IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,890

**STATE OF FLORIDA,**

Appellant,

vs.

**LAWRENCE FRANCIS LEWIS,**

Appellee.

**********
ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA, (Criminal Division)
**********

# INITIAL BRIEF OF APPELLANT

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CASE NO. 96,890

STATE OF FLORIDA v. LAWRENCE LEWIS

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for the State of Florida, Appellee herein, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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## PRELIMINARY STATEMENT

Appellant, State of Florida, the prosecution below will be referred to as the "State". Appellee, Lawrence Francis Lewis, was the defendant at trial and will be referred to as the "Defendant" or "Lewis". Reference to the various records will be as follows:

Original trial record - "TR [vol.] [pages]"

Postconviction record - "PCR [vol.] [pages]"

Supplemental postconviction record - "SPCR [vol.] [pages]"

## STATEMENT OF THE CASE AND FACTS

In June 1987, Lewis was indicted for aggravated battery, burglary of a conveyance, aggravated assault, robbery, kidnaping, and first-degree murder (TR 3259-60). Following a mistrial, trial commenced July 18, 1988 the jury convicted Lewis of all counts (TR 3043-44). On direct appeal, this Court found:

> At about 10 p.m. on May 11, 1987, the witness Mayberry was a passenger in a truck being driven by the victim, Gordon, who pulled off the highway because he believed that a tire had been thrown in front of his truck. As Gordon approached a jeep parked beside the highway, a man Mayberry later identified as appellant attacked him with a pipe. Gordon ran toward his truck, chased by appellant. As Gordon climbed into the rear of the truck, appellant got in beside Mayberry, who was now driving, and ordered him to stop or be killed. Mayberry refused, jumped out of the truck, and hid for two or three hours beside the highway, during which time he heard Gordon's truck go by several times. He never saw Gordon alive again.
>
> Appellant appeared briefly at the home of witness Markum at approximately 11 p.m. on May

> 11, driving a truck she had never seen before, and reported that his jeep was disabled on the road. Markum testified that there was an injured man on the floor of the truck who was asking for water and said he was in pain. Appellant returned to Markum's between midnight and 2 a.m. on May 12. Markum overheard appellant tell her friend Ballard that appellant had left some guy on U.S. 27 and put the truck in a canal. Witness Hedden, after 12:30 a.m. on May 12, saw appellant driving a truck later identified as Gordon's, and saw a man on the floor who had a broken arm. Witness Rivera testified that when she, Ballard, and appellant went to retrieve appellant's jeep in the early morning hours of May 12, appellant told her he had killed someone.
>
> On May 12, Gordon's truck was pulled from a canal on U.S. 27. On May 13, Gordon's body was found in the tall grass in the median of U.S. 27, across the road from where his truck had been found. The medical examiner testified the victim had five lacerations to the head, injuries to his left shoulder, a compound fracture to his left forearm, and various defensive wounds. The examiner opined that Gordon was alive when the wounds were inflicted and he died from blunt head trauma.

Lewis v. State, 572 So. 2d 908, 910 (Fla. 1990).

During the penalty phase, the judge inquired whether there would be evidence. After conferring with Lewis, defense counsel, Richard Kirsch ("Kirsch"), indicated nothing would be presented. Inquiring of Lewis as to whether he understood his right to call witnesses such as mental health experts or relatives, Lewis told the judge he understood, but did not want evidence presented (TR 3152-58). The State introduced certified copies of prior convictions, and the parties rested (TR 3167-68).

In closing, Kirsch argued Lewis' drinking was mitigation as it related to his ability to appreciate the criminality of his conduct and to conform it to the law (TR 3187-88). The instructions included both mental mitigators, the victim participated/consented to the act mitigator, and the catchall instruction (TR 3190-96). Ultimately, the jury recommended death by a ten to two vote, and, after making an independent assessment, the judge imposed the death penalty, finding nothing in mitigation, but finding three aggravators: prior violent felony convictions, felony murder, and heinous, atrocious, or cruel ("HAC") (TR 3198, 3216-33, 3562-70). The convictions and sentences were affirmed Lewis, 572 So. 2d at 912 and certiorari petition to the United States Supreme Court was denied. Lewis v. Florida, 501 U.S. 1259 (1991).

On September 11, 1992, Lewis sought relief pursuant to Florida Rule of Criminal Procedure 3.850 and followed with amendments and supplements. The State responded to the pleadings. In June 1993, Judge Kaplan recused himself and Lewis filed a second supplement to his 3.850 motion, to which the State responded. Following this, Lewis sought to depose Judge Kaplan, and the State appealed the denial of its motion to quash the subpoena. This Court ruled capital postconviction defendants could engage in limited discovery upon a showing of good cause, and remanded the case for further proceedings. State v. Lewis, 656 So. 2d 1248 (Fla. 1994). From August 1995 to November 1996, Lewis sought public records from

various agencies and deposed Judge Kaplan. Subsequently, Lewis filed an amended rule 3.850 motion and the State responded (PCR 426-585). A Huff[1] hearing was held and the trial court ordered an evidentiary hearing on the claims related to a Brady[2] violation, ineffective assistance of counsel during the penalty phase, and ineffective assistance of counsel for failure to obtain a competent mental heath evaluation (PCR III 237-337; V 652-56; VIII 145-72).

At the evidentiary hearing, the trial court heard Kirsch, along with attorney, Oliveann Lancy ("Lancy"), who both represented Lewis during trial (PCR IX 203-04, 290). Kirsch testified that James Mayberry ("Mayberry"), a victim who identified Lewis at trial, had been convicted of numerous crimes, had charges pending from Dade and Broward counties, and, at trial, had admitted to his extensive criminal history and drug addiction (PCR IX 206-07, 252-57). The discovery received by Kirsch included letters from the prosecutor disclosing Mayberry's pending cases and notifying him of their dispositions (PCR IX 209-15, 230). Kirsch recalled the State's file was open to him, but that photographs, taken days before trial, had not been disclosed prompting their exclusion as a discovery violation (PCR IX 211-13).

While Kirsch and Lancy contacted and attempted to introduce Doctors Frick and Blinder during the guilt phase to establish the

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[1] Huff v. State, 622 So. 2d 982 (Fla. 1993).

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

effects of alcohol/drugs on identification and memory, the judge refused to permit this testimony (PCR IX 271, 274, 285-87, 294). Also, Kirsch complained when it was learned Mayberry and Lewis had been in the same holding cell and he motioned to have Mayberry's identification of Lewis suppressed, but such was denied (PCR IV 234-35). The defense also tried to have admitted Mayberry's polygraph results, however, the State's objection was sustained (PCR IX 236, 272). Additionally, Kirsch never thought the prosecutor had prepared Lewis' sentencing order (PCR IX 270-71).

With respect to the ineffectiveness of penalty phase counsel claim, the judge heard that Kirsh commenced his investigation for mitigation on August 5, 1988 when the guilty verdicts were returned (PCR IX 237). The appointment of a mental heath expert, Dr. Klass, to assist with formulating mitigating evidence for the September 1, 1988 penalty phase was discussed with Lewis on August 14, 1988 and authorized on August 22, 1988, (PCR IX 239-40, 281-82, 308).

During the approximate month between conviction and penalty phase, Kirsh, Lancy, and the defense investigator had many contacts with Lewis and his mother, Bonnie Miller ("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 (PCR IX 241, 258-59, 282-83, 295). Lancy had contacted Mark Lewis, Defendant's brother, before trial (PCR IX 295). Until the verdict was returned, Miller was cooperative,

however, upon conviction, she would not talk to counsel or meet Dr. Klass; she refused to cooperate, testify, or attend the penalty phase. (PCR IX 241-44, 259-63, 262, 275). In an attempt to convince Miller to help, Kirsch sent two letters and spent approximately two-and-a-half hours on the telephone with her (PCR IX 261-63). It was Kirsch's recollection that before the conviction, he had obtained Lewis' family history to the extent he knew the father, Lawrence Lewis, Sr. ("Lewis, Sr."), was abusive and a Mafia member (PCR IX 241-42, 275). Kirsch had not obtained the Department of Corrections records and was unable to obtain Lewis' school and hospital records because he could not secure the cooperation of Lewis' family (PCR IX 242-45, 279, 308-09).

Both Lewis and Miller indicated they did not know how to reach Lewis, Sr., but during the period between the verdict and penalty phase, Lewis, Sr. reached Kirsch; although, when asked for his assistance, Lewis, Sr. refused to help or to talk to Dr. Klass (PCR IX 242-44, 263, 274). Instead, Lewis, Sr. told Kirsch he "didn't have anything to offer" because "he was a convicted felon, he couldn't do any good for [Lewis]." (PCR IX 243-44, 274). Getting nowhere with the immediate family, Kirsch did not contact other relatives (PCR IX 270).

Lewis waived his right to testify and made it clear he did not want mitigation shown; he did not want Dr. Klass to testify and "was very much against … bringing in any evidence, anybody to

testify from his family." These decisions were against Kirsch's advice (PCR IX 264-65, 270, 275, 282-83, 306-07). The Defendant knew Dr. Klass was his appointed mental health expert, and even though he met the doctor, Lewis was reluctant to go into any family history or "anything dealing with the actual crime." (PCR IX 245, 264-66, 299). Lancy testified Lewis was "very adamant" about not wanting Dr. Klass to testify (PCR IX 306). When Lancy met with Lewis to discuss using Dr. Klass, Lewis told her he wanted a new trial and the only way for him to get one was to be given the death penalty and not put on any mitigating evidence (PCR IX 266, 299, 307). Both Lancy and Kirsch repeatedly told Lewis it was necessary for mitigation that they put on some testimony, however, Lewis refused even though Kirsch explained the importance of Dr. Klass and that he would be rendering favorable testimony (PCR IX 267). Kirsch did not discuss with Lewis his foster care experience, school records, or IQ because Kirsch was relying upon Dr. Klass to develop this information (PCR IX 283-84).

While admitting he told the trial judge that Lewis did not wish to use Dr. Klass, Kirsch averred he had arranged for Dr. Klass to be in the courthouse waiting to be called, and that if fact, Dr. Klass was there (PCR IX 246, 270). Kirsch recalled Dr. Klass was prepared to testify Lewis had an allergy to alcohol which had a strange effect on him and made it impossible to form the intent to kill, and may have caused Lewis to act inappropriately even if a

very small amount of alcohol was consumed. This coincided with Lewis' theory of the murder (PCR IX 267-68). Kirsch explained (1) he did not know how to get any information from Miller because she would not talk to him, (2) Lewis, Sr. was "no help", and (3) Lewis was of the opinion that offering mitigation was admitting guilt and he did not want any testimony which might implicate him (PCR IV 276). Even though Kirsch tried to convince Lewis to present mitigation, he refused and Kirsch did not want to go against his client's wishes, however, he did make an argument for a life sentence (PCR IX 276, 287).

At the evidentiary hearing, Dr. Klass testified Lewis was "uncooperative, unreasonable, suspicious, and irrational or perhaps mistrusting." Before visiting with Lewis on August 24, 1988, Dr. Klass believed he had some background information and also stated "it was only with great patience and time that [he] was able to get some initial information" which was limited to Lewis' characterization of his childhood as rough, admission of previous hospitalization, psychiatric evaluations, and a self-report of poor school results and extensive use of alcohol, marijuana, and LSD. Dr. Klass learned Lewis was raised by a derelict mother who was an alcoholic prostitute (PCR IX 313-16, 434-39). According to Dr. Klass, on the eve of the penalty phase, Lewis became more cooperative; Dr. Klass met with Kirsch and Lewis for four hours discussing Lewis' possible idiosyncratic reaction to alcohol and

substance/alcohol abuse (PCR IX 315-18, 434-35, 440-42). It was his belief follow-up tests could have been done (PCR IX 316-17).

For his trial testimony, Dr. Klass was prepared to opine about Lewis' "idiosyncratic reaction to alcohol" and that there would have been brain damage from a skull fracture Lewis received when he was two years old. Subsequently provided school and hospital records would have been used to corroborate the self-reported history. Dr. Klass admitted he did not have time to get such reports as Lewis began cooperating only the day before the penalty phase began (PCR IX 319-21, 444-49).

According to Dr. Klass, the present records contain mitigation of (1) drug/alcohol abuse, (2) an alcoholic, promiscuous, and disturbed mother, (3) exposure to violence/neglect, (4) abandonment to foster care, (5) skull fracture, and (6) idiosyncratic reaction to alcohol (PCR IX 324-28). Although unconfirmed, Dr. Klass thought there was evidence Lewis did not appreciate the consequences of his actions, and had a diminished capacity to contain his impulses, however, he refused to diagnose organic brain damage (PCR IX 330-31; XI 541). Dr. Klass acknowledged Dr. Chand characterized Lewis' fall, at the age of two, as resulting in a bruise over the right eye requiring hospitalization, however, the EEG, radiological exam, and Dr. Chand's diagnosis of Lewis at the age of 16 showed no neurological deficit or organic reason for Lewis' reported aggressive, violent behavior (PCR XI 548-52).

Even though Lewis self-reported a "rough childhood" such was not sufficient for Dr. Klass to opine Lewis had an abusive childhood; he had wanted confirmation and, without such, would not have testified Lewis' family history created a mitigating circumstance (PCR XI 562-65). He had sufficient information on Lewis' substance and alcohol abuse to make a diagnosis within a reasonable degree of medical certainty (PCR XI 565). Even though he did not have as much information as he would have liked, Dr. Klass would have testified during the penalty phase regarding Lewis' family background and substance/alcohol abuse (PCR XI 572).

Although Dr. Sultan had not evaluated Lewis at the time of the crime, she opined her exam and review of records resulted in the conclusion Lewis had "multiple psychological and organic disabilities" and was a product of an environment in which he was severely psychologically and physically damaged (PCR X 339-51). In forming her opinion, Dr. Sultan relied, in part, upon information generated after the trial and unavailable to either defense counsel or Dr. Klass (PCR X 396, 400-02). It was Dr. Sultan's opinion the records showed mitigation of (1) child abuse, (2) physical injuries which had a psychological impact, (3) impulse control problems, (4) alcoholism and (5) mild to moderate organic brain damage, (6) Lewis was under the influence of extreme mental or emotional disturbance during the crime, and (7) he was unable to conform his conduct to the requirements of law (PCR X 366-71).

Dr. Sultan described Lewis as cooperative with the ability to decide not to pursue mitigation (PCR X 378, 378). The records revealed Lewis read above the twelfth grade level and had an average IQ of 104 (PCR X 397). The result of the Clemency Board Examination showed Lewis had a "normal" profile; the only elevated scale, although it did not meet the level of psychopathy, was the psychopathic deviance scale which usually is evident in those with addictions or antisocial behavior (PCR X 398-99).

Melissa Barger ("Barger"), Lewis' cousin, characterized her extended family as "extremely dysfunctional." It was her observation the Lewis boys were always afraid of their father, however, she never saw Lewis, Sr. hit either of his sons, nor could she recall Miller ever being hurtful or neglectful of the boys. It was Barger's testimony Lewis, Sr. had an alcohol problem and she had witnessed fist fights between Lewis, Sr., his wife, and other in-laws. Although she would have been willing to testify, Kirsh did not contact her, but then again, because her family was good at keeping secrets, she had not known Lewis was on trial (PCR XI 455-62, 465-67, 470-71).

Mary Baker ("Baker"), formerly known as Sister Essellman while with Catholic Charities, was the case worker monitoring Lewis' foster care which started when he was five years old (PCR XI 492-96). During the ten months foster care lasted, Lewis had limited contact with his father and no contact with his mother (PCR XI 496-

99). Baker's knowledge of Miller came from reports by Lewis, Sr. (PCR XI 506-07). Following the Catholic Charities involvement, Lewis was taken in by his uncle (PCR XI 502). At the time of trial, Baker would have testified if called (PCR XI 503-04).

State Attorney Investigator, Daryl[3] Gardner ("Gardner"), explained that when talking to Mayberry about the case, he noticed some "pretty severe sores" on Mayberry's legs and cautioned him to seek medical help. Concerned for this important witness, and knowing Mayberry did not have insurance, Gardner called a hospital to determine if they would treat indigents (PCR XI 475-82). After finding the hospital could help, Gardner conveyed this information to Mayberry's sister; at no time did Gardner pay for or give Mayberry money for his treatment. On occasion, Gardner discussed the case with the prosecutor and prepared a memorandum relaying that the Dade Public Defender assigned to Mayberry was seeking a sentencing deal. According to Gardner, he was pleased Mayberry was incarcerated, because it was easier for him to reach Mayberry when necessary(PCR XI 479-85, 490, 513-14, 521-24).

In 1988, William Altfield prosecuted Mayberry's Dade County case. It was his recollection that the Broward prosecutor considered Mayberry a key witness, but did not need for Mayberry to be given any "breaks." Mayberry pled open to the court and, over the State's objection, received a one cell downward departure based

[3] Mr. Gardner's name is Terrill.

upon the court's acknowledgment of Mayberry's substance abuse problem and cooperation in the murder case. Additionally, the Dade County file did not indicate restitution had been ordered even though there were $2,000 in damages (PCR XI 525-28, 531, 536).

Ralph Ray ("Ray"), Assistant State Attorney, prosecuted Lewis and recalled that Mayberry had been arrested on Dade County charges and was in custody there during this case (PCR XI 601-03). Mayberry was essential because he was the sole eye witness to a portion of the instant crime (PCR XI 603). While he did not recall talking to the Dade Assistant State Attorney or the disposition of Mayberry's criminal charges, Ray remembered disclosing two criminal histories on Mayberry, which included both the Dade and Broward County pending charges (PCR XI 605-06, 609-10, 615-16). Ray corresponded with Mayberry's defense counsel in order to obtain his authorization to discuss the Lewis case with Mayberry. At no time did Ray pay for Mayberry's medical treatment or give him money (PCR XI 612-14, 624-25). Ray neither negotiated nor requested leniency for Mayberry's pending charges (PCR XI 627-29). In fact, Ray distanced himself from Mayberry's cases; Mayberry received the statutory maximum for his Broward conviction. Ray did not recall an ex parte conversation with the trial judge regarding sentencing, and made it clear he would not engage in unethical behavior (PCR XI 621-22, 629-31, 637). While he received geographical information from the State without defense counsel being present, Judge Kaplan

averred he weighed the aggravators and mitigators and prepared the sentencing order independently (PCR X 422-24, 432).

Acknowledging Strickland v. Washington, 466 U.S. 668 (1984), requires proof of counsel's deficient performance and prejudice, the trial court denied postconviction relief finding:

> Defendant's trial counsel, Richard Kirsch, testified that he advised the Defendant that it was necessary for mitigation purposes to present testimony and the Defendant refused. Mr. Kirsch testified that he explained to the Defendant the importance of Dr. Klass' testimony as Dr. Klass was going to give favorable testimony. Mr. Kirsch testified that the Defendant specifically stated that he (the Defendant did not want any testimony which would implicate him in the crime and that he (the Defendant) wanted to maintain his innocence. Mr. Kirsch testified that he didn't think he could go against his client's wishes. Mr. Kirsch explained to Defendant that a difficult childhood could be mitigating and Defendant remained adamant in his insistence that no mitigation evidence be presented.
>
> This testimony of Mr. Kirsch was consistent with the testimony of Olive Ann Lancy, Mr. Kirsch's associate at the time. Ms. Lancy testified that she was present when the Defendant was advised as to mitigation evidence and that the Defendant was insistent that no such evidence was to be presented. Ms. Lancy does not recall any particular reason that the Defendant was against bringing in any evidence, only that he did not want anyone testifying from his family.
>
> Furthermore, it is clear, that the Defendant's mother was uncooperative once the guilty verdict was rendered and refused to speak with Dr. Klass, the court appointed mental health expert, or Mr. Kirsch regarding Defendant's background. Mr. Kirsch had no

> reason to believe the Defendant's mother, Bonnie Miller, would have given any information regarding records or background during the guilt phase, in anticipation of the penalty phase, if Mr. Kirsch had made the inquiry. Mr. Kirsch knew that Defendant's father was abusive from conversation with Defendant's mother during the guilt phase of the trial. The whereabouts of Defendant's father were unknown and it was not until after the guilty verdict that Mr. Kirsch was contacted by the Defendant's father. At this time, Mr. Kirsch inquired as to his participation in the penalty phase and the Defendant's father stated that he had nothing to add as he was a convicted felon himself. This was all occurring while the Defendant, himself, refused to cooperate with Dr. Klass. Furthermore, the Defendant was reluctant to go into his background and instructed Mr. Kirsch that no family members were to be contacted.

(PCR 1063-64)(footnote omitted). Noting the deficiency component need not be reached when prejudice is not proven, the court opined:

> Furthermore, the trial court in the instant case did properly instruct the jury as to the statutory mitigating circumstances that could be considered and "any other aspect of the defendant's character or record and any other circumstances of the offense." (Transcript of Penalty Phase, p. 3139). See generally, Card v. Dugger, 512 So. 2d 829 (Fla. 1989)(Habeas petitioner convicted of first-degree murder and sentenced to death was not considered, where state and defense counsel told jury during penalty phase that there could be unlimited consideration of any nonstatutory mitigating circumstances, and court instructed jury that it could consider as mitigating circumstances any aspect of defendant's character or record or any other circumstances of defense). In the case under consideration here, trial counsel, while not having had the benefit of presenting evidence in mitigation did, in fact, urge the jury to consider the Defendant's age, his mentality,

the intoxication factor surrounding the circumstances of the offense and the provocation by Mr. Mayberry toward the victim, Mr. Gordon, at the time of the offense; all of which constitute non-statutory mitigating circumstances. The jury recommended a sentence of death by a vote of ten (10) and it is unlikely that any additional evidence of mitigation would have resulted in a different recommendation.

A review of the Sentencing Order entered on September 27, 1988 also reveals that the trial judge did consider all statutory mitigating circumstances and "all other aspects of the Defendant's character, record and all other circumstances of the offense brought to the attention of the Court" (Sentencing Order, page 7). In finding that no statutory mitigators applied, the trial court did specifically mention the evidence of intoxication of the Defendant which was brought out during the guilt phase and during defense counsel's closing argument at the penalty phase. Specifically, the Court stated

> While there was some evidence of the effect that the Defendant may have consumed one or more cans of beer prior to ten (10) o'clock P.M. on May 11, 1988, the credible evidence that was otherwise introduced indicated the Defendant was able to conform his conduct to the requirement of the law if he had so desired. (Sentencing Order, page 6)

Recognizing that the crux of Defendant's claim is the lack of mitigating evidence presented and, as a result, not considered by the trial court, this Court nevertheless finds that any evidence presented in support of non-statutory mitigators would not have been sufficient to counter the finding of three (3) aggravators by the trial court in the weighing process. Thus, the result would remain the same.

> As such, this Court finds that the Defendant has failed to satisfy the second prong of the Strickland test as the Defendant has not demonstrated that any deficiency of trial counsel affected the fairness and reliability of the proceeding that confidence in the outcome in undermined. Strickland v. Washington, supra. Accordingly, the Defendant's claim for relief on this ground is denied.

(PCR 1066-67).

Almost ten months later, in granting Defendant's motion for rehearing, the trial court reversed its previous order stating:

> … this Court agrees with the Defendant that the Deaton [v. Dugger, 635 So. 2d 4 (Fla. 1993)] opinion correctly states the law that applies to the instant case. At the time of trial, the law regarding an attorney's preparation time in penalty phase proceedings was in a state of flux. In light of the Deaton opinion and its progeny, a defendant's penalty phase attorney clearly must have adequate time to prepare for this proceeding to protect the Defendant's constitutional rights. Equally clear is the fact 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.
>
> During the evidentiary hearings in this case, testimony revealed that Lewis's defense counsel did not have adequate time to fully and properly prepare for Lewis' penalty phase. Therefore, in accordance with Deaton, this Court finds it necessary to vacate the Defendant's death sentence and to grant the Motion for Rehearing based upon the ineffective assistance of penalty phase counsel.

(PCR 1146-47)(footnote omitted). This appeal followed.

## SUMMARY OF THE ARGUMENT

In vacating Lewis' death sentence, the trial court erred in three respects; not only were two errors of law committed, but the factual basis for the trial judge's decision on rehearing has no record support. As such, upon this Court's de novo review of the lower tribunal's legal reasoning and deferential review of the factual findings supported by substantial, competent evidence, this Court should determine the trial court committed reversible error.

A. After making factual findings and forming the legal conclusion Lewis suffered no prejudice from the failure to present mitigating evidence, the trial court, on rehearing, reversed its decision, merely citing to Deaton v. Dugger, 635 So. 2d 4 (Fla. 1993). A finding of prejudice is required under Strickland. It was an error of law to vacate the death sentence because the order on rehearing is devoid of legal reasoning or finding of prejudice.

B. There is no factual support for the trial court's conclusion that defense counsel lacked sufficient time to prepare; there was no testimony defense counsel needed additional time or believed more time would have led to mitigating evidence especially where all his efforts were thwarted by Lewis and his family. Further, the apparent conclusion, that nearly thirty days to investigate is per se insufficient time, is an error of law. The trial court's decision to vacate the Defendant's death sentence is without foundation of either record facts or existing case law.

C. As a matter of law, the trial court mis-read and misapplied Deaton. Such case does not mandate a finding of ineffectiveness when defense counsel attempts a meaningful investigation, but is obstructed through no fault of his own. Clearly, counsel may not be labeled ineffective when the Defendant and his family refused to cooperate with or disclose information to either his counsel or psychiatrist which might have led to mitigation. This is also true in light of the instant fact, defense counsel argued for mitigation and the sentencing court considered such evidence when imposing the death penalty. When applied correctly to these circumstances, the law requires a conclusion that defense counsel rendered effective assistance.

Given these errors of law and fact, this Court should find reversible error, and remand the case with instructions that the death sentence be reinstate.

## ARGUMENT

THE TRIAL COURT ERRED BOTH AS A MATTER OF LAW AND FACT WHEN VACATING DEFENDANT'S DEATH SENTENCE - REVERSAL OF A DEATH PENALTY IS NOT REQUIRED UNDER DEATON V. DUGGER, 635 SO. 2D 4 (FLA. 1993) WHEN IT IS THE AFFIRMATIVE ACTS OF THE DEFENDANT AND HIS FAMILY WHICH PRECLUDED COUNSEL FROM PRESENTING MITIGATING EVIDENCE.

It was reversible error to have vacated Lewis' death sentence. The legal conclusions drawn by the trial court are erroneous as a matter of law as this Court will discover from its de novo review. Similarly, there is no record support for the trial court's determination that defense counsel did not have sufficient time to investigate mitigating evidence, therefore, no deference need be paid to this factual finding. Thus, the resultant decision to vacate the sentence cannot stand. The case must be reversed and remanded for reinstatement of the death penalty.

The standard of review for claims of ineffective assistance of counsel has been set out in Stephens v. State, 748 So. 2d 1028 (Fla. 1999) in which this Court opined:

> The determination of ineffectiveness pursuant to Strickland is a two-pronged analysis: (1) whether counsel's performance was deficient; and (2) whether the defendant was prejudiced thereby. See, e.g., Strickland, 466 U.S. at 694, 104 S. Ct. 2052; Rutherford v. State, 727 So. 2d 216, 219-20 (Fla. 1998). As the Supreme Court explained in Strickland:
>
> > … Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement … both the performance and prejudice

> components of the ineffectiveness inquiry are mixed questions of law and fact.
>
> Id. at 698, 104 S. Ct. 2052 (citations omitted)(emphasis supplied). Thus, under Strickland, both the performance and prejudice prongs are mixed questions of law and fact, with deference to be given only to the lower court's factual findings.

Stephens, 748 So. 2d at 1033 (emphasis in the original). Questions of fact are reviewed to determine whether they are supported by competent, substantial evidence. See, Huff v. State, 25 Fla. L. Weekly S411, 411 (Fla. May 25, 2000) (citing Grossman v. State, 708 So. 2d 79 (Fla. 1997)); State v. Riechmann, 25 Fla. L. Weekly S 163, 165 (Fla. Feb. 24, 2000) (finding ineffectiveness claims subject to plenary review), corrected opinion, 25 Fla. L. Weekly S 242 (Fla. Mar. 22, 2000)(changing spelling of name and numbering of footnotes); Rose v. State, 675 So. 2d 567, 571 (Fla. 1996) (same).

A. The trial court erred as a matter of law by not explaining the finding of ineffectiveness on rehearing when no prejudice was found originally and prejudice was not discussed on rehearing.

The trial 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, therefore, Lewis was not prejudiced by his counsel's performance. This is an error of law as both deficient performance and prejudice must be established by the defense. If there is no prejudice, it matters not how deficient counsel's performance was; no relief is mandated.

Under Strickland, both deficient performance and prejudice must be proven. If counsel acted in a deficient manner, but such did not prejudice his client, no relief is warranted.

> An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.... Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

Strickland, 466 U.S at 691-69. Elaborating on the prejudice prong, the court explained "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. See, Rose, 675 So.2d at 569 n. 4. Applying this standard, this Court has affirmed the denial of relief where additional mitigation was available, but was not presented. See, Asay v. State, 25 Fla. L. Weekly 523 (Fla. June 29, 2000)(affirming denial of relief where counsel conducted reasonable investigation when considered in light of hindrance by defendant's mother); Hill v. Dugger, 556 So. 2d 1385, 1388-89 (Fla. 1990)(affirming denial despite affidavits from family members regarding defendant's background and drug use, from doctor asserting he had insufficient information, and from counsel conceding ineffective representation); Smith v. Dugger, 565 So. 2d 1293, 1295 (Fla.

1990)(affirming denial of claim counsel failed to investigate and present information to mental health expert and to ensure competent evaluation); Swafford v. Dugger, 569 So. 2d 1264 (Fla. 1990)(same); Kight v. Dugger, 574 So. 2d 1066 (Fla. 1990); Roberts v. State, 568 So. 2d 1255, 1260 (Fla. 1990)(same).

In its original order denying postconviction relief, the trial court outlined a litany of instances where Kirsch and Lancy attempted to investigate mitigation, but were impeded by their client and his family. The trial court also examined the mitigation evidence Lewis presented at the hearing, and without passing judgment upon the reasonableness of defense counsel's performance, determined the result of the sentencing proceeding would not have been different even if this mitigation had been put forward. The trial court concluded that no prejudice arose from counsel's performance[4] (PCR 1063-67).

On Lewis' motion for rehearing, citing to Deaton, 635 So. 2d at 4, but without presenting any legal reasoning, for reversing its

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[4] As recognized by the trial court, Kirsch argued in his penalty phase closing, that Lewis' drinking should be considered mitigation as it related to his ability to appreciate the criminality of his conduct and to conform his conduct to the requirements of law (TR 3187-88). The instructions on mitigation included both mental mitigators, that the victim participated or consented to the act, and the catchall instruction (TR 3190-96). After making an independent assessment of the evidence and taking into account the jury's ten to two recommendation for death, the trial court imposed the death penalty (TR 3198, 3216-33, 3562-70). Upon this evidence, the postconviction court concluded Lewis had not shown prejudice (PCR 1069).

prior decision on prejudice, the trial court found the defense did not have enough time to investigate, thus, counsel was ineffective and Lewis' waiver of mitigating evidence was not knowing and voluntary (PCR 1146-47). In the rehearing order, the trial court failed to explain how Lewis is now found to be prejudiced by counsel's actions; in fact, the trial court neither addressed the prejudice prong nor explained what factors were overlooked or misapprehended in its original determination that no prejudice had been shown. Even if counsel did not present all mitigation available, if the mitigation now available would not have resulted in a different sentence, there is no prejudice. Cf. Van Poyck v. State, 694 So. 2d 686, 694-96 (Fla. 1997)(notwithstanding a wish for additional time for investigation, it would not have mattered how much time was granted given the weakness in the mitigation available). Without a showing of both deficient performance and prejudice, Lewis' death sentence should not have been vacated.

Other than now finding Deaton applicable to the instant case, the sum total of the trial court's analysis and conclusions were delineated as follows:

> During the evidentiary hearings in this case, testimony revealed that Lewis's defense counsel did not have adequate time to fully and properly prepare for Lewis' penalty phase. Therefore, in accordance with Deaton, this Court finds it necessary to vacate the Defendant's death sentence and to grant the Motion for Rehearing based upon the ineffective assistance of penalty phase counsel.

(PCR 1146-47). Not only did the trial court misread and misapply[5] Deaton, there was no discussion or finding that defense counsel's actions prejudiced Lewis as required by Strickland and there was no basis for the factual finding that counsel had insufficient time to prepare[6]. The mere reference to Lewis' allegedly involuntary waiver of mitigation does not establish that presently available mitigation would have been sufficient to outweigh the existing aggravation and merit a life sentence. Hence, as a matter of law, the trial court erred in granting relief. This is especially true where the postconviction court had considered all of the alleged mitigation gathered in the approximately eight years since affirmance of the conviction and sentence, and found Lewis "has not demonstrated that the outcome of the proceeding would have been different had the mitigating circumstances been presented for review." (PCR 1067).

B. The trial court's factual finding that defense counsel did not have adequate time to prepare is not supported by the record, thereby rendering the trial court's legal conclusions erroneous.

As recognized by Stephens, 748 So.2d at 1034, a judge's factual findings are accorded deference and will not be disturbed if supported by competent, substantial evidence.

Despite this deference to a trial court's

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[5] See analysis presented in sections "C", below.

[6] See analysis presented in sections "B", below.

> findings of fact, the appellate court's obligation to independently review mixed questions of fact and law of constitutional magnitude is also an extremely important appellate principle.

Id., at 1034. See, Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997)(reasoning standard of review following Rule 3.850 evidentiary hearing is that if factual findings are supported by substantial evidence, appellate court will not substitute its judgment for trial judge's on questions of fact, credibility, or weight). Here, the trial court's finding Kirsch "did not have adequate time to fully and properly prepare for Lewis' penalty phase" is unsupported by competent, substantial evidence; it is clearly erroneous and no deference is owed. The legal conclusion which flowed from this erroneous factual finding is flawed and must be reversed.

During the evidentiary hearing, neither Kirsch nor Lancy testified they did not have sufficient time to investigate and prepare for the penalty phase. It is clear that no reasonable amount of time before the penalty phase would have altered Lewis' decision not to cooperate and present mitigation especially in light of his professed agenda of wanting a new trial by being sentenced to death without putting on any mitigating evidence (PCR IX 266, 299, 307). Moreover, Kirsch averred Dr. Klass never told him additional time was required to do a more thorough examination[7]

[7] While Dr. Klass testified he recalled telling counsel more information was required (PCR XI 564-65), this does not render Kirsch's performance deficient. As addressed in sections

(PCR IX 247). Dr. Klass characterized Lewis as "uncooperative, unreasonable, suspicious and irrational or perhaps mistrusting" (PCR IX 313; X 437). Furthermore, Dr. Klass was prepared to render an opinion regarding the idiosyncratic effects of alcohol on Lewis, his history of a skull fracture, and other information he had in his file relating to Lewis' family in order to provide evidence of mitigation (PCR IX 313-16, 319; X438-40, 444, 449). While 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 make a diagnosis within a reasonable degree of medical certainty on each factor, there is no evidence Lewis would have facilitated or agreed to the collection of his records or permitted the presentation of the facts they contained (PCR IX 316-17, 320-21, 330-31; X 440; XI 541, 562-63, 565). The mere fact these tests and records were not ordered does not render counsel's performance ineffective. Given this evidence, it is clear the trial court's factual finding of insufficient time to investigate has no record support. Hence, no deference need be accorded the trial court's findings of fact on this point.

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A and B, the actions of Lewis and his family precluded the gathering of mitigating evidence. Lewis has not explained how Kirsch or Dr. Klass could have obtained school and hospital records without his authorization. Similarly, Lewis did not enlighten the lower tribunal how Kirsch could have located other family members if their names and residences were not disclosed. It cannot be stressed enough; it was Lewis' actions which caused diminution of Kirsch's investigation. Without question, Kirsch tried to investigate, but was thwarted by Lewis at each turn.

Instead, this Court must decide the mixed question of law and fact to determine the validity of the trial court's conclusion related to the claim of ineffective assistance of penalty phase counsel. In doing so, the questions remain the same, whether counsel's performance was deficient and whether the alleged errors prejudiced Lewis. Because Lewis created roadblocks to a full investigation of mitigation and it is evident that no reasonable additional amount of time would have been sufficient to dissuade him from his obstructionist behavior, Kirsch cannot be deemed deficient. Similarly, if all the information made available some ten years later is insufficient to undermine confidence in the sentencing results, then it matters not that mitigation was not developed at trial. It is obvious, Kirsch investigated mitigation and obtained the services of a mental health expert, yet Lewis would not comply with his requests or follow his advice. Furthermore, given the fact there were three aggravators, prior violent felony, felony murder, and HAC, it is not likely the mitigation presented now would have outweighed such aggravation. Breedlove v. State, 692 So. 2d 874, 877-78 (Fla. 1997)(concluding aggravators of prior violent felony, felony murder, and HAC far outweighed childhood beatings and alcohol abuse mitigation offered in postconviction hearing). As such, Lewis is not entitled to relief and the trial court's order must be reversed.

C. The trial court misread and misapplied Deaton; defense counsel attempted a meaningful investigation, but was thwarted by the Defendant and his family.

Deaton, does not support the decision to vacate Lewis' death sentence or that his waiver of mitigation was not knowing and intelligent. When counsel's investigation is obstructed by the overt actions of the Defendant and his family, it cannot be said that counsel's actions in halting his investigation were unreasonable and Deaton cannot be read to mandate that Lewis' waiver was not knowing and voluntary as a matter of law. Moreover, Deaton does not establish a per se rule that a month long period between conviction and commencement of the penalty phase is insufficient time in which to investigate mitigation. It is incongruous that by virtue of having nearly a month to prepare for the penalty phase, automatically defense counsel renders ineffective assistance. Such a per se rule undermines completely long-standing legal reasoning that a counsel's performance is given deference and ineffectiveness will not be found, unless the decisions were both deficient and prejudicial. The trial court erred as a matter of law by finding implicitly that a month is not sufficient time to investigate mitigation, and therefore, defense counsel could not advise his client properly, thereby, making Lewis' waiver involuntary.

In Strickland, the United States Supreme Court cautioned:

> Judicial scrutiny of counsel's

> performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 689-90. See also Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995) (emphasis in original) (reasoning "[t]he standard is not how present counsel would have proceeded, in hindsight, but rather whether there was both a deficient performance and a reasonable probability of a different result."). Thus, defense counsel's investigation and preparation for the penalty phase must be considered in light of Lewis' actions, or more appropriately obstructions of Kirsch's representation.

During the evidentiary hearing in Deaton, defense counsel testified (1) he did not prepare for the penalty phase prior to the verdict, (2) he had only a day or two to prepare and spent "[v]ery little time" doing so, (3) he did not discuss the need to obtain records for mitigation nor attempt to locate such records, (4) he

offered no basis for not trying to get the records, (5) he did "nothing" to present witnesses and "wondered" where Deaton's mother was, and (6) he never discussed the types of mitigation which could be introduced other than Deaton's testimony regarding his abuse as a child. Deaton, 635 So. 2d at 7-9.

Conversely, here, although Kirsch had not commenced preparation for the penalty phase until the verdict was entered, he had almost a month to investigate, unlike Deaton's counsel, who had a few days only (PCR IX 237-40, 258-59, 281-82, 308). Moreover, Kirsch had a co-counsel and private investigator assisting him and unlike in Deaton, Kirsch and Lancy had significant contact with Lewis' family (PCR IX 203-04, 241, 258-59, 282-83, 290, 295). However, neither Lewis nor his family would cooperate with Kirsch (PCR IX 241-44, 259-63, 274-75, 279, 308-09). Because of this lack of cooperation, Kirsch did not contact other family members and was unable to obtain medical and school records, (PCR IX 242-43, 270, 279, 308-09). Deaton's attorney confessed to not having tried to get medical and school records and to having failed to discuss with Deaton the various types of mitigation which could be presented Deaton, 635 So.2d at 7-9. Conversely, Lewis' counsel (1) explained mitigation, (2) obtained the services of a mental health expert, (3) facilitated the psychological examination of Lewis, (4) attempted to enable the doctor to meet with Lewis' mother and father, (5) ensured Dr. Klass was available to testify in the

penalty phase, and (6) tried to convince family members to testify on Lewis' behalf. This was all to no avail. Against counsel's advice, Lewis refused to cooperate with Dr. Klass, Lewis' parents refused to meet the doctor or to testify, and Lewis refused to permit the presentation of his family members or Dr. Klass (PCR IX 239-44, 246, 258-65, 270, 274-75, 281-83, 295, 308, 313, 437). Even though Kirsch and Lancy explained the necessity of presenting mitigation and that Dr. Klass would be testifying favorably, Lewis refused to agree to such presentation (PCR IX 267). As the trial court found in its original order, counsel advised Lewis about mitigation and the necessity for evidence, nonetheless, both Lewis and his immediate family refused to cooperate with either Kirsch or Dr. Klass, who was prepared to give favorable testimony (PCR VIII 1063-64). Given the trial court's initial findings of fact and the conclusion of law that Lewis was not prejudiced, it is incomprehensible that the trial court could find the facts of Deaton so closely mirrored the instant case as to require reversal.

Moreover, even with his options severely curtailed, Kirsch did much more than Deaton's attorney. Although thwarted by Lewis at each turn, Kirsch attempted to investigate and present mitigation; he even argued to the jury for mitigation. To the extent the trial court equated Kirsch's inability to investigate as deficient performance, it was erroneous. Once Lewis claimed ineffectiveness based upon Kirsch's investigation, the decision to forego certain

actions must be reviewed for their reasonableness. Squires v. State, 558 So. 2d 401, 403 (Fla. 1990).

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.... And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Strickland, 466 U.S. at 691. See, Mills v. State, 603 So. 2d 482, 485 (Fla. 1992)(affirming postconviction relief denial where record did not support lack of preparation for penalty phase; there was no evidence defendant had mental health issues which could have generated mitigation). Where a defendant takes affirmative steps to preclude his counsel from investigating or presenting mitigation, counsel's decision to follow his client's wishes should not be designated unreasonable.

But even more than this, under the instant facts, it is an error of law to conclude Deaton requires a finding of ineffectiveness. The question to be answered is whether Kirsch rendered effective assistance, and in answering that question, it matters not how much time counsel was given to perform. Whether it was one day or an infinite amount of time, the focus is on the decisions of counsel and the impact those decisions had on the

outcome of the proceedings. If a defendant refuses to cooperate, then no additional amount of time could generate mitigating evidence or permit its disclosure to the jury. Cf. Van Poyck, 694 So. 2d at 694-96 (notwithstanding a wish for additional time for investigation, it would not have mattered how much time was granted given the weakness in the mitigation available). When Lewis and his family elected not to cooperate, and left counsel with the firm belief they would never cooperate, they forced Kirsch to litigate the penalty phase without presentation of mitigating circumstances. Deaton does not create a per se time requirement for a defense counsel's investigation nor does Deaton give a defendant a second opportunity to litigate the sentence he received merely because he refused to participate initially and foiled his counsel's ability to investigate fully or present the mitigation found. The trial court's reliance upon and reading of Deaton was clearly erroneous and must be reversed.

In fact, even the most liberal reading of Deaton does not permit a defendant to obtain relief where it was the defendant's actions which hindered counsel's performance, especially where counsel was actively investigating and preparing evidence of mitigation. Should this Court be persuaded that error occurred here, it should recognize the error was caused by the Defendant's own acts. It has been a long-standing principle that a defendant may not create or invite error, sit mute or actively mislead the

court when questioned about his decision, and then complain of such error upon receiving an unfavorable result. Knight v. State, 746 So.2d 423, 432 (Fla. 1998) (finding defendant's actions were tantamount to invited error, therefore, defendant not entitled to relief); San Martin v. State, 705 So.2d 1337, 1347 (Fla.1997) (same).

Neither defense counsel, by being labeled ineffective, nor the State, by losing a valid sentence, should be penalized by the Defendant's manufactured defect. Lewis' professed reason for foreclosing counsel from presenting mitigation is very telling. As this Court will recall, when discussing mitigation and the use of Dr. Klass, Lewis told his counsel he wanted a new trial and the only way for him to get one was to be given the death penalty and not put on any mitigating evidence (PCR IX 266, 299, 307). It should be obvious that Lewis' attack upon counsel's performance during the penalty phase was contrived to give him a second opportunity before a jury; Lewis is undeserving of a new sentencing. This Court should not permit a defendant's manipulation of the judicial system, or to make such a sweeping declaration as that a month is per se insufficient time in which to investigate sentencing evidence and advise a client. This Court's de novo review should result in the reversal of the trial court's order granting postconviction relief.

## CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, Appellant requests respectfully this Court REVERSE the order of the trial court below and remand with directions to reinstate Appellee's sentence of death.

Respectfully submitted,
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Initial Brief of Appellant" has been furnished by U.S. Mail to: TODD SCHER, ESQ., Capital Collateral Regional Counsel - South, 101 N.E. 3rd Avenue, Suite 400, Fort Lauderdale, FL 33301 on August 31, 2000.

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