IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-1201

WILLIAM DUANE ELLEDGE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal involves a Rule 3.850 motion on which an evidentiary hearing was granted on some issues, and summarily denied on others. References in the brief shall be as follows:

(R. ___) -- Record on Direct appeal;

(PC-R. ___) -- Record in this instant appeal.

References to the exhibits introduced during the evidentiary hearing and other citations shall be self-explanatory.

REQUEST FOR ORAL ARGUMENT

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

STATEMENT OF FONT

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Introduction

Duane Elledge has been on Florida's death row for nearly 30 years awaiting execution after pleading guilty in 1975. He has undergone four resentencing proceedings, three of which were reversed because of prosecutorial overreaching, the State's failure to disclose discovery material and judicial error. This fourth time is no exception.

At the evidentiary hearing on Mr. Elledge's claims, the State withheld exculpatory evidence under the guise of "exempt materials," yet improperly used the information to impeach the defense expert witness at the evidentiary hearing. The State knowingly allowed misleading and false testimony to be presented without correction. This unethical behavior should not be condoned or overlooked.

* * * *

Mr. Elledge pled guilty to first-degree murder and rape on
March 17, 1975. He was sentenced to death on March 27, 1975 by Circuit Court Judge Daniel Futch. State Attorney Michael Satz was the prosecutor. On direct appeal, the Florida Supreme Court vacated the death sentence because it found that testimony about Mr. Elledge's confession to a murder for which

he had not been convicted was a non-statutory aggravating factor and was not harmless error to admit it into evidence. Elledge v. State, 346 So. 2d 998 (Fla. 1977).

At his second resentencing prosecuted by Michael Satz, Mr.

Elledge was again resentenced to death by Judge Futch and the Florida Supreme Court affirmed. Elledge v. State, 408 So. 2d 1021 (Fla. 1982). The Eleventh Circuit Court of Appeals vacated the death sentence and remanded for resentencing. The Eleventh Circuit held that the sentencing judge's failure to either consider less restrictive alternatives or to give a specific cautionary instruction before it ordered Mr. Elledge shackled was reversible error and entitled Mr. Elledge to a new hearing. Elledge v. Dugger, 823 F.2d 1439 (11th Cir.)., modified 833 F.2d 250 (1987).

At the third resentencing prosecuted by Michael Satz, Mr. Elledge was sentenced to death again by Judge Daniel Futch. The Florida Supreme Court again reversed and remanded for new sentencing. The Court held that the failure of the trial court to conduct a Richardson hearing when defense counsel objected to the state's failure to comply with the discovery rules was reversible error; the court's failure to find Mr. Elledge's abused childhood as a nonstatutory mitigating factor

was error; and the court's admission of numerous photos of the victim was error. Elledge v. State, 613 So. 2d 434 (Fla. 1993).

On November 1, 1993, Mr. Elledge's fourth resentencing began in Fort Lauderdale before the Honorable Circuit Court Judge Charles M. Greene. State Attorney Michael Satz was again the prosecutor. On November 19, 1993, the jury returned a verdict of 9-3 in favor of death.

On February 4, 1994, Mr. Elledge was sentenced to death a fourth time. The Florida Supreme Court affirmed the conviction and sentence. Elledge v. State, 706 So. 2d 1340 (Fla. 1997); rehearing denied (1998). The United States Supreme Court denied certiorari, Elledge v. Florida, 119 S. Ct. 366 (1998). In its denial of certiorari, Justice Breyer, in a dissent, said he would have granted the petition for certiorari because Mr. Elledge:

> argues forcefully that his execution would be especially "cruel." Not only has he, in prison, faced the threat of death for nearly a generation, but he has experienced that delay because of the **State's own faulty procedures** and not because of frivolous appeals on his own part. His three successful appeals account for 18 of the 23 years of delay. A fourth appeal accounts for the remaining 5 years -- which appeal, though ultimately unsuccessful, left the Florida Supreme Court divided 4-2, 706 So. 2d 1340

(1997).

Id. (emphasis added).

Based on his fourth resentencing, on May 29, 2001, Mr. Elledge filed a Second Amended Motion to Vacate Judgment and Conviction (PC-R. at 1571-1680). A hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993) was held on September 21, 2001. An evidentiary hearing was granted partially on the claims of ineffective assistance of counsel, conflict of interest and Ake v. Oklahoma, 470 U.S. 68 (1985). The remainder of the issues were summarily denied (PC-R. at 1746-1762).

An evidentiary hearing was held on July 1-3, 2002 (PC-R. at 1-646). The order denying relief was filed on April 3, 2003 (PC-R. at 1939-1952). An amended order was filed on April 17, 2003, and the only change from the first order to the amended order was the line that read, "The Defendant shall have thirty (30) days from the date of this Order to appeal." (PC-R. at 1953-1974).

Mr. Elledge filed a Motion for Rehearing (PC-R. at 1967-1976) which was denied on May 22, 2003 (PC-R. at 2012-2013).

A notice of appeal was filed on June 20, 2003 (PC-R. at 2025). This appeal follows and is timely.

SUMMARY OF ARGUMENTS

1. Mr. Elledge was deprived of his rights to due process

when the State failed to disclose exculpatory evidence in its possession. Confidence in the reliability of the outcome of the proceedings is undermined by the non-disclosure. Further, the State knowingly presented false or misleading evidence to obtain a conviction and sentence. Mr. Elledge's sentence of death must be vacated and a resentencing ordered.

2. Mr. Elledge was deprived of the effective assistance

of counsel at his resentencing.

3. Mr. Elledge suffered from a conflict of interest that

violated his rights. This was ineffective assistance of counsel.

4. Excessive security measures and his shackling deprived

him of his due process rights.

5. Thirty years on death row is cruel and unusual punishment.

6. Mr. Elledge's lengthy confinement violations international law.

7. ....

8. Mr. Elledge is insane to be executed.

9. Mr. Elledge's failure to interview jurors violates his rights and his access to the courts.

10. Mr. Elledge is innocent of the death penalty.

11. Florida's death penalty statute is unconstitutional.

12. Florida's death penalty is cruel and unusual punishment.

13. The cumulative errors in Mr. Elledge's resentencing and post-conviction hearing entitle him to a new resententencing.

ARGUMENT I

THE HEARING COURT ERRED IN DENYING MR. ELLEDGE'S CLAIM THAT HE WAS DEPRIVED OF HIS DUE PROCESS RIGHTS WHEN THE STATE WITHHELD EVIDENCE THAT WAS MATERIAL AND EXCULPATORY AND/OR PRESENTED FALSE OR MISLEADING EVIDENCE.

I. INTRODUCTION.

At Mr. Elledge's resentencing in 1993, the State argued that the mental health experts used by the defense were inconsistent with each other and "differ[ed] in their own analysis" (R. 2806). The State also argued that the defense experts were incredible because they differed with each other and, canceled each other out.

At the evidentiary hearing conducted in July, 2002, Mr. Elledge presented 1) evidence of trial counsel's ineffectiveness and failure to present evidence of a competent and highly qualified mental health expert; and 2) evidence that a conflict of interest developed between trial counsel and Mr. Elledge that left Mr. Elledge without an attorney to represent him.

At the evidentiary hearing, however, there were new discoveries and new disclosures. As a result, the evidence that was presented did not directly correspond to the Second Amended Rule 3.850 motion. Upon being appraised of these new discoveries, Mr. Elledge orally moved to amend the Rule 3.850

motion.

This is not an unusual development in Rule 3.850 proceedings. In Jones v. State, 709 So.2d 512, 518 (Fla. 1998), evidence of a Brady violation was discovered on the eve of an evidentiary hearing. There, the defendant was permitted to present the evidence and allowed to subsequently orally amend his successor Rule 3.850 motion to include a previously unpled Brady violation. Cf. Way v. State, 760 So.2d 903, 916 (Fla. 2000)(no error where testimony was excluded by the judge at the evidentiary hearing as outside the scope of the 3.850 motion because "Way never attempted to amend his postconviction motion," not even during the appeal). Mr. Elledge orally sought to amend his Rule 3.850 motion to conform with the evidence at the hearing (PC-R. at 620). The trial court, by his actions, allowed the hearing to proceed based on the Brady claim alleged by the defense. Mr. Elledge also moved to amend the 3.850 motion in his written closing statements.

The amended claim included 1) the State violated due process by not disclosing at resentencing and in the post-conviction process evidence that Dr. Norman had conducted specific tests on Mr. Elledge – tests that a defense expert had 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. Cf. Brady v. Maryland, 373 U.S. 83 (1963).

II. THE STATE WITHHELD EXCULPATORY INFORMATION AND FAILED TO CORRECT FALSE OR MISLEADING TESTIMONY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

A. The Facts

Dr. Dorothy Lewis, a psychiatrist and board certified by the American Board of Psychiatry and Neurology in Psychiatry (PC-R. at 262), first evaluated Mr. Elledge in 1983. At that time, she reviewed his California Department of Youth Authority records, his Colorado State Hospital records, and statements he made to the Florida Parole Commission. She

spoke with his mother on the telephone and in person with his sister and brother. From these interviews, she learned that Mr. Elledge was born a "blue baby," with lack of oxygen to the brain and that he had had a traumatic delivery (PC-R. at 279-281).

She learned that his mother had had a drinking problem and had been drinking during her pregnancy with Mr. Elledge. She learned that Mrs. Elledge was hospitalized for psychiatric problems; that she went through stages of depression where she was listless and did not get out of bed. There were other times when she flew into rages, battered her children and got into violent fights with her husband and assaulted him with knives. Dr. Lewis described Mrs. Elledge as suffering an episodic mood disorder. Mrs. Elledge was extremely suspicious – she felt people were looking through windows and following her. Dr. Lewis described these as "psychotic symptoms." Dr. Lewis said this information was important because some of these disorders are hereditary and run in families.

Dr. Lewis also learned that Mr. Elledge had epilepsy. (PC-R. at 282). He had severe beatings as a child, and he had episodes where he could not remember what he had done. Dr. Lewis learned that Mr. Elledge had numerous head injuries, including having his head bashed into a concrete wall in a

cellar when he was 5 years old. He sustained a blow to his head at age 9, and was hit over the head with a croquet mallet by his brother. His nose was broken several times, and he was hit in the head with a two by four (PC-R. at 280-285). He was hit in the right frontal area with a rifle butt. “He has had many different head injuries and trauma to the central nervous system at birth.” (PC-R. at 286).

Dr. Lewis said these assaults on Mr. Elledge’s brain caused Mr. Elledge to be impulsive and overwhelmed by feelings of rage or other feelings of passion.

Mr. Elledge also was evaluated by Dr. Jonathan Pincus in 1983. Dr. Pincus identified signs of central nervous system dysfunction; paranoia; the possibility of a seizure disorder and episodes of blanking out (PC-R. at 289-290).

Based on these factors, and her opinion that Mr. Elledge was paranoid, had brain damage and a history of hideous abuse (PC-R. at 299-300), Dr. Lewis said she would have wanted additional tests to be conducted on Mr. Elledge.

> Well, I would have wanted – I know that he has since had a – a EEG. Excuse me. But because of his history of some of the psychomotor symptoms that I talked about, and the lapses where he doesn’t remember things, and Dr. Pincus’s recommendation, I would have wanted him to have sleep-deprived EEG because what you’re more likely to pick up abnormalities on the EEG if an individual is sleeping, strangely enough. So you keep the person up all night.

> I would have wanted him to have an EEG with what is photic stimulation where lights are flickered because people who are susceptible to this, have -- that that is more likely to elicit the abnormal electrical activity or hyperventilation. Because when you breathe a lot, you are then more likely to have abnormal brain activity. Also, if I recall -- again, correct me if I'm wrong -- there was some abnormality noted and then discounted on even the regular EEG that he had.
>
> So that I would have wanted to pursue that further, particularly with a neurologist. I would also have liked -- well, I never saw the raw data, but I would have like to have had more thorough neuropsychologicals done because he has -- you know, he has signs of some frontal-lobe dysfunction.
>
> And then, ideally, in the ideal world, it would have been nice to have him have a PET scan because a PET scan wold probably have been the best way of documenting frontal lobe dysfunction. So, again, in an ideal world, that's the kind of workup that he – I would have wanted, and, indeed, we have occasionally been able to get that on, you know, on an individual with similar behavior problems.

(PC-R. at. 304-305).

Dr. Lewis had been requesting that these tests be conducted on Mr. Elledge for many years, in fact, since she first evaluated him in 1983.

> I discussed a need for specialized EEGs throughout the times that I have been involved in the case, and I asked for EEGs with photic stimulation, and hyperventilation, and nasopharyngeal leads...And so that those really should have been done... And, therefore, with individuals who have seizures, not only do you go by the clinical evidence, but you also would want to do maybe three EEGS. It has been shown if you do more than one with

> someone where there are clinical signs that there is a seizure disorder, you should do several.

(PC-R. at 539-540).

During the evidentiary hearing in July, 2002, it was learned for the first time that Mr. Elledge, in fact, had undergone some of these tests, but that information was withheld from the defense by the State Attorney. It was revealed at the evidentiary hearing that the State Attorney had ex parte communication with defense expert Dr. Norman, to which the defense was not a party. The State Attorney received a three-page faxed document from Dr. Norman that was not turned over to the defense, despite Dr. Norman's role as a **confidential** defense expert (PC-R. at 104). This ex parte communication was dated October 14, 1993, before Dr. Norman's scheduled deposition on October 18, 1993.

Mr. Elledge's defense counsel William Laswell testified that he never before saw the documents in question: "I don't think I've seen this before." (PC-R. at 575). James Ongley, another defense attorney on Mr. Elledge's case, was uncertain if he had previously seen those withheld documents (PC.-R. at 605). Post-conviction counsel for Mr. Elledge testified that she reviewed each and every page of Mr. Elledge's files and at

no time found the faxed documentation from Dr. Norman (PC-R. at 567-575).

The State kept these documents secret until it began its cross examination of Dr. Lewis in 2002. On cross examination, in an effort to discredit her credibility and testimony, the State Attorney asked Dr. Lewis:

> Q: You had indicated that you want an EEG with hyperventilation and photic stimulation?
>
> D: Correct.
>
> Q: Do you realize that [those tests] was done with Mr. Mr. Elledge on October 4, 1993?

(PC-R. at 484).

Dr. Lewis said she knew there had been some abnormalities but she was unaware that Mr. Elledge ever had hyperventilation or photic stimulation EEGs. "But I have seen something that had these other things in it that would have made me want to follow up with, you know, with more specific tests." (PC-R. at 495).

The disclosure of those records only came to light during the cross examination of defense witness Dr. Lewis at the July, 2002 evidentiary hearing. Those records were not in the defense attorney files (PC-R. at 567-575), nor were they in the State Attorney files turned over to the defense in post-conviction proceedings. In fact, the State Attorney admitted

that those records, which were surreptitious obtained, were withheld from the defense and filed as “exempt” materials and intentionally kept from the defense. At no time was the defense privy to those documents or the communication the State Attorney had with defense expert Dr. Norman. It was only after the trial court re-opened the exempt materials in open court in 2002 it discovered that the faxed report from Dr. Norman was placed in exempt materials of the State Attorney and had been intentionally kept from the defense (PC-R. 636).

It is undisputed that Dr. Norman’s faxed report was not disclosed to the defense before the July, 2002 evidentiary hearing.

In denying this claim, the trial court simply said that “the Defendant has failed to establish any Brady violation with regard to Dr. Norman’s report.” (PC-R. at). This was error.

B. The Law.

1. Brady v. Maryland.

To insure a constitutionally adequate adversarial testing and a fair trial occur, the prosecutor is required to disclose to the defense evidence “that is both favorable to the accused and ‘material either to guilt or punishment.’” United States

v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). In Strickler v. Greene, 527 U.S. 263, 281 (1999), the Supreme Court reiterated the "special role played by the American prosecutor" as one "whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done," quoting Berger v. United States, 295 U.S. 78, 88 (1935). Hoffman v. State, 800 So.2d 174 (Fla. 2001); State v. Huggins,788 So.2d 238 (Fla. 2001); Florida Bar v. Cox, 794 So.2d 1278 (Fla. 2001). The State's duty to disclose exculpatory evidence applies even when there has been no request by the defendant. Strickler at 280. The State also has a duty to learn of any favorable evidence known to individuals acting on the government's behalf. Id. at 281. "It is irrelevant whether the prosecutor or police is responsible for the nondisclosure; it is enough that the State itself fails to disclose." Garcia v. State, 622 So.2d 1325, 1330 (Fla. 1993). "The State is charged with constructive knowledge and possession of evidence withheld by other state agents, including law enforcement officers." Jones v. State, 709 So.2d 512, 520 (Fla. 1998).

Most recently, the United States Supreme Court in Banks v. Dretke, 124 S.Ct. 1256 (2004), held that when police or prosecutors conceal significant exculpatory or impeaching

material in the State's possession, it is incumbent on the State to set the record straight. The court also said that a rule in which the "prosecutor may hide, defendant must seek" is untenable in a system constitutionally bound to accord defendants due process. "Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbriation." Kyles v. Whitley, 514 U.S. 419, 440 (1995).

This Court has held that, "the State is under a continuing obligation to disclose any exculpatory evidence." Johnson v. Butterworth, 713 So.2d 985, 987 (Fla. 1998); see also Roberts v. Butterworth, 668 So.2d 580 (Fla. 1996)(finding that Brady obligation continues in post-conviction). In Ventura v. State, 673 So. 2d 479 (Fla. 1996), this Court said, "The State cannot fail to furnish relevant information and then argue that the claim need not be heard on its merits because of an asserted procedural default that was caused by the State's failure to act."

While undisclosed reports may be of debatable exculpatory value, the defendant should have the benefit of the information contained within them. Boshears v. State, 511 So. 2d 721 (Fla. 1st DCA 1987); Perdomo v. State, 565 So. 2d 1375 (Fla. 2nd DCA 1990).

Exculpatory and material evidence is evidence of a

favorable character for the defense that creates a reasonable probability that the outcome of the guilt and/or capital sentencing trial would have been different. Garcia v. State, 622 So. 2d at 1330-31. This standard is met and reversal is required once the reviewing court concludes that there exists a "reasonable probability that had the [unpresented] evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 680.

Materiality "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have ultimately resulted in the defendant's acquittal." Way v. State, 760 So. 2d 903, 913 (Fla. 2000). Rather:

> The materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is 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, 514 U.S. at 435).

Further, the cumulative effect of the suppressed evidence must be considered when determining materiality. See, Way, 760 So. 2d at 913 (citing Kyles, 514 U.S. at 436 and n. 10). "It is the next effect of the evidence that must be assessed." Way, 760 So. 2d at 913 (quoting Jones v. State, 709 So. 2d

512, 521 (Fla. 1998)); see Kyles, 514 U.S. at 436 and n. 10.

2. **Brady Analysis**

In Strickler v. Greene, 527 U.S. at 287-288, the Supreme Court specifically delineated the "three components of a true Brady violation." They are: 1)"The evidence at issue must be favorable to the accused;" 2) "that evidence must have been suppressed by the State, either willfully or inadvertently;" and 3) "prejudice must have ensued."

For more than 15 years, Dr. Lewis had been requesting that Mr. Elledge undergo additional tests to determine the level of his impairment. Since 1983, Dr. Lewis had requested that Mr. Elledge have neuropsychological testing and EEGs to confirm that Mr. Elledge was paranoid, suffered from brain damage and was epileptic.

In 1993, without the knowledge of Mr. Elledge's defense attorney, the information that Dr. Lewis had been seeking came to light. Dr. Norman notified the State Attorney in an October 14, 1993 faxed report to his secretary, Joanne Hendricks, that Mr. Elledge had apparently been given those tests and the results of those tests were supplied to the State Attorney. At no time were the results of those tests passed on to the defense. This report was faxed to the State Attorney several days before the scheduled deposition of Dr.

Norman on October 18, 1993. Because the report of testing by Dr. Norman was not disclosed, defense attorneys had no reason to ask whether Dr. Norman had conducted those tests.

The report and its results only came to light in July, 2002 when Dr. Lewis was cross examined by State Attorney Michael Satz. At no time during the post-conviction proceeding were those test results or the faxed results made available to the defense. At no time during the resentencing of Mr. Elledge did those test results or faxed report become available to the defense. Even during the deposition of Dr. Norman, conducted by the State on October 18, 1993, no mention was made of additional EEGs allegedly done on Mr. Elledge.

Clearly, this information was not disclosed. And even after it was disclosed at the evidentiary hearing, it was learned that the State knowingly withheld this information by calling it “exempt,” and filing it away from the eyes of the defense counsel. It was only after the trial court opened the “exempt” materials at the evidentiary hearing that the trial court found that this report was never turned over to the defense and shielded by the State Attorney as “exempt” materials.

The information was favorable because it was precisely what Dr. Lewis had been requesting for years. Even Mr.

Ongley, who had limited contact with this case, knew that Dr. Lewis had been requesting these EEGs be conducted on Mr. Elledge since the time of trial. "I recall her requesting additional tests be done." (PC-R. at 237). Mr. Ongley testified that he was not surprised that Dr. Lewis had made these testing requests back in 1985. "You're looking for a specific environmental source that may contribute to abnormal EEGs, looking for temporal lobe epilepsy or something like that." (PC-R. at 238).

At no point during Mr. Ongley's testimony or his cross examination did the State Attorney mention that these tests had already been completed. The fact that the State withheld this information until Dr. Lewis was on the stand in cross examination was an obvious attempt by the State to discredit Dr. Lewis at an evidentiary hearing nine years after the resentencing. The State realized her credibility was critical. The defense had attempted to portray Dr. Lewis as a demanding expert who had unreasonably wanted all sorts of tests done on Mr. Elledge. In fact, the tests that she had specifically asked for were precisely the tests that had been done on Mr. Elledge by another doctor whom neither the State nor the defense suggested was demanding at all. This information was favorable to the defense because it would have

determined what direction Dr. Lewis would pursue in further testing. For example, if she had known the EEGs had been done and were normal, she could have pursued a PET scan or other avenues that were more sensitive than the EEG. Instead, the State foreclosed the defense from exploring those possibilities.

Additionally, where the State never revealed the existence of these sensitive EEG's, the Defendant was never able to obtain the raw data from said testing. If the State had obtained that information in 1993 and made it available to the defense immediately, it is quite probable the raw data would still have been in existence and the defense could have obtained the same from Dr. Norman. Although Dr. Norman did not apparently find any relevant information in his analysis, it has been the experience of the undersigned, that an individual trained in a specific area of an expertise will discover items that another overlooked. It is likely that Dr. Lewis could have reviewed the EEG she had been asking for and found a number of items that could have buttressed her initial suspicions of some organic brain damage with specific reference to the frontal lobe injuries. Because Dr. Norman was not necessarily looking for a specific aspect of a brain injury, it is possible he did not conclude from the raw data

that which would have been relevant to Dr. Lewis.

This would be no different than two lawyers who are competent in the area of criminal law, and yet specifically one lawyer who can handle death penalty mitigation work and can find mitigation in an individual's background, when another lawyer not specifically trained in that area might overlook issues that would be relevant. Therefore, it is argued that the failure of the State to provide the defense with that information in a timely fashion, very likely contributed to the inability to recover that information forever. For Dr. Lewis to have been asking for it for ten (10) years, only to find out if was already in existence and could have been utilized to the benefit of Mr. Elledge, amounts to the most serious violation of Brady with respect to the most significant issues on behalf of Mr. Elledge.

As to the final component of "a true Brady violation," prejudice is present when "the cumulative effect of the suppression of the materials [ ] undermines confidence in the outcome of the trial." Rogers v. State, 782 So.2d 373 (Fla. 2001). As the United States Supreme Court explained in Kyles v. Whitley, 514 U.S. at 436, "The fourth and final aspect of Bagley materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, **not item**

by item." (emphasis added). Accordingly, this Court must evaluate the failure to disclose this information with the testimony from the 1993 resentencing proceedings and the defense's failure to present the testimony of Dr. Lewis.

The United States Supreme Court has cautioned that in showing materiality, petitioners:

> need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a Brady violation by demonstrating that some inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Kyles v. Whitley 514 U.S. at 435-6.

Although the element of prejudice can never be presumed without any evidence in the record that prejudice occurred, there is ample evidence of real prejudice to Appellant in the above styled cause. The failure to reveal the information prohibited Dr. Lewis from examining additional evidence of brain injury. Additionally, 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. The Appellant is severely prejudiced where the State withheld that information upon receipt and for the previous ten(10) years, only to be used by the State on cross-examination of the defense expert.

3. Giglio v. United States.

In Giglio v. United States, 405 U.S 150 (1972), the Supreme Court held that due process precludes a prosecutor from knowingly presenting false or misleading testimony while seeking a conviction. A prosecutor is obligated to correct such false or misleading testimony if he knows that it is false. Accordingly, post-conviction relief is warranted if such a violation of due process is revealed and if the false testimony "could ... in any reasonable likelihood have affected the judgment of the jury." Williams v. Griswald, 743 F. 2d 1533, 1543 (11th Cir. 1984) (quoting Giglio, 405 U.S. at 154). The standard for meeting the prejudice prong of Giglio is less onerous than for a Brady violation. United States v. Agurs, 427 U.S. 97 (1976). Under Giglio, where the prosecutor knowingly misleads the jury, the court, or defense counsel, the conviction must be set aside unless the error is harmless beyond a reasonable doubt. Intentionally misleading defense counsel violates due process. Gray v. Netherland, 116 S.Ct.

2074, 2082 (1996); Kyles v. Whitley, 115 S.Ct. 1555, 1565 n.7 (1995).

"The State, as the beneficiary of the Giglio violation, bears the burden to prove that the presentation of false testimony at trial was harmless error beyond a reasonable doubt. Guzman v. State, 868 So. 2d 498 (Fla. 2003). Otherwise, a new trial is required.

4. **Giglio Analysis.**

In United States v. Agurs, 427 U.S. 97, 103 (1976), the Supreme Court explained that where "undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury." In this type of situation, a conviction must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Id. Unlike a Brady-type situation where no intent to suppress is required to be demonstrated, a "strict standard of materiality" applies in cases involving perjured testimony because "they involve a corruption of the truth-seeking process." Id. at 104. Thus, although both Brady and Giglio require a showing of "materiality," the legal standard for demonstrating entitlement to relief is significantly different. The standard for establishing "materiality" under

Giglio has "the lowest threshold" and is "the least onerous." United States v. Anderson, 574 So. 2d 1347, 1355 (5th Cir. 1978). See Craig v. State, 685 So. 2d 1224, 1232-34 (Fla. 1996) (Wells, J. concurring in part and dissenting in part) (discussing differing legal standards attendant to Brady and Giglio claims).

Despite the State's attempt at the evidentiary hearing to minimize the due process violation under Giglio, 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 resentencing. 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.

Dr. Caddy was severely impeached at the 1993 resentencing. He testified that his previous testing of Mr. Elledge in 1989 was incomplete but that his testimony in 1993 was more refined (R. 2324-2327).

Dr. Schwartz also was impeached at the 1993 resentencing for failing to know of previous neuropsychological testing of Mr. Elledge and for failing to ask for other testing (R. 1720-

1726). He knew that a neuropsychologist had seen Mr. Elledge a few weeks before, but he did not read the report (R. 1764). He was told the results of the test were normal. He admitted to now seeing Mr. Elledge's California records.

With this information revealed the 2002 evidentiary hearing, Mr. Elledge could have sought additional tests and raw data. Instead, the State engaged in improper ex parte communication to ferret out confidential information then failed to disclose this information until nine years later.

Post-conviction counsel only learned of the ex parte contact and undisclosed information by accident during post-conviction proceedings when the prosecution was cross examining Dr. Dorothy Lewis. When it was revealed that the State had improperly communicated with the defense expert, the State attempted to place blame on the trial court by stating that it had reviewed the exempt records and determined that they were exempt, placed them in a box and sent them to the repository in Tallahassee. The State never specifically addressed how it obtained a confidential report from Dr. Norman in 1993 or addressed why the State Attorney never turned over the information to the defense. The State never addressed why it was speaking with a confidential defense expert without notice to Mr. Elledge. According to Mr.

Laswell, Dr. Norman was a confidential defense expert. The State was not privy to this information “until I surfaced it” (PC-R. at 104).

Ms. Bailey, the prosecutor, told the trial court that she was relying on Fla. Stat. sec. 455 and 394.4615 in not disclosing the material and said, “I cannot by law give these out under the Public Records Act.” (PC-R. at 598). But the prosecutor failed to explain how she was able to pull these records out from her exempt file and then use them against a defense expert in a post-conviction hearing and have the records remain exempt under the law.

This information, which was withheld by the State, was then used **against** Mr. Elledge’s defense at his post-conviction proceeding when he should have had access to the information to further explore his defense. This information also would have supported the credibility of the other defense experts who could have relied on these tests to show their thoroughness and could have opened other avenues of testing. This is the prejudice to Mr. Elledge. Dr. Lewis repeatedly said she wanted additional tests to be conducted on Mr. Elledge. Her requests were made to seem outlandish and extreme when she repeatedly requested that these tests be conducted. But it was clear that they were neither extreme

nor burdensome. Defense counsel Laswell made Dr. Lewis out to be a demanding expert who only wanted to order additional tests, and not review her own records.

Yet, when these records were finally made available in 2002, they confirmed that Dr. Lewis's requests had already been completed, and were not unreasonable, demanding or outlandish. In fact, they were the tests that were routinely done by mental health experts. These records also showed that the State knowingly put on false and misleading information, and foreclosed the defense from using this information. The State only revealed this information when Dr. Lewis was on the stand on cross examination. The State did not impeach the two defense attorneys with these records. The State sat silent as Mr. Laswell testified that Dr. Lewis repeatedly asked for additional tests. It was only when Dr. Lewis, who the State clearly disliked and who they tried to discredit, was on cross examination, that the materials were used to ambush Dr. Lewis and post-conviction counsel. This unethical episode only illustrates the lengths that the continuous pattern of prosecutorial misconduct thrives and the length the State would go to win at all costs. See, Berger v. United States, 295 U.S. 78 (1935)(the prosecutor could "strike hard blows but not foul ones").

c. Conclusion.

Cumulative consideration of the numerous and substantial failures to disclose favorable evidence to Mr. Elledge's trial counsel undermines confidence in the reliability of the outcome. In State v. Huggins, 788 So.2d 238, 244 (Fla. 2001), this Court analyzed a Brady claim and stated:

> The State presented a purely circumstantial case against Huggins. As Angel was its key prosecutorial witness who established crucial details in the State's theory of the case, her credibility was critical.

Likewise, Dr. Lewis' credibility was crucial in this case. The prosecution knew how important it was to undermine her credibility. There is no doubt that the nondisclosures here, "shake[] the confidence in the verdict." State v. Huggins, 788 So. 2d at 243-4. Here, 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.

Further, in Kyles v. Whitley, the United States Supreme Court recognized that evidence that impeached the police investigation could establish a Brady violation:

> Damage to the prosecution's case would not have been confined to evidence of the eyewitnesses, for Beanie's various statements would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances

> in which it was found, but the thoroughness and even the good faith of the investigation, as well. . . . [the evidence's] disclosure would have revealed a remarkably uncritical attitude on the part of the police.
>
> * * *
>
> Even if Kyles's lawyer had followed the more conservative course of leaving Beanie off the stand, though, the defense could have examined the police to good effect on their knowledge of Beanie's statements and so have attacked the reliability of the investigation in failing even to consider Beanie's possible guilt and in tolerating (if not countenancing) serious possibilities that incriminating evidence had been planted.

514 U.S. 419, 445-6. (citations omitted).

The undisclosed evidence would have not only been of value just on its face, but the synergistic effect of the nondisclosures considered together would have shown that Dr. Lewis was credible, that her requests were not demanding or outrageous. It also illustrated that Mr. Lewis was the only mental health expert who offered consistent, non-conflicting mitigation testimony.

In reviewing the materiality of the nondisclosures, this Court must review the net effect of the suppressed evidence and determine "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." Maharaj v. State, 778 So. 2d 944, 953 (Fla. 2000). Further, "[i]n applying these

elements, the evidence must be considered in the context of the entire record." Occhicone v. State, 768 So. 2d 1037, 1041 (Fla. 2000).

Moreover, the proper question under Giglio is whether there is any reasonable likelihood that the false information could could have affected the court's judgment as the fact finder in this case. If there is any reasonable likelihood that the false information 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. Guzman v. State, 868 So. 2d 498 (Fla. 2003). A new resentencing is warranted.

ARGUMENT II

MR. ELLEDGE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS RESENTENCING.

A. Introduction.

Mr. Elledge is entitled to a new resentencing. The evidence presented at the evidentiary hearing conclusively showed that in addition to the Brady violations, Mr. Elledge received ineffective assistance of counsel in that his trial counsel failed to obtain and hire adequate mental health experts.

Trial counsel hired mental health experts who testified on

Mr. Elledge's behalf at his resentencing. Doctors Glenn Caddy and Gary Schwartz were hired by the defense to evaluate Mr. Elledge and to testify on his behalf. Neither of the experts were board certified, a fact that the trial court found persuasive. (R. 3004; 3007). The experts' testimony differed considerably from one another. Dr. Schwartz testified that Mr. Elledge suffered from a lack of impulse control and mild to moderate organic brain disorder. His credibility was diminished during cross examination by the testimony of Dr. Caddy, the second defense expert (R. 3005). Their conflicting testimony led the trial court to give no weight to their expert opinions.

At the evidentiary hearing, trial counsel William Laswell testified that in 1993, when he represented Mr. Elledge, the mental health mitigators "were considered to be the weightiest and the most helpful of the allowed mitigation" (PC-R. at 27).

And because the mental health mitigators were the most important in his case, he began working on that aspect of the case "very early." (PC-R. at 27). Mr. Laswell testified that he read Mr. Elledge's prior proceedings and spoke with prior counsel. He involved expert Trudy Block-Garfield, who gave him advice about the case. He described Ms. Block-Garfield as "a highly respected psychologist in Broward County, but

also the wife of a friend of mine who is a criminal defense lawyer" (PC-R. at 32). Mr. Laswell testified that it became clear early on that Dr. Block-Garfield "would not be a helpful witness" because she thought that Mr. Elledge was a sociopath, with anti-personality disorders, the same diagnosis given Mr. Elledge by the State metal health expert, Dr. Harley Stock (PC-R. at 33).

As a result of her opinion, Mr. Laswell testified that he "didn't surface her." He did not place her name on any witness list or notify the State of her involvement (PC-R. at 35).

Mr. Laswell testified that he obtained the services of Dr. Norman, a neurologist. Dr. Norman was a confidential defense expert (PC-R. at 104). Mr. Laswell said he had his co-counsel, Jim Ongley, deal with Dr. Norman because of his medical background (PC-R. at 30). Dr. Norman was not called as a defense witness, because, "As I recall, Norman's studies were normal....showed no abnormalities." (PC-R. at 60).

Mr. Laswell testified that he listed Dr. Norman on the witness list, because "I knew he couldn't hurt me." (PC-R. at 61).[1] Dr. Norman was deposed by the State. Dr. Block-

[1] Mr. Laswell was wrong. Dr. Norman hurt Mr. Elledge in a significant way. During the deposition of Dr. Norman, on October 18, 1993, Dr. Norman said he found no evidence that Mr. Elledge suffered from a seizure disorder and was a "normal individual." During the deposition, the State proceeded to

Garfield, was not listed as a defense witness and was not deposed.

Mr. Laswell testified that he was forwarded the name of Gary Schwartz, a psychologist from Dade County, whom he thought "may have some unique input because of his familiarization to the law." (PC-R. at 29-30). Mr. Laswell testified that he had never worked before with Gary Schwartz, but had seen him lecture and he came highly recommended (PC-R. 31). He testified that he never questioned whether Dr. Schwartz had been involved in a capital murder before (PC-R. at 37).

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tell Dr. Norman details of the crime and events leading up to the crime. Dr. Norman said, "..this is a little bit more detailed than what I was furnished and a little bit different description of what happened in the first murder, but yes, that sounds very, very much like purposeful behavior."

Dr. Norman said, "The most damaging thing to him is that he remembers all three murders. If he truly was in a seizure state his memory of them should be at least vague or what not." Dr. Norman also said: "But the way this was described (by the State), I mean this was person out of control, obviously, and could have been involuntarily out of control, I mean in a seizure type state. What you're describing doesn't sound like a seizure state....The fact he can remember that, as I said, is the damaging part for him" See, Deposition of Donald E. Norman, October 18, 1993.

It was clear that after Dr. Norman evaluated Mr. Elledge and found him to be normal with no seizure disorders. In light of this potentially damaging information, the defense had no reason to list Dr. Norman as a witness and had no reason to have the State depose him. The state's deposition hurt the defense case and helped the State's case.

Glen Caddy had already evaluated Mr. Elledge and Mr. Laswell had used him before as an expert (PC-R. at 32). He became involved in the case "months before" the resentencing (PC-R. at 44).

Mr. Laswell testified that he considered Dr. Dorothy Lewis, "who was a lady thought to be one time on the cutting edge, ascribing behavior patterns to death-row inmates." (PC-R. at 30). He heard of her through Mr. Elledge.[2] Mr. Laswell said he knew of her work, but did not know that Mr. Elledge was one of the people she had studied as part of her work (PC-R. at 46). Mr. Laswell testified that he knew that Dr. Lewis and Jonathan Pincus "began to make some efforts to link homicidal tendencies to temporal lobe epilepsy, which was startling news at that point." (PC-R. at 46).

Mr. Laswell testified that he contacted Dr. Lewis, who agreed to help Mr. Elledge and testify on his behalf. Mr. Laswell asked her to pull her file on Mr. Elledge and then called her several weeks later, but learned that she had not looked at her file (PC-R. at 48). According to Mr. Laswell, Dr. Lewis never pulled her file. After two conversations with Dr. Lewis, Mr. Laswell characterized their relationship

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[2]Had Mr. Laswell been prepared and reviewed all of Mr. Elledge's background materials, he would have known that Dr. Lewis evaluated Mr. Elledge in 1983 and testified for him at a federal court proceeding in 1985.

as going “off the rails between the two of us” (PC-R. at 49). Mr. Laswell said he had difficulty reaching Dr. Lewis. “She didn’t seem as nearly as anxious to work for Billy as she had, and she still had not reviewed her file” (PC-R. at 49).

On the third conversation Mr. Laswell had with Dr. Lewis, he hung up on her and asked James Ongley, a doctor who was a lawyer in his office, to work with Dr. Lewis because, “quite frankly, I was fed up with her by then” (PC-R. at 49).

Mr. Laswell acknowledged that he told the court that Dr. Lewis was a “necessary witness.” “What I mean by necessary, Elledge wanted her here and that she had done a good, valuable workup on Elledge and that with Pincus, she had done work with Elledge” (PC-R. at 58). Even in 2002, in the post-conviction proceedings, Mr. Laswell testified that Dr. Lewis still was valuable. “The original workup that she and Pincus did for Mr. Elledge when he was on death row six or seven years before.” That workup included her opinion of severe abuse with temporal lobe epilepsy and organic brain damage (PC-R. at 59).

According to Mr. Laswell, it is up to both the attorney and the defendant to make the decision on what witnesses to

call (PC-R. at 71).

James Ongley testified that he was called in to assist Mr. Laswell on Mr. Elledge's case. He was assigned various tasks, but never participated in sitting at counsel table (PC-R. at 188). "I was not directly involved in this case" (PC-R. at 190). He was present for the deposition of Dr. Norman and then was asked to deal with Dr. Lewis by Mr. Laswell. He did not know that Mr. Laswell told the court that he would be working with Dr. Lewis and that he would conduct her examination (PC-R. at 209).

Mr. Ongley was told by Mr. Laswell that their relationship was "irretrievably broken. I remember him mentioning hanging up the phone on her. She wasn't talking to him and he didn't want to talk to her and my job was to do whatever I could to convince her to come down" (PC-R. at 195). Mr. Ongley testified that he had no prior relationship with Dr. Lewis. "No, but I think the thought was, I, calling as a doctor might have a little more effect, and another voice might smooth what Mr. Laswell had managed to destroy" (PC-R. at 195).

Mr. Laswell asked him to send some materials to Dr. Lewis

on or about November 13-14, 1993.[3] While he had the files of the case, he was not asked to do anything with them, he said (PC-R. at 191). He did not participate in the trial and had no tasks to perform, other than to try to find some sort of objective evidence to show that Mr. Elledge was born a blue baby and had suffered head trauma (PCR-R. at 191).

Mr. Ongley said he spoke with Dr. Lewis on a Friday, met with Mr. Elledge over the weekend, and on Monday, reported to the judge that she would not be a witness in the case (PC-R. at 192). Mr. Laswell "felt it was bad for her to come down," and participate in Mr. Elledge's case (PC-R. at 196). Mr. Ongley testified that he told Dr. Lewis that Mr. Laswell felt that she would be detrimental to the case (PC-R. at 196).

> ....I remember her feeling that if she came down, she would be detrimental because she wasn't aware of certain information. She wasn't prepared. She felt we weren't prepared, and she expressed that she felt it would be detrimental. And I believe that's what I conveyed to Mr. Elledge on the weekend.

(PC-R. at 197).

Mr. Ongley testified that he would not want to put on an expert who cancelled out another expert's testimony (PC-R. at 199), yet they did precisely that. The only doctor he knew

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[3]Mr. Elledge's resentencing hearing began on November 1, 1993. The defense began its case on November 5, 1993.

about was Dr. Norman. He did not know Doctors Caddy or Schwartz nor did he know the nature of their testimony (PC-R. at 199). “The only thing I knew was Dr. Norman’s report, which said nothing.” (PC-R. at 204).

He knew that the resentencing had started, but did not know what the testimony was (PC-R. at 204). In other words, the defense presented two doctors whom they had no idea what they would say, rather than give Dr. Lewis, who had good information about Mr. Elledge, the additional information she needed to testify.

Dr. Lewis, who was ready to testify that Mr. Elledge was paranoid, and had been since his early years, suffered brain dysfunction and psychotic symptoms. She also was ready to testify that Mr. Elledge was under extreme mental and emotional disturbance at the time of the offense and that his capacity to appreciate the criminality of his conduct was extremely impaired. (PC-R. at 339).

Dr. Lewis testified that she did not prepare for a case too much in advance, and generally did not begin to prepare for her testimony until several days before her testimony (PC-R. at 307). In 2002, Dr. Lewis testified that she began reviewing Mr. Elledge’s materials the two days before her testimony (PC-R. at 308), presumably so the information she

reviews stays fresh in her mind.

Dr. Lewis said she was contacted in 1993 about Mr. Elledge's case. "I was at one point told that I think some time in November, this case would come up. And again, I don't know when that was, but at some point, I was prepared to come down. I think it was Saturday or a Sunday, to be here -- I could be wrong. I think it was Monday the 8th of November. And then I got a message saying that the trial was off and it wasn't going to happen" (PC-R. at 310).

After she was told that Mr. Elledge's trial was off, she identified messages she received at her New York office on Friday, November 5, 1993 indicating that Mr. Elledge's trial was on and that she was expected in Florida on that Monday. Dr. Lewis identified a message that read: The judge said it is not acceptable for you to come down on Tuesday. He is expecting you on Monday" (PC-R. a 313). By the time she had received the message that she was wanted in Florida on Monday, she had already rescheduled her plans.

"I was told earlier in the week that the trial, that I was not going to be needed on Monday and I guess that the trial was off because it says, "The trial is on again." So that I had made other commitments for probably Monday and Tuesday" (PC-R. at 314).

Dr. Lewis testified that she was willing to come to Florida to testify on Mr. Elledge's behalf. "I was certainly willing because I made arrangements to come down the following Monday." She added, however, that she never comes simply at the request of a defendant, and if a defendant's attorney did not want her to testify, she would abide by the attorney's wishes (PC-R. at 320).

Dr. Lewis identified her own handwritten notes that she took of her conversation with Mr. Ongley in 1993. Mr. Ongley told her and she wrote down that the defense was going to ask for a mistrial and hoped for a continuance of the case. She was told by Mr. Ongley that he was not ready to prepare her for cross examination, and that he knew nothing of how the case progressed to that point and had not even seen her report from 1983 (PC-R. at 331).[4]

> And up until that point, Mr. Laswell had told me that I was going to be working with Mr. Ongley. I said okay. So I had no idea. You know, I thought maybe he was co-counsel and he knew of everything that was going on. And I think that this was the first that Mr. Ongley told me that he didn't know anything about the case and that he never read my report.

(PC-R. at 331).

Dr. Lewis said this conversation with Mr. Ongley occurred

[4]This was consistent with Mr. Ongley's recollection of events.

on Friday, November 12, 1993. (PC-R. at 331). Dr. Lewis testified that she received a call on Saturday, November 13, 1993 from Mr. Ongley telling her that Mr. Laswell did not have a copy of her report from 1983. Dr. Lewis described that as "absurd":

> ....here Laswell was telling me that he was going to – you know, that he wanted me to come down and that he wanted me to, you know, assist in Mr. Elledge's defense. How could he not – how could he not have a copy of my report? I mean, there were copies. You have to have a copy of my report. Why would you ask a witness to come if you don't know what she said before? So that didn't make sense.

(PC-R. at 333).

Dr. Lewis was told by Mr. Ongley that he would try to delay the case, withdraw or move for a mistrial. She received another call Saturday evening from Mr. Laswell who told her that the judge had not ordered her to Florida, and that he was leaving the decision up to Mr. Elledge to decide if she should come to Florida. Mr. Laswell then told her that he thought it was detrimental for her to come to testify on Mr. Elledge's behalf (PC-R. at 333-334).

> Dr. Lewis testified that she spoke with Mr. Elledge by phone

and she discussed with him:

> ... his lawyer's recommendation and wish that I not come because they 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.

(PC-R. at 334).

Dr. Lewis testified that she agreed to come to Florida on Monday, and then on Saturday and Sunday, but Mr. Ongley decided that she should not come. Mr. Elledge then agreed with that assessment because his attorneys had none of her records and did not know about her previous evaluation of Mr. Elledge. "I believe that I wrote a letter to Mr. Ongley returning the many tickets and saying something about how I was glad to work with him and he had been perfectly nice on the phone. But 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." (PC-R. at 337).

Dr. Lewis had proof that she had plane tickets to come to Florida and that she was prepared to do so. It was defense counsel who was unprepared.

In denying Mr. Elledge relief on this claim, the trial court spent eight of fourteen pages of its amended order attacking defense witness Lewis, and in doing so, relied extensively on the court's 1993 prejudgment of her based largely on defense counsel's representations, to find that Dr. Lewis was incredible. The court failed to be a neutral

arbiter of the facts regarding Dr. Lewis. The trial court was blinded by his past dealings with Dr. Lewis and whether she was able to attend the resentencing hearing in 1993. (PC-R. at 1953-1966). See, Light v. State, 796 So. 2d 610, 617 (Fla. 2nd DCA 2001)(judge is not to examine whether he believes the evidence presented as opposed to contradictory evidence, but whether the nature of the evidence is such that a reasonable jury may have believed it).

In 1993, the trial court said that Dr. Lewis lacked "willingness to help Mr. Elledge," (R. 2153). The trial court also found in 1993 that:

> The Court: The record is complete. Dr. Lewis at best is hostile to appearing. She has shirked all her Court's obligations. The Court -- 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 here on the 14th, she didn't. She was unable to assist Mr. Laswell. Mr. Ongley understood that obligation, she was unable to assist Mr. Ongley. She has not 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 to her. Mr. Elledge has decided that 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...
>
> ...So we proceed from there. And Dr.

> Norman obviously is available as a neurologist who has done testing at the defense's request, who has completed both an MRI as well as EEG.

(R. 2450).

At the 2002 evidentiary hearing, Mr. Elledge presented unrebutted testimony that Dr. Lewis **was** willing and able to testify on behalf of Mr. Elledge in 1993. Moreover, the trial court ignored the testimony of William Laswell, who described Dr. Lewis as "a lady thought to be one time on the cutting edge, ascribing behavior patterns to death-row inmates." (PC-R. at 30). He heard of her through Mr. Elledge. Mr. Laswell said he knew of her work, but did **not** know that Mr. Elledge was one of the people she studied as part of her work (PC-R. at 46). Mr. Laswell testified that he knew that Dr. Lewis and Jonathan Pincus "began to make some efforts to link homicidal tendencies to temporal lobe epilepsy, which was startling news at that point." (PC-R. at 46).

Mr. Laswell acknowledged that he told the Court that Dr. Lewis was a "necessary witness." "What I mean by necessary, Elledge wanted her here and that she had done a good, valuable workup on Elledge and that with Pincus, she had done work with Elledge" (PC-R. at 58). Even in 2002, in the post-conviction proceedings, Mr. Laswell testified that Dr. Lewis **still** was a

valuable witness. "The original workup that she and Pincus did for Mr. Elledge when he was on death row six or seven years before." That workup included her opinion of severe abuse with temporal lobe epilepsy and organic brain damage (PC-R. at 59).

The trial court erroneously determined that despite being a nationally-recognized expert in her field, it was "Dr. Lewis's complete lack of cooperation which resulted in her failure to testify" (PC-R. at 1962) and that the "failure of Dr. Lewis to appear was due entirely to her own fault and not the fault of counsel." (PC-R. at 1962).[5] The trial court ignored the testimony of Mr. Laswell, who developed a personality conflict with Dr. Lewis and his own client. Mr. Laswell had Dr. Ongley confer with Dr. Lewis, but Dr. Ongley knew nothing about the case and was not ready or able to prepare Dr. Lewis for her testimony. Dr. Ongley testified that the only information he knew about Mr. Elledge came from Dr. Norman. He did not know what doctors Caddy or Schwartz had found. (PC-R. at 199). He said: "The only thing I knew was Dr. Norman's report, which said nothing." (PC-R. at 204).

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[5]The State's vendetta against Dr. Lewis is evident in parading Mr. Satz into the hearing to attempt to discredit Dr. Lewis with a case from Rochester, New York, that was irrelevant to these proceedings and in an entirely different context.

More importantly, neither Mr. Ongley nor Mr. Moldof, nine years later, had any problems with Dr. Lewis.

The trial court, however, ignored these facts. Contrary to the analysis the trial court should have done under Light, the trial court prejudged Dr. Lewis based on its erroneous opinions of what transpired in 1993. The Court offered no explanation as to why post-conviction counsel was able to procure her attendance without any problem, yet trial counsel could not.

1. **Factual Conclusions**

Deficient Performance

Defense counsel was unfamiliar with Dr. Lewis and what her evaluation of Mr. Elledge revealed from 1983. He covered up his failings by blaming Dr. Lewis for being difficult and failing to pull her file. What is unclear, however, is why trial counsel initially sought to obtain the services of Dr. Lewis, a credentialed and highly-educated psychiatrist who evaluated Mr. Elledge in 1983 and who was willing and able to assist counsel with Mr. Elledge's case in 2002, send her plane tickets to testify (PC-R. at 175) and then said he never had any intention to use her.

Three weeks before trial, on October 12, 1993, Mr. Laswell described Dr. Lewis as a "necessary witness," (R.

3458), but then repeatedly told the court of the trouble he was having in obtaining the services of Dr. Lewis. What was revealed at the evidentiary hearing is that trial counsel having been informed by Dr. Lewis that he was unprepared, was trying to placate his client by saying he wanted to bring Dr. Lewis to Florida, but in fact, he had no intention of doing so. Instead, he presented two mental health experts who had no idea what they would testify to.

Trial counsel documented each and every problem he had with Dr. Lewis, but only apparently to placate his client. He told the court about the communication problem he had with Dr. Lewis. He told the court he was unprepared to handle Dr. Lewis as a defense witness because Mr. Ongley, his co-counsel, was unfamiliar with the case, with her written report, and he did not know what had transpired up until that time. He also did not know what kind of testing Dr. Norman conducted nor was he aware that Mr. Elledge had even participated in a lengthy study that linked homicidal tendencies to temporal lobe epilepsy. He also did not tell co-counsel what was happening in the case or enlist his help. Thus, it was not Dr. Lewis who created the roadblock to a good mental health defense. It was defense counsel's lack of preparation.

This was ineffective assistance of counsel. See, Kenley

v. Armontrout, 937 F.2d 1298 (8th Cir. 1991); Kimmelman v. Morrison, 477 U.S. 365 (1986). The question remains why was counsel unprepared when he decided the one doctor who had favorable evidence should not be presented at resentencing.

In Williams v. Taylor, 120 S. Ct. 1495, 1511 (2000), the Supreme Court found deficient performance where trial court failed to prepare for the penalty phase of a capital trial until a week before trial, "failed to conduct an investigation that would have uncovered extensive records," "failed to seek prison records," and "failed to return phone calls of a certified public accountant." 120 S. Ct. at 1514.

Justice O'Connor in her concurring opinion explained, "trial counsel failed to conduct investigation that would have uncovered substantial amounts of mitigation," and as a result this was a "failure to conduct the requisite diligent investigation," Id.

More recently in Wiggins v. Smith, 123 S. Ct. 2527 (2003), the Supreme Court discussed counsel's decision to limit the scope of the investigation into potential mitigating evidence and the reasonableness of counsel's investigation. The Court said:

> [A] court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. Even assuming [trial

> counsel] limited the scope of their investigation for strategic reasons, Strickland does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy.

Wiggins, 123 S. Ct. at 2538.

This Court has recognized that trial counsel has a duty to conduct an adequate and reasonable investigation of available mitigation and evidence that negates aggravation. Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995); Rose v. State, 675 So. 2d 567 (Fla. 1996). This did not occur in Mr. Elledge's case.

It is counsel's responsibility to know his case. Counsel's lack of preparation was not a reasonable tactical decision. This is deficient performance. Nixon v. Newsome, 888 F. 2d 112, 116 (11th Cir. 1989) (where defense attorney failed to impeach key state witness because of lack of preparation, then chose not to recall the witness to avoid repeating damaging testimony, indicating a strategic decision, the fact that the attorney was forced into such a situation indicates his ineffectiveness).

Mr. Elledge was deprived of his right to the "adequate" assistance of a mental health expert. Cowley v. Stricklin, 929 F. 2d 640 (11th Cir. 1991). It was not Dr. Lewis who

indicated an unwillingness to testify on Mr. Elledge's behalf. Counsel admitted numerous times that he was not prepared to deal with Dr. Lewis. No one knows why. Mr. Ongley, who had no personality problems with Dr. Lewis, admitted that he was unfamiliar with the case and could not prepare Dr. Lewis for court. No one knows why.

Had trial counsel done his job, Dr. Lewis would have testified **instead** of the two conflicting and incredible experts hired by the defense. She would have provided testimony that was consistent with her earlier evaluation plus any additional testimony on a current evaluation. This was extremely important because she saw Mr. Elledge many years **before** any defense or state expert evaluated Mr. Elledge, and according to Mr. Laswell, "I think that closer to the time that the acts were committed would be the most forceful evidence" (PC-R. at 29).

After successfully blocking a qualified defense expert, the

trial court found the two defense experts who did testify, were incredible. They were not believed because neither was board certified and the opinions of each canceled the other out as to their inconsistent findings. Dr. Schwartz testified on cross examination that he did not know of earlier

neuropsychological testing of Mr. Elledge. He did not know to ask for earlier testing materials (R. 1726). He knew that a neurologist had seen Mr. Elledge a few weeks before, but he did not read the report (R. 1764). He was told the results of that test were normal. He admitted to not seeing Mr. Elledge's California records.

Had Dr. Lewis testified, her credentials would not have been questioned. Contrary to Dr. Caddy, she would have testified to the importance of Mr. Elledge's psychotic episodes; Mr. Elledge's chronic paranoia, a psychotic symptom that underlay all three of the murders he committed; and his recurrent depressions. She would have testified to early and serious suicide attempts, during one of which Mr. Elledge was unconscious for two weeks. Mr. Elledge's depressions are relevant because of their frequent associations with alcoholism and drug abuse. She would have testified that Mr. Elledge's suffered severe mental illness, not a character disorder as described by defense witness, Dr. Glenn Caddy. Dr. Lewis also would have testified to the significance of Mr. Elledge's frequent head injuries and signs of organic dysfunction. She would have explained that organic impairment is associated with poor judgment and impulsivity. Moreover, Dr. Lewis would have testified to the fact that Mr. Elledge

was unable to conform his conduct to the requirements of law and suffered from mental and emotional distress during the time of the crime.

The lack of preparation of Dr. Caddy shows that the fault of Dr. Lewis' absence was systematic to the attorneys, not Dr. Lewis. This is borne out by the level of preparation the defense attorneys gave doctors Caddy and Schwartz. There was no reason why mental health experts should not have read reports or been unaware of background information had trial counsel prepared. They didn't.

Even defense counsel Laswell testified that he "wasn't thrilled with Caddy or Schwartz either," his own defense experts who he hired on Mr. Elledge's case (PC-R. at 170). He described defense expert Dr. Caddy as testifying that Mr. Elledge had a mixed personality disorder and sociopathy, which is precisely what the State expert opined. "I wasn't happy with this particularly, **but at least they would show up and be prepared.**" (PC-R at 171). Apparently, all Mr. Laswell required in an expert was to show up. Obviously, it didn't matter what they had to say because their testimony conflicted with each other because neither was prepared.

In fact, when asked about this own defense expert that he called at Mr. Elledge's resentencing, Dr. Schwartz, who found

that Mr. Elledge had post-traumatic stress disorder that came and went, Mr. Laswell said, “I don’t know of any other expert that is adjustable with post-traumatic but that seems to be what Schwartz was saying” (PC-R at 174).

Trial counsel had an ego clash with Dr. Lewis and could not set it aside for Mr. Elledge. Trial counsel admitted that he did not care for Dr. Lewis (PC-R. at 49). If defense counsel was only pacifying his client and had no intention of bringing Dr. Lewis to Florida, he would not have purchased airline tickets (PC-R. at 175). The fact was that defense counsel was not prepared.

The defense did not understand how to prove technical mental health issues. Defense counsel was willing to settle for experts “who showed up and were prepared” regardless of what they had to say. But neither were prepared and were severely impeached because of their lack of background information. In its sentencing order, the trial court erroneously said that in his expert opinion, Dr. Caddy said Mr. Elledge “was not under the extreme mental or emotional disturbance when he committed the murder.” (R. 3010). This was clearly not true as Dr. Caddy specifically found statutory mitigating factor to be present. Defense counsel failed to correct the trial court on this issue.

Question: Can you opine for us, Doctor, whether or not he was acting under extreme mental duress or stress?

Dr. Caddy: Yes, he was.

(R. 2212).[6]

Despite this clear, unequivocal answer, the trial court purposely ignored this "weighty mitigating factor" to find that no statutory mitigation was found or that it was canceled out by Mr. Elledge's own defense experts. Trial counsel failed to object to the trial court's error. This was clear and obvious ineffective assistance of counsel.

2. Prejudice

Dr. Lewis had a long-standing history with Mr. Elledge and would have testified that he suffers from paranoia, brain dysfunction, epilepsy and psychotic symptoms. She would have testified to his serious abusive upbringing. She would testified that she evaluated Mr. Elledge years before any other experts saw him in 1993 and that he was under extreme mental and emotional disturbance at the time of the offense and that his capacity to appreciate the criminality of his conduct was extremely impaired (PC-R. at 339). Had Dr. Lewis testified, there would been no need to call other experts

[6]This Court noted that the trial court misstated Dr. Caddy's views, but found the error harmless. Elledge v. State, 706 So. 2d 1340, 1347 (Fla. 1997).

whose only job was to "show up on time and be prepared." Her credentials and her background are beyond reproach. She is eminently qualified in her field, and no other experts would have been needed. Instead, defense counsel chose to use an expert who was more helpful to the state than to Mr. Elledge, by describing him as a sociopath and the other was incredible. Both experts were severely impeached. Dr. Lewis was all that Mr. Elledge needed.[7]

The two defense experts provided totally inconsistent conclusions about Mr. Elledge's mental status. What is clear is that defense counsel had at his disposal an experienced and credentialed mental health expert who would have provided a wealth of significant statutory and non-statutory mitigation to the jury without inconsistencies that plagued doctors Caddy

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[7]The State attempted to bolster Mr. Laswell's unreasonable decision not to use Dr. Lewis by stating that Dr. Lewis was less than persuasive in other cases, like Arthur Shawcross, a serial killer in Rochester, New York. Dr. Lewis wrote extensively about the errors she made in the Shawcross case in her book, Guilty by Reason of Insanity, 1998. The errors in that case were based on trial counsel failing to provide her with the background information she requested. That case, however, was factually distinguishable. If prior "unpersuasive" findings were the standard, then Mr. Laswell would never have used Dr. Caddy or Dr. Schwartz, who were found to be incredible. This is not a proper consideration here. This case should be judged on its own merits, and should not be compared with factually distinct cases from other jurisdictions. See, Cruse v. State, 588 So. 2d 983 (Fla. 1992)(the adequacy of an expert's evaluation of a criminal defendant over ten years earlier was not a relevant issue for the jury's consideration).

and Schwartz, which were fatal to the credibility of the penalty phase case. It would have been up to the jury to decide her credibility, not the judge and not the State Attorney. See, Light v. State, 796 So. 2d 610 (Fla. 2nd DCA 2001).

3. Conclusions of Law

Deficient Performance

Analysis of an ineffective assistance of counsel claim proceeds under Strickland v. Washington, 466 U.S. 668 (1984), which requires a defendant to show deficient attorney performance and prejudice. A defense attorney representing a defendant in a capital penalty phase "has a duty to conduct a reasonable investigation" regarding evidence of mitigation. Middleton v. Dugger, 849 F. 2d 491, 493 (11th Cir. 1988). See also Baxter v. Thomas, 45 F. 3d 1501 (11th Cir. 1995); Jackson v. Hering, 42 F. 3d 1350 (11th Cir. 1995); Blanco v. Singletary, 943 F 2d 1477 (11th Cir. 1991); Horton v. Zant, 941 F. 2d 1449 (11th Cir. 1991); Cunningham v. Zant, 928 F. 2d 1006 (11th Cir. 1991).

Counsel's performance is deficient where, as here, counsel has leads for conducting investigation and indications that further investigation is necessary. Baxter, 45 F. 3d at

1513. "In cases where sentencing counsel did not conduct enough investigation to formulate an accurate life profile of a defendant, we have held the representation beneath professionally competent standards. Jackson, 42 F. 2d at 1367, citing Blanco; Harris, Middleton; Armstrong v. Dugger, 833 F. 2d 1430 (11th Cir. 1987).

Counsel cannot blindly follow the commands of a client. Rather, counsel "first must evaluate potential avenues and advise the client of those offering potential merit," Blanco, 943 F.2d at 1502 (quoting Thompson v. Wainwright, 787 F. 2d 1447 (11th Cir. 1986))(the ultimate decision that was reached not to call witnesses was not a result of investigation and evaluation, but was instead primarily a result of counsels' eagerness to latch onto Blanco's statements that he did not want any witnesses called. Indeed, this case points up an additional danger of waiting until afer a guilty verdict to prepare a case in mitigation of the death penalty: Attorneys risk that both they and their client will mentally throw in the towel and lose the willpower to prepare a convincing case in favor of a life sentence). Blanco, 943 F. 2d at 1503.

Counsel provides ineffective assistance where, as here, he fails to obtain and introduce the defendant's medical and

psychiatric records or fails to know what prior experts have said. Cunningham, 928 F. 2d at 1018 (discussing trial counsel's failure to introduce medical and psychiatric records); Middleton, 849 F. 2d at 493-94 (discussing trial counsel's failure to obtain institutional and other records). Counsel provides ineffective assistance when he makes only a superficial presentation of mitigation. Cunningham, 928 F. 2d at 1017-1018.

A defense attorney has a duty to ensure that his client receives appropriate mental health assistance, including providing the mental health expert with necessary information. Clisby v. Jones, 960 F. 2d 925, 934 n. 12 (11th Cir. 1992)(en banc) ("we have difficulty envisioning a case in which counsel's failure to alert the trial court to the manifest inadequacy of an expert's psychiatric assistance would not violate he defendant's right to assistance of counsel under the 6th Amendment") Cowley v. Stricklin, 929 F. 2d 640 (11th Cir.1991); Blake v. Kemp, 758 F. 2d 523 (11th Cir. 1985).

This Court has held that defense counsel is not ineffective for failing to present evidence that is inconsistent. See, e.g. Cherry v. State, 781 So. 2d 1040 (Fla. 2000); Rivera v. State, 717 So. 2d 477 (Fla. 1998); Remeta v. Dugger, 622 So. 2d 452 (Fla. 1993). In Mr.

Elledge's case, the question is whether the Sixth Amendment is satisfied when counsel affirmatively presents inconsistent theories, thereby depriving the defendant of a coherent defense that can withstand attack from the State. Trial counsel's presentation of mental health experts who contradicted each other on the stand violated the Sixth Amendment. Strickland v. Washington, 466 U.S. 668 (1984); Ake v. Oklahoma, 470 U.S. 68 (1985). Particularly when a mental health expert was available who would have offered credible, consistent testimony from long-standing study of the client.

A criminal defendant has a right to an adequate and professional conducted mental health evaluation. Ake. Counsel provides ineffective assistance where, as here, he fails to know what other experts had determined, and failed to present the testimony of qualified and expert mental health experts. Cunningham, 928 F.2d at 1018 ("There is no evidence that trial counsel asked the [expert] to consider the medical record for the purpose of mitigation"). While counsel has a duty to provide relevant information to a mental health expert to assure that the defendant receives adequate mental health assistance, Cunningham; Blake, the expert's failure to conduct an appropriate evaluation also violates the Sixth Amendment. Ake. Here, the Sixth Amendment was violated by counsel's

failure to obtain a qualified mental health expert who did more than simply “show up.”

The resulting failure to present available mental health mitigation constitutes deficient performance. “[M]erely invoking the word strategy to explain errors [is] insufficient since ‘particular decision[s] must be directly assessed for reasonableness [in light of] all the circumstances.” Horton, 941 F,. 2d at 1461, quoting Strickland, 466 U.S. at 691. As Horton noted, “our case law rejects the notion that a ‘strategic’ decision can be reasonable when the attorney has failed to investigate his options and made a reasonable choice between them.” 941 F. 2d at 1462. Thus, an attorney’s performance is unreasonable when the attorney “fails[s] to investigate and present mitigating evidence.” Id. at 1463.

In this case, defense counsel failed to present a cogent mitigation case or to prepare the mental health experts he did retain. As a result, the mental health experts were found to be incredible because they were not credentialed and were not prepared. Under the case law, Mr. Elledge’s trial attorney’s performance was deficient.

Prejudice

Strickland’s prejudice standard requires showing “a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. A defendant is not required to show that counsel's deficient performance "[m]ore likely than not altered the outcome of the case." Strickland, 466 U.S. at 693. The Supreme Court specifically rejected that standard in favor of showing of a reasonable probability. See Kyles v. Whitley, 115 S. Ct. 1555 (1995) (discussing identity between Strickland prejudice standard and Brady materiality standard). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Id.

In Collier v. Turpin, 177 F. 3d 1184 (11th Cir. 1999), the Eleventh Circuit noted that Collier's defense attorneys presented testimony that their client had a good reputation, was hard working and took care of his family, but the Court found that his attorneys did not meet the standard of objective reasonableness required by the Sixth Amendment.

The court described counsel's performance as "no more than a hollow shell" of the testimony necessary for a

"particularized consideration of relevant aspects of the character and record of [a] convicted defendant before the imposition upon him of a sentence of death." Woodson v. North Carolina, 428 U.S. 280, 303, 96 S. Ct. 2978, 2991, 49 L.Ed. 2d 944 (1976).

> Although counsel were aware of the Supreme Court's opinion in Lockett, and recognized that the sentencing phase was the most important part of the trial given the overwhelming evidence of guilt, they presented almost none of the readily available evidence of Collier's background and character that would have led the jury to eschew the death penalty. Instead of developing an image of Collier as a human being who was generally a good family man and a good public citizen, who had a background of poverty but who had worked hard as a child and as an adult to support his family and close relatives, counsel's presentation tended to give the impression that the witness knew little or nothing about Collier. In failing to present any of the available evidence of Collier's upbringing, his gentle disposition, his record of helping family in times of need, specific instances of his heroism and compassion, and evidence of his circumstances at the time of the crimes – including his recent loss of his job, his poverty, and his diabetic condition – counsel's performance brought into question the reliability of the jury's determination that death was the appropriate sentence. See Woodson [citations omitted].

Collier v. Turpin, 177 F. 3d 1202.

The Eleventh Circuit found that Collier's attorneys did not perform as objectively reasonable attorneys would have and

that their performance fell below the standards of the profession. Id. No matter what the trial attorneys said, the Eleventh Circuit still examined the reasons behind the decisions they made.

The same should be true for Mr. Elledge. Mr. Laswell testified that he had difficulty with Dr. Lewis because she refused to retrieve her file and prepare for the case. Instead of using her, Mr. Laswell obtained two mental health experts, one who had never testified before in a capital murder case and whose results were unable to be supported, and a second expert who had the same opinion as the State expert and was unprepared and unfamiliar with Mr. Elledge's background. The two experts, did, however, "show[ed] up."

Mr. Laswell's performance fell below the standards of reasonableness and below the profession's standards. Like Mr. Collier, Mr. Elledge's defense attorney failed to present competent mental health background material that would have the given the jury an alternative to death. His excuse for not using Dr. Lewis is on one hand, he had "no intention" of using her and on the other hand, he was trying "desperately to get her down here" (PC-R. at 164). One or the other is true, not both.

More importantly, post-conviction counsel was able to

procure Dr. Lewis' testimony and present her without rancor. Mr. Laswell could have done the same. No where in Dr. Lewis' testimony, notes or phone calls did she refuse to come to Florida. Nor did Mr. Ongley testify that Dr. Lewis refused or that he could not communicate with her. Most telling is the question, why would defense counsel buy plane tickets for someone who had refused to come?

Unfortunately, Mr. Elledge suffered from Mr. Laswell's lack of preparation. Mr. Elledge was deprived of his Sixth Amendment right to the effective assistance of counsel at his resentencing. Accordingly, his death sentence should be vacated and he should be granted a new resentencing.

ARGUMENT III

TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO DECLARE A CONFLICT OF INTEREST BETWEEN HIM AND MR. ELLEDGE.

"[T]he mere physical presence of an attorney does not fulfil the Sixth Amendment guarantee." Holloway v. Arkansas, 435 U.S. 475, 490 (1978) and Mr. Elledge was entitled to more. Rendering effective assistance of counsel pursuant to the Sixth Amendment requires that defense counsel avoid an "actual conflict of interest" that adversely affects his representation. When an attorney actively represents an interest contrary to his client's interest, prejudice is

presumed. Cuyler v. Sullivan, 466 U.S. 333, 351 (1980); Freund v. Butterworth, 117 F. 3d 1543 (11th Cir. 1997). Such a conflict developed between Mr. Elledge and counsel.[8]

A conflict of interest adversely affecting a lawyer's performance violates the Sixth Amendment Right to conflict-free counsel. Cuyler v. Sullivan, 446 U.S. 335 (1980); Glasser v. United States, 315 U.S. 60 (1942); Foster v. State, 387 So.2d 344 (Fla. 1980). Because a conflict of interest existed, the failure to act on behalf of Mr. Elledge resulted in ineffective assistance of counsel. Without an objection by trial counsel to the representation, prejudice will be presumed if a defendant demonstrates counsel "actively represented conflicting interests" and "an actual conflict of interest adversely affected his lawyer's performance." Strickland v. Washington, 446 US 668, 692 (1984).

Mr. Elledge was forced to proceed with an attorney who did

not abide by his wishes, even though he was entitled to make those decisions. At that moment, a Sixth Amendment conflict

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6. In Freund, 117 F.3d at 1579-80, three elements are necessary to find a conflict of interest:1) there must be some plausible alternative strategy or defense; 2) show that the strategy was reasonable; and 3) show some link between the actual conflict and the decision to forego the alternative strategy. Mr. Elledge has met all three elements.

existed and Mr. Elledge was stripped of his constitutional rights. Mr. Elledge wanted an attorney in whom he had confidence and with whom he could communicate. This conflict violated the Sixth Amendment right to effective assistance of counsel. See Cuyler v. Sullivan, 446 U.S. 335 (1980); Glasser v. United States, 315 U.S. 60 (1942); Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991).

The trial court was correct when it found that Mr. Laswell was "overwhelmed by the task of it." Mr. Laswell acknowledged that at one point in the proceedings, Mr. Elledge was left without counsel and acted as his own attorney. "It may be at some point, that you know, he was lawyerless" (PC-R. at 164). Mr. Laswell acknowledged that he was at odds with his client.

> At that point, I had tried to do the best job that I could, and Mr. Elledge was substantially dissatisfied with my efforts....Not a fitting subject for a jury to hear in a penalty phase, but perhaps one for a sitting judge to hear prior to passing sentence. So, yes, acting as the lawyer for Mr. Elledge, I gave Mr. Elledge an opportunity to testify before the judge outside the presence of the jury to tell the judge why he feels he didn't receive a full shake. Maybe we should have had a inquiry. I don't know. This was ten years ago. We weren't sophisticated about things as we are now. But you're exactly right and you basically are acting as his own lawyer testifying in narrative form as his own witness.

(PC-R. at 92).[9]

A conflict of interest developed between lawyer and client over Dr. Lewis. Another conflict developed before sentencing when Mr. Elledge was left on his own, without counsel. The trial court and defense counsel allowed Mr. Elledge to present to the court any mitigation or argument to support a life sentence. The trial court also said, "And that at a later time we'll – I'll give you the opportunity to discuss any issues you may have as it relates to Mr. Laswell's representation of you." (R. 2908). The trial court then put Mr. Elledge under oath (R. 2980).

This was improper. While the trial court said this was not the place to determine trial counsel's effectiveness, that is precisely what occurred. The trial court permitted Mr. Elledge to allege trial counsel ineffectiveness. The trial court then acknowledged that Mr. Laswell "had his heart in the right place and...did as good a job as possible but was overwhelmed by the task of it." (R. 2964).

Despite this acknowledgment that Mr. Laswell was "overwhelmed," by representing Mr. Elledge, no hearing was

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[9]This testimony came from Mr. Laswell at the post-conviction evidentiary hearing. The trial court erred when he said that "the Defendant did not attempt to develop such conflict of interest claim during the evidentiary hearing" (PC-R. at

conducted pursuant to Faretta v. California, 422 U.S. 806 (1975) to determine if Mr. Elledge was competent to represent himself. Mr. Elledge stood virtually alone. In the face of Mr. Elledge's efforts to obtain effective assistance, Mr. Laswell was placed in a conflict with his client's cause. Mr. Elledge's interest was to have an attorney in whom he had confidence and with whom he could communicate about the representation. Mr. Laswell's interest was in preserving his reputation in front of the court and the State Attorney.

Mr. Elledge was abandoned by his trial counsel and the trial

court stood by silently and let it happen. Attorney and client were pitted directly against each other. Such a conflict violates the Sixth Amendment right to effective assistance of counsel. See Cuyler v. Sullivan, 446 U.S. 335 (1980); Glasser v. United States, 315 U.S. 60 (1942). Mr. Elledge's conflict-laden counsel failed to subject the prosecution's case to a meaningful adversarial testing" that the constitution requires. United States v. Cronic, 466 U.S. 648, 656 (1984).

Defense counsel's attempts to disassociate himself from his

client constituted a breach of counsel's duty of loyalty, see

King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984), a duty recognized by the United States Supreme Court as "perhaps the most basic of counsel's duties." Strickland v. Washington, 466 U.S. 668, 692 (1984).

Prejudice is presumed when a defendant demonstrates that "an actual conflict of interest adversely affected his lawyer's performance." Cuyler, 446 U.S. at 348. The conflict between Mr. Elledge and his attorney is clear, as are the adverse effects. The conflict severely affected counsel's performance. The two men could not communicate and could not assist one another, within the meaning of the Sixth Amendment. The conflict violated Mr. Elledge's right to present a defense, see Crane v. Kentucky, 476 U.S. 683 (1986), and right to confront and cross-examine witnesses, Davis v. Alaska, 415 U.S. 308 (1974). Mr. Elledge was denied these rights not only because defense counsel was ineffective at trial, but also because Mr. Elledge had no one to represent him when the defense attorney was busy representing himself and his office.

This conflict was caused by counsel's deceit and inaction,

resulting in an "irreconcilable conflict," See Brown v. Craven, 424 F.2d 1166, 1169-1170 (9th Cir. 1970); and an apparent "malpractice conflict of interest," see United States v. Ellison, 798 F.2d 1102, 1106-1107 (7th Cir. 1986), and

United States v. Sanchez-Barreto, 93 F.3d 17, 20-22 (1st Cir. 1996).

Mr. Elledge is entitled to a new resentencing with conflict-free counsel.

ARGUMENT IV

EXCESSIVE SECURITY MEASURES AND SHACKLING VIOLATED MR. ELLEDGE'S DUE PROCESS RIGHTS. THIS VIOLATION CONTINUED IN POST-CONVICTION WHEN THE PROSECUTOR ATTEMPTED TO TAINT THE PROCEEDINGS WITH FEARS OF LAX SECURITY.

Before the State and the defense rested their cases during Mr. Elledge's resentencing, an armed deputy walked into the courtroom. While the trial court noted that armed deputies regularly walk into the courtroom, the one in Judge Green's courtroom was not there at anyone's request (R. 2696-2697). The defense attorney noted for the record that the deputy was standing in the courtroom with his arms crossed and displayed his weapon. The defense attorney said he was brandishing a weapon while in uniform and the attorney moved for a mistrial (R. 2697).

The trial judge excused the jury (R. 2702) to hear the defense motion for mistrial. Before taking testimony, the trial court on the record said:

The Court: Excuse me. We have been working with

> this jury I believe this is the ninth day and there has been very brief occasions over the nine day period that uniformed deputies who are assigned to the courthouse security division have as they do on every day in each and every courtroom in the Broward County Courthouse entered the back of the courtroom and stayed there for a matter of a couple of minutes and then left. And that is the routine practice of the Sheriff's Department in Broward County.
>
> There is no reflection on this trial, no reflection on any trial that's being
> conducted. Those deputies are not present at the behest of the Court, but are conducting routine security of the court – of each courtroom in the courthouse.
>
> And the reason why I point that out as significant is that the uniform deputy to which Mr. Laswell has made a motion for mistrial on behalf of Mr. Elledge today is no different perhaps from uniform deputies who may have had entered over the last nine days and stated in the back of the courtroom for a minimal amount of time, anywhere from one to say four or five minutes, and then left. So they are no attraction to anyone other than someone who comes and goes.

Mr. Elledge also noted for the record:

> For days I've sit and I've watched this deputy here and the deputy in the back of the courtroom when they are sitting up by the jury box wearing a holster on their foot. Though they are in plainclothes uniform, they are still brandishing a weapon that's where it's visible to the jury

> insinuating and inferring by the presence of a weapon itself that I'm dangerous. This is prejudicial, highly prejudicial and in violation of Estelle v. Williams.

(R. 2705-2706).

The trial court took testimony from Deputy Russell Dennis Cracraft of the Broward County Sheriff's Department, who testified that he had been present in plain clothes throughout Mr. Elledge's trial. He said that he concealed weapons in two ways – one was inside a 12-inch boot, which was covered by trousers. At other times, he carried a gun in a waist holder, which was covered by a jacket or vest. He said that throughout the proceedings, there were two plain-clothes deputies assigned to the courtroom (R. 2706-2708).

The trial court also heard testimony from Deputy Thomas Breward of the Broward County Sheriff's Department. He also was assigned in plain clothes and was stationed in the rear of the courtroom (R. 2709). He testified that at no time did he display a firearm or holster to the jury (R. 2709).

Mr. Elledge argued that on two occasions, he saw Deputy Breward sitting with his legs crossed and the ankle holster strapped to his ankle. Mr. Elledge saw it and is sure the jurors saw it as well (R. 2709).

The deputy repeatedly said the jury never saw his ankle

holster, but Mr. Elledge asked if he wore an ankle holster. Deputy Breward said yes. Mr. Elledge asked if Deputy Breward wore low quarter shoes. The deputy responded yes. Deputy Breward said he never sat in front of the jury – always in the back behind several rows of benches and spectators (R. 2710). He testified that he never brandished a gun as the jury came in (R. 2710). It is unclear how Mr. Elledge could have known Deputy Breward was wearing an ankle holster unless he saw it from the defense table, which was not far from the jury box. Thus, if Mr. Elledge could see it, it's probable that the jury could see it, too.

The trial court said that before jury selection began, he discussed with the parties how security would be provided. The judge determined that Mr. Elledge would not need to be shackled (R. 2713). The trial judge denied the motion for mistrial.

The trial court erred in his decision. The judge never inquired of the jurors whether they had seen the officers brandishing weapons. The defense also failed to request that the jurors be questioned individually as to whether they saw the deputies with their guns and what impact it had on them. Trial counsel was ineffective for failing to request to question the jurors in this case.

Even in post-conviction, when no jury was present, the prosecutor again told the court that she was concerned about security and felt threatened because “This man has been convicted or committed a triple homicide. This is not enough security.” (PC-R. at 4). Before the evidentiary hearing began, the prosecutor asked the judge for additional security in the courtroom because she said that one court deputy and one armed deputy in the courtroom was insufficient (PC-R. at 4).

The trial court said he had no authority to order additional deputies into the courtroom. He also said that he received no information that Mr. Elledge was a specific threat or was a heightened security risk (PC-R. at 6). The court noted that Mr. Elledge was shackled, but defense counsel asked that he be uncuffed so that he could take notes of the proceedings.

The trial court said he could send Mr. Elledge back to the Broward County Jail until the prosecutor was satisfied with the level of security in the courtroom, but the judge refused to do so and the evidentiary hearing proceeded. The prosecutor noted her objection for the record (PC-R. at 4-6).

Neither at trial or in post-conviction, did Mr. Elledge

make

statements to law enforcement or court personnel to cause them to believe that he would be a danger to them or others.

At trial, the court failed to consider alternative restraints, as the court is required to do. The trial court never "polled the jurors to determine whether any of them would be prejudiced by the fact that the defendant was under restraints." Woodard v. Perrin, 692 F. 2d 220, 222 (1st Cir. 1982). See also Bowers v. State, 507 A.2d 1072, 1081 (Md. 1986)(voir dire adequate to screen out one juror who indicated shackling would influence him). Similar to Elledge v. Dugger, 823 F. 2d 1439 (11th Cir. 1987), the trial court also gave no specific cautionary instruction. See, e.g., Billups v. Garrison, 718 F. 2d 665, 668 (4th Cir. 1983); Commonwealth v. Brown, 364 Mass. 471, 305 N.E. 830, 834 (Mass. 1973).

Excessive security permeated the entire capital trial proceedings. Police presence permeated the courtroom. The overall effect was to taint the process and give the jury and the judge the impression of Mr. Elledge's future dangerousness, to Mr. Elledge's substantial prejudice. The excessive police presence stripped Mr. Elledge's trial of any fairness. Mr. Elledge was prejudiced as a result and is entitled to relief. To the extent that trial counsel failed

to request an opportunity to question jurors the about the excessive security measures, Mr. Elledge was afforded ineffective assistance. Relief is warranted.

ARGUMENT V

KEEPING A DEATH-SENTENCED INDIVIDUAL ALIVE ON DEATH ROW FOR NEARLY 30 YEARS CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT.

Lengthy confinement on death row, particularly when the delay is not caused by the defendant, constitutes cruel and unusual punishment: "After such a delay, an execution may well cease to serve the legitimate penological purposes that otherwise provide a necessary constitutional justification for the death penalty." Elledge v. Florida, 119 S. Ct. 366 (1998)(J. Breyer dissent). See also Lackey v. Texas, 115 S. Ct.1421 (1995)(J. Stevens, respecting denial of certiorari).

Mr. Elledge's prolonged stay on death row made it difficult, it not impossible, to find mitigating witnesses twenty-five years after the crime occurred. The trial court erroneously said that these difficulties "are primarily due to the defendant's lifestyle prior to his 1974 arrest in Florida." (R. 3021).[10] The trial court failed to correctly

[10] The trial court found that while Mr. Elledge's legal team had difficulty in finding witnesses to testify about his social

state that Mr. Elledge's lengthy stay on death row has everything to do with State misconduct and the State's repeated inability to prosecute Mr. Elledge in a fair and impartial way.

Mr. Elledge has been subjected to prolonged isolation and enforced idleness, which has added to a bleak quality of life on death row. The result has been human storage. Mr. Elledge has been kept alive only to be killed. Preserving bodies without regard for quality of human life is cruel and unusual punishment. See, Robert Johnson, Death Work, A Study of the Modern Execution Process, 1990.

Mr. Elledge has been warehoused for nearly thirty years. If "persons who have been sentenced to death have to wait for long periods before they know whether the sentence will be carried out or not" and "if the uncertainty...lasts several years...the psychological effect may be equated with severe mental suffering, often resulting in serious physical complaints...it may be asked whether such a situation is reconcilable with the required respect for man's dignity and physical and mental integrity." Amnesty International, When the State Kills...The Death Penalty: A Human Rights Issue,

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history and background, the court blamed Mr. Elledge and his "lifestyle prior to his 1974 arrest in Florida" for the lack of mitigation in his case (R. 3760).

(Amnesty International Publication, 1989).

The State has been unrelenting in its efforts to execute Mr. Elledge. That effort, however, was never intended to last thirty years. "The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and mental experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture." People v. Anderson, 6 Cal. 3d 628, 649 (1972). See also, Furman v. Georgia, 408 U.S. 238 (1972)(Brennan, J., concurring) "'[T]he prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death." See also Knight v. Florida, 528 U.S. 990, 993-999 (1999)(Breyer, J., dissenting from denial of certiorari) and Foster v. Florida, 537 U.S. 990, 991-992 (2002)(Breyer, J., dissenting from denial of certiorari). Mr. Elledge is entitled to relief.

ARGUMENT VI

MR. ELLEDGE'S LENGTHY CONFINEMENT VIOLATES INTERNATIONAL LAW.

Because of the long delay between sentencing and execution and the condition in which Mr. Elledge is housed, execution of the death penalty in this case and in Florida constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the International Covenant on Civil and Political Rights ("ICCPR").

The United States Senate has said it "considers itself bound by Article VII to the extent that "cruel, inhuman or degrading treatment or punishment" means that cruel and unusual punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States."

Soering v. United Kingdom, 11 Eur. H.R. Rep. 439 (1989), held that the extradition of a capital defendant to the United States would violate Article 3 of the European Convention on Human Rights because of the risk of delay before execution. Article 3 prohibits "inhuman or degrading treatment or punishment." The Soering court held that "the very long time on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and the personal circumstances of the applicant."

The European Court based its conclusion on a finding that,

in the average case, “before being executed, condemned prisoners in Virginia spent an average of 6-8 years on death row, enduring anguish and mounting tension...” It also recognized “that the machinery of justice....is itself neither arbitrary nor unreasonable, but, rather, respects the rule of law and affords not inconsiderable procedural safeguards to the defendant in a capital trial.”

Courts of other nations have found that delays of 15 years or less can render capital punishment degrading, shocking or cruel. See, Pratt v. Attorney General for Jamaica (1994) 2 A.C. 1, 29, 33, F All E.R. 769, 783, 786 (P.C. 1993) (en banc)(U.K. Privy Council).

The Supreme Court of Canada held that the potential for lengthy incarceration before execution is “a relevant consideration” when determining whether extradition to the United States violates principles of “fundamental justice.” United States v. Burns, (2001) 1 S.C. R. 283, 353, P123.

Mr. Elledge has endured an extraordinarily long confinement under sentence of death that extends from when he was a young man to his late middle age. This confinement has resulted partly from the State’s repeated procedural and

substantive errors. This is both cruel and unusual punishment. Mr. Elledge is entitled to relief.

ARGUMENT VII

THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY ON THE STANDARD BY WHICH IT MUST JUDGE EXPERT TESTIMONY. THE JURY MADE DECISIONS OF LAW THAT WERE WITHIN THE PROVINCE OF THE COURT IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The trial court instructed the jury on expert witnesses as follows:

> Expert witnesses, as I previously told you are like other witnesses with one exception, the law permits they 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.

(R. 2869)(emphasis added).

This instruction was an erroneous statement of law. The decision whether a particular witness is qualified to give expert testimony is left to the trial judge alone. Ramirez v. State, 651 So. 2d 1164 (Fla. 1995) (citing Johnson v. State, 393 So. 2d 1069, 1072 (Fla. 1980), cert. denied, 454 U.S. 882

(1981)). The trial court's instruction permitted the jury to decide whether the experts were experts in the field in which the court had already qualified those persons. In this instance, the experts were defense mental health experts Schwartz and Caddy and State mental health expert, Harley Stock (R. 1540; 2183). In addition to judging the experts' credibility, the jury was permitted to judge these experts' expertise.

During closing argument, the prosecution emphasized this point in challenging the qualifications of the defense experts. The court accepted Drs. Schwartz and Caddy as qualified to give opinion testimony about psychology. Yet, during closing argument, the state suggested the jury was not required to accept the defense expert's qualifications: The state said,

> Look at the credibility of the witnesses (Drs. Caddy, Schwartz and Stock) and you can give what weight you feel these witnesses deserve.
>
> (R. 2816-2817).
>
> ...So you have to look at what the expert has to say and how experienced and how effective they are in their trade. But I submit to you that again that actions speak louder than words.
>
> (R. 2817).

The erroneous jury instruction about experts supported the state's argument that the jury was allowed to reject the experts' qualifications.

The United States Constitution, through the Sixth Amendment right to compulsory process and confrontation, and through the Fourteenth Amendment right to due process, guarantees criminal defendants "a meaningful opportunity to present a complete defense." Crane v. Kentucky, 476 U.S. 683, 690 (1986)(citing California v. Trombetta, 467 U.S. 479, 485 (1984)). See also Ake v. Oklahoma, 470 U.S. 68, 76 (1985). By providing funds for experts, the courts have acknowledged that experts are indispensable in presenting a defense. See Ake; McFarland v. Scott, 114 S. Ct. 2568, 2571-72 (1994).

By permitting the jury to accept or reject an expert's qualification in a field, the instruction allowed the jury to reject the defense experts without a legal basis for doing so. See Strickland v. Francis, 738 F.2d 1542, 1552 (11th Cir. 1984).

Trial counsel failed to object to this instruction, rendering his performance deficient. The instruction violated Mr. Elledge's right to present a defense as guaranteed by the Sixth, Eighth and Fourteenth Amendments. Mr. Elledge is entitled to relief.

ARGUMENT VIII

MR ELLEDGE IS INSANE TO BE EXECUTED

Mr. Elledge is insane to be executed. In Ford v. Wainwright, 477 U.S. 399 (1986), the United States Supreme Court held that the Eighth Amendment protects individuals from the cruel and unusual punishment of being executed while insane. Mr. Elledge does not at present have access to facts to plead this claim in further detail. However, he raises this claim to exhaust state remedies and to preserve the claim for review in future proceedings and in federal court. See Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998). Accordingly, Mr. Elledge must raise this issue in the instant appeal.

ARGUMENT IX

MR. ELLEDGE IS DENIED HIS FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND IS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE OF THE RULES PROHIBITING MR. ELLEDGE'S LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT.

The ethical rule that prevents Mr. Elledge from investigating claims of jury misconduct or racial bias that may be inherent in the jury's verdict is unconstitutional.

Under the Fifth, Sixth, Eighth and Fourteenth Amendments Mr. Elledge is entitled to a fair trial and sentencing. His inability to fully explore possible misconduct and biases of the jury prevent him from fully showing the unfairness of his trial. Misconduct may have occurred that Mr. Elledge can only discover through juror interviews Cf. Turner v. Louisiana, 37 U.S. 466 (1965); Russ v. State, 95 So. 2d 594 (Fla. 1957).

Rule 4-3.5(d)(4), Rules Regulating the Florida Bar, is invalid because it is in conflict with the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. It unconstitutionally burdens the exercise of fundamental constitutional rights. Mr. Elledge should have the ability to interview the jurors in this case. Yet, the attorneys statutorily mandated to represent him are prohibited from contacting them. The failure to allow Mr. Elledge the ability to interview jurors is a denial of access to the courts of this state under article I, section 21 of the Florida Constitution. Rule Regulating the Florida Bar 4-3.5(d)(4) is unconstitutional on both state and federal grounds.

Should this Court uphold Rule 4-3.5(d)(4), an individual who is not restricted by the rule from contacting jurors should be appointed to assist Mr. Elledge. Social scientists

are available who could conduct this research and assist Mr. Elledge.

Mr. Elledge must be permitted to interview the jurors who acted as co-sentencers in his case. Mr. Elledge may have constitutional claims for relief that can only be discovered through juror interviews. However, Mr. Elledge is incarcerated on death row and is unable to conduct such interviews. He has been provided counsel who are members of the Florida Bar. Rule 4-3.5(d)(4), Rules Regulating the Florida Bar, precludes counsel from contacting jurors and conducting an investigation into constitutional claims that would be discovered through interviews.

Mr. Elledge's trial and jury were beset with influences that were significantly prejudicial. Even before the trial started, one member of the venire suggested to others that Mr. Elledge ought to be killed and the proceedings were a waste of time (R. 320). A deputy confirmed that statements such as "we'll just fry the guy" were being made (R. 332). The man apparently spoke with several potential jurors who were all talking about it (R. 335). The defense moved for a mistrial (R. 341). The court asked which panel members heard the comments. About 8-10 jurors heard the comments. The trial court questioned nine potential jurors. Many of them

described joking and sarcasm as to why it took nineteen (19) years and Mr. Elledge should have been executed long ago. (R. 349-385). Trial counsel argued that the entire panel was tainted. The court denied the defense motion. The court ruled that the panel was not tainted, that a few individuals made comments and the court will excuse two of the panel members (R. 388).

In another incident, after the State rested its case, but midway through the defense case, a Miami Herald article appeared about Mr. Elledge (R. 2045). The trial court asked if any juror read the paper. Two jurors responded, Linda Church and Jean Tillman. Both women said they saw the headlines and the photo, but did not read the article. (R. 2047-2053).

The defense asked that the two jurors be removed and moved for a mistrial. (R. 2106-2110). The defense sought to remove Mrs. Church. The trial court removed her (R. 2110). The trial court told the remaining jurors that Mrs. Church was removed because she did not abide by the court's request not to read or be influenced by anything (R. 2157).

In another unrelated incident, a cartoon appeared on the bulletin board outside the courtroom where Mr. Elledge was

tried. It was a colored cartoon of a bird swallowing a frog. The frog is holding onto the bird's neck and the writing says, "Don't ever give up." Mr. Elledge requested that the jury be asked if they saw the cartoon. Both the defense attorney and the state did not want the jurors questioned (R. 2731). The trial court asked the jurors again about the November 15 Miami Herald article. Ms. Tillman said she saw it, but had not discussed it with the other jurors.

Three jurors said they saw the bulletin board outside the courtroom -- Tillman, Slaton and Davison. Each of the jurors said nothing they saw on the bulletin board would influence their decision (R. 2792-2796). Defense attorney Laswell said he did not want to question any more jurors. His client, did, however. The trial court said, "the jurors won't be affected by what they saw." (R. 2798). Mr. Elledge moved for a mistrial. The trial court denied the motion, stating that there is no evidence to support such a motion. The trial court said the illustration had nothing to do with the case; Mr. Elledge's name was not on it and the jurors have been questioned. (R. 2800).

Whether the illustration referred to Mr. Elledge's trial or

another trial in the courthouse, the prejudicial effects on

Mr. Elledge's jury were the same. Whether these or other matters improperly influenced the jury is subject to speculation because an adequate inquiry and investigation did not have not occur.

Mr. Elledge seeks to have this Court declare rule 4-3.5(d)(4), Rules Regulating the Florida Bar, unconstitutional and allow his legal representatives to conduct discrete, anonymous interviews with the jurors who sentenced him to death. In the alternative, Mr. Elledge asks that the Court appoint researchers not restricted by Rule 4-3.5(d)(4) to conduct juror interviews for the purpose of determining whether overt acts or external influences contributed to his conviction and verdict of death.

ARGUMENT X

MR. ELLEDGE IS INNOCENT OF THE DEATH PENALTY

Where a person is sentenced to death and can show innocence of the death penalty, he is entitled to relief for constitutional errors that resulted in a sentence of death. Sawyer v. Whitley, 112 S. Ct. 2514 (1992). Innocence is a claim that can be presented in a motion pursuant to Rule 3.850. Johnson v. Singletary, 612 So.2d 575 (Fla. 1993); Jones v. State, 591 So.2d 911 (Fla. 1991). This Court has recognized that innocence of the death penalty constitutes a

claim. Scott v. Dugger, 604 So.2d 465 (Fla. 1992).

Innocence of the death penalty is shown by demonstrating insufficient aggravating circumstances so as to render the individual ineligible for death under Florida law. In this case, the trial court relied upon the following aggravating circumstances to support the sentence:

- **S** The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
- **S** A capital felony was committed while the defendant was engaged in the commission of or attempt to commit, or escape after committing a rape (sexual battery).
- **S** The capital felony was committed for the purpose of avoiding or preventing a lawful arrest.
- **S** The capital felony was especially heinous, atrocious or cruel.

(R. 3749-53).

Conversely, the court found none of the statutory mitigating circumstances were proven by a preponderance of the evidence.

As for non-statutory mitigating circumstances, the court found that Mr. Elledge was raised under difficult circumstances and that his parents were alcoholics. His mother inflicted physical abuse on her children, and her children were often the target of her anger and abusive

discipline. Mr. Elledge's parents were poor and moved frequently.

The court found that while Mr. Elledge had a difficult and abusive life, the court gave this non-statutory mitigating factor little weight (R. 3762). The court also found that as non-statutory aggravating factors that Mr. Elledge had shown little or no remorse and failed to present evidence of a good prison record. Moreover, the trial court found that while Mr. Elledge's legal team had difficulty in finding witnesses to testify about his social history and background, the court blamed Mr. Elledge and his "lifestyle prior to his 1974 arrest in Florida" for the lack of mitigation in his case (R. 3760).

The jury instructions on aggravating circumstances were erroneous, vague, and failed to adequately channel the sentencing discretion of the jury or genuinely narrow the class of persons eligible for the death penalty.

Additionally, the trial court erred in stating in his sentencing order that Dr. Caddy did not opine that Mr. Elledge was not under the extreme mental or emotional disturbance when the committed the murder of Margaret Strack. This misstatement was not harmless error. This was a substantial mistake that involved a critical expert witness and a mental health mitigating factor. The trial court's mistaken notion

cannot be characterized as “harmless,” Elledge v. State, 706 So. 2d 1340, 1349 (Fla. 1997)(Anstead, J., concurring in part and dissenting in part).

Moreover, Mr. Elledge’s death sentence is disproportionate. In Florida, a death sentenced individual is rendered ineligible for a death sentence where the record establishes that the death sentence is disproportionate. See Tillman v. State, 591 So.2d 167 (Fla. 1991). This proportionality review is not limited by the aggravating and mitigating circumstances, rather it encompasses the "totality of the circumstances." Tillman, 591 So.2d at 169, citing Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990)[citations omitted]. Mr. Elledge is entitled to relief.

ARGUMENT XI

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY, AND IT VIOLATES THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND PROHIBITING CRUEL AND UNUSUAL PUNISHMENT.

Florida's capital sentencing scheme denies Mr. Elledge his right to due process of law, and constitutes cruel and unusual punishment on its face and as applied in this case. Florida's death penalty statute is constitutional only to the

extent that it prevents arbitrary imposition of the death penalty and narrows application of the penalty to the worst offenders. See Proffitt v. Florida, 428 U.S. 242 (1976). The Florida death penalty statute, however, fails to meet these constitutional guarantees, and therefore violates the Eighth Amendment to the United States Constitution.

Florida's capital sentencing statute fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). These deficiencies lead to the arbitrary and capricious imposition of the death penalty and violate the Eighth Amendment to the United States Constitution.

Florida's capital sentencing procedure does not have the independent re-weighing of aggravating and mitigating circumstances required by Proffitt v. Florida, 428 U.S. 242 (1976).

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and

inconsistent manner, and juries receive unconstitutionally vague instructions on the aggravating circumstances. See Godfrey v. Georgia; Espinosa v. Florida, 112 S. Ct. 2926 (1992).

Florida law creates a presumption of death if a single aggravating circumstance is found. This creates a presumption of death in every felony murder case, and in nearly every premeditated murder case. Once an aggravating factor is found, Florida law provides that death is presumed to be the appropriate punishment, which can only be overcome by mitigating evidence so strong as to outweigh the aggravating factor. This systematic presumption of death does not satisfy the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders. See Furman v. Georgia, 408 U.S. 238 (1972); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988).

Because of the arbitrary and capricious application of Florida's death penalty, the statute as it exists and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

"...[D]espite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with

arbitrariness, discrimination, caprice, and mistake." Blackmun dissenting, Callins v. Collins, 114 S. Ct. 1339 (1994).

"No matter how narrowly the pool of death-eligible defendants is drawn according to objective standards, Furman's promise still will go unfulfilled so long as the sentencer is free to exercise unbridled discretion within the smaller group and thereby to discriminate....[T]he death penalty cannot be administered in accord with our Constitution." Id..

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. The Florida death penalty statute on its face and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution. Mr. Elledge is entitled to relief.

ARGUMENT XII

FLORIDA'S DEATH PENALTY PERMITS CRUEL AND UNUSUAL PUNISHMENT

Florida's death penalty statute denies Mr. Elledge his right to due process of law and constitutes cruel and unusual

punishment on its face and as applied to this case. Execution by electrocution and/or lethal injection constitutes cruel and unusual punishment under the constitutions of both Florida and the United States. Mr. Elledge hereby preserves arguments as to the constitutionality of the death penalty, given this Court's precedents.

ARGUMENT XIII

THE HEARING COURT ERRED IN FAILING TO CONDUCT A CUMULATIVE ERROR ANALYSIS.

Although the facts underlying Mr. Elledge's argument are raised under alternative legal theories -- i.e., Brady, Giglio, and ineffective assistance of counsel, -- the cumulative effect of those facts in light of the record as a whole must be assessed. Not only must this Court consider Mr. Elledge's claims in light of the record as a whole, but it also must consider the cumulative effect of the evidence that Mr. Elledge's jury never heard. The hearing court, however, failed to conduct such a cumulative error analysis.

Materiality of evidence not presented to the jury must be considered "collectively, not item-by-item." Kyles v. Whitley, 514 U.S. 419, 436 (1995); Young v. State, 739 So.2d 553, 559 (Fla. 1999). The analysis is 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. at 1566 (footnote omitted).

In Lightbourne v. State, 742 So. 2d 238 (Fla. 1999), this Court explained the analysis to be used when evaluating a successive motion for post-conviction relief:

> In this case the trial court concluded that Carson's recanted testimony would not probably

> produce a different result on retrial. In making this determination, the trial court did not consider Emanuel's testimony, which it had concluded was procedurally barred, and did not consider Carnegia's testimony from a prior proceeding. **The trial court cannot consider each piece of evidence in a vacuum, but must look at the total picture of all the evidence when making its decision**.
>
> When rendering the order on review, the trial court did not have the benefit of our recent decision in Jones v. State, 709 So. 2d 512, 521-22 (Fla.) cert. denied, 523 U.S. 1040 (1998), where we explained that when a prior evidentiary hearing has been conducted, "the trial court is required to 'consider all newly discovered evidence which would be admissible' at trial and then evaluate the 'weight of both the newly discovered evidence and the evidence which was introduced at the trial'" in determining whether the evidence would probably produce a different result on retrial. **This cumulative analysis must be conducted so that the trial court has a "total picture" of the case**. Such an analysis is similar to the cumulative analysis that must be conducted when considering the materiality prong of a Brady claim. See Kyles v. Whitley, 514 U.S. 419, 436 (1995).

Lightbourne, 742 So. 2d at 247-248(emphasis added)(citations omitted). See also, Roberts v. State, SC92496 (Fla. December 5, 2002)(Order Remanding for Evidentiary Hearing).

The “total picture” in Mr. Elledge’s case is one of prosecutorial misconduct for withholding information that should have been presented to the defense. This picture also consists of a trial attorney who failed to learn of the withheld information and failed to provide his client with effective assistance of counsel and conflict-free

representation.

The State hid evidence from the defense, claimed it was exempt, and then pulled it out and used it during the cross examination of the defense expert. The State's vendetta against Dr. Lewis, borne of its perception of past wrongs, has no place in the courts of law. Neither does the conflict of interest between defense counsel and Mr. Elledge, the ineffective assistance of counsel, the shackling of Mr. Elledge in front of the jury, the jury misconduct or the holding of Mr. Elledge on death row for 30 years.

Withholding evidence to cross examine Dr. Lewis was unethical and improper. Mr. Elledge is fighting for his life, while the State continues almost 30 years after the crime to play a shell game with the evidence, hoping the trial court and this Court will condone or overlook its behavior. The law is clear. Under Lightbourne and Roberts, this Court must review all of the evidence to see what impact the disclosure of the Brady and Giglio information has on the resentencing proceeding.

Mr. Elledge is entitled to a new resentencing.

CONCLUSION

Mr. Elledge submits that he is entitled to a new resentencing proceeding. To the extent that relief is not

granted on issues on which the lower court did rule, Mr. Elledge requests that the case be remanded so that full consideration can be given to his other claims.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first-class postage prepaid Office of the Attorney General, Criminal Appeals Division, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, FL 33401-3432 this 8th day of June, 2004.

_____

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Initial Brief satisfies the Fla. R. App. P. 9.100 (1) and 9.210(a)(2).

_____
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