visits:

> Q. Is there anything else pertaining to your search or your discovery that I haven't specifically asked you about that you should share.

ROASUPP 3/83. Ricker's concealed the solo visits and emphasized that coworkers had accompanied:

> A. Not that I can think of, as soon, as soon as we heard about Carla's disap....we got concerned about 6:30 Tuesday night. ... And me and a bunch of people went out looking. Ah. .me and Ray Walby we went out looking and ah.... (beeping interruption) the Disney people, they were right on the job site and stuff like that . Me and Ray looked for about two hours before we got to the office I guess.

*Id.* at 83-84.

Ricker concealed from police the fact that he had been at the scene alone, within yards of Carla Larson's body, twice the evening of her disappearance. None of Ricker's odd June 12 behavior was elicited at either trial, even though defense counsel had been apprised of this in the deposition, and knew the visits were not reported to Weir.

Detective Weir never had the chance to put two and two together. He testified at the postconviction evidentiary hearing that he never read the deposition, that he was not in the courtroom at the 1999 trial, and that he never knew about the two solo trips. ROA 32/318.

Ricker's behavior was odd. He lead the search for Ms. Larson June 12, and he brought a witness with him June 16 to find the body of the woman he described to Weir as "very good friends ... I like her a lot ... ." ROASUPP 3/70. He also disclosed that while the victim was missing, he took a coworker to the intersection of Osceola Parkway and World Drive, "looking for maybe contents of the stuff in

the vehicle or whatever we could find." ROASUPP 3/136. Six months later, a road worker found Carla Larson's purse in the weeds at that location. ROA2002 23/895-98. The jury might find the inexplicable search for contents at the same scene where contents were found six months later to be more than coincidence.

Ricker attempted to lead searchers to the body the night of the disappearance, but no one was able to find it – not the coworkers, not the police dogs, not the searchers in the helicopter. After that failed, he continued the sham searching. He took a coworker with him to look for "contents." Finally, he took a coworker one more time to the scene, where he finally was able to engineer the discovery of the victim's body.

That is enough to raise a reasonable doubt, that the killer could be Ricker, the very good friend who had a long-standing relationship with the victim, who acted incongruously and conducted searches beyond the norm including two visits alone to the scene the day of the disappearance, who knew Carla Larson was wearing jeans and brown boots when that could not be seen as she drove her SUV, and who had the time to meet, kill, and dispose of Carla Larson. Effective defense counsel could have argued that Mr. Ricker tried to get the body found the night of the murder so that his beloved Carla would not suffer from prolonged exposure to the elements. When that effort failed, he went through the same charade days later, leading a coworker to the body.

But that's not all – Mr. Larson had a prior sexual battery episode when he kidnaped a pretty blond woman, drove her to a remote location, disrobed her and forced her to insert a flashlight in a sexual battery. Ricker told her that "things would never work" when he took girls out, "so, this is the way it has to be done ... ." ROASUPP 4/303. Ricker had a blue blanket in the car when he raped the victim in 1983. *Id.* at 399. Carla Larson's torso and head were covered by a blue blanket. ROA2002 24/1147, 1176.

The postconviction judge found that the 1983 case was not sufficiently similar to the instant case for similar fact purposes. The 1983 victim was raped while evidence that Ms. Larson had been sexually assaulted was "inconclusive." However, the State made sure at trial Huggins' that the jury knew the victim had been suffered contact of a sexual nature. The medical examiner speculated that the victim's breasts had suffered "irregular mal handling [sic]" at the time of death, and the State emphasized the possibility "Q. So, we emphasize the point again, when you found her, there was nothing at all on top. No bra, nothing like that? A. Right." Dr. Gore then testified that there was enhanced decomposition in the front thighs and genitalia and speculated "there was considerable trauma involved by means of friction, rubbing, or any other thing." ROA2002 24/1153-54.

Dr. Gore took pains to ensure that the jury knew that the condition of the thighs and genital area was attributable to trauma, not blood pooling:

> In this particular case, you have seen the slides, and you have seen the medial portion of the upper thighs, which was definitely discolored, and little further away. There was no discoloration. What does that mean? Well, it is discoloration only in that part, not beyond the entire medial part of the thigh. The reason is very simple. That area probably received some type of injury. It will be a friction rub, it could be rub, it could be pinching, whatever it is. And that's the reason that that area, along with the vaginal orifices, labia majora and that part shows more discoloration.

ROA2002 24/1171-72.

The facts of the two cases are different only because there was no conviction for rape in this case, despite the evidence of rape presented at trial.

The judge also differentiated the two cases because the 1983 victim was placed in restraints while Ms Larson was not. However, the 1983 victim was not restrained until the assault was over, to aid Ricker's getaway. Ms. Larson died, so there was no need to restrain her. The court also ignored the signature commonality of the blue towel or blanket.

The court found it significant that Ricker pleaded to a lesser charge in the 1983 case. It is irrelevant what the ultimate conviction was for, or that there was a conviction at all. *See Pomerantz v. State*, 703 So.2d 465, 469 (Fla. 1997) (facts of prior crime admissible when defendant plead to a lesser offense after remand). *See also* C. Ehrhardt, Florida Evidence § 404.9 (2007 edition) (text and notes at notes 36-39).

The court ignored the fact that Ricker concealed the solo visits from the detective. If concealment of hair samples is evidence of guilt, then so is concealment of the visits. And the court ignored the fact that Ricker described the blue jeans and brown work boots Ms. Larson wore the day she disappeared, even though he said the only time he saw her that day was when she waved to him from her truck, jeans and boots out of sight. ROASUPP 3/72.

Counsel's claimed tactical decision for not implicating Ricker was made without regard for Ricker's odd behavior, and especially without knowledge of the criminal history disclosed at the evidentiary hearing, which would have been discovered by competent counsel. That knowledge colors Ricker's behavior at the time of the murder in a far more sinister light.

Public Defender Wesley said he chose an alternative suspect for the first trial, Kevin Smith. He claimed that he could not switch to Ricker for the second trial because "I know that there is due process limitation on me in a subsequent proceeding from taking an entirely new approach ... ." ROA 33/414. There is no such due process limitation. Ricker was the more viable suspect.

There was no evidence that Kevin Smith, the defense's designated "suspect," knew Carla Larson or that he could have been anywhere near the Publix the day she disappeared. Ricker, on the other hand, was within a mile or two of the Publix, knew Larson well for years, and had a total of two hours when he had no alibi.

Opportunity abounded, and motive, an affair or a pass gone bad could inferred from the relationship. How far gone can be measured by Ricker's 1983 actions, and his statement to that victim that "things would never work" when he took girls out, "so, this is the way it had to be done . . . ." ROASUPP 4/303.

The defense did not have to prove Mr. Ricker was the actual killer – the defense only had to raise reasonable doubt as to Mr. Huggins.

**B. Counsel was ineffective for failing to properly challenge the state's "consciousness of guilt" evidence related to Mr. Huggins allegedly shaving his pubic region to avoid collection of physical evidence.**

The trial court correctly found that the trial attorneys were deficient when they opened the door to the introduction of nine prior felony convictions.

> [W]hile Mr. Huggins may have established deficient performance on the part of trial counsel, he cannot establish prejudice. There is no reasonable probability that the introduction of the prior convictions made a difference in the outcome of the case.

ROA 5/925. The court erred in finding no prejudice.

Counsel was ineffective in the presentation of defense witness Mark Thornton. It is this ineffectiveness which this Court found opened the door to the introduction of the nine felony convictions. 889 So.2d at 756.

The defense should have used Mr. Thornton to establish a lice outbreak and incidents of inmates shaving. Instead, the defense horribly and fatally bungled. The defense also should have objected when the State elicited the hearsay from

Thornton, and was ineffective for failing to do so. Trial counsel's ineffectiveness deprived Mr. Huggins of his Fifth Amendment right to remain silent and have the State prove its case beyond a reasonable doubt without the benefit of any prior felony offenses.

Mr. Thornton could have established that he saw Mr. Huggins almost daily, ROA 32/168, that inmates would show guards a louse on scotch tape to establish the fact that there was a lice infestation, that there was an infestation when Mr. Huggins shaved, *id.* at 171, and that when there was an infestation, inmates sometimes shaved, *id.* at 172-73. He saw Mr. Huggins had shaved his head and pubic region when he saw Mr. Huggins step out of the shower. *Id.* at 176.

Mr. Thornton thought he told Mr. Wesley everything he testified to in the evidentiary hearing before he testified in the first trial. *Id.* at 179-81. At the second trial, defense counsel Hill never told him to not use hearsay from Mr. Huggins, "I wouldn't know what hearsay was, actually." Hill never told him not to tell the court or jury anything that Mr. Huggins told him. *Id.* at 189.

Mr. Wesley was dismissive of Thornton's testimony when he spoke of how he assigned the witness to Mr. Hill. He "let Greg Hill take a witness on a very simple matter." ROA 33/391-92. Wesley did not advise Thornton or Hill to limit the testimony to procedures. ROA 33/395-96. Mr. Wesley's goal for calling Thornton was vague and ill-conceived: "what I was hoping is that Thornton would

say [the lice problem was] chronic, epidemic and acute, you know. ..." ROA 33/454-55. He never conveyed that "hope" to Thornton or Hill.

Wesley would never have asked Thornton how he knew why Huggins had shaved because

> Thornton is not the kind of witness you want to give him too much leeway. ... [I]t was a difficult line of questioning anyway. It was a difficult topic.

ROA 33/396. So, "a very simple matter" that was a bone tossed to Mr. Hill at the last minute was, in fact, "a difficult line of questioning ... . A difficult topic." Mr. Wesley's cavalier approach left both Thornton and Hill ill-prepared to avoid what this Court found to have fatally opened the door.

Mr. Wesley's reckless attitude was further illustrated by the fact that he had no recall of the Thornton examination. ROA 33/400. He conceded that he "guessed" he should have intervened, and that he should have done a lot of things differently that day. ROA 33/399-400.

Mr. Hill likewise evidenced the defense implosion. Wesley gave him a small file hours before the testimony. The only thing Wesley told him was "to establish the lice issue at the jail." ROA 32/286-88. Nothing Wesley or Thornton told Hill would have given him cause to suspect that the question he asked could elicit a hearsay statement, especially with the hearsay instruction by the judge. Even when

Thornton answered, Hill did not interpret Thornton's answer to include hearsay. ROA 32/289-91.

Mr. Hill said that if he had known of the hearsay problem, he would have established the lice issue with testimony about the lice problem and that it was not uncommon for inmates to shave their body hair to try to rid themselves of the lice. ROA 32/292.

In the direct appeal, the majority of this Court found that Mr. Hill had actually attempted to elicit hearsay earlier in the examination:

> Indeed, defense counsel specifically asked the officer, "Did Mr. Huggins ever directly contact you and indicate that he had crabs?" When the State's hearsay objection was sustained, defense counsel indirectly elicited the same information by including it as an implied assumption within the question "To your knowledge, did Mr. Huggins ever shave his pubic region after complaining of lice?"

*Huggins v. State*, 889 So.2d 743, 756 (Fla. 2004). When Hill first blundered into hearsay, the State was kind enough to prevent the defense from opening the door. When he blundered into hearsay again, the State once again objected, but the fatal answer was given. ROA2002 26/1469.

Another problem arises from a close reading of the fatal colloquy. While the question might have been answered based on hearsay, Thornton never answered that question. His answer was unresponsive, a non sequitur. The question was "did Mr. Huggins ever shave his pubic region after complaining of lice?" Thornton's answer, "Yes, I did," does not logically follow or answer the question. The second

question, whether Thornton knew if Mr. Huggins had, in fact, shaved himself, did not elicit hearsay because Thornton personally observed Mr. Huggins come out of the shower after shaving. Thus, the only element of the entire defense interrogation that could be deemed to have opened the door was the unresponsive answer, "Yes, I did."

It was the State that went beyond Mr. Thornton's unresponsive "yes, I did," answer, and introduced the evidence of Mr. Huggins' statement. Defense counsel was ineffective for failing to object based on the fact that Thornton's answer was non sequitur. ROA2002 26/1471. "But how do you know that the reason he shaved was because of crab lice?" elicited new evidence – "Yes, I did" did not inform the jury "that the reason he shaved was because of crab lice." Trial counsel should have objected to prevent the State from eliciting the hearsay that lead to the introduction of the nine prior felony convictions.

If this Court now now finds that "Yes, I did," was a responsive answer introducing hearsay, then the ineffective assistance occurred during the direct examination. If "Yes, I did" is deemed unresponsive, then the ineffective assistance occurred when the defense failed to object when the State's cross examination for the first time sought to elicit hearsay, and when the defense failed to make the argument that the State introduced the hearsay when it sought to introduce the prior convictions.

Wesley was inattentive. Hill was clueless. Although Hill paid lip service to an intention to avoid hearsay, the simple fact as this Court observed is that he tried on two occasions to elicit hearsay. The State stopped him on both occasions.

Mr. Hill could be charged with a third hearsay attempt – after the first hearsay effort was rebuffed, Mr. Hill immediately inquired: "Q Did Mr. Huggins ever directly contact you and indicate that he had crabs? A You mean directly? I don't recall that he did or did not." ROA2002 26/1468. It is only because Thornton didn't recall that hearsay was avoided.

In *Brown v. State*, 846 So.2d 1114 (Fla. 2003), this Court found that trial counsel had improperly opened the door when he asked an FBI agent if he had given the defendant anything to drink. This opened the door to State evidence that the drink was whiskey offered to end a two hour armed standoff. In *Brown*, the prejudice prong was not met because of a confession, overwhelming physical evidence, and witnesses linking the defendant to the murder. In this case, the evidence was circumstantial.

In this case, as in *Brown*, if the defense questioning is deemed to have opened the door, then it was ineffective. Attorney Hill said a primary goal was to avoid hearsay evidence, yet he attempted to elicit hearsay at least three times – the first two attempts overt, the final and fatal attempt less overt, as this court held: "defense counsel indirectly elicited the same information by including it as an

implied assumption within the [door-opening] question." 889 So.2d at 756. The door was opened by questioning that was directly contrary to the stated strategy of the defense attorneys.

The evidence of nine prior unrelated felonies damned Mr. Huggins. Justice Pariente noted their severely damaging nature:

> In this case it is likely that the jury would focus on Huggins' nine prior convictions as evidence of guilt rather than as a reason to disbelieve the innocent explanation for Huggins' act of shaving his pubic region.

889 So.2d at 775 (Pariente, J. dissenting).

Justice Pariente's conclusion of prejudice is not in conflict with the majority opinion. The majority opinion held that the probative value outweighed the prejudice in a rule 90.403 weighing. There was prejudice, but the probative value permitted admission. When there is a finding of deficient performance, as the court found in this case, the prejudice prong is not a 90.403 balancing test. Deficient performance requires a finding that the evidence should not have been admitted – it was inadmissible but for counsel's failure. In this case, if counsel's failure in opening the door had not occurred, the State could never have admitted the prior convictions. In this context, the *Strickland* prejudice standard applies:

> [T]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. ...
>
> ... . [A] court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

*Strickland*, 466 U.S. at 695-96.

The defense in this case acted contrary to its avowed strategy, or any rational strategy. What the defense did was improper, the door should never have been opened. In that light, the prejudice analysis by Justice Pariente sets out every which way the prejudice prong of *Strickland* is met in this case:

> The focus on Huggins' shaved pubic region and nine prior convictions cannot be considered harmless error beyond a reasonable doubt. Although substantial circumstantial evidence pointed to Huggins, absolutely no physical evidence directly linked him to the murder. Further, the prosecutor emphasized the evidence of Huggins' shaved pubic region and his prior convictions in closing argument ...
>
> ....
>
> Because of the circumstantial nature of the evidence in this case and the prosecutor's emphasis on both the shaved pubic region as consciousness of guilt and the nine prior convictions, the errors in admitting this evidence were not harmless beyond a reasonable doubt. Therefore, I would grant Huggins a new trial.

889 So.2d at 776 (Pariente, J., dissenting).

The question also arises whether Mr. Huggins ever actually complained to Thornton about crabs. At the first trial, the State objected that Thornton was not a listed witness. During the *Richardson* hearing, the court asked Thornton what he knew:

> THE WITNESS: [Wesley] just asked me as he was waiting on his client if inmates in the facility ever have had body lice or crabs, what he asked me.
>
> THE COURT: And what did you tell him?
>
> THE WITNESS: From time to time.
>
> THE COURT: Do you recall whether or not Mr. Huggins had any complaints about body lice or crabs?

THE WITNESS: Not to me.

ROA1999SUPP 8/1365-66. The defense later withdrew Thornton as a witness.

The order denying postconviction relief found "no indication that Mr Huggins told his defense counsel about his statement to Mr. Thornton ... ." ROA 5/925. Mr. Huggins was incompetent to assist postconviction counsel in addressing any factual issue in this claim. Had Mr. Huggins been able to assist, he would have been able to advise whether he ever told Thornton he shaved because of lice or crabs. Thornton testified at the first trial, much closer in time to the time of the shaving incident, that Mr. Huggins never advised him about lice or crabs. Mr. Huggins might well have corroborated the prior inconsistent statement and impeached Thornton.

Mr. Wesley argued the 1999 *Richardson* issue. He knew Thornton told the court in 1999 that Mr. Huggins never made a statement about lice. When the State elicited Thornton's hearsay testimony, the defense should have impeached Thornton with his prior inconsistent statement. The defense was, therefore, ineffective in this manner as well.

Eliminating the prior felony convictions would have left the jury with reasonable doubt respecting guilt, such that "the decision reached would reasonably likely have been different absent the errors."

**C. Counsel was ineffective for failing to present available evidence which would have raised a reasonable doubt.**

Counsel for Mr. Huggins was ineffective for failing to present the following witnesses:

**(1) Preston Ausley**. Mr. Ausley was available and would have testified he saw a woman who looked like Angel Huggins driving an SUV with a tag number consistent with the victim's.[29] This would have cast doubt on the state's theory that only John Huggins possessed the vehicle and would have linked Angel Huggins to the murder, substantiating a conspiracy between Angel Huggins, Kevin Smith, and Faye Blades to pin the murder on John Huggins.

Wesley claimed concern for Ausley's credibility. ROA 33/411. The transcript of Mr. Ausley's testimony in the habeas proceeding, ROA1999 2/187-3/267, close in time to the homicide, does not suggest "tremendous credibility problems." He was credible enough for the circuit court to order a new trial.

**(2) Illeen Manning.** Ms. Manning was available. Counsel was ineffective for failing to present her testimony linking a white male who does not fit the description of John Huggins with Carla Larson at the Publix on June 10, 1997.

Ms. Manning's testimony that Mr. Larson had facial features like the man she saw suggests that Mr. Larson may have met his wife for lunch. Dale Vittier

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[29] Mr. Ausley's testimony was given in the hearing on the petition for writ of habeas corpus. ROA1999 2/187-3/267.

testified it was possible for workers like Mr. Larson to leave the Home Depot without clocking out. ROA 32/246-47. He also testified that Mr. Larson appeared to know about the blue towel covering Mrs. Larson's body before it was made known beyond police circles. ROA 32/245-46.

The postconviction court denied relief because "Larson's coworkers" would have contradicted Manning – Mrs. Larson had said she was going to get lunch and food for a meeting. ROA 5/927-28.

The court erred on two counts – only one coworker testified Mrs. Larson had said she was going to get lunch and food for a meeting. Ms. Manning's testimony was not directly contradicted by the coworker. Mr. Larson's coworker confirmed that Mr. Larson could have left the job without clocking out, opening the possibility to meeting his wife at the Publix.

**(3) Shawny Kronfield.** Ms. Kronfield was available at trial. Defense counsel knew that she could have testified that Charlotte Green wanted to be in the limelight and center of attention. Wesley said he knew, based on his deposition of Ms. Kronfeld, Ms. Kronfeld's interview with Detective Weir, and Ms. Kronfeld's business records, that Charlotte Green picked up a check, at the earliest, on July 2, 1997. ROA 33/402-07, destroying Green's timeline. Wesley conceded that he did not recall making a strategic decision to not bring that fact out. ROA 33/407. The State relied heavily on Ms. Green's testimony.

**(4) Lillian Brandell.** Lillian Brandell was available and would have provided an alibi for Mr. Huggins, for when Ms. Green allegedly saw Mr. Huggins. Ms. Brandell could have also testified about phone calls which would reasonably place Mr. Huggins at a hotel when the Ford Explorer was burned on June 26, 1997. Counsel was ineffective for failing to call Ms. Brandell. Without the input of a competent Mr. Huggins, it was not feasible to present her testimony.

**(5) Tammy Creighton.** Ms. Creighton would have established the alibi that Mr. Huggins was with her at the times Green said she saw Mr. Huggins. She could also have established Angel Huggins' jealousy as motivation to fabricate evidence against John Huggins. The court denied relief on this claim because of trial counsel's belief Creighton would be unreliable at trial because she had reconciled with her sister. ROA 5/931, ROA 33/407. This finding is not supported by the record. In fact, Ms. Creighton had already reconciled with her sister when she provided the alibi in her deposition. ROASUPP 11/97.[30]

**(6) Angel Huggins.** Angel Huggins' testimony would have established her motivation to frame John Huggins: the reward money; anger at the affair with Tammy Creighton; a desire to conceal here own involvement in criminal activity

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[30] If Tammy Creighton became unreliable because she was reconciled with her sister, the question arises why Ms. Creighton might change her story to harm Mr. Huggins. This suggests that Angel Huggins was, indeed, out to get Mr. Huggins, and Ms. Creighton would change her story to aid Angel's vendetta.

with Mr. Huggins; her desire to conceal her involvement in the adult entertainment industry from the police; and her desire to hide her own and/or Kevin Smith's involvement with the murder of Carla Larson. Angel Huggins' motivation cast doubt on the legitimacy of the magical "discovery" of Carla Larson's jewelry at her mother's residence in a shed that had been exhaustively searched several times by the police. The jury also never learned that Angel Huggins told Robin Mansfield that she had "blacked out" for two hours the day Mrs. Larson died. The jury never learned that Angel Huggins had attempted to influence Jonathan Huggins to implicate his father. Postconviction counsel was unable to prepare for and call Angel Huggins as a witness because of Mr. Huggins' incompetence.

**(7) Jonathon Huggins.** Jonathan Huggins, the defendant's son, would have testified that Angel Huggins tried to get him to help frame John Huggins, that the car he saw his father driving after the murder was not Carla Larson's SUV, and that the testimony used at the second trial (the transcript of his testimony at the first trial) was unreliable and included information fed to him by the State. Postconviction counsel could not develop the claim without Mr. Huggins' competent assistance.

**(8) Robin Mansfield.** Robin Mansfield was available and would have testified that Angel Huggins told her she had suffered a black out the day of the

murder, June 10, 1997. Angel Huggins' statements were inculpatory and evidenced Angel's motivation to fabricate evidence against Mr. Huggins.

This claim was supportive of the claim that Angel Huggins was implicated and set up Mr. Huggins. Mr. Huggins' unavailability through his incompetence prevented reliably preparation and presentation.

**D. Counsel was ineffective for failing to challenge the state's case as follows:**

**(1) Charlotte Green.** Counsel was ineffective for failing to cross examine Green about prior inconsistent statements. As demonstrated at the postconviction hearing, Ms. Green was impeachable on virtually everything she said, either with prior consistent statements in the record or her own contradictory statements in the postconviction hearing. ROA 31/134-50. Trial counsel Wesley conceded he did not do enough. Counsel was also ineffective for failing to bring out the newspaper articles which stated that the White Ford Explorer had been painted black in an "unprofessional manner." Counsel would have deprived the State of the sole bolstering argument it had to rehabilitate Green.

**(2) Kevin Smith.** Kevin Smith showed consciousness of guilt when he wiped down a radar detector from the SUV. He had no alibi. He was friends with Angel Huggins and Kimberly Allred and all had motives to frame Mr. Huggins. Postconviction counsel was unable to prepare or present the facts of this claim without the competent assistance of Mr. Huggins.

**(3) Dr. Sashi Gore**. Counsel was ineffective for failing to object to Dr. Gore's gruesome irrelevant testimony about maggots on Mrs. Larson's body and the bone exposed by animal "chewing through".

**(4) The reward money paid to Angel Huggins.** Angel Huggins received a $5000.00 reward. Mr. Huggins' unavailability prevented presentation of the claim in the evidentiary hearing.

**(5) The jewelry found in the shed**. Counsel was ineffective for failing to file a Motion in Limine – the State had no witness who saw Mr. Huggins enter the shed where the victim's jewelry was found after the murder.

**(6) Christopher Smithson** - Smithson came forward only after Mr. Huggins won a retrial for the prosecutorial misconduct. His story of seeing Mr. Huggins driving from the wooded area and crossing Osceola Boulevard to turn eastbound was rendered incredible by the fact that a guardrail prevented the maneuver. Competent counsel would have learned this and impeached Smithson.

**(7) Testimony of Mr. Huggins:** Counsel was ineffective for failing to call Mr. Huggins as a witness on his own behalf. Mr. Huggins' testimony would have raised a reasonable doubt as to his guilt. Counsel's ineffectiveness for failure to call Mr. Huggins was exacerbated by counsel's opening the door to the introduction of Mr. Huggins's prior felony convictions. The introduction of the nine prior felony convictions eviscerated any strategic reason for counsel not

calling Mr. Huggins to the stand. However, Mr. Huggins was unavailable to assist in the development of this claim in the evidentiary hearing due to his incompetence.

The trial court erred in allowing the State to elicit the inculpatory statements from Mr. Wesley, given the lack of development of the claim. This error is raised here as a separate ground for appellate relief.

**PENALTY PHASE INEFFECTIVENESS**

The trial court erred in refusing to allow collateral counsel to question trial counsel King. ROA 33/462. The privilege was waived when the ineffective assistance claims were made. Mr. Huggins was either competent to withdraw the waiver, and therefore should have had his *Faretta* motions granted, or he was incompetent to waive. Mr. Huggins was deprived of his right to call and confront witnesses guaranteed by the Sixth and Fourteenth Amendments to the United State Constitution and the equivalent Florida provisions.

The sentencing memorandum relied on the mitigation from the first trial. ROA2002 15/1174; 15/1181; 15/1181; 15/1184-87. The mitigation evidence in the first trial was insufficient and the result of ineffective assistance.

Counsel was obligated to perform an adequate investigation (as outlined in the ABA Guidelines and *Wiggins v. Smith*, 539 U.S. 510 (2003). Whether that investigation occurred before or after the first trial is irrelevant – the law and due

process do not require the defense to address mitigation from a tabula rasa in preparing for a retrial.

Statutory and nonstatutory mental health mitigation existed and should have been presented to the jury and the court. ROA 31/27-45 (Dr. Carpenter), 31/463-508 (Dr. Berland).

The evidence from the first trial was fair game and trial counsel at the second trial should have proffered all mitigation evidence it had available. An effective mitigation case at the first trial would have compelled the court to find that the mitigation did indeed outweigh the aggravating factors.

The mitigation evidence was inadequate, such that Mr. Huggins was not in a position to make an informed decision whether to act as his own counsel or what mitigating evidence to present at the penalty phase.

## CUMULATIVE EFFECT

Under current Florida and Federal law this Court must consider the cumulative effect of all the instances of ineffective assistance of counsel.

## ISSUE 4

**THE STATE COMMITTED PROSECUTORIAL MISCONDUCT BY KNOWINGLY ARGUING FALSE FACTS TO THE JURY IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND CONTRARY TO THE MANDATES OF *GIGLIO V. UNITED STATES*, 405 U.S. 150 (1972). PROSECUTOR ASHTON'S CLAIM OF WORK- PRODUCT**

## PRIVILEGE DENIED MR. HUGGINS' RIGHT TO CALL WITNESSES PROTECTED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Prosecutor Ashton was forced at trial to admit Green was not credible, except for the fact that she knew about the black paint on the SUV. ROA2002 27/1618-19. Ashton then expanded the bolstering to all the witnesses who testified about the paint: "There is no way that any of these witnesses could have known about that lousy black spray paint job unless they had seen it." ROA2002 27/1619-20. The assertions were false, Ashton knew them to be false, and they materially affected the outcome of the trial. This violates the fundamental tenets of due process and Constitutional protections recognized in *Giglio v. United States*, 405 U.S. 150 (1972).

Ashton had to have known the black paint fact was publicized and available to the witnesses: Ashton had argued the extensive publicity in the first trial, ROASUPP1999 9/1542-43; the State had broadcast the black paint fact seeking witnesses, ROA 32/321-22; the newspaper articles were filed while Ashton was lead counsel.

Relief is required because: (1) Ashton uttered a falsehood; (2) Ashton knew the statement was false; and (3) the false statement was material. *Guzman v. State*, 941 So.2d 1045, 1050 (Fla.2006), *pet. hab. corp. granted in part, Guzman v.*

*Secretary, Dept. of Corrections*, 663 F.3d 1336 (11th Cir. 2011) (new trial ordered for *Giglio* violation).

The postconviction court found a procedural bar, citing to *Ferrell v. State*, 29 So.3d 959,977 (Fla. 2010). ROA 5/944. However, in *Ferrell* the alleged misconduct was a closing argument inconsistent with the testimony of a witness and apparent in the appellate record. In this case, the fact of extensive pretrial publicity about the black paint was extrinsic to the record on appeal.

The court also found that the claim failed because Mr. Huggins did not establish the falsity of Ms. Green's trial testimony. This flies in the face of prosecutor Ashton's capitulation that Green was a liar when he made the unusual closing evidentiary hearing argument that Green looked so bad she made another witness look good.

> I would submit to you that Ms. Green's main importance to the jury was how much better it made Mr. Smithson look. Ms. Green was impeached all over the place, but Mr. Smithson was not. So I would submit to you that additional impeachment of Ms. Green would not likely have changed the outcome of this case ... .

ROA 34/605-06. This amounts to an admission that his false rehabilitation of Green in the trial closing prejudiced the defense.

The trial court also erred in sustaining Mr. Ashton's exercise of privilege about his knowledge of the black paint publicity in deposition, ROA 2/318-21, and in the evidentiary hearing, ROA 34/542-43. Mr. Huggins was denied the right to

introduce evidence guaranteed by the Sixth and Fourteenth Amendments to the United State Constitution and the Florida analogs. *Crawford v. Washington*, 541 U.S. 36 (2004).

The State has no work product privilege for prosecutorial misconduct, i.e. *Brady* or *Giglio* violations. *Young v. State*, 739 So.2d 553, 559-60 (Fla. 1999) (discovery rules and *Brady* obligated the prosecution to disclose work product because the impressions impeached the key law enforcement witness).

The work product privilege is no longer available after the judgment and sentence becomes final. *Kokal v. State*, 562 So.2d 324, 326-27 (Fla. 1990) (privilege for mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency is no longer applicable in post-conviction). Prosecutors have testified in postconviction proceedings about their knowledge of a *Giglio* violation. *See, e.g., Franqui v. State*, 59 So.3d 82 (Fla. 2011); *Hurst v. State*, 18 So.3d 975 (Fla. 2009) (testimony by prosecutor on *Giglio* claim from closing argument); *Archer v. State*, 934 So.2d 1187 (Fla. 2006). Ashton admits he knew of the press coverage which had been placed in the court file while he was lead prosecutor in the case, consistent with his own closing argument in the first trial that there was extensive publicity about the vehicle. It would strain credulity to believe Ashton did not recall this when he made his closing argument at the second trial.

## ISSUE 5

**_BRADY_ VIOLATION – FAILING TO REVEAL THAT STATE WITNESSES HAD BEEN PAID REWARDS.**

Mr. Huggins does not waive this claim should he be able to provide input that would establish this claim, e.g. Angel Huggins' reward.

## ISSUE 6

**MR. HUGGINS WAS COMPELLED TO WEAR A LEG BRACE AT TRIAL, DEPRIVING HIM OF HIS RIGHT TO A FAIR TRIAL UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND DUE PROCESS UNDER THE FOURTEENTH AMENDMENT. TRIAL COUNSEL'S FAILURE TO OBJECT WAS EFFECTIVE ASSISTANCE. *STRICKLAND*.**

Mr. Huggins wore a leg brace throughout his trial. Mr. Huggins had a constitutional right to appear in the courtroom free of bodily restraint. Counsel failed to object to the restraint in the guilt phase, which was ineffective assistance of counsel.

Mr. Huggins asked to be freed form his leg brace when he assumed pro se representation prior to the penalty phase. ROA2002 27/1771-72. ROA2002 15/1120-22. The hearing on Mr. Huggins' penalty phase motion provides the information necessary to establish that the guilt phase shackling was impermissible.

The postconviction court erred when it found that Mr. Huggins failed to meet his burden of proof as to whether he wore a leg brace because Wesley did not

recall the brace. The record is replete with proof the brace was worn. Both the judge and the prosecutor present at the trial affirmed at the postconviction hearing that Mr. Huggins wore the leg brace throughout the trial.

> MR. GEMMER: And they used a leg brace in Hillsborough County?
> THE COURT: Yeah. If memory serves me correctly.
> MR. ASHTON: (Nods head.)
> THE COURT: He had a leg brace, sort of like a brace that an athlete would have, that was underneath his pants. That as long as you walked normally, you – it was not visible ...

ROA 27/29.

Prosecutor Ashton affirmed that the leg brace included a chrome box at the ankle:

> MR. GEMMER: The only leg brace I'm aware of -- and I've seen a leather device, with a lot of chrome, and a big old chrome box down at the ankle. ... [T]he State is nodding that that's the way the leg brace is.

ROA 27/30. The court disagreed that the brace he observed at trial had a visible lock box. ROA 27/30.

At trial, the judge ruled that Mr. Huggins was not "shackled," and found that the restraint was not visible to the jury. Then he required all parties to use the podium in the penalty phase, guaranteeing that the jury would see Mr. Huggins' impaired ability to move as well as the protruding silver lockbox. ROA2002 27/1771-72.

The court's and the State's own statements about the visibility and nature of the leg brace prove that the jury saw the brace. If the judge and the state attorney saw the brace sufficiently to argue about it, the jury had to have seen it as well. It is undeniable that the jury viewed Mr. Huggins in shackles, an "inherently prejudicial practice," *Bello v. State*, 547 So.2d 914, 918 (Fla. 1989), *see Holbrook v. Flynn*, 475 U.S. 560 (1986), in violation of state and federal constitutional protections. "[T]he use of shackles can be a 'thumb [on] death's side of the scale.' *Sochor v. Florida*, 504 U. S. 527, 532 (1992) (internal quotation marks omitted); see also *Riggins v. Nevada*, 504 U. S., 127, 142 (1992) (KENNEDY, J., concurring) (control of a defendant's appearance exerts a 'powerful influence on the outcome of the trial')." *Deck v. Missouri*, 544 U.S. 622, 633 (2005).

In the instant case, the trial court ruled that the leg shackle was necessary because Mr. Huggins was a convicted felon facing a death sentence, the court did not hear the brace click, the jury had to know Mr. Huggins was held in a jail, the courtroom had "numerous exits" (amount not specified), and Mr. Huggins' thought processes did not appear impaired by the shackling. ROA2002 28/1806-07. All of these grounds have been roundly rejected by this Court and the United States Supreme Court.

Part of the judge's justification for shackling was that the judge could not see or hear the brace. The *Deck* Court rejected such justification:"This statement

does not suggest that the jury was unaware of the restraints. Rather, it refers to the degree of the jury's awareness, and hence to the kinds of prejudice that might have occurred." 544 U.S. at 634. The burden is on the state to prove there was no prejudice whatsoever, not that the prejudice was minimal: "[T]he defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.'" 544 U.S. at 635.

Mr. Huggins advised the court that the "leg brace pops and cracks every time I get up, sit down, when I walk. It causes me to walk stiff legged. The jury is going to see that. They are going to know what it is." ROA2002 28/1805.

The jury in this case clearly was aware that Mr. Huggins was shackled. The State must prove beyond reasonable doubt this did not affect the verdict.

**Leg Braces are Shackles**

Even the use of a stun belt concealed from overt view raised all of the concerns the United States Supreme Court later found controlling in *Deck. United States v. Durham*, 287 F.3d 1297, 1305 (11th Cir 2002).

The Supreme Court recognizes only one exception to a restraint-free trial:

> [A]ny such determination must be case specific; that is to say, it should reflect particular concerns, say special security needs or escape risks, related to the defendant on trial.

*Deck,* 544 U.S. at 633.

Florida and federal protections prohibit restraints when other measures are available. *Shelton v. State,* 831 So.2d 806, 807 (Fla. 4th DCA 2002). A leg brace limits mobility and cannot be used to shackle a defendant without justification. *Weaver v. State*, 894 So.2d 178, 194 (Fla. 2004), *cert. denied,* 125 S.Ct. 2297 (2005). *Cf. Griffin v. State*, 866 So.2d 1(Fla. 2003), *cert. denied,* 125 S.Ct. 413 (2004) (leg brace improper even when defendant was planning escape – increased security was the permitted measure).

The trial judge also erred when he characterized the claim as limited to Mr. Huggins' pro se motion to remove the brace before the penalty phase, which he found procedurally barred. ROA 5/946. The claim included the impermissible shackling at guilt phase.

The court failed to address the ineffectiveness claim. The heading for the claim and the first paragraph of the argument allege ineffective assistance when trial counsel failed to object to guilt-phase restraint. ROA 1/54.

Mr. Huggins must be given a new trial without the imposition of the restraints which deprived him of his constitutional rights guaranteed by the 4th, 5th, 6th, 8th and 14th amendments to the United States Constitution and the equivalent protections of the Florida Constitution.

## CONCLUSION

Based on the numerous constitutional violations which occurred in this case, the *Brady* and *Giglio* violations, and the ineffective assistance of counsel, operating outside the norms for capital representation as set out by the ABA Guidelines and *Strickland,* a new trial is required to assure confidence in the integrity of this State's capital trial and sentencing scheme. Should a new trial not be required, then remand on the competency issue, the *Nelson* and *Faretta* issues should issue. Further, the several evidentiary rulings by the postconviction court limiting or impermissibly allowing evidence require remand to allow the errors to be corrected so that the postconviction motion can be considered with a proper evidentiary basis. Mr. Huggins also requests any other relief this Court deems appropriate.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by e-mail to: Ken Nunnelley at capapp@myfloridalegal.com on November 19, 2012.

/s/David R. Gemmer
Assistant CCRC-Middle
Florida Bar Number 370541
Office of The Capital
Collateral Regional Counsel
3801 Corporex Park Drive
Suite 210
Tampa, Fl 33609-1004
gemmer@ccmr.state.fl.us
Support@ccmr.state.fl.us
(813) 740-3544

## CERTIFICATE OF COMPLIANCE

This brief is typed in Times New Roman 14 point.

/s/ David R. Gemmer
Counsel for Appellant