IN THE SUPREME COURT OF FLORIDA

WILLIAM DUANE ELLEDGE,

Appellant,

v. CASE NO. SC03-1201

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF THE APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

Statement of the Case and Facts

In 1974, Elledge confessed to the rape and murder of Margaret Strack and the murder and robbery of Edward Gaffney in Hollywood, Florida; and the murder and robbery of Kenneth Nelson in Jacksonville, Florida, between August 24 and August 26, 1974.

On October 30, 1974, Elledge pled guilty to the murder of Kenneth Nelson in Jacksonville, Florida, and was sentenced to life imprisonment.[1] On March 17, 1975, Elledge pled guilty to the rape and murder of Ms. Strack. Following a jury recommendation of death, the court, on March 18, 1975, sentenced Elledge to death. The Florida Supreme Court reversed the death sentence and remanded for a new sentencing hearing. Elledge v. State, 346 So.2d 998 (Fla. 1977). On remand, Elledge was again sentenced to death, and affirmed in Elledge v. State, 408 So.2d 1021 (Fla. 1982).

In his first state collateral sojourn, Elledge questioned the voluntariness of his guilty plea and alleged ineffectiveness of defense counsel. Relief was denied in Elledge v. Graham, 432 So.2d 35 (Fla. 1983), providing that ". . . our review of the record convinces us that the appellant's confessions and guilty plea were properly admitted and that the allegation of

[1] Subsequently, Elledge pled guilty to the murder and robbery of Robert Gaffney and was sentenced to life imprisonment.

ineffective assistance of counsel has not been shown." Certiorari was denied, Elledge v. Graham, 464 U.S. 986 (1983). However, Elledge received federal habeas corpus relief in Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987), reh'g granted in part, 833 F.2d 250 (11th Cir. 1987), thus, his case was returned to the State court for resentencing.

A third sentencing proceeding was held in 1989, where Elledge again sought to withdraw his guilty pleas. Relief was denied pretrial, and Elledge was sentenced to death. The new death sentence was vacated, Elledge v. State, 613 So.2d 434 (Fla. 1993), based upon a sentencing order deficiency and a Richardson hearing error.

On June 10, 1993, prior to the fourth resentencing, Elledge again moved for permission to withdraw his guilty plea, asserting his plea was involuntary. The trial court denied Elledge's request on the merits, concluding the withdrawal request was insufficient on its face (TR 3135). Elledge was resentenced to death. The Florida Supreme Court affirmed the new death sentence in Elledge v. State, 706 So.2d. 1340 (Fla. 1997), cert. denied, Elledge v. Florida, 525 U.S. 944 (1998).[2]

[2] Elledge raised 27 issues on appeal from resentencing. The Court listed all claims in footnote 4, 706 So.2d at 1342.

On September 22, 1999, Elledge filed a "shell motion" for postconviction relief raising 36 issues. An Amended Motion to Vacate Judgment and Sentence filed March 27, 2000, raised fifteen (15) claims. He subsequently filed a Second Amended Motion May 29, 2001, wherein he withdrew the attack against the Death Penalty Act of 2000. On July 1-3, 2002, the evidentiary hearing took place on Elledge's motion. The trial court denied relief on April 3, 2003, and issued an amended order on April 17, 2003. Elledge's Motion for Rehearing was denied May 22, 2003, and his Notice of Appeal was timely filed June 20, 2003.[3]

[3] References to the original trial record/resentencing will be noted by "TR"; the postconviction evidentiary hearing will be noted by "PCR".

1. Historical Facts:

The original 1975 plea colloquy reflects the court inquired of Elledge (TR 3095-3135),[4] and the facts may be found in Elledge v. State, 346 So.2d at 999-1000.

[4] Elledge was a 24-year-old married carnival worker. (TR 3098). He had completed the 11th grade in school and had been in trouble as a juvenile. (TR 3098-99). As an adult he had been convicted in Colorado of a second degree felony of menacing with a weapon and had received drug and alcohol treatment as an outpatient. (TR 3099). Pretrial he had been examined by Dr. Taubel and Dr. Eichert regarding any mental defenses. (TR 3099). He appreciated that "plea could result in the death penalty or a minimum-mandatory 25 year life sentence prior to being eligible for parole." (TR 3100). Elledge specifically acknowledged that he discussed defenses with his attorney, discussed the nature of the case and received advice from counsel as to what to do. (TR 3101). No threats or force were used to get him to change his mind regarding the plea and he was satisfied with counsel's representation. (TR 3102). Counsel discussed with him the penalty phase process and the consequences of any jury's recommendation. (TR 3103). The court concluded Elledge knew what he was doing in changing his plea to guilty. (TR 3104).

The court further inquired of Elledge about the facts of the crime. (TR 3104-09).

The trial court concluded that a valid factual basis for the plea existed, to which defense counsel agreed and the plea was accepted. (TR 3110-11).

State's Case in 1993 Penalty Phase

At the 1993 resentencing proceeding, the State called a number of witnesses in support of the statutory aggravation.

Dr. Abdullah Fatteh's August 25, 1974, autopsy showed the cause of death was asphyxiation by strangulation. (TR 1143-47)

Allen Devin, a private investigator was working with the Hollywood Police Department (TR 1168) on Monday, August 26, 1974, found items at the Normandy Hotel belonging to Margaret Ann Strack. (TR 1170). Devin met Elledge in Jacksonville, Florida, at a detention center August 27, 1974, when Elledge made a taped statement, after executing two waiver forms, concerning the Strack homicide. (TR 1174-76, 1185). Elledge confessed to two murders in Hollywood and gave the location and the specifics of the murders. (TR 1192). The taped confession was played to the jury. The State published, over the objection raised by defense counsel (TR 1286), Elledge's voluntary statement regarding the Gaffney murder. (TR 1288).

Defense Case

The defense first presented four family members who all stated that Elledge suffered physical and mental abuse from his mother up to the day he left home permanently.[5]

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[5] Sharon Jenkins testified that her aunt Geneva, Elledge's mother, would punish Elledge for no reason and that his mother would never show affection and was abusive to all her children. (TR 1403-05). Elledge was skinny at birth and a blue baby. He had to be fed goat's milk because he had colic until he was six months old. (TR 1406). In Ms. Jenkins' opinion, Elledge needed more attention than his abusive, alcoholic parents gave him and his nature was very meek. (TR 1407). Ruby Sparks, Elledge's aunt, first testified about her and Elledge's mother's abusive father and how they were treated as children. (TR 1420-21). Ms. Sparks observed that Elledge's mother liked playing music and that she and her husband Rayburn, used to go to clubs and play at bar, enjoying the night life and drinking the weekends away. (TR 1423-24, 1429). She recalled that many weekends the kids were left alone while the parents went drinking all weekend and, more importantly, that her sister Geneva inflicted most of the child abuse on the children. (TR 1430-31). At age 11, Elledge went to live with the Wilcox family in an effort to straighten Elledge out. (TR 1433). Ms. Sparks recalled that he was badly beaten by Mr. Wilcox and that he eventually started running away all the time and ending up at detention centers when he was 13 or 14. (TR 1434-35). On cross-examination, Ms. Sparks said the last time she saw Elledge was in early 1974, and that she never met Elledge's wife nor visited him in prison. (TR 1443). She admitted that she did not have much contact with the family from 1950 through 1974 with the exception of a few letters, talking on the phone and a couple of visits. (TR 1445). Ms. Sparks' recollection was that Elledge's father was a gentle and kind man who kept the family together and cared for the children. (TR 1447). She was unaware that Elledge had been in a foster home (TR 1448), but did recall that the Wilcox's had tried to help Elledge. (TR 1449).

Connie Moffitt, Elledge's older sister, remembered how her mother physically and mentally abused both her and her brothers. (TR 1454-55, 1458, 1460, 1464). She testified that when her parents were away playing on the weekends at clubs and drinking all weekend, she stayed home and took care of her siblings. (TR 1456-57). At birth, Elledge was a blue baby and always exhibited a stubborn streak. As a child he would hold his breath and stop breathing which resulted in Elledge's

Dr. Gary Schwartz, a psychologist, tested Elledge for mental

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mother sticking Elledge's head under water to get him to start breathing. (TR 1547). Elledge started to run away between 8 and 9. His mother would beat him every time she could yet the police would bring him back. (TR 1460). Mrs. Moffitt recalled that her mother was abusive to her husband. (TR 1462). Her father would never spank her and was a good man. (TR 1463). Elledge finally ran away for good at around 14 and since that time she has only seen her brother three or four times. (TR 1464-65). Elledge was sent to live with the Wilcox's and probably received worse beatings from Mr. Wilcox who was mean and abusive. (TR 1465).

Mrs. Moffitt stated Elledge was slow to develop as a baby, he was slow walking and talking, and her mother thought he was retarded. (TR 1467). They were poor and although they went to school, Elledge always was in trouble in school. (TR 1469, 1472-73). Since incarcerated, she only saw her brother twice in court. (TR 1470). On cross-examination, she testified that although she met Elledge's wife, she never visited Elledge in prison. (TR 1477).

Daniel Elledge, Elledge's brother, testified that the last two times he saw his brother were in 1985, in federal court in Miami, and then in 1989, in state court. (TR 1489). He had never visited Elledge in prison (TR 1490), and admitted that he turned his life around when his brother got in trouble in 1974. (TR 1501). Daniel Elledge detailed that his mother would beat him and his brother and sister three to five times a week or more. (TR 1490-91). Elledge finally left home at around 14 or 15 (TR 1493), which explained why he had limited contact with his brother. He did not find out until 1989 that his brother was in jail. (TR 1508). As children his parents were never there on weekends because they played music and that it was his sister who was in charge when they were gone. (TR 1494-1495). He admitted that he and his sister Connie had become intimate and that Connie had had sexual relations with both of her brothers. (TR 1495). His brother started using drugs and drinking early (TR 1497). Daniel believed that although he drank, he stayed home and took care of his father, and that was why he turned out okay. (TR 1502).

On cross-examination, Daniel Elledge admitted that his father was good to them and that he stayed with his father who was disabled until he died. (TR 1509). After age 11, Elledge was in and out of reform schools and he only saw Elledge once every four or five years. (TR 1510). Between the ages of 6 and 9, he was intimate with his sister. (TR 1511-12).

health considerations. (TR 1541, 1543-52). After reviewing Elledge's life history, he observed that overall Elledge's childhood was marked with severe emotional and physical abuse from his alcoholic parents, especially his mother. (TR 1555-56). They were very poor, living in a ghetto atmosphere, wandering from place to place. At times, they stayed in cars overnight and they had limited food and clothing. (TR 1556). Elledge did poorly in school and did not adjust well; he had problems with his teachers and other students; he would get into fights at school and then when he came home, suffered abuse from his mother. (TR 1557). Dr. Schwartz thought Elledge could have suffered from fetal alcohol syndrome since his mother drank. Through interviews with family members, he learned that Elledge was a blue baby at birth which meant that he had an oxygen deprivation and that he was underweight. (TR 1558). As a teen, Elledge was involved in drugs and criminal offenses. (TR 1558). It was Dr. Schwartz' view that Elledge was very impulsive and functioned poorly under stress, using poor judgment. (TR 1658-59). Although Elledge's IQ was 103 (TR 1673), it was his view that there may be some brain damage based on one test which Elledge did not process "normally." (TR 1674). He observed that Elledge was a drug abuser (TR 1676), and that his thinking patterns were disturbed. (TR 1678). Elledge had a poor self-concept and "was a very disturbed person overall." (TR 1678). Because Elledge was a blue baby, there could be organic brain damage, and clearly because he was underweight,

his growth development lagged. (TR 1690). Because Elledge was denied mothering, he had severe emotional problems. (TR 1691). Based on the information received regarding Elledge's early years, Dr. Schwartz believed Elledge had an inability to deal with stress and could not control impulses. (TR 1702). He testified that in 1974, Elledge could not conform his conduct to the requirements of law and was under extreme emotional and mental stress or disturbance. (TR 1704-05).

On cross-examination, Dr. Schwartz stated that Elledge was a quick thinker, acting very impulsively. (TR 1759). Dr. Schwartz said Elledge was not schizophrenic (TR 1760), and admitted there was no evidence of brain damage from tests done by another doctor only one month earlier. (TR 1765). It was his view, however, that any organic brain damage would not have allowed him to process information correctly in 1974. (TR 1768). The organic brain damage caused irritability, poor impulse control and the use of drugs would have contributed to his actions. (TR 1769). Dr. Schwartz admitted that Elledge had some control because he knew what he wanted to do, however, it was his view that both the Gaffney and Nelson murders occurred while Elledge was suffering from post-traumatic stress syndrome after the murder of Ms. Strack. (TR 1780-84). Dr. Schwartz admitted that a 1973 hospitalization diagnosis revealed that Elledge had a personality disorder but suffered from no organic brain damage or psychosis. (TR 1788). Dr. Schwartz opined Elledge had an anti-social personality

disorder (TR 1791). He did admit that earlier, contemporaneous doctors' reports from Dr. Miller and Dr. Taubel, showed Elledge had no neurological problems, no other major neurotic or psychotic problems, rather, Elledge suffered from anti-social personality disorder. (TR 1793-1801).

On redirect, Dr. Schwartz again stated that Elledge suffers from anti-social personality disorder, organic personality disorder, alcohol and drug abuse and was under excessive mental and emotional duress and could not conform his conduct to the requirements of law at the time of Ms. Strack's murder. (TR 1877-89).

The defense called a number of character witnesses regarding Elledge's adjustment to prison since 1975.

Dr. Glenn Caddy, a psychologist opposed to the death penalty, testified that he first met Elledge in 1989. (TR 2179-83). Dr. Caddy performed no tests but rather relied on the psychological testing by other doctors including Dr. Schwartz. (TR 2184-87). Elledge had a chaotic upbringing, marked by violence and abuse. He came from a poverty-class environment and moved around a lot which contributed to his inability to fit in at school. (TR 2189-90). He noted Elledge's parents were alcoholics and his mother ran around on his father. (TR 2191). Elledge experienced a sexual encounter with an adult neighbor at age 12 and was once picked up by a man who sexually assaulted him and then threw him over a bridge. Dr. Caddy recalled that from age 13

to 14 Elledge was being placed in detention centers because he ran away from his family (not being able to stand the abuse). (TR 2191). Elledge was an alcoholic at age 12 (TR 2193-94), a street kid into drugs in his early teens, who could not manage his temper. (TR 2194-95). He was a sociopath with poor impulse control (TR 2198), who was out of control at the time of the murders. (TR 2201). In Dr. Caddy's view, Elledge holds all the victims responsible. As an example, Dr. Caddy stated that it was Mr. Nelson who set the stage for his own murder. (TR 2201-04).

Elledge had a normal IQ (103), and had potential. (TR 2208). In his view, Elledge was acting under extreme emotional and mental duress at the time of the murders (TR 2212), Elledge did not suffer fetal alcohol syndrome; did not suffer from post-traumatic stress syndrome in 1974; but had a sociopathic personality disorder with overtones of polysubstance abuse, childhood physical abuse, sexual childhood abuse, impulse control disorder, organic personality disorder with rage episodes and a thought processing disorder. Dr. Caddy concluded Elledge could not control his behavior to the requirements of law at the time of the murder and during the 48 hour period of these murders was totally out of control. (TR 2219-20).

On cross-examination, Dr. Caddy testified that Elledge had a personality disorder (TR 2259), which caused him to play by his own rules and permitted instant gratification for whatever he wanted. (TR

2287-90). In exploring the crime scenes with Dr. Caddy (TR 2292-2304), Dr. Caddy testified that as the criminal episode went on, Elledge got more and more out of control and therefore the first murder broke down his "bounds of control." (TR 2307). Although Elledge was under extreme emotional distress: he was not psychotic (TR 2317), nor did he have severe brain damage which would have influenced the commission of the crimes (TR 2318), nor was he suffering from bipolar mood disorder (TR 2318). Dr. Caddy stated his diagnosis of mixed-personality disorder with a substantial feature of impulse control disorder is not a functional disorder nor organicity nor psychosis. (TR 2324).

On redirect, Dr. Caddy believed Elledge has an anti-social personality disorder and that Elledge knew when he came to Florida in 1974, he was out of control. (TR 2351-70). Elledge was under extreme emotional and mental duress. He was substantially impaired and could not conform his conduct to the requirements of law. (TR 2374-76).

In the State's case in rebuttal, Dr. Harley Stock, a forensic psychologist (TR 2631), testified he reviewed a plethora of evidence in evaluating Elledge. (TR 2641-44).[6] Dr. Stock found no evidence of

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[6] Including viewing the transcripts from March 17, 1975, depositions of Dr. Caddy, depositions of Dr. Schwartz, depositions of Dr. Radelet, reports from Drs. Eichert, Lewis, McMahon, Miller, Norman, a report of Ms. Marzulli, the reports of Dr. Todd and Dr. Taubel, records from Colorado State Hospital, California Youth Authority and records from the Florida Department of Corrections, as well as other letters and police reports. He also listened to Elledge's taped confessions and spent fourteen hours over a two-day period evaluating Elledge and doing more testing. (TR 2641-44). Dr. Stock testified

organicity and observed that the Carlson test performed by Dr. Schwartz could not predict the future dangerousness because an incorrect analysis was performed. (TR 2659-60). The results of the Bender-Gestalt test found no evidence of organicity or brain damage and Dr. Stock related that Elledge had no mental illness, no organic brain damage, but rather suffered from an anti-social personality disorder. (TR 2661). Elledge was not suffering from any mental illness at the time he committed the Strack murder, but rather exhibited anti-social behavior which allowed him to make choices within his own control. (TR 2662). Dr. Stock did not believe Elledge was under an extreme emotional or mental disturbance. Rather his conduct evidenced conscious volitional control therefore, his ability to conform his conduct to the requirements of law was not impaired. (TR 2663-65).

Dr. Stock found that Elledge could not have suffered from fetal alcohol syndrome because he did not meet the specific criteria and appearances associated with that syndrome. (TR 2666). Elledge suffers from an anti-social personality disorder which continues through life. In the right circumstances, Elledge might continue to be dangerous. (TR 2668-69).

On cross-examination by defense counsel, Dr. Stock testified that the MMPI tests were important because they determined Elledge had an

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that he believed that Elledge was malingering on the MMPI test administered by Dr. Schwartz. (TR 2649-57).

anti-social personality disorder which was evidenced by his continuing efforts to manipulate the system. (TR 2681). The State rested. (TR 2698).

2. July 1-3, 2002, 3.850 Evidentiary Facts:

a. DR. LEWIS' FAILURE TO APPEAR

On Monday morning, November 15, 1993, Dr. Lewis failed to appear in court to testify on behalf of Elledge. The trial transcript of the day indicates, Jim Ongley reported to the Court that in telephone discussions with Dr. Lewis over the weekend, she had complained about Laswell's failure to advise her regarding the opinions of the other defense experts and the results of their other tests. Elledge himself had also spoken with Dr. Lewis. She told him that since she was "completely in the dark" as to the findings of other experts, then it was not in his best interest for her to testify. Ongley informed the court that he had sent her numerous other documents but that no actual reports had been written by the other two defense mental health experts, Drs. Schwartz and Caddy. Neither Laswell nor Ongley excused Dr. Lewis from appearing.[7] The decision was then

[7] The record is clear that in the judge's mind, Dr. Lewis was supposed to be there. The Court acknowledged that originally Dr. Lewis was to appear the previous Monday, Nov. 8th, and that Dr. Lewis "never had any hesitation to appear at that time in that she did not request the information that she's requesting to appear here today." The Court was prepared to cite Dr. Dorothy Otnow Lewis in contempt of court for her failure to

left strictly up to Elledge. Elledge told the Court that if Dr. Lewis felt she was unprepared to testify then he would defer to her judgment and asked the Court to excuse her. (State's #8 TR 2044) In Laswell's opinion, Elledge did not have much of a choice, thanks to Dr. Lewis. (PCR 144) With regard to Dr. Lewis' excuse that she now needed time to review all the experts' work subsequent to hers, Laswell again pointed out that Dr. Lewis still had not reviewed her own file nor any material that Laswell had forwarded to her. (PCR 147, State's #10 TR 2116) As to Dr. Lewis' excuse, that Laswell had not prepared her to testify, Laswell told the Court: "I've never tried to make her aware of what her testimony should be. It would be my firm belief that expert witnesses should make me aware of what their opinions are." (State's #10 TR 2116)

The Court again asked Elledge to confirm his decision not to call Dr. Lewis and reiterated that since Dr. Lewis had failed to show up twice (Monday, November 8th and Monday, November 15th) the Court could issue a rule to show cause against her for possible contempt of court. If Elledge desired, the Court would do that. (State's #10, TR 2118) The defendant replied that he

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be present that morning and further stated that: "if the defense wishes Dr. Lewis to testify, the Court will do whatever is within its power to get Dr. Lewis here." (State's #8, TR 2034-45)

had even asked Dr. Lewis, if nothing else, just to be present to personally address the Court as to her concerns. She refused and told Elledge that she would send a fax. The Court explained to Elledge: "[I]t's not her decision." (State's #10 TR 2119)

Since Elledge wished to telephonically speak with Dr. Lewis once again, another call was placed to her from court. The phone conversation took place between Dr. Lewis and Elledge. Dr. Lewis spewed forth reasons and excuses: due to controversy over the Shawcross case; due to Laswell not preparing her to testify; due to her belief that Ongley had not even read her report and was unfamiliar with what had happened in the trial thus far; due to the fact that she had not reviewed her file and the materials sent to her because "this was cancelled"; and since she was "absolutely unfamiliar with what other physicians have found" she was not prepared to testify. (State's #10 TR 2124-26). Dr. Lewis inconsistently represented that she "had not had a chance to" review, then in the next breath stated that materials were, in fact, sent to her but that she had not reviewed them because she "had planned to do this over the weekend and then it was cancelled." (State's #10 TR 2126-27) Dr. Lewis' new excuses to Elledge were that she would now need to review old records, talk with him again, talk with his family members, talk with the defense attorneys and review her testimony from the prior

federal hearing (which had, in fact, already been sent to her.) She told Elledge it would “take a lot of work and a lot of time and a lot of reviewing.” (State’s #10 TR 2128) Even after the Court joined the conversation, Dr. Lewis still insisted that she had to know what the results of other tests were, what other psychiatrists had found, all of the psychological activities and she had to have more of a social history. She also suggested that additional EEG testing of the defendant be performed and that the defense consult with neurologist Dr. Jonathan Pincus. (State’s #10 TR 2132-39)

Despite requesting all this additional information, it was obvious in this telephonic hearing that Dr. Lewis had failed to review her own records since, when questioned by the Court, she did not know how much time she had spent testing Elledge, on what dates, or even how many times she had met with him. (State’s #10 TR 2139-40) She had not looked at the letter that Elledge personally sent her “a long time ago” seeking her assistance, but she did offer to “pull the file and try to find it.” (State’s #10 TR 2129) It was abundantly clear on Monday, November 15, 1993 (the day she was supposed to testify), Dr. Lewis had not done the slightest bit of preparation.

The Court questioned her as to what had happened since the previous hearing only a week earlier when she had so willingly

agreed to be there to testify on November 15th. Dr. Lewis blamed the lawyers, this time, Ongley. (State's #10 TR 2142-43) She stated that she was fully prepared to be there, had all her materials ready and had every intention of coming down, but Ongley was not familiar with the case and it was not in Elledge's best interests. (State's #10 TR 2145)

As the Court observed at the conclusion of that telephonic hearing, Dr. Lewis was completely uncooperative. Even though she was simply being called to testify as to the evaluation she had already performed and to her prior testimony, the Court explained to Elledge: "she's just not willing to come forward to do that." (State's #10 TR 2151) Laswell confirmed that Dr. Lewis had been "solicited" because of her prior work with the defendant but she had repeatedly refused to read the transcript of her own prior testimony which he had sent her months previously. The Court specifically noted "her lack of willingness to help Mr. Elledge" (State's #10 TR 2153) and observed that even if they took a "ninety or a hundred day recess so that Dr. Lewis could turn her attention to Mr. Elledge. . . the Court has no reason to be anymore inclined that Dr. Lewis will cooperate in any manner greater than what she already has."(State's #10 TR 2154)

Elledge was asked once again, if it was his desire to have her testify, and he repeated: “As I said, Your Honor, if she feels that she would not be prepared without the other information that she’s requested, I would have to defer to her knowledge on that issue because she’s the one that’s the expert, not me.” (State’s #10 TR 2155).

As the record shows and as Laswell testified at the evidentiary hearing, the decision was left up to Elledge. (PCR 161) These on-the-record phone conversations with Dr. Lewis in New York were part of Laswell’s efforts to try to secure the witness that the defendant adamantly wanted: “we were trying desperately to get this lady down here because Mr. Elledge wanted her here against the advice of his lawyer.” (PCR 163-64) However, as Laswell explained, there were serious problems with this witness who would not prepare, would not read her file, would not even retrieve her file, and would not come to court. She made commitments and agreements with the Court to be there, then ignored them. Without Dr. Lewis’ co-operation and voluntarily traveling to Florida, he would have had to extradite her and that would have been “horrible” for the defense. (PCR 164-65) Laswell “never told Dorothy Lewis not to come” in fact, he bought her plane ticket. Still, his advice to Elledge was “don’t have her as a witness.” (PCR 175)

One of the additional tests requested by Dr. Lewis was an "alcohol induced EEG." In following up on this matter, Ongley had contacted defense expert Dr. Norman, a neurologist, and was advised that Dr. Norman did not do such a test as he believed the literature to be "imprecise". Ongley had also researched the possibility of an alcohol induced MRI and could find no place in South Florida to perform such a test. (State's #10 TR 2152) On November 17, 1993, two days after Dr. Lewis' failure to appear and while the Elledge trial was still in process, Ongley was still following up on the mental health mitigation and the Dr. Lewis situation. He reported to the court that he had contacted Dr. Pincus who had no records or recollection of Elledge. (State's #9 TR 2441-42) Ongley testified at the evidentiary hearing that he continued to look into Dr. Lewis' demands because, as he put it: "[t]here was never going to be a reason that I was the cause of her not coming down." (PCR 242)

On November 17th, the Lewis matter was addressed in court for the last time. The Court ruled:

"The record is complete. Dr. Lewis at best is hostile to appearing. She has shirked all her Court's obligations." The Court held:

> She was asked to appear by the defense, she didn't. We had telephonic communications with her, she agreed that she would appear on Monday, the 15th of November, fly from the New York City area to be here on the 14th,

> she didn't. She was unable to assist Mr. Laswell. Mr. Ongley undertook that obligation, she was unable to assist Mr. Ongley. She has now indicated that she is not available until February. It's now November 17th. We have had two telephonic conversations both on the record and with Mr. Elledge speaking with her. Mr. Elledge has decided at this time he does not wish to call her, that she does not assist in the case, that the last time Dr. Lewis saw Mr. Elledge was in 1983 or '82.

(State's #9 TR 2445-46).

The Court then confirmed the specific documents that had been forwarded to Dr. Lewis by both defense attorneys, that Laswell had sent her first class airplane tickets and that he had agreed to her demanded $250/hr fee. (State's #9 TR 2446-47). The Court further ruled:

> The Court finds that the demeanor of Dr. Lewis and her absolute lack of willingness to cooperate is not attributable to counsel for the Defendant, but to Dr. Lewis. Dr. Lewis indicates she has nothing to testify to at this time. She's requested many speculative additional testing without any indication that the results of those tests would bear any fruit.

(State's #9 TR 2449)

Laswell testified at the evidentiary hearing that he had prepared for the presentation of other mental health mitigation evidence through Dr. Caddy, Dr. Schwartz and various members of the defendant's own family. Although he had consulted with additional mental health experts, it was his deliberate trial strategy to present these witnesses and not Dr. Lewis. (PCR 166-68). At trial, Laswell called twenty-one defense witnesses

including experts, family members, friends and acquaintances. (PCR 106-09).

b. DR. LEWIS'S TESTIMONY AT THE EVIDENTIARY HEARING

On Tuesday, July 2, 2002, Dr. Dorothy Lewis testified at the 3.850 evidentiary hearing. She said that she began her preparation the week previously and after she arrived in town, she spent many hours on Saturday and Sunday (June 29-30) reviewing materials such as her old records and her report. (PCR 307) She "made a point" to go to counsel's office to review police reports and the defendant's confession. (PCR 308)

Laswell contacted her in 1993, and told her that the case would be going to trial in November. She was prepared to be there Monday, November 8th. (PCR 309-10) Then she "got a message saying that the trial was off, and it wasn't going to happen." (PCR 310) She received another message saying that she was, in fact, expected to testify on Monday, November 8th, but by then she had "rescheduled her life" so she did not appear. (PCR 313)

On Monday, November 8th, Dr. Lewis received a phone call from the court. After discussing the "mis-communication" regarding her scheduled testimony, she offered to "look over the

case" that night and testify by speaker phone the next day.[8] (Defense #2 TR 1521) At the evidentiary hearing she confirmed that what she was "willing to do was, you know, go over as much as I could, in the time left and fly out on Tuesday night." (PCR 318, Def. #2 TR 1516, 1520) Interestingly, at that point, Dr. Lewis had no reservations or concerns about testifying on short notice, even the very next day, despite the fact that she, admittedly, had not reviewed Elledge's file. (Def. #2 TR 1518-19) Since the trial had already begun and other matters set, the Court could not accommodate Dr. Lewis' schedule. She confirmed that she then had agreed to fly down on Sunday, November 14th, to testify the next day, Monday, November 15th. She confirmed that she did have tickets and, "of course, [she] was prepared." (PCR 323) Her testimony directly contradicts the representations that she made to the Court over the phone on Monday, November 15, 1993.[9] (State's #10 TR 2124-29)

Dr. Lewis testified that later that week she was contacted by Ongley and she presented handwritten notes to prove it.

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[8] She noted that it made no sense for her to look at her files before she was scheduled to appear. When the hearing was "delayed" she did nothing, figuring she usually had "ample time to prepare if rescheduled." (PCR 318).

[9] Dr. Lewis admitted Laswell never suggested to her that he did not want her to testify. (PCR 321). Moreover she stated she has Elledge's original files. (PCR 329).

(Defense #8, #9) She testified that Ongley had confided to her that he was totally unprepared, he knew nothing of what had transpired during the trial, he had never seen her report and that he hoped to get a continuance. (PCR 331) Dr. Lewis claimed that in a phone call on Saturday, November 13th, Ongley said he would try to get a delay, he would withdraw and he was "going for a mistrial". (PCR 333) She also claimed that Ongley told her that Laswell had not "ordered her down" and "no one" knew if she was under subpoena. (PCR 333) Elledge called her himself that same night and during their conversation they discussed his lawyer's recommendation that she not testify because:

> [T]hey don't even know what, you know, what I have written, and they don't even have my report. We agree that, you know, I would not – they would not be prepared for, you know, for my testimony which apparently they had never planned to have anyway.

(PCR 334)

At the evidentiary hearing Dr. Lewis blamed Ongley for her failure to appear for testimony on November 15th. She acknowledged that she had agreed to come and testify on that date, but Ongley told her not to:

> Well, at one point I had agreed to come on Monday, and then on Saturday, Mr. Ongley decided that I should not come and, apparently, Mr. Elledge agreed with that. . . But of course I was prepared to come I had the tickets and I was ready to go. On Saturday at 5:30, he was saying, I don't know the case, I can't prepare you. Don't come.

(PCR 336-37)

At resentencing "she would have testified" that Elledge was under extreme emotional disturbance at the time of the offense and his capacity to appreciate the criminality of his conduct or conform it to the law was extremely impaired.[10] (PCR 338-39).

On July 2, 2002, **after** "all her preparation for this evidentiary hearing", Dr. Lewis still did not know the date she wrote her report on Elledge, did not know the dates she had evaluated him (PCR 344-45), did not know how many times she had seen him - she "guessed" it was three times - nor even how much time she had spent with him. (PCR 365) She admitted that months before the November 5th phone call, Laswell had sent her a copy of her earlier testimony in Elledge's federal habeas hearing but she did not read it as it "doesn't make sense to prepare early". (PCR 352). Blaming Ongley once again, she testified that if "he hadn't cancelled it" she would have reviewed the Elledge file on "some of Friday and Saturday and Sunday ... which should have been adequate".[11] (PCR 354). In 1993, she told Laswell that she

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[10] Dr. Lewis testified Ongley said it was not in Elledge's best interest to appear during the phone conversation Saturday, November 13th. Ongley decided she should not come and Elledge agreed because she did not have the files and did not know what other experts' testimony. (PCR 336).

[11] She also admitted that she had not even retrieved her files from storage in New York. (PCR 353-55).

was going to review it on the airplane as that is what she usually does (PCR 355) and during the telephonic hearings she told the Court that she usually reviewed the day before she was to testify. (PCR 356) On July 2, 2002, Dr. Lewis verified "I don't review in advance." (PCR 365) She admitted that she had never read her previous testimony from the federal proceeding until two days before "postconviction evidentiary hearing," (PCR 357) and that her prior testimony was far more lengthy and detailed than her report. (PCR 358) She was adamant that Ongley never sent her any documents to review (PCR 359-61) and insisted that Ongley told her he, Ongley, knew nothing about the case. (PCR 362-63)[12]

Dr. Lewis was questioned about the November 15, 1993, phone call when she told the Court that she still had not reviewed her file. (PCR 364) She confirmed that she had not looked at it on Friday 12th, and then on Saturday the 13th Ongley said "Don't come." She testified that "if he wanted me to come, I would have been reviewing that from Thursday night, lots on Friday, Saturday and Sunday." (PCR 364) She did not explain why she

[12] This testimony directly contradicts the testimony of Jim Ongley.

hadn't begun preparation on Thursday, or even on Friday if it wasn't until Saturday that Ongley cancelled her trip.[13]

Despite the fact that in 1993, Dr. Lewis never reviewed her file, never appeared for testimony and did nothing on behalf of Elledge, she billed Laswell for five hours of work.[14]

c. IMPEACHMENT OF DR. LEWIS

i. Shawcross

On cross-examination, Dr. Lewis was asked about a controversial case, the Shawcross case in late 1990-early 1991. She had included the incident in her 1998 book and stated that it had taken her three years to get over that case. She admitted that Elledge's 1993 trial was within that three year period. (PCR 367-69) She believed that part of Laswell's

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[13] Dr. Lewis admitted that she saw Dr. Norman's deposition, but only recently, (PCR 361) and admitted Ongley had sent materials to her. (PCR 359).

[14] Her testimony was that she "did the last one for zero" as she was "never paid for work that she did for Mr. Laswell and for the Court". (PCR 366) When asked to explain what it was that she actually did, she testified that she "just billed him for 5 hours of time. There was much more time spent on going over and talking and planning and talking whatever." (PCR 366-67) Since Dr. Lewis, admittedly, did no preparation whatsoever for this case in 1993, she billed Laswell (and the Court) just for talking to them on the phone.

reluctance to use her was due to her performance in the Shawcross case.[15] (PCR 369).

ii. Credentials

On cross-examination, Dr. Lewis was impeached for exaggerating her qualifications and accomplishments on her current Curriculum Vitae. (PCR 386-94).

iii. Lack of Preparation

Dr. Lewis' consistent refusal and failure to prepare herself for the 1993 penalty phase trial was thoroughly discussed during the evidentiary hearing. She testified that during the past couple of days she read the police homicide reports on the murder of Margaret Strack but, had not done so, even prior to her testimony in 1985. (PCR 394-95) She has never read the reports on the murder of Paul Nelson and Edward Gaffney, (PCR 396) nor reviewed the photographs of the murder of Margaret Strack (PCR 396) She testified that the police reports were

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[15] Dr. Lewis testified that the Shawcross jury hated her as did the entire city of Rochester, N.Y. (PCR 370-71) They made up limerick songs and jingles about her that were played on the radio. She thought her office and home telephone lines were being tapped. (PCR 371-72) She even went so far as to tell a friend that if anything happened to her she "didn't do it at [her] own hand". (PCR 375) Dr. Lewis admitted that despite the fact that she was unqualified and despite the fact that she knew that testimony under hypnosis was not credible, she still hypnotized the defendant. (PCR 372) She did it because the Shawcross defense attorneys wanted her to. (PCR 373)

consistent with what Elledge had told her during her evaluation (PCR 397) however, further questioning showed that she did not know if they were consistent. (PCR 399-400) She has never read the transcripts of Elledge's testimony at any of his sentencing hearings. (PCR 402-08) When she wrote her report on Elledge in 1983, she did not know whether she had read the transcript of his confession to the police regarding Margaret Strack's murder:

> I don't remember that. I don't know if I had or not. Possibly not. If I didn't write it down, then I had not read it. I'm not certain. I don't think so.

(PCR 411)

She admitted that it would have been important to read Elledge's description of how he murdered the victim before she reached her opinion. She could not recall having done so and did not document it in her report. (PCR 411) She did read Elledge's statement before she testified in 1985. (PCR 413) In 1985, while waiting to testify as to her already formulated opinion, she interviewed Elledge's sister and brother for corroborating information. (PCR 416-17).[16]

iv. Non-Appearance

On July 2, 2002, Dr. Lewis admitted she had never before been called by a judge from the bench, and in this case, she was

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[16] Dr. Lewis violated the Rule of Sequestration for these interviews while the federal hearing was in progress. (PCR 417)

called twice. (PCR 367) Yet she still failed to appear on Monday, November 15th as she had agreed to do. She blamed defense attorneys Laswell and Ongley for all deficiencies.[17] (PCR 354-63)

The only family member she spoke with before writing her report was Elledge's mother who was "very guarded" in their "telephone conversation." (PCR 418) Without any formal evaluation, testing, medical records, and other information, and without ever actually meeting Mrs. Elledge in person, Dr. Lewis opined that "there was evidence consistent with a serious mood disorder". (PCR 378)

v. Violation of the Rule of Sequestration

As a witness in the 1985 federal habeas proceeding, Dr. Lewis was twice accused of violating the Rule of Sequestration. Once, for interviewing the defendant's family members while she and they were waiting to testify, and then a second time, for trying to speak to the attorney while she was in recess during

[17] Dr. Lewis' testimony reflects she pre-judges and assumes facts when reaching her opinions, for example, her statement that a .08% blood alcohol level is considered "smashed" (PCR 400) is not a scientific conclusion nor a term of art. And nowhere in this voluminous record is there any suggestion that homicide victim Margaret Strack was a prostitute, yet that is how Dr. Lewis initially referred to her before correcting herself. (PCR 535)

her testimony. (State's #13) This expert witness committed the same violation during this 2002 evidentiary hearing.[18]

vi. Unwillingness to Acknowledge Other Possibilities

Dr. Lewis testified that she first met with Elledge in 1983, nine years after the murder of Margaret Strack. (PCR 349) She confirmed her reliance on Elledge's statements and discounted any contradictory evidence. She admitted that Elledge's story was inconsistent with the testimony of the bartender but she justified the discrepancies, determining the bartender's testimony was "inaccurate". (PCR 401). She believed everything

[18] On July 1, 2002, upon commencement of this hearing, the Rule of Sequestration was invoked at the State's request. (PCR 16) Aware of Dr. Lewis' prior proclivities, the State asked that the Court have postconviction counsel specifically advise Dr. Lewis of this rule. The Court instructed both parties to advise all witnesses while postconviction counsel assured everyone that the State "has nothing to worry about". (PCR 17) On July 2, Dr. Lewis was called to the stand. She was still testifying on cross-examination when the Court recessed for the evening. She was told by the Court not to speak with any other witnesses nor to the attorneys. However, immediately upon exiting the courtroom, Dr. Lewis turned to postconviction counsel and asked for additional data from another expert witness. This exchange was witnessed by others and was brought to the Court's attention the next morning. The Court found that: ". . .the Court reiterated to Dr. Lewis at the close of business that the Rule of Sequestration had been invoked and explained to her what that is, to which Dr. Lewis made the comment, 'I'm well aware.' Dr. Lewis then, in fact – which seems to be uncontroverted – made a statement to Dr.(sic) Moldof, wherein I admonished her that one of the people that she could not talk to about the case was even Mr. Moldof and she had no ability to speak to counsel." (PCR 467-68)

Elledge told her and, testified, that Elledge was not manipulative, self-serving or deceptive.[19] (PCR 453-56).

[19] Had she been a witness at trial in 1993, Dr. Lewis would have testified to the same opinion that she had testified to in federal court in 1985. The Eleventh Circuit Court of Appeals found her opinion was contrary to the great weight of expert testimony presented and found her to be “less persuasive”. (State’s #6)

SUMMARY OF ARGUMENT

Argument I: Elledge's contention that a Brady violation resulted because trial counsels could not recall seeing an EEG report prepared by defense expert Dr. Normal is wanting. Under Strickler v. Greene, and Giglio v. United States, Elledge has failed to prove any Brady violation occurred.

Argument II: Elledge also contends trial counsel Mr. Laswell rendered ineffective assistance when he prepared Elledge's case as to the mental health experts. Laswell spoke to mental health experts, employed a number of mental health experts, gathered information and spoke to family members regarding Elledge's mental health. The crux of this issue is the noncooperation displayed by Dr. Lewis, a mental health expert with whom Elledge had a previous doctor/client relationship. Dr. Lewis' conduct and failure to prepare for Elledge's fourth resentencing, evidenced overwhelming support for Laswell's decision not to use her as an expert.

Argument III: Any assertion that a conflict of interest occurred between defense counsel and Elledge resulting in Elledge being unrepresented is wanting. The record reveals the only conflict was that created by Dr. Lewis, in her failure to prepared and assist Elledge, as a witness at resentencing. Her non-cooperation extended to all efforts to get her to testify at the

postconviction evidentiary hearing in this cause. The trial court did not err in concluding she was the "problem."

Argument IV: Elledge's shackling issue is procedurally barred from postconviction appellate review.

Argument V and VI: Issues raised as to Elledge's length on Florida's death row have been decided adversely to him.

Argument VII: Elledge's contention that the standard jury instructions regarding expert testimony is without merit. Moreover, it is procedurally barred because it could have, but was not, raised on direct appeal.

Argument VIII: Elledge has presented no basis to suggest he is "insane to be executed." He has failed to make any argument at all other than to say he raised the claim to preserve it.

Argument IX: The lack of any merit regarding the Florida Rule of Professional Conduct 4-3.5(d)(4), which prohibits juror interviews has been upheld repeatedly by this Court. Additionally, the issue is procedurally barred from postconviction review since it was not, but could have been, raised on direct appeal.

Argument X: There is no basis to contend Elledge is innocent of the death penalty. There were four proven aggravating factors that the trial court found outweighed mitigation presented.

This Court affirmed those aggravators and affirmed the appropriateness of the sentence imposed.

Arguments XI, XII and XIII: The remaining issues raise constitutional challenges to the death penalty. Each have been decided against Elledge and other Florida death row appellants.

ARGUMENT I

ELLEDGE CLAIMS THAT HE WAS DENIED HIS DUE PROCESS RIGHTS WHEN THE STATE WITHHELD EVIDENCE THAT WAS MATERIAL AND EXCULPATORY AND/OR PRESENTED FALSE OR MISLEADING EVIDENCE

Following the July 2002, evidentiary hearing on December 10, 2002, Elledge's counsel, first raised the "amended issue" that:

> "1) the state violated due process by not disclosing at resentencing and in the postconviction process evidence that Dr. Norman had conducted specific tests on Mr. Elledge-tests that a defense expert has been requesting for years. This information should have been made available to the defense, but was withheld by the State as 'exempt materials,' yet used against the defense expert at the evidentiary hearing; 2) the State knowingly allowed misleading or false testimony to be presented without correction when trial counsel testified that Dorothy Lewis, a defense expert, wanted to know if various tests had been conducted on Mr. Elledge. The State knew at all times that those tests had been conducted on Mr. Elledge, but withheld that information until cross examination of Dr. Lewis; and 3) and the State improperly withheld materials that it considered 'exempt', when those materials in fact were the result of improper contact between the State and a confidential defense expert."

(Appellant Brief pp 8-9).

The trial court in reviewing this claim concluded no Brady violation occurred. (PCR 1966)

The United States Supreme Court, in Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999), provided a three-prong analysis for determining the merits of a Brady violation claim: [1] the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] the evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued. "'With regard to the third prong, the Court emphasized that prejudice is measured by determining "whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" Strickler, 527 U.S. at 290 (quoting Kyles v. Whitley, 514 U.S. 419 (1995)). In applying these elements, the evidence must be considered in the context of the entire record. See State v. Riechmann, 777 So.2d 342, 362 (Fla.2000); Sireci v. State, 773 So.2d 34 (Fla.2000); Haliburton v. Singletary, 691 So.2d 466, 470 (Fla.1997)." Carroll v. State, 815 So.2d 601, 619 (Fla. 2001).

1. Failure to disclose that Dr. Norman had conducted specific tests on Mr. Elledge.

Elledge asserts that during the evidentiary hearing, "it was learned for the first time that Mr. Elledge, in fact, had undergone some of the tests, but that information was withheld from the defense by the State Attorney." Contending that an *ex parte* communication occurred between the State Attorney and the defense expert, Dr. Norman,[20] Elledge concludes, "it is undisputed that Dr. Norman's faxed report was not disclosed to the defense before the July 2002 evidentiary hearing."

The Court found no Brady violation and concluded there was **no** evidence that (a) any *ex parte* communication occurred,[21] or (b) that defense counsel actually did not receive these reports.[22] The record affirmatively reveals defense counsels

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[20] The allegation is only that Dr. Norman was asked to fax a copy of his report to the State Attorney's Office, and that Dr. Norman complied.

[21] Mike Satz, State Attorney, stated as an Officer of the Court, that he had no recollection as to how the fax was transmitted (PCR 615) but observed that he "wouldn't have taken that deposition of Dr. Norman if I didn't have a copy of the report that he was talking about because that was the purpose of Defense, the purpose of hiring Dr. Norman was to do an EEG and MRI....And I certainly would not have taken the deposition unless I had a copy of those reports...." (PCR 615). The record also reflects that trial counsel Laswell testified that because he placed Dr. Norman on his witness list, he would have turned over any report to the State. He further noted this was true because the report was dated almost a month after Dr. Norman was listed as a witness on the defense's witness list. (PCR 590). See Fla.R.Crim.P. 3.220 (d)(B)(ii).

[22] Laswell testified that he had no reason to believe that Dr. Norman did not send the report to him (PCR 590), he simply

Laswell and Ongley **could not recall** whether they saw the three page faxed report[23] from Dr. Norman, although Dr. Norman was, in fact, the defense expert.[24]

Although provided an opportunity to present additional testimony at the "continued" evidentiary hearing, Elledge failed to present the testimony of Dr. Norman, who may or may not have been able to clarify why the reports were 1) sent to the state attorney's office via fax, and 2) explain whether he sent the October 14, 1993 report of the EEG and MRI to defense counsel, and 3) whether they discussed the conclusions reached in said report.

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could not recall receiving it (PCR 588). Moreover, Laswell recalled that the report of the EEG results were normal and stated, repeatedly, that he did not believe Dr. Norman's testimony would be helpful. (PCR 588-89).

[23] Neither Laswell nor Ongley would have seen the transmittal cover page from Dr. Norman's office, since it went to the State Attorney's office. As to the reports themselves, pages two and three, Laswell recalled having seen the MRI report but simply could not recollect whether he saw the EEG report.

[24] There can be no discovery violation or Brady violation if the defense had an opportunity to secure the information from Elledge's own witness. Simply because the State obtained a copy of a report to which they were entitled at trial constitutes neither an *ex parte* communication nor a Brady violation. Occhicone v. State, 768 So.2d 1037, 1042 (Fla. 2000) ("Although the 'due diligence' requirement is absent from the Supreme Court's most recent formulation of the Brady test, it continues to follow that a Brady claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant.")

The record reflects that Laswell and Ongley could not recall having seen the report, “but he couldn’t swear to it” that he, Laswell, did not see the EEG report. (PCR 576, 577). He could not even remember the earlier four page report submitted to him by Dr. Norman which was in defense counsel’s file. (PCR 577). Laswell did recall, however, that he only received reports from Dr. Norman and that he, Laswell, only ordered one EEG and one MRI be done. (PCR 583-84). On recross, Laswell observed that after reviewing all of the materials, there was nothing helpful in any of the reports because the reports came back normal. (PCR 588). Laswell observed that there was no reason to believe that “Dr. Norman did not send reports to him.” If he had received the reports, he would have furnished them to the State because Dr. Norman had been listed as a defense witness in his September 15th witness list. (PCR 590).

Mr. Ongley also could not recall nor had any recollection of the final EEG report. (PCR 605). He stated that Dr. Norman’s deposition, was four days after the fax transmittal and, had a report been used during the deposition which he did not have, he would have immediately asked for a copy. (PCR 609-10).

At the conclusion of all testimony, the trial court went through the boxes of exempt materials and found the October 14,

1993, EEG and MRI report in box "Q". (PCR 632).[25] In the trial court's August 31, 2000, Order, it found there was nothing in the "six boxes of exempt public records from the State Attorney's Office" that would be favorable to Elledge. (PCR 636-37, 639, 643).

As to whether postconviction counsel Moldof had access to these reports, testimony showed Moldof left the responsibilities of reviewing the files to Pamela Izakowitz, a part-time attorney with CCRC, who handled postconviction litigation. (PCR 567). Apparently, Izakowitz started helping Moldof, and at some point, went through all the files at the repository, "reading every page". (PCR 568). It was her testimony on direct examination that she never saw any documents regarding the EEG report dated October 14, 1993. (PCR 569).

On cross-examination it was shown Izakowitz was "totally" unaware of the separately maintained exempt public records at the repository, and did not review them. Therefore she did not know that these "exempt records" contained Dr. Norman's EEG and MRI reports dated October 14, 1993. (PCR 569-71).

Additionally, Moldof was present at the January 7, 2000, public records hearing on exempt materials and **at no point in**

[25] The Court also found in the State Attorney's exempt materials the "faxed cover sheet" and two pages of reports sent to the State Attorney's Office.

time filed a waiver of exemption regarding the State Attorney's records to be exempt, albeit he did file such a waiver for the Department of Corrections' records that were subject to an exemption. He had every opportunity to secure a similar waiver of exemption of any of the State Attorney's files.[26]

The State reaffirmed that the public records sought to be exempted by the State Attorney's Office were all based on statutory exceptions. Assistant State Attorney Susan Bailey stated that records that were determined to be exempt were sealed and separately boxed and sent to the repository pursuant to the rule.[27] (PCR 594-98). These facts are uncontested.

Citing Strickler v. Green, supra, Elledge's postconviction counsel contends that the State failed in its continuing duty to provide favorable evidence to the defense.

Elledge's postconviction counsel asserts that the October 14, 1993, report, only "came to light in July, 2002, when Dr. Lewis was cross-examined by the State Attorney". (Appellant's Brief, pages 12-13). The record is to the contrary. Discussions regarding the MRI and EEG reports occurred during

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[26] It is odd that Moldof would not have challenged the State Attorney's exempt files in light of the continuing efforts of that office to resentence Elledge and the ongoing exchanges between the State Attorney and Dr. Lewis.

[27] Absent a showing of a public records violation, which there was none, there can be no "Brady or discovery" violation.

Dr. Norman's deposition, October 18, 1993; were brought out in the trial testimony of Dr. Schwartz (TR 1764-65); were contained in the State Attorney's exempt materials sent to the repository; were reviewed by the trial court in the 2000 Public Records hearings as to exempt materials; were the subject matter of the trial court's August 31, 2000, Order concluding that no favorable information was contained in the exempt records and, were known to Dr. Lewis based on her testimony during the July 2002, evidentiary hearing. (PCR 484).

Moreover, the trial court "found" the reports in "two folders" in the "exempt records" that had been previously reviewed by the court, on July 3, 2002. Moldof's own witness, Pamela Izakowitz, clearly did **not** review or read every page of the files in the repository, and apparently missed the fact that exempt files existed and were maintained in separate folders. See: Fla.R.Crim.P. 3.852(f).

These reports showed Elledge was normal. The defense was aware of this outcome (even assuming *arguendo* that the October 14, 1993 one-page report on the EEG was not furnished to Laswell or Ongley), therefore Elledge has failed to meet the first prong of Strickler. Elledge cannot demonstrate how this report was either "exculpatory" or "impeaching" of any witness. See: Asay v. State, 769 So.2d 974, 982 (Fla. 2000). Nor can he

demonstrate how defense counsel could have draw out more evidence from Dr. Lewis or the other mental health experts.

Whether "postconviction counsel" was duped or was unaware of the report is equally of no moment and does not qualify as to Strickler's first prong. Moldof certainly had the wherewithal to challenge and review all the exempt materials by all the agencies submitting files for exemption. On appeal, to now urge that the State unfairly impeached Dr. Lewis is inaccurate.[28] He cannot demonstrate by any credible evidence that the report alone would have made a difference in how he presented the claim that Laswell and Ongley rendered ineffective assistance of counsel or that the other mental health experts somehow were not competent or adequately prepared. Moreover, it would not have changed how the State was able to impeach Dr. Lewis at the postconviction hearing. Laswell specifically testified he wanted Dr. Lewis to testify as to her earlier 1980's encounters with Elledge and, did not want her to do another evaluation or

[28] Elledge now asserts that this information was "favorable because it was precisely what Dr. Lewis had been requesting for years." How odd since the issue was not whether Dr. Lewis was denied materials but rather, whether her continuing inability to even look at her own notes to testify or even show up for court was a valid reason to assert that Laswell and/or Ongley rendered ineffective assistance to Elledge.

order more tests.[29] Additionally, postconviction counsel has not identified what exactly Dr. Lewis would have found had she known, assuming arguendo, she did not know the EEG and MRI test were normal, that the tests were done and were normal.

Elledge now argues that "... the real prejudice is shown where the Appellant could have obtained the raw data from Dr. Norman's testing which could have been utilized to demonstrate the existence of those brain injuries that the State continues to question." (Appellant's Brief p 23).

Such a suggestion is absurd for two reasons. First, Elledge could have called Dr. Norman and secured the information surrounding this entire claim at the evidentiary hearing, but elected not to. There is nothing in this record to reflect that "raw data" does not exist, and, in fact, this was not presented below. Second, the report of Dr. Norman, without dispute, states that Elledge has no brain damage or "is normal". The

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[29] Testimony at the evidentiary hearing clearly reflects that it was Dr. Lewis who was trying to do more than she was requested to do. Instead of simply reviewing her files and presenting background and a mental health history as the defense team wanted, she kept urging additional testing, which Laswell and Ongley told her was not what was needed. In spite of repeated efforts to have her testify by the defense counsels, Elledge and the court, **Dr. Lewis did nothing to prepare, and never appeared in court after promising to do so.** Whether she knew or was impeached about an EEG list had nothing to do with the ultimate issue before the Court - whether counsels did everything to secure Dr. Lewis as a witness for Elledge.

trial court's order reflects that: "...Moreover, the results of Dr. Norman's tests of the Defendant, which revealed no abnormalities, were in line with previous examinations of the Defendant years earlier." (PCR 1964).

2. The State knowingly allowed misleading or false testimony to be presented.

The second-prong of Strickler has likewise not been met.[30] Elledge asserts below, as proof that the State used misleading or false evidence to impeach Dr. Lewis, that:

> In Mr. Elledge's case, the prosecution clearly mislead the defense counsel and the court. The prosecution had in its possession ex parte communications with a defense expert. That ex parte communications was not provided to the defense during Mr. Elledge's resentencing proceedings. The ex parte communications also was withheld from the materials received from the Office of the State Attorney, which were supplied in public records litigation.
>
> The ex parte information was only presented to the defense during postconviction proceedings when the prosecution was cross-examining Dr. Dorothy Lewis....

In Carroll v. State, 815 So.2d 601, 619 (Fla. 2001), the

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[30] Elledge argues here that the "State kept these documents secret until it began its cross examination of Dr. Lewis in 2002." Such a allegation is neither true nor supported by the record. There is no evidence anywhere that the State "secreted" these documents from the defense. The State secured the report from Dr. Norman, a listed witness for the defense. Because of the previous references to the test, there was no reason for the State to know or suspect, for that matter, that either trial defense counsel or postconviction counsel was unaware of the report. (Moreover, the reports were part of the record sent to the repository).

Florida Supreme Court observed:

> The court below denied Carroll's claim, reasoning that there was no Brady violation since Carroll personally knew or should have known whether he was acquainted with Rank, whether he took drugs with Rank on the day in question, and whether there were witnesses to his activities with Rank. On appeal, Carroll argues that the trial court's reasoning is flawed because: (1) he was incompetent and therefore unable to provide his attorney with information to help his defense; and (2) even if he had been capable of disclosing to trial counsel that he knew Rank, he obviously could not have been aware of the other information contained within the notes, i.e., that the victim's family suspected Rank was somehow involved, that Rank allegedly abused the victim, and that another rape had recently occurred in the neighborhood.
>
> As previously discussed, a competency hearing was held in this case and Carroll was declared competent to stand trial. Thus, Carroll's first argument is without merit. Further, we find no error in the trial court's conclusion that Carroll was in the best position to provide information as to whether or not he knew Rank and whether he consumed drugs with Rank on the day in question. See Roberts v. State, 568 So.2d 1255, 1260 (Fla.1990) (denying Brady claim on basis that defendant "himself knew whether he had been drinking or taking drugs prior to the offense and also would have been aware of those who may have witnessed this"); see also Occhicone, 768 So.2d at 1042 ("Although the 'due diligence' requirement is absent from the Supreme Court's most recent formulation of the Brady test, it continues to follow that a Brady claim cannot stand if a defendant knew of the evidence allegedly withheld or had possession of it, simply because the evidence cannot then be found to have been withheld from the defendant.").
>
> Similarly, we find Carroll's second argument to be without merit. As noted by the State, the prosecution is not required to provide the defendant all information regarding its investigatory work on a particular case regardless of its relevancy or materiality. Further, even if we were to conclude

> that the State should have disclosed the information, we would find Carroll has failed to satisfy the prejudice prong of the three-part test. Trial testimony by police officers and various experts revealed that hair and blood samples were taken from Rank, but that subsequent testing ruled out his involvement. By contrast, blood was found on Carroll's sweatshirt and genitalia, and semen, saliva, and pubic hair recovered from the victim were consistent with that of Carroll. Thus, considering the investigative notes in the context of the entire record, we find no error in the trial court's denial of this claim since there is no reasonable probability that this evidence could "put the whole case in such a different light as to undermine confidence in the verdict." Strickler, 527 U.S. at 290, 119 S.Ct. 1936.

Dr. Norman, an neurologist, was retained by Laswell in preparation for the penalty phase resentencing. (PCR 104) In open court, Laswell furnished the State a copy of Dr. Norman's "report." (Defense #3 TR 135) This report, a four-page letter dated October 4, 1993, addressed to Mr. Laswell, was introduced into evidence at the evidentiary hearing as State's #11. That report states, in part, that Mary Ann Marzulli, Laswell's own mitigation specialist, provided Elledge's history "in great detail" to Dr. Norman. **Dr. Norman's physical and neurological examinations of Elledge showed no abnormalities and a future EEG and MRI test would be performed on Elledge**. Dr. Norman wrote:

> DISPOSITION: I will review the patient's EEG and MRI brain scan, **and forward a further report with these as soon as they are accomplished**. Due to transportation

> difficulties in getting him to the facility, he was seen by me before the other tests were done.

(State's #11, emphasis added).

Dr. Norman did administer an EEG and, an MRI was done. Written reports of these tests show that they were both performed on October 4, 1993 (the State received faxed copies on October 14, 1993). (State's #14) The EEG report, which was typed on October 7, 1993, states:

> REPORT OF ELECTROENCEPHALOGRAM
> This EEG, performed on an alert and cooperative patient, is performed in the alert state, and shows throughout the majority of the record normal patterns of brain activity…there are brief periods of theta slowing occurring...This is a very non-specific finding, and may indeed represent simply **mild drowsiness**. There are no definite focal, paroxysmal or cortical irritative abnormalities seen. **Hyperventilation and photic stimulation produced no changes**.
>
> IMPRESSION: The EEG is felt to be within normal limits.

(State's #14, emphasis added)

At the evidentiary hearing, Dr. Lewis was cross-examined about Dr. Norman's findings. She confirmed that back when she had evaluated Elledge she had suggested an EEG with hyperventilation and photic stimulation. She was asked if she knew that it had been done and she replied in the affirmative:

> A. There is on October 4th, 1993. I was going to say, I thought that Dr. Norman had ordered that.

> Q. And it was normal?
>
> A. It had some references in it to say this is probably normal. It had some abnormal activity and, to the best of my knowledge, they could not decide whether it was the result of drowsiness or something else…

(PCR 484)

At this point, "collateral counsel" claimed "surprise", that he did not have the EEG report and did not know why the State had it and he did not. (PCR 486-93) Moldof pointed out that in Dr. Norman's deposition, on October 18, 1993 (State's #15), there was no mention of "a photosensitive or hyperventilation in the EEG". (PCR 491)

Surprisingly, when cross-examination of Dr. Lewis resumed, Dr. Lewis denied having seen Dr. Norman's EEG report. (PCR 493-94). She did admit that she had seen a report from Dr. Norman which mentioned:

> Some kinds of potentially abnormal brain waves. But there was something like they are probably normal. But it did not say this was done with photic stimulation and hyperventilation.

(PCR 494) She then testified that she had never seen Dr. Norman's deposition. But, Dr. Lewis admitted:

> I have seen something that said there are brief episodes of slowing, okay, occurring in the right or left hemisphere and there is a very nonspecific finding and may, indeed, represent simply mild drowsiness. There are no definite focal, paroxysmal or cortical irritative abnormalities…" (PCR 495) She claimed that she was not aware that Dr. Norman had

> done photic stimulation and hyperventilation but that she had "seen something that had these other things in it…

(PCR 495)

Although Dr. Lewis was unwilling to admit it, or she "just" simply forgot, she must have reviewed the results of Elledge's EEG test as Dr. Norman's "Report of Electroencephalogram" because, it is the **only** report documenting the test. (State's #14) She could not possibly have gleaned this information from Dr. Norman's October 4th letter/report addressed to Laswell (State's #11) as the EEG had not yet been performed. Moreover, even though she claimed never to have read the report, Dr. Lewis was aware that "they could not decide whether it was the result of drowsiness". (PCR 484) She acknowledged:

> I have seen something that said there are brief episodes of slowing, okay, occurring in the right or left hemisphere and there is a very nonspecific finding and may, indeed, represent simply mild drowsiness… I was not aware that he had had hyperventilation and photic stimulation. But I have seen something that had these other things in it…

(PCR 495)

The word "drowsiness" was mentioned **only** in the Report of Electroencephalogram itself. (State's #15) Dr. Lewis' claim that she saw a different EEG report (PCR 494, 499) is not possible because **there was no other EEG test performed on Elledge**. Further, she initially admitted that she knew

that Dr. Norman had "ordered" an EEG with hyperventilation and photic stimulation, (PCR 484) but the only way she could have known this was by reading the EEG report itself since there was no mention of it in Dr. Norman's deposition (PCR 486) nor in Dr. Norman's letter.[31] Interestingly, she did testify she saw Elledge's MRI results (PCR 495-96) done on the same day as the EEG. (State's #14)

Postconviction counsel represented that he did not have the EEG report.[32] If this is true, then **it was not Moldof** who provided the EEG report to Dr. Lewis, but rather, the tests had to have been previously sent to Dr. Lewis by Laswell and/or Ongley.[33] At trial, Laswell knew about the test and the test results and had informed his other expert witness, Dr. Gary Schwartz about them. Dr. Schwartz testified at trial that

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[31] Not surprisingly, either Dr. Lewis did not read the entire report and missed the part dealing with hyperventilation and photic stimulation or she has a selective memory.

[32] Under Rule 3.850, discovery is not required, instead files and records are secured either under public records or through the statewide repository. The trial court engaged in extensive public records hearings for the last three years. See January 7, 2000 hearing; Amended Order on Exempt Public Records August 31, 2000, and the last public records hearing July 3, 2002.

[33] Dr. Lewis did nothing on her own, and would not and did not secure other files other than those sent to her by Laswell or Ongley.

Laswell had told him that Elledge's EEG and MRI were both normal.[34] (TR 1764-65)

Even if Elledge's EEG results and the test reports were never actually read by trial counsel, Elledge was not prejudiced at the sentencing. Both Laswell and Ongley knew that the EEG and MRI results were "normal" and Laswell testified he made made a deliberate, knowing, strategic decision to not call Dr. Norman as a witness. (PCR 60-62)[35]

Postconviction counsel could or should have known that Dr. Norman had performed an EEG test and that there was a report. The files of this case reflect that Dr. Norman's letter/report of October 4th (State's #11), which postconviction counsel admits to having (PCR 585-86) indicated tests were to be done. That report also specifically states that such a report would be forthcoming. Dr. Norman also discussed the EEG results in his deposition of October 18th, (State's #15) which postconviction counsel also admits having. (PCR 555)

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[34] Since the point of this evidentiary hearing was to address claims of Laswell's alleged ineffectiveness, it is clear that Laswell did attempt to prepare Dr. Lewis (and Dr. Schwartz) by providing these test results to his expert witnesses.

[35] And, if Dr. Lewis **had** appeared and testified in 1993, she would have been confronted and impeached with Elledge's EEG results. Moreover the record of the resentencing reflects that none of the doctors suggested, other then Dr. Schwartz, that Elledge suffered organic brain damage.

The 1993 trial testimony of Dr. Schwartz shows he was "told by Mr. Laswell that [the EEG results] were within normal range." (TR 1764-65) Thus, if postconviction counsel had read any of these records, he had to know that the test was done and that a written report existed. Furthermore, postconviction counsel did have the written report of the MRI as he sent that report to Dr. Lewis himself. (PCR 497-98) If an MRI report exists then an EEG report exists as well.[36] Lastly, collateral counsel had no standing to assert discovery violations in a postconviction proceeding. He had every opportunity to secure whatever information he wanted and he could have called any witness he needed to present evidence for the evidentiary claims.

In Swafford v. State, 838 So.2d 966 (Fla. 2002), the Court observed regarding a "legitimate discovery" violation:

> Swafford argued that the state failed to disclose exculpatory evidence. "The test for measuring the effect of the failure to disclose exculpatory evidence, regardless of whether such failure

[36] On July 3, 2002, at the conclusion of the evidentiary hearing, this Court conducted a review of the State's Chapter 119 withheld exempt documents. Therein, the Court found copies of the EEG and MRI reports along with a copy of the three-page fax itself, including cover letter. (PCR 632-33, 636, 643) These exempt documents were the subject of a public records hearing on January 7, 2000. They had been inspected by this Court and determined to be properly withheld and exempt from disclosure.

> constitutes a discovery violation, is whether there is a reasonable probability that 'had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " Duest v. Dugger, 555 So.2d 849, 851 (Fla. 1990) (quoting United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). The court found that no Brady violation had occurred and that Swafford had not established the materiality of the information he claims the State withheld. Thus, the court concluded: "There is no possibility that the result of the proceeding would have been different even if all this information were available." Swafford has shown no error in the court's ruling, and we hold that the court correctly refused to hold an evidentiary hearing on this claim.

See also Cox v. State, 819 So.2d 705, 712 (Fla. 2002); Gilliam v. State 817 So.2d 768, 775 (Fla. 2002), and Spencer v. State, 842 So.2d 52 (Fla. 2002).

Assuming for the moment that collateral counsel has "some standing" to assert a "Brady" violation, and "that" is what Moldof is contending, the State would submit he cannot sustain any relief under Brady. See Vining v. State, 827 So.2d 201(Fla. 2002), wherein the Court opined:

> A defendant must demonstrate the following elements before a Brady violation has been proven: (1) the evidence at issue is favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) the evidence has been suppressed by the State, either wilfully or inadvertently; and (3) the defendant has been prejudiced by the suppression of this evidence. See Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); Way v. State, 760 So.2d 903, 910 (Fla.2000), cert. denied, 531 U.S. 1155, 121 S.Ct. 1104, 148 L.Ed.2d 975 (2001); Thompson v. State, 759 So.2d 650, 662 (Fla.2000). A defendant is prejudiced by the suppression of exculpatory evidence if it is material,

> in other words if "there is a reasonable probability that the result of the trial would have been different if the suppressed documents had been disclosed to the defense." Strickler, 527 U.S. at 289, 119 S.Ct. 1936.
>
> In the instant case, the lower court concluded that no prejudice occurred from the withheld items because Vining did not show any inconsistencies between the items and the trial testimony nor did he show how the items could have been used to impeach the witnesses. Further, the court determined that the evidence was not material under Brady as Vining had not shown that there is a reasonable probability that his conviction or sentence would be different. After reviewing the record and the order below, we agree with the postconviction court's conclusion that Vining failed to show the prejudice and materiality required for a Brady violation. Thus, we affirm the denial of relief on this claim.

Based on the foregoing, collateral counsel had or should have had all records and files and, if for whatever reason he did not, then any failure to obtain those files can not be attributed to the State. There was no “right to discovery” of the EEG report in postconviction and there was absolutely no evidence presented that, at trial, any discovery or Brady violation occurred.

3. The State improperly withheld information that resulted in prejudice to Elledge.

The third-prong of Strickler is also herein wanting; postconviction counsel cannot demonstrate through any competent evidence that the EEG report would have made a difference or the State improperly used it. Below, postconviction counsel Moldof

contended: "[H]ere, the undisclosed evidence would have not only been of value just on its face, but the synergistic effect of the nondisclosure considered together would have shown that Dr. Lewis was credible, that her requests were not demanding or outrageous. It also illustrated that Mr.(sic) Lewis was the only mental health expert who offered consistent, non-conflicting mitigation testimony." Contrary to the aforenoted, Elledge has not shown relevancy,[37] not shown how the October 14, 1993, EEG final report was contrary to any other evidence presented or was not known by the other mental health experts. He has not shown, even how Dr. Lewis would have presented additional evidence or suggested other tests to assist Elledge. See: Swafford v. State, 828 So.2d 966 (Fla. 2002), citing Duest v. Dugger, 555 So.2d 849, 851 (Fla. 1990), quoting United States v. Bagley, 473 U.S. 667, 682 (1985) (The standard to be employed in any failure to disclose exculpatory evidence is a "reasonable probability that had the evidence been disclosed...the result of the proceeding would have been different."); Vining v. State,

[37] Elledge's postconviction counsel opines that this "Brady" claim warrants relief because: [H]ere, it shakes confidence in the verdict because it altered the course of defense testing and preparation for resentencing, especially when mitigation was Mr. Elledge's **only** defense." The Florida Supreme Court, in affirming the 1993 resentencing, found the trial court correctly assessed mitigation but the mitigation did not outweigh the aggravating factors proven. Elledge v. State, 706 So.2d 1340, 1349.

827 So.2d 201 (Fla. 2002) (withheld items not shown to be inconsistent or impeachment evidence. Matters were not material under Brady since no showing that results would be different and the defense failed to show prejudice.); Maharaj v. State, 778 So.2d 944, 953-954 (Fla. 2000)(State's alleged withholding of the victims recent purchase of large insurance policies not shown to be exculpatory and therefore not material, and "cannot reasonably be said to put the case in such a different light as to undermine confidence in this verdict."); Johnson v State, 804 So.2d 1218, 1223 (Fla. 2001)[38] ("Although Johnson's trial counsel was provided a copy of police notes regarding the murders, Johnson claims that the notes were illegible. Thus, he contends, he was unaware that the police originally investigated the possibility of a co-suspect based on a witness report that two white males left the bar after the shooting. However, Johnson's counsel was also provided a copy of the police complaint report during discovery, as evidenced by the state

[38] In Johnson the Court further discussed another Brady allegation: "Johnson also claims that the police withheld exculpatory character evidence regarding the customer victim. According to the victim's girlfriend, he was the type of person who would have resisted the robbery attempt. Under section 90.404(1)(b), Florida Statutes (2000), evidence of a pertinent trait of character of the victim of the crime may be offered by the accused. While this evidence might have been admissible if known to Johnson at the time of trial, it would not "probably produce an acquittal on retrial," nor have any effect on Johnson's death sentence..."

attorney's letter regarding discovery materials. This report clearly states that a named witness saw "two W/M drive away from the tavern." Thus, any police investigation of a co-suspect is not newly discovered evidence nor is it withheld Brady evidence. Furthermore, the fact that the police might have investigated the possibility of a co-suspect does not establish a reasonable probability that the outcome would be different had Johnson presented this information at trial and cannot satisfy either the Brady or Jones standards. Thus, the trial court correctly denied relief without a hearing on this claim."); Stewart v. State, 801 So.2d 59, 70 (Fla. 2001)("Stewart argues the trial court erred in denying claim that the State failed to provide jail records to his attorney prior to trial in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)...On cross-examination, Mr. Brody asked Mr. Skye if the State had ever obtained the Hillsborough County jail records. Mr. Skye stated that since there was no discovery for the penalty phase in 1985 or 1986, his recollection was that the State never obtained, thought about, or cared about those records. When asked if he thought the State had no Brady obligation to provide the jail records to the defense, Mr. Skye stated, "I would say that's true because my understanding of the Brady [sic] is that the state attorney or the prosecutor doesn't

have an obligation to go out and seek out exculpatory things [that] are equally available to the defendant." In view of the fact that the Hillsborough county jail records were equally available to [the] Defendant or anyone who subpoenaed them, the court finds that the State did not suppress or withhold those records.").

Elledge has failed to meet any of the three-prong analysis set forth in Strickler. In failing to do so he is entitled to no relief.

Lastly, Elledge contends under Giglio v. United States, 405 U.S. 150 (1972), he is entitled to relief because the use of Dr. Norman's report was somehow "false or misleading" when used by the state to cross examine Dr. Lewis. Specifically he contends that the State's deliberate misleading of defense counsel violates due process". (Appellant's Brief p 24).[39]

To establish a Giglio violation, it must be shown that: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material. Ventura v. State, 794 So.2d

[39] Elledge argues: "...the State disclosed new information that established that the State knew that these additional tests had been conducted on Mr. Elledge, but failed to notify the defense and allowed incomplete and erroneous testimony to be presented by the trial attorney and the defense expert at the re-sentencing. If counsel for Mr. Elledge had known that these tests had been conducted on Mr. Elledge, he could have used that information to support the credibility of his experts." (Appellant's Brief p. 25).

553, 562 (Fla. 2001); see also Rose v. State, 774 So.2d 629, 635 (Fla. 2000), and Guzman v. State, 868 So. 2d 498 (Fla. 2003).

In Guzman, the Court reviewed Guzman's claim that Martha Cronin and the lead detective on Colvin's murder case both testified falsely at trial, violating Giglio:

> The first two prongs of the Giglio test are satisfied in this case. Both Cronin and the lead detective on the case testified falsely at trial that Cronin received no benefit for her testimony against Guzman other than being taken to a motel rather than jail when she was arrested. In fact, the State paid Cronin $500, a significant sum to an admitted crack cocaine addict and prostitute. The knowledge prong is satisfied because the knowledge of the detective who paid the reward money to Cronin is imputed to the prosecutor who tried the case. See Gorham v. State, 597 So.2d 782, 784 (Fla. 1992) (holding that the prosecutor is charged with constructive knowledge of evidence withheld by other state agents, such as law enforcement officers).
>
> The only disputed issue with respect to Guzman's Giglio claim is the third prong, which requires a finding that the false testimony presented at trial was material. See Ventura, 794 So.2d at 562. Guzman asserts that the postconviction court applied the wrong standard in deciding the materiality prong of his Giglio claim. In its order denying Guzman's rule 3.850 motion, the postconviction court articulated the Giglio standard of materiality as:
>
> Under Giglio, a statement is material if "there is a reasonable probability that the false evidence may have affected the judgment of the jury." [Ventura v. State, 794 So.2d 553, 563 (Fla.2001)] (quoting Routly [v. State], 590 So.2d [397, 400 (Fla.1991).]) "In analyzing this issue ... courts must focus on whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. (quoting White v. State, 729 So.2d 909, 913 (Fla.1999)). Order Denying Claims IIC(1), IIE(1), IIE(4), etc. at 12.
>
> After evaluating the State's $500 payment to Cronin in light of the other evidence presented at trial, the postconviction

court concluded that "there is not a reasonable probability that the false evidence would put the whole case in such a different light as to undermine confidence in the verdict." Id. at 13.

The postconviction court stated and applied the Giglio standard of materiality from our decisions in Ventura v. State, 794 So.2d 553 (Fla.2001), White v. State, 729 So.2d 909, 913 (Fla.1999), and Routly v. State, 590 So.2d 397 (Fla.1991). Having reviewed these decisions, as well as our other Giglio and Brady decisions, we conclude that our precedent in this area has lacked clarity, resulting in some confusion and improper merging of the Giglio and Brady materiality standards. [FN8] For example, in Rose v. State, 774 So.2d 629, 635 (Fla.2000), we said: "The standard for determining whether false testimony is 'material' under Giglio is the same as the standard for determining whether the State withheld 'material' in violation of Brady." In reliance on Rose, the trial court's order that we approved in Trepal erroneously stated that in addressing a Giglio claim "[t]he materiality prong is the same as that used in Brady." Trepal v. State, 846 So.2d 405, 425 (Fla.2003). We recede from Rose and Trepal to the extent they stand for the incorrect legal principle that the "materiality" prongs of Brady and Giglio are the same. We now clarify the two standards and the important distinction between them.

> FN8. In her specially concurring opinion in Trepal v. State, 846 So.2d 405, 437 (Fla.)(Pariente, J., specially concurring), cert. denied, --- U.S. ----, 124 S.Ct. 412, 157 L.Ed.2d 295 (2003), Justice Pariente noted the confusion and succinctly stated the difference between the standards.

The Brady standard of materiality applies where the prosecutor fails to disclose favorable evidence to the defense. See Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Under Brady, the undisclosed evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). [FN9] A criminal defendant alleging a Brady

violation bears the burden to show prejudice, i.e., to show a reasonable probability that the undisclosed evidence would have produced a different verdict. Strickler v. Greene, 527 U.S. 263, 281 n. 20, 289, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).

> FN9. This is the same standard that is used to evaluate the prejudice prong of an ineffective assistance of counsel claim. See Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (stating that "the appropriate test for prejudice [in ineffective assistance of counsel claims] finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution," that in an ineffective assistance of counsel claim "[t]he 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" and that "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome").

By contrast to an allegation of suppression of evidence under Brady, a Giglio claim is based on the prosecutor's knowing presentation at trial of false testimony against the defendant. See Giglio, 405 U.S. at 154-55, 92 S.Ct. 763. Under Giglio, where the prosecutor knowingly uses perjured testimony, or fails to correct what the prosecutor later learns is false testimony, the false evidence is material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Justice Blackmun observed in Bagley that the test "may as easily be stated as a materiality standard under which the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt." 473 U.S. at 679-80, 105 S.Ct. 3375. The State, as the beneficiary of the Giglio violation, bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt. Id. at 680 n. 9, 105 S.Ct. 3375 (stating that "this Court's precedents indicate that the standard of review applicable to the knowing use of perjured testimony is

equivalent to the Chapman [v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)] harmless-error standard"). [FN10]

> FN10. In United States v. Alzate, 47 F.3d 1103 (11th Cir.1995) the court, after articulating the standard of materiality applicable to Brady claims, stated:
>
> A different and more defense-friendly standard of materiality applies where the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony. Where either of those events has happened, the falsehood is deemed to be material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103[, 96 S.Ct. 2392, 49 L.Ed.2d 342] (1976) (emphasis added). As the Supreme Court has held, this standard of materiality is equivalent to the Chapman v. California, 386 U.S. 18, 24[, 87 S.Ct. 824, 17 L.Ed.2d 705] (1967), "harmless beyond a reasonable doubt" standard. Bagley, 473 U.S. at 679 n. 9[, 105 S.Ct. 3375]. Id. at 1110 (citations and footnote omitted), quoted in Trepal, 846 So.2d at 439 (Pariente, J., specially concurring).

Thus, while materiality is a component of both a Giglio and a Brady claim, the Giglio standard of materiality is more defense friendly. [FN11] The Giglio standard reflects a heightened judicial concern, and correspondingly heightened judicial scrutiny, where perjured testimony is used to convict a defendant. See Bagley, 473 U.S. at 682, 105 S.Ct. 3375 (explaining that the defense-friendly standard of materiality is justified because the knowing use of perjured testimony involves prosecutorial misconduct and "a corruption of the truth-seeking function of the trial process") (citing Agurs, 427 U.S. at 104, 96 S.Ct. 2392). Under Giglio, once a defendant has established that the prosecutor knowingly presented false testimony at trial, the State bears the burden to show that the false evidence was not material.

FN11. The Alzate court stated that the Brady standard of materiality "is substantially more difficult for a defendant to meet than the 'could have affected' standard we apply [to Giglio claims]." Alzate, 47 F.3d at 1110 n. 7.

In Guzman's case, the postconviction court's resolution of the Giglio claim does not sufficiently reflect the standard appropriate to a Giglio claim. In its order, the court did not state that there was no reasonable likelihood that the false evidence regarding the $500 payment to Cronin could have affected the court's judgment as factfinder. Nor did the court find that the State had demonstrated that the false evidence was harmless beyond a reasonable doubt. Because of this lack of findings critical to a Giglio analysis, we cannot determine that the court adequately distinguished the Giglio standard from the Brady standard when considering and ultimately deciding the Giglio claim. [FN12] We therefore remand this claim to the trial court for reconsideration and for clarification of its ruling on the materiality prong of Guzman's Giglio claim. To reiterate, the proper question under Giglio is whether there is any reasonable likelihood that the false testimony could have affected the court's judgment as the factfinder in this case. If there is any reasonable likelihood that the false testimony could have affected the judgment, a new trial is required. The State bears the burden of proving that the presentation of the false testimony was harmless beyond a reasonable doubt.

FN12. In its articulation of the Giglio standard, the lower court correctly stated that the false testimony is material if "there is a reasonable probability that the false evidence may have affected the judgment of the jury." The confusion, however, is attributable to the second sentence in the court's articulation, stating that, "[i]n analyzing this issue ... courts must focus on whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." This second sentence is correctly used to analyze Brady claims, but is

> inappropriate to analyzing claims under the more defense-friendly standard of Giglio.

868 So. 2d at 506-508.

Elledge meets none of Giglio's three-pronged test. Dr. Norman's report was not false,[40] the prosecution had no way of knowing that defense counsel did not have the report[41], and the report would not have presented any evidence that was material.[42] The trial court was correct in denying relief as to this claim. Robinson v. State, 865 So.2d 1259 (Fla. 2004); Tompkins v. Moore, 193 F.3d 1327, 1329 (11th Cir. 1999); Sochor v. State, 2004 FLA NEXIS 985 (July 8, 2004).

ARGUMENT II

Effective Assistance of Counsel-Penalty Phase

In denying all relief, the trial court reviewed the historical facts as to counsels' representation of Elledge, reviewed the

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[40] Tompkins v Moore, 193 F.3d 1327, 1340 (11th Cir. 1999)("Tompkins has failed to meet the threshold requirement that he show false testimony was used.").

[41] There is nothing in this record to reflect that the State Attorney's Office knew that defense counsels did not have the "report". In fact everything in this record points to the contrary. While defense counsel could not recall having seen the "report", which said Elledge was normal, the inability to recall is not the equivalent to not receiving or having the report. Dr. Norman was defense counsel's expert.

[42] The "report" was used to cross-examine Dr. Lewis regarding her believe that Elledge had brain damage. The report merely reflected that the tests done by Dr. Norman showed that Elledge was normal. Any "materiality" of that information is non-existing.

evidentiary testimony of counsels and the facts surrounding the appearance of Dr. Lewis. The court resolved the ineffective counsel assertion adverse to Elledge, finding:

> Based upon the testimony adduced at the evidentiary hearing, this Court finds that Dr. Lewis did not have any intention of appearing and testifying on behalf of the Defendant at the trial in 1993. Her failure to appear was not the fault of Mr. Laswell or Dr. Ongley, but rather by her lack of preparedness and her reluctance to undergo cross-examination, perhaps of the kind she had experienced during the federal habeas corpus hearing by the same State Attorney, Michael Satz. The testimony and evidence presented at the evidentiary hearing supports a finding that Mr. Laswell and Dr. Ongley did not pursue Dr. Lewis because she would have been more of a liability than a help to the Defendant, however up until and during the trial, they both attempted to secure her attendance based on the Defendant's desire to have her testify. Having heard the testimony and reviewed the evidence, this Court finds that Dr. Lewis' testimony was totally devoid of credibility and that it was Dr. Lewis's complete lack of cooperation which resulted in her failure to testify.
>
> The testimonial evidence which was presented at the evidentiary hearing primarily focused on the reasons that Dr. Lewis ultimately did not testify on behalf of the Defendant. Throughout the evidentiary hearing, the issue of Mr. Laswell and Dr. Ongley's performance on behalf of the Defendant was not pursued, other than the failure to have Dr. Lewis testify at the trial. As was clearly revealed, the failure of Dr. Lewis to appear was due entirely to her own fault and not the fault of counsel. With regard to counsels' performance regarding mental health mitigation and the investigation of possible mitigation, the evidence and testimony does not support a finding that the performance was constitutionally unsound. Cherry v. State, 781 So.2d 1049, 1050 (Fla. 2001) (upholding conclusion that trial counsel's failure to present mitigating evidence of drug abuse was not predicated upon lack of investigation, but because the evidence at trial did not support the proposed mitigation); Rutherford v. State, 727 So.2d 216, 222 (Fla. 2000) (upholding denial of ineffective claim since defense attorney's discussions with defendant, family and mental

> health experts did not uncover any mental impairment); Davis v. Singletary, 199 F.3d 1471, 1478 (11th Cir. 1997) (upholding, a reasonable trial strategy, counsel's decision not to present defendant's mental health history in order to keep from the jury appellant's pedophillic tendencies). Inasmuch as there was no lack of performance on counsels' part in presenting that which they did at the trial, the Defendant has failed to satisfy the performance prong of Strickland, supra.

(PCR 1962-63).

In Blanco v. State, 507 So.2d 1377, 1381 (Fla. 1987), the Court has held:

> . . . A claimant who asserts ineffective assistance of counsel faces a heavy burden. First, he must identify the specific omission and show that counsel's performance falls outside the wide range of reasonable professional assistance. In evaluating this prong, courts are required to (a) make every effort to eliminate the distorting effects of hindsight by evaluating the performance from counsel's perspective at the time, and (b) indulge a strong presumption that counsel has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment with the burden on claimant to show otherwise. Second, the claimant must show that the inadequate performance actually had an adverse effect so severe that there is a reasonable probability that the results of the proceedings would have been different but for the inadequate performance.

For relief, Elledge must demonstrate: "...counsel's performance was deficient...." Strickland, 466 U.S. at 687 (1984). The Court explained what it meant by "deficient". Id. at 689 (citation omitted). For example, the ability to create a more favorable or appealing strategy several years after the fact, does not translate into deficient performance at trial. Patton v. State, 784 So.2d 380 (Fla. 2000)(precluding reviewing

court from viewing issue of trial counsel's performance with heightened perspective of hindsight); Rose v. State, 675 So.2d 567, 571 (Fla. 1996)(holding disagreement with trial counsel's choice of strategy does not establish ineffective assistance of counsel); Cherry v. State, 659 So.2d 1069, 1073 (Fla. 1995)(concluding standard is not how current counsel would have proceeded in hindsight); Rivera v. State, 717 So.2d 477, 486 (Fla. 1998); Occhicone v. State, 768 So.2d 1037 (Fla. 2000)(same).

Elledge has a heavy burden to meet given that a court must, "indulge the strong presumption that counsel's performance was reasonable and that counsel made all significant decisions in the exercise of reasonable professional judgment." Strickland. In explaining the concept of reasonableness, the Court stated:

> The *Harich* court held, however, that a defendant must prove that the approach taken by defense counsel would have been used by no professionally competent counsel and that the approach taken by counsel was one which did not fall 'within the objective yardstick that we apply when considering the question of ineffectiveness of counsel' *quoting* Harich, at 1471.

State v. Williams, 797 So.2d 1235 (Fla. 2001). With these principles in mind it is clear that Elledge has failed to establish that defense counsels' penalty phase performance was constitutionally deficient.

LASWELL'S PREPARATION AND TESTIMONY

Following remand April 5, 1993, for a new resentencing hearing, the case was assigned to Assistant Public Defender William T. "Bill" Laswell.[43]

On July 1, 2002, at the evidentiary hearing, Bill Laswell testified that when he received this case, he "jumped right on it". (PCR 20) Since defendant Elledge had already spent 19 years incarcerated, he knew that mitigation was going to be very difficult. (PCR 24). At that time, he knew mental mitigation was the strongest point in Elledge's case and believed the mental health mitigators carried the most weight with juries and with the courts. (PCR 25, 27) Thus, he began his preparation of mental health mitigation very early. (PCR 27).

Laswell met with prior defense counsel Peter Giacoma who had represented the defendant at the third penalty phase trial in 1989. He compiled the voluminous trial file and immediately considered the presentation of mitigation evidence through mental health experts. (PCR 27-28) His first consideration was to look at possible mental mitigation closer to the time of the crime, because he thought it would be more significant. (PCR 29)

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[43] For the past 12 years (since 1990) Mr. Laswell has worked in the Capital Crime Section at the Public Defender's Office. He began practicing law in Indiana 30 years ago and started in Florida in 1972. (PCR 19). He handled his first capital murder defense 30 years ago and has defended more than 100 cases including guilt and/or penalty phases. (PCR 592-93).

On July 13, 1993, Laswell filed a Motion to Appoint Confidential Expert (State's Exhibit #2) and at the hearing two days later, Dr. Trudy Block-Garfield was appointed to assist the defense in preparation of mental health mitigation. (State's #3, PCR 99). He consulted with Dr. Block-Garfield who he considers to be a highly respected psychologist in Broward County.[44]

Laswell specifically wanted Dr. Gary Schwartz because he was aware of the doctor's background. Laswell had previously attended a lecture by Dr. Schwartz, and he came highly recommended. (PCR 31). Laswell had also previously worked with Dr. Glenn Ross Caddy, who had already evaluated Elledge and testified for the defense at the third penalty phase trial in 1989.(PCR 30) Dr. Caddy was board certified on three boards.[45] (PCR 95) He also selected Dr. Norman, a neurologist, (PCR 31) and specifically requested the Court's appointment of this expert at an ex parte hearing.[46] (PCR 104). Laswell further enlisted the assistance of fellow Assistant Public Defender Jim

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[44] He had worked with her before and valued her insight and always believed her to be straight up and give good, solid advice. (PCR 32-33, 106).

[45] Laswell testified he did not recall any written reports generated by Dr. Caddy. (PCR 42).

[46] Dr. Norman's responsibility was to look for organic problems. (PCR 106).

Ongley who is also an M.D. and was a former Medical Examiner. (PCR 30)[47]

Laswell observed that early on, it became clear that Dr. Block-Garfield would not be a helpful witness to the defense (she had informed Laswell that the defendant was a sociopath.) Laswell therefore had no intention of calling her.[48] (PCR 34, 105) He did, however, add her name to the defense witness list "in an abundance of caution..., using her in some back-up situation, if necessary." (PCR 101) He did also consult with Dr. Block-Garfield and a mitigation specialist, Marianne Marzulli, about the direction of the case.[49] (PCR 44-45)

Laswell became aware of Dr. Lewis sometime in late summer, through the defendant. Elledge informed Laswell that he

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[47] Ongley became involved in Elledge's case as early as September 27, 1993 when he appeared in court as defense co-counsel at the hearing on the State's Motion to Appoint Expert. (State's #5, PCR 110) His original assignment was to handle Dr. Norman. (PCR 30).

[48] Dr. Block-Garfield, informed Laswell that she did not think the crimes were committed under extreme disturbance. She believed Elledge was a sociopath, and Laswell explained that because sociopaths have a behavior or antipersonality disorder which is labeled a person who makes bad decisions over and over again Laswell believed Dr. Block-Garfield would run contradictory to the other mental health experts who might be more favorable to Elledge. (PCR 32-35, 105).

[49] Laswell testified that early on he discussed with Dr. Block-Garfield mental mitigation and that the mitigation specialist Marzulli collected mitigation evidence for him. (PCR 44).

(Elledge) believed Dr. Lewis to be "the most wonderful psychologist" and the leading expert in the country and he just had to have her testify. (PCR 45, 111-12). Laswell was aware of Dr. Lewis' [and Dr. Pincus'] work and contacted her at Bellevue Hospital in New York. They had a "wonderful conversation" and Dr. Lewis seemed glad to help "Billy" out.[50] (PCR 46-47)

In that initial conversation Laswell asked Dr. Lewis to review her file and told her he would call her again in a couple

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[50] Dr. Lewis and Dr. Pincus had been involved in a study of Florida death-row inmates years earlier seeking to determine whether there was a link between homicidal tendencies and temporal lobe epilepsy. Elledge was one of the death-row inmates in the study. (PCR 46, 112-15). Testimony further revealed that Dr. Lewis had previously testified in 1985, in federal court in Elledge's behalf and she had not done well. In the opinion which issues, in a footnote, the Eleventh Circuit concluded her testimony was not credible and found that Lewis' determination that Elledge was under extreme disturbance and suffered organic brain damage was contrary to other experts and not persuasive. Laswell admitted that he knew about the prior testimony and opinion of the court. (PCR 112-115). See Elledge v. Dugger, 823 F.2d 1439, 1447 (11th Cir. 1987):

> Even if Elledge's counsel had produced Dr. Lewis and Elledge's family members at the sentencing phase, we agree with the district court that Elledge was not prejudiced thereby: he nevertheless would have received the death penalty.
>
> The value of Dr. Lewis's testimony was undercut in part by the revelation that her analysis largely relied on Elledge's recitations and had not been fully corroborated by independent follow-up investigation. In addition, the two court-appointed psychiatrists who examined Elledge each gave damaging evaluations that would have diluted Dr. Lewis's impact. (FN18)

of weeks. Laswell testified that Dr. Lewis said she had lots of information on Elledge and that she would help out well before trial. (PCR 47) He called her three to four weeks later, but she had still not pulled her file on Elledge for review. Instead, she suggested further evaluation and testing. Laswell made it clear that he was seeking her testimony only as to the original evaluation of the defendant that she had done closer to the time of the crimes. He again asked Dr. Lewis to review her file. (PCR 47-48)

Laswell fully expected to call Dr. Lewis as a witness (PCR 49) and on October 12, 1993, at a pre-trial hearing, he asked for the Court's approval of her demanded fee of $250.00 per hour. Laswell told the Court that: "it is the belief of Mr. Elledge and myself that she has much to add to the penalty phase and the mitigation to be offered. And she is a necessary witness." (Defense #3) The Court granted his request.

After their first two conversations, Dr. Lewis did not seem nearly as anxious to help out. Laswell testified that he found it increasingly more difficult to get in touch with her. She still had not reviewed her file and the next contact "went off

the rails" between the two of them. Laswell ended the call by hanging up on her. (PCR 49).[51]

Elledge's fourth penalty phase trial started on November 1, 1993. On Friday, November 5, 1993, during a recess, Laswell appeared before the Court and requested the judge to order Dr. Lewis to appear for testimony on the following Monday or Tuesday. The Court issued an order for her appearance. (State's #7 TR 1394-97) Dr. Lewis did not show up and the first thing that Monday morning, November 8, 1993, the Court addressed the absence of Dr. Lewis. Laswell represented that despite the fact that Dr. Lewis had received notice (and a subpoena) several weeks earlier, despite the fact that he had sent her airplane tickets which accommodated her personal schedule and despite receiving an agreement to pay her demanded fee of $250.00 per hour, Dr. Lewis was not there. (Defense #4 TR 1480-87) Laswell's last communication with her was on the previous Friday evening, November 5th, when Dr. Lewis told him that she still had not retrieved her file and that there was no way she could be in court on Monday, November 8th. She had made other plans. (Defense #4 TR 1482). Laswell expressed to the Court his

[51] Laswell testified that since he was not having any success in getting Dr. Lewis to review the files after speaking to her on at least three separate occasions, he decided to have Ongley try and deal with her. (PCR 49).

exasperation with Dr. Lewis and his decision that he no longer wished to call her as a witness, however, Elledge did, even against Laswell's legal advice.

The Court requested Laswell contact Dr. Lewis again and arrange for her to come in later that day (Monday) or the next. The Court stated that "if Mr. Elledge wants her here, the Court is going to try to do that within reasonable parameters." (Defense #4 TR 1486) Addressing the defendant the Court assured Elledge: "... this Court will use its power to insure her presence". Elledge then requested to speak with Dr. Lewis himself and the court agreed to allow him the use of the courtroom telephone to do so. (Defense #4 TR 1487)

Laswell testified that his change of opinion[52] regarding calling Dr. Lewis as a defense witness was predicated upon "her unprofessional refusal to retrieve or examine files of her prior evaluation [of defendant] in the 80s which he [Laswell] thought was a simple request. And she over and over and over would not do that." (PCR 70) As a lawyer, he would have "no enthusiasm for putting on an expert witness who would have to be compelled

[52] Laswell testified he thought that Dr. Lewis was a necessary witness (PCR 57), because if she reviewed her notes, she could testify as to her work-up as to whether Elledge had temporal lobe epilepsy and Pincus' report would present evidence of possible organic brain damage. (PCR 59). Laswell changed his thinking when Dr. Lewis continued to be unprepared and would not retrieve her files and/or discuss Elledge's case. (PCR 58-59).

to be here who was unprepared and who wouldn't open a file and look at it." (PCR 71) Furthermore, Dr. Lewis had contradicted herself by stating that she never reviews a file until she gets on the airplane. For these reasons, Laswell's advice to Elledge was not to call Dr. Lewis. (PCR 72-73)

Nevertheless, at the defendant's request, during a recess in the trial proceedings on Monday, Nov. 8th, the Court placed a phone call from the courtroom to Dr. Dorothy Lewis in New York. (Defense #2 TR 1514-29) During that on-the-record conversation, Dr. Lewis admitted that she had not yet reviewed Defendant's file even though she had it available. (Def. #2 TR 1518-19) She "did" offer to "look over the case" that night and testify by speaker phone the very next day, Tuesday, (TR 1521) or even on Wednesday. (TR 1516, 1520) The Court was unable to accommodate that. During that conversation, Dr. Lewis agreed to fly in on Sunday night, November 14th to testify on Monday, November 15th.

Dr. Lewis was also informed that Jim Ongley would conduct her direct examination (TR 1524) and that it was against Laswell's advice to call her as a witness[53] but that Elledge was

[53] Laswell testified that previous to this time he never mentioned to Dr. Lewis that it was against Laswell's advice that they continue to try and get her to testify. (PCR 125). He further observed that he continued to beg her to review her files. (PCR 125).

adamant that she testify.[54] (TR 1516) Dr. Lewis acknowledged that she understood that she would be testifying only to her previous work. (TR 1525) That is exactly what Laswell had intended all along. (PCR 129) The record shows that Dr. Dorothy Lewis unequivocally agreed with the Court, and with Elledge, to appear for testimony on Monday, November 15, 1993. (Defense #2 TR 1514-29)

Laswell testified that in his opinion, Dr. Lewis had no intention of getting prepared in the time between this last phone call and the following Monday.[55] She had weeks to pull her files and had not yet done so. (PCR 77) Laswell had made it abundantly clear that he simply wanted her to review her own files.[56] (PCR 89) He again advised Elledge that any time an expert has to be compelled to do the work he or she has already promised but failed to do, there is no chance of presenting a

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[54] Laswell testified that although Elledge wanted Dr. Lewis to testify about her earlier study, Laswell told Elledge that he did not think Dr. Lewis was prepared to do so. He further told Elledge that it was not good that he, Laswell, was having to compel Dr. Lewis to review her notes and come to court. Laswell finally stated that because Elledge wanted her, he made every effort to get her. (PCR 77-79)

[55] Laswell acknowledged that the decision not to call Dr. Lewis was ultimately his. (PCR 85)

[56] Handwritten notes reflect that Laswell told Lewis that all she needed to do was read her prior federal trial testimony and then come testify. (PCR 94).

good case.[57] (PCR 78) Laswell also believed that the State's cross-examination of Dr. Lewis could be disastrous if the Shawcross case came up, and he thought that Dr. Lewis' reputation as a psychiatrist and as an expert witness had deteriorated.[58] (PCR 137-38) Considering the circumstances, he clearly believed it to be a bad move to call her and told the defendant so.[59] Elledge replied "I don't care and I want her anyhow." (PCR 138) Laswell did assure Elledge that if Elledge wanted this witness then he would "make the efforts to get her there". (PCR 79) And, in fact, he did make the travel

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[57] Laswell testified that he sent Dr. Lewis a letter in mid-August asking to review the files and what he thought she needed o look at for testifying. (PCR 131-32).

[58] Laswell specifically stated that he told Elledge about the Shawcross case, and the possible negatives that accompanied any testimony by Dr. Lewis. Elledge said it did not matter, and as a result Laswell pressed forward trying to secure Dr. Lewis as a witness. (PCR 138).

[59] The record reflects, on Saturday, November 13th, Laswell and Ongley went to see Elledge and talk about Dr. Lewis and whether she was coming to testify. They told Elledge that they did not think she was coming for the November 15th hearing date, and Elledge blamed Laswell stating that he had not sent the files to Dr. Lewis. (PCR 133-34). In spite of these events, Laswell testified at the hearing that he still had not given up totally. (PCR 134). Apparently Dr. Lewis was insistent that Laswell sent information to her from other doctors. Laswell reaffirmed in his testimony that he did not want her to provide additional diagnosis but rather Dr. Lewis was to be called to testify as to her prior dealings with Elledge. (PCR 134-37).

arrangements for Dr. Lewis as was requested by the Court.[60] (PCR 130-31).

Ultimately, when Dr. Lewis failed to show up on November 15th, at that point Elledge informed the Court that he would defer to her judgment and then excused Dr. Lewis from appearing.[61] (PCR 143)

Laswell also testified that he planned and did call a number of witnesses at the fourth resentencing.[62] Laswell investigated mitigation regarding Elledge's prison records, speaking to prison guards; spoke with family members, detectives, old girlfriends and Drs. Schwartz and Caddy.[63] (PCR 60) Laswell also

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[60] The record also reflects that not only had Dr. Lewis failed to look at any files or even her previous federal testimony but she also expected counsel to prepare her as to how she should testify. (PCR 159). Laswell expressed concerns that this was totally unprofessional conduct on the doctor's part and fell below minimum standards. (PCR 160) Laswell admitted after all that occurred, he had no confidence in her. (PCR 161).

[61] The Court questioned Elledge whether he wanted the Court to take further action to secure Dr. Lewis' presence. Elledge decided that he did not want her to be held in contempt of court and released her from attendance. (PCR 142-43).

[62] Laswell testified that at the fourth resentencing hearing, he had the benefit of all previous hearings including Mr. Giacoma's efforts and in fact called 21 witnesses. (PCR 106, 107-09). He further noted that Mr. Giacoma had elected not to call Dr. Lewis when he was handling the case. (PCR 106).

[63] Laswell explained that he wanted to abide by his client's wishes and started setting the foundation for presenting mental health mitigation by speaking with Drs. Schwartz and Caddy and talking with family members. (PCR 166-69). Laswell felt that

testified that he did not plan to call either Dr. Block-Garfield or Dr. Norman, but did list them on his witness list "just in case". (PCR 61-62) Laswell testified that he did not believe Dr. Norman's findings hurt Elledge's case because the finding simply showed no abnormalities. (PCR 61).

ASSISTANT PUBLIC DEFENDER DR. JAMES ONGLEY'S PREPARATION AND TESTIMONY

Dr. James Ongley was also called to testify at the evidentiary hearing.[64] Dr. Ongley became involved with the representation of Elledge over one month prior to the trial.[65] On or after November 8, 1993, after the trial had started, he

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while there was evidence as to mental health mitigation he was not that thrilled with what Drs. Schwartz or Caddy, were saying. (PCR 171-73).

[64] He began his practice of law handling capital murder cases at the Public Defender's Office in August 1990. After graduating from medical school and six years of residency training, he had served as an Assistant Medical Examiner in Broward and Dade counties for a total of nine years. He has testified numerous times as an expert witness in Broward, Dade, Palm Beach and the Bahamas. (PCR 205-06) One of the reasons he was hired by the Public Defender's Office was for this expertise and, from the beginning, he was utilized as the in-house expert in dealing with other medical and mental health experts. (PCR 214-15)

[65] The record reflects that he appeared in court on September 27, 1993, as co-counsel for the defense at the hearing on the State's Motion to Appoint Expert. (PCR 207, State's #5) He also represented the defense at the State's deposition of defense expert Dr. Donald Norman on October 18, 1993. (PCR 207, State's #15).

was asked by Laswell to work with Dr. Dorothy Lewis and to "sweet talk " and "charm" her into coming to testify. (PCR 190-210) Laswell asked for Ongley's assistance not only because of his unique background but Laswell thought that Ongley, being an M.D., could get some professional courtesy from Dr. Lewis. (PCR 49)

At the evidentiary hearing, Ongley testified that he contacted Dr. Lewis after the November 8th telephonic hearing. He had sent, via Federal Express, various records to her and was in the process of going over these documents himself. (PCR 211-12, 226-27) Ongley was reviewing the records they had concerning Elledge's mental health. (PCR 219) Ongley admitted that with his medical background, he had a significant advantage in dealing with experts and getting prepared.[66]

Ongley understood that the prime reason for calling Dr. Lewis as a witness was that she had some of the earliest data that was available on Elledge due to her evaluation of him many years previously. (PCR 221) It became clear to him, however from the very first conversation, when Dr. Lewis refused to appear, that she did not want to come down and testify on Elledge's

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[66] Frequently, in other cases, he has received a file in the morning from one of his colleagues and prepared for cross-examination of an expert that same afternoon - and he has been successful. (PCR 213)

behalf. Nothing he could do would have changed her mind: "it didn't matter what I said to her. It wasn't going to satisfy her." (PCR 216-17).

Ongley observed that Dr. Lewis gave excuse after excuse, and she in fact, blamed him for not knowing what else had happened in the trial thus far.[67] She blamed him for not being familiar with things. She wanted Elledge examined by other doctors. She said that Dr. Pincus should come down and not her. (PCR 217) Since Dr. Lewis had not yet reviewed her own files, Ongley believed it would have been a "herculean job" to get her ready for Monday. (PCR 198) However, he testified he was prepared and planned to spend as much time with her as necessary, even the whole weekend if she wished. He noted that it was his sole task to work with Dr. Lewis and he "would have spent the time and there is nothing else more important at trial when you're doing the trial." (PCR 223)

Ongley stated that he knew Dr. Lewis was expected to testify on Monday, Nov. 15th, and, he never told Dr. Lewis that she did not have to come to court, nor did he have the authority to do

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[67] Ongley testified that Dr. Lewis wanted him to tell her what other witnesses had testified to at trial. He stated that he told her could not provide her with that information and that what she was needed for was her prior knowledge of Elledge based on her work with Elledge and other death-row inmates, and her work with Dr. Pincus. (PCR 220-21) Moreover, he told Dr. Lewis that there were no new other doctors' reports. (PCR 226-27).

so. He thought it was "quite remarkable" that she did not show up on that day. (PCR 225-26) Ongley testified he did not cancel Dr. Lewis - only "Dr. Lewis cancelled Dr. Lewis."[68] (PCR 237).

In sum, Laswell and, to a lesser degree, Ongley did not pursue Dr. Lewis only after she became a liability. Their performance regarding mental health mitigation and investigating the possible mitigation to be presented is, and was, constitutionally sound. See Cherry v. State, 781 So.2d 1049, 1050 (Fla. 2001)(upholding conclusion that trial counsel's failure to present mitigating evidence of drug abuse was not predicated upon lack of investigation, but because the evidence at trial did not support the proposed mitigation); Rutherford v. State, 727 So.2d 216, 222 (Fla. 2000)(upholding denial of ineffective claim since defense attorney's discussions with defendant, family and mental health experts did not uncover any mental impairment); Asay v. State, 769 So.2d 974, 985-986 (Fla. 2000)(finding counsel's decision to forgo mental health mitigation since initial report was unhelpful was

[68] Dr. Lewis told the Court on November 15th that she was unprepared to testify and absolutely unfamiliar with the case, (PCR 236) and further stated that she felt she should not testify because it was not in Elledge's best interest. (PCR 240). Ongley readily admitted that had she come to Broward, he would have spent as much time as possible getting her prepared. (PCR 254).

constitutionally reasonable). See Davis v. Singletary, 199 F.3d 1471, 1478 (11th Cir. 1997)(upholding, as reasonable trial strategy, counsel's decision not to present defendant's mental health history in order to keep from the jury, appellant's pedophillic tendencies); Marek v. Singletary, 62 F.3d 1295, 1300 (11th Cir. 1995)(finding trial counsel's decision not to present mitigation of appellant's childhood because of negative aspects including his homosexuality was reasonable strategy); Van Poyck v. Singletary, 694 So.2d 686 (Fla. 1997)(finding trial counsel's decision not to pursue mental health evidence based on negative aspects of doctor's report was reasonable strategy); Haliburton v. Singletary, 691 So.2d 466, 471 (Fla. 1997)(same).

Laswell and Ongley investigated all aspects of Elledge's history and targeted mental mitigation. Twenty-one witnesses informed the resentencing jury and the trial court about every aspect of Elledge's life. While witnesses were cross examined by the State, none of the cross-examinations so disrupted the mitigation as to suggest that the jury and trial court did not have a full and fair opportunity to evaluate Elledge. Indeed, the jury recommended that the aggravating circumstances outweighed the mitigating circumstances by a 9-3 vote. Elledge v. State, 706 So.2d at 1342.

Moreover, any question as to whether Elledge knew about the decision not to call Dr. Lewis is moot. It was Dr. Lewis who forced Elledge to make the decision not to call Dr. Lewis to testify. The evidentiary hearing reflects that both Laswell and Ongley continued up to and including in the middle of the resentencing hearing to try and secure Dr. Lewis' testimony and other mental health mitigation.

There was no lack of performance on either of the attorneys' part in presenting what they had at resentencing. Elledge has failed to satisfy the performance prong of Strickland.

The testimonial evidence present at the evidentiary hearing predominately focused on why Dr. Lewis was ultimately not called.[69] The record refutes that Dr. Caddy and Dr. Schwartz were unqualified or rendered incompetent evaluations of Elledge. Both doctors explored Elledge's background, had access to files and records and spoke with family members and Elledge as to his life history. The fact that the jury and/or the trial court may have rejected the testimony and found more credible the State's mental health expert, Dr. Stock, does not in and of itself

[69] The trial transcripts of the resentencing hearing provides a plethora of "potential mental health" mitigation that was tendered by both medical and lay testimony.

support a conclusion that somehow an Ake violation occurred.[70] Elledge's Ake claim has not been demonstrated either through written allegation or evidentiary development before this Court.

To suggest that Laswell did not conduct a thorough investigation and hire a proper and qualified expert belies the record before this Court.[71] Moreover because Laswell ultimately elected not to continue to pursue Dr. Lewis just because Elledge believed she knew him best, does not support any Ake violation. See Thompson v. State, supra; Downs, 740 So.2d 506, 509, n.5 (Fla. 1999), and Provenzano v. State, 561 So.2d 541, 546 (Fla. 1990); Bryan v. State, 748 So.2d 1003, 1007 (Fla. 1999); Gaskin v. State, 737 So.2d 509, 520 (Fla. 1999); Jones v. State, 732 So.2d 322 (Fla. 1999), and Blanco v. State, 706 So.2d 7, 9 (Fla. 1997). Elledge's claim is unsupported by either fact or law.

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[70] The information and materials that were provided Dr. Caddy and Dr. Schwartz were similar materials to those provided to Dr. Lewis.

[71] As previously noted, Laswell testified that he carefully selected the doctors for Elledge's case. Laswell consulted with Dr, Block-Garfield as to mitigation issues; secured a mitigation expert; sought out Dr. Schwartz, who was highly recommended and had worked on other capital cases; sought Dr. Caddy's help, (Laswell had previously worked with this board certified specialist); selected a neurologist and secured the assistance of Jim Ongley, an M.D., who worked as an assistant public defender in his office. Laswell early on secured all previous medical reports and even collected the information of Dr. Lewis, since she had some years earlier used Elledge in a study of death-row inmates.

Sochor v. State, supra; Porter v. State, 788 So.2d 917 (Fla. 2001).

ARGUMENT III

Conflict of Interest between Counsel and Elledge.

To the extent Elledge contends that there was a conflict of interest between Laswell and himself regarding Dr. Lewis, the record at resentencing and the evidentiary hearing reflects the only "conflict" existing throughout was the inability of Dr. Lewis to cooperate with anyone attempting to represent Elledge.

Elledge argues that an actual conflict of interest arose which adversely affected Elledge's representation when trial counsel, Mr. Laswell, did not agree with what Elledge wanted done with his defense. Below, Elledge periodically, affirmatively, asked questions and communicated with witnesses and the court. Elledge points to the scenario regarding Dr. Lewis and the difficulty Mr. Laswell and Mr. Ongley had with Dr. Lewis in getting her to the hearing to testify in Elledge's behalf.[72] In essence, Elledge is arguing that he was abandoned

[72] Elledge also asserted below that Mr. Laswell elected not to call certain witnesses at the resentencing, specifically Betty Fox, a pen pal; Jane Officer; Reverend Melvin Biggs, and Reverend Stanley Daniels. Elledge also chides Mr. Laswell's representation because he called to the stand Phillip Charlesworth, the chief investigator for the Broward Public Defender's Office who was charged with investigating Elledge's case in 1993. After a lengthy colloquy where Mr. Elledge questions Mr. Charlesworth on the stand, Elledge now asserts

by trial counsel and that the trial court just stood by and let it happen.[73]

Conflict of interest claims are cognizable on direct appeal. In the instant case, albeit twenty-seven (27) issues were raised on this resentencing, no claim was raised with regard to a conflict of interest between defense counsel and Elledge which resulted in "Elledge being without counsel." Elledge was not only represented by Mr. Laswell, but by Mr. Ongley.[74] In spite of the disagreement in securing Dr. Lewis, Elledge has not shown any dissatisfaction with his lawyer (TR 2969), which resulted in a detriment to the case.

In Herring v. State, 730 So.2d 1264, 1267-68 (Fla. 1998), the Florida Supreme Court held:

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that "during these proceedings, Mr. Laswell and his investigator defended themselves, all the while leaving Mr. Elledge without any counsel whatsoever." (Amended Petition, page 100). Those claims have not been raised on appeal.

[73] Although given the opportunity to develop this issue at the evidentiary hearing, Elledge and his collateral counsel declined to call any witnesses regarding this aspect of the conflict assertion. Elledge has failed to develop any facts to support his contention he stood alone without the assistance of counsel.

[74] The record reveals that Laswell at the mini Spencer hearing discussed with the Court and Elledge, Elledge's dissatisfaction with some of the tactics used by Laswell. (PCR 91). The record also reflects the Court had previously denied Elledge's request to act as co-counsel. (PCR 92). Clearly, these issues could have been raised on direct appeal and were not.

> To prove an ineffectiveness claim premised on an alleged conflict of interest the defendant must 'establish that an actual conflict of interest adversely his lawyer's performance.' Cuyler v. Sullivan, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); Buenoano v. Dugger, 559 So.2d 1116, 1120 (Fla. 1990). Our responsibility is first to determine whether an actual conflict existed, and then to determine whether the conflict adversely affected his lawyer's representation. A lawyer suffers from an actual conflict of interest when he or she 'actively represents conflicting interests'. Cuyler, 446 U.S. at 350, 100 S.Ct. at 1708. To demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests that his or her interests were impaired or compromised for the benefit of the lawyer or another party. See Buenoano v. Singletary, 74 F.3d 1078, 1086, n.6 (11th Cir. 1996); Porter v. Singletary, 14 F.3d 554, 560 (11th Cir. 1994); Oliver v. Wainwright, 782 F.2d 1521, 1524-25 (11th Cir. 1986). Without this factual showing of inconsistent interests, the conflict is merely possible or speculative, and, under Cuyler, 446 U.S. at 350, 100 S.Ct. 1708, such a conflict is 'insufficient to impugn a criminal conviction.' . . .

730 So.2d at 1267.

In Herring, the allegation was that Herring's ineffectiveness claim was premised on the fact that Howard Pearl, defense counsel, had become a special deputy sheriff in Marion County in 1970. Such information had not been provided to Herring and, as such, Herring believed that Howard Pearl's representation was skewed and thus adversely affected Herring's defense. The court ultimately concluded that no actual conflict had been demonstrated and observed:

> . . . although a court's inquiry into actual 'conflict' and 'adverse affect' may overlap, the

> Cuyler decision is clear on its face that the defendant must satisfy both prongs of the claim to prove ineffective assistance of counsel. Therefore, because Herring failed to demonstrate that an actual conflict of interest existed, we do not reach the issue of whether the conflict adversely affected Pearl's representation. See Porter v. Singletary, 14 F.3d 554, 560-61 (11th Cir. 1994) (declining to address question of adverse affect on representation without proof of actual conflict).
>
> We reject Herring's second and third claims because they pertain solely to the issue of 'adverse affect' under Cuyler . . .

730 So.2d at 1268.

See: Thompson v. State, 759 So.2d 650 (Fla. 2000); Groover, 656 So.2d at 425, Chandler v. Dugger, 634 So.2d 1066, 1068 (Fla. 1994).

Elledge has all but abandoned development of any conflict claim below. To the extent Laswell testified that Elledge may have been without "counsel" during the Dr. Lewis fiasco, (PCR 90) the record verifies Laswell repeatedly attempted to secure Dr. Lewis in spite of his better judgment. His paramount concern was his client's wishes and he was willing to make the best of a rather difficult, uncooperative witness, Dr. Lewis. (PCR 79).

The trial court held "[T]urning to the Defendant's argument that there was a conflict of interest between Mr. Laswell and himself, the Defendant did not attempt to develop such conflict of interest claim during the evidentiary hearing. Furthermore,

the evidence adduced at the hearing clearly reveals that any conflicts which might have existed resulted from the failure of Dr. Lewis to cooperate with counsel or the Court during the re-sentencing." (PCR 1965).

This Court has held that an attenuated or hypothetical conflict of interest cannot form the basis for a conflict claim much less reversal. Owen v. Crosby, 854 So. 2d 182, 193-94 (Fla. 2003)("A possible, speculative or merely hypothetical conflict is 'insufficient to impugn a criminal conviction.'"); Spencer v. State, 842 So.2d 52, 63 (Fla. 2003)(reversible error cannot be predicated on "conjecture"). Moreover as announced in Mickens v. Taylor, 535 U.S. 162 (2002), a conflict of interest for Sixth Amendment purposes, must be one that would actually affect the adequacy of that representation. No such event occurred here.

ARGUMENT IV

EXCESSIVE SECURITY MEASURES AND SHACKLING

Elledge complains that he was deprived of a fair trial because of excessive security measures and his shackling during resentencing. Laswell complained that armed deputies were regularly walking into the courtroom. As a result, Laswell moved for a mistrial. (TR 2696-97).

Following further discussion as to the motion for mistrial, the trial court held:

> THE COURT: Okay. The court discussed with the parties prior to even selecting a jury how security would be provided. The court indicated that while it had, what's the right word - -
>
> THE DEFENDANT: Your Honor, I have been so far as to stop a miscarriage from going on.
>
> THE COURT: While that - - that while each of the counsel tables are fully covered, which would have allowed for the shackling of Mr. Elledge without the jury having an opportunity to observe, the court determined that that would not be the procedure to be used. Mr. Elledge was appreciative of that at the time, was aware that the court would provide security. As security was fashioned it was done in a manner to be as least observable, offensive, and in the most minimus in manners as is possible.
>
> The court followed that procedure, had discussions with both armed deputies as well as the uniformed unarmed court bailiffs, who for that matter the jury wouldn't know were or were not armed. Theoretically they were jackets, but regardless. Clearly, the entire procedure that has been followed has not been complained of other than a roving uniformed officer who occasionally, and different officers at that time,

> made routine courtroom checks, which were not complained of until just this very moment. The significance of the complaint as to the officer today who visited is minimized by the fact that they were other officers in the past who also routinely came in a couple of minutes, no longer, and left and that's exactly what happened today.
>
> Motion for mistrial on those grounds is denied.

(TR 2707-14).

This issue could have and should have been raised on direct appeal. He is procedurally barred from arguing on appeal. To characterize the matter as evincing excessive security which "permeated the entire capital trial proceedings" is baseless. See Huff v. State, 762 So.2d 476 (Fla. 2000).

Elledge also argues that trial counsel rendered ineffective assistance of counsel for failing to question the "excessive security measures". The record demomstrates that trial counsel participated in determining the kind of security to take place during the resentencing proceedings. The measures undertaken were reasonable. Elledge cannot demonstrate that any prejudice occurred pertaining to the security measures, and as such, he cannot demonstrate cause and actual prejudice under Strickland v. Washington, 466 U.S. 668 (1984), based on conjecture that trial counsel should have done more.

ARGUMENT V

KEEPING A DEATH-SENTENCED DEFENDANT ON DEATH ROW FOR AN LONG PERIOD CONSTITUTES CRUEL AND UNUSUAL PUNISH.

Elledge argues that lengthy confinement on death row constitutes cruel and unusual punishment. This issue was raised on direct appeal and decided adversely to Elledge. See Elledge v. State, 706 So.2d 1340, 1347, n.10 (Fla. 1997); Porter v. State, 653 So.2d 374 (Fla. 1995); Knight v. State, 746 So.2d 423, 437 (Fla. 1998); Booker v. State, 773 So.2d 1079 (Fla. 2000), and State v. Moore, 591 NW 2d 86 (Neb. 1999).

Because this issue was raised on direct appeal it is not cognizable in postconviction litigation. See Elledge v. State, 706 So.2d 1340, 1347 (Fla. 1997).

ARGUMENT VI

LENGTHY CONFINEMENT VIOLATE INTERNATIONAL LAW

Elledge also argues that the long delay between sentencing and execution and the condition in which Elledge is housed, constitutes "cruel, inhumane, or degrading treatment or punishment" in violation of Article VII, of the International Covenant on Civil and Political Rights (ICCPR) (Appellant's Brief, p 75). This issue is procedurally barred because it was raised as part of Issue XII on direct appeal--the delays in the time Elledge has been on Florida's death row. Since this claim was raised on direct appeal, it is not cognizable on

postconviction and therefore it is procedurally barred from further review. Porter v. State, 653 So.2d 374 (Fla. 1995); Knight v. State, 746 So.2d 423, 437 (Fla. 1998); Booker v. State, 773 So.2d 1079 (Fla. 2000), and State v. Moore, 591 NW 2d 86 (Neb. 1999).

ARGUMENT VII

THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY ON THE STANDARD BY WHICH IT MUST JUDGE EXPERT TESTIMONY.

The trial court instructed the jury on expert witnesses pursuant to the standard jury instructions, without objection. Trial counsel, however, cannot be said to have rendered ineffective assistance of counsel merely for failing to object to the standard jury instructions previously approved by the Florida Supreme Court.[75] Downs v. State, 740 So.2d 506, 517 (Fla. 1999); Thompson v. State, 759 So.2d 650 (Fla. 2000); Harvey v. State, 656 So.2d 1253, 1258 (Fla. 1995).

At the close of all the instructions, defense counsel did not object as to the instructions given (TR 2875).[76]

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[75] Expert witnesses as I previously told you are like other witnesses with one exception, the law permits an expert witness to give his or her opinion.
However, an expert's opinion is only reliable when given on a subject about which you believe that person to be an expert.
Like other witnesses, members of the jury, you may believe or disbelieve all or any part of an expert's testimony.

(TR 2869).

[76] On direct appeal however, counsel raised other issues regarding the correctness of the jury instruction as to reasonable doubt; and submitted special jury instructions with regard to non-statutory mitigation and an explanation as to the nature and function of mitigating circumstances. Counsel also

This issue could have been raised on direct appeal had there been a basis to do so. As such, it is procedurally barred. See Brown v. State, 755 So.2d 616 (Fla. 2000) (challenge to jury instruction on expert procedurally barred); LeCroy v. State, 727 So.2d 236, 238, 241, n.11 (Fla. 1998) (jury instruction on expert testimony procedurally barred); Davis v. State, 520 So.2d 572, 574 (Fla. 1988) (finding that Florida's standard jury instruction on expert testimony sufficiently explained to the jury who was to weigh expert testimony).

Elledge further argues that the State "emphasized this point in challenging the qualifications of the defense expert's", specifically, in the jury instruction as to expert witnesses. This issue was summarily denied because it is refuted by the record. The State may inquire into the basis, i.e., facts and circumstances relied upon by the experts in reaching an opinion. "We have held 'that it is proper for a party to fully inquire into the history utilized by the expert to determine whether the expert's opinion has a proper basis.'" Johnson v. State, 608

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challenge as unconstitutional the jury instruction on heinous, atrocious and cruel and asserted that the instruction on the avoid arrest aggravator should not have been given. Under Thompson, supra, and the above-noted cases, the claim is procedurally barred and counsel cannot be found to have been ineffective for failing to raise this particular jury instruction.

So.2d 4, 10-11 (Fla. 1992) (quoting Parker v. State, 476 So.2d 134,139 (Fla. 1985). The prosecutor's remarks were appropriate based on the testimony before the jury. See Walls v. State, 641 So.2d 389, 391 (Fla. 1994) (explaining that jury's free to reject opinion testimony to the extent that it is not supported by the facts at hand); Byrd v. State, 297 So.2d 22, 24 (Fla. 1974) (affirming rule that jury is entitled to disbelieve an expert in favor of non-expert testimony).

ARGUMENT VIII

INSANE TO BE EXECUTED

Citing Ford v. Wainwright, 477 U.S. 399 (1986), and Stewart v. Martinez-Villareal, 532 U.S. 637 (1998), Elledge has raised this claim to exhaust "state remedies and to preserve a claim for review in future proceedings and in federal court." (Appellant Brief, p 79-80). By raising the issue without specific facts, the trial court as well as this Court can only conclude that Elledge has failed to state a cause of action upon which relief may be granted and therefor he barred from asserting that he is insane to be executed. See: Provenzano v. State, 760 So.2d 137 (Fla. 2000).

ARGUMENT IX

DENIAL OF EFFECTIVE COUNSEL DUE TO RULES PROHIBITING LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT.

The Florida Rule of Professional Conduct 4-3.5(d)(4), which prohibits juror interviews, is not unconstitutional because "it prohibits him from fully exploring possible misconduct and bias of the jury thus preventing him from fully showing the unfairness of his trial." (Appellant's Brief, page 83).

First, Elledge pled guilty and as a result, a jury was empaneled for the penalty phase only. Second, at no time during the latest penalty phase did defense counsel object or preserve this issue for further review. As such, it is procedurally barred. See Huff v. State, 762 So.2d 476 (Fla. 2000); Brown v. State, 755 So.2d 616 (Fla. 2000); Gaskin v. State, 737 So.2d 509, 513, n.6 (Fla. 1999) (finding procedurally barred a challenge to the rule which prohibits juror interviews to determine whether misconduct has occurred); Thompson v. State, supra, 25 Fla.L.Weekly at S349, n.12. And third, Elledge made no attempt to raise this issue on direct appeal.[77] Based on the fact scenario set forth herein, it trial counsel could have

[77] He argues alternatively that social scientists ought to be appointed in his case, should the court uphold validity of Rule 4-3.5(d)(4), against an individual attorney. Elledge should not be permitted to try to breathe life into an issue that is barred, by suggesting the court appoint social scientists, thus, hoping a colorable claim may develop. Indeed, this claim is legally insufficient on its face. Moreover, the State questions whether Elledge has standing to challenge the validity of this Rule of Professional Conduct as promulgated by the Florida Supreme Court to regulate members of the Florida Bar.

raised these claims on direct appeal had there been a basis to do so. See: Power v. State, 2004 Fla. LEXIS 662, 29 Fla. L. Weekly S207 (Fla. May 6, 2004)(Other cases similar constitutional challenges rejected.); Sweet v. Moore, 822 So.2d 1269 (Fla. 2002).

In the instant case, even assuming that the issue is not procedurally barred, Elledge would be required to make a *prima facie* showing of misconduct which he cannot do. Asserting that appointing social scientists to collect evidence and study possible allegations where the jurors may be guilty of misconduct is simply inadequate. LeCroy v. State, 727 So.2d 236 (Fla. 1999).

Elledge, however, cannot overcome the procedural bar and under this issue has failed to assert that counsel rendered ineffective assistance of counsel at resentencing for failing to secure social scientists to assist in developing this claim.

ARGUMENT X

INNOCENT OF THE DEATH PENALTY

Elledge urges the "innocence of the death penalty is shown by demonstrating insufficient aggravating circumstances so as to render the individual ineligible for death...." (Appellant's Brief p 84). He supports this contention by arguing that the

mitigation outweighed the aggravation;[78] the instructions as to aggravation were erroneous, et al.;[79] there was error in the trial court's sentencing order;[80] and the sentence is not proportionate.[81] Each contention is either flawed, unsupported by the record or has been decided adversely to him.

In Sochor v. State, 2004 Fla. LEXIS 985, 29 Fla. L. Weekly S363 (Fla. July 8, 2004) the Court held:

> Sochor claims that he is entitled to relief for constitutional errors, even though otherwise procedurally barred, because he is "innocent of the death penalty." We reject the claim because we found on direct appeal that the evidence supported the existence of three aggravating circumstances. Sochor, 619 So.2d at 292; see also Allen v. State, 854 So.2d

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[78] The trial court found four statutory aggravating factors which were unassailed and proven beyond a reasonable doubt: 1) previously convicted of another capital murder; 2) murder committed during or attempt to commit or escape after committing a rape; 3) murder committed to avoid or escape arrest; and, 4) the murder was HAC. To be innocent of the death penalty, there must be "no aggravating factors" to weigh again the mitigation.

[79] Jury instruction raised on direct appeal were decided against Elledge and issues raised belatedly postconviction are procedural barred.

[80] Errors regarding the accuracy of the trial court's assessment of the evidence was reviewed on direct appeal and found to be error but harmless.

[81] The Court affirmed Elledge's fourth death sentence on direct appeal concluding the aggravating factors outweighed the mitigating factors, and that the sentence of death was affirmed. The Florida Supreme Court as part of its appellate function performs a proportionality review. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981); Proffitt v. Florida, 428 U.S. 242 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973).

> 1255, 1258 n.5 (Fla. 2003) (holding that innocence of death penalty claim lacks merit because defendant did not allege that all the aggravating circumstances supporting his death sentence were invalid, and because this Court had already conducted a proportionality review on direct appeal).

Likewise, in the instant case, this Court has upheld the aggravating factors in Elledge's case, finding that the trial court correctly weighed the aggravating against the mitigating circumstances and concluded that "the aggravating circumstances clearly and convincingly outweigh the mitigating circumstances so that no reasonable person could differ." Elledge, 706 So.2d at 1346. See also: Windom v. State, 2004 Fla. LEXIS 664, 29 Fla. L. Weekly S191 (Fla. May 6, 2004).

ARGUMENT XI

CAPITAL SENTENCING STATUTE UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY.

"In view of the arbitrary and capricious application of the death penalty under the current statute, the constitutionality of Florida's death penalty statute is in doubt." (Appellant Brief, p 89). On its face and as applied, Elledge argues that he is entitled to relief. He raised on direct appeal challenges to the constitutionality of Florida's death penalty statute, specifically he asserted that in Claim XXVII, that Florida's

death penalty statute was unconstitutional.[82] Elledge, 706 So.2d at 1347. Elledge could have also raised the claims that were in Issue XIV, below, and raised here.[83] Each of these claims could have and should have been raised on direct appeal and therefore the claims are procedurally barred and without merit. See Peede v. State, 748 So.2d 253, 256, n.6 (Fla. 1999); Hall v. State, 742 So.2d 225, 226 (Fla. 1999); Buenoano v. State, 559 So.2d 1116, 1118 (Fla. 1990); LeCroy v. State, 727 So.2d 238, 241 (Fla. 1998); Remeta v. State, 622 So.2d 452, 455-56 (Fla. 1993); Huff v. State, supra, 25 Fla.L.Weekly at S413, n.2, issue XVI. See also Engle v. State, 576 So.2d 698, 700 (Fla. 1992) (ruling

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[82] Therein, he complained about the jury and the lack of unanimous verdicts; the trial judge's can override the jury's recommendation and there is no basis for the jury's recommendation given; the fact that the Florida Supreme Court conducted an improper appellate review; and that in his case the aggravating circumstances were not proven and there was no narrowing to support a valid sentencing scheme.

[83] That the death penalty scheme in Florida constitutes an arbitrary imposition of the death penalty; that there is not sufficient definition of sufficient aggravating circumstances; that the capital sentencing scheme does not have independent reweighing of aggravation and mitigation; that the juries receive unconstitutionally vague instructions as to aggravating circumstances; that there is presumption to death in a single aggravating circumstance of felony murder; that the death penalty is arbitrarily and capriciously applied; that the death penalty is "fraught with arbitrariness, discrimination, caprice and mistake" and that because of the arbitrary and capricious application, constitutionality of Florida's death penalty statute is in doubt.

that motion is legally insufficient absent factual support for allegation conclusively shows that relief is not warranted).

ARGUMENT XII

FLORIDA'S DEATH PENALTY PERMITS CRUEL AND UNUSUAL PUNISHMENT

Execution by electrocution and/or lethal injection does not constitute cruel and unusual punishment on its face and as applied. The allegations presented in this claim are argued to "preserve[s] arguments as to the constitutionality of the death penalty."

The issue was decided adversely to him when he raised it on direct appeal (Issue 27), see Elledge, 706 So.2d. at 1342, moreover, since Elledge never exercised his rights under Fla. Stat. 922.105(2), he has waived execution by electrocution. The constitutionality of execution by lethal injection has been decided against Elledge. Sochor v. State, 2004 Fla. LEXIS 985, 29 Fla. L. Weekly S363 (Fla. July 8, 2004); Power v. State, 2004 Fla. LEXIS 662, 29 Fla. L. Weekly S 207 (Fla May 6, 2004); Davis v. State, 875 So.2d 359 (Fla. 2003).

ARGUMENT XIII

CUMULATIVE ERROR ANALYSIS NOT CONDUCTED.

Elledge's last claim is a catch-all issue wherein he asserts he was denied a fundamentally fair proceeding; that the

cumulative errors at trial prevented a fair trial; that death is different and differs from lesser sentences and therefore careful scrutiny must be given; that the burden remains on the State to prove beyond a reasonable doubt that individual and cumulative errors do not affect the plea, verdict or sentence, and that the errors pled in the instant motion cumulatively warrant 3.850 relief. As observed in Freeman v. State, 761 So.2d 1055 (Fla. 2000):

> Freeman additionally argues the cumulative effect of the errors made during his trial deprived him of his constitutional rights to a fair trial. The trial court summarily denied this claim as improperly pled, stating 'no particular allegations or citations to the record, nor any indication of the true nature of the claim' has been alleged. A postconviction movant must specifically identify the claim which demonstrate the prevention of a fair trial. Mere conclusory allegations do not warrant relief. See Valle v. State, 705 So.2d 1331 (Fla. 1997); Jackson v. Dugger, 633 So.2d 1051 (Fla. 1993); Phillips v. State, 608 So.2d 778 (Fla. 1992); Roberts v. State, 568 So.2d 1255 (Fla. 1990); Smith v. Dugger, 565 So.2d 1293 (Fla. 1990); Kennedy v. State, 547 So.2d 912 (Fla. 1989). Accordingly, this claim was insufficiently pled and properly summarily denied. See Rivera v. State, 717 So.2d 477 (Fla. 1998).

Where Elledge has failed to raise specific points of error, or cite to specific portions of the record to support his "ethereal claims," arguing cumulative error constitutes insufficient pleading for postconviction relief; see Asay, supra, "Finally, we affirm the trial court's denial of claim XX regarding cumulative error because we have considered the

individual alleged errors and find them to be without merit. See Downs v. State, 740 So.2d 506, 509, n.5 (Fla. 1999)"; Occhicone, supra slip opinion, pg. 5, n.3, (the cumulative impact of judicial error at trial denied him his right to a fair trial. However, any claim that cumulative errors committed at trial prejudiced the outcome of his case must be raised on direct appeal; therefore, Occhicone is procedurally barred from raising this claim here. See Torres-Arboleda v. Dugger, 636 So.2d 1321, 1323-24 (Fla. 1994)).

Conclusion

Based on the foregoing, the trial court's denial of all relief should be affirmed.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Hilliard Moldof, 1311 SE Second Ave., Ft. Lauderdale, FL 33316, this 8th day of September, 2004.

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