IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,161

McARTHUR BREEDLOVE,

Appellant.

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR DADE COUNTY, STATE OF FLORIDA

AMENDED REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

MR. BREEDLOVE WAS DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING AND DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF MR. BREEDLOVE'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.

A. THE EVIDENTIARY HEARING.

1. The Evidence Presented at the Evidentiary Hearing Established that Trial Counsel Conducted No Investigation for the Penalty Phases.

The State argues that Mr. Levine's "credibility was highly questionable" because "many of his contentions did not square with the record of the first trial" (Answer Brief at 28). The State is wrong. First, the lower court did not find Mr. Levine's unrebutted testimony incredible, nor did it find that his testimony was inconsistent with the record.

Second, and most significantly, Mr. Levine's testimony is wholly consistent with the trial record and is corroborated by the testimony of other witnesses. Mr. Levine testified that he was not involved in the preparation for Mr. Breedlove's trial and only became involved in the trial shortly before it began when Mr. Zenobi asked him to sit in (2PC-R. 856-59). Contrary to the State's contentions, the record bears out Mr. Levine's testimony. Mr. Breedlove's trial began on February 27, 1979 (T. 396). The record shows that Mr. Levine first filed motions in Mr. Breedlove's case on February 21, 1979 (R. 41).[1] Thus, the

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[1]The State's brief agrees that Mr. Levine filed motions on February 21, 1979 (Answer Brief at 29).

record shows that Mr. Levine did not begin participating in Mr. Breedlove's case until six days before the trial began and that even that participation was limited to presenting motions on legal issues, as Mr. Levine testified.

The State argues that Mr. Levine's testimony that he was not on the case until shortly before trial is contrary to the record because the record reflects that Mr. Levine "was present at every hearing on the case after Defendant's December 8, 1978, arraignment, except for one, on February 15, 1979" (Answer Brief at 32-33). The record actually reflects that after Mr. Breedlove's December 8, 1978, arraignment, Mr. Levine did not appear in any court hearing until February 22, 1979 (T. 13), just 5 days before Mr. Breedlove's trial began. Mr. Levine's testimony is fully consistent with the trial record.

The State argues that Mr. Levine's request at a February 22, 1979, hearing, that the State disclose its penalty phase witnesses indicates that Mr. Levine "was handling all duties associated with the penalty phase of the trial" (Answer Brief at 30). However, a request for a witness list does nothing to question Mr. Levine's unrebutted testimony that he did not know he would be conducting the penalty phase and did nothing to investigate for it. Indeed, Mr. Zenobi had filed a penalty phase witness list, and Mr. Levine testified he had nothing to do with preparing that witness list and had not seen it before Mr. Zenobi asked him to do the penalty phase (2PC-R. 869).

The State argues that responsibility for the penalty phase had been assigned to Mr. Levine before trial because Mr. Zenobi's

pretrial activities were focused on the guilt phase (Answer Brief at 30). However, consistent with Mr. Levine's testimony, this shows nothing more than that no preparations had been done for the penalty phase and that, perhaps in recognition of that fact, Mr. Zenobi requested Mr. Levine's assistance in filing legal motions regarding the penalty phase just six days before the trial began.

The basic problem with this part of the State's argument is that the filing and arguing of legal motions says nothing about whether any factual investigation for the penalty phase occurred before the guilty verdict. Mr. Levine testified that he did not know he would be conducting the penalty phase until after the guilty verdict was returned and that he had conducted no investigation for the penalty phase. The State has cited nothing showing that Mr. Levine conducted any factual investigation for the penalty phase, because no such citations exist. Mr. Levine conducted no factual investigation. The lower court made no findings that Mr. Levine conducted a factual investigation for the penalty phase.

The State argues that Mr. Levine's "claim that he was only present to 'protect the record' also rings hollow" because Mr. Zenobi made most of the objections during the trial (Answer Brief at 31). Rather than contradict Mr. Levine's testimony that he was present to "protect the record," this fact bears out that testimony. Mr. Levine testified at the evidentiary hearing that Mr. Zenobi requested his assistance because Mr. Zenobi felt "that while he's in the heat of cross examination and putting on the

case he was going to do, he might overlook something as far as preservation" (2PC-R. 859-60). As Mr. Levine testified, an attorney who is acting as second chair "to protect the record" would only interject objections or arguments if he believed the lead attorney had overlooked an objection, had not remembered earlier testimony or argument correctly, or had omitted a legal basis for an objection, for example. This is precisely the role Mr. Levine filled at Mr. Breedlove's trial.

The State contends that Mr. Levine's examination of Mr. Breedlove at the suppression hearing is contrary to Mr. Levine's "claim of no prior contact with Defendant" (Answer Brief at 31). Mr. Levine did not testify that he had "no prior contact" with Mr. Breedlove. Mr. Levine testified that he had two conversations with Mr. Breedlove--first, when Mr. Levine and Mr. Finger talked to Mr. Breedlove about statements Mr. Breedlove made to law enforcement and second, at the motion to suppress (2PC-R. 865). Certainly, Mr. Levine's early involvement with Mr. Breedlove at the time of Mr. Breedlove's alleged statements would have made Mr. Levine familiar enough with the circumstances of the statement to question Mr. Breedlove at the suppression hearing. Moreover, Mr. Levine testified that he had not interviewed Mr. Breedlove regarding his social background, as an attorney would do in anticipation of a capital penalty phase (2PC-R. 865). Examining Mr. Breedlove regarding the suppression issue is entirely different from conducting an investigation of Mr. Breedlove's social background.

The State argues that Mr. Levine's and Mr. Finger's memories were "suspiciously consistent" (Answer Brief at 32). However, since both attorneys were present at the meetings with Mr. Breedlove shortly after his arrest, there is nothing "suspicious" about both attorneys remembering the same events. Further, Mr. Levine testified that he and Mr. Finger "remembered the case over the years" and "discussed this case several times" (2PC-R. 880). The State also argues that Mr. Levine's memory seemed to be too good, while Mr. Zenobi's was not (Answer Brief at 28). However, the State has neglected to mention that although Mr. Zenobi has conducted more than twenty first-degree murder trials since Mr. Breedlove's, Mr. Levine has never been involved in another capital murder trial. It is logical, therefore, that Mr. Breedlove's case would stand out in Mr. Levine's memory.

The State's brief ignores all the testimony and evidence corroborating Mr. Levine's testimony that he conducted no penalty phase investigation. Mr. Levine's lack of experience at the time of Mr. Breedlove's trial bears out that he was not responsible for preparing Mr. Breedlove's case. Mr. Levine had never appeared before a twelve member jury, as he testified at the evidentiary hearing, and as he pointed out during Mr. Breedlove's trial (T. 541). At the time of Mr. Breedlove's February 1979 trial, Mr. Levine had been a member of the bar since 1976, and as an assistant public defender had handled only misdemeanors and non-capital felonies.

Mr. Finger's testimony corroborates Mr. Levine's testimony that he was not asked to conduct the penalty phase until after

the guilty verdict. Mr. Finger testified that shortly before trial he was present when Mr. Zenobi asked Mr. Levine to sit in as second chair during the trial to help preserve the record (2PC-R. 844). Mr. Finger was also present when the guilty verdict came in late on a Friday and heard Mr. Zenobi ask Mr. Levine to conduct the penalty phase (2PC-R. 845).

The fact that Mr. Levine did not prepare for the penalty phase by talking to Mr. Breedlove's family members and friends or to the mental health experts is corroborated by those witnesses. At the evidentiary hearing, Mr. Breedlove's family members and friends testified that none of Mr. Breedlove's attorneys had spoken to them about Mr. Breedlove's background. Mr. George Bell, a longtime friend of Mr. Breedlove's, testified that none of Mr. Breedlove's attorneys talked to him at the time of the trial (2PC-R. 976). Mr. Arthur Lee Breedlove, Mr. Breedlove's brother, testified that none of Mr. Breedlove's attorneys talked to him at the time of the trial (2PC-R. 1002). Ms. Olabella Breedlove, Mr. Breedlove's sister, testified that none of Mr. Breedlove's attorneys talked to her at the time of the trial (2PC-R. 1026). Mr. Elijah Gibson, Mr. Breedlove's brother, testified that none of Mr. Breedlove's attorneys contacted him regarding Mr. Breedlove's drug use at the time of the trial (2PC-R. 1127). Mr. Henry Washington, Mr. Breedlove's nephew, testified that none of Mr. Breedlove's attorneys talked to him at the time of Mr. Breedlove's trial (2PC-R. 1177). Ms. Juanita Anderson, Mr. Breedlove's sister, testified that none of Mr. Breedlove's attorneys talked to her at the time of the trial

(2PC-R. 1182-83). Dr. Eli Levy, one of the mental health experts whose testimony was presented at the penalty phase, testified at the evidentiary hearing that when he was asked to evaluate Mr. Breedlove, he was not aware he would be asked for any opinions regarding mitigating factors, that he was provided no background information regarding Mr. Breedlove or the offense, and that between the time of the evaluation and the time of his testimony at the penalty phase, trial counsel did not discuss the evaluation with him (2PC-R. 1043). Dr. Benjamin Center, another mental health expert who testified at the penalty phase, testified at the evidentiary hearing that when he was asked to evaluate Mr. Breedlove he was not aware he would be asked for any opinions regarding mitigating factors, that he was not provided any background information regarding Mr. Breedlove or the offense, and that between the time of the evaluation and the time of his testimony at the penalty phase, trial counsel did not discuss the evaluation with Dr. Center (2PC-R. 1090-92). The testimony of all of these witnesses is consistent with Mr. Levine's testimony and establishes that no penalty phase investigation was conducted in Mr. Breedlove's case.

In fact, a comparison of the defense experts' penalty phase testimony and their reports (Defense Exhibits D, E, B) shows that all Mr. Levine did at the penalty phase was go through the reports, asking questions that tracked the reports. The record is thus wholly consistent with Mr. Levine's evidentiary hearing testimony that all he did over the weekend to prepare facts for

the penalty phase was to review the experts' reports. In a capital case, this is deficient performance.

2. The evidentiary hearing established that substantial mitigating evidence was available for presentation at the penalty phase.

The State argues that Mr. Breedlove was not prejudiced by trial counsel's deficient performance. The State's contentions are refuted by the record.

a. Lay testimony

Regarding the testimony of Mr. Breedlove's family members and friends, the State first argues that Mr. Breedlove did not establish that these witnesses were available at the time of Mr. Breedlove's trial (Answer Brief at 54). To the contrary, all of the witnesses presented by Mr. Breedlove at the evidentiary hearing testified that they would have talked to defense counsel and would have testified on Mr. Breedlove's behalf at the penalty phase, had they been asked. Mr. George Bell, a longtime friend of Mr. Breedlove's, testified that if Mr. Breedlove's attorneys had talked to him at the time of the trial, he would have told them the information he testified to at the evidentiary hearing (2PC-R. 976). Mr. Arthur Lee Breedlove, Mr. Breedlove's brother, testified that he was in prison at the time of Mr. Breedlove's trial, that his family knew how to contact him, and that if Mr. Breedlove's attorneys had asked, he would have testified at the penalty phase (2PC-R. 1002). Ms. Olabella Breedlove, Mr. Breedlove's sister, testified that she lived in the Miami area at the time of Mr. Breedlove's trial, that her parents knew how to contact her, and that if Mr. Breedlove's attorneys had contacted

her, she would have spoken to them and would have testified if asked (2PC-R. 1026). Mr. Elijah Gibson, Mr. Breedlove's brother, testified that if Mr. Breedlove's attorneys had contacted him and asked him to testify regarding Mr. Breedlove's drug use, he would have agreed to testify (2PC-R. 1127). Mr. Henry Washington, Mr. Breedlove's nephew, testified that if Mr. Breedlove's attorneys had talked to him and asked him to testify at the time of Mr. Breedlove's trial, he would have testified (2PC-R. 1177). Ms. Juanita Anderson, Mr. Breedlove's sister, testified that she was living with her parents at the time of Mr. Breedlove's trial and that if Mr. Breedlove's attorneys had asked her to testify, she would have testified (2PC-R. 1182-83).

The State also argues that Mr. Breedlove is somehow to blame for trial counsel's failure to interview the family members because Mr. Breedlove supposedly did not cooperate with his counsel (Answer Brief at 54). The State has cited no such testimony from trial counsel at the evidentiary hearing--because there is none. Mr. Levine did not testify that Mr. Breedlove did not cooperate with a mitigation investigation. Rather, Mr. Levine testified that no mitigation investigation was ever attempted.

The State argues that Mr. Levine's complaints at trial that the State did not provide him with police reports and with the California records shows that this information was not available at the time of Mr. Breedlove's trial. The information was clearly available to the State, which had the police reports and California records and even introduced the California records at

the penalty phase. If the State is contending that these records were unavailable to the defense although they were available to the State, then actions of the State rendered defense counsel ineffective. United States v. Cronic, 466 U.S. 648 (1984). The State contends that Mr. Levine conceded that he was not entitled to these records under the law at the time (Answer Brief at 54-55, citing 2PC-R. 915). However, Mr. Levine only testified that he was not entitled to the police reports, not the California records. The California records clearly existed, as the State had possession of them, but Mr. Levine made no effort to obtain them prior to the penalty phase.

The State baldly asserts that "ample evidence of Defendant's use of drugs in the past was adduced at the original trial" (Answer Brief at 55). The State provides no citations to the trial record where this "ample" evidence appears. The only evidence about Mr. Breedlove's drug use came out in the mental health experts' testimony regarding what Mr. Breedlove had told them. No independent evidence corroborating Mr. Breedlove's self-report was presented.

The State argues that Mr. Levine made a tactical decision not to present the lay testimony because such testimony would have allowed the State to emphasize Mr. Breedlove's prior convictions and bad acts (Answer Brief at 55-58). Mr. Levine testified that his failure to present lay testimony was not strategic or tactical, but resulted from a failure to investigate. Mr. Levine further testified that he would have presented lay testimony regarding Mr. Breedlove's childhood and

drug abuse if he had investigated and obtained such evidence. The State cannot make up strategies which counsel did not proffer. Further, although no lay testimony was presented at the penalty phase, the State did present extensive evidence regarding Mr. Breedlove's prior convictions, including detailed testimony regarding the facts of those offenses, and did cross-examine the defense mental health experts regarding their lack of knowledge about those prior convictions. The evidence was fully presented and argued to the jury even without any lay testimony.

The State argues that reasonable defense counsel would not have presented some of the lay witnesses (Answer Brief at 58-59). Again, the State ignores Mr. Levine's testimony that he had no strategic reason for not presenting these witnesses and that he would have presented their testimony had he conducted the necessary investigation.

The State argues that Mr. Levine would not have presented Elijah Gibson's testimony because the defense attacked him during the guilt phase, because he could have provided damaging testimony, and because his evidentiary hearing testimony was incredible (Answer Brief at 59-60). The lower court did not find Elijah Gibson's testimony to be incredible. Mr. Levine testified that he would have presented Elijah Gibson's testimony about Mr. Breedlove's drug use had he known about it. During Elijah Gibson's testimony at the evidentiary hearing, the State did not elicit the supposedly damaging testimony now argued by the State,

clearly a recognition that the drug use testimony did not open the door to this other testimony.[2]

The State argues that Mr. Levine would not have presented Arthur Lee Breedlove's testimony because Arthur Lee was in prison at the time of Mr. Breedlove's trial and had several prior convictions (Answer Brief at 59). Mr. Levine-testified that he had no strategic reason for not presenting Arthur Lee's testimony and that he would have presented such testimony had he investigated and discovered it. Of course, elsewhere in its brief, the State argues that evidence Mr. Breedlove was abused as a child was inconsequential because his siblings who had also experienced this abuse had not had legal problems like Mr. Breedlove. Arthur Lee's testimony showed that other children in the household experienced problems similar to Mr. Breedlove's as a result of their childhood treatment.

The State argues that Mr. Breedlove did not establish that he was neglected as a child because witnesses testified that Ruby Breedlove, the father, was a good provider (Answer Brief at 60). The State of course ignores the evidence presented that neither Mr. Breedlove's mother, Mary Etta, nor his stepmother, Virginia, provided any care or nurturing for the children because of their own alcoholism (2PC-R. 1218-19, 983). The State also ignores evidence that the mother and stepmother spent household money on alcohol, rather than on food and clothing for the children (2PC-

[2]The State complains that Mr. Breedlove did not present testimony from Mr. Breedlove's mother at the evidentiary hearing (Answer Brief at 59). At the time of the evidentiary hearing, Mr. Breedlove's mother was dead.

R. 1218). The State further ignores the evidence that Ruby Breedlove was out of the house most of the time working at two jobs and when he was at home, the children lived in terror that he would beat them and/or their mother or stepmother (2PC-R. 983-85, 991, 989-90, 1020-24, 1179-81, 1172-74, 992-93).

The State relies on Dr. Toomer's testimony that Mr. Breedlove told Dr. Toomer that his home life was "okay to idealistic" to argue that the children were not neglected (Answer Brief at 60). The State has ignored a significant aspect of Dr. Toomer's testimony. Dr. Toomer explained that Mr. Breedlove's description of his home life raised a concern in Dr. Toomer's mind because that description was too idealized. Dr. Toomer explained that when a patient describes his home life as idealistic, What that does clinically for any therapist or any clinician, it causes a bell to go off, usually an okay or an idealistic presentation of family life is symbolic of dysfunction" (2PC-R. 1152-53).

The State contends that evidence of beatings Mr. Breedlove received as a child is questionable (Answer Brief at 61). The State says this evidence is questionable because, according to the State, the abuse was not mentioned until the instant Rule 3.850 motion was filed. The short answer to this argument is that because trial counsel did not investigate for the penalty phase, no one asked about any abuse in Mr. Breedlove's childhood. As is apparent from the family members' testimony, they would have described the abuse had any one bothered to ask them. Further, the State's contention that there are no indications of

physical abuse in Mr. Breedlove's past records is simply wrong. As Dr. Toomer testified, the records from California show that Mr. Breedlove told an evaluator that he was whipped for bed-wetting and that his parents responded to his thumb-sucking by threatening to cut off his thumb (2PC-R. 1159-60). These records also indicate that Mr. Breedlove reported he did not feel loved by his father and stepmother and he was unable to communicate with either parent (2PC-R. 1162).

The State further argues that the evidence of childhood beatings is questionable because the children did not think their father was a bad person (Answer Brief at 62-63). However, as Arthur Lee Breedlove explained, the fact that the children still loved their father did not change the fact that he beat them unreasonably:

> Q. Mr. Rosenberg was talking about the reason for these beatings being that somehow these beatings were justified. Did you feel that your father was using excessive force when he was beating you?
>
> A. I do.
>
> Q. Did you feel he was using excessive force in beating McArthur?
>
> A. Yes.
>
> Q. You feel a bullwhip was appropriate punishment to skip school?
>
> A. No.
>
> Q. Had the other children skipped school before?
>
> A. Yes, they had.
>
> Q. Had they been punished the same way?

A. No.

A. Could your father have beaten you and still been considered in your eyes a good father?

A. Yes.

Q. What's your definition of a good father?

A. Someone that is there when you need him, you know, and a good provider.

Q. He provided for you?

A. That's something he always have been.

Q. The fact that he beats you didn't make him a bad father in your eyes?

A. No.

Q. Did it justify the beatings?

A. No, not at all.

Q. Because you were beaten by your father, did it mean you hated your father?

A. No.

Q. Being around your father lately, has he changed from the way he was back then?

A. Like night and day.

MR. ROSENBERG: Objection, relevance.

THE COURT: Sustained.

Q. (By Ms. Backus) Has anything that Mr. Rosenberg told you about McArthur changed the way you were beaten back when you were children?

A. No.

Q. Does it change the way that you would react to the stories of how you have been beaten in the past?

A. No.

(2PC-R. 1010-11).

The State also relies on Ruby Lee Breedlove's testimony to argue that the evidence of beatings was questionable (Answer Brief at 63-64). However, the State has failed to recognize that Ruby Lee agreed he had beaten the children, including waiting until the children had gone to bed and did not have pants on so he could beat their bare legs:

> Q. When you would punish the children, what type of things would you use to punish them?
>
> A. I used to beat them. I used to punish them by making them stand in the corner with one feet up. Beating ain't too much good. I tried different ways. I let them stand in the corner one feet up. You try different ways of punishing them.
>
> Q. What things did you use as far as when you would hit them, what other type things besides the bullwhip?
>
> A. Used to use my belt sometimes, you know, a switch, I remember couple times I even used one of the lamp cords, you know what I'm mean?
>
> Q. Extension cord?
>
> A. Yes, I think I remember using that a couple of times. I got the most punishment when I draw back to hit them, I hit my own arm so you quit using them.
>
> Q. When you punished McArthur, he cried?
>
> A. Well, you know, he used to, you know, he used to. Most of the time, he didn't cry, he held it in and afterward he would go in his room.
>
> Q. Would he put on extra clothes to protect himself?
>
> A. Yes, I used to tell them, you know, when they do things they weren't supposed to

do, so I told him, "Don't do it," then they break my rule and go anyway. I said, "Okay, Next time you do it, I'm coming back to beat you." I let that slide over and sometimes he go back to do the same thing again. I said, "Okay, when I come back tonight, I'm going to give you a beating." When I came back, they had two or three pairs of pants like padded themselves and so if I whip them it wouldn't hurt them.

I would tell them to put the clothes off and get in their pajamas. That's okay, remember I told you. I would beat them, I would hit them, give them a few lickings.

Q. You wait until it was time to go to bed?

A. Right.

(2PC-R. 1220-21).

The fact of the beatings is undisputed. The children's and father's different perceptions of the beatings does not alter the fact that they occurred. The children believed the beatings were unreasonable and lived in fear of their father. As the mental health experts explained, such abuse has a lifelong effect on a person's behavior and mental health. This evidence is classic mitigation.

b. Expert **mental health testimony**

The State argues that Mr. Breedlove was not prejudiced by trial counsel's handling of mental health evidence because Mr. Levine "competently examined" the mental health experts, because the mental health experts "were prepared and testified favorably for Defendant," and because "none of the experts changed their opinions or the bases therefor" (Answer Brief at 35). The State's arguments are incorrect, not based upon the actual record

in Mr. Breedlove's case, and do not address Mr. Breedlove's actual claim regarding the mental health testimony.

First, the State argues that the trial court rejected statutory mental health mitigating factors based upon the facts of the offense rather than upon the deficient presentation of the mental health evidence (Answer Brief at 35). However, in the excerpts from the trial court's sentencing order quoted in the State's own brief, the State fails to address the trial court's statement that "[t]here is no evidence" to support the extreme emotional disturbance mitigating factor (R. 187). Regarding the substantial impairment mitigating factor, the trial court found "[t]here was a conflict in the evidence" as to this factor (R. 188). Thus, the trial court found that the defense had not presented evidence supporting the extreme emotional disturbance factor or resolved the conflict in evidence over the substantial impairment factor in the State's favor. Both of these findings indicate that the trial court concluded the defense had not met its burden to establish these factors.

Indeed, in its prior briefs in Mr. Breedlove's case, the State has taken exactly the opposite position it now takes regarding the penalty phase mental health evidence, arguing that at the penalty phase the mental health experts did not testify to the existence of statutory mitigating factors:

> [T]he evidence as to Breedlove's mental state and alleged mental problems was speculative and contradictory. None of the defense experts expressly testified that the statutory mitigating circumstances pertaining to mental state applied, and, to the contrary, the state's rebuttal experts expressly testified that they did not.

(State v. Breedlove, Fla. Sup. Ct. No. 82,731, Initial Brief of Appellant, p. 31).

> [N]one of the three [defense] witnesses--Drs. Center, Levy, or Miller--ever expressly stated that [sections]921.141(6)(b) or (f) applied.

(State v. Breedlove, Fla. Sup. Ct. No. 82,731, Reply Brief of Appellant, p. 2). Further, in its most recent opinion in Mr. Breedlove's case, this Court similarly concluded that the mental health evidence presented at the penalty phase was not nearly so strong as the State would now have the Court believe: "While Breedlove presented some testimony concerning possible psychological problems, two state experts expressly stated that they found no evidence of organic brain damage or psychosis and one of them said Breedlove was malingering." State v. Breedlove, 655 So. 2d 74, 77 (Fla. 1995).

The State argues that prejudice was not established because the experts presented at the penalty phase did not change their opinions in their evidentiary hearing testimony (Answer Brief at 35). Mr. Breedlove never claimed that the experts would change their opinions. Rather, Mr. Breedlove claimed that because they had been provided no background information and because they had not been prepared for their testimony, the experts were not able to support their opinions when they testified at the penalty phase. This Court recognized this as Mr. Breedlove's claim when the Court remanded the case for an evidentiary hearing:

> Breedlove further alleges that counsel failed to furnish the mental health experts with any information concerning his background, the facts of the offense, or his mental status on the night of the homicide. Consequently, the

> experts were unprepared to respond effectively to the State's cross-examination. Breedlove further asserts that counsel negligently failed to present available evidence of intoxication on the night of the murder which could have been used as a basis to support the experts' testimony.

Breedlove v. Singletary, 595 So. 2d 8, 12 (Fla. 1992). As this Court recognized, Mr. Breedlove's claim is that the mental health experts were not provided information to support and amplify their opinions, not that their opinions would change based upon background information. As the Court obviously recognized, testifying to opinions without any factual basis, and having the shortcomings pointed out on cross-examination, is no better than not calling the witnesses at all. If expert witnesses are to testify, they should be prepared to do so with the information needed to support their conclusions,

Mr. Breedlove established his claim at the evidentiary hearing. With the background information, the mental health experts were able to provide greatly expanded testimony regarding Mr. Breedlove. For example, based upon the background information, Dr. Levy testified at length at the evidentiary hearing regarding Mr. Breedlove's childhood and upbringing and regarding how those childhood experiences shaped Mr. Breedlove's later behavior (2PC-R. 1048-52). Thus, Dr. Levy was able to explain that very early in life Mr. Breedlove was introduced to substance abuse by observing the behavior of his mother and stepmother, both of whom were alcoholics. Dr. Levy was also able to explain that the tense and violent household in which Mr. Breedlove was raised meant that he "had no emotional cradle

through which he could evolve and develop those human qualities that make him feel he is worthwhile and a lovable human being" (2PC-R. 1051). Based upon Mr. Breedlove's childhood, Dr. Levy explained, "[N]o wonder that Mr. Breedlove had poor scholastic performance, no wonder he had dropped out at the tenth grade, no wonder that at the age of sixteen or seventeen he began taking drugs" (2PC-R. 1051). As Dr. Levy was able to explain based upon Mr. Breedlove's background, "somebody with this kind of background would seek substance[s] to anesthetize their feelings. I think that the origin of his drug use was his need to try to numb his pain" (SPC-R. 1053). Dr. Levy provided no such testimony at Mr. Breedlove's penalty phase.

At the time of the penalty phase, Dr. Levy had not been informed about Dr. Center's diagnosis of organic brain damage (2PC-R. 1058).[3] Having been provided information regarding Dr. Center's brain damage testing before the evidentiary hearing, Dr. Levy was then able to explain the interaction between brain damage and Dr. Levy's diagnosis of paranoid schizophrenia (2PC-R. 1059). Having not been given such information at the time of the penalty phase, Dr. Levy provided no such testimony at the penalty phase.

Finally, based upon his evaluation and review of background materials, Dr. Levy was able to testify at the evidentiary hearing that the statutory mental health mitigating factors existed (2PC-R. 1060). Dr. Levy testified that Mr. Breedlove

[3]In fact, at the time of his evaluation of Mr. Breedlove, Dr. Levy had recommended brain damage testing, but was never informed that such testing had been conducted (SPC-R. 1058).

"did suffer from extreme emotional disturbance" at the time of the offense (2PC-R. 1060). As to the substantial impairment factor, Dr. Levy testified, "My opinion is that his judgment at the time was substantially impaired given his emotional disturbance and intellectual limitation" (Id.).

Clearly, Dr. Levy's evidentiary hearing testimony established that the background information not only supported the opinions he provided at the penalty phase, but also allowed him to provide testimony he was unable to provide at the penalty phase because he had not been given the necessary information. Mr. Breedlove was prejudiced by trial counsel's failures to prepare Dr. Levy and to provide him with background information.

Dr. Center's evidentiary hearing testimony also established the prejudice resulting from trial counsel's deficient performance. For example, Dr. Center explained that while the neuropsychological testing he performed in 1979 established that Mr. Breedlove suffered from significant brain damage, only the combination of that testing and the background information would explain the behavioral consequences of the brain damage (2PC-R. 1099-1100, 1103). Having been provided no background information at the time of the penalty phase, Dr. Center did not testify regarding how observations of Mr. Breedlove were consistent with his brain damage. Dr. Center also testified that the background information provided corroboration for Dr. Center's test results, explaining that prior mental health evaluations showed Mr. Breedlove's IQ to be in the dull normal range, "almost exactly

what he achieved in terms of with me, in terms of the I.Q. score" (2PC-R. 1101).

Based upon the background information, Dr. Center was also able to explain that a brain damaged person is able to behave appropriately in a structured environment and that Mr. Breedlove had exhibited appropriate behavior when he was in a structured environment (2PC-R. 1104). Dr. Center provided no such testimony at Mr. Breedlove's penalty phase.

Finally, based upon his testing and upon the background information, Dr. Center was able to testify to the existence of the statutory mental health mitigating factors (2PC-R. 1105, 1106). As is clear from Dr. Center's evidentiary hearing testimony, he was able to support his conclusions regarding statutory mental health mitigation not only from his testing but also from the background information regarding Mr. Breedlove's impulsive behavior and his abuse of alcohol and drugs. At the penalty phase, Dr. Center was not able to provide such support for his opinions.

As the testimony presented at the evidentiary hearing also demonstrated, background information was essential to countering the State's mental health experts' penalty phase testimony that Mr. Breedlove was antisocial. Dr. Jethro Toomer explained that an antisocial diagnosis cannot be made without a review of a person's entire history because the diagnosis requires that the person have met the criteria for conduct disorder before age sixteen or eighteen, which was not the case with Mr. Breedlove

(2PC-R. 1147).[4] Dr. Toomer also explained that a person with antisocial personality disorder always violates society's norms, but that Mr. Breedlove's history shows periods when he successfully "was able to abide by certain norms and the standard" (2PC-R. 1148), such as when Mr. Breedlove responded to therapy when he was in the California state hospital (2PC-R. 1162-63). Dr. Toomer further explained that a person with antisocial personality disorder is unable to show any caring for others, but that Mr. Breedlove's history showed that he had a conscience and expressed caring for other people (2PC-R. 1148). Finally, Dr. Toomer explained that the existence of organic brain damage means that a person "cannot be diagnosed as anti-social personality" and that in order to diagnose antisocial personality disorder, the evaluator "must rule out organicities in order to render that diagnosis" (2PC-R. 1165). Without consulting with the defense experts prior to the penalty phase regarding the criteria for diagnosing antisocial personality disorder and without the background information, however, the defense was unable to counter the State experts' antisocial opinions. Mr. Breedlove was substantially prejudiced by trial counsel's failure to prepare.

The prejudice resulting from trial counsel's failure to be prepared with background information is also shown by the testimony of the State's expert, Dr. Mutter, at the evidentiary

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[4] Indeed, throughout its cross-examination of the defense experts, the State consistently pointed out that when he was living at home as a child and teenager, Mr. Breedlove did not have problems with the law.

hearing. For example, Dr. Mutter testified that at the time of his evaluation of Mr. Breedlove, he could not determine whether Mr. Breedlove's mental status at the time of the offense were affected by drug or alcohol use because he had no independent evidence that Mr. Breedlove had used drugs or alcohol at the time of the offense (2PC-R. 1227). The only information Dr. Mutter had was "a statement by the defendant which may or may not be true" (Id.). At the evidentiary hearing, Mr. Breedlove presented independent evidence establishing that Mr. Breedlove had used drugs and alcohol at the time of the offense.

Mr. Levine testified that at the time of Mr. Breedlove's penalty phase, he had no familiarity with organic brain damage or how it is diagnosed (2PC-R. 74-75). Thus, at the penalty phase, Drs. Mutter and Jaslow were able to testify that they, as psychiatrists, saw no signs of organic brain damage (R. 1398, 1410), and the State was able to argue that since Dr. Center was not a medical doctor, but only a psychologist, the opinions of Drs. Mutter and Jaslow should prevail. However, had Mr. Levine been prepared, he could have gotten Dr. Mutter to agree, as he did at the evidentiary hearing, that neuropsychological testing such as that conducted by Dr. Center is a valid method of diagnosing organic brain damage (2PC-R. 1229-30). Again, Mr. Breedlove was prejudiced by trial counsel's failure to prepare.

The State's arguments do not address the State's cross-examination of the defense mental health experts at the penalty phase nor the State's penalty phase closing argument regarding the defense experts' failure to review background information.

The State's cross-examination of the defense experts is set forth in detail in Mr. Breedlove's initial brief (pp. 69-79), but is utterly ignored in the State's answer brief. The State's penalty phase closing argument regarding the experts' failure to review background information is also set forth in Mr. Breedlove's initial brief (p. 79), but is likewise ignored in the State's answer brief.

B. MR. BREEDLOVE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL

Based upon the facts presented at the evidentiary hearing and upon legal precedent, Mr. Breedlove received ineffective assistance of counsel at his capital penalty phase and is entitled to relief. The State's brief ignores a substantial body of law demonstrating that trial counsel's performance was deficient and that counsel's deficiencies prejudiced Mr. Breedlove.

Trial counsel's performance was deficient because counsel failed to investigate mitigation. The State has made no showing that trial counsel investigated for Mr. Breedlove's penalty phase. Failure to investigate available mitigation constitutes deficient performance. Rose v. State, ___ So. 2d ___ (Fla. Mar. 7, 1995); Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995); Deaton v. Singletary, 635 So. 2d 4 (Fla. 1994); Heinev v. State, 620 F.2d 171 (Fla. 1993); Phillips v. State, 608 So. 2d 778 (Fla. 1992); Mitchell v. State, 595 So. 2d 938 (Fla. 1992); State v. Lara, 581 So. 2d 1288 (Fla. 1991); Stevens v. State, 552 So. 2d 1082 (Fla. 1989); Bassett v. State, 451 So. 2d 596 (Fla. 1989). No strategic decision can be attributed to counsel's actions

because counsel failed to investigate. Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991) ("[C]ase law rejects the notion that a 'strategic' decision can be reasonable when the attorney had failed to investigate his options and make a reasonable choice between them"). A trial attorney's failure to investigate for the penalty until after the guilty verdict is unreasonable. Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995). Under these legal standards, Mr. Breedlove's counsel's performance was deficient.

As to prejudice, the State argues Mr. Breedlove must show that the evidence which was not presented at the penalty phase would "probably" have affected the outcome (Answer Brief at 53, 54). Strickland's prejudice standard requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694 (1984).[5] Confidence in the outcome is undermined when the court is unable "to gauge the effect" of counsel's omissions. State v. Michael, 530 So. 2d 929, 930 (Fla. 1988). Prejudice is established when trial counsel's deficient performance deprives the defendant of "a reliable penalty phase proceeding." Hildwin, 654 So. 2d at 110.

[5] A defendant is not required to show that counsel's deficient performance "[m]ore likely than not altered the outcome in the case." Strickland, 466 U.S. at 693. The Supreme Court specifically rejected that standard in favor of a showing of a reasonable probability. A reasonable probability is one that undermines confidence in the outcome.

The evidence presented in post-conviction established numerous mitigating circumstances. The evidence established that at the time of the offense Mr. Breedlove was suffering from an extreme emotional disturbance. See Fla. Stat. sex. 921.141(6)(b). The evidence established that at the time of the offense, Mr. Breedlove's capacity to conform his conduct to the requirements of law was impaired. See Fla. Stat. sec. 921.141(6)(f). The evidence established that Mr. Breedlove suffers from organic brain damage, a recognized nonstatutory mitigating factor, see State v. Sireci, 536 So. 2d 231 (Fla. 1988), was abused as a child, also a recognized nonstatutory mitigating factor, see Campbell v. State, 571 So. 2d 415, 419 n.4 (Fla. 1990), had a history of severe alcohol abuse, another recognized nonstatutory mitigating factor, see Carter v. State, 560 So. 2d 1166, 1168 (Fla. 1990), and is able to function appropriately in a structured environment such as a prison, also a recognized nonstatutory mitigating factor. See Valle v. State, 502 so. 2d 1225, 1226 (Fla. 1987).

Despite the establishment of these numerous recognized mitigating factors, the State argues that prejudice has not been established because the aggravating factors would outweigh the mitigation (Answer Brief at 65).[6] The State ignores the fact that the lower court's order stated, "the aggravating

[6]As part of this argument, the State contends that evidence of child abuse has limited value because Mr. Breedlove was 31 years old at the time of the offense. However, as the mental health experts explained below, childhood abuse and other childhood events have a lifelong impact upon a person's behavior and mental health.

circumstances outweighed this mitigating circumstance" (2PC-R. 824) (emphasis added). While the circuit court's conclusion is based solely on one unidentified mitigating circumstance, the evidence presented below established numerous recognized mitigating circumstances.

In cases such as Mr. Breedlove's, where trial counsel have failed to present available substantial mitigation, this Court has granted relief despite the presence of numerous aggravating circumstances. See Rose v. State, ___ So. 2d ___ (Fla. Mar. 7, 1995), slip op. at 18 (prejudice established "[i]n light of the substantial mitigating evidence identified at the hearing below as compared to the sparseness of the evidence actually presented (at the penalty phase]); Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995) (prejudice established by "substantial mitigating evidence"); Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992) (prejudice established by "strong mental mitigation" which was "essentially unrebutted"); Mitchell v. State, 595 So. 2d 938, 942 (Fla. 1992) (prejudice established by expert testimony identifying statutory and nonstatutory mitigation and evidence of brain damage, drug and alcohol abuse, and child abuse); State v. Lara, 581 So. 2d 1288, 1289 (Fla. 1991) (prejudice established by evidence of statutory mitigating factors and abusive childhood); Bassett v. State, 541 So. 2d 596, 597 (Fla. 1989) ("this additional mitigating evidence does raise a reasonable probability that the jury recommendation would have been

different").[7] The Court has also granted relief based on penalty phase ineffective assistance of counsel when the defendant had a prior murder conviction. Torres-Arboleda v. Dugger, 636 So. 2d 1321 (Fla. 1994).[8] The evidence presented at Mr. Breedlove's hearing is identical to that which established prejudice in these cases, and Mr. Breedlove is similarly entitled to relief.

The mitigation established at the evidentiary hearing would have totally changed to picture of Mr. Breedlove presented at the penalty phase. There, the State relied upon Mr. Breedlove's prior convictions while the defense presented nothing to explain or reduce the aggravating weight of those convictions. In contrast, the mental health evidence clearly established that Mr. Breedlove has suffered serious mental disturbances since early childhood and that these mental disturbances resulted from factors such as brain damage and his upbringing over which Mr. Breedlove had no control and about which Mr. Breedlove had no choice. Thus, the mental health evidence would have substantially diminished the weight of the aggravating circumstances.

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[7] Prejudice was found in these cases despite the existence of numerous aggravating factors. See Rose v. State, 461 So. 2d 84 (Fla. 1984) (three aggravating factors); Hildwin v. Dugger, 20 Fla. L. Weekly at S39 (four aggravating factors); Phillips v. State, 476 So. 2d 194 (Fla. 1985) (four aggravating factors); Mitchell v. State, 527 So. 2d 179 (Fla. 1988) (three aggravating factors); Lara v. State, 464 So. 2d 1173 (Fla. 1985) (same); Bassett v. State, 449 So. 2d 803 (Fla. 1984) (same).

[8] After this Court granted relief, Mr. Torres-Arboleda received a life sentence.

Finally, the State takes issue with Mr. Breedlove's reliance upon this Court's prior conclusion that Mr. Breedlove's conviction could only rest upon a felony murder theory and thus that "[a] strong presentation of mitigating evidence is more likely to tip the scales in a case where the killing was not premeditated." Breedlove v. Singletary, 595 So. 2d 8, 12 (Fla. 1992). The State contends that this conclusion "overlooks the evidence at trial" (Answer Brief at 69). However, the State has overlooked significant facts in the record. As this Court has previously recognized, the victim died from a single stab wound inflicted during the course of a burglary, and Mr. Breedlove acquired the weapon only after entering the house. Breedlove v. Singletary, 595 So. 2d at 12. Most significantly, the State has overlooked the fact that Mr. Breedlove was acquitted of attempted murder as to Carol Meoni. Thus, the jury must have concluded that Mr. Breedlove had no intent to kill, but that they could convict Mr. Breedlove in the victim's death under the felony murder theory.

C. **ARGUMENT IN RESPONSE TO THE STATE'S CROSS-APPEAL**

The State asserts that "new evidence" establishes that Mr. Breedlove's ineffective assistance of counsel claims are procedural defaulted, arguing now that this Court erred in its prior ruling excusing the default (Answer Brief at 23). Mr. Breedlove will explain below that (1) the State's dismissal of the cross-appeal is binding and therefore the arguments raised by the State are improper; (2) the Court's ruling excusing the procedural default is the law-of-the-case; (3) the State's

defense of laches is procedurally barred and should be summarily rejected; and (4) the alleged "evidence" below neither demonstrates that this issue should be "revisited" nor that the ineffectiveness claim presently before the Court is procedurally barred.

1. **The State's Dismissal of the Cross-Appeal is Binding.**

On June 23, 1992, the State filed a notice of cross-appeal, indicating its intention to cross-appeal "Trial Court rulings on questions of law" (2PC-R. 831).[9] On August 30, 1995, Mr. Breedlove filed his Initial Brief in this cause. On December 15, 1995, the State filed its Answer Brief raising arguments referring to matters presumably related to its cross-appeal (although, as explained infra, such arguments were not within the scope of this Court's remand nor addressed by the lower court). On March 8, 1996, the State filed a Notice of Dismissal of Cross-Appeal, and on March 13, 1996, this Court entered an order dismissing the cross-appeal. After Mr. Breedlove moved to strike those portions of the State's brief dealing with the procedural bar/laches argument, the State filed a motion seeking, inter alia, reinstatement of its cross-appeal.

The State's voluntary dismissal of the cross-appeal is binding on the State; any issues raised in that appeal, assuming arsuendo that such are cognizable in this proceeding, are waived and abandoned by the State's notice of dismissal. There is no mechanism for reinstatement of a dismissed appeal absent a

[9]The Notice of Cross-Appeal indicates it was served on Mr. Breedlove's counsel on June 23, 1991, rather than 1992. Mr. Breedlove's counsel presumes that this is a typographical error.

showing by the movant that this Court's order of dismissal resulted from "any illegality, fraud, mutual mistake, or excusable neglect." State v. Wynn, 567 So. 2d 533, 534 (Fla. 5th DCA 1990).[10] "Under the rule (of appellate procedure governing voluntary dismissal of appeals], the State's act in filing the Notice of Voluntary Dismissal was effective to dismiss this appeal." Id. at 535 (Cowart, J., specially concurring).

A notice of voluntary dismissal under Rule 9.350(b) "divest[s] an appellate court of jurisdiction which cannot be restored." Id.[11] Were a criminal defendant to dismiss an appeal and later wish to reinstate it for some reason, such a request would likely be rejected and the claims in the dismissed appeal waived. Compare Coleman v. Thompson, ___ U.S. ___, 111 s. Ct. 2546, 2566-67 (1991). A different result should not obtain to the advantage of the State, particularly where there is no vehicle for the relief sought because of a procedural default and the law-of-the-case doctrine, as the State's own pleading concedes and as is demonstrated below. The State dismissed its appeal, and the issue presented is thereby waived and abandoned.

"Given the State's correct observation that the matter raised in its cross-appeal was not properly raised via a cross-appeal (Appellee's Response in Opposition to Appellant's Motion to Strike Portions of Appellee's Answer Brief at 2), there can be no "excusable neglect" in this case for dismissing an admittedly noncognizable appeal.

"As Judge Cowart observed, "[t]he notice [of voluntary dismissal] was like opening the barn door and letting the horse out ; obtaining court permission to close the barn door, or even closing the door, is not going to cause the horse to be back in the barn." Id.

2. This Court's Ruling in Breedlove v. Singletary is the Law of the Case.

The State is asking this Court to "revisit" its prior ruling that Mr. Breedlove's claims of ineffective assistance of counsel were not procedurally barred. However, this Court's prior legal conclusion that the procedural default was excused under the particular facts of Mr. Breedlove's case is the law of the case, and should *not* be disturbed. The matter was fully briefed and argued before this Court in 1992, and the State's attempt to relitigate this issue under the guise of a cross-appeal should be rejected.

In the postconviction motion filed by the undersigned CCR counsel after a death warrant was signed, several claims alleging ineffective assistance of counsel were alleged, as well as affidavits and legal argument explaining why the procedural default should be excused under the unique circumstances of Mr. Breedlove's case. The State filed a written pleading acknowledging that prior collateral counsel Elliot Scherker swore that "he did not investigate or raise a claim of ineffective assistance of counsel because he believed that he would have been ethically and legally precluded from doing so, and that he never discussed the matter with the defendant" (2PC-R. 126). The State argued as a matter of law that Mr. Scherker's statement "fails to establish an exception to the two-year time period" (2PC-R. 126). The trial court rejected the State's procedural bar arguments and denied relief on the merits (2PC-R. 324). The State then filed a notice of cross-appeal regarding "questions of law" (2PC-R. 337).

In its 1992 cross-appeal, the State raised its argument that the ineffectiveness claims were barred. Mr. Breedlove argued that while the lower court did not err in reaching the merits of the ineffectiveness claims, it erred in summarily denying them. After observing that Mr. Breedlove's second postconviction motion was "untimely," this Court rejected the State's default argument, concluding as a matter of law that the default was excused:

> However, Breedlove was represented by the public defender's office both at his trial and during his first rule 3.850 proceeding. Therefore, that office was unable to assert a claim of ineffective assistance of trial counsel. Adams v. State, 380 So. 2d 4221 (Fla. 1980). On the peculiar facts of this case, we choose to overlook the procedural default as it relates to claims of ineffective assistance of counsel.

Breedlove v. Singletary, 595 so. 2d at 11 (emphasis added). The Court thereafter remanded the case to the circuit court for an evidentiary hearing on the penalty phase ineffective assistance of counsel claim. Id. at 12. The Court did not remand for a hearing regarding the procedural bar issue,

The Court's ruling is the law of the case, and cannot be disturbed simply because the State continues to be unhappy with it.[12] The State's own pleading responsive to Mr. Breedlove's

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[12]While Mr. Breedlove continues to believe that he was entitled to a hearing on his claims of ineffective assistance of counsel at the guilt phase, he recognizes that this Court ruled as a matter of law that the claim should be summarily denied. In light of the Court's ruling, Mr. Breedlove did not present any evidence at the hearing relating to his guilt phase claim, nor is he asking the Court to "revisit" its prior decision. Certainly, if Mr. Breedlove had called witnesses to testify as to the merits Of the guilt phase ineffectiveness claim, the State would cry foul. Yet the State of Florida, despite the Court's decision on the procedural default issue, sought to elicit testimony over (continued...)

motion to strike the argument concerning this issue from the Appellee's Brief expressly conceded that "the trial court was bound by this Court's mandate in Breedlove," and even conceded that in denying relief after the evidentiary hearing on the ineffectiveness claim, the trial court "did not err in failing to revisit the issue . . . [a]s the trial court was without power to overturn this court's prior ruling to the contrary" (Appellee's Response in Opposition to Appellant's Motion to Strike Portions of Appellee's Answer Brief at 2). That the Court's decision regarding the procedural bar in Breedlove v. Singletary is the law of the case is not even disputed by the State.

"It is the general rule in Florida that all questions of law which have been decided by the highest appellate court become the law of the case which, except in extraordinary circumstances, must be followed in subsequent proceedings, both in the lower and appellate courts." Brunner Enterprises v. Department of Revenue, 452 So. 2d 550, 552 (Fla. 1984). "[O]nce an issue has been settled as the law of the case in one appellate proceeding, it may not be relitigated before the appellate court in a subsequent appeal in the same case." PADOVANO, FLORIDA APPELLATE PRACTICE, S14.12, at 246 (1988). See Westbrook v. Zant, 743 F. 2d 764, 768 (11th Cir. 1984) (citation omitted).

The State's request to revisit the law previously decided by the Court is not to be granted as "a matter of right" but rather

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[12] (. . . continued)
repeated objections by Mr. Breedlove's counsel regarding this issue, and now urges the Court to review the matter based on alleged "evidence" which was improperly elicited. The State's arguments must be rejected.

only in "unusual circumstances" and "for the most cogent reasons." Strazzulla v. Hendrick, 177 So. 2d 1, 4 (Fla. 1965). See also Brunner Enterprises, 452 So. 2d at 552 ("no party is entitled as a matter of right to have the law of the case reconsidered"). No such "unusual circumstances" exist in this case. All of the information that the State now urges requires revisiting the procedural bar issue was previously available in 1992, previously argued in 1992, and previously rejected by the lower court as well as this Court in its prior opinion.

Courts have defined "unusual circumstances" very narrowly, and only reluctantly revisit a prior ruling of law when, for example, there has been an intervening appellate opinion on the same issue. Brunner Enterprises, 452 So. 2d at 553 ("[a]n intervening decision by a higher court is one of the exceptional situations in which a court will entertain a request to modify the law of the case"). In Mr. Breedlove's case, there has been no intervening decision by a higher court which would necessitate revisiting the law of this case. The law of the case may be revisited if there is a showing that strict adherence to the rule would result in a "manifest injustice." Id. It is difficult to fathom how the State of Florida can establish a "manifest injustice" in this case of such a magnitude to overturn the law of the case. First, it must be remembered that this Court already decided that the equities of the situation demanded that the procedural bar issue be decided in Mr. Breedlove's favor. Moreover, the State prevailed on the very claim that it is now seeking to have revisited. What "manifest injustice" could

possibly accrue to the State when it prevailed on this very claim? Indeed, the only *'manifest injustice" which would arise would be if the Court were to revisit the law of the case and deprive Mr. Breedlove of a merits ruling on this claim after ruling as a matter of law in 1992 that he was entitled to a hearing on the merits.[13]

The Court's legal ruling that the procedural default was excused is the law of the case, as even the State had conceded. The Court should therefore decline the State's invitation to revisit its prior ruling because it is the law of the case.

3. The State's Assertion of Laches Must Be Rejected.

In a footnote in its Answer Brief, the State asserts that "[t]o the extent that Defendant has claimed that the State failed to rebut any of his contentions, and such is due to the missing files, this claim should also be barred by the doctrine of laches" (Answer Brief at 25 n.2). As Mr. Breedlove will explain, the State is procedurally barred from asserting a defense of

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[13]This Court has consistently invoked the law of the case doctrine even when it has acknowledged that, but for the law of the case, a death sentence would not be affirmed. See, e.g. Porter v. Dugger, 559 So. 2d 201, 203 (Fla. 1990) ("even though the jury override might not be sustained today, it is the law of the case"); Mills v. Dugger, 559 So. 2d 578 (Fla. 1990) (same). See also Johnson [Marvin] v. Dugger, 911 F. 2d 440, 454 (11th Cir. 1990), vacated on other grounds, 920 F. 2d 721 (11th Cir. 1990) (citation omitted) (upholding this Court's practice of invoking the law of the case doctrine and observing that "[t]he Florida courts have relied upon the 'law of the case' doctrine 'in order to lend stability to judicial decisions and the jurisprudence of the state, as well as to avoid piecemeal appeals and to bring litigation to an end as expeditiously as possible"). Certainly if the Court had determined that revisiting admittedly invalid death sentences is not a "manifest injustice" of such a magnitude to lift the law of the case, the State has not proven such in Mr. Breedlove's case, especially when the State prevailed below.

laches at this time. Furthermore, the defense of laches does not apply under these circumstances, and has been insufficiently pled by the State. Even assuming that the doctrine of laches applies in this case and was sufficiently raised by the State, the State has not met its high burden of establishing that Mr. Breedlove's claim should be barred due to laches.

The State is barred from asserting a defense of laches at this time because it asserted laches for the first time after this Court remanded for an evidentiary hearing. At no time prior to the Court's reversal on the penalty phase ineffective assistance of counsel claim did the State assert a defense of laches. In fact, the State asserted quite the opposite. In its written answer to Mr. Breedlove's ineffectiveness claim, the State never asserted that the loss of the files prejudiced the State and precluded it from being able to respond; rather, the State defended the claim based on the record:

> The State submits that the record clearly shows that counsel was not ineffective under Strickland, in that counsel's performance did not fall outside the wide range of reasonable professional assistance, and that even if the performance was inadequate, there is no reasonable probability that the results of the sentencing proceeding would have been different.
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> * * *
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> [T]his Court must look to the record and files to see if the defendant's claims of ineffectiveness of counsel can be sustained or rejected.

(2PC-R. 140). As to Mr. Breedlove's claim that counsel failed to investigate a history of substance abuse, the State asserted that "[f]rom the record, counsel was clearly aware of the defendant's

history of alcohol and drug abuse and introduced evidence of the same at the penalty phase" (2PC-R. 140). The State also argued that "the record indicates that defense counsel had the defendant evaluated for competency to stand trial . . ." (2PC-R. 142). The State further argued that the record refuted Mr. Breedlove's claims that counsel inadequately investigated, and concluded that "the record reflects that counsel more than adequately investigated and presented evidence of the defendant's long history of substance abuse, as well as existing mental health problems, i.e., schizophrenia and brain damage" (2PC-R. 142). As to Mr. Breedlove's claim that counsel failed to adequately prepare the expert mental health witnesses for their testimony, the State argued that "the record refutes that allegation" (2PC-R. 143).

The State has clearly procedurally defaulted a defense of laches. The State had every opportunity to do so in its responsive pleading below. It did not. The State had the opportunity to claim its prejudice in responding to Mr. Breedlove's rehearing motion before the trial court. It did not.[14] The State had the opportunity to raise any laches argument in its brief before this Court on the appeal from the summary denial of relief. It did not. Arguments not preserved

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[14] Instead, in its response to Mr. Breedlove's motion for rehearing, the State reiterated its position that "the record refutes Mr. Levine's affidavit, as the record shows that counsel, either Mr. Levine and/or Mr. Zenobi did investigate and present evidence of the defendant's mental history and status as well as his history or drug and alcohol abuse," and that the "allegation [that counsel was ineffective for not providing background information about the defendant's background to the three mental health experts] is refuted in the record" (2PC-R. 332).

for review are procedurally defaulted, as are arguments which are withheld and later resurrected; the State is procedurally barred from asserting an issue it failed to raise at the proper time. Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993).

Even were the State not barred from raising laches, laches has not been established. The State's bare allegation that Mr. Breedlove's claims must be denied as violative of laches is insufficient on its face to even invoke the defense. The State has claimed in its brief that "to the extent" that it was unable to rebut Mr. Breedlove's allegations due to the fact that the trial attorney files are missing or lost, Mr. Breedlove's claim should be denied, However, the State has made no showing that the lost files is a fact attributable to Mr. Breedlove. Further, just because "the proceedings below took place 14 years after the trial" (Answer Brief at 25 n.2), it is well established that the mere passage of time, standing alone, cannot constitute the prejudice necessary to support a finding of laches. Malcom v. State, 605 So. 2d 945, 949 (Fla. 3d DCA 1992).

In order to establish laches, the State must allege and prove that "the delay has resulted in injury, embarrassment, or disadvantage to any person and particularly to the person against whom relief is sought." Lishtsev v. Lightsey, 8 So. 2d 399 (Fla. 1942). A showing that the "delay" in question was unreasonable or inexcusable must also be made, as well as establishment of the fact that the inexcusable "delay" caused the moving party undue prejudice. Congara, Inc. v. Singleton, 743 F. 2d 1508, 1517 (11th Cir. 1984). Laches "must be first pleaded and then proved

by clear and convincing evidence." Donico-Cab v. Donico-Cab, 434 So. 2d 30, 31 (Fla. 3d DCA 1983).

In Mr. Breedlove's case, the State has utterly failed to establish laches. Initially, it is difficult to fathom how the State was unduly prejudiced by the lost files when the State prevailed below. Further, the State cannot meet the threshold showing that the "delay" in the case was both inexcusable and that the fact that the files were lost is attributable to the "delay." The Court has already held as a matter of law that the procedural default in this case was excused. Breedlove v. Sinoletarv, 595 So. 2d at 11. Likewise, the State has made no showing that the lost files is in any way attributable to the "delay" alleged by the State or to any actions by Mr. Breedlove. The State has neither alleged nor established when the files were lost.[15] Moreover, the State has neither alleged nor proven that had the files been available at an earlier time, they would have assisted the State in responding to Mr. Breedlove's claims.[16]

The State's chief complaint is that when it called Mr. Breedlove's guilt phase attorney, Eugene Zenobi, as part of its case-in-chief below, Zenobi "had virtually no memory of the trial at all" (Answer Brief at 25 n.2). The State fails to explain how

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[15] If the files were lost in 1980, for example, there can be no prejudice, much less undue prejudice, to the State at this time, as the files were just as lost in 1980 as they were at the time of the evidentiary hearing in 1992.

[16] See Alexander v. State of Maryland, 719 F. 2d 1241, 1246 n.9 (4th Cir. 1983) ("we think it is incumbent on the state in this case to show that it was prejudiced by the disappearance of the records in a period of delay chargeable to [the defendant]. . . . [T]he state in demonstrating prejudice must show more than that the records are unavailable").

the fact that the files were lost somehow caused it undue prejudice when it relied on the record to establish that Mr. Breedlove's penalty phase counsel acted in an objectively reasonable manner under Strickland. See, 2PC-R. 140; 142; 143; 332.

Moreover, Zenobi never testified that he had Virtually no memory of the trial at all" (Answer Brief at 25 n.2). In reality, the record reflects that when Zenobi was unable to recall certain things, the State was able to refresh his recollection with documents that were contained in the court file.[17] For example, when Zenobi could not recall if he went to

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[17]Mr. Zenobi was briefly questioned by the State about his standard procedures with respect to his files, and he explained that he "would imagine" that "standard practice" would have been to take notes about what he did in a case (2PC-R. 1200). However, Mr. Zenobi did not testify that he took notes in Mr. Breedlove's case or that notes, if they did exist, would have provided any pertinent information or assisted in his testimony. It is important to note that all of the State's complaints about this issue pertain to Mr. Zenobi. Mr. Zenobi represented Mr. Breedlove at the guilt phase, not the penalty phase. Because Mr. Breedlove did not receive a hearing on his guilt phase issues, Mr. Breedlove did not call Mr. Zenobi to testify.

The State asserts that Mr. Zenobi's testimony was "directly contrary to much of Levine's testimony" with respect to Mr. Zenobi's standard operating procedures (Answer Brief at 25 n.2). The State fails to point to anywhere in the record to support its assertions because it cannot; Mr. Levine never testified about Mr. Zenobi's note-taking habits, but rather explained that he did not need anything in the file to refresh his recollection:

> Q. (by ASA Gary Rosenberg] You reviewed your office file to review your notes about why you presented some testimony and why you didn't and who you talked to about organic brain --
>
> A. [by Mr. Levine] My office file from the Public Defender's Office?

(continued...)

court for a hearing on the State's penalty phase witness list, the State showed him part of the record referring to such a hearing, and he then recalled the hearing (2PC-R. 1203). When Zenobi could not recall whether he had sought any mental health evaluation of Mr. Breedlove, the State showed him a motion requesting a competency evaluation as well as a witness list naming mental health experts, and he then recalled that he had sought mental health evaluations in Mr. Breedlove's case (2PC-R. 1207).

Other areas of inquiry of Zenobi in which he had no adequate recollection were addressed by the testimony of other witnesses. For example, Zenobi could not recall how Mr. Levine came to

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[17] (.continued)

Q. -- Yeah.

A. No.

Q. Did you ask to see it?

A. No.

Q. Do you think that it would be helpful to refresh your memory about what you did and didn't do?

A. No.

Q. Your memory is good on all that?

A. I know prior to Friday I did absolutely nothing. I can tell you with crystal clarity what I did over the weekend. I read those [mental health] reports that were in the file, period.

(2PC-R. 893).

assist him with Mr. Breedlove's trial (2PC-R. 1204). However, other witnesses provided that explanation. Attorney David Finger testified that after he withdrew from the Breedlove case, he was present during a conversation between Jay Levine and Zenobi "when Mr. Zenobi asked Mr. Levine if Mr. Levine would help him out, sit with him during the course of the trial and help him with the record of making any objections, basically to help him as a second chair in the case with him" (2PC-R. 844). Finger was also present during a conversation after the guilty verdict was rendered in which Zenobi passed on the penalty phase to Levine:

> Q. Do you recall what Mr. Zenobi said to Mr. Levine?
>
> A. The jury had been discharged. They were coming back I believe on Monday for the second phase and I distinctly recall the conversation outside of the courtroom. It was courtroom 4-3, right down the hall.
>
> I remember Mr. Zenobi telling Mr. Levine that "I'm kind of depressed," I know he used the word depressed, I'm a hundred percent positive of that. I believe he said "I'm kind of depressed. I would like you to do phase two," and Mr. Levine agreed to do it. I have a distinct recollection of that conversation, as I remember Gene Zenobi saying, "I'm depressed."

(2PC-R. 845).

Finger's testimony was corroborated by Levine himself, who explained that Zenobi "asked me to do a couple little things for him," such as continuance motions and filing standard death penalty form motions (2PC-R. 857). Levine also explained that Zenobi approached him about sitting in as a second chair:

> A. [Mr. Zenobi] asked me if I would sit in with him on the case because it was a

> first degree murder and the policy was they like to have two attorneys there.
>
> What I recall him saying, "Would you sit in with me and help me protect the record on appeal?" It was basically, from what I recall, his feeling that while he's in the heat of cross examination and putting on the case he was going to do, he might overlook something as far as preservation.
>
> So I stayed there, took notes during the trial. I didn't participate but I did make arguments at sidebar that I thought were necessary to protect the record.

(2PC-R. 860).

Contrary to the State's belated complaints, testimony about how Levine came to assist Zenobi and represent Mr. Breedlove at the penalty phase was fully before the lower court. Laches simply cannot be established under these circumstances.[18]

4. There is No "New Evidence" Which Warrants Revisiting This Issue or Which Establishes that the Issue is Procedurally Barred.

The State also alleges that "evidence adduced at the hearing on remand showed that the claims were omitted not due to any conflict, but because of a tactical choice" (Answer Brief at 24). The sole "evidence" cited consists of hearsay testimony from the cross-examination of Jay Levine, Mr. Breedlove's penalty phase counsel. Elliot Scherker, the postconviction attorney, was not called by the State to testify.

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[18]The State's brief broadly asserts that "Levine's testimony was very selective, and much of his testimony did not seem to correlate with the trial record" (Answer Brief at 25). This is not the case, and the lower court made no such finding. Mr. Breedlove addresses these assertions in the body of the instant brief in connection with the State's specific claims about Mr. Levine's testimony. See supra at 1, et. seq.

This Court's remand for an evidentiary hearing was limited to one issue: penalty phase ineffectiveness. The Court did not remand for evidentiary development on the State's cross-appeal, nor did the State request an evidentiary hearing on the default issue, although it clearly could have. Therefore, not only is the State procedurally barred from arguing this matter at this time, it is attempting to use evidence which it improperly elicited at the evidentiary hearing.

At the hearing, the State attempted to elicit testimony from Levine as to why no ineffectiveness claims were raised by Elliot Scherker. Mr. Breedlove's collateral counsel objected "about the relevance of 1983" (2PC-R. 956). The trial judge indicated that he had brought the issue up because "I wanted to refresh my recollection on it" (Id.). The State then asked Levine about whether he knew that no ineffectiveness claims were raised in the first postconviction motion, and Mr. Breedlove's counsel again objected because the evidence had "no relevance" (Id.). After allowing Levine to answer the question, the judge concluded that "I don't really think it is relevant" (2PC-R. 956). The State's attempts to elicit testimony on the procedural bar issue was improper because it was outside the scope of the Court's mandate.[19]

"Contrary to the State's representation that the trial court "plainly tended to agree with the State's position on the bar and laches issue" (Answer Brief at 25) (footnote omitted), the trial court stated on the record that it did not think the evidence from Mr. Levine was relevant because, as the State acknowledged in its Answer Brief, the trial judge "felt constrained by this court's mandate to rule on the merits" (Answer Brief at 25). The trial court properly felt

(continued...)

Further, the scant information the State did elicit from Levine in no way establishes that there was a "conscious decision to waive the claim" (Answer Brief at 24). First, the State is relying on hearsay testimony from Levine; notably, the State did not call Scherker to testify or otherwise proffer any testimony from him. Levine explained that he did talk to Scherker about the fact that Zenobi had asked him to do the penalty phase after the guilty verdict was rendered, and that "there was no investigation" conducted in Mr. Breedlove's case (2PC-R. 854). Levine also told Scherker that due to his and Zenobi's lack of preparedness, Mr. Breedlove "did not get a trial, it looked like a trial, but it wasn't a trial. . . It looked like a sentencing hearing but he didn't get a sentencing hearing" (2PC-R. 853). Levine "thought" Scherker "made a strategic decision not to use [the evidence of ineffectiveness] . . . because he thought he would win it without embarrassing Gene [Zenobi]," adding that "I can't swear to it" (2PC-R. 857). Levine also testified that "there was something that happened within the course of that because of Elliot's conflict that he didn't follow-up on the information that he had and he had a conflict" (2PC-R. 857).

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[19] (. ..continued)
"constrained" by the Court' mandate because it is an abuse of discretion to ignore this Court's mandate. See Hoffman v. State, 613 So. 2d 405, 406 (Fla. 1993) ("[w]hen a lower court receives the mandate of this Court with specific instructions, the lower court is without discretion to ignore that mandate or disregard the instructions"). Because the evidence the State now desires to use against Mr. Breedlove was improperly elicited because it was outside the remand instructions of this Court, the State's argument must be rejected.

Rather than establishing that Scherker had a "conscious decision to waive the instant claim" (Answer Brief at 24-25), Levine's testimony actually buttresses the conflict. Levine believed that Scherker did not raise the claims of ineffectiveness because he did not want to embarrass Gene Zenobi and therefore "he had a conflict" (2PC-R. 857).[20] This is the very reason for the rule precluding the assertion of ineffectiveness claims against a member of one's own office, as this Court observed in the case cited in this Court's prior opinion in Mr. Breedlove's case, Adams v. State, 380 So. 2d 421 (Fla. 1980). In Adams, also a capital postconviction case, the Court noted that an attorney from the same public defender's office that represented the defendant at trial had "a hopeless conflict of interest" with respect to ineffective assistance of counsel claims because the attorney "would be faced with the dilemma of vigorously asserting the petitioner's claim of defending the professional reputation of his office." Id. at 422. This Court also noted that the likelihood that the attorney would have to call his associate as a witness "create[d] an additional impediment." Id.

Adams controls this situation. Scherker did not "consciously" waive any claims, but could not "embarrass Gene" by

[20]The State's brief also asserts that no actual conflict existed because Levine had left the Public Defender's Office prior to the filing of the postconviction motion by Scherker. However, the State ignores the fact that Zenobi was still employed there, and further ignores the irrelevance of whether Levine was still employed there. Scherker's conflict was in raising an ineffectiveness claim against the Public Defender's Office, an office where he was employed at the time.

filing an ineffective assistance of counsel claim. This is the conflict of interest, for Scherker would have had to "defend[] the professional reputation of his office" while trying to defend Mr. Breedlove. He could not do the latter without embarrassing Zenobi, as Levine explained at the hearing below. This is why the Court decided as it did in its prior opinion that Scherker had a conflict of interest during the prior postconviction proceedings. The "new evidence" argued by the State amounts to nothing more than further proof of the conflict, and further supports the propriety of the Court's prior ruling. The Court's prior ruling should not be disturbed.

CONCLUSION

On the basis of the arguments presented herein and in his initial brief, as well as the record, Mr. Breedlove respectfully submits that he is entitled to relief from his unconstitutional death sentence, and to all other relief which the Court deems just and proper.

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on May 9, 1996.

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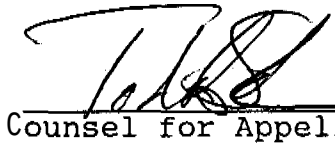
By: 
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