IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,223

MICHAEL GEORGE BRUNO, SR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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STATEMENT OF FONT

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ARGUMENT IN REPLY

ARGUMENT I

1. Introduction.[1]

It is clear that errors by trial counsel, singularly or cumulatively, can deprive a defendant of his right to the effective assistance of counsel. The State, however, addresses counsel's deficiencies piece by piece with no consideration for the totality of the circumstances and how counsel's performance as a whole fell short of that which Mr. Bruno was entitled under the Sixth Amendment. In fact, the State's understanding of a cumulative analysis is that "since Bruno's claims are either procedurally barred or without merit, *a fortiori* Bruno has suffered no cumulative effect which rendered his sentence invalid" (AB at 96).[2] This contention is hardly worthy of discussion, as it makes very little sense to begin with. This Court has recognized that a cumulative effect analysis is proper and can serve as the basis for relief. See, e.g. State v. Gunsby, 670 So. 2d 920 (Fla. 1996). Moreover, the State's argument that in assessing the cumulative effect of error in this

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[1]For reasons known only to the State, the State's Brief uses Mr. Bruno's Rule 3.850 motion and the numbering system used by the State below to discuss Mr. Bruno's arguments on appeal. This system is needlessly confusing, and Mr. Bruno will use the manner in which he briefed the claims to address the State's arguments on appeal.

[2]Reference to the State's Answer Brief shall be designated as (AB at ___).

case the Court is precluded from considering errors found on direct appeal but found to be harmless is also contrary to the Court's repeated pronouncements that under Rule 3.850, a court must assess all previously asserted errors in determining whether Rule 3.850 relief is warranted. See, e.g. Lightbourne v. State, __ So. 2d ___ (Fla. 1999); Swafford v. State, 679 So. 2d 736 (Fla. 1996). Thus Mr. Bruno asserts that all the deficiencies in this case, those asserted herein and those found on direct appeal but determined to be harmless, see Bruno v. State, 574 So. 2d 76, 80-81 (Fla. 1991), must be considered in determining whether the result of the guilt and penalty phases of Mr. Bruno's trial is undermined and thus meriting relief.

2. Trial Counsel's Impairments.

The State asserts that Mr. Bruno presented "no evidence" to support his claim because he did not call either Ginger Bottner or Michael Castoro at the evidentiary hearing, which witnesses would have testified to trial counsel Craig Stella's significant alcohol and cocaine usage during the time he represented Mr. Bruno (AB at 8). However, Mr. Bruno called Mr. Stella himself to testify to his impairments.[3] Stella would only discuss these matters with Mr. Bruno's collateral counsel after demanding that the State extend him limited use immunity; in fact, during

[3]Stella refused to cooperate with collateral counsel's efforts to investigate this issue, and collateral counsel eventually had to ask permission of the lower court to depose him, a request opposed by the State. The trial court eventually permitted the deposition because it was "concerned about" the allegations of Stella's drug use at the time he represented Mr. Bruno (T. 9).

Stella's deposition, he refused to answer any questions about his drug and alcohol use during the time he represented Mr. Bruno unless the State immunized him or immunity was obtained from the this Court. See, e.g. PC-R. 221; 227; 228; 229; 233; 234; 235; 236; 248; 249; 261.

The State's brief asserts that "Bruno presented nothing to refute [trial counsel's] testimony or to otherwise show that Mr. Stella was, in fact, intoxicated during Bruno's preparation or trial" (AB at 9-10) (emphasis in original). However, a review of the testimony and the relevant dates establishes that the State's contention is incorrect and unsupported by the evidence. Even the lower court found that, following the date when Stella agreed to represent Mr. Bruno-- August, 1986--Stella's "alcohol problem was getting worse, and he was using cocaine every few weeks" (PC-R. 179). See also id. (Stella's "use of cocaine went on intermittently from August of 1986, to October of 1986").

Between August and October, 1986, the first critical months of his representation of Mr. Bruno, Stella's own immunized testimony established that his drinking became "significantly worse" and that "it began to effect my personal life and . . . my work habits as well" (T. 201-02). He further testified that his drinking was "[o]ut of hand," that it got "significantly worse" in the months after he was retained by Mr. Bruno's parents to represent their son on capital murder charges, and that "I'm sure I was drinking" during the workweek between August and October of 1986 (T. 207). As to his cocaine usage during this time period,

Stella testified that although he never "considered that I had a problem with" cocaine, he could not state that he never used cocaine during the workweek (T. 204). The finding by the lower court that Stella's impairments did not affect his work performance, and the State's contention to the same effect, cannot be squared with the record.

Although Stella testified that he abused no alcohol or illicit substances between October, 1986, and February or March of 1987, he had a "relapse" around the beginning of March, 1987, and was eventually hospitalized on March 15, 1987 (T. 201). At this point, Mr. Bruno's trial was set to commence just two (2) weeks later, on March 30, 1987. Even crediting the accuracy of Stella's testimony that he abused no alcohol or cocaine between October, 1986, and the beginning of March, 1987, Stella also acknowledged that in the months when he was sober, he was heavily involved in a federal trial. Stella explained that the federal trial, which took place in January, 1987, lasted three (3) weeks and was "certainly time consuming" (T. 195); in fact, while the federal case was going to trial and while it was being tried, Stella acknowledged that he spent "very little time" working on Mr. Bruno's case, despite the fact that Mr. Bruno's capital trial was set to commence in March, 1987 (T. 197-98).

It is clear that, once the relevant time periods are considered in conjunction with the testimony, Stella's effectiveness in Mr. Bruno's case was impaired by not only his time spent in the federal case but also by his drug and alcohol

usage. As noted above, Stella's "relapse" began around the beginning of March, 1987, when Mr. Bruno's trial was still set for the end of March; at the evidentiary hearing, Stella testified that he believed that at this late stage of the process, he would have been filing the capital motions, which in his practice is one of the "[l]ater things" he did in preparation for trial (T. 214). Presumably, therefore, the significant pretrial motions would already have been filed, in Stella's manner of litigating capital cases. A review of the record, however, reveals just the opposite. The capital motions, which are essentially form motions, were actually filed almost immediately after Stella undertook Mr. Bruno's representation. See R. 961; 964; 966; 968; 972; 989; 991; 993; 995; 997; 999. **NONE** of the significant motions in Mr. Bruno's case were filed under **after** Stella's hospitalization in March, which occurred when Mr. Bruno's trial was still set for March 30. For example, the motion to suppress Mr. Bruno's statements to law enforcement, a **belated** motion for leave to file an insanity defense, and a motion to preclude the State from introducing Williams-rule evidence were not filed until June and July of 1987. It is clear that up until the time of Stella's "relapse" Mr. Bruno's case was not being actively litigated by Stella due to his drug/alcohol impairments alone or together with the considerable time he spent litigating the federal case just prior to his

"relapse."[4]

The State never addresses the contention that Stella's impairments and his subsequent immunity from the State affected his credibility at the evidentiary hearing, as well as his memory of the events surrounding his representation of Mr. Bruno. While unable to recall any detail when Mr. Bruno's collateral counsel was questioning him, Stella was suddenly able to recall strategy decisions and other details he was not able to recall on direct examination; Stella himself recognized his own lack of credibility when addressing Assistant State Attorney Susan Bailey:

> I'm going to be candid with you, Ms. Bailey. I don't recall what all the factors were ten years ago. I'm not going to play the - gee, Todd Scher, I don't remember anything, but Ms. Bailey, all of a sudden, when I'm being cross-examined, I remember everything.

(T. 680). Stella's impairments serve not only as an independent basis for relief, but also as a backdrop, in conjunction with his self-acknowledged lack of credibility, for assessing the reasonableness of the strategy decisions he allegedly made during the course of his representation of Mr. Bruno, discussed more fully infra and in Mr. Bruno's Initial Brief.

3. Breach of Confidentiality and Duty of Loyalty.

a. Procedural Bar. Despite the representations it made to this

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[4]The State relies on Stella's testimony for the assertion that Stella "did not believe that [his cocaine and alcohol addiction] affected his ability to represent Bruno or anyone else during that period" (AB at 9). Such testimony is as meaningful and relevant as an attorney's admission that he or she was ineffective, which is generally not considered very persuasive. See Harris v. Dugger, 897 F. 2d 756, 761 n.4 (11th Cir. 1989).

Court on direct appeal, the State maintains in these proceedings that this claim is procedurally barred (AB at 12). A review of the record and the State's presumably good-faith representations made to this Court on direct appeal reveal the State's position at this time to be incorrect. On direct appeal, Mr. Bruno challenged the trial court's error in failing to conduct an evidentiary hearing and/or grant a mistrial when trial counsel learned that Dr. Stillman's conclusions were at odds with Stella's understanding of Stillman's testimony. In its Answer Brief, the State asserted:

> Appellant's initial assertion of error under this issue is the trial court's failure to conduct an evidentiary hearing or declare a mistrial or continuance at the penalty phase when it was disclosed through the mental health expert that Appellant was insane at the time of the murder. Again, Appellant has raised this claim in the guise of an ineffective assistance of counsel claim, which . . . is not cognizable in this proceeding.

Answer Brief of Appellee on Direct Appeal, Case No. 71, 419, at p. 83. In this proceeding, the State acknowledges that, on direct appeal, it argued that "the pith of Bruno's claim was that trial counsel was ineffective and that such an argument was not cognizable on direct appeal" (AB at 20), yet now asserts that Mr. Bruno is trying to "escape" a procedural bar by "recast[ing]" his claim as an ineffective assistance of counsel claim (AB at 12-13).[5] The State, quite simply, is playing procedural games and

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[5]This Court recently rejected the State's tactics of maintaining inconsistent positions in capital cases. In Lightbourne v. State, ___ So. 2d. ___ (Fla. 1999), the State took the position that CCR counsel failed to obtain NCIC reports in an effort to exercise diligence in locating a witness. The Court

fails to recognize the difference between the issue raised on direct appeal and the issue raised in the postconviction proceedings.

On direct appeal, Mr. Bruno challenged the trial court's failure to grant a mistrial and/or a continuance, which this Court summarily rejected. Bruno v. State, 574 So. 2d 76, 83 (Fla. 1991). This is not the same claim as was raised below, which involved a conflict of interest/ineffective assistance of counsel claim. A claim alleging conflict of interest and/or ineffective assistance of counsel is properly raised in a collateral proceeding. See, e.g. Wuornos v. State, 676 So. 2d 972, 974 (Fla. 1996); Cuyler v. Sullivan, 446 U.S. 335, 348-49 (1980). No procedural bar is applicable to this claim, and application of such a bar would not be regularly and consistently applied were such a bar to be imposed on Mr. Bruno.

b. The Merits. The State's Answer Brief does not really address Mr. Bruno's claim, except to summarily argue that Stella explained his reasons for doing and saying what he did, so thus the inquiry is at an end simply because Stella had his reasons for selling out his client and the credibility of his mental health expert to the ultimate factfinder and sentencer (AB 21). The law, however, obligates more than just wholesale reliance on an attorney's testimony in assessing whether a conflict of

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rejected the State's argument, observing that "[i]n fact, the State has argued in at least one other case on appeal, Thompson v. State, 24 Fla. L. Weekly S17 (Fla. Dec. 24, 1998), that NCIC records are not available via a public records request." Lightbourne, slip op. at 18.

interest exists.[6] In Sanders v. Ratelle, 21 F. 3d 1446 (9th Cir. 1994), the Ninth Circuit observed that "[t]he existence of an actual conflict cannot be governed solely by the perceptions of the attorney; rather, the court itself must examine the record to discern whether the attorney's behavior seems to have been influenced by the suggested conflict." Sanders, 21 F. 3d at 1452. See also Fitzpatrick v. McCormick, 869 F.2d 1247 (9th Cir. 1989) (after review of the entire record, court concluded that there was an actual conflict of interest, despite counsel's protestations that his actions stemmed from ethical considerations); Burger v. Kemp, 483 U.S. 776, 806 n.11 (1987) (Marshall, J., dissenting) ("Counsel's self-serving declarations that he did not permit his representation of Stevens to affect his representation of petitioner cannot outweigh the conflict revealed by the record itself").

The lower court's order simply does not comport with the facts adduced at the hearing or a review of the record as a whole. For example, as to the statements divulged in the June, 1987, pleading seeking to file a belated notice of insanity, the lower court found that there was no prejudice to Mr. Bruno due to counsel's statements to the trial judge and the State in which he

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[6]This is particularly true when the attorney making the statements has acknowledged his use of "dramatic flair" when making representations to judges (T. 217), and that he told the trial court "some dramatic lies" during his representation of Mr. Bruno (T. 227).

disparaged Mr. Bruno,[7] because Stella testified they were made "as a justification for his seeking a belated notice of intent to rely on an insanity defense" (PC-R. 177-78). However, the trial court failed to explain the reasonableness of an attorney telling the court and the State about "conflicts with the Defendant as to the conduct of the trial" or how such "conflicts" in any way bear on a request to belatedly file an insanity defense (PC-R. 178). The "good cause" requirement of Rule 3.216 does not vitiate the rules of professional conduct or the duty of loyalty owed to a client by an attorney. Cf. Fla. R. Crim. P. 3.210 (b)(1) (in showing good faith and reasonable grounds to believe a defendant is incompetently, attorney constrained in revealing information to facts and observations which "do[] not invade the lawyer-client privilege").

As to the disparaging statements made by Stella in the presence of both Judge Coker and the prosecutor following Dr. Stillman's testimony at the penalty phase,[8] the lower court

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[7]In a June, 1987, motion, Stella revealed to the trial court and the State that Mr. Bruno "on numerous occasions recounted his recollection of the events on the night in question" and "he attributes [it] to sporatic [sic] memory loss" (R. 1031). Stella further divulged that Mr. Bruno "failed to advise him" of "his contacts with his son and former wife regarding their son's whereabouts or competency to testify and did represent to the undersigned that he could not get in touch with his son and did not know where he was." Id. The motion further revealed that these conversations took place "despite the undersigned's numerous warnings to the Defendant not to have any contact with the witnesses." Id.

[8]During the State's cross-examination of Mr. Bruno, Stella went sidebar with the lower court and the prosecutor, and proceeded to divulge, *inter alia*, his "surprise and dismay" at Dr. Stillman's testimony that Mr. Bruno was insane at the time of the crime, and

found no prejudice because the State's evidence at guilt and penalty phases was "overwhelming, and the statement by Mr. Stella did not deny the Defendant effective assistance of counsel" (R. 177-78). Neither the lower court nor the State address the comments made by Stella in which he indicated his reason for bringing these matters to the attention of the court and the state was fear of being perceived as "ineffective" (R. 863-66; 917).[9] At the hearing, Stella's purported reasons for making such comments vacillated depending on whether he was being questioned by Mr. Bruno's counsel or the State Attorney who immunized him. For example, on direct examination by Mr. Bruno's counsel, Stella testified that he made the comments to Judge Coker and the prosecutor because "it was important that Judge Coker know that these events were catching me by surprise" and that "the judge would probably deny our motion for any further or additional psychiatric evaluation or continuance of the penalty phase if he thought these were items or important things that

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that "I do not want it coming back that I, as the attorney and representative of the defendant, was remiss or failed to follow-up on a potentially viable insanity defense" (R. 863-66). Later on during the proceedings, Stella proceeded to put another statement on the record with the prosecutor present again discussing his disgust with Stillman, and again noting that "the reason I am putting it on the record is to make it abundantly clear that it was not oversight on the part of Defense counsel to explore or give reason to explore the defense of insanity" (R. 917).

[9]It was also clear that Stella was afraid of upsetting Judge Coker, who Stella relied on to get lucrative appointments, and who he acknowledged he was "very fond of" and "still am" (T. 227). See also T. 450 ("I made the decision that it was important that Judge Coker know that these events were catching me by surprise"); T. 451 (emphasizing importance of letting "judge know this caught me by surprise").

we'd known about for some time" (T. 450). As to his sidebar with Judge Coker, Stella reaffirmed that "I wanted the judge to know this caught me by surprise" (T. 451). When it came time for cross-examination at the evidentiary hearing, Stella acknowledged that overnight he came up with "other strategic reasons" for divulging his dismay about Stillman's testimony, namely that the State's cross-examination of Stillman was "thorough and devastating" (T. 721), and Stella wanted another doctor because Stillman "disintegrated" and did "lousy for me" (T. 722). The bottom line is no matter which version of Stella's tactical reasons is to be believed, the inescapable conclusion is that his statements to the court and the prosecutor breached his duty of loyalty to Mr. Bruno.

The alleged "overwhelming" nature of the State's penalty phase case[10] is not the proper standard for determining whether there was a conflict of interest, where prejudice is essentially presumed, or whether Mr. Bruno received ineffective assistance of counsel. See Osborne v. Schillinger, 861 F. 2d 612, 629 (10th Cir. 1983) (counsel's actions were "not simply poor strategic choices; he acted with reckless disregard for his client's best interests and, at times, apparently with the intention of weakening his client's case"). Stella's statements clearly breached his duty of loyalty to Mr. Bruno, thereby evidencing a conflict of interest, and certainly there was no reasonable

[10]The jury recommended a death sentence by an 8-4 majority, belying the contention that the State's case was "overwhelming."

strategic decision to make such statements to a sentencer and a prosecutor.[11] Stella's concern was more for not being thought of as "ineffective" than for maintaining his loyalty to Mr. Bruno, as both his statements at trial and his immunized evidentiary hearing testimony establish. "The most egregious examples of ineffectiveness do not always arise because of what counsel did not do, but from what he did do -- or say." Douglas v. Wainwright, 714 F. 2d 1532, 1557 (11th Cir. 1983) (relief granted because trial attorney "fail[ed] to appreciate that the trial judge was the ultimate sentencer" when making disparaging remarks about client and strength of penalty phase case). Relief is warranted under either a conflict of interest or ineffective assistance of counsel analysis.

4. Voluntary Intoxication.

The position advanced by the lower court and the State is simply that because trial counsel had a strategic reason, the

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[11]Neither the lower court nor the State have explained the impact of Stella's statements in light of the prosecutor's closing argument and the trial court's rejection of Stillman's testimony on credibility grounds. Following Stella's disclosures to the court and the State, the State launched into a tirade during closing regarding Dr. Stillman's lack of credibility. See R. 884 (Dr. Stillman "doesn't know what he's talking about"); R. 884-85 ("all of a sudden at the time of sentence [Dr. Stillman] runs in and says the defendant was insane at the time of the offense ....You know that he never came to that conclusion"); R. 885 ("If they had had an insanity defense, Dr. Stillman would have appeared before this."). Judge Coker also rejected Dr. Stillman's testimony *in toto* (R. 1106-07), and this Court found that "[v]iewing Dr. Stillman's testimony as a whole, we believe the trial judge had the discretion to discount much of his opinion." Bruno, 574 So. 2d at 83. Clearly Stella's statements had a grave impact on how the mitigation was viewed by the jury, judge, and this Court.

issue is resolved against Mr. Bruno (AB at 24-25). This ignores the law. "[M]erely invoking the word strategy to explain errors [is] insufficient since 'particular decision[s] must be directly assessed for reasonableness [in light of] all the circumstances.'" Horton v. Zant, 941 F. 2d 1449, 1461 (11th Cir. 1991) (quoting Strickland v. Washington, 466 U.S. at 691) (footnote omitted). "[C]ase law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." Horton, 941 F.2d at 1462. See also Deaton v. Dugger, 635 So. 2d 4, 8 (Fla. 1993); Blanco v. Singletary, 943 F. 2d 1477, 1501 (11th Cir. 1991).

The State concedes that Stella did nothing in advance of trial to independently investigate an intoxication defense, see AB at 25 (Stella's tactical decision reasonable "regardless of whether Mr. Stella had hired a neuropharmacologist, or any other mental health expert, to support this defense"),[12] yet it defends Stella's "tactical decision" because Mr. Bruno allegedly would not cooperate (AB at 25). The evidence fully supports the fact that no investigation was conducted, and no discussion about hiring mental health experts was held until the eve of trial when Stella saw that Mr. Bruno's son was going to be testifying (T. 669). Other than Stella's testimony, which is dubious at best in

[12]The State makes no mention of the unrefuted testimony adduced at the evidentiary hearing from neuropharmacologist Dr. Jonathan Lipman. See Initial Brief of Appellant at 54 *et. seq.* (discussing Dr. Lipman's testimony regarding intoxication).

terms of credibility[13] and inconsistent with other actions he took in the case in the face of Mr. Bruno's apparent opposition,[14] there is nothing in this record to support the State's argument, and nothing to refute the fact that no investigation was conducted into an intoxication defense. The State takes no issue with the fact that despite having hired the services of an investigator, Stella never directed the investigator to discuss with Mr. Bruno his drug use either in general or on the night of the offense (T. 918).[15]

While it might be the State's position that an attorney can forego a defense and a defendant's waiver of such a defense without any independent investigation of the viability of such a defense, see AB at 25, this position finds no support in the law. In fact, this Court's decision in Deaton is directly on point. There, the Court addressed a situation where a circuit court judge found that trial counsel rendered prejudicially deficient

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[13]That Stella was concerned even at the time of trial that he not be perceived as "ineffective," see R. 863-66; 917, certainly is a factor to be considered when evaluating his purported reasons for not investigating, much less presenting, what in his works was the "best route to go" and was "the best defense under the facts of the case" (T. 237; 670).

[14]For example, in the face of alleged opposition by Mr. Bruno to Stella's calling a mental health expert at trial who in fact testified that Mr. Bruno was **insane**, Stella testified that "I called the people I called, irrespective of my client's wishes" (T. 734). Furthermore, when questioned about his filing of a notice of intent to rely on an insanity defense in light of Mr. Bruno's alleged refusal to cooperate with an intoxication defense, Stella acknowledged that "he didn't ask [Mr. Bruno] about it," he did it anyway (T. 745).

[15]The investigator testified that he acted only on the express direction of Stella (T. 926).

performance in failing to investigate potential mitigating evidence, thereby rendering Jason Deaton's purported "waiver" of mitigation invalid. The Court affirmed Judge Moe's granting of relief:

> In this case, the trial judge found that Deaton had waived the right to testify and the right to call witnesses to present evidence in mitigation, but concluded that, because his counsel failed to adequately investigate mitigation, Deaton's waiver of those rights was not knowing, voluntary, and intelligent. **The rights to testify and to call witnesses are fundamental rights under our state and federal constitutions. Although we have held that a trial court need not necessarily conduct a Faretta type inquiry in determining the validity of any waiver of those rights to present mitigating evidence, clearly, the record must support a finding that such a waiver was knowingly, voluntarily, and intelligently made.**

Deaton, 635 So. 2d at 8 (emphasis added). Because "clear evidence was presented that defense counsel did not properly investigate and prepare for the penalty phase proceeding[,] . . . counsel's shortcomings were sufficiently serious to have deprived Deaton of a reliable penalty phase proceeding." Id at 8-9. Moreover, because "evidence presented in the rule 3.850 evidentiary hearing established that a number of mitigating circumstances existed," id. at 8, counsel's failure to adequately investigate "was prejudicial." Id. at 9. The Deaton analysis is directly applicable to the instant situation. See also Dobbs v. Turpin, 142 F. 3d 1383, 1388 (11th Cir. 1998) (quoting Baxter v. Thomas, 45 F. 3d 1501, 1514 (11th Cir. 1995) ("This circuit 'rejects the notion that a strategic decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them'").

The reasonableness of Stella's wholesale acquiescence to Mr. Bruno's alleged refusal to cooperate with an intoxication defense is further called into question by Stella's consistent concerns about Mr. Bruno's competency. The State argues that Stella's concerns were "dispelled by Dr. Stillman," who did not believe Mr. Bruno to be insane or incompetent (AB at 25-26). This however is refuted by Stella's own testimony. Stella unequivocally indicated that he had consistent concerns about Mr. Bruno's competency, Dr. Stillman's initial conclusions notwithstanding.[16] Following the penalty phase, Stella even sought **further** evaluations of Mr. Bruno's competency because he had doubts about Mr. Bruno's mental state (T. 736). The law is clear that when an attorney has doubts about a client's mental state, the duty to investigate is heightened, see Thompson v. Wainwright, 787 F. 3d 1447, 1451 (11th Cir. 1986), and that no tactical decision made by a defendant whose mental state is questionable can be reliable. See Pridgen v. State, 531 So. 2d 951, 955 (Fla. 1988). The law is also clear that an attorney may not "blindly follow" the commands of a client. Blanco, 941 F. 2d at 1502. Just last year the Eleventh Circuit reaffirmed that "lawyers may not 'blindly follow' such commands." Dobbs v. Turpin, 142 F. 3d 1383, 1388 (11th Cir. 1998). See also Thompson, 787 F. 3d at 1451 (attorney has independent duty to investigate potential areas of mitigation, not simply "decide[]

[16]Just because a mental health professional determines that a defendant may not meet the legal criteria for incompetency does not mean that the defendant is free of any mental health difficulties.

not to investigate [the defendant's] background only as a matter of deference to [the defendant's] wish"). As the Thompson Court wrote:

> The reason lawyers may not "blindly follow" such commands is that although the decision whether to use such [mitigating] evidence in court is for the client, the lawyer must first evaluate potential avenues and advise the client of those offering possible merit. Here, Solomon did not evaluate potential evidence concerning Thompson's background. Thompson had not suggested that investigation would be fruitless or harmful; rather, Solomon's testimony indicates that he decided not to investigate Thompson's background only as a mater of deference to Thompson's wish. Although Thompson's directions may have limited the scope of Solomon's duty to investigate, they cannot excuse Solomon's failure to conduct any investigation of Thompson's background for possible mitigating evidence. Solomon's explanation that he did not investigate potential mitigating evidence because of Thompson's request is especially disturbing in this case where Solomon himself believed that Thompson had mental difficulties. An attorney has expanded duties when representing a client whose condition prevents him from exercising proper judgment. We conclude that Solomon's failure to conduct any investigation of Thompson's background fell outside the scope of reasonably professional assistance.

Id. at 1451-52 (emphasis added) (citations omitted). See also Martin v. Maggio, 711 F. 2d 1273, 1280 (5th Cir. 1983) (defendant's "instruction that his lawyers obtain an acquittal or the death penalty did not justify his lawyer's failure to investigate the intoxication defense. . . . Uncounselled jailhouse bravado, without more, should not deprive a defendant of his right to counsel's better-informed advice"); Heiney v. State, 620 So. 2d 171, 173 (Fla. 1993) (rejecting State's contention that counsel's failure to investigate was reasonable; "Heiney's lawyer in this case did not make decisions regarding

mitigation for tactical reasons. Heiney's lawyer did not even know that mitigating evidence existed. This is so because counsel did not attempt to develop a case in mitigation"); State v. Lara, 581 So. 2d 1288, 1290 (Fla. 1991) (rejecting State's contention that the defendant and his family prevented counsel from developing and presenting mitigating evidence, noting that this argument conflicted with the postconviction court's findings that no investigation had been conducted and that defense counsel failed to properly utilize expert witnesses regarding the defendant's mental state).

The failure to adopt the most viable defense available under the facts is unreasonable attorney performance under the Sixth Amendment. Stella's "failure to adopt the obvious defenses to the State's murder [] charge[] . . . indicates such lack of preparation and exercise of skill that . . . his conduct fell far short of that required of counsel in a criminal trial." Young v. Zant, 677 So. 2d 792, 799 (11th Cir. 1982). Relief is warranted.

5. Failure to Move to Suppress Initial Statement.

a. Procedural Bar. Despite recognizing that Mr. Bruno's claim was that his trial counsel failed to move to suppress **initial** statements to the police because they were given without Miranda warnings, and despite acknowledging that it raised no procedural defense below, the State now argues that the lower court was correct in finding this claim barred (AB at 32).[17] A rather

[17]The lower court found this claim barred because "it was raised, or could have been raised on appeal" (PC-R. 184).

perfunctory review of the claim raised by Mr. Bruno, however, establishes that this claim could not have been raised on appeal because it involves a claim that trial counsel failed to seek suppression of Mr. Bruno's statement to the police; an ineffectiveness claim can only be raised in a collateral proceeding. Wuornos v. State, 676 So. 2d 972, 974 (Fla. 1996).

This is not like Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995), which is cited by the State (AB at 32). In Harvey, this Court refused to entertain a claim that sought to **relitigate** the issue of the suppression of Harvey's statement that had already been addressed on direct appeal. Id. at 1256. In Mr. Bruno's case, law enforcement elicited several sets of statements from Mr. Bruno, the first statement was taken on August 12, 1986; additional statements were taken from Mr. Bruno following his arrest on August 13, 1986. It is the August 12 statements that are at issue here, not the later statements which counsel did seek to suppress and which were addressed on direct appeal. Bruno v. State, 574 So. 2d 76, 79-80 (Fla. 1991). A claim regarding counsel's failure to seek suppression of the statements is properly raised in a collateral proceeding and is not procedurally barred as a matter of law.

b. The Merits. As to the merits of this issue, Mr. Bruno will rely on his Initial Brief and the arguments and evidence discussed therein. See Initial Brief at 56-59. One point, however, is that the State apparently puts much reliance on the fact that the challenged statement was allegedly "exculpatory"

(AB at 34, 35). The State fails to acknowledge that the prosecution took those "exculpatory" statements and introduced them through the testimony of two detectives (Hanstein and Edgerton) and used them against Mr. Bruno to demonstrate the contradiction with his later statements. This point was **totally** lost on the lower court, who clearly was unaware of Mr. Bruno's claim. The lower court found no prejudice because "there is no reasonable probability that the verdict would have been different, had Bruno's initial exculpatory statements been received in evidence" (PC-R. 184). Of course, the statements **were** in evidence; Mr. Bruno's claim was that counsel unreasonably failed to seek their exclusion. Relief is warranted.

6. Failure to Attack "Confession" on Intoxication Grounds.

a. Procedural Bar. Once again demonstrating its gamesmanship, the State, which below asserted no procedural defense to this claim, now argues that the lower court's finding of a procedural bar "was proper" (AB at 37). The State's ping-pong procedural bar arguments notwithstanding, it is clear that this claim is not procedurally barred. The State cites to Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995), yet fails to distinguish the case cited by Mr. Bruno, Oats v. Dugger, 638 So. 2d 20 (Fla. 1994). In Mr. Oats' case, the trial court's failure to suppress inculpatory statements on voluntariness grounds was addressed on direct appeal. Oats v. State, 446 So. 2d 90, 93 (Fla. 1984). In his Rule 3.850 motion, Mr. Oats challenged trial counsel's failure to seek suppression of his statements due to lack of mental capacity

to waive Miranda, which issues was expressly held not to be procedurally barred. Oats v. Dugger, 638 So. 2d at 21 (noting that only claims procedurally barred were Caldwell claim and claim regarding the aggravators). That this claim in Mr. Oats' case was never barred is also demonstrated by the merits discussion issued by the Eleventh Circuit. Oats v. Singletary, 141 F. 3d 1018, 1026 (11th Cir. 1998). Any procedural bar to this claim in Mr. Bruno's case would be inconsistently applied and thus a violation of due process.

b. The Merits. The State relies on the fact that pretrial examinations revealed that Mr. Bruno was sane and competent to support its argument that Mr. Bruno was not capable of waiving Miranda due to intoxication (AB at 38). Of course, the issues of sanity and competency are completely different issues than Mr. Bruno's mental state at the time of his interrogation, and the State concedes that Stella could not remember "whether he discussed with Dr. Stillman Bruno's ability to waive Miranda" (AB at 39). Apparently the State is conceding deficient performance.

As to prejudice, the State argues that Dr. Lipman, who testified at the evidentiary hearing on this issue, "did not specify the amount of cocaine and/or LSD Bruno had ingested or when in relation to giving his statement he had ingested them" (AB at 39) (emphasis in original).[18] This assertion is not

[18]In terms of prejudice, the State chooses not to address Stella's testimony that Mr. Bruno's level of intoxication at the time he made his statements to law enforcement would have been significant to the issue of voluntariness (T. 271), and would have been "cannon fodder for cross-examination" in terms of impeaching

accurate. Dr. Lipman testified that Mr. Bruno had taken "additional cocaine several times since the time of the offense, and prior to his arrest, and he had taken additional L.S.D." (T. 848), and "[h]e hadn't slept for many, many days" prior to giving his statements, which is consistent with significant intoxication:

> People that use cocaine hour after hour for day after day after day, do not sleep. And it's difficult to say how much the lack of sleep contributes to their condition, as opposed to the effect of the cocaine, plus the lack of sleep, because the two are inextricably mixed. Even an ordinary person, who is not taking drugs, will, after a time, begin to hallucinate without sleep.
>
> The lack of sleep is simply part and parcel of the cocaine experience, whether it's used chronically and at high doses.

(T. 850). Based on his evaluation of Mr. Bruno and his level of intoxication, Dr. Lipman opined that Mr. Bruno's ability to knowingly and voluntarily waive constitutional rights would have been impaired, and that "I don't think he was on [sic] a condition to waive his rights knowingly" (T. 849).[19] The fact that Mr. Bruno ingested L.S.D. and cocaine prior to his arrest "would have reduced his ability to distinguish the difference between the reality an[d] unreality of the situation. He was in

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the officers who elicited the statements (T. 272). The State also chooses not to address Stella's acknowledgement that he would have presented evidence of intoxication "as long as it was supported by viable competent evidence" (Id.).

[19]In light of this testimony, the State's assertion that "Dr. Lipman did not opine that Bruno was legally incompetent to waive his Miranda rights" is completely lacking in any record support (AB at 40-41).

a nightmare" (T. 849-50).

The State further asserts that absent the confessions "the evidence against [Mr. Bruno] was overwhelming" (AB at 42).[20] This however is not the appropriate prejudice test under Strickland; rather, the test is whether confidence is undermined by counsel's deficiencies. Clearly Mr. Bruno's statements had an effect on the jury. First of all, during deliberations, the jury asked to listen to the tape of Mr. Bruno's statement to the police (R. 763). During its closing argument, the State repeatedly discussed Mr. Bruno's statement and argued that the statement on its own was enough to convict:

> The case is truly overwhelming. If we just had two facts, one, the fact of the death in this statement, plus the defendant's statement to the police that I am the one who killed him, even though he is saying in self-defense, that proves the case beyond a reasonable doubt of murder one against this man. That would be a very strong case.

(R. 709) (emphasis added). See also R. 711 ("he made up this little lie to the police"); R. 714 ("his main purpose in giving that statement was to give the police a reason that he did it, some excuse that he did it, and he gave them this self-defense story. Of course, it's not a very good story . . . And Mr. Stella finds himself in the same position that his client found himself, that they can't explain this away"); R. 715 ("We know his version isn't true anyway. This was a cold-blooded murder").

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[20]The alleged "overwhelming" nature of the State's case is undermined by the fact that the jury deliberated over 26 hours at the guilt phase (R. 769-70), and only returned a verdict after a coercive instruction by the judge (Id.).

Relief is warranted.

7. Failure to Effective Challenge State's Case. Mr. Bruno relies on his Initial Brief.

8. Failure to Object to Guilt Phase Jury Instructions. Mr. Bruno relies on his Initial Brief.

9. Failure to Ensure Jury Challenges Were Recorded. Mr. Bruno relies on his Initial Brief.

10. Failure to Investigate and Present Available Mitigation.

The State makes no attempt whatsoever to discuss trial counsel's deficiencies with respect to the penalty phase; rather, the State wholly relies on an inaccurate understanding of Florida law as to the admissibility of expert opinion to establish statutory and nonstatutory mitigation evidence. There is **no** discussion or justification of counsel's failure to know that Mr. Bruno had a sister until **after** the penalty phase hearing, or that counsel had not bothered to obtain Mr. Bruno's records from a past psychiatric hospitalization until **after** the penalty phase, or that Stella did not believe in investigating for the penalty phase until the guilt phase was over despite the fact that a penalty phase investigation is "a full-time thing" (T. 251). The State fails to reconcile Stella's testimony that his investigator, Sidney Patrick, was "actively involved in that part of the investigation" (T. 428), with Patrick's unequivocal testimony that he did not work on the penalty phase at all (T. 922, 931, 934). The State fails to reconcile Stella's testimony that he wanted Dr. Stillman to testify at the evidentiary hearing

to statutory mitigation (T. 433, 435), yet Stella never even asked Dr. Stillman about the applicability of statutory mitigating circumstances. The State apparently believes it is constitutionally adequate for an attorney to put on a mental health expert to testify at a capital penalty phase without knowing that the expert was going to testify that the client was insane; Stella fully acknowledged that Dr. Stillman's testimony was "[a] true element of surprise. It really was the first time I had heard about it" (T. 449).

The pith of the State's **only** argument is that mitigation evidence, particularly nonstatutory mitigation, cannot be presented through the testimony of mental health experts because it is hearsay (AB at 71-74). This position finds no support in the law, which is clear on the point that hearsay is admissible at a capital penalty phase. Garcia v. State, 622 So. 2d 1325 (Fla. 1993). Moreover, the State is flatly wrong in its assertion that "the trial court refused to consider any of the social history testimony offered by Drs. Dee or Lipman" (AB at 74). In fact, the lower court's order **fully accepts** all of the testimony presented by Mr. Bruno but finds no prejudice: "Even though the Defendant presented expert testimony at the evidentiary hearing, which was more detailed than that presented at trial, the Defendant has failed to show with a reasonable degree of probability, that his sentence would have been different had this evidence have [sic] been presented to the jury and Trial Judge" (PC-R. 192). See also id. ("there is no

reasonable probability that his sentence would have been different had defense counsel presented evidence of Bruno's mother's abuse [sic] behavior, his physical and sexual abuse, and additional testimony about his drug addiction"). It is thus evident that the lower court accepted the evidence of nonstatutory mitigation as true in addressing prejudice.

This Court has **repeatedly** discussed and found nonstatutory mitigation to exist when it is presented solely through a mental health expert as opposed to a lay witness. See, e.g. Jones v. State, 705 So. 2d 1364 (Fla. 1998) (vacating death sentence and finding plethora of nonstatutory mitigation presented through mental health expert, including circumstances of defendant's birth, school troubles, special education classes, brain damage, borderline mental retardation); Miller v. State, 733 So. 2d 955 (Fla. 1998) (vacating death sentence and discussing extensive nonstatutory mitigation in the record despite the fact that no defense witnesses called; nonstatutory mitigation established though introduction of documents and reports outlining defendant's life and background); Marquard v. State, 641 So. 2d 54 (Fla. 1994) (sole penalty phase witness was mental health expert who "testified extensively concerning Marquard's deprived childhood and present psychological state"); Robinson v. State, 574 So. 2d 198 (Fla. 1991) (sole penalty phase witness was mental health expert who testified to defendant's background, "constant physical abuse," "beatings with a leather belt, with a switch while his hands were tied, and to beatings while forced to squat

with a broom handle between his legs for indefinite periods;" the trial court "accepted as true that Robinson had a difficult childhood and found as a separate mitigating circumstance that Robinson suffered from physical and sexual abuse during childhood"); Randolph v. State, 562 So. 2d 331 (Fla. 1990) (sole penalty phase witness was mental health expert who testified to "several nonstatutory [mitigating] circumstances" including defendant's adoption at a young age, problems in school, psychiatric treatment as a young child, emotionally unstable mother, and physical abuse). The State's position finds no support in the law; no new rule of law can be applied to Mr. Bruno as the State urges.

The State also fails to discuss the trial court's finding that it was only **after** the penalty phase that "Stella learned for the first time that the Defendant had a sister" (PC-R. 195). As the lower court found, the sister informed Stella that Mr. Bruno "had previously attempted suicide, and had been involuntarily hospitalized in Pilgrim psychiatric hospital" (Id.). The State also does not discuss Stella's purported reason for not calling the sister to testify at the penalty phase, namely that "she would testify that the Defendant had previously attempted to sexually molest her during her adolescent years" (PC-R. 196). Perhaps the State decided not to address Stella's testimony because it was so obviously fabricated. How could Stella have made a tactical decision not to call a witness when, as he acknowledged and the lower court found, he was unaware of even

the **existence** of the sister until **after** the penalty phase was over?[21] Even crediting Stella's testimony on this point, however, the fact remains that he did not have to call the sister to testify; had he investigated and located the sister prior to trial or certainly the penalty phase, he would have discovered the past psychiatric records and history of his client, and turned those records over to his mental health expert and presented them in mitigation. See Argument II, infra.

Trial counsel Stella "presented no more than a hollow shell of the testimony necessary for a 'particularized consideration of the relevant aspects of the character and record of [a] convicted defendant before the imposition upon him of a sentence of death.'" Collier v. Turpin, 155 F. 3d 1277, 1294 (11th Cir. 1998) (quoting Woodson v. North Carolina, 428 U.S. 280, 303 (1976)). Through the extensive and unrebutted evidentiary hearing testimony, Mr. Bruno has established deficient performance and prejudice as to counsel's representation at the penalty phase. The lower court's prejudice analysis focused solely on the fact that there were aggravating circumstances (PC-R. 192). However, this is not an adequate prejudice analysis. A proper prejudice analysis entails a consideration of "the totality of the evidence," not simply the mere fact that aggravators were presented by the State. Collier v. Turpin, 155

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[21]Perhaps Stella's testimony was yet another "dramatic lie" which he acknowledged telling the trial court (T. 227). Even Stella expressed doubts about what the sister allegedly told him, since "we did not seek corroboration of what she had said" (T. 456).

F. 3d 1277, 1296 (11th Cir. 1998). While not "underestimat[ing] the strength of the aggravating factors," there can be no other conclusion that "there is at least a reasonable probability that a jury confronted with the start contrast between [Mr. Bruno's] acts on the day of the crimes and his history would not have voted for the death sentence." Id. "The aggravating circumstances surrounding [Mr. Bruno's case], while deplorable, do not rise to such a level as to overshadow the significant mitigating evidence that [] the jury had no occasion to consider." Dobbs v. Turpin, 142 F. 3d 1383, 1390 (11th Cir. 1998). Relief is warranted.

ARGUMENT II

Mr. Bruno alleged that trial counsel unreasonably failed to provide his client with the assistance of a competent mental health expert in violation of Ake v. Oklahoma, 470 U.S. 68 (1985). The State argues that because the evidence presented below essentially was the same as that testified to by Dr. Stillman, relief is not warranted (AB at 78 *et. seq.*). The State's arguments are contrary to the record and the law.

The State overlooks the most critical fact regarding Dr. Stillman, namely, that, **unbeknownst to trial counsel**, Dr. Stillman testified that Mr. Bruno was insane at the time of the offense. Due to counsel's self-preservation desire, counsel chose to let the State and the trial court know about his own

lack of confidence in Dr. Stillman's conclusions.[22] The State has made no argument to explain the reasonableness of a trial attorney's lack of awareness of what his own mental health expert is going to testify to at a capital penalty phase. The failure of trial counsel to know what conclusions the expert will testify to, and to provide that expert with sufficient time and materials to buttress that conclusion, is unreasonable attorney performance which requires that relief be granted. Although Dr. Stillman has since died and was thus not available to testify at the evidentiary hearing, the record is clear that Dr. Stillman was attempting to obtain additional information about Mr. Bruno's history, and only received some basic facts 48 hours before he testified at the penalty phase (R. 821). Even the lower court found that it was not until **after** the penalty phase that trial counsel found out that Mr. Bruno "did in fact have an extensive history of drug abuse; that he had attempted suicide; and that he had been hospitalized at Pilgrim State Hospital in New York State following his suicide attempt" (PC-R. 194). Neither the State nor the lower court have set forth a legal basis for how counsel's failure to investigate and provide this important and clearly relevant information to the only mental health expert involved in the case does not amount to unreasonably prejudicial attorney performance.

"Exploring the defendant's mental state and other potential

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[22]Due to counsel's haphazard approach to the penalty phase investigation, Dr. Stillman's testimony was viciously attacked by the prosecution and found to be incredible by the trial court.

mitigating factors was clearly a central task for [defense] counsel." Wallace v. Stewart, ___ F. 3d ___ (9th Cir. 1999). The law is clear that an attorney has an obligation to provide the mental health expert with the necessary information and material to permit the expert to reach a fully informed opinion:

> In sum, had these experts known the details of Wallace's family background, the substance and tone of the sentencing hearings would have been significantly different. Which brings us to the heart of the issue here: Does an attorney have a professional responsibility to investigate and bring to the attention of mental health experts who are examining the client, facts that the experts do not request? The answer, at least in the sentencing phase of a capital case, is yes.

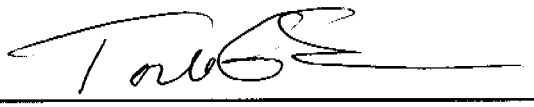
Id.

Mr. Bruno relies on his Initial Brief to rebut the remaining arguments set forth by the State as to this claim. Mr. Bruno is entitled to a new sentencing hearing.

CONCLUSION

Mr. Bruno submits that relief is warranted in the form of a new trial and/or a new sentencing proceeding. As to those claims not discussed in the Reply Brief, Mr. Bruno relies on the arguments set forth in his Initial Brief and on the record.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on August 6, 1999.



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