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

REPLY 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.

issue.

STATEMENT OF FONT

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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.

A rule declaring that a "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendant's due process." Banks v. Dretke, 124 S. Ct. 1256, 1275 (2004). A prosecutor's dishonest conduct or unwarranted concealment should attract no judicial approbation. Kyles v. Whitley, 514 U.S. 419, 440 (1995). Despite such rulings from the country's highest court, that is precisely what occurred in Mr. Elledge's case.

When police and prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is incumbent on the State to set the record straight. Banks. Mr. Elledge is still waiting for the State to set the record straight.

The State in its Answer Brief attempts to suggest that the information was not material, that it was not withheld by the State and that it was the duty of defense counsel to find the ex parte information that was hidden by the prosecution. The State also attempts to shift blame to defense counsel for

failing to uncover the hidden documents. That is not the law.

> ...where the State commits a discovery violation, the standard for deeming the violation harmless is extraordinarily high. A defendant is presumed to be procedurally prejudiced "if there is a reasonable probability that the defendant's trial preparation or strategy would have been materially different had the violation not occurred." Pomeranz v. State, 703 So. 2d 465, 468 (Fla. 1977)(quoting State v. Shopp, 653 So. 2d 1016, 1020 (Fla. 1995). Indeed, only if the appellate court can say beyond a reasonable doubt that the defense was not procedurally prejudiced by the discovery violation can the error be considered harmless." Id.

Cox v. State, 819 So. 2d 705, 712 (Fla. 2002).

Where it is demonstrated that the State intentionally misled the defense and/or the trier of fact, the due process violation warrants reversal unless the State proves that the due process violation was harmless beyond a reasonable doubt." Guzman v. State, 868 So. 2d 498 (Fla. 2003).

In the instant case, the information was withheld from the defense, and the prosecution admitted as much. What remains in dispute is why the State would place in its exempt files a report from a defense expert if the report had already been turned over to the defense? If the defense had access to the report, as asserted by the State, why would it need to be placed in an exempt file by the prosecution? To this date, no satisfactory explanation has been forthcoming.

Moreover, the trial court found that the document in

question was in the State's exempt files. The State attempted to explain why the report was withheld from the defense:

> Ms. Bailey: Your Honor, the procedure when we have a capital case, as you know, there are certain time limitations. The State is required to send its files to the records repository in Tallahassee. It is often a monumental task because it involves the entire State file.
>
> The file is reviewed by attorneys. So far that has been Ms. McCann and myself. And we go through each document to see whether it is allowed to be disclosed under the Public Records Statute or whether we are required by law to withhold it under the Public Records Statute. We are traveling under Chapter 119. We are not traveling under the Rules of Discovery.
>
> It is the responsibility of the State to copy its file and to forward it to the Records Repository. We send our file to a copy company. It is very voluminous. In this particular case there was a total of 18 boxes that were sent to the Records Repository.
>
> **I do not read every document that is in there. I cannot. There is no way possible for that to be.** Anything that I identify as something that is exempt and the law precludes me from disclosing, that is pulled and put into a separate box. Once we go through the file and make the determination what is under the law, under the Public Records law allowed to be disclosed and what is exempt under the Public Records law, and case law. And there are other provisions in the Florida Statutes such as medical records; that exemption is not found in Chapter 119, and

the box is sent to a copy company and shipped from there to the Records Repository.

The exempt materials are required, not by me, but by the Repository to be sealed separately, and as you can see from what has been brought into court, there is a transmittal form on the outside that seals the box and so the Repository knows what boxes are exempt. Anything that is – I perceive as a medical record or a mental health record, I'm exempt under Florida Statute to withhold under the Public Records Act. I'm also required by law to provide a written reason and disclose why these records are exempt and why we are withholding them. That is done on the transmittal form.

In this case, like every other, I can tell you that there were a total of 18 boxes sent to Tallahassee. There were **six sealed boxes.** My numbering system was M, N, O, P, Q and R. Those were sent to a copy company and they were copied and sent to the Record Repository in Tallahassee for further proceedings, which the Court is well aware of.

At anytime, if the Court wishes, if the Court reviews those documents, finds that the Court does want the Defense to have them, they are not compelled or because of the weighing the privacy interests involved, the Court wishes to disclose them and they are copied, I think that from – I think they are sent back to the Repository and copied in the Repository and then sent to counsel or whatever the Court's order will reflect. But once they leave my office, I have no further contact with the boxes that go to the Repository.

Mr. Moldof: My question still is, where did it come from? Did they keep something from the exempt material for their benefit and not provide it to us?

The Court: I guess the first issue at this juncture is to open the exempt material boxes in open court.

Mr. Moldof: Where did they get the copy that they have from? Where did you get it from?

The Court: I don't think that [it] takes a rocket scientist to figure out. It was part of the State's file simply from the cover sheet –

Mr. Moldof: Okay.

The Court: –- from Dr. Norman's office. The record is abundantly clear and Dr. Norman's office faxed that document to the State Attorney's office, and I don't think anyone is disputing that.

Ms. Bailey: And, Your Honor, **simply because we withhold these from disclosure, it doesn't mean the State can't use them.**

Mr. Moldof: How can that be? How can they withhold it from disclosure and use it? How are they saying that?

* * *

Ms. Bailey: I'm complying with mental health records are exempt under Florida Statutes 445, Florida Statute 394.4615. I cannot by law give these out under the Public Records Act.

(PC-R. at 594-597)(emphasis added).

The State conceded that it withheld the documentation from the defense. It also deliberately misrepresented the

truth about where it received the document, and why it was exempt.[1]

There is a discrepancy in the argument asserted in the State's Answer Brief that there was no discovery or Brady violation (Answer Brief at 36), yet at the post-conviction hearing in 2002, the prosecutor said: "Simply because we withhold these from disclosure, it doesn't mean the State can't use them" (PC-R. at 597). This was an acknowledgment that the State withheld material evidence from the defense.[2]

The State also argued at the evidentiary hearing that in

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[1]Mr. Satz, the prosecutor, represented to the court that his office received a package via facsimile from Dr. Norman's office (PC-R. at 561). The material was faxed to Mr. Satz's secretary in October 14, 1993 (PC-R. at 574).

[2]This was similar to the issue in Mr. Elledge's third resentencing, which was reversed when the trial court failed to conduct a Richardson hearing when defense counsel objected to the State's failure to comply with discovery rules. In Elledge v. State, 613 So. 2d 434 (Fla. 1993), Mr. Elledge's attorney called a prison official, Officer Kuck, who testified that Mr. Elledge was not a problem prisoner. On cross-examination, the prosecutor said to Officer Kuck: "Let me show you State's Exhibit marked W, as a composite." The exhibit consisted of copies of 19 disciplinary reports that Mr. Elledge had received in prison. Defense counsel immediately asked for a sidebar where he objected, said he had never seen the prison reports before and they should have been provided as part of discovery. The trial court held that no discovery violation had occurred because the State was not required to anticipate mitigating evidence. This Court said that when the State asserts that it is excused from compliance with discovery because it could not have anticipated the defense evidence, the question should be resolved at a Richardson hearing. Id. at 45-436.

addition to withholding documents from the defense, it was allowed to use it whenever it wanted, including against a defense expert at a post-conviction hearing without ever disclosing it to defense counsel.

The State argued that it could exempt the record because it was a "mental health record." However, no explanation was offered as to how a report from a neurologist, who is a medical doctor who conducts an EEG on a criminal defendant, is a mental health record. No explanation was offered how a defense witness report ended up in the State Attorney files, missing from the defense attorney files, labeled "exempt" by the prosecution and used in post-conviction against a defense witness. No explanation was offered on how a report about his own client was not disclosed to defense counsel in Chapter 119 litigation.

The State offers no explanation except to argue that Mr. Elledge's trial lawyers "could not recall seeing the report" (Answer Brief at 36). During his direct examination, Mr. Laswell, Mr. Elledge's trial attorney, testified that Dr. Lewis repeatedly wanted to know if various EEGs were done on Mr. Elledge, but to his knowledge, "were never done" and he "never had those tests done" (PC-R. at 146). When he was recalled and specifically asked about the Dr. Norman report in

possession of the prosecution, he said, “I don’t think I’ve seen this before” (PC-R. at 575). If defense counsel never authorized those tests to be completed by his defense expert, then it appears that they were requested by someone **other** than defense counsel, perhaps the prosecution. The information came from a defense expert who did not fax the documents to Mr. Elledge’s defense counsel, but rather to the prosecutor’s office.

While the trial judge was going through the materials exempted by the State Attorney, the prosecution attempted to shift the blame from itself for withholding the documents, to the trial court who conducted in camera proceedings on the exempted records. But the trial judge did not recall seeing the documents in the exempt files (PC-R. at 574).

The trial judge found that the Dr. Norman materials were in two files that the prosecution had exempted and withheld from the defense (RPC-R. at 636).

In its Answer Brief, as it did at the evidentiary hearing in 2002, the prosecution attempts to divert attention away from its improper conduct, and tries to shift the blame to defense counsel for not having “discovered” the report and faxed

notice.[3]

The State offered no explanation as to how Mr. Elledge was to accomplish this feat since it is not "rocket science" to see that the State hid the information.

The State's obligation to turn over exculpatory and im-impeaching information applies even when there has been no request by the defendant. Strickler v. Greene, 527 U.S. 263, 280 (1999).[4] "It is irrelevant whether the prosecutor or

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[3]The State argues in its Answer Brief that this claim should fail because Dr. Norman was not called to testify at the evidentiary hearing (Answer Brief at 36). But Mr. Elledge did not need Dr. Norman to prove his claim. It was the **State's** conduct that is in question. The trial judge found that Dr. Norman had faxed the EEG report to the State, which was obvious by the fax cover sheet (PC-R. at 594-597). The issue is why the report was not disclosed, not whether Dr. Norman sent the report. That is all that Dr. Norman could have testified to. Mr. Laswell had already proved through his testimony that he did not order the tests (PC-R. at 146) and had no recollection of seeing the report (PC-R. at 575). Post-conviction counsel Pamela Izakowitz also testified that she had looked through all the boxes and had not seen the report. And, Susan Bailey herself, admitted she did not turn it over, did not feel any obligation to do so, and found it perfectly acceptable to ambush a defense witness with a document and never disclose it (PC-R. at 594-597).

[4]But in this case, there were discovery and Brady requests by the defense. On July 6, 1993, the defense filed a Demand for Discovery Relative to Sentence, pursuant to Brady v. Maryland, 373 U.S. 83 (1963) (R. 3144–3146). The motion was denied as to the list of aggravating circumstances the prosecution intended to prove at sentencing, but was granted as to any and all papers, documents, statements relevant to the sentencing, under the State's "continuing obligation of discovery FRCR 3.220" (R. 3148).

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).

In Banks v. Dretke, 124 S.Ct. 1256 (2004), the United States Supreme Court 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. "Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbriation." Kyles v. Whitley, 514 U.S. 419, 440 (1995).

Banks noted that defense counsel had no due diligence obligation to obtain exculpatory information held by the State. Banks held that since trial counsel relied on the State's alleged full disclosure of exculpatory evidence, "it was also appropriate for Banks to assume that his prosecutors would not stoop to improper litigation conduct to advance prospects for gaining a conviction." citing Berger v. United States, 295 U.S. 78 (1935); Strickler, 527 U.S. 263 n. 14; Banks, 124 S. Ct. at 1274.

In Strickler, the United States Supreme Court said that in light of the State's open file policy, "it is especially unlikely that counsel would have suspected that additional impeaching evidence was being withheld." 527 U.S. 263 at 285.

> Our decisions lend **no support to the notion that defendants must scavenge for hints of undisclosed Brady material when the prosecution represents that all such material has been disclosed.** As we observed in Strickler, **defense counsel has no "procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred**."

527 US. 263 at 286-287 (emphasis added).

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."

The information was withheld by the State and used against the defense witness at the evidentiary hearing. It was material and favorable because it was precisely what Dr. Lewis had been requesting for years – that Mr. Elledge undergo several different

types of EEGs. The sole purpose for the surprise disclosure at this juncture was to discredit Mr. Elledge's expert, Dr. Lewis. It also shows a continuing pattern of the State's misconduct.

When asked what additional tests she would have wanted Mr. Elledge to undergo, Dr. Lewis responded, "...a sleep deprived EEG because what you're more likely to pick up abnormalities on the EEG if an individual is sleeping....an EEG with what is photic stimulation where lights are flickered and because people who are more susceptible to this, have -- that that is more likely to elicit the abnormal electrical activity or hyperventilation...a more thorough neuropsychological... and a PET scan" (PC-R. at 304-305).

She was then asked by the prosecutor, Michael Satz, "Do you realize that those tests were done on Mr. Elledge on October 4, 1993?" (PC-R. at 484). The question was posed only after several hundred pages into Dr. Lewis' cross examination. It appears that only the State knew that these tests had already been conducted on Mr. Elledge, yet failed to notify the defense and allowed incomplete and erroneous testimony to be presented to the judge. The prosecution used this information only in cross examination of Dr. Lewis, in an effort to ambush her and make it appear as if she did not know

what had transpired in the case.

Unfortunately, no one except the State knew what unethical conduct had transpired, but the State and the defense expert. Obviously, some testing was ordered by the State[5] or someone else on Mr. Elledge without the knowledge of defense counsel.

The materiality at issue here was that the State knew that its case rested on the credibility of Dr. Lewis. And, the State did everything in its power to ensure that she would look incredible and unprepared, to the point of having a secret tool to use against her. Even defense counsel, Mr. Laswell, testified that he found that she was demanding and repeatedly asked for materials and tests on Mr. Elledge. "She is the expert, and why is she asking me for all of these things?" (PC-R. at 147).

Had Dr. Lewis known that this information existed and that the tests that she had been repeatedly requesting for years had been done, it could have opened other avenues of

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[5]To the extent that the State implies that Mr. Elledge should have known what tests had been given him, this was his fourth resentencing due to prosecutorial misconduct and judicial error. He had been tested repeatedly by a variety of doctors, and at least seven mental health experts. None of the experts announced which tests he was being given or the results. Thus, Mr. Elledge had no way of knowing what had been authorized by the defense and what had not.

testing.

This was unfair. Mr. Elledge is entitled to relief.

ARGUMENT II

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

In this argument, the State argues that trial counsel was effective, and claims that "the record refutes that Dr. Caddy and Dr. Schwartz were unqualified or rendered incompetent evaluations of Elledge" (Answer Brief at 80).

The State's argument, however, is directly contrary to what the trial court found in sentencing Mr. Elledge to death.[6] The trial court found that the two defense experts canceled each other out and they "differed significantly as to the extent and even the existence of extreme mental or emotional disturbance of the defendant at the time of the commission of the capital felony" (R. 3755).

Despite the State's argument to the contrary, the trial

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[6]The State's argument also is directly contrary to the closing argument highlighted by the prosecutor at trial, who argued: "Dr. Schwartz....found mild to moderate organicity. Dr. Caddy did not find any mild to moderate organicity....Dr. Schwartz ...said that fetal alcohol syndrome possibly may be applicable to this case. Dr. Caddy said he considered this and rejected it. Dr. Schwartz said possibly post-traumatic stress disorder might be applicable in this case. Dr. Caddy, he rejected that. So the two experts put on by the defense differ in their own analysis" (R. 2806).

court found that **both** defense experts had credibility problems. They were not board certified and offered opinions that differed from each other and the testimony presented at trial.

As for Dr. Schwartz, the trial court found:

> [he] is not a Board Certified Psychologist and....testifies exclusively for the defense bar....Dr. Schwartz's credibility was diminished during cross examination and as a result of the testimony of Dr. Caddy, the defendant's other witness....When confronted on cross-examination with these facts, Dr. Schwartz receded from his initial opinion and admitted that only minor organic problems were possible...The court finds that this opinion is contrary to the other evidence presented...

(R. 3754-3756).

As for Dr. Caddy, the trial court found that he, too, was not board certified and his opinion differed sharply from Dr. Schwartz's opinion. The trial court found:

> He disagreed with Dr. Schwartz on many points....he found no evidence of any organic brain disorder and even if organicity existed to some degree, it did not play a part in the behavior....These findings directly contradict Dr. Schwartz's conclusions.....Dr. Caddy testified that the murder of Margaret Anne Strack was a result of "rage reaction".....however, this conclusion was negated somewhat when Dr. Caddy admitted that the defendant had exercised control during various moments of the rape and strangulation ....the Court finds that these admissions regarding control are inconsistent with a diagnosis of "rage reaction" ...Dr. Caddy's testimony was further minimized by

his answers...

(R. 3756-3758).

The trial judge found that instead of complementing each other and supporting each other's diagnosis, Dr. Caddy agreed with the State expert, Dr. Harley Stock, who found that Mr. Elledge did not suffer from fetal alcohol syndrome and had no indications of organicity. (R. 3758-3759).

Based on the dismal performance of the defense mental health experts, the trial court found "a lack of significant mitigating circumstances. The court finds zero (0) statutory mitigating factors and three (3) non-statutory mitigating circumstances have been proven by a preponderance of the evidence, though entitled to little weight cumulatively" (R. 3768).[7]

Defense counsel testified that mental health mitigating factors were the "weightiest and most helpful" in 1992 (PC-R. at 27), and he began working on them early (PC-R. at 27). His testimony, however, is belied by his conduct. He never

[7]In his sentencing order from the 1993 resentencing, the trial court misstated Dr. Caddy's views about which statutory mitigator applied to Mr. Elledge. This Court found the error to be harmless, in light of the court's reliance on the conclusions of Dr. Stock. Elledge v. State, 706 So. 2d 1340, 1347 (Fla. 1997). In his dissent, Justice Anstead found the error was not harmless. Id. at 1348-1349.

questioned whether Dr. Schwartz had previously been involved in a capital case (PC-R. at 37). He retained Dr. Schwartz because “Gary was raised in a family that has lawyers and judges” (PC-R. at 31).

He hired Dr. Glenn Caddy because he had already evaluated Mr. Elledge and had testified as an expert for Mr. Laswell in the past (PC-R. at 32). Dr. Caddy had been retained by Mr. Elledge’s previous lawyer, Peter Giacoma, in 1989, and had testified at Mr. Elledge’s third resentencing (R. 2179-2184).

But, it was clear that Mr. Laswell did not know how his experts were going to testify, because had he known their testimony was going to impeach each other, he could have presented Dr. Lewis, who had no contradictions in her testimony, was eminently qualified, highly educated, and had evaluated Mr. Elledge many years earlier. Dr. Lewis was one of the first experts ever to evaluate Mr. Elledge and Mr. Laswell acknowledged that she “was a lady thought to be one time on the cutting edge, ascribing behavioral patterns to death row inmates” (PC-R. at 30). He also testified that the “closer to the time that the acts were committed would be the most forceful evidence” (PC-R. at 29).

Moreover, Mr. Laswell planned on using Dr. Lewis up until three weeks before trial and had sent her plane tickets to

travel to Florida (PC-R. at 175), but because of personality conflicts, he chose not to call her. He admitted that he "made some mistakes" (PC-R. at 175).

This decision not to call Dr. Lewis was unreasonable, especially in light of the two conflicting experts whom he chose to testify on Mr. Elledge's behalf at the resentencing.

Mr. Laswell said he listed Dr. Norman on a witness list when he had offered no helpful information to his client, but rather assisted the State's case. He did not call Dr. Norman because his "studies were normal....[they] showed no abnormalities" (PC-R. at 60; 588). When asked why he listed Dr. Norman when he had no helpful information, Mr. Laswell's responded: "I knew he couldn't hurt me" (PC-R. at 61).[8]

Mr. Laswell testified that he did not list Trudy Block-Garfield on the defense witness list because she found that Mr. Elledge had a personality disorder and thought Mr. Elledge was a sociopath with anti-personality disorders, the same diagnosis given by the State expert, Harley Stock (PC-R. at 33; 170). Mr. Laswell said "I didn't surface her" or notify the State that she was consulted by the defense (PC-R. at 35).

Yet, Mr. Laswell listed and presented doctors Glenn Caddy

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[8]This was before Mr. Laswell knew Dr. Norman had conducted EEG tests for the State or a third party. See, Argument I.

and Gary Schwartz, both who confirmed the diagnosis of the State expert, Dr. Stock.

Mr. Laswell said that he “wasn’t thrilled with Caddy or Schwartz either” (PC-R. at 170). Dr. Caddy testified that Mr. Elledge had a mixed personality disorder and sociopathy, which is precisely what the State expert testified to. Mr. Laswell said his defense expert and the State’s expert “were on firm footing” (PC-R. At 172).

Dr. Caddy also testified that Mr. Elledge had a personality disorder and sociopathy. This was the same diagnosis found by Trudy Block Garfield, but “not surfaced” by defense counsel because of her harmful findings. Mr. Laswell could not explain the logic of that decision.

Dr. Schwartz testified that Mr. Elledge suffered from post-traumatic stress disorder, and that the disorder “appears to come and go” (PC-R. at 173). Mr. Laswell said he did not know of any other mental health expert who has found “adjustable” post-traumatic stress, “but that seems to be what Schwartz was saying” (PC-R. at 174). And, since his other mental health expert, Dr. Caddy, did not find that diagnosis, Mr. Laswell conceded that it “certainly creates some conflict in there” (PC-R. at 174).

When asked why he presented two mental health experts who

were in conflict and not helpful to his case, Mr. Laswell responded:

> What I did was try to put a round peg in a square hole. I could not get – you know, I wasn't happy with this particularly, but at least, they would show up and be prepared.

(PC-R. at 171).

Using mental health experts in a mitigation penalty phase case simply because they "show up and are prepared" is unreasonable. Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Counsel failed to investigate whether his two mental health experts were in conflict with each other and consistent with the State's expert. Had he done so, Dr. Lewis would have been the logical choice. Dr. Lewis was the original expert whose evaluation was all that was needed.

In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. Strickland v. Washington, 466 U.S. 688, 691 (1984). But, when counsel's judgments are based on lack of investigation into his experts intended testimony, and lack of preparation for not knowing what his experts have found in their evaluations and will testify to, that decision

is unreasonable.

Moreover, when defense counsel's personality clashes with that of the expert, and the sole reason for not calling the expert to testify is the personality conflict, that, too, is unreasonable.

Where counsel fails to investigate and interview promising witnesses, and has no reason to believe they would not be valuable in securing the defendant's release, counsel's inaction constitutes negligence, not trial strategy. Workman v. Tate, 957 F. 2d 1339, 1345 (6th Cir. 1992)(citing Strickland, 466 U.S. at 689).

How defense counsel could proceed to trial, knowing that his mitigation penalty phase case rested on the importance of mental health mitigation, without first finding out what his experts intended to say and if they were going to hurt his client and their own credibility is incomprehensible and certainly unreasonable. Mr. Elledge was denied effective assistance of counsel. He is entitled to a new resentencing.

ARGUMENT III

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

In this argument, the State argues that the conflict in the case "was the inability of Dr. Lewis to cooperate with anyone attempting to represent Elledge" (Answer Brief at 81).

This is incorrect and again, belied by the record. While it was clear that Mr. Laswell had personality problems with Dr. Lewis and refused to work with her, that did not account for the fact that he abandoned Mr. Elledge during his resentencing.

Mr. Laswell conceded in the post-conviction hearing that Mr. Elledge was alone and without counsel. He said, "It may be at some point, that you know, he was lawyerless" (PC-R. at 164). He also acknowledged that allowing Mr. Elledge to testify on his own against his lawyer and his investigator was based on lack of "sophistication" (PC-R. at 164).

In its Answer Brief, the State simply reiterated the trial court's finding that Mr. Elledge did not develop this issue at the evidentiary hearing (Answer Brief at 82). The State also argued that Mr. Elledge was represented by both Mr. Laswell and by Mr. Ongley, (Answer Brief at 75-76), but again, the testimony at the evidentiary hearing disputes this.

Mr. Ongley testified that it was Mr. Laswell's case and that he was only asked to do various tasks (PC-R. at 188). He never sat at the defense table and "I wasn't directly involved in this case" (PC-R. at 190).

It is unclear what more was needed than Mr. Laswell's admission that he allowed his client to be "lawyerless." When he permitted Mr. Elledge to represent himself and his interests without an attorney, while he defended himself and his actions in court, prejudice is presumed. Cuyler v. Sullivan, 466 U.S. 333, 351 (1980). 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 record at the resentencing proceeding shows the conflict between Mr. Elledge and Mr. Laswell. It shows that Mr. Elledge's dissatisfaction with his attorney went beyond Dr. Lewis.

Defense counsel filed a motion to allow Mr. Elledge to be named as co-counsel, but it was denied (R. 3076). Despite the court's ruling, defense counsel went forward and Mr. Elledge represented himself, clearly when it was not in his best interest to do so.[9]

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[9] Even Dr. Lewis found that since Mr. Elledge had a bi-polar mood disorder, "he was certainly not competent to represent himself" (PC-R. at 384).

After the jury reached a verdict in the case, Mr. Elledge faulted Mr. Laswell for failing to find mitigation, for failing to call witnesses and for being overwhelmed by the case.

Mr. Laswell told the court that he and his client:

> did not see eye to eye on many things here and he has expressed his serious disappointment and critical acceptance of the work that I've done on his behalf. He has critiqued me substantially. And I have replied to him that I felt that this case was going to rest on the record that we made in November and that a part of that record that perhaps needs to be further flushed out would be his address to the court.
>
> And having said that, Your Honor, if you will, I would like to let Mr. Elledge address the Court about the issue of my behavior, why he didn't get a fair trial and other matters. Is that acceptable?

(R. 2907).

This was unacceptable. Yet, no one realized how inappropriate this process was. No one realized that by bringing his concerns to the court's attention about his defense attorney, Mr. Elledge was left with no attorney at all. The trial judge allowed Mr. Elledge to present any mitigation or argument to convince the court to sentence him to life in prison. The trial 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 swore in Mr. Elledge (R. 2980), who said:

Mr. Elledge: I like Mr. Laswell. But I think as a lawyer he should not be working on capital cases because he didn't have the focus. This case was too much. I knew this case was too much for Mr. Laswell by his self. I addressed that from the beginning. I felt that Mr. Laswell would be overworked with this one case by himself. And I requested the appointment of co-counsel from the start. Because I know the volumes of material that is involved with this case over the years.

(R. 2925-2926).

After Mr. Elledge argued to the court, the judge asked Mr. Laswell if he wanted to ask his client any questions. Mr. Laswell responded:

No, there is not. As a matter of fact, Mr. Elledge probably more eloquently covered the difficulties occasioned by the way than perhaps my witnesses could. And I would still like to put on the record some of the efforts that we did make.

The Court: Absolutely.

(R. 2936-2937).

Instead of conducting a Faretta[10]-type hearing, Mr. Laswell proceeded to call witnesses who supported his efforts in representing Mr. Elledge. Again, no objections to this improper procedure were lodged by any one in the courtroom. Mr. Elledge, who knew only to object to the conduct of his attorney when he was not presenting Dr. Lewis, had no idea what

[10]Faretta v. California, 422 U.S. 806 (1975)

the court should have done, no less to request a Faretta hearing.

Mr. Laswell called Philip Charlesworth, the chief investigator for the Broward County Public Defender's office (R. 2938), who testified about when he began working on Mr. Elledge's case and the witnesses whom he met with. He patted himself on the back for the "rather good job" of finding witnesses.

After he was cross examined by the State, Mr. Elledge was allowed to cross examine him as well. After several questions, Mr. Laswell interrupted, not to object to the procedure, but to tell the court that the questioning was going veering off the topic. Mr. Laswell and Mr. Elledge had a disagreement about the nature of the questions.

Mr. Laswell:	Judge, the record should reflect that this questioning should be perhaps encouraged and tolerated by the Court, but has nothing to do with the issue --
Mr. Elledge:	But it does.
Mr. Laswell:	-- For consideration. It's not the people we didn't find, it's the impossibility of finding people from twenty-five and thirty-years ago that's the issue.
The Court:	Sure. That issue that you're raising, Mr. Elledge, with regard to Ms. Fain and what you have already testified is that Ms. Fain has in the interim developed some hostility or ill

feelings for you, you indicated that she had in a previous proceeding or at this proceeding, I should say, lifted her children so they could see you in the window and said this is part of my life I want to forget –

Mr. Elledge: Right.

The Court: – In the hallway. Certainly Mr. Charlesworth did everything he could, he located her for you, he made her – And the Court assisted at your request – to have her be brought to Florida and made available to testify and that she did.

(R. 2953).

The questioning continued, but Mr. Laswell did not object to the process, but only to the fact that it was "outside the scope." (R. 2956).

Mr. Elledge eventually was given the opportunity to complain about Mr. Laswell. Again, no objection from the defense attorney, the State or the judge was forthcoming.

Mr. Elledge: The first thing I would like to address, Your Honor, is my complaint is not intended in a derogatory sense toward Mr. Laswell. I believe that Mr. Laswell's done as good a job as possible for everything that he had to work with.

I believe that because there was so much volume for one person to work and attempt to coordinate everything it became an overwhelming task and just over burdened Mr. Laswell to the point of stressed out. He just burned out on

it.

I feel that in addition to that the Court played a major part in the stress that was placed on Mr. Laswell when you had instructed Mr. Laswell not to attempt to advise me to not cooperate with Mr. Stock. Because up to that point we had presented virtually nothing as far as mitigation went. But what we had intended to present was somewhat hampered when Your Honor said that after we had presented the mitigation that we intend to present you was going to have this evaluation done. And you went so far as to tell Mr. Laswell that if he attempted to advise me to not cooperate with Dr. Stock, that you would hold him in contempt. And I believe this kind of put Mr. Laswell between a rock and a hard place. He didn't really know how to respond by virtue of the fact that you yourself had said I have no Fifth Amendment rights. And I think that's a total misconception.

The Court: Anything you specifically feel Mr. Laswell should have done that he didn't do for you?

Mr. Elledge: He did not call witnesses that I asked him to.

The Court: The witnesses that you have already testified to?

Mr. Elledge: Yes.

The Court: Okay.

Mr. Elledge: He stated in open court that he had disagreements about Dr. Lewis. He said we had a conflict behind this lack of communication. The Court has witnessed the conversation with Dr. Lewis and

myself over the telephone.

The Court: Numerous conversations.

Mr. Elledge: And this conversation was very productive until it came time for Mr. Laswell to cooperate with Dr. Lewis and then they had a breakdown in communication. Now whether that was Dr. Lewis' fault or Mr. Laswell's fault, I'm not sure.....

(R. 2969).

* * *

The Court: Okay. Anything else?

Mr. Elledge: The breakdown in communications between Mr. Laswell and people that he delegated work to caused a very severe problem for Mr. Laswell and for me. Because what happened in effect was Mr. Laswell delegated a lot of work out, but when it came time to get this work back in and coordinate it and form some kind of picture, like I was telling to you earlier about forming a picture that made some sense, things didn't fit together like a puzzle would. He didn't have all the pieces there. There was pieces missing. There was breakdown in communication about transportation, there were (sic) breakdown in communication about where the witnesses would be staying. If it hadn't have been for the phone calls that Mr. Charlesworth was talking about and me being able to communicate with these witnesses, they would have never known where to go.

The Court: The Court recognizes that we're not here to determine the effective or ineffective assistance of Mr. Laswell. At the same time the Court find that from your comments just now, that Mr. Laswell certainly had his heart in the right place and certainly –

Mr. Elledge: He did.

The Court: – From what you say did as good a job as possible but was overwhelmed by the task of it. The Court doesn't find Mr. Laswell to be criticized by you. But let me ask Mr. Laswell, is there anything you want to say in response at all?

Mr. Laswell: The appropriate forum I'm sure is forthcoming, Your Honor.

The Court: Okay.

Mr. Laswell: This proceeding just needs to be gotten through this afternoon.

The Court: Okay. Mr. Satz, any comments you want to make?

Mr. Satz: Your Honor, just with reference to Mr. Laswell's competence, I think he did a fine job in this case and I agree with Mr. Elledge. Probably that's the only thing I agree with no doubt....

(R. 2965).

Despite the trial judge saying that this was not the place to determine counsel's effectiveness, that is precisely what occurred. The trial court permitted Mr. Elledge to allege that his defense attorney was ineffective. The trial court then ruled 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). If that was the case, then the court should have appointed new counsel, but did it did not.

This entire proceeding was improper and laden with conflict of interest. No Faretta hearing was conducted. During these proceedings, Mr. Laswell and his investigator defended themselves, while leaving Mr. Elledge twisting in the wind, without any legal counsel. At the very least, conflict counsel should have been appointed for the purpose of the Faretta hearing, but that did not happen.

Mr. Elledge stood virtually alone and even though his instincts about defense counsel's failure to call consistent mental health experts had merit, he was "lawyerless," as his attorney admitted. He was abandoned by his trial counsel. Mr. Elledge's interest was to have an attorney in whom he had confidence and with whom he could communicate about his representation. Mr. Laswell's interest was in preserving his reputation in front of the court. The State Attorney's only interest was to make sure a warm body occupied the defense counsel chair so that he could get another death sentence against Mr. Elledge. Mr. Elledge is entitled to relief.

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.

The State argues that this claim was raised on direct

appeal and should be procedurally barred, (Answer Brief at 87-88). But, it should be noted that since the direct appeal was filed and an opinion was issued in the case in 1997, another seven years have passed, and Mr. Elledge remains confined on death row. The lengthy delay is due to the State's misconduct and repeated inability to prosecute Mr. Elledge fairly and impartially. Even at this late date, the State continues to withhold evidence that has been hidden for more than ten years. Any procedural bar has been waived by the State's misconduct.

ARGUMENT XIII

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

The State does not address, let alone contest, Mr. Elledge's argument that the circuit court erred in failing to give cumulative consideration to the instances of false and or misleading evidence and argument. The State simply argues that this issue should have been addressed on direct appeal (Answer Brief at 97-98). However, the claim was not ripe on direct appeal.

The point of raising a cumulative error claim before the hearing court, which conducted the evidentiary hearing, was to encourage it to look at **all** the evidence from the resentencing and post-conviction hearing when making a decision. But it

appears that the hearing court failed to do so. It was symptomatic of how the hearing court responded at trial, where he made a critical mistake in his sentencing order, finding that an expert's opinion was in fact, the opposite of what it was at resentencing.

In his dissent in Elledge v. State, 706 So. 2d 1340 (Fla. 1997), Justice Anstead disagreed with the majority view that the trial judge's explicit mistake of fact in his sentencing order was harmless error. Justice Anstead found that the mistake was "substantial," and involved the testimony of a critical witness who testified about a statutory mental mitigating factor.

> Moreover, the mistake is clear on the face of the sentencing order in erroneously stating that the expert's opinion was exactly opposite of that testified to at trial. Of course, if the judge's erroneous statement had been correct, i.e., that defendant's own expert gave important mental health testimony against the defendant, such an opinion would have been devastating to the defendant's position. It is one thing to have evidence offered against a defendant at trial; it is quite another to have the defendant's own witness offer evidence against him on the critical issue at trial, i.e., his state of mind at the time of the offense. The effect of such damaging testimony on a fact finder is obvious, and the trial court's mistaken notion that that is what happened in the penalty phase of this case cannot be characterized as "harmless."

Id. at 1348.

Just as the trial court erred in his sentencing order, he

also erred in failing to conduct a cumulative analysis in light of the evidence and testimony at the evidentiary hearing.

Under Kyles v. Whitley, 514 U.S. 491, 446 (1995), the required evaluation must be conducted on all the withheld exculpatory and impeaching evidence. The evaluation must include the ineffectiveness of defense counsel, who presented mental health experts who canceled each other out and who lost sight of his role as an advocate in representing Mr. Elledge.

Under the law, this Court must Court must review all of the evidence to see what impact the disclosure of the withheld information had on the resentencing proceeding. Mr. Elledge is entitled to a new resentencing.

CONCLUSION

As to those claims not addressed in the Reply Brief, Mr. Elledge relies on the arguments set forth in his Initial Brief and on the record. He submits that he is entitled to a new resentencing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first-class postage prepaid to Carolyn M. Snurkowski, Assistant Deputy Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050 on this 12th day of November, 2004.

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CERTIFICATE OF COMPLIANCE

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

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