IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-611
Lower Case 91-2561-CFAES

STATE OF FLORIDA,

Appellant/ Cross-Appellee,

v.

VIRGINIA LARZELERE,

Appellee/ Cross-Appellant.

ON APPEAL FROM THE SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE AND INITIAL BRIEF OF THE CROSS-APPELLANT

DAVID DIXON HENDRY
FLORIDA BAR NO. 0160016
ASSISTANT CCC
CAPITAL COLLATERAL REGIONAL COUNSEL-MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
813-740-3544

COUNSEL FOR APELLEE/ CROSS-APPELLANT

TABLE OF CONTENTS

Page

ANSWER BRIEF OF THE APPELLEE

INITIAL BRIEF OF THE CROSS-APPELLANT

TABLE OF AUTHORITIES

Page

Other Authorities

NOTE REGARDING REFERENCES

References to the record of the direct appeal of the trial, judgment and sentence in this case are of the form, e.g. (Dir. ROA Vol. 1, pg. 123). References to the record of the most recent postconviction record on appeal are in the form, e.g. (ROA Vol. 1, pg. 123). Generally, Virginia Larzelere is referred to as "Ms. Larzelere" throughout this motion. The Office of the Capital Collateral Regional Counsel**B** Middle Region, representing the defendant, is shortened to "CCRC."

REQUEST FOR ORAL ARGUMENT

Ms. Larzelere was sentenced to death at the trial level. In postconviction, the circuit court granted a new penalty phase due to the ineffective assistance of trial counsel. The resolution of the issues involved in this action may eventually determine whether she lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural 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. Ms. Larzelere, through counsel, accordingly urges the Court to grant oral argument.

STATEMENT OF THE CASE AND OF THE FACTS

A. Procedural History

Dr. Norman Larzelere was shot and killed on March 8, 1991. On May 4, 1991 an arrest warrant was issued for Virginia Larzelere for "aiding, abetting, counseling and hiering (sic) Jason Eric Larzelere age 18 years to commit the murder of her husband Norman B Larzelere, this [] known to be true via sworn statements by [Steven Heidle and Kristen Palmieri]."[ROA Vol. 18, pg. 2916] On May 24, 1991 the Grand Jury, in and for Volusia County returned an indictment for First Degree Murder against both Virginia Larzelere and Jason Larzelere. [ROA Vol. 18, pg. 2915] Ms. Larzelere pled not guilty and proceeded to trial. The guilt phase of Ms. Larzelere's trial was held between January 27, 1992 and February 24, 1992. The jury found Ms. Larzelere guilty as charged.

Following the jury's verdict, Ms. Larzelere proceeded to penalty phase, although the defense presented absolutely no evidence for the jury's consideration. On March 4, 1992 the jury returned a recommendation in favor of death by a vote of 7-5. The trial court held a sentencing hearing and sentenced Ms. Larzelere to death on May 11, 1993.

Ms. Larzelere appealed the judgment of conviction and sentence of death. This Court affirmed Ms. Larzelere's conviction and death sentence. Larzelere v. State, 676 So.2d 394 (Fla. 1996). Ms. Larzelere petitioned the United States Supreme Court for a Writ of Certiorari which was denied. Larzelere v. State, 519 U.S. 1043 (1996).

The instant appeal concerns the lower court's March 24, 2005 postconviction

Order affirming Ms. Larzelere's conviction for first degree murder. Although the conviction was affirmed by the lower court, Ms. Larzelere's sentence of death was vacated by the lower court due to ineffective assistance of trial counsel at the penalty phase [ROA Vol. 21, pp. 3343-3414]. Ms. Larzelere asks this Court to affirm the lower court's ruling granting a new penalty phase, but asks that this Court grant guilt phase relief as well.

The evidentiary hearings in this case were held in Volusia County from May 13-24, 2002, as well as June 3-4, 2002. Following the evidentiary hearings, witnesses Dennis Harris, Ronald Bilbrey, and Bernadette D'Alvia Eady, came forward and executed affidavits detailing trial counsel's dealings in and use of cocaine and methamphetamine at the time of the Larzelere case [affidavits located at ROA Vol. 19, pp. 3051-3054, Vol. 20, pp. 3252-3259, Vol. 20 pp. 3314-3317, respectively]. Dennis Harris provided a deposition on November 3, 2003 detailing lead trial counsel Jack Wilkins' illegal drug use [ROA Vol. 30, pp. 4819-4867, ROA Vol. 31, pp. 4868-5076], and that deposition was filed and considered as substantive evidence by the lower court. The lower court did not consider or mention the affidavits of D'Alvia Eady and Bilbrey in its Order denying guilt phase relief.

B. Facts at Trial

Ms. Virginia Larzelere was married to the victim, Dr. Norman Larzelere. She managed his dental office in Central Florida at the time of the murder. On March 8, 1991

at approximately 1:00pm, a masked gunman rushed into the dental office of Dr. Norman Larzelere in Edgewater, Florida, chased down Dr. Norman Larzelere, and delivered a fatal shotgun blast to his chest, then fled the scene. A patient, an office assistant, and Ms. Larzelere were all present in the dental office at the time of the shooting. The state's original theory was that Jason Larzelere was the shooter, but argued to the jury at trial that there could have been another shooter who conspired with Ms. Larzelere.

Ms. Larzelere was arrested for the murder with her son, Jason Larzelere, based on information received from later-immunized witnesses Kristen Palmieri and Steven Heidle. The state's theory of the case was that Virginia Larzelere solicited her natural born son Jason Larzelere to kill Dr. Norman Larzelere for an interest in several life insurance policies and a share of estate assets. Shortly after the murder, the state witnesses informed law enforcement that Virginia Larzelere sent Jason Larzelere to retrieve some items from storage the night before the murder, including a will and some life insurance policies. Allegedly, the state witnesses overheard Ms. Larzelere inform Jason Larzelere that he would "get his $200,000 for taking care of business." Ms. Larzelere allegedly complained after the shooting that Jason was 30 minutes late to the dental office, and that his tardiness complicated matters in the murder of her husband. The immunized state witnesses also informed law enforcement that Ms. Larzelere directed them to encase the alleged murder weapons in concrete and dispose of them, which they did. They also informed law enforcement that Ms. Larzelere and Jason reenacted the murder in their presence, with Jason playing the role of the gunman and Ms. Larzelere playing the role of

the victim.

During Ms. Larzelere's trial, two other state witnesses testified that they engaged in extramarital affairs with Ms. Larzelere, and that she encouraged them to assist her with the execution of her husband. Ms. Larzelere was convicted of first degree murder, but her son, Jason Larzelere, was acquitted in a subsequent and separate trial.

C. Facts from the Evidentiary Hearing and Postconviction Proceedings

Virginia Larzelere was represented at trial by private attorney John Carleton Wilkins III, aka "Jack" Wilkins. After Ms. Larzelere was convicted of first degree murder and sentenced to death in 1993, Jack Wilkins was convicted of tax evasion, withholding subpoenaed financial documents from the federal government, and lying to a federal grand jury. He was sentenced to five years federal prison for his criminal conduct. He resigned from the Florida Bar in 1995 in lieu of impending disciplinary proceedings before serving his prison sentence.

During the time Jack Wilkins represented Virginia Larzelere, his longtime office manager and bookkeeper Gladys Jackson revealed that Wilkins drank vodka and gin "all of the time." [ROA Vol. 35, pg. 5582]. His staff would pick up "jugs" of vodka for him ("the ones with the handles"), he was known to drink around "noontime" in the office, and Wilkins was known to leave the office with the bottle in hand. [ROA Vol. 35, pp. 5583-5584]. Wilkins could be seen having several drinks throughout the day regularly in his office [ROA Vol. 35 pg. 5586]. He was even seen drinking vodka at 10am in the office [ROA Vol. 35, pg. 5587]. Jack Wilkins admitted at the evidentiary hearing that he

drank in his office, sometimes even at noon before he played golf, and that he even had a bar "built" in his office at the time he represented Virginia Larzelere [ROA Vol. 35, pg. 5696]. At the time of being retained in the Larzelere case, Wilkins was dating court reporter Kimberly Fletcher [ROA. Vol. 41, pg. 6491]. Ms. Fletcher testified that Wilkins would drink alcohol at lunch during the week, he would continue drinking liquor into the night, and on the weekends he would even drink vodka and orange juice in the mornings [ROA. Vol. 41, pg. 6491]. At night Wilkins would switch to whiskey, and at the time she considered Wilkins to be a "heavy drinker." [ROA Vol. 41, pg. 6492]. Assistant state attorney Dorothy Sedgewick even smelled liquor on Wilkins' breath during the Larzelere case just outside of the courtroom, and she became concerned because this was such a "serious case"; she discussed the situation with her co-counsel, assistant state attorney Les Hess [ROA Vol. 41, pg. 6474]. The two state attorneys decided that they would watch Wilkins closely, and that if they observed any signs of impairment, they vowed to promptly report this to the court [ROA Vol. 41, pg. 6475]. Ms. Sedgewick did not remember what portion of the case this incident took place, but she remembered there were court reporters present, talking to Wilkins at the time she smelled alcohol on his breath; she expected the reporters to approach her and ask if she smelled the alcohol on Wilkins' breath [ROA Vol. 41, pg. 6476]. Ms. Larzelere's sister, Patsy Antley, remembers going to lunch on occasion with Wilkins during the time of the Larzelere trial and observed him "dr[i]nk during lunch." He would not eat but he would drink three to four drinks of straight liquor [ROA Vol.38, pg. 6129].

Jeannette Atkinson testified that she went to Wilkins' office one morning at approximately 9am or 10am and she observed Jack Wilkins have three vodka drinks [ROA Vol. 38, pg. 6028]. At her sister's bond hearing she said she definitely smelled alcohol on him, and that was at 9am [ROA Vol. 38, pg. 6028]. Attorney Rodney Kent Lilly testified that he knew Wilkins to drink at lunch [ROA Vol. 35, pg. 5738]. Attorney Jonathan Stidham observed Jack Wilkins in court at the time of the Larzelere case and observed his hands shaking. Mr. Stidham suspected at that time that Wilkins was having withdrawals from alcohol and needed a drink [ROA Vol. 39, pg. 6242]. Courtroom observer Dorriejean Muller attended the Larzelere trial and smelled alcohol emanating from Jack Wilkins as he walked past her [ROA Vol. 38, pg. 6078]. Private Investigator Gary McDaniel recalled his first meeting with Jack Wilkins in May of 1991 at Wilkins' office. He recalled that Wilkins had about three whiskey drinks during a 40 minute case discussion [ROA Vol. 40, pg. 6289]. Florida Department of Law Enforcement agent David Waller recalled that Wilkins was drinking liquor in his office during a meeting in 1993, one month before Larzelere was sentenced to death [ROA Vol. 39, pp. 6195-6196]. Wilkins was charged with Boating Under the Influence of alcohol in 1993 and was subsequently convicted.

Dennis Harris informed that at the time of the Larzelere case, Jack Wilkins was buying and using large quantities of the illegal drug Methamphetamine, and he asked Harris, who was at the time a law client of Wilkins, if he knew of a cheaper drug supplier [ROA Vol. 19, pg. 3053]. Wilkins informed that he bought Methamphetamine by the

quarter pound, and that the high quality of the drug kept him up and wired for 6-7 days [ROA Vol. 19, pg. 3053]. Another individual, Ronald Bilbrey, Jr., swore that in the late 1980s Jack Wilkins asked him to supply him with an ounce of cocaine, which he did, and he personally observed Jack Wilkins ingest the cocaine through his nose [ROA Vol. 20, pg. 3254]. Bilbrey supplied Jack Wilkins with an ounce of cocaine per month at the time leading up to the Larzelere trial. In June of 1992 to June of 1993 (the time of Larzelere's sentencing), Bilbrey was supplying Wilkins with an ounce of Methamphetamine per month [ROA Vol. 20, pg. 3257]. Another individual, Bernadette D'Alvia Eady, swore that in May of 1991 she shared vodka and cocaine with Jack Wilkins in a hotel bar in South Florida [ROA Vol. 20, pg. 3315]. During that meeting Wilkins informed her that he was purchasing Methamphetamine at $2000 per ounce [ROA Vol. 20, pg. 3315]. During another meeting at a South Florida nude bottle club in May of 1991, D'Alvia Eady and Wilkins shared large amounts of vodka, cocaine, and methamphetamine together in a restroom on a toilet seat [ROA Vol. 20, pg. 3316].

Ms. Gladys Jackson remembers the costs of the Larzelere capital case totaling approximately $25,000 [ROA Vol. 35, pg. 5591]. She never remembers Volusia County paying for any costs or expenses related to the case, and she remembers that Wilkins' firm was responsible for the costs and expenses of the case [ROA Vol. 35, pg. 5592]. She remembers that the Larzelere case caused a great financial strain on Wilkin's law office, and at the time of the Larzelere trial the firm was low on money [ROA Vol. 35, pg. 5593]. In 1994 Wilkins received a federal subpoena requesting his firm's past receipt

books, and Wilkins asked her to "get rid" of the books [ROA Vol. 35, pg. 5594]. The receipt book that was destroyed by Wilkins could have reflected money that was received in 1991-1992 [ROA Vol. 35, pp. 5596-5597]. Ms. Jackson testified against Wilkins before a federal grand jury [ROA Vol. 35, pg. 5598].

Florida Department of Law Enforcement agent David Waller testified at the evidentiary hearing. Documents regarding Wilkins' misdealings were introduced during Waller's testimony as Defense EH Exhibit 6 [ROA Vol 39, pg. 6178]. Defense EH Exhibit 5 contains further details of Wilkins' financial misdealings.

SUMMARY OF ARGUMENTS ON CROSS-APPEAL

ARGUMENT I: When the state expanded their theory of the case at trial to include unnamed co-conspirators in the murder, and the trial court provided jury instructions to support this expanded theory, this constituted fatal variances and constructive amendments to the indictment. The lower court erred in denying this claim.

ARGUMENT II: The lower court erred in refusing give due consideration to the claim involving numerous conflicts of interest; specifically, Ms. Larzelere should be afforded a new trial due to trial counsel's representation of a co-defendant, financial misdealings including tax evasion and failure to report legal fees, his failure to consult any experts, and his abuse of alcohol, methamphetamine, and cocaine.

ARGUMENT III: The cumulative effect of the errors that occurred during Ms. Larzelere=s trial violated her constitutional rights.

SUMMARY OF ARGUMENT ON APPEAL

The post-conviction court did not err when it held that counsel's performance was deficient because counsel did not spend sufficient time preparing for the penalty phase, never sought out Ms. Larzelere's background, never sufficiently followed up on the investigator's report outlining the abuse and family history, and never interviewed her

family members. Counsel did not obtain informed mental health evaluations of Ms. Larzelere. Counsel presented no mitigation evidence to the jury, and only presented minimal information to the court. Due to the lack of investigation, counsel was unable to advise Ms. Larzelere as to the potential mitigation. Thus, the alleged waivers of mitigation were not knowingly and voluntarily made. The post-conviction court did not err in vacating the sentence of death and ordering a new penalty phase.

The State has asked this Court to reverse the lower court's ruling granting a new penalty phase following a three week evidentiary hearing. Absolutely no evidence was presented to the jury at the original penalty phase. A wealth of mitigation was available, including sexual abuse. The jury recommended a death sentence by the slimmest of margins, a seven to five vote. A mental health professional was not retained by the defense until after the jury had voted for death. This type of representation in a capital case is abhorrent, unprofessional, and unacceptable. The lower court's ruling is supported by competent and substantial evidence.

ANSWER BRIEF

ARGUMENT I

THE POSTCONVICTION COURT DID NOT ERR WHEN IT HELD THAT TRIAL COUNSEL WAS INEFFECTIVE IN THE PREPARATION AND INVESTIGATION OF THE PENALTY PHASE OF LARZELERE'S TRIAL. DUE TO TRIAL COUNSEL'S INEFFECTIVENESS, COUNSEL WAS UNABLE TO ADVISE LARZELERE AS TO THE POTENTIAL MITIGATION. LARZELERE'S WAIVERS OF MITIGATION WERE NOT KNOWINGLY AND

VOLUNTARILY MADE. THUS, THE POSTCONVICTION COURT DID NOT ERR WHEN IT VACATED THE SENTENCE OF DEATH AND ORDERED A NEW PENALTY PHASE.

Standard of Review.

Under the principles set forth by this Court in Stephens v. State, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference to the factual findings by the lower court.

Penalty Phase Preparation

Trial counsel never fully investigated the sexual abuse suffered by Ms. Larzelere. Attorney John Howes filed a formal written notice of an appearance on the day of jury selection. (ROA Vol. 34 pp. 5389-5390). Both Howes and Attorney Jack Wilkins were responsible for the second-phase preparation. (ROA Vol. 34 pg. 5390). Howes testified that he and Wilkins were jointly representing Virginia Larzelere and would share reports with each other. (ROA Vol. 34 pp. 5398-5399), however, Howes was unaware of the sexual abuse suffered by Virginia Larzelere. (ROA Vol. 34 pg. 5400, 5444-5446). Wilkins also failed to note any issues of possible physical and sexual abuse. (ROA Vol. 35 pg. 5686). Both Howes and Wilkins acknowledged that they received and read the investigator=s initial report, which outlined Ms. Larzelere's father as a chronic alcoholic and that he had inflicted emotional and physical abuse suffered by her and her sisters. (ROA Vol. 34 pg. 5449, Vol. 35 pg. 5689).

Jeanette Atkinson testified at the evidentiary hearing that she was the sister of

Virginia Larzelere, and she was never consulted about mitigation for her sister (ROA Vol. 38 pg. 6032). She described the abuse suffered by her sister, and she would have testified at trial if only she were asked. (ROA Vol. 38 pp. 6039-6040).

Patsy Antley was another sister of Virginia Larzelere and testified at the evidentiary hearing. Ms. Antley also testified that her father, "Pee Wee" Antley was an alcoholic who drank every day. Her testimony corroborated Atkinson=s that "Pee Wee" Antley had molested all of his daughters on a regular basis to the extent that when he died, all of the daughters of this monster felt nothing but relief. (ROA Vol. 38 pg. 6125). Although she was present at the trial on occasion, neither Wilkins nor Howes ever asked her about sexual abuse or mitigation in general. She also testified that she would have been willing to testify as to the sexual abuse if only she were asked by trial counsel. (ROA Vol. 38 pp. 6127-6132).

Peggy Beasley was the youngest sister of Virginia Larzelere and testified at the evidentiary hearing. She testified that once Virginia moved out of the Antley household she never moved back in, rather, she would come back to visit at family functions and holidays. (ROA Vol. 38 pg.6139). Ms. Beasley testified that no one from the defense team ever interviewed her as to the family history of abuse. (ROA Vol. 38 pg. 6143). Ms. Beasley detailed the sexual abuse she suffered at the hands of her father, her efforts to tell her mother, the subsequent threats by her mother and father to conceal this systematic, ongoing sexual abuse of the sisters and the efforts that Virginia made to protect her younger sisters from "Pee Wee" Antley. (ROA Vol. 38 pp. 6145-6149). Ms.

Beasley also testified regarding an incident which occurred between her daughter and "Pee Wee" Antley. (ROA Vol. 38 pp. 6149-6151). The mitigation evidence of sexual abuse and subsequent emotional scarring was available to be presented at the penalty phase of the trial if only trial counsel had bothered to investigate. Like all the other sisters, Ms. Beasley would have testified at the penalty phase of defendant's trial if only she were asked. (ROA Vol. 38 pp. 6153-6154).

Jessica Larzelere was the daughter of Virginia Larzelere. At the evidentiary hearing, she testified as to the physical and verbal abuse that Virginia suffered at the hands of her husband, Harry Mathis, (ROA Vol. 40 pp. 6395-6396) and further abuse by a subsequent husband. (ROA Vol. 40 pp.6398-6399). Jessica also testified that she had also been sexually abused by her grandfather, "Pee Wee" Antley and testified as to her mother's reaction to the reports of sexual abuse. Jessica testified that when her grandfather died, she was relieved that no one else could ever again be abused by this man. (ROA Vol. 40 pp. 6407-6412). Jessica also testified that mitigation matters were never discussed with her by trial counsel and that she was available and willing to testify at the penalty phase and at sentencing. (ROA. Vol. 41 pp. 6568- 6573).

Jason Larzelere testified at the evidentiary hearing that he was also sexually abused by "Pee Wee" Antley, his grandfather. Jason also testified that he had informed his mother who admitted to him that she too, had been a victim. Peggy Beasley also confided in Jason that she had been a victim of Antley as well as Jessica Larzelere. Jason was never contacted by Wilkins or Howes to testify in the penalty phase of Virginia

Larzelere=s trial but he would have testified if he were asked. (ROA Vol. 41 pp. 6592-6597).

Dr. Harry Krop testified at the evidentiary hearing. He was qualified as an expert in forensic psychology and has a specialty of evaluation and treatment of victims of sexual abuse. (ROA Vol. 37 pp. 5898-5899). Dr. Krop was appointed by the trial court to evaluate Virginia Larzelere after the penalty phase. He considered it unusual to be appointed after the penalty phase in that it had never happened before or since. (ROA Vol. 37 pp. 5901-5902). Dr. Krop also testified that he had never met Wilkins or Howes during the representation. (ROA Vol. 37 pp. 5904-5905). Wilkins provided Dr. Krop with depositions and police reports which dealt with the crime itself. Wilkins forwarded letters that Ms. Larzelere had written. Dr. Krop was unsure why this was done and was not sure how this correspondence would have aided him regarding mitigation. (ROA Vol. 37 pp. 5905-5908).

At the evidentiary hearing, the following testimony was elicited from Dr. Krop:

> Q. I show you what's been marked as Defendant's Exhibit 1 in evidence. Do you recognize this document, sir?
> A. Well, I have not seen this whole document, but I was given last night the first three pages of this document.
> Q. Oh, very well, sir. And you have a copy of that there?
> A. Yes.
> Q. Could you read on Page 2, sir, background, Virginia G. Larzelere?
> A. You want me to read it to myself or read it out loud?
> Q. Read out loud, if you would.
> A. It says: The Defendant client was the first child of William and Vivian Antley, born 12/27/52, in the City of Lake Wales. Her father, William, committed suicide in 1988 and is

> survived by the mother, Vivian Antley, age 60, and then a telephone number.
>
> Both the father and mother have been employed for more than 40 years for Donald Duck, a well-established fruit juice company in Lake Wales. She describes the father as a chronic alcoholic, sitting on the porch drinking at home daily with no outside hobby or social interests. She was victimized emotionally and physically, as were the other children. Without hesitation, the client states she cursed him when he died, an obvious emotional response to her victimization as an adolescent.
>
> She identified her eldest sister as Jeanette Atkinson, wife of John Atkinson. She presently has custody of Jessica, her second oldest child. Then gives the address of where the Atkinsons reside and their phone number. Jeanette is helping client not only with the custody of Jessica, but other personal matters and can be reached at work, and there's a telephone number.
>
> She has an executive administrative position with Joseph Land Trucking Company. Client states she was born 1/7/59 and remains her closest confidant. She states that Jeanette could give investigator an overview of Defendant's upbringing, except for the issues related to child abuse, which is unspoken among family members. Client believes that all the children were subjected to same.
>
> Q. Let me stop you there, sir. This issue of child abuse being unspoken among family members, do you find that common or uncommon in your practice regarding sexual abuse?
>
> A. That's not uncommon. That's fairly common.
>
> (ROA Vol. 37 pp. 5912-5914).

It should be noted that Dr. Krop was reading from the very exhibit that trial counsel admitted that they both had read. Dr. Krop testified that had he been provided with the above information at the time of his original evaluation, he would have explored it further. (ROA Vol. 37 pg. 5916) Wilkins had told Dr. Krop that he would not be able to speak with any family member and that there were no family members to contact. (ROA Vol.

37 pg.5917). Dr. Krop opined that "Certainly that's generally stronger mitigation if the defense is able to show that the person has a horrendous background or has severe psychiatric problems." (ROA Vol. 37 pg.5920).

The testimony of the Antley sisters and Virginia Larzelere's children regarding the systematic sexual abuse by "Pee Wee" Antley, certainly demonstrates a horrendous background. Dr. Krop testified that he would have liked to have the opportunity to check on the people who had knowledge of Virginia Larzelere's life. (ROA Vol. 37 pg. 5927) Subsequent to the trial, Dr. Krop continued to ask Wilkins for information regarding family members, however he never obtained it. (ROA Vol. 37 pg. 5932).Dr. Krop was deposed by the State prior to the Spencer hearing. (ROA Vol. 37 pg. 5934). Neither Wilkins nor Howes attended the deposition. Dr. Krop thought this unusual in that in his experience, defense attorneys usually attend the depositions to bring out favorable testimony and to protect their clients. (ROA Vol. 37 pp. 5934-5937). The postconviction court found counsel's performance to be deficient. Their performance fell far below usual professional norms. Dr. Krop should have been retained upon the arrest of Virginia Larzelere. Dr. Krop testified that he is usually retained a good year before the actual trial. (ROA Vol. 37 pg. 5902). This report of sexual abuse upon the Antley sisters should have been provided. Instead, Wilkins suppressed the information. It is clear that upon the penalty phase jury reaching a recommendation, Wilkins and Howes had completely abandoned their client. It was only after the penalty phase jury had rendered a recommendation that Ms. Larzelere was evaluated by Dr. Krop. Larzelere was deprived

of a reliable adversarial testing of the penalty phase evidence because the jury did not have the benefit of the testimony of a mental health expert for their review.

Mr. Donald Robert West was an experienced capital attorney who testified at the evidentiary hearing. He was deemed to be an expert qualified to testify as to ineffective assistance of counsel. (ROA Vol. 49 pg. 7634). Mr. West had reviewed the trial transcript, had attended the evidentiary hearing, observed the live testimony of Jack Wilkins and reviewed the transcript of the testimony of John Howes. He also observed the testimony of Dr. William Mosman and Dr. Harry Krop. He also reviewed depositions and guilt and penalty phase proceedings and the sentencing (ROA Vol. 49 pp.7634-7637).

Mr. West had read the deposition of John Howes and his attention was caught by the statement of Howes that this was a "tough case" and that his (Howes') job of avoiding capital punishment, "keeping her out of the electric chair would be an extremely difficult one." (ROA Vol. 49 pp.7637-7638). Mr. West opined that after reading Wilkins' deposition where Wilkins stated that they thought they had won the case in guilt phase and they were planning a celebration for Howes' birthday, all of trial counsels' efforts went into the guilt phase. (ROA Vol. 49 pg. 7639).

At the evidentiary hearing, the following testimony was elicited from Mr. West:

> A. Well, by that time, I also knew, having read Mr. Wilkins' deposition, that they thought they had won the case, that it seemed evident that they put virtually all their energy into the guilt phase, that they had been planning a celebration, that they had - it was Howes' birthday around that same time, and

> that they were expecting to win.
>
> And of course, you couple that with Howes' comment that it's going to be an extremely difficult penalty phase, what that told me was that they didn't spend any time at all that I can determine to have been quality time developing mitigation issues or preparing witnesses to testify, that all of their efforts went into the guilt phase.
>
> And I think that was ultimately evidenced by the fact they didn't put on any witnesses at all, and that Mr. Wilkins' argument to the jury, to me, demonstrated a clear lack of understanding of the penalty phase process. He did not argue against aggravation, he did not argue in favor of mitigation, did not seem to have even a clear grasp on the evidentiary burdens that relate to penalty phase.
>
> He took nothing from the guilt phase that might arguably have been mitigating and emphasized it with the jury. He, through Mr. Howes, asked for mitigators to be read to the jury, and the court agreed to read some mitigators, but offered no evidence in support of it.
>
> And then, in his final argument, almost invited the jury to sentence her to death by the way he constructed his argument. And I found that to be very, very troubling, especially considering that Mr. Wilkins had no experience whatsoever in capital cases. As experienced as he may have been as a criminal defense lawyer over the years, he had no experience whatsoever in capital cases.
>
> Q. Was that - his lack of experience, as you read Jack Wilkins' closing argument to the jury, did that become clear to you, his inexperience in this type of proceeding?
>
> A. Yes, it did, to me. I could ascertain no - no reasonable strategy that would have resulted in that argument.
>
> (ROA Vol. 49 pp. 7639-7640).

It should be noted that Howes, not Wilkins, was the so called "expert" in penalty phase proceedings, yet an attorney with no experience in penalty phase did the closing argument. It is obvious that these arrogant fellows expected to win the guilt phase. Upon receipt of the guilty verdict, effective, competent counsel would have requested a break

between the guilt and penalty phase to properly prepare a penalty phase. Effective counsel would have at least read up on the law and would have considered having his client evaluated by a mental health professional *before* the jury had tendered a recommendation of 7 to 5.

The postconviction court held:

> Based on the totality of this evidence, this Court finds that counsel's performance was deficient because counsel did not spend sufficient time preparing for the penalty phase, never sought out Defendant's background, never sufficiently followed-up on the investigator's report outlining the abuse and family history, and never interviewed Defendant's family members. Counsel did not obtain informed mental health evaluations of defendant sufficiently in advance of the penalty phase. Counsel presented no mitigation evidence to the jury, and only the testimony of two jail guards and limited information regarding former spousal abuse to the Court. Due to this lack of investigation, counsel was unable to advise Defendant as to the potential mitigation. Thus, Defendant's waivers of mitigation were not knowingly and voluntarily make.
> (ROA Vol. 21 pp. 3374-3375)

Regarding the investigation and presentation of the penalty phase, the following testimony was elicited from Mr. West at the evidentiary hearing:

> Q. Mr. West, did you read something in Jack Wilkins' deposition whereby he indicated who was responsible for the penalty phase proceeding?
> A. Yes, I did.
> Q. What did you read in Jack Wilkins' deposition?
> A. Jack Wilkins said that the penalty phase was left up to John Howes, that he was going to do everything that related to the penalty phase.
> Q. Okay. Now, upon reading the transcript and reading the penalty phase proceeding, did it appear that John Howes was

> responsible for the second phase, the penalty phase?
> A. Considering what you've described, as well as John Howes' testimony, and as well as the record that relates to how counsel was involved in the case at various stages, it appears to me that John Howes was not at all actively involved in either the investigation of the penalty phase, or as the record is clear, in the presentation of it.
>
> My understanding of how this counsel issue unfolded was that John Howes was brought into this case to defend Jason Larzelere by Jack Wilkins, who was contacted on Mr. Larzelere's behalf by her sister, Jeanette Atkinson.
>
> Fees were going to be paid ultimately out of the insurance proceeds, and that notices were filed on behalf of each of those defendants that as the case began to be prepared for guilt phase, depositions taken, they got through some sort of rocky roads in terms of counsel, and there was an issue of severance and there was some litigation related to that.
>
> But ultimately, when it came down to trial, as I recall, in January of '92, shortly before trial or perhaps even on the day of trial, John Howes filed his appearance on behalf of Virginia Larzelere, as co-counsel. And as John Howes said in his deposition, or perhaps his trial testimony, that he really wasn't involved in Virginia's case from a penalty phase representation at the beginning. He was representing Jason.
>
> And it seems evident that he never was involved in her penalty phase investigation, because on the issue of whether he talked to family members or not, he always deferred to Wilkins and said that family members were talked to by Wilkins. And he acknowledged he never had any contact with family members, I think, except for perhaps during the trial itself.
>
> (ROA Vol. 49 pp. 7648-7649).

Howes' conduct, the designated penalty phase attorney's conduct, clearly fell far below professional norms. Howes did no investigation of possible mitigation witnesses, ordered no evaluation of his client by mental health professionals, even if he had gotten Virginia Larzelere evaluated by Dr. Krop before the recommendation was tendered, he would

have been unable to supply Dr. Krop with the material that would have helped Dr. Krop do a proper evaluation simply because he had not bothered to look for it.

At the penalty phase, Wilkins announced that he would not be presenting any additional mitigating evidence or evidence relating to any mitigating factors in the case above and beyond those which have already been presented during the guilt or innocence phase of the trial (Dir. ROA Penalty Phase Transcript Vol. 2 pp. 6173-6174).

The postconviction court granted a new penalty phase based on trial counsels' ineffective assistance and the prejudice which resulted from their conduct. The lower court stated the following in its Order:

> Due to this lack of investigation, counsel was unable to advise Defendant as to the potential mitigation Thus, Defendant's waivers of mitigation were not knowingly and voluntarily made. See Lewis, 838 So.2d at 1113-14; Deaton, 635 So.2d at 8-9; Coney, 845 So.2d at 130-31.
>
> This Court finds that counsel=s performance was prejudicial under Strickland. This Court finds that but for counsel=s deficient performance, there is a reasonable probability Defendant would have been sentenced to life in prison. See Coney, 845 So.2d at 131; see also Lewis, 838 So.2d at 1114 fn 10 and citations therein; Deaton, 635 So.2d at 8-9; Wiggins, 123 S.Ct. At 2543-44. In the instant case, the jury recommendation of death by the thinnest margin allowable, a 7-5 vote. Considering the evidence presented at the evidentiary hearing regarding the sexual abuse and family history, including the family members and doctors' testimony, this Court cannot conclude that this evidence, either in the form of statutory or non-statutory mitigation, if heard by the jury would not have tilted the balance in favor of a recommendation of life. If only one of the seven jurors voting for death had been persuaded to change his or her vote, the recommendation would have been for a life sentence. See id, Further, considering the law regarding

> overriding the jury=s recommendation, the Court would likely have followed the life sentence recommendation. See id. As such, Defendant=s sentence of death shall be vacated, and Defendant is entitled to a new penalty phase.
> (ROA Vol. 21 pg. 3375)

Appellant's argument on page 46 of Appellant's brief, ironically, reinforces the postconviction court=s analysis of the reasons for granting relief. Dir. ROA pg.7354 is a portion of the sentencing order from 1993 and reads in part:

> Eight, Child abuse Suffered by Virginia Larzelere. There was also testimony from a witness, Claude Murah, who stated that he and Virginia Larzelere were lovers prior to the murder, that Virginia Larzelere spent the night at his home the night before the murder, and that at some point during their relationship Virginia Larzelere told him that Jason Larzelere was a product of her father sexually abusing her when she was 12 or 13 years of age.
>
> Although the Court finds the witness Murah credible, it finds, based on the overall evidence in the case, said statement of Virginia Larzelere to be not credible for the same reasons previously recited herein as to Virginia Larzelere's overall lack of credibility.
>
> Even had the Court found this allegation of child sexual abuse to be true, there is no proof that said abuse had an impact on the defendant such that 26 years later it influenced or caused or contributed to the commission of the capital felony by the defendant.
>
> This mitigating circumstance was not reasonably established by the greater weight of the evidence.
> [Dir. ROA pp.7354-7355, Sentencing]

Judge Watson, sitting as the trial judge, rejected this mitigator for the exact same reason he outlined to Virginia Larzelere, the mitigator had not been proved by a greater weight of the evidence. Wilkins' rambling, vague closing did not even discuss this mitigator so the jury did not hear it. Wilkins was ineffective. However, when Judge Watson assumed the

role of the postconviction court, and after hearing from Drs. Krop and Mosman, the Antley sisters, Jason and Jessica Larzelere, Judge Watson properly held that the evidence developed at the *postconviction* hearing would have swayed the jury for life.

It is clear from the evidence elicited at the evidentiary hearing, that there was a wealth of mitigation which could have and should have been developed. Trial counsel's decision to "rely on all the testimony that was received by the jury during the four-week period of time, and we have nothing additional factually to offer" was based on ignorance. Trial counsel's efforts were completely focused on the guilt phase. They abdicated their duty to properly investigate and prepare a penalty phase through their arrogant belief that they were going to win the case at the guilt phase. Trial counsel was unaware of the evidence which was available to be presented at the time of the penalty phase. The post conviction court did not err when it vacated the sentence of death and ordered a new penalty phase.

Legal Argument

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688. Strickland requires a defendant to demonstrate (1) unreasonable attorney performance, and (2) prejudice. Counsel's strategic choices made after thorough investigation of law and facts relevant to plausible options are not usually ineffective. However, if counsel fails to investigate before adopting a strategy, and that failure results in prejudice to the

defendant, counsel's failure is ineffective assistance. Id. No tactical motive can be attributed to an attorney whose omissions are based on ignorance, or on the failure to properly investigate or prepare. Id., Williams v. Taylor, 529 U.S. 362 (2000).

In Torres-Arboleda v. Dugger, 636 So.2d 1321 (Fla. 1994) the Court held:

> During the 3.850 hearing, collateral counsel presented substantial mitigation evidence that trial counsel could have discovered if he had conducted a reasonable investigation of Torres-Arboleda's background. Documentary evidence showed that Torres-Arboleda had a history of good behavior during his incarceration in California, had no police record in Colombia, and had attended a university in Columbia. These documents should have been considered in mitigation as such factors may show potential for rehabilitation and productivity within the prison system. Id. at 1325
>
> Testimony at the postconviction proceeding also revealed that Torres-Arboleda grew up in abject poverty in Columbia, was a good student and child, and supported his family after his father's death. Such evidence may be considered in mitigation. Id. at 1325
>
> Based upon the testimony and documentary evidence presented during the postconviction proceeding, Torres-Arboleda has shown that for counsel's unprofessional errors, the result of the proceeding would have been different.
> Id. at 1326.

Ms. Larzelere contends that the facts in Torres-Arboleda are on point with the facts of the case at bar. Ms. Atkinson's testimony that Virginia offered herself up for sexual abuse, rather than see her younger sister suffer the same degradation and pain as she was subjected to, is an act of courage which should have been brought before the second phase jury.

Patsy Antley would have given the jury an insight to the dynamics of the Antley family. The threats, the victimization of all of the Antley sisters which started at an early age for all of the victims of PeeWee Antley was not considered by the jury who recommended a death sentence by a vote of 7 to 5. [ROA Vol. 38, pp. 6120-6136]

Peggy J. Beasley, in addition to documenting the horrible childhood Virginia experienced, would have documented the spouse abuse by Harry Mathis and Virginia's actions in obtaining a heart monitor for Peggy's child. [ROA Vol. 38, pp. 6138-6158].

Ms. Larzelere contends that the evidence of childhood abuse would have been gripping and compelling non-statutory mitigation and would have been given great weight by the second phase jury.

In Nibert v. State, 574 So.2d 1059 (Fla. 1990), the Court stated that:

> Nibert presented a large quantum of uncontroverted mitigating evidence. First, Nibert produced uncontroverted evidence that he had been physically and psychologically abused in his youth for many years. The trial court found this to be "possible" mitigation, but dismissed the mitigation by pointing out that "at the time of the murder the Defendant was twenty-seven(27) years old and had not lived with his mother since he was eighteen (18)". We find that a defendant had suffered through more than a decade of psychological and physical abuse during the defendant's formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end. To accept that analysis would mean that a defendant=s history as a victim of child abuse would never be accepted as a mitigating circumstance, despite well-settled law to the contrary. Nibert reasonably proved this nonstatutory mitigating circumstance, and there is no competent, substantial evidence to support the trial court's refusal to consider it. Id at 1062.

In the case at bar, the jury never heard compelling mitigating evidence due to the ineffectiveness of trial counsel. As early as June 7th 1991, trial counsel was on notice that Ms. Larzelere had a childhood of abuse and depravity. Trial counsel was on notice that this abuse was so terrible that it would take some time to get the family members to discuss it. Effective counsel would have contacted the Antley sisters, explained how important their testimony would be if the case went to a penalty phase, prepared them for trial, and then would have called them to testify.

In the case at bar, substantial mitigating evidence was presented at the 3.850 hearing. The only reason that this evidence was not presented at the penalty phase trial and the sentencing hearing was due to the ineffectiveness of trial counsel. Trial counsel was on notice that there was potential mitigation that needed to be investigated. Trial counsel could offer no reason at the 3.850 hearing why issues of sexual abuse of Virginia Larzelere were not explored. Trial counsel simply did not investigate the issue.

The Supreme Court of the United States held as follows in Wiggins v. Smith, 123 S.Ct.2527 (2003):

> Counsel did not conduct a reasonable investigation. Their decision not to expand their investigation beyond a presentence investigation (PSI) report and Baltimore City Department of Social Services (DSS) records fell short of the professional standards prevailing in Maryland in 1989. Standard practice in Maryland capital cases at that time included the preparation of a social history report. Although there were funds to retain a forensic social worker, counsel chose not to commission a report. Their conduct similarly fell short of the American Bar Association's capital defense work

> standards. Moreover, in light of the facts counsel discovered in the DSS records concerning Wiggins' alcoholic mother and his problems in foster care, counsel's decision to cease investigation when they did was unreasonable. Any reasonably competent attorney would have realized that pursuing such leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of aggravating factors from Wiggins' background. Indeed, counsel discovered no evidence to suggest that a mitigation case would have been counterproductive or that further investigation would have been fruitless, thus distinguishing this case from precedents in which this Court has found limited investigations into mitigating evidence to be reasonable. Id. at 2530.

In Virginia Larzelere's case, the report indicating that there was sexual abuse in the family was never pursued. Furthermore, the State had relied upon the evidence presented in guilt phase which would indicate an "apparent absence of aggravating factors" from Virginia Larzelere's background as in Wiggins. Since Howes had stated that this was going to be a tough penalty phase case, it was gross negligence not to begin investigating the phase for which he was responsible for.

Rompilla v. Beard, 125 S.Ct 2456, 2466 (2005) states "[i]t is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." Attorney Howes did not comply with his basic duty to the detriment of Virginia Larzelere.

Regarding the decision not to present mitigation but rather to rely on the testimony in guilt phase, the Wiggins Court further held:

> When viewed in this light, the "strategic decision" the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post-hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing. Id. at 2538.

In assessing the reasonableness of an investigation and the "tactical decisions" resulting from that investigation, the Wiggins Court further held:

> In assessing the reasonableness of an attorney's investigation, however, 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 Schiaich and Nethercott 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. Id. at 2538.

The postconviction court also held that "Counsel did not obtain informed mental health evaluations of Defendant sufficiently in advance of the penalty phase. Counsel presented no mitigation evidence to the jury, and only the testimony of two jail guards and limited information regarding former spousal abuse to the Court." (ROA Vol. 21, pp. 3374-3375) See Baxter v. Thomas, 45 F.3d 1501, 1515 (11th Cir. 1995) (stating petitioner is prejudiced "where defense counsel was deficient in failing to investigate and present psychiatric mitigating evidence"). A mental health evaluation was ordered almost as an afterthought subsequent to the jury recommendation of seven to five.

In Ake v.Oklahoma, 470 U.S. 68, 105 S.Ct. 1093 (1985), the Supreme Court of

the United States stated:

> These statutes and court decisions reflect a reality that we recognize today, namely, that when the State has made the defendant=s mental condition relevant to his criminal culpability **and to the punishment he might suffer,** (emphasis added), the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effect of any disorder on behavior and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Id. at 80, 1095.

In the 3.850 hearing, Dr. Krop testified that certainly that's generally stronger mitigation if the defense is able to show that the person has a horrendous background or has severe psychiatric problems. Clearly, the testimony of the Antley sisters, Dr. Krop and Dr. Mosman was strong mitigation. The postconviction court did not err when it held that counsel should have obtained informed mental health evaluations of Virginia Larzelere.

Ms. Larzelere's case falls squarely on point with the facts of Lewis v. State, 838 So.2d 1102 (Fla. 2002). In Lewis, the trial court ordered a new penalty phase in a postconviction action and that order was affirmed by the Florida Supreme Court. The facts in Lewis were more onerous than the facts in the Larzelere case; Lewis was clearly the murderer of Gordon and Virginia Larzelere clearly was not the murderer of Dr. Larzelere. Lewis's counsels had the same level of experience as did Virginia Larzelere's

counsel. The level of preparation regarding guilt and penalty phase were similar. The Florida Supreme Court held:

> Counsel never contacted any of Lewis's other family members in an attempt to discover potential mitigation, nor did counsel attempt to obtain mitigating evidence that was contained in Lewis's background records, including Lewis's hospitalization records, school records, and foster care information.
>
> Kirsch focused on mental health evidence in preparing for the penalty phase but waited more than two weeks after the guilty verdict was returned before he requested the trial court to appoint Dr. Joel Klass as the mental health expert. When Dr. Klass first met with Lewis, he described Lewis as being uncooperative, very suspicious, and confused about Dr. Klass's role in the proceedings. Lewis was willing to cooperate during a second interview, however, and provided Dr. Klass with general background information that he had a "rough" childhood, was a loner, abused various drugs and alcohol, had poor grades in school because of his substance abuse problems, and had some form of a psychological evaluation when he was a child. Dr. Klass asserted that he needed documentated corroboration before he could render a professional opinion or conclusion. He remembered discussing *possible* theories with defense counsel and pointing out what information he needed before he could reach a conclusion - information which he did not receive prior to trial. Id. At 1109.

It is clear from the testimony at the 3.850 hearing that no investigation of any kind regarding mitigation was undertaken by the defense at the time of the penalty phase trial. No expert had evaluated Ms. Larzelere, no family members had been interviewed or called by trial counsel.

The Lewis Court further held:

> In reviewing the current case, we find there is competent,

> substantial evidence to support the trial court=s finding that counsel did not spend sufficient time to prepare for mitigation prior to Lewis's waiver. Kirch never sought out Lewis's background information and never interviewed other members of Lewis's family; therefore, he was unable to advise Lewis as to potential mitigation which these witnesses and records could have offered. The only witness who was available and willing to testify in favor of the defendant was a mental health expert who had merely talked with Lewis and had not yet reached a diagnosis because he did not have sufficient information. There is also competent, substantial evidence to support the trial court's finding that Lewis's waiver of the presentation of mitigating evidence was not knowingly, voluntarily, and intelligently made. Based on this lack of a knowing waiver and the substantial mitigating evidence which was available but undiscovered, we hold that Lewis did suffer prejudice. Accordingly, we find that there is competent, substantial evidence to support the trial court's factual determinations and approve the legal conclusion that Lewis established a claim for ineffective assistance of counsel in the penalty phase of the trial. Id. At 1113-1114.

In Ms. Larzelere's case, she was unable to waive the presentation of mitigating evidence because she was unaware of the substantial mitigation which would have been available to her had *any* investigation been done. This is a far worse situation than faced by Lewis. Lewis had at least a partial investigation and a partial mental health evaluation. Larzelere had none at the time of her trial. The postconviction court=s order granting a new penalty phase should be affirmed.

In State v. Coney, 845 So.2d 120 (Fla. 2003), trial counsel was not planning to investigate the defendant's background until it became necessary, that is, until after a jury would find the defendant guilty of a capital offense (Id. 129). In Ms. Larzelere's case, trial counsel expected to win the case in the guilt phase to the extent they were planning a

celebration of Howes' birthday rather than prepare for penalty phase. This Court held in Coney:

> As outlined above, trial counsel's performance was plainly deficient. He failed to obtain competent medical evaluations of his client sufficiently in advance of trial so that the expert opinions could be properly analyzed and the experts furnished with background information from past court proceedings and prison records regarding the defendant's mental deficiencies and poor impulse control. He failed to devote the time necessary to do a thorough investigation of the defendant=s background. And, he failed to remedy these shortcomings by seeking additional time and resources from the court in preparation tor the penalty phase. Id. At 131.

In Virginia Larzelere's case, the situation was even worse than in Coney; Howes filed a notice of appearance on the day of jury selection. (ROA Vol. 34 pp. 5389-5390). Dr. Krop had never met Wilkins or Howes during the representation. (ROA Vol. 37 pp. 5904-5905) Although he had read the investigator's report, Wilkins told Dr. Krop that he would not be able to speak with any family member and that there were no family members to contact. (ROA Vol. 37 pg. 5917). This was not mere ineffectiveness, it was wilful misconduct on the part of Wilkins.

In Deaton v. Dugger, 635 So.2d 4 (Fla. 1993), this Court held:

> The State argues that the trial judge erred in setting aside Deaton's sentence and in ordering a new sentencing proceeding. In setting aside Deaton's sentence, the trial judge stated:
>
> Based on the totality of the circumstances presented at the evidentiary hearing, this court is not convinced by a preponderance of the evidence that the defendant knowingly, freely, and voluntarily waived his right to testify or to call witnesses at the penalty phase. While the court does not find

> that the evidence presented by the defendant at the evidentiary hearing would necessarily have been beneficial to his cause at the sentencing phase, the court finds that the defendant was not given the opportunity to knowingly and intelligently make the decision as to whether or not to testify or to call these witnesses. For this reason, defendant's third issue, as it alleges the ineffective assistance of counsel during the sentencing phase of the trial, is granted, but is denied with respect to the allegations of the ineffective assistance of trial counsel during the guilt phase of the trial. …
>
> In this case, the trial judge found that Deaton had waived the right to testify and the right to call witnesses to present evidence in mitigation, but concluded that, because his counsel failed to adequately investigate mitigation, Deaton's waiver of those rights was not knowing, voluntary, and intelligent. The rights to testify and to call witnesses are fundamental rights under our state and feferal constitutions. Although we have held that a trial court need not necessarily conduct a *Faretta* [FN2] type inquiry in determining the validity of any waiver of those rights to present mitigating evidence, [FN3] clearly, the record must support a finding that such a waiver was knowingly, voluntarily, and intelligently made. *See, e.g. Henry v. State*, 613 So.2d 429 (Fla. 1992) Id. At 7-8.

In Ms. Larzelere's case the postconviction court did conclude in its order, that considering the evidence presented at the evidentiary hearing regarding the sexual abuse and family history, including the family members' and doctors' testimony, this Court cannot conclude that this evidence, either in the form of statutory or non-statutory mitigation, if heard by the fury would not have tilted the balance in favor of a recommendation of life.

The Deaton court went on to hold:

> In view of this testimony and other substantial evidence presented at the postconviction hearing, including the testimony of two mental health experts, we believe that counsel's shortcomings were sufficiently serious to have

> deprived Deaton of a reliable penalty phase proceeding. Consequently, under the circumstances of this case, we must find that Deaton's counsel was ineffective and that such ineffective assistance was prejudicial. Id. At 9.

The facts of Ms. Larzelere's case fall directly on point with the facts in Lewis, Coney and Deaton. The postconviction court did not err when it vacated the sentence of death and ordered a new penalty phase.

CROSS-APPEAL

ARGUMENT I

THE LOWER COURT ERRED WHEN IT DENIED THE CROSS-APPELLANT'S CLAIM XVI: THE FATAL VARIANCE/CONSTRUCTIVE AMENDMENT CLAIMB THE TRIAL COURT'S INSTRUCTION TO THE JURY THAT VIRGINIA LARZELERE COULD BE FOUND GUILTY OF FIRST DEGREE MURDER IF SHE ACTED WITH AN UNNAMED CO-CONSPIRATOR CONSTITUTED A CONSTRUCTIVE AMENDMENT AND FATAL VARIANCE TO THE INDICTMENT, IN VIOLATION OF VIRGINIA LARZELERE'S FIFTH AMENDMENT RIGHT (AS APPLIED TO THE STATE VIA THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT) TO BE INFORMED OF THE ACCUSATION AGAINST HER.

Standard of Review.

This Court reviews legal questions de novo as per Stephens v. State, 748 So.2d 1028, 1032 (Fla. 2000) This Court gives deference to the circuit court's findings of fact if they are supported by competent and substantial evidence. Melendez v. State, 718 So.2d 746, 747 (Fla.1998)

Virginia Larzelere was embarrassed in her defense due to fatal variances and constructive amendments of the indictment at trial. The indictment, the sworn criminal complaint upon which a warrant was issued, the state's theory of the case upon which Virginia Larzelere was arrested and indicted by a Grand Jury, and selected excerpts from the trial transcript (including the jury instructions) on this issue [*see* ROA Vol. 18, pp. 2915-2925] clearly show that Ms. Larzelere's rights to be informed of the nature of the

charges against her were violated. The lower court erred in denying this claim.

The Substance of the Constructive Amendment Claim

There were no other named or unnamed co-conspirators or participants listed in the indictment of Virginia Larzelere besides Jason Larzelere. As alleged in the sworn criminal complaint, the state based its case on the theory that Virginia Larzelere solicited Jason Larzelere to perform the killing, and Jason Larzelere shot and killed Norman Larzelere. On May 4, 1991 an arrest warrant was issued for Virginia Larzelere for:

> "aiding, abetting, counseling and hiering (sic) Jason Eric Larzelere age 18 years to commit the murder of her husband Norman B Larzelere, this [] known to be true via sworn statements by [Steven Heidle and Kristen Palmieri]."

[ROA Vol. 18, pp. 2916].

In preparing for trial, Virginia Larzelere was on notice that she had to defend against that particular allegation. At trial, the state essentially argued that Virginia Larzelere could be convicted if the jury found that any known or unknown, unnamed/unlisted phantom co-conspirator of Virginia Larzelere did the shooting. The jury was virtually instructed that Virginia Larzelere could be convicted on the theory of a phantom conspiracy not limited to Jason Larzelere. The indictment charged Virginia and Jason Larzelere together as co-defendants with Murder in the First Degree, charging that:

> "VIRGINIA GAIL LARZELERE and JASON ERIC LARZELERE did, on the 8th day of March, 1991, in Volusia County, Florida, in violation of Florida Statute 782.04, form a premeditated design to effect the death of NORMAN LARZELERE, murder NORMAN LARZELERE, in the County and State aforesaid, by shooting him with a firearm."

[Dir. ROA pg. 1086, ROA Vol. 18, pg. 2915]

While the indictment was limited to alleging participation between Virginia and Jason Larzelere, the state's argument and jury instructions unconstitutionally opened the door to an overbroad and wide-ranging, not-otherwise alleged conspiracy and conviction.

The following discussions regarding jury instructions, specifically the conspiracy instruction, were held prior to closing arguments:

> The Court: Fine. Now, over at the principal instruction, I have done some research on this, and I'm concerned that we're using the term co-conspirator in that instruction, and yet but for the instruction that was earlier given, included the definition of conspiracy, there is no definition as it relates to this instruction of the elements of conspiracy.
>
> It occurs to me that it would be appropriate to define the elements of conspiracy, either by referring to the previously given definition in the [sic] these instructions, or a new definition that plugs into this instruction.
>
> I don't know authority for that as far as case law, but I'd like to at least have argument briefly here, to see if you agree. And, of course, you folkes [sic] object to that instruction, but my request of you is, aside from that objection, if it's going to be given, do you agree or disagree that to be complete, it would need to have either reference to or definition separately of the conspiracy definition?
>
> Mr. Wilkins [for the defense]: Judge, I think you can cure it by substitution [of] Jason Larzelere for the word conspirator.
>
> Ms. Sedgewick [for the state]: I object to that. It's not required that we prove that the killer was Jason Larzelere. We only have to prove that the killer was a co-conspirator of Virginia Larzelere.

Mr. Howes [for the defense]: Judge, on their theory of the case, and theory of the facts, the only person it can be is Jason Larzelere. There are no other co-conspirators.

Ms. Sedgewick: There are two other co-conspirators, Kristen Palmieri and Steven Heidle, based upon the evidence presented in the case.

The Court: What says the State as to the Court's point on the need for definition of conspirator or conspiracy.

Ms. Sedgwick: I agree.

Mr. Howes: We object, Your Honor, We think it's sufficient as is, or it be replaced with the name of Jason Larzelere, because under the State's theory of the case, that's the only person it could be. Otherwise, if it could be someone other than Jason Larzelere, we have a due process problem, because we're finding now, immediately preceding closing arguments, that Steven Heidle and Kristin Palmieri were co-conspirators in the murder.

The Court: I'm going to work in definition for instructions for conspiracy elements that won't be any different than the general instructions on the conspiracy. But it will start out with some language that ties the definition with the principal instruction that we're speaking of. And it will fall on the same page as this instruction.

Mr. Howes: Your Honor, we further object to any instruction other than the standard with respect to this matter.

Ms. Sedgewick: The state wishes to make clear that the Court's instructions that the Court intends to give is not limiting the co-conspirator pursuant to this definition to be Jason Larzelere.

The Court: No. I am going to give a general definition of elements of conspiracy...

[Dir. ROA pp. 5771-5773, ROA Vol. 18, pp. 2919-2921]

Kristin Palmieri and Steven Heidle were not listed in the indictment. And neither were two other alleged co-conspirators, Phil Langston and Norman Carnes. The State should have made itself more clear in the original indictment and presentation to the grand jury. Because they were not clear, and because the State was able to expand its theory from that alleged in the indictment, fundamental notions of fairness, the Fifth Amendment and Fourteenth Amendments to the United States Constitution, as well as the corresponding provisions of the Florida Constitution, were violated in the case at bar. The above passages clearly illustrate that the state was detracting from and expanding the crime that they alleged and initially set forth in the indictment. The conspiracy elements as instructed to the jury were not limited to Jason Larzelere as they should have been. If the state was proceeding on a theory of conspiracy, they should have charged conspiracy in the indictment. If the jury is going to be instructed on conspiracy, the terms of the conspiracy need to be adequately defined in the indictment. Due process requires that the state adequately inform the defendant of the nature of the charges. Because the State did not submit the "phantom conspiracy" theory to the grand jury, and the indictment did not advance the theory of any "named or unnamed co-conspirators as the shooters," Virginia Larzelere lacked adequate notice of the crime she was to defend herself against, and learned shortly before closing arguments that she was facing an undefined, ever-expanding, and actually limitless conspiracy.

Fla. R. Crim. Pro. 3.140(o) reads as follows:

> **Defects and Variances**. No indictment or information, or any count thereof, shall be dismissed or judgment arrested, or new trial granted on account of any defect in the form of the indictment or information or of misjoinder of offenses for any cause whatsoever, *unless the court shall be of the opinion that the indictment or information is so vague, indistinct, and indefinite as to mislead the accused and embarrass him or her in the preparation of a defense* or expose the accused after conviction or acquittal to substantial danger of a new prosecution for the same offense. (emphasis added)

The only individuals listed in the indictment were Virginia and Jason Larzelere. Yet the jury was instructed as follows:

> The elements involved in a conspiracy that must be shown by independent evidence are, one, that the intent of Virginia Gail Larzelere was that the offense that was the object of the conspiracy would be committed. And two, that in order to carry out that intent, Virginia Gail Larzelere agreed, conspired, combined, or confederated with Jason Eric Larzelere to cause said offense to be committed, either by them or one of them, *or by some other person.* (emphasis added) [Dir. ROA pg. 5895, ROA Vol. 18, pg. 2922]
>
> It is not necessary that Virginia Gail Larzelere do any act in the furtherance of the conspiracy. It is a defense to a charge of criminal conspiracy that a defendant, *after conspiring with one or more persons to commit the offense* that was the object of the alleged conspiracy, *persuaded the alleged co-conspirators* not to do so...
>
> *If two or more persons help each other commit a crime and the defendant is one of them*, the defendant must be treated as if she had done all the things *the other person or persons did...*
>
> If a defendant paid or promised to pay *another person or persons to commit a crime...* (emphasis added) [Dir. ROA pg. 5896, ROA Vol. 18, pg. 2923]

> ...the defendant and the co-conspirator agreed, conspired, combined, or confederated to cause said offense to be committed, *either by them or one of them, or by some other co-conspirator*. (emphasis added) [Dir. ROA pg. 5897, ROA Vol. 18, pg. 2924]
>
> ...a defendant, *after conspiring with one or more persons* to committ [sic] the offense that was the object of the alleged conspiracy, *persuaded the alleged co-conspirators* not to do so... (emphasis added) [Dir. ROA pg. 5898, ROA Vol. 18, pg. 2925]

The above jury instructions constituted constructive amendments and fatal variances from the indictment which warrants relief from the conviction. A trial modification that broadens the charge contained in the indictment is reversible error. Lucas v. O'Dea, 179 F. 3d 412, 416 (6th Cir. 1999) It is Ms. Larzelere's position that she was not charged with conspiracy, so the instructions regarding conspiracy should not even have been given. If the conspiracy instructions were lawfully given to the jury, the instructions should have been limited to naming Jason Larzelere as the sole co-conspirator. Opening the conspiracy to limitless unnamed co-conspirators had the effect of expanding the terms of the limited indictment. Jason Larzelere was the only other person named in the indictment, therefore it was improper to instruct the jury that Virginia Larzelere could be found guilty if the jury felt that she conspired with someone other than Jason Larzelere. *See* Lucas v. O'Dea, 179 F. 3d 412, 416 (6th Cir. 1999) citing Stirone v. United States, 361 U.S. 212, 217-219 (1960). Amendments occur when the charging terms of the indictment are altered, literally or in effect, by the court or the prosecutor after the grand jury has passed upon them. Id. Variances occur when the charging terms of an

indictment are not altered, but the evidence at trial proves facts different from those alleged in the indictment. Id. (Internal citations omitted). Jury instructions that alter the circumstances upon which a conviction can be based from those alleged in the indictment are constructive amendments. Id. In the case of United States v. Ford, 872 F. 2d 1231 (6th Cir. 1989), the defendant was charged with possessing a firearm on or around a certain date. The jury was instructed that they could convict the defendant if they found that the defendant possessed a firearm at anytime during a one year period. The Sixth Circuit held that this constructive amendment was a "fatal variance" and was per se prejudicial error. Id. It is noted that in the case at bar, only one date is mentioned in the indictment: the date Dr. Larzelere was shot and killed. One must question whether it was proper to instruct the jury on a general conspiracy without specifying the date listed in the indictment, March 8, 1991. Lack of notice in the indictment of a specific date upon which the crime occurred could have precluded a possible defense of alibi.

Though the development of constructive amendment law comes from the Grand Jury Clause of the Fifth Amendment which applies only to federal courts, state criminal defendants have an equally fundamental right to be informed with the nature of the accusations against them. *See* Lucas 179 F. 3d at 417.

A case almost directly on point came out of the 11th Circuit Court of Appeals in 1990. United States v. Keller, III, 916 F. 2d 628 (11th Cir. 1990). Keller, III involved multiple counts of bank robbery and conspiracy to commit bank robberies. Regarding count three of the indictment in Keller, III, Keller and an individual named Smith were

alleged in the indictment to have conspired to commit a bank robbery. There were no other named or unnamed co-conspirators in the indictment, just as in the Larzelere case. During the deliberations in Keller, III, the jury had a question. In regards to count three of the indictment, they asked if they could find one defendant guilty, and the other defendant not guilty. The Court answered and instructed the jury that they could feasibly convict a defendant if they were to find that the defendant conspired *with some other person.* Keller, III, at 636. The Court found that this constituted an amendment and reversed the conviction. The Court reasoned and held the following:

> The court's instructions had the effect of adding the phrase "with other named and unnamed co-conspirators" to Count Three of the indictment. The grand jury could have included a similar phrase in the indictment, but did not. The grand jury understood that it could include similar language, because it did so in Count Seven of the indictment. The jury instructions altered an essential element of the offense and thereby broadened the possible bases for conviction of Keller by allowing the jury to convict him if he conspired with anyone, when the indictment alleged he conspired solely with Smith. (footnote omitted).
>
> We conclude that the trial court's jury instructions constituted a constructive amendment of the indictment and therefore violated Keller's Fifth Amendment right to be charged by grand jury indictment. Such a violation is reversible error *per se*. United States v. Peel, 837 F. 2d 975, 979 (11th Circuit 1988), United States v. Figueroa, 666 F. 2d 1375, 1379 (11th Cir. 1982).

Keller, III at 636.

Just as in Keller, III, the jury instructions in the Virginia Larzelere case constituted a constructive amendment to the original indictment. No other named or unnamed co-

conspirators were listed in the indictment. The state may argue that the indictment did not specifically allege that Virginia conspired with Jason. The fact that conspiracy was not even alleged in the indictment illustrates just how vague and indistinct the indictment was. The state could have listed other known or unknown persons in the indictment, but it did not. The jury instructions broadened the possibilities not listed in the original indictment for the state to obtain a conviction. This constitutional violation constitutes per se reversible error. United States v. Peel, 837 F. 2d 975, 979 (11th Cir. 1988). The lower court's Order denying relief in the case at bar failed to distinguish the Keller case. The lower court failed to distinguish or address any of the cases cited by Larzelere pertaining to this claim.

The lower court held that this particular claim was procedurally barred. In the alternative, the court held that the case of State v. Roby, 246 So.2d 566 (Fla. 1971) should sustain the conviction. The lower court was wrong to cite this case as it does not address the specific issue of constructive amendments and fatal variances to an indictment, sufficiency of the indictment to provide adequate notice of the particular accusations against a defendant, and it is therefore clearly legally distinguishable. It is also factually distinguishable. In Roby, it was clear that two individuals, including Roby, even by Roby's own admission, shot the victim. The shooting was the cause of death of the victim following an escalating bar brawl. It was unclear if a .22 caliber bullet (known to be fired by Johnson) or if a .25 caliber bullet (known to be fired by Roby) caused the fatal wound. In this case, Ms. Larzelere did not shoot Dr. Larzelere, and she did not

admit to shooting Dr. Larzelere or conspiring with her son to have Dr. Larzelere shot. In Roby, three individuals (Roby, Johnson, and Williams) were specifically named and jointly charged by indictment for murder. One defendant was acquitted (Johnson). In the case at bar, only Jason Larzelere and Virginia Larzelere were named and charged by indictment. Roby holds that if an indictment specifically charges one person with committing a felony, and charges another person of being an aider or abettor in the offense, both people can be found guilty of the offense whether they actually committed the offense, or whether the other named person in the indictment committed the murder, and one simply aided and abetted the actual murderer in the offense. As such, in the case at bar, under the reasoning of Roby, Virginia Larzelere can be found guilty of murder if she aided and abetted Jason Larzelere in the murder, and if Jason actually committed the murder with her help. *But contrary to what the lower court stated in its Order denying guilt phase relief*, Roby does not stand for the proposition that Virginia Gail Larzelere can be found guilty of aiding and abetting an unknown co-conspirator who committed the actual murder, a co-conspriator who is not jointly-named and not charged in the indictment. At a minimum, if the state is proceeding on such a theory, the instant Larzelere indictment should have charged that "Jason Larzelere, Virginia Larzelere, and any known or unknown co-conspirators or individuals murdered Dr. Norman Larzelere." The instant case lacks the notice and due process that was afforded in Roby. Roby does not authorize constructive amendments to an indictment as the lower court suggests.

In support of their constructive amendment and furthering the prejudice, the

following closing arguments were made at trial by the State. In final summation, the State urged the jury to "particularly pay attention to the instructions of the two alternative forms of proof as to what a principal is." [Closing Arguments, Dir. ROA pg. 5870]

The State argued as follows:

> -"The evidence proved [Virginia Larzelere's] motivation to do the killing. It proved her premeditation to kill Dr. Larzelere. And it proved her participation, her active participation in the murder, not as the shooter, but as a principal under Florida Law, which makes her equally as guilty as the shooter…she was consciously aware that the murder was going to take place, in her state of nervousness that was observed and noticed and testified to by various people…"
> [Dir. ROA pg. 5777]

> -"[I]t's necessary to discuss…Virginia Larzelere's contact with people that we know of that she discussed her desire to kill Dr. Larzelere with."
> [Dir. ROA pg. 5778]

> -"Virginia Larzelere is in California with Norman Karn, that she's carrying on this relationship, that she is making it as clear as she can to Norman Karn that she needs her husband dead…She tells Norman Karn that that's her money, and that she needs Dr. Larzelere dead instead of divorcing him, because she doesn't want Dr. Larzelere to get her money during a divorce…She tells him she'll make payments for the killing of Dr. Larzelere, the payment she speaks of is $20,000 and a new Harley Davidson motorcycle. She tells Ron Hayden, and she makes a statement to Ron Hayden that a shotgun, as far back in 1989, a shotgun would be a clean way to do it."
> [Dir. ROA pp 5780-5781]

> -"Virginia Larzelere carries on a conversation with Phil Langston, again, her favorite topic, that she needs Dr. Norman Larzelere dead."
> [Dir. ROA pg. 5782]

> -"[T]here's a call from Jason's car phone to Virginia's car phone, her white ZX, that at 11:47 p.m., there's a call from Jason's car phone to Kristen's car phone, all in the night before the murder. On March 8th at 8:39 a.m., there's a three minute call to Virginia's car phone from someone, and that is

before the time she gets to the office."
[Dir. ROA pg. 5791]

-"The next three calls that show on Kristen's car phone during the period of time which she has given testimony...12:06 to the dental office; 12:24 to the dental office; 12:46 to the dental office, all from Kriten's car, placing Kristen in her car calling the dental office. The evidence is persuasive that at the point Kristen had to be calling Virginia for updates on what was going on in the murder. Kristen had to have known that the murder was to take place before that time."
[Dir. ROA pg. 5793]

-"Steven Heidle, who again the evidence shows, despite his statements that he was willing to make to the police concerning his knowledge only occurring after the murder, his guilty knowledge occurring after the murder, the evidence is persuasive that Steven Heidle also knew beforehand of the murder taking place."
[Dir. ROA pg. 5796]

-"Virginia is actively participating in the murder. She's actively participating. She was actively participating during her phone conversations with other person's that morning. She's actively participating essentially as the lookout, making sure things are going. She is actively participating when she sends Kristen out to lunch...when she lies and makes up stories concerning how the murder occurred, and what the gunman looks like. That is active participation as a principal under Florida Law."
[Dir. ROA pg. 5808]

-"During the days after the murder, there has been testimony concerning Steven Heidle and Kristen Palmeiri's contact with Virginia. And again the evidence is persuasive that they knew not just after the murder, but before the murder, and that they were co-conspirators with Virginia Larzelere."
[Dir. ROA pg. 5810]

-"The evidence shows that they were all participants in their own ways together...And under the law of Florida, she is just as guilty as the shooter."
[Dir. ROA pp. 5817-5818]

-"You will be read an instruction on what a co-conspirator is...You'll be also read by the Judge, and you'll be given a written packet that will contain different pages of what a principal is and what must be proven a principal is

under Florida law. These are in the alternative. The proof may be as to either/or. The proof does not have to be as to both. The evidence shows that Virginia is guilty as a principal, and that there is evidence as to both forms of a principal under Florida law. Under one of the definitions of principal that must be proven is that, if two or more people help eachother commit a crime, and the defendant is one of them, that the defendant, being Virginia, must be treated as if she had done all the things the other person or other persons did, if the defendant, Virginia, knew what was going to happen."
[Dir. ROA pp. 5818-5819]

-"And that is, if she, the defendant, paid or promised to pay another person or persons, any other person or persons, to commit a crime, that the defendant, Virginia Larzelere, must be treated as if she had done all of the things a person who received or promised the payment did. That means she's guilty of all of their acts, each and every one of their acts she's guilty. If you find, as I have argued to you, that Steven Heidle was participating with the knowledge of Virginia and in cahoots with Virginia, then all of Steven's acts are Virginia's acts. If you find that Kristen Palmeiri was participating in any way as a principal to Virginia, then Kristen Palmeiri's acts are Virginia's acts, and Virginia's guilty of those. As the evidence shows of Jason's acts, they would also be commuted to Virginia. If the defendant knew what was going to happen, she made or promised the payment, whatever that payment is, cash, cars, in exchange for the commission or promise to commit the crime or to help commit the crime, and the crime was committed by a co-conspirator."
[Dir. ROA pp. 5819-5820]

-"I want to encourage you to maintain that same attention to the rest of the closing arguments, and to the jury instructions that are a little bit complicated, in applying principles and in applying the conspiracy instruction to the evidence."
[Dir. ROA pg. 5822]

The Defense responded as follows:

-"[N]ever would I have bet that the State was going to come before you on that day and say, our star witnesses, Steve and Kristen, lied to you from the witness stand. And that's what you just heard. Not one time before today have you ever heard the theory that Steve Heidle and Kristen Palmeiri were co-conspirators before the murder...They made a deal for immunity."

[Dir. ROA pg. 5823]

-"Today Ms. Sedgwick told you, on three separate occasions Steve Heidle and Kristen Palmeiri were co-conspirators before the murder...I submit to you that the State believes that their own two star witnesses are perjurers and liars, and that they lied not only to the police under oath, but they lied to you during the trial of this case. Their testimony is totally unreliable, and the only verdict available is not guilty. That was not where I planned to start my closing argument, but I had no idea what the representations of the State were going to be today. Now I'm going to go back to where I originally intended to go."
[Dir. ROA pg 5824]

The State continued:

-"They all participated and communicated with Virginia Larzelere. She was at all times in a position to know the details of their participation before the murder, during, and after the murder."
[Dir. ROA pg. 5861]

-"It's clear from her conversations prior to September 28th of 1990 with Norman Karn, with Ron Hayden, her last conversation as recently as June or July of '90 with Phil Langston, concerning the desire to have the Doctor killed, her willingness to pay money to have the Doctor killed[.]"
[Dir. ROA pg. 5863]

-"Very specific conversations that she had with different people, some of whom were not connected with each other in any way, concerning to get Dr. Norman Larzelere killed."
[Dir. ROA pg. 5864]

-"When you hear the instructions of the Court and you go back and review in your mind, and in your discussion, all the testimony that has been presented, and when you particularly pay attention to the instructions of the two alternative forms of proof as to what a principal is, you should find Virginia Larzelere guilty of murder in the first degree for the cold, calculated, premeditated killing of Dr. Norman Larzelere. Thank you ladies and gentlemen."
[Dir. ROA pg. 5870]

Incredulously, the State was permitted to argue to the jury that Florida law

supported a guilty verdict against Virginia Larzelere if any number unindicted co-conspirators participated in the murder of Dr. Larzelere, and that all of their acts were the acts of Ms. Larzelere. The State argued that she knew that the murder would take place as shown by her nervousness and cell phone contacts with alleged unindicted co-conspirators, therefore she was guilty. As much as a stretch of imagination that takes, it was unconstitutionally impermissible for the State to make that argument because the indictment was limited to participation by Virginia and Jason Larzelere.

The indictment was for first degree premeditated murder, therefore it was improper for the jury to be instructed on a theory of conspiracy. Perhaps the most suitable crime for which Virginia Larzelere is alleged to have committed is solicitation for murder, but this was not charged. As case law points out, there is no crime of attempted conspiracy to commit murder. In the case at bar, although the allegations may fit the crimes of several counts of solicitation to commit murder, these were not charged and should not have been instructed. In Hutchinson v. State, 315 So.2d 546 (Fla. 2d DCA 1975), the court held that there is no such crime as attempted conspiracy to commit murder. Because the receiver of the solicitation in Hutchinson never agreed to carry out the act, the court held there could be no conspiracy. That follows the general law that if two people come to an agreement to commit a crime, and one is a police officer who is undercover and feigning agreement, a charge of conspiracy cannot be sustained. King v. State, 104 So.2d 730 (Fla. 1957). In Hutchinson, the court cited to Gervin v. State, 371 S.W. 2d 449 (Tenn. 1963) which held that criminal solicitation does not constitute an

attempt. In the case at bar, the acts of which Virginia Larzelere are accused do not fit the crime of premeditated murder, rather solicitation at most. There is no action, or *actus reus,* that Virginia Larzelere took to assist in the actual murder of Dr. Larzelere, therefore she cannot be a principal to the murder, as was the case in Roby, Id.. Furthermore, because the State argued that Virginia Larzelere conspired with individuals other than Jason Larzelere to commit the murder, glaring constructive amendments to the indictment should void the conviction.

Contrary to the lower court's Order at ROA Vol. 21, pp. 3379-3380, it is immaterial that Ms. Larzelere was not actually charged with conspiracy. The jury convicted her based on a theory of conspiracy after being instructed on the charge of conspiracy. In the alternative, one cannot know for sure under which theory the jury convicted, therefore relief must be granted. In fact, the State specifically urged the jury to consider both theories at the close of their argument. Virginia Larzelere is entitled to a favorable merits ruling on this particular claim, either pursuant to this Initial Brief or on Habeas Relief due to the ineffective assistance of appellate counsel.

The Procedural Bar

The lower court erred in finding this claim procedurally barred. This claim constitutes fundamental error and should have been addressed by the lower court.

The case of Stirone v. The United States, 361 U.S. 212 (1960) holding that constructive amendments to an indictment are *per se* prejudicial and thus warrant relief, has not been reversed, and remains good case law. In the instant case, the trial attorneys

actually objected to the notion of instructing the jury that Ms. Larzelere could be found guilty on a theory of conspiracy that involved her conspiring with someone other than Jason Larzelere to commit the murder. The direct appeal attorney failed to raise this critical issue involving a constructive amendment to the indictment, and therefore, Ms. Larzelere was provided with ineffective assistance of counsel during her direct appeal.

The lower court erred in holding this claim procedurally barred. The lower court erred further in finding this claim "misplaced" just because Ms. Larzelere was not officially charged with conspiracy. The jury was instructed on conspiracy, and that was obviously the state=s theory of the case. There is state case law to suggest that this type of claim is so fundamental that it should never be procedurally barred. In the case of Hodges v. State, 878 So.2d 401 (Fla. 4th DCA 2004), the trial court expanded the definition of kidnapping in the jury instructions beyond what was charged in the information (although the standard jury instruction on kidnapping was read, the actual information failed to allege every element that was contained in the standard jury instructions). Trial counsel failed to object to the expansion/standard jury instruction, and appellate counsel failed to raise the claim on appeal. It was initially ineffective for trial counsel to fail to make an objection. Arguably, because the error was not preserved at the trial level, appellate counsel should not have been faulted for failing to raise an issue that was not preserved at the trial level. The Fourth District Court of Appeal nonetheless granted relief notwithstanding the obvious procedurally bars. In the case at bar, trial

counsel *did* object to the instructions, yet appellate counsel inexplicably failed to raise this vital issue.

Ms. Larzelere suggests that the error is so basic and fundamental that she was not even charged with the correct crime. The jury was instructed on a completely different crime not listed in the indictment, and she was convicted of an unindicted crime. Ms. Larzelere was indicted for first degree premeditated murder under F.S.A. 782.04. Under the state=s theory of the case at trial, she should have actually been charged with principal, solicitation or conspiracy to murder under F.S.A. Chapter 777.011 or 777.04.

The lower court failed to acknowledge or address any of the following case law cited as supplemental authority for her claim XVI: United States v. Narog et al, 372 F. 3d 1243 (11th Cir. (Fla.) 2004) (held, it is per se reversible error when essential elements of offense contained in the indictment are altered by jury instructions so as to broaden possible bases for conviction beyond what is contained in indictment), Griffis v. State, 848 So.2d 422 (Fla. 1st DCA 2003) (expanding the definition of a crime beyond that which is charged in the information, resulting in a conviction of a crime not charged, is fundamental error), Concepcion (et al) v. State, 857 So.2d 299 (Fla. 5th DCA 2003) (erroneous jury instructions constituted fundamental error, and claim was not barred by the contemporaneous objection rule), Dixon v. State, 823 So.2d 792 (Fla. 2d DCA 2002) (reversible fundamental error found where defendant=s jury was instructed with language not contained within the information), Zwick v. State, 730 So.2d 759 (Fla. 5th DCA 1999) (convictions reversed where general verdict made it impossible to determine

whether jury found defendant guilty of uncharged acts), Jeffries v. State, 849 So.2d 401 (Fla. 2d DCA 2003) (held, it is fundamental error to instruct the jury on a crime not charged in the information, the resulting verdict is a nullity), and United States v. Bobo, 334 F. 3d 1076 (11th Cir. 2003) (insufficiently-pled indictment requires reversal; indictment not framed to apprise defendant, with reasonable certainty, of nature of accusation against him is defective, even if it follows language of statute). It is clear that in the case at bar, the indictment contained defects so serious and was so vague, indistinct and indefinite that the conviction cannot be upheld. Due to the faulty indictment, Ms. Larzelere was not apprised with reasonable certainty of the nature of the accusations against her, and was found guilty of conspiring with unknown individuals not listed or noticed in the charging document. *See also* Cabrera v. State, 890 So.2d 506 (Fla. 2d DCA 2005) (held, trial court's unobjected-to administration of jury instructions on conspiracy offenses with which defendant was charged, by including "and/or" conjunction between defendant's and codefendant's names as to elements State was required to prove beyond reasonable doubt, was fundamental error, as jury could have convicted defendant based solely upon a conclusion that codefendant's conduct satisfied an element of one of the offenses; a defendant has the right to have a trial court correctly and intelligently instruct the jury on the essential and material elements of the crime charged and required to be proven by competent evidence).

If the jury is going to be instructed on a theory of conspiracy, the terms of the conspiracy need to be sufficiently defined in the indictment. In other words, the

instructions need to be limited to the participants listed in the indictment. Otherwise, a defendant is in jeopardy of being convicted of an uncharged crime, she lacks notice of the crime charged, and her due process rights are violated. Attorneys Howes and Wilkins defended this case on the theory of "Jason Larzelere was not the shooter," only to learn just prior to closing arguments that the state need not prove that Jason Larzelere was the shooter [Dir. ROA, pg. 5773, ROA Vol. 18, pg. 2921]. The prejudice here is obvious, and case law even holds that prejudice is presumed in these types of cases.

If this claim is in fact procedurally barred, Ms. Larzelere asks that the claim be considered in her Petition for Writ of Habeas Corpus.

ARGUMENT II

THE LOWER COURT ERRED IN DENYING MS. LARZELERE'S CLAIM III CONCERNING NUMEROUS CONFLICTS OF INTEREST IN HER REPRESENTATION; SPECIFICALLY: WILKINS' DUAL REPRESENTATION OF CO-DEFENDANTS, FINANCIAL MISDEALINGS INCLUDING TAX EVASION AND FAILURE TO REPORT LEGAL FEES AT THE TIME OF THE LARZELERE CASE, FAILURE TO CONSULT ANY EXPERTS, AND ABUSE OF ALCOHOL, COCAINE, AND METHAMPHETAMINE.

Standard of Review.

This Court reviews legal questions de novo and gives deference to the circuit court's findings of fact. Reichmann v. State, 777 So.2d 342, 350 (Fla.2000).

Ms. Larzelere was denied her right to the effective assistance of counsel, thus her rights under the 6th and 14th Amendments were violated. The lower court's Order failed

to adequately address the numerous conflicts of interest that trial counsel was operating under. Seldom does a capital case in criminal postconviction involve an attorney who has never handled a capital case before, who must resort to misappropriating and selling a client's boat to obtain money to cover expenses and costs in the case, who is drinking extreme amounts of liquor throughout the pre-trial preparation stages and the trial proceedings, who is ingesting gross amounts of cocaine and methamphetamine at the same time, who spends time filing false tax returns and responding to serious bar complaints rather than preparing for closing arguments[1], who lies to a grand jury following the trial concerning his financial misdealings, and who resigns from the Florida Bar before he is shipped to federal prison for his wrongdoings committed at the time of the capital case. This Court cannot have confidence in Ms. Larzelere's guilt phase verdict just as the lower court did not have confidence in her sentence of death. Ms. Larzelere suggests that the recommendation for death by the slimmest of margins (7 to 5) in this case, which was followed by the presentation of absolutely no evidence in the penalty phase, illustrates that the jury had residual doubt about Ms. Larzelere's guilt. Her alleged co-conspirator, Jason Larzelere, was later acquitted of this murder. Had Jack Wilkins been operating as a conflict-free and competent attorney, Ms. Larzelere would have been acquitted due to the circumstantial nature of this case that was sinisterly bolstered by the testimony of

[1]The misdealings in the Karen Joiner bar complaint ultimately served as a basis for Wilkins' federal conviction and prison sentence (see PC EH Exhibit 6).

disingenuous, immunized, unindicted, alleged co-conspirators, one of whom committed suicide after testifying at the trials.

Numerous witnesses testified as to the drinking habits of Jack Wilkins. The following rhetorical question begs to be asked: How can one adequately prepare for a first degree murder trial when one is drinking vodka throughout the morning and afternoon, and whiskey into the night? The record of the evidentiary hearing is full of references to the heavy drinking that Jack Wilkins was engaged in during the time he represented Virginia Larzelere. As a result of heavy drinking, cognitively Jack Wilkins was not functioning at a sober level. As a result, Jack Wilkins made errors in judgment that negatively affected the outcome of the trial. The following is a recipe for disaster: an inexperienced, financially insecure, tax-evading, alcoholic attorney representing a death penalty client whose primary goal was to collect life insurance premiums, minimize costs, and maximize his own financial gain.

Psychiatrist/Substance Abuse Counselor Dr. Richard Seely was called by the defense at the evidentiary hearing and was qualified as an expert in the areas of addictions and substance abuse. Dr. Seely reviewed numerous pre-evidentiary hearing depositions and selected testimony from the evidentiary hearing, and concluded that more likely than not Jack Wilkins was an alcoholic (ROA Vol. 50, pg. 7873), and that if Jack Wilkins failed to adequately investigate the case, that failure could have been caused by his alcoholism (ROA Vol. 50, pp. 7873-7874). During the evidentiary hearing, and by his own admission, it became clear that Jack Wilkins was a problem drinker:

> Q: During the point in time that you were representing Virginia Larzelere, about May of '91, did you ever drink in your office?
> A: On occasion.
> Q: What did you drink in your office?
> A: If it was in the**B**noon and I had some people over and we were going to have a cocktail before we went and played golf, I probably had a Bloody Mary. In the evenings, I sometimes had some people in just to sit down that were friends, lawyers, and we were discussing upcoming things. I would offer them a drink and whatever anybody had. I had a little bar that I had built into my office.
> Q: You had a bar in your office?
> A: Well, I say a bar, I called it a bar. It was just a little cabinet that was in there for entertainment in my office.

[ROA Vol. 35, pg. 5696]

Rather than investigating the Larzelere case, Wilkins was regularly drinking vodka at noontime and preparing for a round of golf. Dr. Richard Seely noted that during his representation of Virginia Larzelere, Jack Wilkins was consuming very large amounts of alcohol. Dr. Seely opined that Jack Wilkins was likely suffering cognitive difficulties:

> ...But more globally, such as an individual who was drinking these kinds of quantities of alcohol on a regular basis, let's say, even on the low side of about half a liter a day of alcohol, though this appears closer to a liter, we find that in impaired professionals, where we measured neuropsychologically, regularly, their level of functioning, we find great impairment in their cognition, their thinking, their executive functioning, their ability to make decisions, fluctuations in their mood....In these types of individuals, we find neurocognitive impairment at the levels of operating at 70 to 80 percent of what their normal functioning is when retested after at least three to six months of sobriety.

[ROA Vol. 50, pp. 7863-7864]

And further:

> ....If, indeed, he was drinking at such levels, it would be fair to say that he was not functioning optimally, that he would not have a global, an adequate global view to optimally orchestrate strategies of defense. We certainly may surmise that at times, he may not have given adequate attention, adequate time, adequate preparation for the case if he were spending his this much time drinking or being intoxicated or withdrawing from alcohol.

[ROA Vol. 50, pg. 7867]

The above passages show that at the time Jack Wilkins represented Virginia Larzelere, he was cognitively impaired due to regular consumption of large amounts of alcohol. The prejudice is clear. This impairment can attribute for the lack of investigation and preparation on the case which ultimately led to Virginia Larzelere's conviction and death sentence.

On cross examination, the state attempted to call into question the exact amount of alcohol that Jack Wilkins was drinking. The following exchange occurred at the evidentiary hearing:

> Q: You testified, Doctor, that—and I believe I got this right—that your opinion was that Mr. Wilkins was drinking about one liter of vodka per day. Is that what you said?
> A: I, at times, said between a half and one liter of vodka per day, given the report that 1.75 litres was being purchased approximately every other day.
> Q: And who reported that 1.75 liter vodka bottles was being purchased approximately every other day?
> A: The office bookkeeper.
> Q: That would be Gladys Jackson?

A: Yes.
Q: Can you identify or locate that for me in any of the records that you have, sir?
A: She references, on page 29, line 23, 1.75 liters**B**bottles.
The Court: I'm sorry. You're referring to what, again?
A: I'm sorry. To the deposition of Gladys Jackson.
The Court: Dated?
A: Dated May 1st, 2002. On page 34, line 19,
[Q] "Did he ever have you or someone of the office staff go out and buy him liquor or run errands?
[A] Sure, go to the liquor store, sure.
[Q] Okay. Did you typically do that?
[A] Occasionally, I would do it, whoever was available.
[Q] Later, do you know how much? Well, if you were buying the big 1.75 liter bottles, about how frequently would the liquor be replaced?
[A] Depending on if he took it home with him, you know, once or twice a week. But sometimes he'd leave the office and he'd just take the bottle with him."
So I think that's where I got the impression, if it were twice a week and there are five days in a week, that every other day or every third day, somebody would be getting a bottle for him.

[ROA Vol. 50, pp. 7879-7881]

Jack Wilkins did not provide effective representation for Virginia Larzelere. His actions and inactions fell far below the minimally accepted standards for capital criminal defense. After hearing the amount of alcohol that Jack Wilkins regularly consumed, and hearing how he would leave the office early with his 1.75 liter bottle of vodka in hand, no one could reasonably say that they would want Jack Wilkins to represent them on a criminal case. Jack Wilkins was not fit to be an attorney at the time of the Larzelere case, and his actions and criminal activity at the time of the Larzelere case would surely warrant disbarment. As such, this Court cannot have confidence in the verdict.

The state would attempt to argue that Jack Wilkins' reputation of a heavy drinker was based on pure rumor and innuendo. This is far from the truth. Jack Wilkins admitted that he had a bar in his office, and yes, he did drink at noon. Gladys Jackson, the office bookkeeper, regularly observed Jack Wilkins pouring himself liquor drinks in his office in the morning and into the afternoon at the time of the Larzelere case. The liquor stock in the office was replenished at Jack Wilkins' direction twice per week. Court reporter Kimberly Fletcher, his girlfriend at the time of the Virginia Larzelere case, testified that Jack Wilkins would drink vodka in the morning and afternoon, then switch to whiskey in the evening [ROA Vol. 41, pg. 6491]. Patsy Antley went to lunch with Jack Wilkins during the trial, and observed him "drink his lunch." [ROA Vol. 38, pg. 6129]. Jeanette Atkinson and her husband smelled liquor on Jack Wilkins breath during a pre-trial hearing [ROA Vol. 38, pg. 6028]. Dorriejean Muller smelled liquor emanating from Jack Wilkins during the trial [ROA Vol. 38, 6078]. Attorney Jonathan Stidham knew Jack Wilkins to be a heavy drinker, and during the time of the Virginia Larzelere case, he observed him shaking in the court and wondered if Jack Wilkins was suffering from alcohol withdrawal [ROA Vol. 39, pg. 6242]. Attorney Kent Lilly knew of Jack Wilkins reputation for being a heavy drinker [ROA Vol. 35, pg. 5738]. Even Assistant State Attorneys Dorothy Sedgwick and Less Hess smelled alcohol on Jack Wilkins breath during the trial [ROA Vol. 41, pg. 6474]. They failed to disclose this fact until weeks before the evidentiary hearing. This should have been brought to the Court's attention during the trial. Ms. Sedgwick showed concern during the trial that she did not want the

conviction and sentence to be overturned, and that is why she brought to the court's attention the Koon case regarding waiver and refusal of mitigation. The smell of alcohol on Jack Wilkins' breath should definitely have been brought to the Court's attention. Perhaps Dorothy Sedgwick did not disclose the fact that she smelled liquor on Jack Wilkins' breath because she did not want to jeopardize the reliability of an anticipated conviction. Virginia Larzelere's conviction and sentence were a result of Jack Wilkins: alcohol abuse and dependence.

The lower court erred in failing to consider the gravity of Wilkins' substance abuse. The lower court concluded that Wilkins' substance abuse did not prejudice Ms. Larzelere [ROA. Vol. 21, pg. 3360]. In less than one page in its Order, the lower court dismisses Wilkins' methamphetamine use as not having caused prejudice to Ms. Larzelere, notwithstanding testimony and evidence to the contrary. The lower court's Order is contrary to competent and substantial evidence of prejudice. Dr. Seely testified that because of Wilkins' addiction:

> ...it would be fair to say that he [Wilkins] was not functioning optimally, that he would not have a global, an adequate global view to optimally orchestrate strategies of defense. We certainly may surmise that at times, he may not have given adequate attention, adequate time, adequate preparation for the case if he were spending his this much time drinking or being intoxicated or withdrawing from alcohol.

[ROA Vol. 50, pg. 7867]

Although the lower court addresses the information received from Dennis Harris regarding methamphetamine abuse and dismisses it as not prejudicial, the lower court fails to

reference or acknowledge the corroborating information from Ronald Bilbrey, Jr. and Bernadette D'Alvia Eady concerning Wilkins' methamphetamine and cocaine abuse [*See* affidavits of Bilbrey and D'Alvia Eady at ROA Vol. 20, pp. 3252-3259, ROA Vol. 20, pp. 3314-3317]. It is obvious that because of multiple conflicts of interest, Wilkins was not able to "optimally orchestrate strategies of defense" and he "[did] not have give[] adequate attention, adequate time, [and] adequate preparation [to] the case."

Conflicts of Interest Leading to Failure to Hire Experts

In 1991 and 1992, there was nothing "cutting edge" or "state-of-the-art" about the hiring of experts in capital murder cases. Defense EH Exhibit Number 21 was entered after the testimony of attorney Donald West was concluded. This exhibit is comprised of brochures from some of the various conferences that Donald West attended during the late 1980s and early 1990s. Ironically enough, the "Life Over Death XI" conference was held in Tampa from January 30-February 1, 1992, the same time that Jack Wilkins was in trial on the Virginia Larzelere case. One of the topics that was to be discussed at the seminar was "Getting Funds for Experts and Other Assistance." Jack Wilkins claims that he could see no area where the assistance of experts would have been useful to Ms. Larzelere. William Lasley, the attorney who took the Jason Larzelere case over from Howes and Wilkins, *sought experts in the field of 15 different areas*. *Jack Wilkins consulted absolutely no experts in the Larzelere case*. Jack Wilkins testified that he was

attempting to sell one of Ms. Larzelere's boats in order to get money for costs and expenses. He testified that there was "no way" he would ask the court to fund costs and expenses in the case given the nature of the fee contracts that were signed. The prejudice to Virginia Larzelere was clear in that Jason Larzelere was acquitted, yet Virginia Larzelere was found guilty of the same crime.

Very early on in the representation of Jason Larzelere, William Lasley had Jason declared indigent for purposes of costs and expenses, and sought the assistance of numerous experts. Dr. Myers was appointed to do a psychological evaluation of Jason Larzelere, and he found that Jason Larzelere was sexually abused and suffered from Post Traumatic Stress Disorder. Dr. Krop was unable to make this finding as to Virginia Larzelere because he was brought into the case too late, and was provided with insufficient case materials.

At the very least, Jack Wilkins should have sought the assistance of a mental health expert or an expert in concrete testing. Some of the state's evidence against Ms. Larzelere included the following: "[T]he appellant [Virginia Larzelere] directed the two witnesses [Steven Heidle and Kristen Palmieri] to dispose of a shotgun and a .45 handgun by having them encase the guns in concrete and dump them into a creek." Larzelere v. State, 676 So.2d 394, 398 (Fla. 1996). At the evidentiary hearing, an FBI report regarding testing of concrete samples was introduced as Defense Exhibit Number 22. Testimony concerning the testing was not placed before the jury. This report was *not* introduced at trial due to the ineffective assistance of counsel. Law enforcement, in a

search for further circumstantial evidence against Virginia Larzelere, requested that Florida Department of Law Enforcement test the concrete which was used to encase alleged murder weapons with concrete found in a cooking pot in Virginia Larzelere's basement. Apparently FDLE could not perform the tests, so the samples were forwarded to the FBI for testing.

In a nutshell, the FBI report concluded that the concrete samples used to encase the weapons did not match the concrete mix in Ms. Larzelere's basement because of several differences, primarily differences in color and particle size distribution. Yet, the FBI report attempted to explain away, in a light most favorable to the state, why there may be differences in the two concrete mixtures. This would advance the state's theory that a match could not be totally ruled out, and would put the testing results in an ambiguous posture rather than an in exculpatory posture. This evidence is analogous to law enforcement testing weapons for fingerprints, and finding that a certain suspect's fingerprints were not found on the weapon. By analogy and through law enforcement bias, the report writer may try to explain that although there was not a match in the fingerprints lifted and tested, a match and identification could not be totally ruled out.

Jack Wilkins failed to utilize this vital exculpatory information not just to impeach Steven Heidle and Kristen Palmieri, but to distance Virginia Larzelere from the concrete-encased weapons found in Pellicer Creek. Heidle and Palmieri testified at trial that the concrete was mixed at Virginia Larzelere's house in her basement, and the weapons were encased in concrete there before Heidle and Palmieri dumped them in Pellicer Creek, at

Virginia Larzelere's direction. Any effective and competent attorney would have presented this scientific exculpatory rebuttal information to the jury. The state obviously did not call the FBI scientist who tested the concrete as a witness because this information would have hurt the state's case against Virginia Larzelere. Jack Wilkins should have, at the very least, called the FBI scientist who performed the test. Since the FBI report showed bias and an attempt to explain away the differences in concrete, Jack Wilkins should have consulted and called his own expert with knowledge of the concrete testing procedures. Because he failed to do so, the jury did not hear the exculpatory evidence, and the members of the jury were left with the impression that Heidle and Palmieri were telling the truth when they testified that the weapons were encased in concrete at Virginia Larzelere's house.

At the evidentiary hearing, the defense called chemistry expert John Whelan from the University of South Florida who explained the results of the FBI testing, and who explained that if the concrete was different, the concrete was different, and that should be the end of the discussion. The defense should have ensured that the jury hear this exculpatory information. The impression was left with jury that the weapons were encased in concrete Ms. Larzelere's home. That was not the case. Had the defense presented the testimony of FBI agents who conducted the concrete testing, or had the defense consulted and hired an expert in this area and called him to testify regarding the non-match, Ms. Larzelere would have been acquitted. In its Order, the lower court failed to address the testimony of John Whelan. The defense clearly put on expert testimony at

the evidentiary hearing concerning the concrete that should have been put on at trial. The Court's Order erroneously states the following:

> Defendant presented testimony from Jason's counsel that he would have hired the same type of experts if he had represented her. See generally Evidentiary Hearing Transcripts, May 20, 2002**B**Vol. II at 118-68. However, this testimony does not show what these experts would have opined regarding the facts and circumstances in Defendant=s case.

[ROA Vol. 21, pg. 3363].

Ms. Larzelere informed the lower court through the testimony of John Whelan what a concrete expert for the defense should and would have testified to at trial, and the lower court clearly ignores the substance of his testimony. The lower court's Order was wrong to suggest that the substance of any expert testimony was not presented. In its Order, the lower court erroneously failed to assign the appropriate evidentiary weight to the numerous conflicts Wilkins was operating under, and refused to recognize the value of vital exculpatory information available to defense counsel that was overlooked by trial counsel. Ms. Larzelere submits that due to drug abuse, conflicting interests of greed and an unwillingness to invest the necessary funds for costs in this capital case, she was clearly prejudiced by trial counsel.

The lower court erred in holding the following:

> "Wilkins testified to reasonable trial strategy as the basis for not hiring these types of experts. See Evidentiary Hearing Transcripts, May 14, 2002**B**Vol. III at 433-450. Such intended, strategic decisions will not be second guessed by this Court."

[ROA Vol. 21, pg. 3363].

First of all, in the above-cited 17 pages of Wilkins' testimony, which are now found at ROA Vol. 36, pg. 5789-5806, Wilkins *did not* provide a reasonable strategy for "not hiring these experts." Wilkins *never even consulted an expert pre-trial*. A decision not to hire an expert cannot be deemed strategic unless and until such an expert has been consulted and the issue has been investigated. Wilkins' failure to investigate this case cannot be classified as "intended and strategic." Had Wilkins provided a disingenuous explanation for his failure to hire experts, such post hoc rationalization, and characterization of his failure to investigate and invest the necessary funds in the case, or seek assistance in obtaining the necessary funds for experts as strategy, could easily be rejected. This is the type of post hoc rationalization and ineffective assistance of counsel that has been rejected by Wiggins v. Smith, 539 U.S. 510 (2003). But, we do not even get to that point because Wilkins offered no strategy on the claim of failure to hire experts, contrary to what is stated in the lower court's Order.

A closer look at Wilkins' testimony, cited by the lower court, and found at ROA Vol. 36, pg. 5789-5806 is necessary here. Concerning Wilkins' failure to hire experts, records concerning bankruptcy claims submitted by Wilkins were introduced as Defense EH Exhibit 3, and reveal that Wilkins' recovery of legal fees was contingent on recovery of insurance monies in the civil case.

> Q: Okay, I want to go to Question 5 of the interrogatories, which is actually Page 6 of this material. Are you there?

> A: I'm getting there. Okay.
> Q: Okay. The question was: What hourly rate did you charge the debtor for your services? If you agreed to provide services on a contingency basis, describe the fee with specificity.
> Answer: None. Collection of legal fees owed was contingent on insurance monies.

[ROA Vol. 36, pp. 5791-5792]

The testimony continues and Wilkins says that any experts would have to be hired out of his pocket, and that he would not approach the county and ask for financial assistance in the case, as he has never done so. The lower court acknowledges in its Order that Wilkins' bookkeeper at the time of the Larzelere case testified that "money may have been tight." ROA Vol. 21, pg. 3363. The problem in this case was that the decision whether to consult and hire defense experts was strategically made with only financial considerations in mind, not exculpatory considerations. Wilkins was unwilling to consult the necessary experts in Ms. Larzelere's case because it would drain his already financially strained law office. We must consider the following testimony in light of a man evading financial reporting requirements of the federal government:

> Q: Okay. Now, are you going to seek an insurance expert who's going to enter into this contingency fee with regards to the Larzelere insurance policies? What are you going to do?
> A: Well, assuming you [sic] understood this question, the first part of your question, before**B**when I answered it before, I wasn't ever going to be hiring an expert to do that, anyway, in a case like that, your hypothetical case.
> Now, assuming that I really decided I want to waste some money and I'm going to get an insurance expert to come look at that, I would not ask him to sign anything. I probably would have paid him out of my pocket.

Q: It's going to cost you personally to consult and hire an expert, right?
A: Well, no. I probably know enough insurance experts that I could have gone to one and say, Look take a look at this thing and tell me what the situation is. And if I decided I was going to hire him or employ him as a witness in the case, then I would make other financial arrangements.
Q: What arrangements might you make?
A: Listen, this has gotten way past hypothetical. I don't have any idea what I might have made [sic] on something hypothetically that I never would have done. Q: Are you going to go to ask the Court, Hey, we need an expert here, can we have Volusia County pay for this expert?
A: Probably not. But I've never been there. I've never done any such thing as you just described and never would.
Q: Okay. What about**B** let's go to the testimony about these guns being encased in the concrete and dumped in the river or something.
A: Yeah.
Q: Okay. Let's say you want to refute the testimony of Steven Heidle and Kristen Palmieri when they say the concrete was dumped in a certain date. You might want to ask an expert in marine biology to evaluate the evidence, evaluate the concrete, do some tests on it and see, with regards to the algae that's on that concrete, Can you tell me how long that piece of concrete has been in the water? Do you think you might want to consult an expert on that issue?
A: If I had**B** you, know, hypothetically, if I had, what's your next question? I mean, if I decided I wanted to consult an expert, what?
Q: Okay. Are you going to-
A: What would I do?
Q: Are you going to petition this Court to have Volusia County pay for such an expert?
A: Well, now, that one I can answer, because in a case where there might be a viable part of expert testimony and in the case of experts I know how much money they charge. In your hypothetical, I probably would have filed a request for the Court to examine the cost and the hiring of this expert for purposes of paying the fee and let the Court make its own determination.

[ROA Vol. 36, pp. 5800-5802]

Jack Wilkins' answers at the evidentiary hearing regarding his strategy and plans for obtaining funding for costs in this case were wide-ranging. At one point he said the money would come out of his pocket. In the above passage he seems to be saying that he would in fact petition the court to have the county pay the costs. And at another point he says he would never petition the court to have the county pay for the costs given the nature of the contracts involved in the case. There is evidence to support grave financial conflicts of interest, as well as prejudice, and the lower court erred in denying guilt phase relief in light of the evidence presented at the evidentiary hearing.

The FBI report stated the following:

> The Q1 and K1 cement is different in color and exhibited some differences in particle size, distribution, and mortar composition. However, the K1 cement was exposed to potentially extreme weathering conditions which can affect the comparative properties of the cement. Although it is unlikely that weathering is possible for the differences observed between the Q1 and K1 cements in this case, it cannot be totally eliminated as a possibility. Both Q1 and K1 cements are typical of those marketed in the south or southeast regions of the United States, although cement can be transported out of region.

[Defense EH Exhibit #22, the FBI Report]

A request was made by law enforcement to analyze two samples of concrete to see if they matched. If the samples match, law enforcement has additional solid circumstantial evidence against Virginia Larzelere. But, the concrete samples did not

match as evidenced by the report. Problematically for the defense at trial, the FBI report was somewhat equivocal with regards to whether there was a match between the concrete that encased the weapons and the concrete mix found in Ms. Larzelere's home. That is why Wilkins should have consulted an expert on this crucial matter.

Detective David Gamell was unavailable for the evidentiary hearing, so his deposition was taken after the evidentiary hearing, on June 11, 2002. The parties stipulated to enter the video deposition in lieu of live testimony. Interestingly, when Detective Gamell was openly asked what evidence may have been recovered from Virginia Larzelere's house which indicated that she was guilty, he mentioned that law enforcement retrieved concrete from Virginia Larzelere's basement. He stated that the concrete mix located in Ms. Larzelere's basement matched the concrete that encased the weapons found in Pellicer Creek. He stated that the concrete samples were tested, and there was a match:

> Q: Do you remember anything of significance which you located there in the home?
> A: Oh, yeah, we found concrete, which the concrete was consistent with the concrete that was used encasing the shotgun, the murder weapon. We found, you know, concrete in the basement.
> Q: If you can explain the concrete that you found there in the home. Can you describe what type of concrete that was and the situation with that?
> A: Well, some of it was, you know – there's a pot I remember had concrete in it that had been previously mixed up. There were other lumps of concrete. I believe we did a - we sent it off and had it lab tested in which they said it was consistent with the concrete used to encase the weapon.

[Video Deposition David Gamell, pg. 10, 6/11/02]

Had expert testimony been presented at trial to refute this claim, there is a strong possibility that Virginia Larzelere would have been acquitted.

Jason Larzelere's attorney, William Lasley, remembered that the concrete located in Virginia Larzelere's house did not match the concrete used to encase the weapons. The following testimony was elicited during the evidentiary hearing:

> Q: Now, we discussed the issue of-Mr. Lerner discussed this with you, about whether or not you had hired an expert in construction or cement formation. Do you remember that?
> A: Yes.
> Q: Okay. What was your understanding about the cement that was found in the water that encased the gun versus it being tested to possibly match the concrete found in Virginia Larzelere's home?
> A: That it didn't match.
> Q: Now, would you have brought this up to the jury if you represented Virginia Larzelere?
> A: Yes.
> Q: Would you have consulted and presented the testimony of such an expert in construction on that issue?
> A: It wouldn't have been an expert in construction. It would have been an expert in probably something like metallurgy or chemistry, but yes. I would have sought out such an expert. I would have asked to have her declared indigent for costs. I would have sought out such an expert. And I would have presented as much evidence as I could on that issue because it got the gun away from Virginia, and it got it into Heidle's hands.

[ROA Vol. 44, pp. 7003-7004]

Jack Wilkins failed to ensure the reliability of the adversarial testing process of the criminal justice system by failing to introduce exculpatory evidence.

It became clear that Wilkins' law office did not have the financial stability to invest the necessary capital into the Larzelere case. During the testimony of Jack Wilkins' office bookkeeper, Gladys Jackson, she described the financial state of the office during the time of the Virginia Larzelere case:

> Q: To your knowledge, was it basically Jack Wilkins and his office was responsible for the paying of costs and expenses?
> A: Uh-huh (affirmative), yes, sir.
> Q: Okay. Did the office seem to be, during the Virginia Larzelere case-what was the state, financially, of the office going into that Virginia Larzelere case?
> A: Oh, I think we were doing fine. You mean money-wise?
> Q: Uh-huh.
> A: I think we were doing fine until we started having the -
> Q: The trial?
> A: About the expenses and Mr. Wilkins was in trial all that time, so therefore we didn't have new clients coming in that he could meet with-
> Q: Uh-huh.
> A: -most of the time, so-
> Q: I think you said during your deposition that by the time the trial was over the law firm was broke?
> A: I said that?
> Q: Uh-huh.
> A: Well, we were low on money, yeah.

[ROA Vol. 35, pp. 5592-5593]

Jack Wilkins was experiencing financial difficulties with his law firm, and he was therefore unwilling to make the necessary investments of money on the defense of Virginia Larzelere.

Jack Wilkins, at the time that he represented Virginia Larzelere, was engrossed in financial misdealings which adversely affected his ability to competently represent Ms.

Larzelere. The financial misdealings started before he represented Virginia Larzelere, and the misdealings continued to the point in time when Ms. Larzelere was ultimately sentenced to death in May of 1993. In 1995, the federal government filed a sixteen count indictment against Jack Wilkins, and he was forced to resign from the Florida Bar when he pled guilty to all sixteen counts. The most troubling aspect of this is that Jack Wilkins was involved in specific financial misdealings during the time of the Virginia Larzelere case that ultimately led to his having to resign from the Florida Bar. Even more troubling, with regards to the Karen Joiner Florida Bar complaint, Jack Wilkins was responding to her allegation that he wrongfully kept a $25,000 retainer that she had given him in October of 1991. Jack Wilkins took the time to respond to the Bar complaint in the middle of the Virginia Larzelere trial. William Lasley testified that during the trial of Jason Larzelere, he did not feel that he had even the time to get a haircut due to the gravity and seriousness of the case. Jack Wilkins clearly was not focused on the Larzelere case.

The Virginia Larzelere trial began in late January of 1992. The guilt phase of the trial ended in a one hour guilty verdict on February 24, 1992. The initial complaint letter from the Florida Bar against Jack Wilkins was dated February 14, 1992. The letter from the Bar requested that Jack Wilkins respond to Karen Joiner's allegations within 15 days. Instead of requesting an extension of time due to the fact that he was in the middle of his first capital murder trial, Jack Wilkins scrambled to answer the complaint in his letter dated February 21, 1992. Jack Wilkins delivered his closing arguments in the guilt phase of the trial on February 24, 1992. Jack Wilkins' financial misdealings came to a head

right in the middle of the Virginia Larzelere trial, and he was not focused during the trial or the pre-trial preparation phase. The sixteen count federal indictment reflects that in late 1991 Jack Wilkins was spending most of his time meeting in parking lots with drug runners and evading financial reporting requirements [See Defense EH Exhibits 5 and 6, the Federal Indictment, Plea Agreement, and Bar Complaint]. The testimony of Gladys Jackson, the bookkeeper, illustrates that Jack Wilkins regularly was drinking hard liquor in his office in the morning and afternoon, and he would regularly leave the office with bottle in hand. Jack Wilkins is a convicted perjurer who cannot be believed when he claims to have adequately investigated and prepared for Virginia Larzelere's trial.

Jack Wilkins was ultimately indicted and pled guilty to tax evasion for the years 1991 and 1993, the years that Jack Wilkins was hired by Virginia Larzelere, and the year that Virginia Larzelere was sentenced to death. Jack Wilkins' office fell like a house of cards with documented financial misappropriation starting as early as 1989, and continuing until 1993. In 1991, when Jack Wilkins took on the representation of Virginia Larzelere, he was heavily involved in a pattern and practice of financial misdealing and misappropriation. Rather than do what he should have done, which is to have Ms. Larzelere declared indigent for costs from the beginning so that the defense could have been adequately funded, he waited until the jury had convicted her and recommended a death sentence. Jack Wilkins did not pursue the indigency route because he was always awaiting payment on the insurance proceeds, and he wanted to limit the number of future claims on the money so as to maximize his own recovery. Volusia County would have

been another entity to stake a claim on the speculative insurance policies, and that provides a reason why Jack Wilkins failed to seek the county's assistance.

In October of 1991, Jack Wilkins was involved in the criminal case of Ronald Bilbrey, Sr. that concerned Methamphetamine trafficking. In that case, on October 8, 1991, Jack Wilkins received a $25,000 retainer. One week later, on October 15, 1991, Jack Wilkins received an additional $20,000 on the case. The Wilkins law office account card reflected that only $5,000 was received on the Bilbrey case, although in fact, $45,000 had been received. One must wonder if these under-reported funds were being used to fund the Larzelere defense fund.

Evidentiary Hearing Exhibit Number 6 (the Second Superseding Indictment) details the sixteen count indictment against Jack Wilkins. Count Fifteen, found on page 16 of the indictment, reflects that on February 10, 1992, Jack Wilkins willfully and falsely subscribed to his 1991 tax return, and falsified his earnings for the year 1991. That shows that while Jack Wilkins was in the middle of trial in the case of Virginia Larzelere, he was subscribing to a false tax return and perjuring himself on his tax form. Tax forms are not due until April 15. There was no reason for Jack Wilkins to sign and submit his tax form early in the middle of his first capital trial. One possible reason why he filed early was to cast any suspicion away from himself by early filing. Again, William Lasley testified that while he was in the trial of Jason Larzelere, his hair became long because he felt he did not have the time to get a haircut. Apparently Jack Wilkins felt like he had the time to subscribe to a false tax return in the middle of his first capital murder trial. Jack

Wilkins was unable to focus and provide a competent defense for Virginia Larzelere while he was laundering money and subscribing to these false tax returns.

Evidentiary Hearing Exhibit Number 5 (the Plea Agreement, page 15) details how David Cochran gave a fee of $25,000 to Jack Wilkins on August 6, 1991, and how Jack Wilkins failed to report $9,500 of this income. Additionally, on page 16 of the document, it details how Jack Wilkins received $25,000 cash from Karen Joiner to represent her husband, Ray Joiner. Jack Wilkins reported on his 1991 tax return, that he subscribed to on February 10, 1992, that he had only received $9,500 on the Ray Joiner case in October of 1991. Jack Wilkins must have known he was in trouble because Bar complaints regarding legal fees were forthcoming, and so was federal reporting requirements (tax season). Under-reporting of legal fees coupled with documented Bar complaints concerning funds received would likely lead to an audit if his figures were contradictory. The house of cards began to fall when Karen Joiner initially wrote a letter to Jack Wilkins dated December 13, 1991, and asked him to return the retainer or a portion of the $25,000 retainer that she had given him. Jack Wilkins refused. On February 14, 1992, after Karen Joiner had filed her complaint with the Florida Bar, the Florida Bar sent Jack Wilkins a letter and asked him to respond to Karen Joiner's complaint regarding the $25,000 fee. At this time, Jack Wilkins was in the middle of the Virginia Larzelere trial. Just four days earlier, he had filed a false income tax return and under-reported the money that he received on the Ray Joiner case and other 1991 cases. Jack Wilkins' financial misdealings had been exposed to the Florida Bar, and he became

more interested in defending himself rather than Virginia Larzelere. He submitted his response letter to Karen Joiner and the Florida Bar on February 21, 1992, three days before he was to address the jury in Virginia Larzelere's closing arguments. Jack Wilkins should have requested an extension of time to respond to the Joiner allegations, but he failed to do so. As a result, the Virginia Larzelere defense case suffered. Jack Wilkins may have made the strategic choice to present very few witnesses in the Virginia Larzelere defense case due to the fact that he had to defend himself in his tax evasion case. Jack Wilkins would never admit to this, but the fact remains, he is a convicted perjurer. He arguably perjured himself at the evidentiary hearing and in his deposition when he stated that he was positive that he had Virginia Larzelere declared indigent for purposes of costs and expenses at the very beginning of the case. Virginia Larzelere was not declared indigent for purposes of costs and expenses in the beginning, and consequently, monies for costs and expenses in the defense case were not available, and the defense consequently suffered. The lower court was wrong to dismiss the financial conflict claim as conjecture and non-prejudicial.

Jack Wilkins claimed throughout his pre-evidentiary hearing deposition and throughout the evidentiary hearing that he had Virginia Larzelere declared indigent for costs and expenses in the beginning. Yet he did not seek the assistance of the county to pay for investigator McDaniel's bills. Jack Wilkins even testified that he found it "ludicrous" to have the county pay for an indigent defendant's costs and expenses:

Q: Mr. Wilkins, why did you have Volusia County pay for depositions in this case?
A: Because she was indigent.
Q: Okay.
A: She's an incarcerated defendant, no bond. She has no assets.
Q: Okay. Why didn't you have the Court pay for Investigator Gary McDaniel's bill?
A: I don't know. I don=t know why we didn't do that or that we didn't do it in some portions. I just don't know. I think-well, I do know the answer to that, now that I just thought about it. Gary McDaniel didn't want us to do that through the Court. He was to be paid by contract, the same as everybody else had and that was his decision.
Q: Gary McDaniel did not want to be paid by Volusia County?
A: Well, let me put it back this way. I didn't ask Volusia County to pay Gary McDaniel. Gary McDaniel had agreed to come into the case as a private investigator and he had signed a contract with the law firm of Stidham and whomever on the possibility of Jeanette Atkinson, his employer, receiving monies to pay him....**You know, it's always been my feeling that if there are ways for the individual defendant or the defendant's family or relatives to take care of the case when she has a private attorney, that it's almost ludicrous to come in and ask the county to pay for it.** Now, if it was absolutely necessary because we couldn't take depositions, all the depositions that needed to be taken without getting some help from the Court. But since Gary McDaniel agreed to work without that burden on Volusia County, it suited us fine. I mean, it's kind of asking me why I didn't do the right thing.
Q: Did you consult any experts on this case?
A: I'm trying to remember. You know, there were police officers involved whose depositions that we took. Some of them may have been experts on firearms or on scene reconstruction or onBand I assume you're excluding Dr. Krop. We've already talked about him. But out of the 100-and-some-odd witnesses, some of them were experts in their own field. I just don't remember who they are. If you'll give me what you're referring to as an expert in what field, I could probably give you some help.

> Q: What about expert witnesses, defense expert witnesses? I'm just asking you, did you consult-did you engage in to hire an expert witness prior to the 7-to-5 recommendation for death?
> A: We didn't hire any expert witnesses.
> Q: And you didn't consult with any expert witnesses?
> A: That I remember. I don't remember whether we did it or not, but I didn't hire any. I don't remember paying any. Because there's a difference when I consult with one in a deposition because of the witness list and one that I single out and ask him to do some specific expert witness work in his field of expertise.
> Q: Okay. You're saying that the County-it was no problem, the County was paying for your deposition costs, right?
> A: Yes.
> Q: So you could have had the Court order that Volusia County pay for any defense experts.
> A: That's correct.
> Q: And you didn't do so?
> A: No. There were no areas that I felt needed an expert witness. But that's different from you asking me did I consult with any, because some of the people whose depositions that we took that were listed by the State may have been experts in their own field. I'm just trying to make that distinction.

[ROA Vol. 36, pp. 5770-5773]

The above passage is very troubling. Jack Wilkins agrees that Virginia was indigent as she was incarcerated pending trial. He claims to have had her declared indigent for costs and expenses in the very beginning of the case, but this is false. He then says that it is "ludicrous" to ask the County to pay for costs and expenses when the defendant has family available to gather money to pay for costs and expenses. Jack Wilkins should not have been relying on Larzelere family assistance to fund the defense of this case. That is apparently what he did. The family had no real money, but that does not mean that Ms.

Larzelere was not entitled to a real defense. Jack Wilkins mismanaged this case, he made decisions and omissions based on financial considerations, and he was ineffective. This coupled with inexperience, and heavy drinking and drugging, his ineffectiveness and conflicts of interest resulted in Ms. Larzelere's conviction and death sentence.

The bankruptcy records in the case of Ms. Larzelere's sister, "In Re: Jeanette Atkinson" were entered as Defense EH Exhibit Number 3. In that case, Jack Wilkins and John Howes submitted claims for their respective legal fees, totaling nearly $600,000 collectively. Interestingly, William Lasley's legal fee was approximately $40,000 in Jason Larzelere's case. Jason Larzelere was acquitted. Virginia Larzelere was billed nearly $600,000 by Wilkins and Howes, and she was found guilty and sentenced to death. Jack Wilkins filed his claim in bankruptcy court and claimed his legal fees of $282,206.74. In the bankruptcy claim, Jack Wilkins claimed the Virginia Larzelere case costs totaled $2,982.56. Wilkins admitted at the evidentiary hearing that that figure sounded low [ROA Vol. 36, pg. 5788]. That is low. The costs in a capital case should be much higher. Perhaps only $3,000 was spent to defend Virginia Larzelere. Or, most likely Jack Wilkins was not keeping an accurate reporting of the monies that came in and went out of the case because he was so wrapped up in financial misdealings. The bottom line is that Jack Wilkins was not willing to spend the funds necessary to defend Virginia Larzelere.

On page 8 of Defense EH Exhibit 3 are interrogatories that Jack Wilkins answered in the bankruptcy case of Jeanette Atkinson. Jack Wilkins was asked and answered question 10 the following way: "Has the debtor or anyone else paid you anything for the

services provided? If so, state who made the payments, the dates they were made and the amounts." Jack Wilkins answered the question "No" on the form. At the evidentiary hearing, Jack Wilkins admitted that he answered the question that way, and then attempted to differentiate between money that he received on the case and money that was placed in his trust account:

> A: That's correct.
> Q: Jeanette did pay you money, correct?
> A: No, she did not.
> Q: I thought you stated previously that Jeanette Atkinson had given you at least $3,000?
> A: No, I did not.
> Q: To pay for your lodging?
> A: I didn't say she ever paid me anything. I said Jeanette Atkinson had deposited cost money in the trust account, which the money does not belong to me. That money was used to pay for expenses and I already told you what those expenses were.
> Q: You're saying that Jeanette deposited money in a trust account of yours?
> A: John C. Wilkins, III, trust account.
> Q: But that's not reflected here in Question Number 10?
> A: That's not what they asked in Question Number 10.

[ROA Vol. 36, pp. 5794-5795]

It is almost as if Jack Wilkins is able to re-define and re-interpret the meanings of the words "payments" and "is." Although Jack Wilkins did receive money from Jeanette Atkinson on the Larzelere case, he failed to report it in the bankruptcy interrogatories. We cannot have confidence in the outcome of the Larzelere case given Wilkins' financial misdealings because those misdealings affected the legal representation of Virginia Larzelere.

On Question 11 of the interrogatories, Jack Wilkins was asked: "Have you received any compensation other than monetary payments for the services you provided to the debtor? If so, what have you received?" Jack Wilkins answered, "A 1991 Nissan Pathfinder from Virginia Larzelere." But, he failed to mention the boat that he received. The following inquiry was pursued at the evidentiary hearing:

> Q: Okay. Where is the boat?
> A: There wasn't a boat that I received.
> Q: You received a boat from the estate, did you not?
> A: No, I did not. I was given a boat to put on the market to try and sell for Virginia**B**I mean, for Jeanette Atkinson to raise some cost money. I probably had it for two weeks. I can't even give you that. And I even put it in the water, showed it to a couple of people, gave them a ride and whatever. But before anything could happen on that boat, the bankruptcy people showed up and picked it up. Never saw it again.
> Q: Your understanding here is that you're going to take this boat, you're going to sell it and, therefore, you're going to have a little extra money for costs in this case?
> A: Money would have been given to Jeanette and she could have done with it whatever she wanted. But I'm sure she would have deposited it in my trust account for payment of expenses. At least that's what we discussed. But the money didn't belong to me and neither did the boat. I think Jeanette had the title, as a matter of fact. She had a power of attorney. And she certainly didn't know anything about selling a boat and I'm a boater.
> Q: In Question 11, why didn't you list the boat there as some kind of nonmonetary item that you received?
> A: It was no compensation to me. As a matter of fact, it cost me money because I'm the one who put gas in it.
> Q: You wanted some money to go in your trust account to pay for costs?
> A: Oh, sure. No question about it. And, of course, since that was available, Jeanette was more than happy to do that. By that particular time in this case, there was a lot of money in expenses that were out there, including Gary McDaniel.

> Q: Okay. But you say that Virginia, from the very beginning, was declared indigent for purposes of costs and expenses, right?
> A: Yes, she was.
> Q: So why not**B**rather than going through the trouble of selling the boat, getting money to put in the trust account to pay for the expenses, why not simply just go to the Court and ask them to pay for costs and expenses?
> A: I told you there were two types of costs. My contract, John's contract, Gary McDaniel's contract all provided for a fee plus costs. **There is no way that I will walk into any courtroom in the United States, having that contract signed, and ask the County to pay my costs also**. The costs that we were referring to that we asked Judge Watson to order the County to pay were the costs for preparation of the defense that were not a part of our contract.

[ROA Vol. 36, pp. 5795-5797]

The above testimony makes clear that the nature of Wilkins' fee contracts in the Larzelere case dissuaded him from approaching the court to request assistance from the county to help fund his indigent client's case. The above testimony shows also that Jack Wilkins was disingenuous while answering the interrogatories in the bankruptcy claim. It also reflects that Jack Wilkins was unlawfully taking assets from the Larzelere estate absent authorization from the probate court. As a result of imprudent and ill-advised fee contracts, needed experts were not consulted, were not hired, and as a result, Virginia Larzelere was wrongly convicted and sentenced to death.

Jack Wilkins' testimony at the evidentiary hearing cannot be believed. When asked about his federal criminal convictions, Jack Wilkins responded:

> Q: What were you convicted of?
> A: You mean how many counts?

> Q: I mean what were you convicted of?
> Q: I pled to, to my best recollection, 12 counts of money laundering, one count of obstruction of justice, one count of income tax evasion and two counts of perjury, giving false testimony before a Grand Jury.

[ROA Vol. 36, pg. 5817]

Jack Wilkins was actually convicted of two counts of tax evasion, for the years 1991 and 1993 [See Defense EH Exhibits 5 and 6]. During these two years, Jack Wilkins was retained by Virginia Larzelere, he represented Virginia Larzelere, and Virginia Larzelere was sentenced to death. Virginia Larzelere's conviction and death sentence cannot be upheld due to Jack Wilkins' financial misdealings and their effect on his representation of Ms. Larzelere. Had Jack Wilkins actually pursued declaration of Ms. Larzelere to be indigent for purposes of costs and expenses in the very beginning of the case, he could have freely hired and retained the needed experts and investigators in the case, and could have adequately funded the defense.

The lower court erred in finding the Wilkins' financial misdealings in the Larzelere case "conjecture" and therefore only a "possible conflict." [ROA Vol. 21, pg. 3360]. If Wilkins was involved in financial misdealings during the time of the Larzelere case, which he clearly was, the Larzelere case was affected, and Ms. Larzelere suffered as a result. Absolutely no experts were even consulted by Wilkins in this capital case, and that constitutes prejudicial ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984) and Wiggins, Id.

William Lasley, the attorney who represented Jason Larzelere at trial, was called to testify during the Virginia Larzelere evidentiary hearing. Mr. Lasley testified that in 1991, it was standard to file a motion to have the defendant declared indigent for purposes of costs in capital murder cases [ROA Vol. 42, pg. 6691], and that such a motion should be filed right after the notice of appearance, unless the defendant was independently wealthy. This motion was not made by Jack Wilkins until after the jury recommended that Ms. Larzelere be sentenced to death. Mr. Lasley testified that in the sequence of representation, an investigator and a psychiatrist should be appointed for the defense. Mr. Lasley testified that in first degree murder cases, state of mind is almost always at issue, and that a confidential psychiatrist is needed almost immediately to look into those issues [ROA Vol. 42, pg. 6692]. While the psychiatrist is looking into those issues, he is going to be developing possible mitigation for use in penalty phase proceedings. Mr. Lasley stated that you have to always be prepared for the penalty phase in case it comes. Mr. Lasley was qualified as being knowledgeable in capital cases, and was asked if hiring a psychological expert *after* the jury recommended death fell below community standards. Mr. Lasley responded:

> A: It's more than negligent. It's outrageous.

[ROA Vol. 42, pg. 6698]

With regards to whether Mr. Lasley could have represented Jason Larzelere without the financial assistance of the county, Mr. Lasley responded:

> We could never have afforded the costs in the case at all. We would have had**B**the only way we could try this case is if we had the defendant declared indigent for costs. Without that, we could never have taken the case.

[ROA Vol. 42, pp. 6700-6701]

Defense EH Exhibit Number 9 is a packet of pleadings from the Jason Larzelere case. This exhibit shows the numerous experts that Mr. Lasley utilized or attempted to utilize in Jason Larzelere's case. Because of Jack Wilkins' financial problems and misdealings, he failed to consult even one expert. Jack Wilkins claimed there was not one area that he could fathom where expert testimony could have been utilized in the case of Virginia Larzelere. The two cases were mirror images of one another. Had Jack Wilkins truly investigated the Virginia Larzelere case, and had he sought Volusia County's financial assistance, he could have afforded his investigator, and he could have freely sought the appointment of necessary experts. His failure to do so sealed Ms. Larzelere's conviction and death sentence.

Very early on in the representation of Jason Larzelere, Mr. Lasley sought the appointment of a psychiatric expert. Dr. Myers was appointed, and he discovered though his work that Jason Larzelere was a victim of sexual abuse, and he suffered from Post Traumatic Stress Disorder. Dr. Krop was brought into Ms. Larzelere's case too late, he was not provided with necessary background information, and consequently, powerful penalty phase mitigation was lost. Mr. Lasley asked the county for assistance to pay the bills of his investigator, and he was able to effectively and consistently utilize the services

of his investigator. Jack Wilkins, alternatively, was forced to fire his investigator Gary McDaniel due to conflicts over billing and other matters. Mr. Lasley sought the assistance of an insurance expert to help in the Jason Larzelere defense. Jack Wilkins looked to attorney Kent Lilly to represent Jeanette Atkinson to force as quick a settlement as possible in the collateral civil insurance litigation. Jack Wilkins could have and should have sought the assistance of an insurance expert to attack the state's theory of motive that Ms. Larzelere had her husband killed for insurance proceeds. The matters of insurance and the policies themselves were complicated in this case. An expert could have explained them to the jury and discredited the state's motive for the shooting. Mr. Lasley testified at the evidentiary hearing that in his conversations with the insurance expert, he remembered that "...the expert concluded that, based upon the income of that family, that those life insurance policies were not excessive...that there was a reasonable amount of insurance to carry on him." [ROA Vol. 42, pp. 6753-6754]. Had this information been presented to a jury, instead of seeming sinister, the insurance policies would have been explained to have been reasonable for such a family. This testimony, had it been presented to the jury, could have diminished the state's motive for the killing and could have produced an acquittal. This is evidence that the lower court erred in finding that Ms. Larzelere failed at the evidentiary hearing to present evidence of what information an expert may have presented at trial. Mr. Lasley strategically did not present this information because it did not support Jason Larzelere's theory of defense that Virginia Larzelere had every motive to kill her husband [ROA Vol. 42, pg. 6756]. Mr.

Lasley stated that had he represented Virginia Larzelere, he would have presented this expert testimony regarding the nature of the insurance policies to the jury.

Mr. Lasley sought the assistance of a firearms and ballistics expert, as well as a handwriting expert. Jack Wilkins never sought the assistance of any experts until the jury came back with a death recommendation. A handwriting expert possibly could have testified that the wills did not appear to be forged. Wilkins never consulted such an expert. Mr. Lasley filed motions to have important transcripts transcribed at the county's expense. Jack Wilkins claims to have had the county pay for transcripts, but the record shows that he did not. Mr. Lasley sought the assistance of the county to have the alleged murder weapon and pellets independently tested. Jack Wilkins did not. Mr. Lasley testified that had he represented Virginia Larzelere, he would have presented expert testimony to show that the concrete mix in Virginia Larzelere's basement did not match the concrete that encased the weapons in Pellicer Creek [ROA Vol. 32, pg. 6786]. Mr. Lasley sought the assistance of a marine biologist to scientifically explore the dynamics of the concrete and the algae in the water. Testimony was elicited during the evidentiary hearing from expert John Whelan that the concrete samples did not match. Jack Wilkins could have at least brought to the jury's attention the report from the FBI showing the fact that the concrete did not match. This evidence, coupled with other evidence cumulatively, could have produced an acquittal.

Mr. Lasley sought an expert in the fields of "Battered Child Syndrome," neurology, pharmacology, and telecommunications. It is clear that Mr. Lasley was vigorously

investigating the case of Jason Larzelere, and that Jack Wilkins was not. It appears that Jack Wilkins did little more than depose the state's witnesses. A capital murder case requires more than simply deposing the state's witnesses. Because Mr. Lasley had retained experts in his case, he held a tactical advantage over the state that required the state to ask for multiple continuances. In the Jason Larzelere case, the defense was prepared for trial, but the state was not. In the Virginia Larzelere case, the state was prepared but the defense was not.

Had a thorough, sober, experienced attorney such as William Lasley represented Virginia Larzelere, the result at trial would have been different. William Lasley signed a contract with Jeanette Atkinson to represent her sister before the trial, but Jack Wilkins stepped in and prevented this because he knew he would be losing the $3,000 per day for trial that was contingently promised in his contract. Wilkins was motivated in the Larzelere case to maximize his financial gain, minimize his costs, and cover his illegal tracks. Wilkins had his own selfish and greedy interests at heart, not the interests of his client.

An acquittal would have been probable in the Virginia Larzelere case had trial counsel not been influenced by greed, alcohol, drugs, and conflicts of interest. As such, this Court should reverse the lower court=s Order for failing to recognize that we can have no confidence in the Larzelere guilt phase verdict.

ARGUMENT III

THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED MS. LARZELERE OF A FUNDAMENTALLY FAIR CAPITAL TRIAL AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Standard of Review.

In deciding cumulative error claims, this Court reviews legal questions de novo and gives deference to the circuit court's findings of fact. Reichmann v. State, 777 So.2d 342, 350 (Fla.2000).

When the totality of the errors in this case are viewed cumulatively, the conclusion is inescapable that Ms. Larzelere should be afforded a new trial. Due to Howes' and Wilkins' conflicting joint representation of co-defendants, Wilkins' alcohol and drug abuse, his inexperience in capital cases, his financial misdealings, his contingency fee contract that dissuaded him from approaching the court for costs and expenses, his failure to consult even the first expert prior to trial, the circumstantial nature of the case, and the constructive amendments and fatal variances to the indictment, this Court should afford Ms. Larzelere guilt phase relief. Lightbourne v. State, 748 So.2d 238 (Fla. 1999)

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Ms. Larzelere respectfully urges this Honorable Court to reverse the circuit court's order denying a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of the Appellee and Initial Brief of the Cross-Appellant has been furnished by U.S. Mail to all counsel of record on this ____ day of February, 2006.

_____
David Dixon Hendry
Florida Bar No. 0160016
Assistant CCC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Dr., Ste. 210
Tampa, Florida 33619
813-740-3544
Attorney For Appellee/ Cross-Appellant

Copies furnished to:

The Honorable John W. Watson, III
Circuit Court Judge
Volusia County Courthouse
125 East Orange Avenue
Daytona Beach, FL 32114

Kenneth S. Nunnelley
Assistant Attorney General
Office of the Attorney General
444 Seabreeze Boulevard, 5th Floor
Daytona Beach, FL 32118

Christopher Lerner
Assistant State Attorney
Office of the State Attorney
415 North Orange Avenue
Orlando, FL 32802

Virginia Larzelere
DOC# 842556
Lowell Correctional Institution
Women=s Unit Annex
11120 N.W. Gainesville Road
Ocala, FL 34482-1479

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Answer Brief of the Appellee and Initial Brief of the Cross-Appellant, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210**.**

_____

David Dixon Hendry
Florida Bar No. 0160016
Assistant CCC
CAPITAL COLLATERAL REGIONAL COUNSEL-MIDDLE
3801 Corporex Park Dr., Ste. 210
Tampa, Florida 33619
813-740-3544
Attorney For Appellee/ Cross-Appellant