IN THE SUPREME COURT OF FLORIDA

CASE NO. SC96890

STATE OF FLORIDA,

Appellant/Cross-Appellee,

v.

LAWRENCE FRANCIS LEWIS,

Appellee/Cross-Appellant.

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

AMENDED ANSWER BRIEF OF APPELLEE/INITIAL BRIEF OF CROSS-APPELLANT

TODD G. SCHER
Litigation Director
Florida Bar No. 0899641
CAPITAL COLLATERAL
REGIONAL COUNSEL
101 NE 3d Avenue
Suite 400
Ft. Lauderdale, FL 33301
(954) 713-1284

COUNSEL FOR
APPELLEE/CROSS-APPELLANT

PRELIMINARY STATEMENT

This proceeding involves an appeal by the State of Florida of the circuit court's granting of Rule 3.850 relief as to Mr. Lewis' sentence of death, as well as an appeal by Mr. Lewis of the denial of other issues raised pursuant to Rule 3.850. The following symbols will be used to designate references to the record in this appeal:

"R" -- record on direct appeal to this Court;

"Supp. R" -- supplemental record on direct appeal;

"PCR [vol.]" -- record on postconviction appeal;

"Supp. PCR. [vol.]" -- supplemental record on postconviction appeal"

All other citations, such as those to exhibits introduced during the evidentiary hearing, are self-explanatory.

REQUEST FOR ORAL ARGUMENT

Although Appellant has not requested oral argument, Mr. Lewis requests that oral argument be heard in this case. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue.

STATEMENT OF FONT

This brief is typed in Courier 12 point not proportionately spaced.

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STATEMENT OF THE CASE AND OF THE FACTS[1]

Mr. Lewis was charged with one count of first-degree murder and related offenses (R. 3259-60). After a mistrial, a second trial presided over by Judge Stanton Kaplan began on July 18, 1988. On August 5, 1988, the jury rendered a guilty verdict (R. 3043-44). The jury's 10-2 death recommendation (R.3198), was followed by the judge (R.3562-70), who also vacated the conviction for aggravated assault with a deadly weapon (R.3578). This Court affirmed. Lewis v. State, 572 So. 2d 908 (Fla.), cert. denied 111 S.Ct. 2914 (1991).

On September 11, 1992, a 3.850 motion was filed (Supp.PCR I at 8-52). On October 15, 1992, Mr. Lewis moved to disqualify Judge Kaplan (Id. at 53-71), who recused himself on June 23, 1993 (Supp.PCR II at 211), and Judge Susan Lebow took over. Mr. Lewis subpoenaed Judge Kaplan for a deposition which the State moved to quash (Id. at 294-96). The court denied the motion and the State appealed. See State v. Lewis, 656 So. 2d 1248 (Fla. 1994).

On July 28, 1995, Mr. Lewis orally renewed his discovery request (PCR VIII at 23). On August 10, 1995, Mr. Lewis filed a written discovery request (PCR I at 1-8). On February 2, 1996, the State Attorney's Office provided a list of documents withheld from disclosure (PCR I at 71). A Chapter 119 occurred on February 9,

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[1]Mr. Lewis does not agree with many of the "facts" asserted by the State as to the evidentiary hearing testimony. Most of the "facts" set forth by the State are paraphrased summaries which do not state "facts" but rather argument. In this section of the Brief, Mr. Lewis will set forth the procedural history of the case; witness testimony will be recited in the section of the Brief pertaining to the issue to which the testimony is relevant.

1996 (PCR VIII at 30-89). Following the hearing, Mr. Lewis filed a motion to compel (Id. at 55).

A hearing on the request to depose Judge Kaplan took place on April 26, 1996 (PCR VIII at 90-118); at that time Mr. Lewis informed the court of additional 119 problems (Id. at 114-15). On May 2, 1996, the court entered an order on some public records issues (PCR I at 86-87). On May 10, 1996, Mr. Lewis filed another motion to compel public records (Id. at 88-92), and later requested rehearing of the court's earlier order on the 119 issue (Id. at 94-100). On May 31, 1996, the State providing additional records (Id. at 102-03). On June 4, 1996, the court granted Mr. Lewis' motion to depose Judge Kaplan (Id. at 107).

Mr. Lewis filed his final amended Rule 3.850 motion on February 21, 1997 (PCR III at 232-403). The State responded (PCR IV at 426-585), and Mr. Lewis filed a reply (PCR V at 630-44). The hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993), was conducted on April 3, 1997 (PCR VIII at 143-73). On June 9, 1997, the lower court ordered an evidentiary hearing on certain claims (PCR V at 652-56).

After scheduling and funding problems (PCR VI at 992-1003), the hearing took place on July 20-23, 1998 (PCR IX; X; XI; XII). An order denying relief was entered on November 5, 1998 (Id. at 1060-70). Mr. Lewis sought rehearing (Id. at 1071-88). On January 21, 1999, Mr. Lewis filed a supplement to his motion for rehearing (Id. at 1119-38). Based on the State's response to the motion (id. at 1140-41), an additional evidentiary hearing was scheduled for

September 8, 1999 (Id. at 1142). However, on September 2, 1999, the court granted rehearing, ordered a resentencing, and cancelled the evidentiary hearing as moot (Id. at 1146-48). The State filed a notice of appeal (Id. at 1150), and Mr. Lewis filed a notice of cross-appeal (Id. at 1155).

SUMMARY OF ARGUMENTS

1. No adversarial testing occurred at the guilt phase. The lower court limited the evidentiary hearing to one allegation: whether, pursuant to Strickland, trial counsel performed deficiently in failing to discover, or whether, pursuant to Brady, the State failed to disclose, evidence of benefits to witness James Mayberry. The lower court findings of historical fact underlying the finding of deficient performance are due deference. Under either Brady or Strickland, Mr. Lewis is entitled to relief. The lower court erred in denying this claim for several reasons. First, Mr. Lewis did not have to establish that the suppression was intentional. Second, in finding no prejudice or materiality, the lower court overlooked the cumulative effect of all the error alleged by Mr. Lewis. As to the other errors alleged, the lower court erroneously denied without granting an evidentiary hearing and attaching portions of the record. Mr. Lewis is entitled to a new trial; at a minimum, to an evidentiary hearing on the remaining issues and to cumulative consideration of all the errors alleged.

2. The order granting a resentencing should be affirmed. The findings of historical fact as to deficient performance are fully supported by competent and substantial evidence. The court

properly determined that any "waiver" of mitigation must be knowing, intelligent, and voluntary; when trial counsel fails to investigate, however, no "waiver" can be valid. The court found that because counsel failed to investigate for the penalty phase prior to the guilt phase and did "minimal" preparation after the guilt phase, prejudice ensued because counsel could not properly advise Mr. Lewis of what he was waiving. Unrefuted evidence adduced below established that substantial mitigation was available had defense counsel investigated. Prejudice is also established by numerous factors not addressed by the lower court, such as the Brady violations regarding witness Mayberry, the evidence of Mayberry's failed polygraph, and the post-trial vacation of one of Mr. Lewis' convictions.

3. In the event of a reversal of the resentencing, this Court must remand for an evidentiary hearing on Mr. Lewis' claim that his trial judge was biased. The State conceded an evidentiary hearing on this claim, but the lower court ruled the issue moot due to her order granting the resentencing.

4. Relief is warranted because of an improper *ex parte* communication between the prosecutor and trial judge with respect to the sentencing order. The trial judge acknowledged having an *ex parte* communication with the prosecutor and asked him to provide some information for the sentencing order.

5. After conducting an *in camera* inspection of numerous documents from Broward County State Attorney's Office, the court failed to disclose them and sealed them for appellate review. Mr.

Lewis submits that the Court should release them and permit him Lewis to amend his Rule 3.850 motion.

6. Relief is warranted because of counsel's failure to object to constitutional error. Counsel failed to object to overbroad jury instructions, to instructions which diluted the jury's sense of responsibility as a sentencer, and to the trial court's failure to find mitigation in the record.

ARGUMENT I -- LACK OF ADVERSARIAL TESTING AT THE GUILT PHASE

A. INTRODUCTION. Mr. Lewis' motion alleged specific Brady[2] violations and trial counsel's ineffectiveness. The court granted an evidentiary hearing solely on the issue of whether there was ineffectiveness or a Brady violation as to James Mayberry (PCR V 655). The other allegations were found "procedurally barred, insufficiently pled, or refuted by the record" (Id. at 656). As to the claims on which no evidentiary hearing was held, discussed in Sections C & D, infra, a hearing was warranted; the court also failed to attach portions of the record to refute the allegations. Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990). The facts must be taken as true for determining not only their individual merit, but also whether they cumulatively warrant relief. Kyles v. Whitley, 514 U.S. 419 (1995); Lightbourne v. State, 742 So. 2d 238 (Fla. 1999); Young v. State, 739 So. 2d 553 (Fla. 1999).

B. IMPEACHMENT EVIDENCE ON JAMES MAYBERRY. On direct appeal, this Court noted that "the defense position was the testimony of [James]

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[2]Brady v. Maryland, 373 U.S. 83 (1963).

Mayberry and the other witnesses was not credible and that someone else had committed the crime." Lewis v. State, 572 So.2d 908, 912 (Fla. 1991). The State's case rested on the credibility of Mayberry, who was the vital identification witness, as the prosecutor argued in closing:

> And if you think that James Mayberry is lying about what he saw, reject his testimony because nobody wants Lawrence Lewis to be convicted if the verdict doesn't speak the truth and if you don't think these people are telling the truth don't believe them because that is exactly what your function is.

(R.2849). That Mayberry was the key State witness is also established by the fact that the jury asked that Mayberry's testimony identifying Mr. Lewis be read back (R.3025-26).[3]

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[3]The jury also requested a read-back of the testimony of the witnesses who allegedly saw Mr. Lewis in a truck at the Holly Lakes Trailer Park (R. 3025). These witnesses included Wendy Rivera, who lied in her prior statement to the police and "forgot" to tell the prosecutor that Mr. Lewis had told her he had killed someone (R. 2251), as well as Martin Martin, Stacy Johnson, Chuckie Heddon, and Tracy Marckum. Marckum acknowledged lying not only to the police but also to the grand jury (she was never charged with perjury) (R. 1635-44). Heddon acknowledged lying to the State Attorney's Office investigators in a sworn statement (he was never charged with perjury) (R. 1714-17), gave significantly different testimony at trial than he gave at deposition (R. 1714-36), acknowledged his prior testimony to the police, the State, and in deposition that, until trial, he had maintained that he could not identify the truck or Mr. Lewis in the truck because he was so drunk, and acknowledged that he had lunch with Tracy Markum just before he testified at trial during which time he read a detailed newspaper article about Mr. Lewis' trial (R. 1735). On the issue of whether he saw Mr. Lewis in a truck at the trailer park, Martin acknowledged that he could not identify the truck and, after been asked by Judge Kaplan "do you know if it was Larry Lewis in the truck or not," Martin replied "No, sir" (R. 1500). Finally, Stacey Johnson acknowledged that he did not really know if he ever saw Mr. Lewis getting out of a vehicle at the trailer part (R. 1471), and that he had consumed about three six-packs of beer that evening (R. 1467). As explained in Section C, infra, the trial court never permitted the requested testimony to be read back (R. 3028-30).

"Whenever the government's case depends almost entirely on the testimony of one witness, without which there can be no conviction, that witness' credibility is an important issue in the case. Rogers v. State, 2001 WL 123869 (Fla. Feb. 15, 2001).

The State withheld material exculpatory evidence regarding Mayberry's credibility.[4] Impeachment evidence must be disclosed under Brady, see United States v. Bagley, 473 U.S. 667 (1985), and the suppression need not be deliberate. Kyles v. Whitley, 514 U.S. 419, 432 (1995); Strickler v. Greene, 527 U.S. 263 (1999). To the extent that trial counsel failed to investigate, Mr. Lewis received ineffective assistance of counsel.[5] Strickland v. Washington, 466 U.S. 668 (1984); State v. Gunsby, 670 So.2d 920, 923 (Fla. 1996). Mr. Lewis is entitled to relief under either Brady or Strickland; in the alternative, the suppression warrants a resentencing. See Young v. State, 739 So. 2d 553 (1999); Argument II, infra.

1. Mayberry's Role in the State's Case. Mayberry's role in the case cannot be overemphasized. When the undisclosed impeachment evidence is considered in light of the timetable of what occurred

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[4]At trial, the defense complained about the prosecution's discovery practices (R. 1771-76; 1942-43). In fact, Judge Kaplan found a discovery violation and refused to admit into evidence several photographs which had never been provided to the defense despite a request (R. 1943).

[5]The lower court found "it could be said that defense counsel was negligent in not obtaining the necessary documentation pertaining to [Mayberry's] pending Dade and Broward cases" but that no prejudice had been shown (PC-R. 1062). The legal conclusion as to the lack of prejudice, reviewable *de novo*, see Stephens v. State, 748 So. 2d 1029 (Fla. 1999), will be addressed infra. It should be noted, however, that the State has not cross-appealed the trial court's finding as to deficient performance.

in this case, a disturbing pattern emerges which would have effectively destroyed Mayberry's credibility and a different result would have obtained.[6]

At the time of trial, Mayberry was in prison for grand theft, possession of cannabis, possession of burglary tools, and another grand theft charge (R.1837). All these charges, to which he pled guilty, were brought in 3 cases from Dade and Broward counties (Id.). He explained he "got five years, five and a half years in Dade County. I got five years in Broward County" (R.1838). He further explained that "[t]he first charge in Broward was in July" and he got out on bond; then he was arrested in Dade in August, and got arrested again in Broward on September 7, 1987 (Id.). Prior to May of 1987, when the crime occurred, Mayberry had gotten out of prison in February, 1987, and was out on the street between that time and August, 1987 (R.1839).

Mayberry first met Michael Gordon in March 1987 (R.1840). On May 11, 1987, he saw Gordon at Nose's house, which was a "place where people go to use drugs" (Id). After using heroin and cocaine for most of the afternoon and evening, Gordon and Mayberry headed out to steal appliances (R. 1860). They were in Gordon's truck, and Gordon was driving (R. 1861). Mayberry was "kicked back" and "more or less asleep" when "I thought we hit a median strip or something" (Id.). Gordon said "some asshole threw a tire out in

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[6]See White v. Helling, 194 F.3d 937, 945 (8th Cir. 1999) ("This sequence of events, withheld from the defense at trial, would have provided powerful ammunition for attacking the credibility of Mr. Stouffer's in-court identification of petitioner as the man who took his wallet").

front of the truck" and they pulled over; Gordon got out "and went over and started cussing at the jeep" which was parked "maybe fifty feet or so" away (Id.). Mayberry "thought" he saw one person in the jeep, "[l]ike, an upper body, like the outline of an upper body in the jeep" (R.1862-63). Gordon began cussing at the jeep, and Mayberry noticed "somebody walking down from the country club" with "what appeared to be a metallic object in the guy's hand" (R.1864). Mayberry yelled to Gordon, who turned and began walking back to the truck; the man asked "where are you going" and Gordon said "I'm just leaving" (Id.). Then the man "attacked Michael with the pipe" and Mike took off running (R.1864-65). The guy chased Gordon, who was running toward the passenger door of the truck (R.1865). The guy hit the truck with the pipe as he passed by Mayberry, who was still sitting on the passenger side (Id.). Gordon ran around to the front of the truck, and Mayberry slid around to the driver's side and started the truck as Gordon ran off into the darkness (Id.).

Mayberry drove around and found Gordon, who got into the back of the truck (R.1866). As this was happening, "apparently the same guy" got into the front of the truck with Mayberry, who took off (Id.) The guy told him to stop, but Mayberry said "no way" and the guy said "you're going to die tonight, motherfucker" (R.1867). Mayberry then said "we're both going to die then, motherfucker" (Id.). The guy said he was going to "blow your brains out right now" and started to poke Mayberry with a pipe (Id.). Mayberry thought the guy also had a gun so he jumped out of the truck

(R.1868).

Mayberry ran a bit and fell into some bushes; he could see the truck stop and heard someone say "we're going to get your buddy too" and the truck turned toward where Mayberry was (R.1870). The truck, however, passed by and headed to where the jeep was (Id.).

All Mayberry could see of the person who approached Gordon was "kind of a silhouette. When he got closer, maybe a general description of him" (R.1871). He described the person as "[a] white man. Maybe, medium build, five ten or so" with "dark" hair (Id.). When the guy later got into the truck, Mayberry "got a pretty good look at him" (R.1873); however, all he could describe was again "[w]hite man, dark hair, medium build, like I said before" (R.1874). Mayberry identified Mr. Lewis as the person in the truck (Id.).[7]

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[7]Kirsch objected "that the in-Court identification of the defendant by this witness is a result of an impermissibly suggested [sic] our-of-Court identification. The out-of-court identification having been made as a result of a photo line-up shown to this witness by Detective Gill" (R. 1875). The Court denied the motion for mistrial (Id.). Kirsch also told the court that both Mayberry and Mr. Lewis had been put in the same holding cell on two previous occasions when Mr. Lewis' name was called out by the guards (R. 1875-76). Kirsch explained that "I know it happened on the day that we had the suppression hearing on the photographic lineup. It happened again today. And in both instances the procedure over there is they call out the names and the people step out. We feel that that has again affected the witness' identification of the defendant" (R. 1876). Kirsch then moved to strike Mayberry's in-court identification of Mr. Lewis, which was denied (R. 1877). The court, however, explicitly told Kirsch that "you're certainly welcome to bring that up during cross-examination and that will let the jury determine the credibility of the witness" (Id.). Kirsch stated that he was "not going to bring it up" because "[i]t puts me in a position of having to state to the jury that he's been in jail" (R. 1878). The court then said: "So what. They know he's been in jail. . . Where do they think he is? There's nothing prejudicial about a man charged with first degree murder bring in

After the truck passed by, Mayberry ran across a cow pasture and "climbed up into a tree and hid" (R.1884). As he was running, he "could hear a car going by or a vehicle going by with a flat tire" (Id.). At that point was when he climbed into the tree, where he stayed for 2 or 3 hours (R. 1885). After a while, Mayberry got down from the tree to look for a telephone; eventually he came upon an apartment complex where he "got stopped by a police officer. I told him what happened. And he didn't seem too interested" (R.1899). He began walking down Flamingo Road "and I saw what looked like the same vehicle to me that was involved in the incident earlier" and he hid in some bushes (Id.). As he was hiding, he saw another vehicle come up, which stopped and 3 people (2 males and a female) got out and put gas in the jeep (R.1896-97). After they put the gas in, they left (R.1898). Mayberry stayed hidden and eventually a police officer came up and parked behind the jeep (Id.). Mayberry "just avoided" the officer (R.1899).

After the officer left, Mayberry saw "the people came back again and put gas in the vehicle and then they started the vehicle up" (R.1903). He also observed "the guy, yelled, whoopee, and stuff and hooted and hollered and he urinated in the road after that" (Id.). The female "made a comment about him urinating in the road.... He said, when you got to go, you got to go" (Id.). The group got back into their vehicle "and there was some conversation

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jail. Nine out of ten people are" (Id.). Counsel's unreasonable failure to bring out this significant impeachment evidence is addressed in Section C, infra.

I could hear about who was going to follow who because they had a stash or something" (Id.). Mayberry was asked who was driving the jeep when the group left: "The person that--when you say who, the guy, the same guy I thought was in the jeep earlier. The same guy with the jeep earlier or where the jeep was at" (R.1904). He reemphasized that the guy that "whooped and hollered" drove the jeep off (Id.). The other male and the female drove off in the car they arrived in (Id.).

Mayberry then headed for a phone again; on the way, he hid a burglary tool he had in his possession on top of a wall (R.1905-06). He went to an apartment complex, where he found a lounge chair and napped for a few hours (R.1907). He woke up, then headed to a shopping center to find a phone (Id.). He called his sister, but she was not home; a policewoman came up to him and, despite explaining to her what had happened, she told him to leave (R.1909). After wandering around, Mayberry took a cab and was dropped off near Gordon's house (R.1910).

On cross, Mayberry explained that the sentence he was currently serving was under a false name, Frank Johnson (R.2016). He was out on the street from February until July, 1987, "with the exception of 21 days that I was arrested in Dade County and there charges were dropped against me" on June 12 (Id.).

Mayberry had bought about 9 caps of heroin and 3 caps of cocaine which he brought with him to Nose's house on the night in question (R.2019-20). Mayberry used 3 caps of heroin and 2 caps of cocaine, which is "what I always use" (R. 2022). The "dope I had

wasn't any good" so he gave Gordon some money to get more (R.2023). When he came back, Mayberry did another 3 caps of heroin and 2 of cocaine (Id.). Gordon and his girlfriend did some also, and he witnessed Gordon "shoot it up" (Id.).

Mayberry recalled a statement to Detective Gill on May 14, 1987, but "[b]efore May 14" he had not seen any newspaper articles about Mr. Lewis' arrest (R. 2026). He clarified that he saw no articles "before May 31st" (Id.); rather, he read the article after getting out of Dade County Stockade, and that his sister had the article (R.2027). His sister told Mayberry that they had picked somebody up and mentioned Mr. Lewis' name to Mayberry (Id.).

When Mayberry and Gordon got to the place where the incident occurred, Mayberry was asleep (R.2033). He had not slept in 2 nights (Id.). When they pulled over, Gordon stopped the engine and turned off his lights (R.2034); the jeep's headlights were off as well, and there were no street lights around (R.2035). Mayberry saw someone in the passenger side of the jeep that he thought was a person, but it was too far to see what the person looked like (Id.). Mayberry emphasized that it was another person in the jeep (Id.).

Mayberry could only provide a "general description" of the man who fought with Gordon (R. 2039), and he could not identify him if he saw him again (R.2040). There was nothing to distinguish the individual, such as scars, tatoos, etc. (R.2041). He could not say with "a great degree of certainty" that the man that got into the truck was the same man that had the altercation with Gordon

(R.2057-58). However, the guy urinating on the street matched the description of the person who got into the truck (R.2128-29).[8] Mayberry called the person who was urinating on the street "the big dude" and "the suspect" (R.2131).[9]

On redirect, Mayberry acknowledged using drugs for a long time but denied that it affected his mind (R. 2160). The prosecutor then asked Mayberry to "recite" a little poem he had written describing his life (Id.). After overruling a defense objection (R. 2163 *et. seq.*), Mayberry was permitted to recite his "poem" to the jury (R. 2165-67).[10]

2. The Postconviction Evidence. A wealth of impeachment evidence as to Mayberry existed; had the jury known of this evidence, Mayberry's credibility would have been seriously impeached. The evidence withheld by the State consists of a series of behind-the-scenes events during which significant benefits were extended to Mayberry by the State.

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[8]During his testimony at the motion to suppress, Mayberry repeated that he saw three people later on the night in question, and that the person he saw urinating on the street looked like the same person he had seen earlier (R. 437). The individual that was urinating in the street was David Ballard, however, **not Lawrence Lewis** (R. 2286-87) (trial testimony of Wendy Rivera). This is significant for a number of reasons, not the least of which is that the jury did not hear from Ballard at all at trial. See Section C, infra.

[9]There was a significant amount of additional information available to counsel to impeach Mayberry on his identification of Mr. Lewis. See Section C, infra.

[10]On direct appeal, this Court found that any error in allowing Mayberry to recite this poem was harmless, deferring to Judge Kaplan's discretion. Lewis v. State, 572 So. 2d 908, 910 (Fla. 1990).

The lower court found that “there was no Brady violation by the state and that even if a Brady violation was found to exist, any non-disclosure would be harmless and would not have any effect on the outcome of trial” (PCR VII at 1062). The court did find that “defense counsel was negligent in not obtaining the necessary documentation” relating to Mayberry, although concluding that Mr. Lewis “failed to show any prejudice flowing from this negligence (Id.). The evidence adduced below establishes Mr. Lewis' entitlement to relief.

(a) Lead Counsel Kirsch. In a letter dated March 10, 1988, Ray disclosed the pendency of certain charges against Mayberry in Dade and Broward Counties (PCR IX 209-10; Def.Ex. 1). Another letter dated July 1, 1988, disclosed that Mayberry pled guilty in the Dade and Broward cases and was sentenced to 5 1/2 years (Id. at 210; 214; Def. Ex. 2).

Although Ray supposedly had an “open file” policy (R.1253-54), Kirsch said “it wasn’t a situation where you go up to his office, say let me see your entire file. There were notes there of his personal observation notes, things of that nature that I’m sure he wasn’t going to hand over to me” (PCR IX 211); thus, there was never a time when he had access to Ray’s “entire file” (Id. at 212). Kirsch had trouble with the State at trial on discovery issues,[11] and relied on Ray to provide him with any exculpatory

[11]For example, Kirsch felt he was being misled by Ray into believing he had everything he was entitled to; on another occasion, Judge Kaplan found a discovery violation with respect to some crime scene photographs and refused to admit them into

evidence (Id. at 212-13).

Kirsch identified a letter from Ray dated June 30, 1988, listing the witnesses on which Ray had done criminal checks and providing the histories (Id. at 216; Def. Ex. 3). He further identified a document which listed Mayberry's criminal history as "one of the things he would have provided" (Id. at 217); the lower court allowed the exhibit into evidence (Id. at 218; Def. Ex. 4). Mr. Lewis then introduced a number of court files on Mayberry which Kirsch could not recall if he had seen (Id. at 218).

Kirsch was not aware that Ray had been in touch with Mayberry's Dade public defender and had no information about Mayberry's pending cases in Dade "other than that they were pending charges" (Id. at 230). If Mayberry received a downward departure in his Dade case due to cooperation in Mr. Lewis' case, Kirsch "would have expected" to have been advised of that by Ray, and would have presented this information to impeach Mayberry (Id. at 231).

Kirsch also recalled that Mayberry's trial testimony included admissions that he was out to steal appliances, but did not recall whether the State gave him immunity for such admissions (Id. at 232). Likewise, Kirsch did not know whether the State made any agreements with Mayberry with respect to his admissions of heroin and cocaine usage on the evening in question (id.), nor about Mayberry's confession that he was in possession of burglary tools (Id. at 232-33).

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evidence (R.1776-79; 1942-43).

Kirsch also recalled moving to suppress Mayberry's identification of Mr. Lewis at a photo lineup which took place on June 4, 1987, while Mayberry was in the Dade County Stockade, and also recalled knowing that Mayberry was released a week later; however, he did not know that the Broward prosecutors had been in touch with the Dade prosecutors on that case (Id. at 243). Had he known, he "would have wanted to investigate the circumstances of it" and "certainly" would have used it to impeach Mayberry (Id. at 235).

(b) Terrill Gardner. Gardner, an investigator from the Broward State Attorney's Office, had contacts with Mayberry prior to Mr. Lewis' trial (PCR XI 477-78), and made notes of his contacts which he was shown (Id. at 478-78). Gardner met with Mayberry on July 28, 1987, to "assist in identifying occasions of events of this crime for purposes of taking aerial photographs" (Id. at 479). Gardner talked with him "about some pretty severe sores that he had on his legs" (Id.). He asked if he was going to seek medical attention, but Mayberry "didn't have any money" (Id.). Gardner "encouraged him to try to seek a doctor"; told him "that he could as an indigent, be treated at the Broward County Hospital"; and "told him I would check with the hospital and see and I eventually did that" (Id.). The hospital indicated that Mayberry would not need prepayment to get treated, and Gardner left a message with Mayberry's sister to that effect (Id. at 481). Gardner also told Mayberry's sister to have Mayberry call him "to convince him to go to the hospital ... if he was objecting to it" (Id. at 482-83).

Gardner had another conversation with Mayberry on August 4, when Mayberry said he had gotten treatment and some medication from a friend who was a pharmacist (Id. at 485). Mayberry promised to call Gardner on Mondays and Thursdays, and Gardner gave him his home telephone and beeper numbers (Id.).

Gardner recalled that Mayberry had been arrested in Dade County, but was not positive of any arrest in Broward (Id. at 486). Gardner's notes reflected that on August 17, 1987, Mayberry had been arrested; the notes included Mayberry's jail identification number, court case number, and the prosecutor's name (Id. at 486-87). The notes also reflected that Mayberry was in Jackson Memorial Hospital on an IV (Id. at 487-88).

Gardner's notes further reflected 2 calls about 20 minutes apart from a "Marlene" in Dade County, dated August 20, 1987 (Id. at 488). Gardner did not recall ever speaking to a "Marlene" (Id. at 490), but believed that the calls pertained to his being instructed by Ray "to ascertain what Mr. Mayberry's charges were" (Id.). Gardner discussed Mayberry's situation with Ray (Id.). He did not recall how he got the information about Mayberry's arrest (Id. at 508), but explained that he would receive phone messages "in the course of daily business" that he would sometimes keep in his file (Id. at 509). Gardner's notes, including the phone messages, were introduced into evidence (Id. at 511-12; Def. Ex. 10).

Gardner also identified a memo he wrote to Ray dated February 17, 1988, detailing the Dade prosecutor's name, phone number, and

that "they want him to plead to seven years. He's hoping for three to four. His P.D. felt that if they knew that he was a cooperative witness they might accommodate" (Id. at 513). The way the memo was written, "I was speaking with someone in the Dade State Attorney's Office" (Id. at 514). The memo was introduced into evidence (Id. at 515; Def. Ex. 11).

Gardner did not recall visiting Mayberry in Dade County Jail, nor receiving a letter from Mayberry's Dade attorney giving him permission to see Mayberry (Id. at 515-16).

One of Gardner's duties was to serve grand jury subpoenas but he did not recall whether he served Mayberry (Id. at 517). Gardner then identified a service return indicating that he actually served something on Mayberry on June 11, 1987, at 3:02 p.m. (merely hours after Mayberry's release from Dade County Jail) (Id. at 518).

On cross, Gardner explained that he called Broward General Hospital to see if Mayberry qualified for medical treatment (Id. at 521). It was not something he did for other witnesses, but Mayberry's condition was "serious" and "that's what I told Mr. Ray when I came back to the office that day" (Id.). Gardner did not pay the hospital or give Mr. Mayberry any money (Id. at 522). **(c)**

William Altfield. Altfield was the Dade prosecutor who handled Mayberry's 1987 case (PCR XI 525). In case number 87-26874, Mayberry (aka Frank Johnson) was charged with burglary, second degree grand theft, possession of burglary tools, resisting arrest without violence, and obstructing justice (Id. at 525-26). Altfield spoke with Ralph Ray on March 4, 1988, when Ray told him

that Mayberry was the "key witness in murder cases where Johnson's buddy is victim. Ray doesn't need any breaks. I told Ray will stick to guidelines, no problem, Bill" (Id. at 526).[12] Mayberry's guidelines were 7 to 9 years (Id.). He pled guilty to all counts, and received 5 1/2 years state prison, which was a 1-cell downward departure from the guideline sentence (Id. at 527). According to the file, the Dade prosecutor objected but Altfield did not know why (Id. at 528). The file also reflected that the Dade prosecutor did not appeal the downward departure because of Mayberry's "cooperation with the State" (Id.) The downward departure would "probably not" have been appealed anyway, according to Altfield (Id. at 529). The file also reflected about $2000 in restitution, but "it doesn't appear from either the guideline score sheet or the jacket that restitution was ordered" (Id. at 531). The file also referred to a "Marlene" who was Altfield's witness coordinator (Id.).

Altfield did not remember if Ray told him that Mayberry had pending Broward cases, which could affect a guideline departure (Id. at 533). He also did not recall if Ray told him that Mayberry had admitted fencing stolen appliances in Miami, which could have resulted in additional charges being filed against Mayberry (Id. at 534).

Altfield was also questioned about documents that had a notation from the judge in Mayberry's Dade County case indicating

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[12]Altfield was reading from a written phone message (PCR XI 226).

that "reason for departure was the drug history of the defendant and the defendant's assistance in a Broward County murder prosecution" (Id. at 536; Def. Ex. 12). He had no idea how the judge was informed of Mayberry's involvement in Mr. Lewis' case, and acknowledged that Mayberry received a benefit from the court (Id.). He never recalled speaking with anyone representing Mr. Lewis at the time of trial; in fact, Ray never told Altfield the name of the Broward murder defendant (Id. at 537).

(d) Ralph Ray. Ray recalled that Mayberry had been arrested in Dade County shortly after the incident in which Mr. Gordon died (PCR XII 603). Mayberry "was possibly the most essential [witness], he was the only eyewitness to a portion of this" (Id.).

Ray recalled that Detective Gill went to see Mayberry at the Dade County Stockade and took a statement prior to the grand jury meeting on Mr. Lewis' case on June 19, 1987 (Id. at 604). Ray believed he learned of Mayberry's arrest from Gill (Id.). He acknowledged having "conversations with people in the Dade County State Attorney's Office over the telephone, but I don't know if it was regarding the initial incarceration" of Mayberry (Id. at 605). Ray testified to the contents of a document which included the name Jane Grandy, a particular crime (delivery of drugs), a case number, and that there was an arraignment on June 11, 1987 (Id.). Ray assumed that Jane Grandy was a prosecutor (Id. at 606).

Ray gave Kirsch "a complete criminal history two times" on Mayberry, but could not recall if they referred to Mayberry's initial Dade County case (Id. at 606). Ray recalled that Mayberry

had admitted in statements to having purchased drugs in Dade County, but had no recollection of whether he discussed that with Ms. Grandy (Id. at 608).

Ray also understood that, in September of 1987, Mayberry had a Broward County arrest, as well as another Dade County arrest (Id. at 609). Any of Mayberry's prior arrests would have been communicated to Kirsch they were subject to disclosure under Brady (Id. at 609-10).

As to Mayberry's second series of arrests in Dade County, Ray "spoke to several" prosecutors from Dade prior to Mr. Lewis' trial (Id. at 610). Ray identified a phone message from his file from William Altfield regarding Mayberry, and recalled that he spoke with Altfield on the same day, March 2 (Id. at 611-12). A memorandum from that conversation included a notation that Mayberry was charged with burglary, the case number, and that the case was set for trial that week (Id. at 612). Ray's custom was to speak to prosecutors from other counties when a witness has been arrested "[w]hen they call me" (Id.). Ray did not recall speaking to any defense attorney representing Mayberry, but did identify a letter evidencing a conversation on March 11 with a lawyer representing Mayberry; the letter indicated that the lawyer had no objection to either Ray or Gardner going to the Dade County Jail to speak with Mayberry about his testimony in Mr. Lewis' trial (Id. at 613). The memoranda and letters were introduced into evidence (Id. at 614; Def. Ex. 15). He clarified that the conversation he had was with Mayberry's Broward public defender, not Dade, and had no

recollection of speaking to any lawyer from Dade representing Mayberry (Id. at 615).

Ray identified a memo to the file dated February 18, 1988, regarding a telephone call to Joe Imperado from the Dade State Attorney's Office, with respect to Mayberry (Id.). However, Ray was assuming Imperado was from the prosecutor's office because of the telephone number prefix (Id. at 616); upon reviewing another document, however, Ray clarified that Imperado was in fact a public defender out of Dade (Id.). Mr. Lewis then introduced into evidence the court file from Mayberry's Dade County case number 87-26874 (Id. at 617; Def. Ex. 16). Court files from Mayberry's Broward cases were also introduced into evidence (Id. at 617; 644; Def. Exs. 17, 18, 19, 21).

On cross, Ray denied negotiating a deal for Mayberry in either his Dade or Broward cases (Id. at 628-29), and "tried to disassociate myself from Mr. Mayberry's charges" (Id. at 637). He never investigated the crimes to which Mayberry had admitted during his statements in Mr. Lewis' case (Id. at 641-43).

3. Mr. Lewis is Entitled to Relief. The lower court found "it is clear from the testimony presented and the documentary evidence admitted at the hearing that Mr. Mayberry had pending criminal charges in Broward and Dade County" but that "it is not clear from the evidence that the State deliberately failed to disclose the existence of the pending charges to defense counsel in violation of Brady v. Maryland" (PCR VII 1061). The court did find that "defense counsel was negligent in not obtaining the necessary

documentation pertaining to the pending Dade and Broward cases" (Id. at 1062).

Under Brady, Mr. Lewis is not required to show deliberate suppression. Kyles v. Whitley, 514 U.S. 419, 432 (1995). The lower court erred in concluding that Mr. Lewis failed to show deliberate failure to disclose.

Even crediting Ray's testimony that he himself did not promise or give leniency to Mayberry in his Dade and Broward cases (PCR VII 1147-48),[13] the unrefuted evidence below established that Mayberry did receive leniency and substantial assistance with his pending cases in exchange for his cooperation with the State in Mr. Lewis' case. Ray was obligated to disclose whether or not he personally sought a benefit for Mayberry or it was another state agent who did so. Rogers v. State, 2001 WL 123869 (Fla. Feb. 15, 2001). Ray also had a duty to learn of any favorable evidence. Kyles, 514 U.S. at 437. As the lower court found, Kirsch had no "idea that

[13]Although Mr. Lewis submits that Ray's testimony on this point strains credulity and logic. It is clear that Ray and Bill Altfield had discussions about Mayberry's pending Dade cases. If there were no discussions between Ray and Altfield about giving assistance to Mayberry, there is no explanation for the unrefuted documentary evidence which established that Mayberry received a downward departure for his Dade cases (a departure which was not appealed by the State) due to his substantial cooperation with the Broward authorities in Mr. Lewis' case. How would the Dade County prosecutor and the Dade judge be aware that Mayberry was a key witness providing helpful testimony to the State unless Ray and Altfield had discussed it? Dade County would have no reason to give a benefit to Mr. Mayberry but for the fact that Mayberry was important for the Broward prosecution. Ray clearly knew that Mayberry was shopping for a deal in his Dade cases, as established by the memo from Gardner to Ray dated February 17, 1988, which stated that "evidently they want him to plead to 7 years and he is hoping for 3-4. His Public Defender felt if they knew that he was a cooperative witness they might accommodate" (Def. Ex. 11).

Mr. Ray was in contact with anyone in Dade County regarding Mr. Mayberry or his pending charges in Dade County" (PCR VII 1061).

The lower court also found that Mayberry had pending charges in Dade and Broward, that Ray "believes criminal histories are Brady material,"[14] and that defense counsel "does not recall receiving any of the letters sent by Mr. Ray regarding Mr. Mayberry's pending charges in Broward and Dade County nor did Mr. Kirsch have any idea that Mr. Ray was in contact with anyone in Dade County regarding Mr. Mayberry or his pending charges in Dade County" (PCR VII 1061). There was information withheld from defense counsel by the State; in the alternative, counsel was deficient, as the lower court found (Id. at 1062).

As to materiality, the totality of the picture in light of the behind-the-scenes negotiating regarding Mayberry establishes that confidence is undermined in this case. As noted in this Court's direct appeal opinion and as was clear at trial, the key issue at trial was Mayberry's credibility. When the State's actions are considered in light of the timetable of what occurred in this case, a disturbing pattern emerges which would have effectively destroyed Mayberry's credibility had defense counsel known or, in the alternative, had counsel properly investigated.

The crime in this case occurred on May 11-12, 1987. Shortly thereafter, Mayberry gave a statement to police and was unable to provide any relevant detail as to the identity of the assailant.

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[14]The criminal histories that were provided to Mr. Kirsch by the State did not include any of the charges that were pending against Mayberry at the time of Mr. Lewis' case.

He explained during the motion to suppress that he only was able to discern that the man was white, had brown hair, medium build, about 5'10" (R.418). In his own words, "I couldn't give you a good description of him" (Id.). He observed no details such as eye color, scars, tattoos, or anything about his clothes except that he may have had jeans on (R.429-30). He also explained that he saw 3 people later on the night in question, and that the person he saw urinating on the street looked like the same person he had seen earlier (R. 437). The individual that was urinating in the street was David Ballard, not Lawrence Lewis (R.2286-87). Mayberry later identified Mr. Lewis in a photo line-up, discussed infra, and at trial (R. 1874).[15]

Approximately 12 days after the attack, Mayberry was arrested in Dade County (on May 21, 1987) for possession of drug paraphernalia, and was held in the Dade County Stockade. 10 days later, on May 31, 1987, Mr. Lewis was arrested in Broward County for murder. 4 days later, on June 4, 1987, Det. Gill visits Mayberry, who allegedly identifies Mr. Lewis as the perpetrator. Below, Mr. Lewis introduced handwritten documentation by investigator Gardner to Ray which detailed Mayberry's Dade County case number, that his arraignment is set for June 6, that the prosecutor's name is Jane Grandy, that Mayberry "will make bond," and that Mayberry was "already" (PCR XII 605-06).[16] On June 11,

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[15]Mayberry was polygraphed on May 14, 1986, and failed.

[16]This note was not dated, however, it is clear that it must have been before June 6, since the note refers to the upcoming arraignment set for June 6. Detective Gill went to see Mayberry on

1987--after the identification of Mr. Lewis; after conversations between the Broward authorities and Dade prosecutor Grandy; and after Mayberry was set to be bonded out--the charges were mysteriously dropped against Mayberry by prosecutor Grandy (Def. Ex. 21). This information was not known to the defense or to the jury.

The evidence adduced below establishes the following series of events: Mayberry was arrested in Broward County on July 13, 1987 (approximately a month after the charges are dropped in Dade County) for possession of burglary tools, petit theft, grand theft, and fleeing; Mayberry bonded out on this case the following day (Def. Ex. 17). On July 28, 1987, Mayberry is visited at his trailer by Gardner and they discuss Mayberry's illness and they take crime scene photos (PCR XI 479-80). 3 days later, on July 31, 1987, the charges are dropped on the Broward possession of burglary tools and petit theft case (Def. Ex. 17). 4 days later, on August 4, 1987, Gardner talks with Mayberry about medications, etc., and Gardner gives Mayberry his home telephone and beeper numbers (PCR XI 485). Approximately 2 weeks later, on August 18, 1987, Mayberry is arrested in Dade County for burglary of a conveyance, 2d degree grand theft, possession of burglary tools, resisting arrest without violence, and obstruction of justice (Def. Ex. 16). No bond is set, and a hold is also placed on Mayberry for the pending Broward case (for which he was out on bond) (Id.). At some point, Gardner

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June 4, at which time he allegedly identified Mr. Lewis from a photo lineup.

becomes aware of this, as his notes reflect Mayberry's arrest in Dade, lists the charges and jail number, police arrest number, court case number, and the name and telephone number of the assigned prosecutor, Louis Perez; the notes also detailed that Mayberry was in Jackson Memorial Hospital on Ward D (PCR XI 486-87). 2 days later, on August 20, 1987, Gardner receives 2 calls from "Marlene" of Dade County, with more information about Louis Perez, his phone number, the court case number, and Mayberry's jail number (PCR IX 488). On August 25, 1987, the bond on Mayberry's pending Broward cases was estreated for failing to appear in court, and a capias is issued (Def. Ex. 17). About a week later, on September 4, 1987, Mayberry is given pre-trial release in his Dade case (despite the outstanding capias from Broward County and the bond estreature), and he is released from Dade custody on September 5, 1987 (Def. Ex. 16). 2 days later, on September 7, 1987, Mayberry is again arrested in Broward County for no vehicle registration, expired tag, fleeing a police officer, driving while license suspended, grand theft, possession of cannabis, and the outstanding capias warrants. On September 9, 1987, a capias issues from Dade County and an information is filed regarding the August 18 arrest (Def. Ex. 16). On September 17, 1987, while still in Broward County custody, Mayberry gives his deposition in Mr. Lewis' case. On September 28, Mayberry is transferred to Dade County to resolve his outstanding cases, and on September 30, 1987, the Dade court refused to release Mayberry on bond (Def. Ex. 17).

As of January of 1988, Mayberry is still in Dade custody, and

Mr. Lewis' trial is set to commence in March. On February 17, 1988, a few weeks before the Lewis trial was set to begin, a memo to Ray from Gardner reveals that the prosecutor in Mayberry's Dade case is Rae Shern, and that "evidently they want him [Mayberry] to plead to 7 years and he is hoping for 3-4. His Public Defender felt if they knew that he was a cooperative witness they might accommodate" (PCR IX 513; Def. Ex. 11). The following day, February 18, 1988, another memo executed by Ray details a conversation with Mayberry's Dade County public defender that Mayberry's Dade cases were set for trial on 2/29/88 and provides the name of the division chief in the Dade State Attorney's Office (PCR XII 615; Def. Ex. 19). On March 2, 1988, Dade prosecutor Bill Altfield calls Ray regarding "a witness in a murder case Frank Johnson"; a memo from Ray that same day reflects a conversation between Ray and Altfield that Mayberry was charged with burglary and that the case was set for trial the week of March 7, 1988 (PCR XII 612; Def. Ex. 15). A week later, on March 10, 1988, Ray wrote a letter to Richard Kirsch:

> Additionally, in this regard, Mr. James Mayberry has been charged with criminal offenses in both Broward and Dade County for which he is presently awaiting trial. Mr. Mayberry was arrested on August 18, 1987, in Dade County under the name of Frank B. Johnson, and charged with Burglary of a Conveyance, in Case Number 87-26874CF, before the Honorable Allen Kornblum, Circuit Court Judge.
>
> James Mayberry was arrested in this circuit on September 7, 1987, and charged with the following criminal offenses, in two (2) separate Informations: Grand Theft Auto, Case Number 87-11670CF, and Possession of Cannabis, in Case Number: 87-15071CR, both of these cases are before the Honorable Robert W. Tyson, Circuit Court Judge.

(PCR XII 619; Def. Ex. 1).

The day after Ray's letter, on March 11, 1988, Ray received a letter from Mayberry's Broward public defender in which Ray and Gardner received permission to talk to Mayberry, who was still in the Dade County jail at the time (PCR XII 613-14). 2 weeks later, on March 28, 1988, Mayberry is sentenced in his Dade cases to 5 1/2 years in state prison,[17] with an indication on the sentencing form that the downward departure was due to Mayberry's cooperation with the State in Mr. Lewis' case (PCR XI 536;Def. Ex. 16). Within days, Mayberry is ordered to be transferred to Broward custody (Def. Exs. 17; 18), and on April 26, 1998, is sentenced to 5 years concurrent with the Dade cases (Id.). At the beginning of July of 1988, Mayberry testifies favorably for the State at the motion to suppress his out-of-court identification of Mr. Lewis, and later that month testifies for the State at Mr. Lewis' trial.

Ray's letter to Kirsch (Def. Ex. 1), is significant for what it does not disclose rather than for what it does. It does not mention that the Dade county case was dropped following discussions with the Dade State Attorney's Office. While it does disclose that Mayberry was arrested on August 18, 1987, and charged with Burglary of a Conveyance (Def. Ex. 1), it does not disclose that he was also charged with 2d degree grand theft, possession of burglary tools, resisting arrest without violence, and obstruction of justice, nor does it disclose that his bond on those cases was later estreated

[17]There is no indication in the record that Mayberry was also ordered to pay the large (nearly $2000) restitution amount claimed by the victim in that case.

and a capias issued. While the letter also referred to Mayberry's arrest in Broward on September 7, 1987, for Grand Theft and Possession of Cannabis, it failed to disclose that he was also charged with no vehicle registration, expired tag, fleeing a police officer, driving while license suspended, as well as the outstanding capias warrants. Ray's letter also failed to disclose that on July 13, 1987, Mayberry was arrested in Broward for possession of burglary tools, petit theft, grand theft, and fleeing. The possession of burglary tools and petit theft charges were later dropped. The criminal histories turned over by the State, which Ray acknowledged at the hearing were Brady material, did not disclose any of this criminal activity; in fact, the criminal histories of Mayberry/Johnson which were introduced into evidence at the evidentiary hearing revealed no criminal history whatsoever subsequent to 1982 (PCR IX 217-18; Def. Ex. 4).

Evidence of Mayberry's dealing with State authorities was never disclosed. A witness' bias and incentive for testifying is classic Brady material. Giglio v. United States, 405 U.S. 763 (1972); Moore v. State, 623 So. 2d 608, 609 (Fla. 4th DCA 1993); Brown v. Wainwright, 785 F. 2d 1457, 1464 (11th Cir. 1986).[18] Brady is violated when the State fails to disclose the criminal record of

[18]In addition to being significant impeachment of Mayberry, the withheld behind-the-scene machinations of the State was evidence of improper tactics by the State casting doubt on the reliability of its case. See Kyles, 514 U.S. at 445 (suppressed notes "would have raised opportunities to attack not only the probative value of critical physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well").

its witnesses. State v. Gunsby, 670 So. 2d 920, 923 (Fla. 1996). See also United States v. Scheer, 168 F. 3d 445, 452 (11th Cir. 1999).

Confidence is undermined in the outcome under Brady or Strickland. The jury never knew that Mayberry, because of his "substantial cooperation" with the State in Mr. Lewis's case, received a huge break on his Dade cases, convictions for which the guidelines recommended 7 - 9 years, and had he gone to trial, could have resulted in some 16 years in state prison. Further, the jury never knew that the State chose not to appeal the downward departure due to Mayberry's cooperation with the State. To make the deal even better for Mayberry, the Dade sentence was made concurrent with the sentence he was later to be sentenced on in Broward County. In July 1987, Mayberry was arrested in Broward and charged with possession of burglary tools, larceny, fleeing a police officer, and another count of larceny. Mayberry then bonded out. Unknown to the jury, the State dropped the possession burglary tools and larceny charges on July 31, 1987, and only pursued the grand theft and fleeing a police officer charges. The cases were not disposed of until April 26, 1988, when Mayberry was sentenced to 5 years on the theft charge and time served on the fleeing charge, to run concurrent with his Dade cases, for which he had been sentenced the month before and received a substantial downward guideline departure due to his "substantial cooperation." In the Broward case, Mayberry scored out even higher than he did in his Dade cases -- at 176 points with a recommended guideline

sentence of 9 - 12 years. However, Mayberry was again given a sentence that deviated substantially from guidelines, but no reason was set forth on the scoresheet for the downward departure. It is clear that there was a significant amount of behind-the-scene activity between the Broward State Attorney's Office and James Mayberry, and a great deal of benefit inured to Mayberry. Instead of some 20 years (or more) of state prison time, Mayberry got 5 1/2 years concurrent on all of the charges from Dade and Broward counties, a remarkable benefit given his significant and lengthy criminal record. Mr. Lewis is entitled to a new trial and/or a new sentencing proceeding.[19]

C. ADDITIONAL ALLEGATIONS OF INEFFECTIVENESS. Mr. Lewis' 3.850 motion alleged additional errors which warrant a new trial; the lower court denied an evidentiary hearing on these allegations which warrant relief. These allegations must also be considered cumulatively with the facts alleged in Section B, supra, in terms of the result on Mr. Lewis' trial.

1. Failure to Effectively Impeach Mayberry. Aside from the facts set forth above regarding Mayberry's credibility, there was additional impeachment evidence which counsel, without a reasonable

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[19]The lower did not address the impact of the Brady violations on the sentencing phase. See e.g. Garcia v. State, 622 So. 2d 1325 (Fla. 1993). The State expressly told the jury at the penalty phase that "Mr. Mayberry was telling the truth" and that "you have got to consider his testimony when you consider the fact that Mr. Lewis had a premeditated design to kill these two fellows" (R. 3181). The State's Brady violations, alone and in conjunction with counsel's failure to investigate at the penalty phase, clearly deprived Mr. Lewis of a reliable sentencing. See Argument II.

tactic or strategy, failed to use at trial. Kirsch had information to attack Mayberry's credibility as to his in- and out-of-court identifications of Mayberry yet failed to present it.

After Mayberry identified Mr. Lewis in court as the person that got into the truck with him (R.1874), Kirsch objected and moved for a mistrial based on the suggestive out-of-court identification (R.1875). The court denied the objection and the motion for mistrial (Id.). Kirsch also moved to strike Mayberry's identification because on 2 occasions, Mayberry and Mr. Lewis had been put in the same holding cell and the guards called out the inmates' names, thereby tainting Mayberry's identification (R. 1876-77).[20] The court refused to strike the testimony, but told Kirsch he could bring it up during cross to "let the jury determine the credibility of the witness" (R.1877). Kirsch, however, said he was not going to bring it up because "it puts me in a position of having to state to the jury that he's been in jail" (R.1877-78).

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[20]Evidence was available to demonstrate that the placement of Mayberry in the same holding cell as Mr. Lewis at least on the morning of Mayberry's testimony was intentional. On July 27, 1988, Judge Kaplan had entered a handwritten order to the effect that

> Broward County Jail Security and Transportation Officers are to make sure that the inmate defendant, Lawrence Lewis, and another inmate, James Mayberry, who is testifying against Mr. Lewis are kept separated at all times. This is to include their regular cell assignments and any holding cell areas used while being brought to and from court. James Mayberry's cell area is 5C3.

This order, copied to Classification and Security at the Broward County Jail, was blatantly violated. Kirsch failed to argue that Mayberry's again being placed into a holding cell with Mr. Lewis was a violation of the court's order, disentitling the State from eliciting any identification testimony from Mayberry.

Even Judge Kaplan could not understand why defense counsel would not raise the issue, as Kaplan observed that these facts went to Mayberry's credibility (R.1877). Kirsch's purported reason--that the jury would know that Mr. Lewis was in jail--is simply unreasonable. As the judge pointed out, this was not a situation where a witness was referring to a prior incarceration. Obviously the jury knew that Mr. Lewis was in jail awaiting trial charged with first-degree capital murder.

Additional evidence revealed during the suppression hearing should have been used to impeach Mayberry. For example, Mayberry was initially unable to provide any relevant detail whatsoever as to the identity of the assailant. He explained during the motion to suppress that he only was able to discern that the man was white, has brown hair, medium build, about 5'10" (R.418). In Mayberry's own words, "I couldn't give you a good description of him" (Id.). When describing the individual who got into the truck on the night in question, Mayberry could not observe any further details, such as eye color, scars, tattoos, or anything about his clothes except that he may have had jeans on (R.429-30). Mayberry then explained that he saw three people later on the night in question, and that the person he saw urinating on the street looked like the same person he had seen earlier (R. 437).[21] Mayberry also testified that when he gave a statement to law enforcement, he was only able to detail that the assailant was "five foot 10, medium

[21]The individual that was urinating in the street was David Ballard, not Lawrence Lewis (R. 2286-87 (testimony of Wendy Rivera).

build, brown hair" (R.449). Between the time of the incident and his "identification" of Mr. Lewis on June 4, 1987, Mayberry testified that he had read an article in the newspaper about Michael Gordon's body being found on Griffin Road and U.S. 27 (R.450-51). Mayberry also stated that before Gill came with the photo lineup, Mayberry's sister had told him that someone had been arrested, and "[s]he said the guy's name" (R.453). She also said that there was an article in the newspaper about it, although Mayberry said that the paper wasn't available in the jail but that he "would have been more than happy to read it" (Id.).[22]

As to the lineup, Mayberry said there were 6 photos total (R.455), and that of the 6, only 6 showed a person with brown hair (R.456), so half of the photos could be immediately eliminated (R.457). Of the 3 remaining photos, the individuals were facing straight ahead, whereas the one remaining photo was turned sideways (R.458).[23] Mayberry also explained that of the 6 photos, only one (the one he later picked out as Mr. Lewis) showed a bare-chested man (R.458-59). It was impossible to tell from the photos the height or weight of the people (R.459-60). This is the lineup from which Mayberry identified Mr. Lewis. Kirsch failed to elicit any of this information when cross-examining Mayberry. An evidentiary

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[22]Curiously, an article did appear in the Miami Herald on June 2, 1987 (two days before Mayberry "identified" Mr. Lewis in a photo lineup after a period of discussion with Detective Gill), with the headline "Suspect in beating death just out of prison." The article was accompanied by a photograph of Lawrence Lewis.

[23]This was the photograph that was identified by Mayberry as being Mr. Lewis.

hearing is warranted.

2. Failure to Call David Ballard. Another important figure in this case was David Ballard. The prosecutor, defense counsel, and many of the witnesses referred to Ballard throughout trial,[24] yet the jury inexplicably never heard Ballard testify and was unaware of the exculpatory statements he had made regarding Mr. Lewis.

In Ballard's taped statement to detectives on May 30, 1987, he gave the following story:

> [Lawrence Lewis] said his jeep broke down, he said he threw a tire in the road to stop, you know stop a truck, called him a fucking asshole, so he went around to the driver, got him, and he said he twisted his neck and heard it snap so he threw him in a ditch and he went and got the other guy and drove somewhere. Drove around, he said.

(Statement of David Ballard at 5, May 30, 1987). He also repeatedly told detectives that Mr. Lewis said he had thrown the victim in the median strip (Id. at 5, 11).[25]

Ballard's testimony before the grand jury, however, was a complete transformation from his supposed "truthful" statement to

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[24]The prosecutor told the jury that there were "a lot of reasons" the state did not call David Ballard to testify (R. 2912).

[25]Ballard also said that Mr. Lewis told him that he hit Gordon in the head, but never told him what he had used. Ballard reported finding a steel pole in Mr. Lewis's jeep, so he assumed that "apparently that's what it was" (Statement of David Ballard at 9). Ballard indicated that Mr. Lewis later threw the steel pipe into a canal (Id. at 10). Notes in the files of the State Attorney's Office reveal, however, that Ballard himself threw away a piece of pipe that evening. Clearly an evidentiary hearing is warranted to explore this issue. As a result of either a Brady violation of ineffective assistance of counsel, the jury never knew that one of the suspects in this case had thrown away a critical piece of evidence, and that he then tried to place the blame on Mr. Lewis. An evidentiary hearing is warranted.

police. Ballard told the grand jury that Mr. Lewis never told him anything about hurting anybody, never discussed twisting and breaking someone's arm, and never discussed driving someone around in a truck and beating his head in (Ballard Grand Jury Testimony at 9, 14-15). The reason he was not truthful with detectives in his initial statement was that they employed tactics designed to coerce him into lying. He was drunk and on drugs when the detectives picked him up, and "I could have said anything that night. He was telling me I was going to get twenty-five years or the electric chair, saying they were going to take my kids away and shit." Mr. Lewis never confessed anything to him, and detectives "were telling me more than I was telling them, like they already knew about it before they even talked to me" (Grand Jury Testimony of David Ballard at 10-12).[26] Mr. Lewis' jury never knew that detectives coerced Ballard, who was a suspect in the murder, to give untruthful information regarding Mr. Lewis's involvement in the homicide.[27]

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[26]Ballard also revealed that some of the information he told detectives had come from newspapers, not Mr. Lewis (Grand Jury testimony of Ballard at 16-19). The fact that detectives interrogated Ballard prior to turning on the tape recorder to record his statement is corroborated by the statement itself. For example, one of Gill's questions referred to the fact that "before" Ballard "had mentioned" a particular fact (Statement of David Ballard at 5). One of the detectives later indicated that "I showed you a photograph of a guy, I'll show it [to] you now again" (Id. at 7). The detectives repeatedly referred to instances where Ballard "indicated" something earlier, before the tape had been started (Id. at 8, 17). Interestingly, Ballard was never charged with perjury.

[27]In pretrial statements, Detective Gill indicated that "it was common knowledge . . . that we were interested in Dave

That Ballard was hiding his involvement is also evidenced by a comparison of the forensic testimony, Ballard's reports of what he had allegedly been told by Mr. Lewis, and the statements of the witnesses who were told by Ballard of Mr. Lewis's involvement. At trial, the medical examiner opined that Gordon's injuries were inflicted while he was located in the highway median (R. 1331). There was no evidence that the victim had been killed at another location and then dragged into the median.

This testimony completely contradicts the prosecution witnesses who told the jury that they had heard that Mr. Lewis had "thrown" the victim's body into the highway median. Ballard told detectives that Mr. Lewis had purportedly told him that he twisted the victim's neck and heard it snap, so he threw the victim into a ditch (Statement of David Ballard at 5, May 30, 1987). In her deposition, Tracy Marcum, Ballard's girlfriend at the time, indicated that Ballard had told her that Mr. Lewis confessed to him that he had hit someone with his fists, then dumped the body into the median; a few days later, Ballard told Marcum that the man had been hit with a tool (Deposition of Tracy Marcum at 36, May 10,

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Ballard," (R. 63), and that he was considered a suspect in the homicide until he gave his "truthful" statement to detectives which "left himself out and put Lewis in" (R. 160). Gill admitted that he did not know whether Ballard was responsible for the killing, or if it was Ballard who was driving Mr. Lewis' vehicle that evening (R. 160). Mayberry testified that it was Ballard who was urinating on the street trying to start a jeep as well as the person who had climbed into his truck earlier that night and had the altercation with the victim (R. 2128-33).

1988).[28] None of Ballard's revelations of Mr. Lewis' supposed "confessions" remotely comport with the evidence in this case. It is important to note that even Detective Gill did not know whether Ballard was responsible for the killing, or if it was Ballard who was driving Mr. Lewis's vehicle that evening (R. 160). Ballard was also identified by Mayberry as the person who had gotten into the victim's truck and had the altercation with the pipe (R. 2128-33). The jury knew none of this information.

After giving his grand jury testimony, Ballard again changed his story and provided damaging information to the police about Mr. Lewis. However, prior to Ballard changing his story from his sworn grand jury testimony, Ballard had pending charges against him which were dismissed. Ballard was arrested on November 1, 1987, by the Pembroke Pines Police Department. The court file reveals that on November 2, 1987, probable cause was found to believe that Ballard committed the crime of Burglary of a Structure. Bond was reduced from $5,000 to $2,500. Inexplicably, despite the finding of probable cause, the State announced that it was not filing an information against Ballard, and the case was dismissed on November 16, 1987. Additionally, in April, 1988, Ballard was again arrested and charged with Possession of Cannabis, Possession of Drug Paraphernalia, and other traffic offenses. Ballard pled guilty to these charges (save one, which was dismissed) and was only fined $180.00. Adjudication was withheld on all these cases. The State

[28]Again, notes in the State Attorney's Office files reveal that Ballard told the prosecutor during a pretrial conference that he (Ballard) threw away a pipe.

was clearly currying favor with David Ballard in order to get him to change his grand jury testimony, testimony which was exculpatory to Mr. Lewis. The State wanted Ballard to change his story and testify against Mr. Lewis,[29] and helping Ballard with his pending charges was one way for the State to ensure cooperation with Ballard. Another way was for law enforcement to intimidate Ballard into providing damaging information against Mr. Lewis. The jury, although knowing of Ballard's existence, did not know any of the facts surrounding the State's intimidation and dropping of charges. An evidentiary hearing is warranted.

3. Failure to Object. Trial counsel, without a tactic or strategy, failed to object to actions by the trial judge. First, counsel failed to object when the court told the jury before the instructions were read that the evidentiary portion of Mr. Lewis' trial was "not necessarily" very interesting, that the instructions he was about to give were "pretty boring" and "not that interesting" (R.2951-52). A possible reason cannot be conceived for informing the jury that the evidentiary portion of Mr. Lewis's case was "not necessarily" very interesting or for emphasizing that the instructions are boring; nor can there be any possible reason for not objecting. A jury's instructions are the most critical portion of the case, as the instructions tell the jury how to analyze the evidence. For a judge to tell a jury in a death

[29]The State Attorney files contain letters from the prosecutor to Ballard indicating the State's intention to call Ballard to testify.

penalty case that the instructions are "pretty boring" and "not that interesting" is a constitutional violation of the utmost severity.

Another improper tactic employed by the trial court occurred when the deliberating jurors sent a note that they wished to hear "testimony or evidence that Larry Lewis was seen in the truck at Holly Lakes Trailer Park including transcripts of testimony from Martin Martin, Stacy Johnson, Chuckie Heddon, Tracy Markum and then they want Mayberry's testimony identifying Lawrence Lewis" (R.3025-26). Given that the trial lasted several weeks, the jury's request was reasonable. Rather than simply grant the jurors' request, the court made the jurors feel "guilty" because it was a large task to find all the testimony:

> THE COURT: [] Now, as far as I'm concerned, you are entitled to have that testimony brought back to you to refresh your memory, if you like. You should understand that we do not have any transcripts of their testimony. The testimony of these people if given back to you would have to be read to you by the court reporters and we have two, if you remember. They're both here right now and it is, it's not impossible but it's very impractical for me and Mr. Kirsch, Ms. Lancy and Mr. Ray to go through all of that testimony first by ourselves which would take somewhere between four and eight hours to figure out everything that was said by these people and which may have affect upon that particular circumstance that you may be looking for, to decide what we think we should have read back to you, to answer your questions and to refresh your recollection.
>
> ***
>
> What I'd like you to do, however, before we start doing that, if you want us to do that, to go back to the jury room and discuss it among yourselves and determine whether you feel that it's necessary or still necessary and you want us to do it and we will do it, and don't read anything into what I'm saying to make you think that you should have any pressure on you because once we

> start reading it, obviously, we are going to be here for hours. That's fine. That should not part of your consideration even if we have to go into tomorrow or whatever. Of should not be part of your consideration. And if you really need it we will do it and we are ready to do it.
>
> So you think about it and talk about it some more and we're going to wait around here for awhile and see what you come up with. If you want us to do it we are ready to do it. We'll call you back in and start reading back all the testimony.

(R.3028-30). Moments later, the jury sent another note that "we have decided to proceed from our own recollections" (R.3031).

It is unclear why the judge could not just have ordered the court reporter to read back the requested testimony. Defense counsel failed to object to the trial court's "guilting" the jury into foregoing the read-back. Obviously, the jury found the evidentiary portion of this case more "interesting" than did the trial judge (R.2951-52). An evidentiary hearing is warranted.

D. TRIAL COUNSEL WAS RENDERED INEFFECTIVE. Under Strickland, it matters not whether counsel's failing is the result of unreasonable performance or of external forces which tie counsel's hands and constrain his performance. See Blanco v. Singletary, 941 F.2d 1477 (11th Cir. 1991).[30] An egregious example of ineffectiveness caused by external forces occurred when Tracy Marcum was called as a prosecution witness. The prosecutor prefaced Marcum's testimony with the following argument:

> MR. RAY: Judge, the State witness, Tracy Marcum, is

[30]In Blanco, the Eleventh Circuit found that Judge Kaplan's actions significantly impaired defense counsel's conduct at Mr. Blanco's sentencing phase and ordered a resentencing.

> going to testify next, and has made several statements regarding her knowledge of his incident regarding matters concerning that which she will testify about.
>
> She gave a statement to Detective Gill and Detective Carr on June 2nd 1987. She provided a handwritten statement to the mother of the Defendant, Bonnie Miller, dated June 3rd, 19878, which purports to have been notarized. A copy of which Mr. Kirsch gave to me. She gave testimony to the Grand Jury on June 17, 1987, which Your Honor has had transcribed.
>
> * * *
>
> She never said that - the evidence will show - that she, subsequent to giving the first statements, called the State Attorney's Office and a statement was taken from her by Investigator Hoke on March 17, 1988 at which time she did make those statements. She has testified that the reason she made those previous statements admitting the fact about the truck, was that she was under the influence of Miss Bonnie Miller, who is here in the courtroom.
>
> That Miss Miller drove her here for Grand Jury testimony. That Miss Miller went over her statement with her that she had given to Detective Gill and Detective Carr. Suggested to her things she should say in that would not be implicating Larry Lewis.
>
> That she and a girl named Julie Lanie, who is listed as an alibi witness, fabricated an alibi for Mr. Lewis at Miss Miller's behest and with her assistance.
>
> The State could show and the State did depose Julie Lanie, who did give an alibi story for Mr. Lewis.
>
> The State was contacted, about the same period of time, by Miss Lanie who recanted from her alibi testimony and said it was all a fabrication and a lie and that it had been made up by her and Bonnie Miller, the mother of Larry Lewis.

(R.1555-1557)(emphasis added). Ray then placed Kirsch in the position of facing a Hobson's choice--if he wanted to impeach Marcum about lying to the grand jury, a fact which Ray admitted (R.1558), the state would "rehabilitate" Marcum with the fact that the reason she had lied was that Mr. Lewis' mother had exerted influence over her to do so. Either way, Mr. Lewis would be

severely prejudiced.

Ray was careful to persuade the judge that the jury "could not consider [Marcum's] answers on the issue of determining Mr. Lewis's guilt" (R.1559), and stipulated there was no evidence that Mr. Lewis knew what his mother had done, or in any way directed her to do so. But Ray added that "the State would be tremendously prejudiced in it's case herein" if the court would not allow the evidence of Mrs. Miller's actions to be elicited from the witness (R.1559). Ray also noted that the same "problem" was going to occur with witness Charles Heddon (R.1559-60).

The state's tactics were a blatant attempt to prejudice Mr. Lewis's case by placing defense counsel in the position of either waiving the impeachment of Marcum on the fact that she perjured herself at the grand jury or impeaching her and risking that she would testify that Mr. Lewis's mother had coerced her into lying under oath. Kirsch argued in vain to the trial court that, by implication, the jury would believe that Mr. Lewis's mother must know that her son was guilty so she got all the witnesses to lie (R.1563; 1587). The court agreed with Ray, thus creating the external force which constrained counsel's performance. The fact that the court gave the jury a cautionary instruction that they were not to infer any guilt on Mr. Lewis's part based on his mother's actions did not erase the prejudice suffered by Mr. Lewis due to counsel's coerced ineffectiveness.[31] The information was so

[31]The futility of curative instructions in this case is highlighted by Judge Kaplan's later comments to the jury that jury instructions are "pretty boring" and "not that interesting" (R.

prejudicial that no cautionary instruction could mitigate its harmfulness.

After telling the jury that Mr. Lewis's mother had "arranged" an alibi witness, Marcum dealt the final blow to the jury:

> Q. How often did you see Bonnie Miller up until the time you all had a falling out?
> A. Every day.
> Q. Did she offer you anything of material value?
> A. Yes.
> Q. What did she offer you?
> A. A trip, money.
> Q. Do you know why?
> A. As long as I stuck to my story.

(R.1675-76)(emphasis added).

Ray's conduct prejudicially impacted the jury. And despite Ray's feigned concern that the jury not infer that Mr. Lewis was guilty because of his mother's actions, he brought up the issue in his closing argument (R.2852). In response to a defense objection, the court simply replied that "It's prejudicial, but there's nothing wrong with having prejudicial statements. It's supposed to be prejudicial" (R. 2854). Kirsch then apologized for the interruption (Id.).

The prosecutor's tactics violated due process, and a mistrial was the only proper remedy. Garron v. State, 528 So. 2d 353 (Fla. 1988). While isolated incidents of overreaching may or may not warrant a mistrial, the cumulative effect of one impropriety after another is so overwhelming that they preclude a fair trial. Nowitzke v. State, 572 So.2d 1346, 1350 (Fla. 1990). Kirsch was

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2951-52). There is no reason why jurors would follow a curative instruction when the very judge that is giving that instruction exhibits an openly flippant attitude about jury instructions.

forced into being ineffective at the hands of the state. Relief is warranted.

E. CONCLUSION. The circuit court erred in failing to consider the cumulative effect of all the evidence not presented at Mr. Lewis' trial as required by Kyles v. Whitley, 514 U.S. 419 (1995), and this Court's precedent. Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996); State v. Gunsby, 670 So. 2d 920 (Fla. 1996). The circuit court also limited Mr. Lewis' ability to prove the cumulative effect of the evidence not presented at his trial when it denied a hearing on all but his Brady/ineffectiveness claims relating to Mayberry. An evidentiary hearing is warranted.

ARGUMENT II --THE RESENTENCING SHOULD BE AFFIRMED.

A. MR. LEWIS' CLAIM: THE LEGAL FRAMEWORK. Mr. Lewis "had a right--indeed a constitutionally protected right--to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." Williams v. Taylor, 120 S.Ct. 1495, 1513 (2000). Accord Strickland v. Washington, 466 U.S. 668 (1984). As with any waiver of a constitutional right, Mr. Lewis' waiver must be knowing, voluntary, and intelligent in order to be valid. Faretta v. California, 422 U.S. 806 (1975); Deaton v. Dugger, 635 So. 2d 4 (Fla. 1994). If a defendant "waives" mitigation but counsel fails to investigate and the client is in the dark about what he is "waiving," the Sixth Amendment is violated. Deaton; Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991); Emerson v. Gramley, 91 F.3d 898 (7th Cir. 1996); Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995).

The lower court granted relief because Mr. Lewis' purported waiver of mitigation was invalid due to counsel's failure to investigate (PCR VII 1146). In its cross-appeal, the State attacks the lower court on a number of grounds which will be addressed later in this argument after Mr. Lewis sets forth the relevant facts adduced at the evidentiary hearing. The lower court's order is fully supported by the record and by the law, and thus should be affirmed.

B. TRIAL COUNSELS' TESTIMONY.

1. Kirsch. Kirsch was appointed to represent Mr. Lewis on June 2, 1987 (PCR IX 204), and knew at the outset that it was a capital case (Id. at 204-05). The guilt phase of trial concluded on August 5, 1988 (Id. at 237). As of that date, Kirsch had not done "any work on the case from a penalty standpoint prior to the conviction" (Id. at 237-38). Although a second-chair attorney, Oliveann Lancy, and an investigator, Sidney Patrick, were involved in the case, neither conducted any penalty phase investigation prior to the conviction (Id. at 238). Lancy and Patrick acted at Kirsch's direction, and Kirsch never directed either to investigate for the penalty phase (Id.). Kirsch did not request an order appointing a mental health expert until August 22, 1988 (Id. at 239); the penalty phase began on September 1.

Prior to the guilty verdict, Kirsch obtained no records or background information regarding Mr. Lewis' history (Id. at 242). Prior to the guilt phase, Mr. Lewis' mother, Bonnie Miller, was cooperative and willing to answer questions (id. at 241), but after

the guilty verdict, she would not talk with him or the expert, Dr. Klass (Id. at 242), because she was "very upset" about what had happened during the trial, and thus "didn't care to talk to me" about potential mitigating circumstances (Id. at 244).[32] Kirsch never talked with either Mrs. Miller or Mr. Lewis' father,[33] Lawrence Lewis, Sr., about any obtaining any records regarding Mr. Lewis' background (Id.); he would have no reason to believe that Mrs. Miller would not have assisted him with obtaining information and records if he asked prior to trial (Id. at 279-80).[34] After

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[32]During the trial, the State was permitted to elicit that Mrs. Miller supposedly fabricated evidence and bribed witnesses for the State (R. 1555-57; 1675-76).

[33]Mr. Kirsch was not familiar with Mr. Lewis' father until after the guilt verdict was over (PCR IX 240); all he knew about the father was abusive to his son in his early years and that he (the father) was a member of the Mafia (Id. at 241).

[34]In its brief, the State asserts that "[d]uring the approximate month between conviction and penalty phase," Mr. Kirsch, Ms. Lancy, and the defense investigator had "many contacts" with Bonnie Miller, including "58 telephone calls, visits, and letters to Miller in which they discussed what mitigation was and that an abusive childhood was such evidence" (IB at 5). This is flatly false, as the pages cited by the State bear out. On PCR IX 241, Mr. Kirsch explained that **from the time he was appointed in June, 1987, until the guilty verdict in August, 1988**, he had "a number" of conversations with Mrs. Miller, but could not recall how many (PCR IX 241). On PCR IX 258-59, Kirsch testified that **during the entire time he represented Mr. Lewis** his fee statement indicated the number of telephone conversations he had with Mrs. Miller, which totalled, in the prosecutor's count, about 58 phone calls (Id. at 258-59). PCR IX 282-83 only reveals that between the guilt and penalty phases, Kirsch testified that he spoke with Mr. Lewis and Mrs. Miller about mitigation but nothing in specific detail (PCR IX 258-59). Finally, on PCR IX 295, Lancy testified only that, **prior to the trial itself**, she had contact with Mr. Lewis' mother and his brother, Mark (PCR IX 295). It is clear that there was not extensive contact with the family between the guilt and penalty phase. In fact, Kirsch and Lancy's fee statement reflects that between the guilt and penalty phase, there were **two**

the guilty verdict, Kirsch spoke "briefly" with Mr. Lewis' father and requested that he speak with Klass, but "he wouldn't do it" (Id. at 243);[35] he also said he had nothing to offer because he (the father) was a convicted felon (Id. at 243-44). Aside from Mrs. Miller and Mr. Lewis Sr., Kirsch contacted no other family members (Id. at 245).

Kirsch did not provide Klass with background information on Mr. Lewis (Id. at 244). Klass met with Mr. Lewis, who, to the best of his recollection, was "reluctant" to talk about his background (Id. at 245). According to Kirsch, Klass never indicated that he needed more time to do a more thorough examination of Mr. Lewis (Id. at 247).[36]

At the September 1 penalty phase, Kirsch told the judge that Mr. Lewis did not want to call Klass (Id. at 246); however, when advising Mr. Lewis about the potential mitigation, he did not

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phone calls between counsel and Mrs. Miller, one on August 20, 1988, and the other on August 30, 1988 (State Ex. 1); not over **fifty** as alleged by the State. As for any contacts between the defense investigator and Mrs. Miller or Mr. Lewis in the period between the guilt and penalty phases, the investigator never testified at the hearing and thus Appellant is in no position to speculate as to the extent of any communications or if any occurred at all. In fact, the investigator did no penalty phase investigation at all (PCR IX 238).

[35]Mr. Lewis' father did eventually contact Dr. Klass on August 30, 1988, indicating that Lawrence wanted to see Klass again (PCR IX at 318).

[36]This was contradicted by Dr. Klass, who testified that he had insufficient time to do a full evaluation, there were "many other possibilities" with respect to potential mitigation, and he needed additional information and time to come to any firm conclusions (PCR XI at 564).

advise him about presenting additional information, such as medical and hospitalization records and other background information from other family members, as Kirsch himself was not aware of any such information (Id. at 247). According to Kirsch, Mr. Lewis did not want to call Klass or present testimony that would "indicate that he was guilty" (Id. at 267; 283). This discussion between Kirsch and Mr. Lewis occurred on September 1, 1988, the very day of the penalty phase (Id.). When he discussed with Mr. Lewis the issue of calling Klass on the day of the penalty phase, Kirsch had no other mitigation to discuss, such as a history of child abuse, foster care issues, school records, intelligence deficits, medical history, or any issue relating to brain damage (Id. at 283-84). Kirsch was relying on Dr. Klass to find this type of mitigation (Id. at 284).

2. Lancy. Lancy became an attorney in May, 1987, and was appointed to assist Kirsch in June, 1987 (Id. at 290). Kirsch made all strategic decisions, while Lancy did second-chair tasks like contacting the investigator, interviewing Mr. Lewis, and researching pleadings (Id. at 291). During her visits with Mr. Lewis at the jail, he was always cooperative (Id. at 295).

Their efforts in terms of case preparation focused on the guilt phase (Id. at 293), which was complex and involved numerous witnesses with ever-changing stories (Id.). Prior to trial, Lancy had a number of contacts with Mr. Lewis' mother, who expressed concern about her son's situation and provided information if asked (Id. at 296). Lancy could not recall much about Mr. Lewis' father,

except that "he did show up just before the trial, I think, or right around the time of trial" (Id. at 297).

Lancy recalled Dr. Klass being involved, but could not recall if she or Kirsch had the initial involvement; she did recall speaking to Klass after his appointment (Id. at 297). Lancy believed she had spoken with Mr. Lewis about the possibility of having Klass testify, but could not recall specific details due to the passage of time except generally Mr. Lewis did not want Klass to testify (Id. at 299);[37] later, however, she reiterated that she "really [didn't] know why" Mr. Lewis did not want to have Klass testify (Id. at 306). Lancy also believed that Mr. Lewis did not

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[37]The State writes that Klass' appointment "was discussed with Lewis on August 14, 1988" (IB at 5) (quoting page citation). As with many of the "factual" assertions made by the State, this one too is not entirely borne out by the pages cited by the State or is contradicted by other testimony. The State first cites to PCR IX 239-40, which is Kirsch's testimony. Nothing on these pages supports the State's assertion; on these pages, Kirsch confirmed that it was August 22, 1988, when he first asked for a mental health expert and talked with prosecutor Ray about it, and that the court order was August 23 (PCR IX at 239-40). There is no mention of Kirsch discussing Klass' appointment with Mr. Lewis, let alone on a specific date. The State next cites to PCR IX at 281-82, which is Kirsch's cross-examination; here, Kirsch testifies that he "think[s]" there was a memo in the file "discussing Doctor Klass with Mr. Lewis back on August 14th, if I'm not mistaken, somewhere around that time" (PCR IX at 282). The fee statement, however, reflects no such discussion on that date, despite being very detailed about their work on the case (State Ex. 1). The final page cited by the State is PCR IX at 308, which is Lancy's testimony. There, Lancy acknowledges that any conversations she would have had with Mr. Lewis about Klass would have occurred after Klass was appointed, which was on August 23; she did, however, also testify that she had "no independent recollection, however, I would assume that we had discussed it with Mr. Lewis" (PCR IX at 308). Thus, the record is far from conclusive on whether and when counsel discussed Klass with Mr. Lewis. Be that as it may, even if there was a discussion with Mr. Lewis on August 14, counsel did nothing for nine more days to seek an order appointing Klass to the case.

want family testimony, but could not remember why (Id. at 306). Lancy could not recall when she would have spoken to Mr. Lewis about Klass, and she did not believe that she had any records relating to Mr. Lewis' background, such as school or other childhood records (Id. at 308). Kirsch would have been the one to make the decisions about the appointment of experts and which records to obtain in the case (Id. at 308-09).

C. BACKGROUND MATERIAL NOT DISCOVERED BY TRIAL COUNSEL. Below, Mr. Lewis presented a wealth of background information which was not discovered by trial counsel.[38] As detailed in Section B, supra, Kirsch obtained no background record and thus Dr. Klass, the expert retained to evaluate Mr. Lewis, had no background information. See Section D, infra.

Detailed materials existed regarding Mr. Lewis' childhood which were critical to a full understanding of Mr. Lewis' life and also to Klass' evaluation. See Section D, infra. These records included, *inter alia*, records from the St. Joseph's Home for Boys, Catholic Charities in St. Louis, Missouri, and various school records (Def. Ex. 6).

The records from the St. Joseph's Home for Boys, located in St. Louis, reveal that in 1968, when Larry was almost 7 years old, Catholic Charities of St. Louis referred Lawrence and his brother Mark to the Home for Boys due to a chaotic home situation. According to the records, there was an ongoing custodial battle

[38]The background materials were admitted into evidence by the trial court as Defense Exhibits 6, 7, and 8 (PCR X at 349).

between Larry's father and mother, with ugly charges being leveled including allegations of alcoholism, mental disturbance, and prostitution (Ex. 6, Tab 4). "Because of the unstable custody situation a court commitment to Catholic Charities was requested and granted by the St. Louis City Juvenile Court on 10/4/67" (Id.). The brothers were placed in foster care, but because "the foster family is unable to continue giving care," the boys were referred to the St. Joseph's Home. Caseworker Mary L. Esselman[39] described the situation with Mark and Lawrence's parents after the first few years of their marriage:

> The past five years prior to referral were a series of separations and reunions. Mrs. Lewis always seemed to come back to him after her infidelity, would make promises to amend and then they would agree to start all over. Mr. Lewis now feels that his wife is mentally disturbed. He does not doubt however that Mark and Larry are his children because he did not believe his wife was being unfaithful to him at the time they were conceived. During the course of their separation, the two children have been shifted back and forth from one parent to the other. Mrs. Lewis has used the illegality of their marital status and the unstable nature of Mr. Lewis' claim for custody of the children as a threat and pawn in order to solicit Mr. Lewis' attentions. At times Mr. Lewis has become so distraught with the whole situation that he has determined to leave the state to get away from it.

(Id.). The St. Joseph's records further describe Lawrence's medical history:

> Larry had to be hospitalized at three months of age for pneumonia, and when he was two years old, because of a brain concussion and slight fractured skull. This resulted from a fall from a first floor window during the

[39]Esselman's testimony below is addressed in Section E, supra. At the time she testified, her name was Mary Baker; when she worked with Catholic Charities, Ms. Baker was with a religious order and was known as Sister Esselman (PCR XI 493).

> time when the parents were living together. Mr. Lewis reports that the fall occurred during the afternoon when the mother was asleep and the children unsupervised.

(Id.). The actual medical record, contained in the Catholic Charities records, details that Lawrence was hospitalized at St. Anthony's Hospital for pneumonia when he was 3 months old, as well as a "brain concussion" and "skull fracture" at age 2, resulting in hospitalization at St. Luke's Hospital (Def. Ex. 6, Tab 6).

The records from Catholic Charities provide detailed documentation of the struggles between Mr. Lewis' parents and the ensuing chaos affecting the children. For example, records show that Mr. Lewis Sr. accused his wife of being a "prostitute" with a "serious drinking problem" and "generally a very confused and disturbed person" (Def. Ex. 6, Tab 6). The records also show that Mr. Lewis Sr. himself "is from a difficult background" whose father was an alcoholic and had been in prison for armed robbery (Id.). The records further reveal the existence of a half-brother of Larry and Mark named Chris, who was Mrs. Lewis' child before she met Mr. Lewis and who had cerebral palsy; no one appeared to know the whereabouts of Chris, although it was believed he too had been placed in foster care (Id.).

Although she initially believed that Lawrence's father was "earnest in his desire to provide for the children in a wholesome and stable way," Esselman's detailed records reveal a back-and-forth shuffling of the children for several months and letters from her to both parents unanswered; finally Mr. Lewis resurfaced and "really sounded as though he were desperate" and was "becoming

increasingly discouraged and despondent under the pressure of his circumstances. He has no income, is dissatisfied with the care the children are receiving, and is unable to handle many of the discipline situations that arise with the children" (Id.). Mark "seems to be giving the most trouble," while Larry "is seen as still seeking and craving attention" (Id.). The records also describe Larry as being "more infantile and seems to have more need for the mother figure" (Id.); however, when the mother's contacts with Larry began again, Larry "regressed after the mother came back into the picture" and became "increasingly sullen, withdrawn, and antagonistic" because the mother "encourages his infantilism" (Id.). A 1970 summary prepared for a psychiatric consultation concludes:

> Larry was full term but had two periods of hospitalization in his early years. At three months he was hospitalized for pneumonia. When he was around two years old he fell from a first-floor window and was hospitalized for two weeks with head injuries. Larry has also been a restless sleeper but is not having nightmares and walking in his sleep. He is also complaining of headaches. The uncle has noted that he has difficulty staying on one line when reading.
>
> Larry's symptoms seem to suggest a need for further evaluation in several areas. We are also concerned about preserving this placement for him and about the poor relationship between the two brothers. While the situation is one that is unnatural, it is probably as close to his real family that Larry will be able to get in a long time. We need to know if Larry can be helped to handle it or if he would be better in another type of placement.

(Id.)

Catholic Charities eventually petitioned the court for custody of Mark and Larry for purposes of foster care placement: "It was

explained that because of the mother's history of instability we felt it necessary for the protection of the children and to insure some consistency and stability for the agency to have custody" (Id.).

Other documents admitted during the evidentiary hearing included some of Mr. Lewis' school records (Def. Ex. 6, Tab 5; Tab 6).[40] These documents reveal Mr. Lewis' scholastic difficulties. For example, in 1968, Mr. Lewis received a grade of unsatisfactory in spelling, and "below average progress" in reading, workbook, language, writing, and arithmetic. During the 1972-73 school year (Mr. Lewis was 11 years old), he received all Ds and Fs (Def. Ex. 6, Tab 5). As a freshman in high school, he received 7 Fs for the year (Def. Ex. 8, Tab 18).

D. MENTAL HEALTH EXPERTS' TESTIMONY.

1. Dr. Joel Klass. Dr. Klass, a psychiatrist,[41] was appointed on August 23, 1988, to conduct an evaluation of Mr. Lewis. He first visited Mr. Lewis on August 24, 1988, and found him to be suspicious, irrational, and mistrusting and did not seem to "want to help himself" (Id. at 313).[42] Klass' file and notes did not

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[40]Some earlier school reports are contained in the Catholic Charities records; others were obtained independently.

[41]The State stipulated to Dr. Klass' expertise in psychiatry, and his Curriculum Vitae was introduced into evidence as Defense Exhibit 5 (PCR IX at 311).

[42]Dr. Klass elaborated on cross that when he indicated that Mr. Lewis was uncooperative and suspicious during their first meeting, it was not that he refused to talk; rather, "[t]he impression I had is that he had some confusion about my role. I think he may have felt I was perhaps going to obtain information

reveal that he had any background information (Id. at 314-15). Although Mr. Lewis was initially mistrusting, Klass, "with great patience and time" (id. at 315), elicited that his family background was "rough," he did "lousy in high school due to drugs" and "he was also using LSD, which is a mind altering substance that can cause damage" (Id. at 316). He also mentioned use of marijuana and alcohol, mostly beer (Id.).

Follow-up after this initial interview was needed in terms of potential mitigation, including additional testing in light of Mr. Lewis' skull fracture and heavy drug and alcohol usage (Id. at 316). Klass would have wanted to review any records on Mr. Lewis' background, as it was not unusual for an individual to distort and avoid discussing such matters (Id. at 317). Klass confirmed that he had no such documentation when he evaluated Mr. Lewis (Id. at 318).

Klass had no record of speaking to any of Mr. Lewis' family members; his file reflected that Mr. Lewis' father called him on

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that he would not like me to have, that he was suspicious and more than uncooperative, kind of passive, resistant, not wanting to talk, wanting to end the conversation" (Id. at 443). This is why the law requires that penalty phase investigations be done prior to the guilt phase and not after the defendant has already lost at the conviction phase. Blanco v. Singletary, 977 F. 2d 1477, 1502-03 (11th Cir. 1991) ("[d]uring the precise period when Blanco's lawyers finally got around to preparing his penalty phase case, Blanco was noticeably more morose and irrational. Counsel therefore had a greater obligation to investigate and analyze available mitigating evidence. . . . Indeed, this case points up the additional danger of waiting until after a guilty verdict to prepare a case in mitigation of the death penalty: Attorneys risk that both they and their client will mentally throw in the towel and lose the willpower to prepare a convincing case in favor of a life sentence").

August 30, 1988, indicating that Lawrence wanted to see Klass again (Id. at 318). Pursuant to the message, Klass went back to see Mr. Lewis on September 1, 1988 (the day of the penalty phase) (Id.). At that point, Klass was only able to indicate that Mr. Lewis "may have had an idiosincratic [sic] reaction to alcohol" but had no confirmation; aside from alcohol use, the extent of the mitigation he had as of September 1, 1988, was that Mr. Lewis told him he had poor grades in school and "that he was affected by the drugs that he did and he drank a lot" (Id. at 319). The time he had to complete a full evaluation of Mr. Lewis was not sufficient, particularly in light of Mr. Lewis' state of mind (Id. at 321). He also told Kirsch that there were "many other possibilities" with respect to potential mitigation, but he needed additional information to be able come to any firm conclusions (PCR XI 564).

Klass reviewed numerous materials provided by collateral counsel, including records from the St. Joseph's Home for Boys, Catholic Charities, schools, hospitals, corrections department, and other documents pertaining to Mr. Lewis' mother (Id. at 324-25). As a result, Dr. Klass testified that a wealth of mitigation existed. For example, the records demonstrated "clear evidence" of Mr. Lewis' "very serious problem with alcohol and drugs dating back many, many years including at the time of the alleged offense and before" (Id. at 325). Earlier corrections records described Mr. Lewis's history of "impulsive actions" as "indications of alcohol or drug dependence" (Id.). The records also showed that Mr. Lewis' "used marijuana very frequently, had brain damage," and

"frequently" used LSD (Id). Moreover, Mr. Lewis was exposed to violence at a young age, "which we know specifically predisposes to disfunction and acting out violence" (Id. at 325-26). The records also described the skull fracture at age 2, "which is going to cause cerebral edema, irritation, [and] pounding headaches" (Id. at 327).

Mr. Lewis "may have idiosincronic [sic] or pathological reaction to alcohol, which is a sudden violent reaction to sometimes a small amount of alcohol as if it's an allergic reaction" (Id. at 327); this diagnosis is consistent with Mr. Lewis' prior history of impulsive behavior, as well as organic brain damage (Id. at 328).[43] Thus Mr. Lewis "would see the forest and not the trees. He would see his feelings of the moment, but not the consequences" (Id.). This diagnosis would interfere with Mr. Lewis' decision about not wanting mitigation, because it results in a person who is "not self-protective, he is irrational, uncooperative when it may be of help to him" (Id.). When brain-

[43]In its brief, the State writes that Klass "refused to diagnose organic brain damage" (IB at 9). This statement must be placed into a proper context for, as written, is misleading. Klass is a psychiatrist, not a psychologist or neuropsychologist. Therefore, from the perspective of a psychiatrist, he is not capable of diagnosing brain damage without "demonstrative evidence" such as and MRI or EEG (PCR XI 541). He did make clear, however, that in Mr. Lewis' case there are "suggestions, there's past history that would be highly likely to cause brain damage" (id.), and that other mental health experts, such as psychologists and neuropsychologists, "can give one a definite conclusion about brain damage" (Id. at 547). He later explained that structural damage to the brain can be assessed with tests such as an EEG, but that for functional impairment, "neuropsychological testing can delineate that" (Id. at 568). Essentially, as Klass explained, there is a "difference between my view and what is accepted by other experts" (Id.).

damaged individuals also are influenced by alcohol, they become uninhibited and self-protective, and the thoughtful, reasonable, and rational aspects of a person "are impaired to a degree they're intoxicated" (Id. at 330). In light of these factors, Mr. Lewis "would not appreciate the consequences of his actions at the time and he would have a diminished capacity to obtain [sic] impulses because we can all have unacceptable impulses. It's the degree to which we contain it that makes us civilized" (Id. at 331). Klass' complete findings were based on his review of the documents he had been provided by collateral counsel, which he did not have in 1988 (Id.).

On cross, Klass explained that his understanding of the 1988 evaluation was to ascertain Mr. Lewis' "mental status, whether he understood the difference between right and wrong," and to determine "if he fulfilled the Baker Act criteria" (PCR X at 436). He could not recall what information Mr. Lewis provided other than brief self-report of drug usage, some previous treatment as a young teenager, and that he had been prescribed Valium (Id. at 438-39). Klass initially indicated he wanted to rule out sociopathy because although Mr. Lewis had problems with the law, a diagnosis of sociopathy required the establishment of formal criteria; however, the criteria had not been satisfied based on any of the documents he reviewed in Mr. Lewis' case (Id. at 440-41).

Mr. Lewis was alert and oriented, but had "difficulty with concentration, "irritability," "limited insight" and "poor judgment" (Id. at 441). There were also "suggestions of an organic

problem especially with his history of LSD use" but he was "unable to do formal testing or have evidence for other test results" (Id. at 441-42). Klass was unsure if he knew at the time about Mr. Lewis' skull fracture, but he had nothing about it in his notes "and generally I would have made a note about that" (Id. at 442).[44] As to independent information at the time of his evaluation of Mr. Lewis, Klass repeated that he had "practically no information" and "did not have the extensive, more specific information in the material that has been given to me" (Id. at 448).

2. Dr. Faye Sultan. Dr. Sultan, a clinical psychologist, conducted an 8-hour evaluation of Mr. Lewis at the request of collateral counsel in January, 1993 (PCR X at 341). She also reviewed "hundreds of pages" of documents provided by collateral counsel, which is a "standard" part of a comprehensive examination (Id. at 343). The trial court admitted the materials into evidence (PCR X at 349, Exs. 6, 7, 8).

Dr. Sultan opined that Mr. Lewis has "multiple psychological and organic disabilities" and is a product of an upbringing "in which he was severely psychologically and physically damaged" (Id.

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[44]The State argues that Dr. Klass could have testified at the penalty phase, *inter alia*, "that there would have been brain damage from a skull fracture Lewis received when he was two years old" (IB at 9). However, as the record makes clear, Dr. Klass did not know about the skull fracture at the time he evaluated Mr. Lewis (PCR X at 442; PCR XI at 542-43). This information was provided by collateral counsel. All Dr. Klass knew at the time was that Mr. Lewis had a "rough childhood" and "I believe an injury, but I can't say with certainty with specifics, it has just been too long" (PCR XI 543).

at 391).[45] For example, the skull fracture Mr. Lewis suffered as a 2-year old, combined with "the kind of brutality to which Mr. Lewis himself was subjected and that he witnesses" all led to Mr. Lewis feeling "continuously abandoned" and that by age 6, the foundations for further psychological problems was already present which was only "exacerbate[d] as he grows older" (Id. at 352).

Classifying Mr. Lewis' family background as dysfunctional would be an "understatement" in that "if you exposed any child to the series of events to which he was exposed I think that the guaranteed outcome would be extraordinary dysfunction" (Id. at

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[45]In its brief, the State writes that "Dr. Sultan relied, in part, upon information generated after the trial and unavailable to either defense counsel or Dr. Klass (IB at 10). As with a number of assertions by the State, this sweeping statement is highly misleading. During the hearing, the State questioned Dr. Sultan about her reliance on a document from clemency records generated after Mr. Lewis' trial *as a source of information about Mr. Lewis' skull fracture at the age of 2* (PCR X 394-95). Dr. Sultan acknowledged that the clemency record referred to the skull fracture (id. at 395), and that she relied on that "[i]n part" in terms of confirming the skull fracture (Id. at 396). As Dr. Sultan later explained, the information in the clemency records was not something completely new and thus the only source of the skull fracture; in fact, the skull fracture, as well as other information about Mr. Lewis' background, were detailed fully in other records such as those from the Catholic Charities which were generated and available prior to Mr. Lewis' trial (Id. at 420). As she indicated, the clemency records simply corroborated information contained in other documents (Id.). Insofar as the discussions on pp. 400-02 of the record, also cited by the State in regard to Dr. Sultan's "reliance" on post-trial information, a review of the pages immediately preceding the cited pages establishes that it was *the State, not Dr. Sultan*, who first brought up the results of the post-trial psychological test performed in connection with the clemency process and asked her questions about it (Id. at 397-988). Dr. Sultan did not "rely" on that test in formulating any conclusions about Mr. Lewis; all she said, in response to a question by the prosecutor, was that she was aware that the test had been administered and that "some of the things that they talk about here are probably quite true to Mr. Lewis when I saw him, as well" (Id. at 399).

352). For example, Mr. Lewis and his brother were "kidnapped back and forth" between their mother and father, and the father "would take them with him to bars almost on a daily basis and encourage them to drink, in fact, would provide them with alcohol" (Id. at 353).[46] When the boys became intoxicated, the father "forced them to physically battle with one another and the battle was to continue until blood was drawn. If Mr. Lewis' father felt that the boys were not hitting each other hard enough or hurting each other he would then take on one of the boys and physically push him to the point where blood was drawn" (Id.). Dr. Sultan also detailed additional disturbing events in Mr. Lewis' childhood:

> [T]here is a particular incident that both Mr. Lewis and his brother recalled which involves sort of a repetitive them of Mr. Lewis' father which had to do with shoving objects down the boys' throats. There was an older boy, disabled child living in the Lewis home. When Mr. Lewis was a young child, he was three or four years older than Lawrence Lewis, he had [cerebral] palsy and that boy had a bowel and blatter dysfunction. At some point this child vomited on himself and defecated in his pants and Mr. Lewis, the dad, took those feces and vomit and stuffed it back down the child's throat. . . . Mr. Lewis

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[46]Much of Mr. Lewis' early childhood was documented in the "very large" record from Catholic Charities (Id. at 356). For example, the records discuss an incident which was consistent with the reports of Mr. Lewis and his brother Mark, regarding how their father spent time with them one New Year's Eve:

> Daddy and his friend took us out and we went to 2 taverns. Daddy got in a fight in one of them and some lady threw a cherry bomb in our friends car and another bomb at the bartender behind the bar.
>
> Nobody combed our hair while we were gone, because we didn't go to church on New Year, our daddy went while we were sleeping. We had lots of fun tho [sic] at the taverns.

(Def. Ex. 6, Tab 6).

> witness[ed] that event[.]
>
> * * *
>
> Mr. Lewis himself was the victim of a similar episode when his father became angry and took a number of pop-tarts that Mr. Lewis was eating for breakfast, began to shove those down his throat screaming at him, something like, do you like this, do you want more, are you hungry anymore. We're not talking about what would be considered typical physical abuse, okay, an occasional beating or a parent losing his temper, we're talking about almost daily severely traumatic behavior. Again, I think it's very important for me to talk about the fact that what Mr. Lewis himself experienced as a victim was terrible, but probably more damage was done to him by what he witnessed in his home. Mr. Lewis witnessed the repeated brutal beating of his mother over the years, including being whipped in the head with a revolver, being pistol whipped.

(Id. at 354-55).[47]

Dr. Sultan's review of Mr. Lewis' school records revealed that his academic performance was "extremely inhibited" because, as counselors' notes indicated, "the children are moved from school to school so frequently and some years they actually attend three schools in a single academic year" (Id. at 358). Beyond elementary school, Mr. Lewis was having trouble with learning, attention, and concentration; he had to repeat the second grade, and by the time he reaches junior high, "he has begun to flunk almost every subject" (Id.). These results are not based necessarily on intellectual deficits; in Dr. Sultan's view, Mr. Lewis' "intellectual ability is quite average" (Id. at 359). Rather, his poor scholastic achievement "is a combination of the emotional activity to an abusive childhood and the disruption, that's a part

[47]Collateral counsel obtained records corroborating Mrs. Miller's hospitalization after being pistol-whipped and indicating that Larry was 4 years old at the time (Def. Ex. 8, Tab 17).

of it, the physical disruption. Also, we're probably seeing the aftermath of the head injury that he sustained at age two" (Id.).

As he progressed into his teen years, Mr. Lewis was "experiencing by age 16 a number of difficulties both in his home and outside his home" (Id. at 361). His mother eventually took him to a psychiatrist, Dr. Chand, who referred him to the clinical neurology unit of the St. Louis Hospital for a brain scan and other evaluations (Id.). The reasons for the referral were episodic violent behavior, learning problems, and amnesia possibly linked to psychomotor seizures (Id. at 362). The testing found no seizure activity, but Chand, along with the hospital neurologist, recommended family and medicinal treatment, including increased dosages of Valium (Id.).

Mr. Lewis also has a "rather extensive history of both alcohol and other substance abuse" (Id. at 364). His use of alcohol began by the age of 6 or 8 when he was "regularly" given alcohol by his father (Id.). The alcohol use escalated and "he becomes quite physically dependent on it because there are reports in the record of him sneaking alcohol to school in perfume bottles" (Id.). By the time he was a teenager, he is consuming "huge amounts of alcohol during intense periods of weeks or months followed by some abstinence, again, returning to drinking" (Id.). By his early 20s, he is abusing cocaine, which "adds another dimension to his behavior, really disinhibits whatever control he has remaining psychologically, and he becomes during the episodes when he's aggressive, quite aggressive" (Id.). As she explained, "[p]eople

who have organic impairment like that kind that Mr. Lewis has, alcohol or any substance produces a much larger affect than it would in the non organically impaired individual. So for the average person alcohol may be relaxing and may be quite calming. For example, for Mr. Lewis, the introduction of alcohol produces a loss of impulse control, a loss of judgment" (Id. at 364-65).

Mr. Lewis suffers from organic brain impairments in the "mild to moderate range" when he is in a non-stressed and non-intoxicated state (Id. at 371);[48] however, "his index of organic impairment would increase" when physical and psychological stressors, as well as intoxicants, are added to the picture" (Id.). In other words, Mr. Lewis' "base line organicity has to be viewed in the context of what other things are going on in his mind and in his body" (Id.). "Alcohol use would probably increase the index more than any other factor" (Id. at 372).

Aside from the nonstatutory mitigation, Dr. Sultan opined that the 2 mental health statutory mitigators applied (Id. at 367). At the time of the offense, Mr. Lewis was under the influence of an extreme mental or emotional disturbance based on "his own psychological deterioration which included lack of judgment, impulse activity, the element of the head injury that added greatly to those factors, the psychological factors I just described adding substance abuse, alcohol abuse, intoxication at the time of the offense, all of those factors" (Id.). Mr. Lewis's ability to

[48]As part of her evaluation, Dr. Sultan reviewed the evaluation of Dr. Ellen Gentner, who was also of the opinion that Mr. Lewis suffered brain damage (Id. at 370).

conform his conduct to the requirements of the law at the time of the offense was substantially impaired because "at that time he was severely intoxicated, unable to control aggressive impulses, unable to think clearly about the situation that he was in, not reasoning properly, not perceiving accurately the situation around him and the environment. All of those factors I think would have to be taken into consideration" (Id. at 368).

Further, Mr. Lewis' self-preservation instincts and insight into his problems was lacking: "In order to act in ones best interest, one's own best interest, an individual needs to be able to view the elements of the current situation and to anticipate what might happen if certain behaviors take place. Now, Mr. Lewis did not have the capacity at that time nor did he have that capacity when I met him five years later, [he] is not psychologically and neurologically putting together in a way that would leave me to conclude that he can act in his own best interest" (Id. at 368-69).

On cross, Dr. Sultan explained that Mr. Lewis was cooperative during the evaluation despite the fact that "it was very painful for him to talk about those things" (Id. at 374). He did discuss aspects of the offense, although he was "not so sure if some of the memories [were] his, or have been given to him as the story is unfolded and conversations with police detectives" (Id. at 375). Dr. Sultan did not believe that Mr. Lewis was "motivated" to "be forthcoming" in the sense that he would make up information to help himself; in fact, "Mr. Lewis at the time that I met him was pretty

depressed, not particularly interested in his past being revealed" (Id. at 376-77). He was also "quite conflicted" about the possibility of a successful appeal. Dr. Sultan was aware that Mr. Lewis had "waived" mitigation at the time of his trial, but noted that despite telling Dr. Klass that he did not want to talk about his background, "[h]e actually told him quite a lot in his interview, again, I think we see the ambivalence that I've been describing to you in Mr. Lewis" (Id. at 378).

Dr. Sultan reemphasized that Mr. Lewis suffers from organic brain damage (Id. at 379), which may or may not include actual physical damage to the brain itself (Id. at 380). In other words, "it could be structural or could be functional" (Id. at 379). In Mr. Lewis' case, "when they did a brain wave study they didn't see anything abnormal but the functional impairment remained. And so again, brain damage may be a brain that looks worried, it may also be a brain that just acts worried" (Id.). Thus, Dr. Sultan explained, when Mr. Lewis underwent an EEG at age sixteen which revealed normal brain wave activity, "[i]t means there's no structural damage evident" (Id.). However, Dr. Sultan explained that after her examination of Mr. Lewis, "it was apparent to me that there was a relatively significant possibility that he had some neuropsychological disfunction[], some impairment" (Id. at 390).

As for the physical and emotional abuse in Mr. Lewis' younger years, Dr. Sultan explained that she was able to corroborate that information from interview notes with Mr. Lewis' brother, Mark, as

well as an interview with one of his cousins, Melissa Barger, who confirmed "that there was a great deal of physical violence and many, many beatings and blows" as well as "hospitalizations, medical treatment of the wife, Mr. Lewis' mother, and aware of many beatings to the boys (Id. at 401). Mr. Lewis himself was a source of some of this information, "although he was quite reluctant to detail his injuries" (Id. at 402).

On redirect, Dr. Sultan explained in more detail that a neurological evaluation assesses structural defects in the brain, whereas a neuropsychological evaluation is designed to see if "the functions of the brain are altered" (Id. at 416). She also explained that even after Mr. Lewis' neurological evaluation at age 16, which revealed no structural deficits, the doctors were still concerned about possible temporal lobe seizures despite ruling out a structural cause (Id. at 417). Dr. Sultan also explained that, in terms of the amount and type of background records about Mr. Lewis, "there's far more corroborative information available than is usually in a child abuse case" (Id. at 418).

E. LAY WITNESS TESTIMONY.

1. Melissa Barger. Ms. Barger is Mr. Lewis' older cousin (PCR XI at 455). When she was growing up in St. Louis, she would have contact with both Lawrence and his brother Mark, and were "close" (Id. at 457). Barger also knew Mr. Lewis' mother, Bonnie, as well as his biological father, Larry Senior (Id.).[49] Their entire

[49]Ms. Barger explained that Bonnie Lewis subsequently remarried a man named Harold Miller; both Bonnie and Harold had

family as "very dysfunctional" and Larry and Mark were "always, always, afraid of their dad" (Id. at 458). The families "would go a period of time where our families would get along ... and then they would all just fall apart and there would be periods of time where, you know, nobody spoke for several years" (Id. at 458-59).

She recalled a period when she was around 7 or 8 and Larry was about 3 when she would spend a lot of time at Bonnie's house; she described an incident that occurred there:

> A [M]y aunt had a living room that was all white and back then we didn't always have new things. We didn't always have nice things and Bonnie did not want children in her living room. And I went into Bonnie's living room and she was very angry with me and she took me in the kitchen, [by] the arm. She proceeded to yell at my mother because I had gone into her living room and there wasn't, there wasn't an exchange other than, you know, my mother said something like Bonnie, it's a living room. You know, she didn't hurt anything, and Bonnie jumped up, hit my mother and knocked four molars out of my mouth. When my dad stood up, Larry Sr., it's hard for me to say Larry Sr...
>
> Q You can say big Larry, we know who you're talking about.
>
> A Okay. He actually went over. He was hitting my dad. Before long it was a free for all with big Larry, was just, he was out of control and I said at that time, I just remember myself feeling smaller, smaller and I was so afraid that I was going to get sucked up. Things would have a tendency of happening and they were very insignificant. And they took us home and them we went a long period of time where we didn't see Bonnie.

(Id. at 459-60). "[T]here were times when we were fearful for the families to be together because Larry Sr. was an explosive kind of person. You just never knew when it was going to be okay and when

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died by the time of the evidentiary hearing, Bonnie in 1996 and Harold in January, 1998 (PCR XI 457).

it wasn't. And you just kind of sat on pins and needles" (Id. at 462). She later described "seeing Bonnie beat, terrible beatings to her face" when she was married to Larry Sr, and remembered when Bonnie would come over after she had been beaten; as she explained, "It was like she wanted help, but there was no help" (Id. at 473).

She had no contact with Larry or Mark when they were in foster care, but eventually regained contact with Bonnie while her cousins were still at the boys' home; in fact, Bonnie had moved into an apartment right behind the boys' home, yet Barger did not even know that Larry and Mark were at the home despite the fact that Barger spent her days with Bonnie (Id. at 461). When she and Bonnie would drive by the home, she would ask her aunt why she slowed down in front of the building; one day, Bonnie "started crying and said that's where they go to school. And that was the end of it" (Id. at 461).

Barger also recounted a time when Larry's mother got a new Pekinese which she named "Me Too" (Id. at 462). Barger explained the origin of the name:

> I thought it was some kind of oriental name or something, and I asked [Bonnie] what does Me Too mean. She said, it's because that's what Larry always says. And when she said that I remembered thinking, you know, Mark is the person who does all the talking and Larry was like a little shadow, that it was always just me too, me too, me too always . . .

(Id. at 462).

Barger also provided insight into the kind of relationship that existed between Larry and his father; for example:

> When we would sit down at the table to eat, my parents had a very small bungalow. When we would sit down to

> eat, the kids would get to sit, you know, in the living room or in another room and the adults would sit in the -- so we would have to like walk around the table. And I remember Larry actually stopping with his plate and just like freezing. And I would, you know, I'm like come on, let's go, I'm hungry. You know, he would just like, he froze and I looked and big Larry who was standing there and it was just, he was just looking at him. And I remember thinking that was strange, not strange that he was looking at his son, but strange that it would make you freeze and nobody said anything. You know what I mean? I'm not screaming, yelling, throwing things at my house, but I knew when to duck and I knew when to be afraid when that happened, but I didn't understand fear when someone looked at you.

(Id. at 472-73).

In 1987 and 1988, Barger was living in St. Louis but was never contacted by Mr. Lewis's lawyers or any mental health experts (Id. at 465). Had she been contacted, she would have been willing to talk to them, or come to Florida to testify in court (Id.).

2. Mary Baker. In the 1960s, Ms. Baker was a social worker in St. Louis, Missouri, working as a case worker at the Catholic Charities (PCR XI at 492). At the time, she was in a religious order and was known as Sister Esselman (Id. at 493). Prior to Catholic Charities, Baker worked at a children's home in New Orleans, as well as a day care facility in Chicago (Id.). Baker has a masters degree in social services from St. Louis University (Id.).

During her time at Catholic Charities, Baker was a case worker in the children's division and was assigned the Lewis case after the family was referred by a priest (Id. at 494-95). Part of her responsibilities as a case worker was to maintain a file, which she did in the Lewis case (Id. at 494-95).

Baker testified that Larry Lewis Sr. "was concerned about the care of the children" and, after being referred by a parish priest, came to Catholic Charities "for hopefully placement of the children" (Id. at 495). Larry and Mark were eventually placed in foster care; Baker's role was to "work with the children and the family to help facilitate the childrens' adjustment in the foster home, then to work with the family to rehabilitate the family hopefully to be able to take the children back home" (Id.).

Baker's first contact with Larry was when he was about 5; she had "very limited" contacts with his mother, Bonnie, and some contact with his father (Id. at 496). According to Baker, "[t]his was an extremely dysfunctional family. The mother had separated, had abandoned the children. The father was trying to take care of them and finding great difficult in doing this. Both parents had many problems" (Id. at 496). Once the children were placed in foster care, Ms. Baker continued to have contact with their father, but the mother "was not in the picture at that time" (Id. at 497). During the course of the children's foster care placement, Mr. Lewis had varied contacts with his sons, but "the foster parents reported that the children had indicated that he was taking them in and out of taverns and there were fights occurring" (Id. at 497-98).

Larry and Mark spent about ten months with the foster family (id. at 498), then they were put into the St. Joseph's Home for Boys in St. Louis (Id. at 499). It was at that point that the boys' mother became involved again and was allowed to have

visitation (Id.). The problems between the parents, however, did not cease when the boys entered St. Joseph's: "There were constant problems between the mother and the father, each accused each other of telling stories about their difficulty with the children and really painting a bad picture of each other" (Id.).

On a scale from 1 to 10, 10 being extremely dysfunctional, the Lewis family ranked at an 8 or 9 (Id. at 501). What put the Lewis family on the extreme end of the scale was "[t]he alcoholism that existed in the family, the confusion, the emotional development of both parents" (Id. at 502). The manner in which the children were being handled, the shuttling between parents and foster homes, was not an optimal way to raise emotionally-healthy children (Id.). Her impressions of Mr. Lewis as a child were that "he was a darling little boy" but "he certainly had a lot of obstacles to overcome and he had little by way of support, to help him do that" (Id. at 504).

In 1987 and 1988, Baker was living in Pensacola, and would have been willing to testify or assist in Mr. Lewis' case, but no one contacted her (Id. at 503).

On cross, Baker confirmed that part of her job with Catholic Charities was taking notes that were kept as part of the file; the information contained in the notes was gleaned "from contacts with the parents, with the children, with the consultants that were involved in working with the agency at that time" (Id. at 505).

F. DISPOSITION OF CASE IN LOWER COURT.

1. The Lower Court's First Order. The lower court first denied

relief (PCR VII 1060-70). In addressing the penalty phase claim, the court properly set forth the claim that was raised by Mr. Lewis:

> While the Defendant requested that no mitigating evidence be presented at the penalty phase, such instruction must be a knowing, voluntary, and intelligent waiver. The Defendant contends that any `waiver' could not have been knowing, voluntary, or intelligent as the defense counsel was deficient in his duties.

(Id. at 1062-63). The court also found as a matter of historical fact that the facts of this case were "similar" to those in Deaton v. Dugger, 635 So. 2d 4 (Fla. 1993), and Blanco v. Singletary, 943 F. 2d 1477 (11th Cir. 1991) (PCR VII at 1068-69); however, the court erroneously concluded as a matter of law that the prejudice analysis in cases of purported "waivers" of mitigation, such as those employed in Deaton and Blanco "cannot be controlling" because they were decided after Mr. Lewis' trial (PCR. VII at 1069). The lower court acknowledged that under Deaton and Blanco, Mr. Lewis was entitled to relief (Id.).

2. Mr. Lewis' Motion for Rehearing. Because of the court's erroneous legal conclusion, Mr. Lewis filed a motion for rehearing, arguing, *inter alia*, that the court erred in concluding that it could not apply the rationale of Deaton and Blanco to Mr. Lewis' case (Id. at 1083-84). The State conceded that the lower court "can use cases that issued after Lewis' trial and/or direct appeal to support its position[,]" (id. at 1097); and that the lower court "could use Deaton and Blanco to evaluate its application of Strickland to Lewis' case" (id. at 1098).

3. The Lower Court's Order Granting Relief. On rehearing,[50] the lower court vacated Mr. Lewis' sentence of death, concluding that "the Deaton opinion correctly states the law that applies to the instant case[,]" in that "a defendant cannot knowingly, intelligently, and voluntarily waive his or her right to present mitigating evidence during the penalty phase when his or her defense counsel does not have adequate time to investigate all mitigating circumstances or witnesses[,]"; the court further concluded that "[i]n the interests of justice, Mr. Lewis must be resentenced after a full penalty phase hearing" (Id. at 1146-47). It is this order that is subject of the State's appeal.

G. THE LOWER COURT'S ORDER SHOULD BE AFFIRMED.

1. Deficient Performance. The lower court's factual findings underlying the finding of deficient performance are fully supported by the record. The court found as a matter of historical fact that "[d]efense counsel conducted no independent investigation of the Defendant and, as such, could not properly advise the Defendant"

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[50]After filing his motion for rehearing, Mr. Lewis filed a supplemental rehearing motion in light of Thompson v. State, 731 So. 2d 1235 (Fla. 1998), with respect to the lower court's previous summary denial of the claim that the trial judge, Stanton Kaplan, lacked impartiality and was biased (PCR VII 1119-21). The State responded by conceding an evidentiary hearing on the issue of Judge Kaplan's bias (Id. at 1140-41). In light of the lower court's decision to vacate Mr. Lewis' death sentence on ineffective assistance of counsel grounds, however, the court ruled that the judge bias claim was moot, and that "the evidentiary hearing involving the former trial judge is unnecessary because a new penalty phase proceeding before a different judge is required in this case" (Id. at 1147-48). In the event that this Court were to reverse on the ineffective assistance of counsel issue, the Court must remand the case for the evidentiary hearing on the issue of Judge Kaplan's bias. See Argument III.

(Id. at 1063). It also found that "defense counsel in the case at hand may have been remiss in his duties to prepare for the penalty phase of the trial" (id. at 1065); that "counsel failed to investigate; thereby rendering counsel unable to proffer any evidence which he feels may be presented in mitigation" (id. at 1068); and that counsel "testified that he did not begin investigation for the penalty phase until after the guilty verdict was reached by the jury and it is clear from the evidence, both testimonial and documentary, that the defense counsel spent a minimal amount of time preparing for the capital sentencing of this Defendant" (Id. at 1069). These findings of fact are fully supported by unrefuted evidence and are subject to deference. Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999).

The State harps on the court's conclusion that there was insufficient time for counsel to investigate, arguing that it lacks support in the record and thus is due no deference (IB at 20, 26). When viewed in context of Mr. Lewis' claim and of counsel's performance, however, the lower court's finding is fully supported by the evidence and the law. The reason that counsel had insufficient time to investigate was because they waited until after the guilt phase to begin preparing for the penalty phase, and even then waited until the very last minute to do the little work that they did. See Williams v. Taylor, 120 S.Ct. 1495 (2000).

Mr. Lewis's counsel had a duty to conduct a "requisite, diligent investigation" into Mr. Lewis' background for potential mitigation evidence. Williams, 120 S.Ct. at 1524. See also id. at

1515 ("trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background"); State v. Riechmann, 25 Fla. L. Weekly S163 (Fla. Feb. 24, 2000) ("an attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence"). As the lower court found, counsel spent "minimal" time preparing for the penalty phase (PCR. VII 1069). Although well aware in advance of trial that this was a death case (PCR IX at 204-05), neither Kirsch nor Lancy did "any work on the case from a penalty standpoint prior to the conviction" (Id. at 237-38); nor did the guilt-phase investigator do anything for the penalty phase (Id. at 238). Prior to the guilty verdict, Kirsch made no efforts to obtain any records or background information regarding Mr. Lewis' history (Id. at 242); never talked with either Mrs. Miller or Mr. Lewis' father, Lawrence Lewis, Sr., about any obtaining any records regarding Mr. Lewis' background (Id. at 244). Once the guilt phase was over, Kirsch did not request an order appointing a mental health expert until 8 days before the penalty phase was to begin (Id. at 239); he provided no background information to Klass (Id. at 244). According to Kirsch, Dr. Klass never indicated that he needed more time to do a more thorough examination of Mr. Lewis (Id. at 247). This was contradicted, however, by Klass, who testified that he needed more time to do a complete evaluation and that he communicated such to Kirsch (PCR XI at 564).[51] Moreover,

[51]The State argues that although "there were follow-up tests which could have been completed and the doctor stated he did not have enough time to obtain Lewis' records or enough information to

the evidence below established that at the time he discussed with Mr. Lewis the issue of calling Klass (which was on the day of the penalty phase), Kirsch had no other mitigation to discuss with Mr. Lewis, such as a history of child abuse, foster care issues, school records, intelligence deficits, or any issue relating to brain damage (Id. at 283-84). Mr. Lewis could not have been in a position to waive the presentation of mitigation that his counsel had not known about, much less made an informed strategic decision to present or forego. See Blanco v. Singletary, 943 F.2d 1477, 1501 (11th Cir. 1991) ("Counsel essentially acquiesced in Blanco's defeatism without knowing what evidence Blanco was foregoing. Counsel could therefore not have advised Blanco fully as to the consequences of his choice not to put on any mitigation evidence"); Emerson v. Gramley, 91 F.3d 898, 906 (7th Cir. 1996) (trial counsel "failed to conduct any investigation, however brief, into possible existence of mitigating circumstances.... Without such an

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make a diagnosis within a reasonable degree of medical certainty on each factor[,] . . . this does not render Kirsch's performance deficient" (IB at 26-27 & n.7). The Sixth Amendment establishes otherwise. See, e.g. Wallace v. Stewart, 184 F.3d 1112, 1116 (9th Cir. 1999) ("Does an attorney have a professional responsibility to investigate and bring to the attention of mental health experts who are examining his client, facts that the experts do not request? The answer, at least at the sentencing phase of a capital case, is yes"); Bean v. Calderon, 163 F. 3d 1073, 1079 (9th Cir. 1998) ("When experts request necessary information and are denied it, when testing requested by expert witnesses is not performed, and when experts are placed on the stand with virtually no preparation or foundation, a capital defendant has not received effective penalty phase assistance of counsel"); Glenn v. Tate, 71 F. 3d 1204, 1210 n.5 (6th Cir. 1995) ("defense counsel should obviously have worked closely with anyone retained as a defense expert to insure that the expert was fully aware of all facts that might be helpful to the defendant").

investigation, [counsel] could not advise Emerson whether to try to present evidence of such circumstances.... Emerson's waiver of his procedural rights at the sentencing hearing cannot be considered a knowing waiver to which he should be held").

The lack of preparation by counsel was also evidenced by the fee statement introduced below, reflecting that after August 5, 1988 (date of guilty verdict), and September 1, 1988 (penalty phase begins), they spent approximately 17 *total* hours working on Mr. Lewis' case (State Ex. 1). Of those approximately 17 hours, 1 was spent copying depositions, another was spent writing a motion for new trial, 3 were spent at a jury instruction conference, and 30 minutes spent in another conference with Judge Kaplan. Thus, a generous reading of the fee statement establishes that about 12 hours were expended in preparing for Mr. Lewis' penalty phase, the majority of which during the week of the actual hearing. This is objectively unreasonable and deficient performance, particularly given that no time was spent prior to the guilt phase addressing a potential penalty phase. Williams, 120 S.Ct. at 1514 ("The record establishes that counsel did not begin to prepare for that phase of the proceeding until a week before trial"); Blanco, 943 F. 2d at 1501-02 ("To save the difficult and time-consuming task of assembling mitigation witnesses until after the guilt phase almost insures that witnesses will not be available. No adequate investigation was conducted in this case"); Glenn v. Tate, 71 F.3d 1204, 1207 (6th Cir. 1995) (despite having months to investigate for a potential penalty phase, "the lawyers made virtually no

attempt to prepare for the sentencing phase of the trial until after the jury returned its verdict of guilty.... This inaction was objectively unreasonable").[52]

The State's argues that counsel were "thwarted by Lewis at each turn" (IB at 27 n.7), that "Lewis has not explained how Kirsch or Dr. Klass could have obtained school and hospital records without his authorization," and that "Lewis did not enlighten the lower tribunal how Kirsch could have located other family members if their names and residences were not disclosed" (IB at 27 n.7). These arguments are flawed on numerous levels. First, it fails to contemplate that "[t]he sole source of mitigating factors cannot properly be that information which defendant may volunteer; counsel must make some effort at independent investigation in order to make a reasoned, informed decision as to their utility." Carter v.

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[52]The State concedes that "Kirsch had not commenced preparation for the penalty phase until the verdict was entered," but argues that "Kirsch had a co-counsel and private investigator assisting him" and "had significant contact with Lewis' family" (IB at 31). The State does not mention that, according to Kirsch, neither co-counsel Lancy nor investigator Patrick conducted any penalty phase investigation prior to the conviction (PCR IX at 238). Lancy and Patrick acted at Kirsch's direction, and at no time did Kirsch direct either of them to investigate for the penalty phase (Id.). Thus, that Kirsch "had" co-counsel and an investigator is simply irrelevant when neither of them actually did anything of substance. As for the "significant contact" with Mr. Lewis' family espoused by the State, this too is a red herring. Kirsch was not familiar with Mr. Lewis' father until after the guilt verdict was over (PCR IX 240); all he knew about the father was abusive to his son in his early years and that he (the father) was a member of the Mafia (Id. at 241). As for contact with Mr. Lewis' mother, Kirsch and Lancy's fee statement reflects that between the guilt and penalty phase, there were **two** phone calls between counsel and Mrs. Miller, one on August 20, 1988, and the other on August 30, 1988 (State Ex. 1).

Bell, 218 F.3d 581, 596 (6th Cir. 2000). Here, the lower court made a factual finding that no such effort was made. See PCR VII at 1063 (counsel "conducted no independent investigation" of Mr. Lewis' background); Id. at 1063 (counsel were "remiss" in their duties to prepare for the penalty phase); Id. at 1065 (counsel "spent a minimal amount of time in preparing for the capital sentencing of this Defendant" (Id. at 1069). Counsel clearly had the "ability" to get Mr. Lewis' background records if they had ever discussed the issue with either Mr. Lewis or his family before the trial started; however, counsel *never* discussed the matter with Mr. Lewis' mother nor with Mr. Lewis prior to the beginning of trial (PCR IX at 279-80). Counsel had no reason to believe that either Mr. Lewis' mother or Mr. Lewis himself would not have given them any information or authorization to obtain records had they simply asked them too (Id.).[53] Finally, the State's query as to how counsel could have located other family members "if their names and residences were not disclosed" (IB at 27 n.7), presumes that someone had actually asked for this information and been denied it. This did happen because, as the lower court found, counsel failed to investigate.

The State's argument fails to comprehend the fundamental

[53]Below, Mr. Lewis introduced interviews with both Mr. Lewis' mother and brother; these interviews were conducted by a CCR investigator, Teresa Walsh (PCR XII 585). Ms. Walsh testified that "both the mother and the brother were very cooperative and helpful with whatever I asked" (Id. at 586). Mrs. Miller provided a great deal of information about Lawrence, and gave Ms. Walsh additional places to look for records (Id.). The notes from Ms. Walsh's interviews with Mrs. Miller and Mark Lewis were introduced into evidence (Id. at 590; Def. Exs.13;14).

premise that counsel must begin the mitigation investigation prior to the trial. Waiting until after the guilt phase to *begin* investigating for the penalty phase and discussing such difficult issues with the client is a recipe for disaster:

> The ultimate decision that was reached not to call witnesses was not a result of investigation and evaluation, but was instead primarily a result of counsels' eagerness to latch onto Blanco's statements that he did not want any witnesses called. Indeed, this case points up the additional danger of waiting until after a guilty verdict to prepare a case in mitigation of the death penalty: Attorneys risk that both they and their client will mentally throw in the towel and lose the willpower to prepare a convincing case in favor of a life sentence.

Blanco, 943 F.2d at 1503.

Mr. Lewis' case presents a textbook example of why the law mandates that a penalty phase investigation be conducted prior to trial. Once counsel began to approach Mr. Lewis about potential mitigation, he was, as Dr. Klass described, "uncooperative, unreasonable, suspicious, and irrational or perhaps mistrusting" (PCR IX at 313). Klass also explained that "it's like he did not want to help himself" (id.), and "had some confusion about my role" (PCR X at 443).[54] While the State argues that Mr. Lewis "created

[54]Dr. Sultan agreed that Mr. Lewis' interaction with Dr. Klass was demonstrative of his psychological limitations: "In order to act in ones best interest, one's own best interest, an individual needs to be able to view the elements of the current situation and to anticipate what might happen if certain behaviors take place. Now, Mr. Lewis did not have the capacity at that time nor did he have that capacity when I met him five years later, [he] is not psychologically and neurologically putting together in a way that would leave me to conclude that he can act in his own best interest" (PCR X at 386-69). Dr. Sultan was aware that Mr. Lewis had "waived" mitigation, but also noted that despite telling Dr. Klass that he did not want to talk about his background, "[h]e actually told him quite a lot in his interview, again, I think we

roadblocks" and "would not comply" with the alleged advice by Kirsch to cooperate with Klass (IB at 28), Klass clearly testified that, "with great patience and time" Mr. Lewis did discuss his family and history of substance abuse (PCR IX at 315-16). However, given the few days he was provided, Klass could not reach any definitive conclusions nor independently corroborate the information that Mr. Lewis provided to him (Id. at 320-21). Thus, due to the state of mind Mr. Lewis was in, on top of the fact that counsel only got around to contemplating a penalty phase case on the eve of sentencing, it is no great surprise that the situation played out as it did. The result was not Mr. Lewis "manipulating" the system, but that he was provided with counsel who "conducted no independent investigation of the Defendant and, as such, could not properly advise the Defendant" (PCR VII at 1063).

The State finds it "very telling" that Mr. Lewis supposedly told counsel that he wanted a new trial and the only way that would happen is if he got the electric chair (IB at 35). According to Kirsch, however, Mr. Lewis did not want testimony that would implicate him in the crime or "indicate that he was guilty" (PCR IX at 267; 283); the discussion when this occurred took place on September 1, 1988, the very day of the penalty phase (Id.). By then of course it was too late for Kirsch to do anything anyway because he waited until the last minute to prepare. Equally importantly, "[u]ncounselled jailhouse bravado, without more,

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see the ambivalence that I've been describing to you in Mr. Lewis" (Id. at 378).

should not deprive a defendant of his right to counsel's better-informed advice." 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"). See also Blanco, 977 F.2d at 1502 (citation omitted)("[A] that a defendant's desires not to present mitigating evidence do not terminate counsel's responsibilities during the sentencing phase of a death penalty trial: "The reason lawyers may not `blindly follow' such commands is that although the decision whether to use such evidence is for the client, the lawyer must first evaluate potential avenues and advise the client of those offering potential merit"); 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).

2. Prejudice. The State argues that the lower court "failed to

explain the reversal of its original finding that the mitigation evidence offered at the evidentiary hearing would not have altered the sentencing decision" (IB at 21). This is incorrect. Mr. Lewis argued in his rehearing motion that the court applied an incorrect prejudice test in light of the claim alleged--that the "waiver" of mitigation was not knowing, intelligent, or voluntary (PCR VII 1083). The State *conceded* that the court could properly use the analysis of Deaton and Blanco (Id. at 1097-98). In granting rehearing the court clearly stated:

> Upon re-examination of this Court's order, the entire record, and the case law cited by both parties, this Court agrees with the Defendant that the Deaton opinion correctly states the law that applies to the instant case.

(Id. at 1146).

After explicitly telling the court it could properly rely on Deaton, the State now excoriates it for doing just that (IB at 33-34). And in the face of this specious about-face the State has the audacity to argue that it is *Mr. Lewis* who is engaging in "manipulation of the judicial system" (IB at 35).[55] The State's arguments must be rejected. The court explicitly explained its

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[55]The State also argues that defense counsel and the State are being "penalized by the Defendant's manufactured defect" (IB at 35). The vituperative tenor of this comment really says it all about the role that the State believes it has in capital cases: win at all costs no matter what. According to the State, Mr. Lewis must sacrifice the opportunity to establish that he is undeserving of the death penalty even though his trial counsel barely spent a full workday investigating and preparing a case in mitigation, as to hold otherwise would be "penalizing" the State. The State wants to reap the windfall from counsel's deficient performance, yet it was the State that provided Mr. Lewis with the lawyers who spent barely a full workday on his penalty phase case.

previous error of failing to apply the Deaton analysis to Mr. Lewis' claim, and agreed that he was entitled to a resentencing because his "waiver" was not knowing, intelligent, or voluntary due to trial counsel's failure to investigate.

The fundamental flaw in the State's reasoning is the failure to understand that when dealing with a purported "waiver," the issue is whether the waiver meets constitutional standards; if not, and there is mitigation that defense counsel failed to investigate, **the prejudice is the ensuing involuntary waiver**. The test for assessing Strickland prejudice under these circumstances is not whether the unpresented mitigation "would have altered the sentencing decision"; this is the *identical argument* raised by the State in Deaton and *explicitly rejected* by this Court. In Deaton, the State argued that the lower court had "applied the wrong standard" and that "under Strickland, the trial judge should have considered whether there was a reasonable probability that, absent the errors, the balance of the aggravating and mitigating circumstances did not warrant death." Deaton, 635 So. 2d at 8. This Court rejected the State's argument, correctly holding that when a defendant waives mitigation, "the record must support a finding that such a waiver was knowingly, voluntarily, and intelligently made." Id. 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," counsel's failure to adequately investigate "was prejudicial." Id. at 8-9.

Prejudice is also established under Blanco, as the lower court found.[56] In Blanco, as in Mr. Lewis' case, counsel did nothing to investigate for the penalty phase until after the guilt phase.[57] Blanco told the trial court "he did not want any evidence offered on his behalf." Blanco, 943 F.2d at 1501. The Eleventh Circuit found not only deficient performance but also prejudice, as "[c]ounsel [] could not have advised Blanco fully as to the consequences of his choice not to put on any mitigation evidence." Id. During his postconviction evidentiary hearing, Blanco presented "ample mitigating evidence that could have been presented before the sentencing jury and judge." Id. As a result, "counsels' failure to protect their client's rights at the sentencing phase resulted in `a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 1504. See also id. at 1505 ("Given that some members of Blanco's jury were inclined to mercy

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[56]The State never mentions Blanco in its brief to the Court.

[57]In Blanco, the trial court -- Judge Kaplan -- had indicated that the penalty phase was to begin immediately after the guilt phase ended. Judge Kaplan gave trial counsel an additional four days, however, because they had not investigated. During those four days, Blanco's attorneys did minimal investigation. Mr. Lewis' case presents an even more egregious situation, where counsel had nearly one month to investigate and prepare. Yet they spent, as noted above, maybe 12 hours preparing for the penalty phase, probably even less time than the attorneys found ineffective in Blanco.

even without having been presented with any mitigating evidence and that a great deal of mitigating evidence was available to Blanco's attorneys had they more thoroughly investigated, we find that there was a reasonable probability that Blanco's jury might have recommended a life sentence absent the errors").

Mr. Lewis presented below a wealth of unrebutted mitigation that was available and could have been presented had counsel investigated. See Sections C through E, supra. The compelling mitigation presented below "might well have influenced the jury's appraisal of [Mr. Lewis'] moral culpability." Williams v. Taylor, 120 S.Ct. 1495, 1515 (2000). "[C]ounsel's error[s] had a pervasive effect, altering the entire evidentiary picture at [the penalty phase]." Coss v. Lackwanna County District Attorney, 204 F.3d 453, 463 (3d Cir. 2000).

Because of the lack of investigation, the sentencers had virtually nothing to weigh against the aggravation; even so, some members of the jury voted for life. As the Supreme Court observed, "[m]itigating evidence ... may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death eligibility case." Williams, 120 S.Ct. at 1516. That there were aggravators presented by the State does not establish lack of prejudice in Mr. Lewis' case. 3 aggravators were found: prior violent felony convictions, felony murder, and heinous, atrocious, or cruel (R.3562-66). The trial court found no mitigation and therefore "there are no mitigating circumstances to outweigh the aggravating circumstances" (R. 3568). Under these circumstances,

Mr. Lewis has established prejudice. See Rose v. State, 675 So. 2d 567, 572 (Fla. 1996); Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995); Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992); Mitchell v. State, 595 So. 2d 938, 942 (Fla. 1992); State v. Lara, 581 So. 2d 1288, 1289 (Fla. 1991).

Prejudice is further established in light of other matters not discussed by the lower court. For example, the jury did not know that after the trial, the trial judge vacated Mr. Lewis' conviction on Count III of the indictment which charged aggravated assault with a deadly weapon on Mayberry (R. 3578). The jury did not hear significant information, some of which was improperly withheld by the State, relating to Mayberry's credibility, among other matters. See Argument I. All of factors constitute valid mitigation and undermine confidence in the outcome. Young v. State, 739 So. 2d 553 (Fla. 1999); Garcia v. State, 622 So. 2d 1325 (Fla. 1993).

Mr. Lewis also alleged that Kirsch should have presented the fact that Mayberry failed a polygraph.[58] In arguing to the jury the applicability of the "heinous, atrocious, or cruel" aggravator, Ray argued that Mayberry was "telling the truth" about Mr. Lewis being the killer (R. 3180-81). What the jury did not know during the guilt-innocence phase, but should have been made aware of during the penalty phase, was that Mayberry failed a polygraph administered a few days after the homicide. According to the

[58]This argument was not addressed by the lower court. At the evidentiary hearing, Kirsch testified that he did not know whether the law permitted polygraph results to be admitted at a penalty phase, and “didn’t present it as far as I know” (PCR IX 236).

polygraph report, "Mr. Mayberry's polygrams do contain specific reactions to the pertinent questions indicative of deception." This information mitigated Mr. Lewis's sentence and disproved Ray's misplaced reliance on the truthfulness of Mayberry. See Douglas v. State, 575 So. 2d 165, 167 (Fla. 1991); Lockett v. Ohio, 438 U.S. 586, 604 (1978); Rupe v. Wood, 93 F. 3d 1434, 1441 (9th Cir. 1996).

In addition, Kirsch did not present the testimony of Dr. Blinder, a witness proffered at the guilt phase (See R. 1959 *et. seq*.). Blinder possessed relevant mitigation, namely, to further call into question the credibility of Mayberry and to rebut the highly prejudicial poem Mayberry was allowed to read. While the trial court refused to permit Dr. Blinder to testify at the guilt phase (R.2012), there was no impediment to calling him at the penalty phase. Kirsch proffered to the trial court during the guilt phase what Dr. Blinder could testify to (R.1980-92). Without a tactical or strategic reason, Kirsch failed to present Dr. Blinder at the penalty phase.

Kirsch also failed to prepare Dr. Fred. W. Frick, who had been appointed to assist the defense (R.3445). As evidenced in his deposition taken just days before trial, Frick had no idea what he had been hired to do. In response to questions by the prosecutor, Frick said he was "not sure" what he might be called to testify about (Frick deposition at 8), "I don't know why I'm being asked as an expert witness yet" (id. at 9) and "I don't know enough about any of the people involved here to form any opinion right now" (Id. at 10). Frick did not know whether he was going to be asked to form

opinions about the effect of drugs and alcohol on the witnesses' ability to observe and remember accurately or otherwise be credible witnesses. Based on the evidence available of several witnesses' habits of abusing drugs and alcohol and Frick's background and experience, had he been provided with background information and investigation, he could have provided specific testimony regarding the effects of alcohol and drugs on a person's ability to perceive, observe, and identify, and about various other factors which would affect the reliability and credibility of such a person's observations and testimony. That the jury was also deprived of valid mitigation from Dr. Frick further establishes that Mr. Lewis was prejudiced. The lower court should be affirmed.

ARGUMENT III -- JUDICIAL BIAS

Should the Court reverse the lower court on the resentencing issue, see Argument II, the Court must remand for an evidentiary hearing on Mr. Lewis' claim that he was tried and sentenced by a biased judge. See Porter v. State, 723 So. 2d 191 (Fla. 1998).

After the deposition taken of Judge Kaplan following this Court's decision in State v. Lewis, 656 So. 2d 1248 (1994), Mr. Lewis alleged that Judge Kaplan lacked the constitutional requirement of impartiality and thus a new trial and/or sentencing was warranted (PCR V 116-140). The lower court summarily denied the claim as "legally insufficient" (PCR V 653). The court later held an evidentiary hearing on other claims, and granted sentencing relief (PCR VII at 1146). On December 24, 1998, while Mr. Lewis' case was pending below on a motion for rehearing from the original

order denying relief, this Court issued its decision in Thompson v. State, 731 So.2d 1235 (Fla. 1998). Judge Kaplan presided over Mr. Thompson's case as well as Mr. Lewis' case. The Court in Thompson granted relief in part because of "questions regarding the bias of the original trial judge at the time he [sentenced Mr. Thompson to death] and his ultimate recusal." In a motion for rehearing in Thompson, the State (the same Assistant Attorney General as was involved in Mr. Lewis' case below), argued that "it is imperative that the claim of bias be litigated at an evidentiary hearing" (PCR VII at 1120).

Based on the Thompson decision and the State's position that the issue of Judge Kaplan's bias should have been litigated at an evidentiary hearing, Mr. Lewis filed a supplement to his pending motion for rehearing, noting the incongruity of the State's position in Thompson with the position it took in Mr. Lewis' case (PCR VII at 1120), and asking for reconsideration of the summary denial (Id. at 1121). In response, the State conceded that Mr. Lewis should be afforded an evidentiary hearing on the claim of bias (Id. at 1140).

An evidentiary hearing was scheduled by the trial court; prior to the hearing, however, the lower court granted Mr. Lewis' motion for rehearing and granted him sentencing relief on the ineffective assistance of counsel claim (Id. at 1146). In so doing, the lower court found the issue of Judge Kaplan's bias moot and cancelled the evidentiary hearing (Id. at 1148). Should the order granting the resentencing be reversed, a remand is necessary to litigate the

issue of Judge Kaplan's bias, as the State conceded below (PCR VII at 1140). Mr. Lewis' 3.850 motion alleged extensive facts that Judge Kaplan lacked impartiality (PCR V 116-40). Due to page limitations, the extensive allegations will not be repeated; because the State conceded a hearing, a remand would be required if the lower court's order granting a resentencing is reversed. Porter v. State, 723 So. 2d 191 (Fla. 1998).

ARGUMENT IV -- *EX PARTE* COMMUNICATIONS

The lower court granted an evidentiary hearing on Mr. Lewis' claim that the trial judge and prosecutor engaged in an *ex parte* communication regarding the sentencing order (PCR V 655). This allegation was based on the discovery by collateral counsel that an unsigned draft of the sentencing order was in the State Attorney's files and was in the same typographical font as many of the State's motions (PCR V 757). The lower court denied relief (PCR VII 1070). Should the Court reverse the order granting a resentencing, this claim also warrants a resentencing.

Kirsch testified below that he was not aware if Judge Kaplan asked the State to prepare the sentencing order (PCR IX 249); if he knew that the judge signed a draft order, he would have objected (Id. at 250). All that Kirsch knew was what the trial record actually reflects, that is, that the judge asked the State to provide him with "certain information regarding geography, time, or location, and that was the extent of it" (Id. at 249). See R. 3248-49.

Judge Kaplan testified that he had no independent recollection

as to who typed the sentencing order, but he himself "prepared it" (PCR X 422). He acknowledged, however, that "I couldn't swear a hundred percent that it happened this way" (Id. at 424), and conceded it was possible that the State Attorney's office "did type it up" (Id. at 423). He later explained that "this is a surprise to me that you came up with that. It was prepared in his office, but anything is possible" (Id. at 428-29).

Judge Kaplan acknowledged that Ralph Ray "supplied me with some of the geographical descriptions that were in evidence which I needed. In other words, the [site] of the killing and where the victims were stopped by Mr. Lewis. I couldn't recall where they were but I know I must have asked Mr. Ray to provide me with that information and how it was provided, I don't know" (Id.). The conversation with Ray occurred "off the record" and Richard Kirsch was not present (Id. at 423-24).

On cross, Judge Kaplan had no recollection of who typed up the sentencing order and had no independent recollection whether he asked the State to prepare the order (Id. at 431). Although he said he would "never do that," he acknowledged that "I need them to figure out what findings were necessary in this case or any case" (Id. at 432). Nevertheless, he testified that he conducted an independent weighing of the aggravators and mitigators (Id).

Judge Kaplan "sometimes" had parties draft orders for him, and could not recall that happening in Mr. Lewis' case "until I was, it was pointed out to me that your recitation in your pleadings, that there was the same font from their office" (Id. at 424). He did

not know why there would be an unsigned version of the sentencing order in the State Attorney's files (Id. at 425).

Ray did not recall having a conversation with Judge Kaplan about the sentencing order (PCR XII 620), although the trial transcript reflected "that possibly I had a discussion with Judge Kaplan" (Id. at 621). Ray was shown Defense Exhibit 20, which was the unsigned sentencing order located in the State's files, and Ray testified that the document did not have a signature or a date on it (Id. at 622). Ray did not know whether Judge Kaplan had him draft orders in Mr. Lewis' case (Id. at 623). On cross, Ray testified that it would be "highly unethical" to discuss with a judge anything about sentencing (Id. at 631). He had no explanation for how the unsigned sentencing order was in his file (Id. at 632).

The law is and was clear that *ex parte* contact between a court and a party is unlawful. The law is and was also clear that it was improper for a trial court in a capital case to delegate to the State the responsibility for drafting any portion of a sentencing order. State v. Riechmann, 25 Fla. L. Weekly S163 (Fla. 2000); Nibert v. State, 508 So. 2d 1 (Fla. 1987); Patterson v. State, 513 So. 2d 1257 (Fla. 1987). It is clear that there was an off-the-record communication between the judge and prosecutor. Accepting Judge Kaplan's acknowledgement of an *ex parte* communication as credible, the record establishes that trial counsel was put on notice of the *ex parte* contact but did nothing. To the extent that the State has argued that Kirsch was on notice, Mr. Lewis received

ineffective assistance. A motion to disqualify should have been filed, would have had to be granted, and a new jury sentencing conducted presided over by a different judge. Corbett v. State, 602 So. 2d 1240 (Fla. 1992). Should the resentencing be reversed, Mr. Lewis is entitled to relief on this claim.

ARGUMENT V -- PUBLIC RECORDS SHOULD BE DISCLOSED

Mr. Lewis requested that numerous documents that the lower court was not disclosing be sealed for appellate review (PCR VIII at 36).[59] These documents should have been disclosed. The trial court ordered the withholding of documents tendered by the Broward State Attorney's Office because the documents were either not public record or were exempt under Chapter 119 (PCR I at 86-87). For example, the lower court did not disclose a "stack of prosecutor's notes" (Id. at 87). Mr. Lewis submits that these notes should be disclosed, as "notes" are not automatically subject to being withheld simply because they are called "notes." Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc., 379 So. 2d 633 (Fla. 1980). If the "notes" could constitute Brady material, they must be disclosed. Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993). Mr. Lewis requests that the Court release the documents and permit Mr. Lewis to amend his Rule 3.850 motion.

ARGUMENT VI -- FAILURE TO OBJECT TO CONSTITUTIONAL ERROR

A. HAC AGGRAVATOR. The jury was given the bare-bones instruction

[59]The index to the record on appeal does not indicate that any of the sealed records were transmitted. Mr. Lewis will file a motion to direct the transmittal of these documents to the Court.

on the HAC aggravator (R.3192); this instruction violates the Eighth Amendment. Espinosa v. Florida, 505 U.S. 1079 (1992); Godfrey v. Georgia, 446 U.S. 420 (1980); James v. State, 615 So. 2d 668 (1993); State v. Breedlove, 655 So. 2d 74 (1995). To the extent trial counsel failed to object, Mr. Lewis was denied effective assistance of counsel. The failure to apply the Espinosa ruling to Mr. Lewis violates due process. Fiore v. White, 2001 WL 15674 (2001).

B. PRIOR VIOLENT FELONY AGGRAVATOR. The jury was given an unconstitutionally overbroad instruction regarding the "previous conviction of a violent felony" aggravating circumstance (R.3191-92). Because this instruction fails to define the elements of the aggravating factor which the jury must find beyond a reasonable doubt, it violates the Eighth and Fourteenth Amendments. Espinosa; Godfrey. To the extent trial counsel failed to object, Mr. Lewis was denied effective assistance of counsel.

C. 'AUTOMATIC' AGGRAVATOR. Mr. Lewis was convicted of 1 count of first degree murder, with kidnapping being the underlying felony. The jury was instructed on the "felony murder" aggravator (R.3192), and the trial court found the aggravator (R.3563). The jury's deliberation was tainted by the instruction on this aggravator, which constitutes an "automatic aggravator." The use of the underlying felony as an aggravating factor rendered the aggravator "illusory" in violation of the Eighth Amendment. Stringer v. Black, 503 U.S. 222 (1992). The prosecutor, in his closing argument, even told the jury that this the aggravating circumstance

must be automatically applied (R.3176). To the extent trial counsel failed know the law and object, Mr. Lewis was denied effective assistance of counsel.

D. CALDWELL ERROR. The jury was instructed by the court and the prosecutor that its role was merely "advisory" (R. 586-87, 665-66, 3191, 3194), in violation of the Eighth and Fourteenth Amendments. Caldwell v. Mississippi, 472 U.S. 320 (1985). To the extent trial counsel failed know the law and object, Mr. Lewis was denied effective assistance of counsel.

E. EDDINGS ERROR. Uncontradicted evidence was presented that Mr.Lewis was under the influence of emotional distress brought on by a turbulent relationship with his girlfriend (R.2251, 53); substantial alcohol impairment (R. 1411, 1421, 1426, 1445, 1586, 1589, 1691-93); and that he was in his early 20s and gainfully employed. The court refused counsel's request to instruct the jury on the age mitigator because he "shouldn't be given any benefit because he's 27 years old. Maybe if he was 16 or 13 or 80, you know, that might be different" (R.3116-17). Mr. Lewis was 25, not 27, at the time of the crime. Refusal to instruct the jury on age or to consider this as mitigation was error. Peek v. State, 395 So. 2d 492, 498 (Fla. 1981); Hitchcock v. Dugger, 481 U.S. 393 (1987). The trial court's failure to consider and find the mitigation presented by Mr. Lewis violated Eddings v. Oklahoma, 455 U.S. 104 (1982). To the extent trial counsel failed know the law and object, Mr. Lewis was denied effective assistance of counsel.

CONCLUSION

A new trial is warranted, and the order granting a resentencing should be affirmed. If lower court's order is reversed and Mr. Lewis' death sentence is reinstated, this Court must remand for an evidentiary hearing on Argument III, as well as the other allegations set forth in this Brief.

I HEREBY CERTIFY that a true copy of the foregoing Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on March 2, 2001.

TODD G. SCHER
Florida Bar No. 0899641
Litigation Director
101 N.E. 3d Avenue
Suite 400
Ft. Lauderdale, FL 33301
(954) 713-1284
Attorney for Mr. Lewis

Copies furnished to:

Leslie Campbell
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, FL 33401-2299