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 CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA

AMENDED CROSS-REPLY BRIEF OF THE APPELLEE/ CROSS-APPELLANT

DAVID D. HENDRY
Fla. Bar No.0160016
CAPITAL COLLATERAL REGIONAL COUNSEL-MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
(813)740-3544
COUNSEL FOR APPELLEE/CROSS-APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

RESPONSE TO THE "STATEMENT OF THE FACTS"

The State bolds the following information on page 61 of its brief: "**There were no records indicating Jack Wilkins suffered from alcohol withdrawal after he entered Federal prison.** (R7894-95)." But, at the evidentiary hearing there was testimony given by a Florida civil attorney that at the time of the Larzelere trial, trial attorney Jack Wilkins seemed to be suffering from alcohol withdrawal in court:

> "...I know that it had to have been around the same time because Mr. Wilkins ended up going to prison, in my mind, not too long after the [Larzelere] case was over...His hands were shaking. This was during a break during a trial in another case that I was working on the civil end and he was working on the civil [sic] side, during a break, and his hands were shaking and I suspected that it was because he needed a drink, but I didn't know that...[Delirium Tremens] [were] what crossed my mind."

[Testimony of Attorney Jonathan Stidham, ROA Vol. 39, pg. 6252]

Jonathan Stidham was one of several witnesses that provided testimony concerning Jack Wilkins' alcohol and drug abuse. There can be no confidence in the outcome of the Larzelere trial because of this type of competent and substantial evidence of drug and alcohol abuse. This evidence includes but is not limited to testimony from the prosecutor who prosecuted Larzelere (Dorothy Sedgewick), and an FDLE agent who investigated and arrested Wilkins (David Waller) on tax evasion charges. FDLE Agent David Waller testified that he observed Jack Wilkins drinking liquor in his office in 1993, just one month before Ms. Larzelere was sentenced to death. (ROA Vol. 39, pp. 6195-96). Trial attorney Jack Wilkins was ingesting large amounts of alcohol, cocaine, and

methamphetamine at the time of trial preparation and trial. The lower court's order denying guilt phase relief should be reversed in this case.

MULTIPLE REPRESENTATION

The State argues on page 65 of their brief that the Cuyler v. Sullivan, 446 U.S. 335 (1980) presumptive-prejudice standard does not apply "outside the context of multiple representation," therefore this standard does not apply in the instant case because there was no multiple representation in the Larzelere case. That is incorrect. John Howes and Jack Wilkins provided dual representation to Virginia Larzelere and Jason Larzelere. At the same time John Howes was representing Jason Larzelere, he was representing Virginia Larzelere, co-defendants in what amounted to a conspiracy case. In any event, and using the alternative standard, Virginia Larzelere was prejudiced under Strickland by the multiple conflicts of interest in this case.

THE CONSTRUCTIVE AMENDMENT CLAIM

On page 65 of its 90 page brief, the State finally addresses the Cross-Appellant's constructive amendment claim. The State claims that the lower court was correct in finding the claim procedurally barred because the claim could have, but was not, raised on direct appeal. Then the State argues that because the claim was raised in the 3.850 proceedings, Ms. Larzelere is now procedurally barred from raising the issue in her habeas petition because it is being simultaneously raised in her 3.850 appeal.

It appears that the State is raising some type of "Invincible Double Reverse Procedural Bar" to her constructive amendment claim. Ms. Larzelere simply asks this

Court to address the claim somewhere, be it in the instant appeal or in her habeas appeal. This claim has never heretofore been addressed on the merits. Ms. Larzelere urges that the State's asserted "Invincible Double Reverse Procedural Bar" cannot trump fundamental error, which is exactly what occurred when the State introduced unindicted co-conspirators to the mix and attributed their phantom acts to the acts of Virginia Larzelere.

The State boldly claims on page 68 of their brief that "**Larzelere Does Not Get Two Appeals on the Same Issue**." Ms. Larzelere was denied relief on the constructive amendment claim primarily on procedural bar grounds, the lower court finding that the issue could have and should have been raised on direct appeal. But alternatively, the lower court cited Roby v. State, 246 566 (Fla. 1971) in support of denial of relief. Because the lower court found the claim procedurally barred, and also made an alternative merits ruling in its order, Ms. Larzelere must raise the constructive amendment issue in the instant appeal. And because this issue is arguably an issue better suited for the habeas petition based on the ineffective assistance of appellate counsel, Ms. Larzelere must raise it in her habeas petition. Ms. Larzelere disagrees with the State's characterization that the concurrent appeals are "needlessly burdensome on the Court." Ms. Larzelere is not seeking "two bites at the apple" as the State suggests; she is seeking one fair concurrent bite at the apple. It is noted that while the State's indictment against Virginia Larzelere listed one possible co-conspirator (Jason Larzelere), it argued at trial that there were at least two others (Kristen Palmeiri and Steven Heidle), and that the acts

of these others could be attributed to Ms. Larzelere because they were part of a conspiracy. As such, the State took at least three bites at the conspiratorial apple when it was legally bound to one bite by its indictment.

The State cites to Raulerson v. State, 358 So. 2d 826 (Fla. 1978) in response to Ms. Larzelere's constructive amendment claim. This case is clearly distinguishable. First of all, Ms. Larzelere asserts that the indictment flaws in her case constitute constructive amendments that require *per se* reversal. Raulerson is an example of a variance that would require the defendant show that he was embarrassed in the preparation of his defense. Prejudice is presumed in the case of a constructive amendment. United States v. Keller, III, 916 F. 2d 628, 636 (11th Cir. 1990). The 11th Circuit in Keller reasoned and held the following in granting relief:

> 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 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 Circuit 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 State has failed to do the same.

The State's reliance on Raulerson is misplaced. In Raulerson, the defendant claimed that there was a variance between the name of the victim listed in the indictment and the evidence that was presented at trial. In Raulerson, this Court took judicial notice that "Michael" is generally referred to as "Mike," and held that the defendant was not prejudiced by the slight variance in the name of the victim. But in the case at bar, the error is much more egregious and fundamental. While the State limited the players in its indictment to Virginia and Jason Larzelere, it argued at trial that Steven Heidle and Kristen Palmeiri were co-conspirators, and that their acts in the plot to murder Dr.

Larzelere could be attributed to Virginia Larzelere.

At trial, the defense spent most of their time placing the blame for the murder solely on Palmeiri and Heidle. Yet the jury instructions had the effect of nullifying this attempted defense because the jury was essentially instructed that if Virginia Larzelere was guilty of conspiring with Heidle, Palmeiri, "*or any other person*," their acts were her acts and she was guilty of the murder. In a discussion with the trial court concerning jury instructions, the defense attempted to substitute the term "co-conspirator" with "Jason Larzelere," but the State insisted that the conspiracy not be limited and the phrase "*any other person*" should remain in the instructions. In so insisting, the State constructively amended the terms and limits of the indictment. Where the indictment basically charged a conspiracy solely between Virginia and Jason Larzelere, the evidence at trial and jury instructions had the effect of broadening the possible bases of the conspiracy to Heidle, Palmeiri, and the entire world. In Raulerson it was clear who the victim was ("Mike" is commonly referred to as "Michael"), and the defendant was not prejudiced by the minor variance between the indictment and the evidence presented--but in the case at bar, the State expanded the terms of the alleged conspiracy beyond the parameters of the indictment, and the jury instructions in effect nullified the efforts of the defense to place blame elsewhere at trial.

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* the defendant must be treated as if she had done all the things the person who received or was promised the payment did if []the crime was committed by a co-conspirator...(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, as urged by trial counsel. 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). *See also* Dempsey v. State, -- So. 2d --, 2006 WL 3018161 (Fla. 4th DCA October 25, 2006). ("Under an 'and/or' instruction the jury is informed that if defendant A has committed all

the elements of the crime, B is guilty without having committed any elements. Or the jury could find both defendants guilty where it found only A committed some elements of the crime and only B committed other elements. We have held that the 'and/or' instruction is so seriously flawed as to be fundamental error.") In the case at bar, the jury was instructed that Virginia Larzelere could be convicted for the actions of A [Jason Larzelere], unindicted participants Band C [Steven Heidle and Kristen Palmeiri], and X [the entire world], even though Jason Larzelere was the only other party listed in the indictment.

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.

The State's answer brief fails to directly respond to the constructive amendment claim. The thrust of Ms. Larzelere's claim is that the State unconstitutionally broadened the terms of an alleged conspiracy to include individuals other than Jason Larzelere. In response, in a nutshell, the State claims that Ms. Larzelere's trial attorneys actually requested an instruction on conspiracy, therefore she cannot claim error that a conspiracy instruction was given. Ms. Larzelere asserts that requesting an instruction on a crime not charged is ineffective *per se* under United States v. Cronic, 466 U.S. 668 (1984). The State's argument, which is that Ms. Larzelere acquiesced to the conspiracy instruction, is flawed because the trial attorneys asked specifically requested that the conspiracy definition be *limited* to Virginia and Jason Larzelere. The trial attorneys objected to a general instruction on conspiracy because no other co-conspirators other than Jason Larzelere could be introduced into the case without violating due process. The trial attorneys never acquiesced to the broadening constructive amendments to the indictment which occurred when the jury was instructed as it was. 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 Palmeiri 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 Palmeiri 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]

The defense suggested at trial that Heidle and Palmeiri had motive to be solely responsible for the murder[1], or that someone else besides Jason may have shot the

[1]This was essentially the theory of defense at trial, that Heidle and Palmeiri were solely and jointly responsible for the murder of Dr. Larzelere.

doctor[2]. The defense was embarrassed in the preparation and presentation of their defense because in light of the instructions that broadened the conspiracy beyond Jason Larzelere, their efforts to blame Heidle and Palmeiri, or someone else, became futile because the State was able to argue that Heidle and Palmeiri (or any other known or unknown person) were co-conspirators of Virginia Larzelere, and that the acts of an unknown and unindicted co-conspirator could be attributed to Virginia Larzelere. The discussion of the conspiracy instruction and ensuing constructive amendment to the indictment continued at trial:

> THE COURT: ...So do you at least understand my reasoning for why I believe there needs to be a limited definition of conspiracy in the principal for hire instruction?
> MR. HOWES: Yes, sir.
> THE COURT: Having said that, number one, do you want the Court to leave in–first of all, do you want me to leave in the conspiracy instruction that relates to the admissibility of coconspirators statements?
> MR. HOWES: Yes, sir.
> THE COURT: Secondly, do you, preserving your right which you have to object to the principal for hire instruction, do you want the Court to give a definition of conspiracy added to the principal for hire instruction?
> MR. HOWES: No, sir. As we stated off the record, we think that paragraph 3 in the first part should read: The crime was committed by Jason Eric Larzelere.
> THE COURT: Alright, I understand. What says the State to their request that it be Jason Larzelere?
> MS. SEDGWICK: **There's no legal requirement that the murder be committed by any particular person. The jury can consider whatever evidence has been presented in the**

[2]This case remains a murder mystery. Jason Larzelere was acquitted of the murder and no individual has ever come forward to admit the shooting.

> **case, and determine whether or not the shooter was a co-conspirator of Virginia Larzelere.**
> THE COURT: Now, have you argued in your argument any evidence that anybody was the shooter other than Jason himself?
> MS. SEDGWICK: No, I haven't.
> THE COURT: All right. Then what evidence is there, if you didn't argue it, what evidence is there of somebody being the shooter other than Jason Larzelere?
> MS. SEDGWICK: Defense has argued that it was robbery, and that Kristen and Steven Heidle had motive because they were at loss of funds because of Jason moving home, and that it was not Jason.
> THE COURT: That it was not Kristen or Steven, but also not Jason, but some other person?
> MS. SEDGWICK: Right.
> THE COURT: Did you argue that?
> MS. SEDGWICK: No. But I don't believe that I have to. It's not a question of my arguments, but what the evidence shows.
> THE COURT: **I'm going to rule that in fact the State has the right to have that instruction, even if they didn't argue it, if there in fact is evidence from which the jury could infer the commission of the offense by someone other than Jason. And I'm going to deny the defense's request that the name Jason Larzelere be plugged in there. And I'm going to let the language, by a co-conspirator, be in there, in paragraph 3 of the principal for hire instruction...**
> **MR. HOWES: ...We object to the addition or inclusion, of putting the entire conspiracy language if [sic] there, yes, sir....**

[**Emphasis added**, Dir. ROA pp. 5876-5878]

By allowing the jury instructions on conspiracy to open the conspiracy up to *any other person*, this allowed the jury to convict Virginia Larzelere for a crime not charged in the indictment. The trial court should have limited and substituted the word "conspirator"

in the general conspiracy instructions with "Jason Larzelere." By failing to do so, the State was able to prosecute a case against Virginia Larzelere where: "There's no legal requirement that the murder be committed by any particular person. The jury can consider whatever evidence has been presented in the case, and determine whether or not the shooter was a co-conspirator of Virginia Larzelere." [Prosecutor Dorothy Sedgwick, ROA pp. 5876-5877]. If no one else is listed in the indictment besides Virginia and Jason Larzelere, no one else can be introduced in the case as a co-conspirator of Virginia Larzelere; otherwise the indictment has been constructively amended mandating *per se* reversal.

Without addressing the true issue of the trial court's failure to substitute the name "Jason Larzelere" for "co-conspirator" in the conspiracy instructions, the State claims on page 71 of their brief, "Further, given that Larzelere requested that conspiracy instruction, it is disingenuous for her to now complain that she received what she requested." Ms. Larzelere never requested that the terms of the indictment be constructively amended to open the alleged conspiracy up to a never-ending phantom conspiracy. The lower court's ruling denying guilt phase relief should be reversed due to the constructive amendment of the indictment.

The lower court erred in denying relief from this fundamental error on procedural bar grounds. *See* Cabrera v. State, 890 So. 2d 506 (Fla. 2d DCA 2005), Sherrey v. State, 895 So. 2d 1195 (Fla. 2d DCA 2005)(new trial granted due to fundamental error in jury instructions, notwithstanding failure to object). The Cabrera case cites to Chicone v.

State, 684 So. 2d 736 (Fla. 1996). "A defendant has the right to have a 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. (Citation omitted). The use of the conjunction "and/or" erroneously permitted the conviction of each defendant for conspiracy to traffic in heroin on a finding that either of them conspired with coconspirators in trafficking heroin, twenty eight grams or more." Cabrera at 507. The error in the jury instructions in the case at bar was fundamental, it was improperly procedurally barred by the lower court, and this error is not subject to a harmless error analysis. Reed v. State, 837 So. 2d 366 (Fla. 2002).

FAILURE TO HIRE EXPERTS

The State cites the lower court's order concerning Wilkins reasons for not petitioning the court for indigency status for costs on page 82 of its brief. Jack Wilkins testified that he did not seek financial assistance through the court for his client because his employment contracts contained payment provisions for his costs and for his investigator's costs. This is a clear indication that the employment contracts conflicted with the need to consult with experts. The contracts were contingent upon recovery of the insurance monies. The insurance recovery was speculative, therefore reimbursement was speculative, and any costs spent would result in a financial loss to Wilkins, the man who was evading taxes at the time the Larzelere case was pending. Wilkins claimed that he would have made "other financial arrangements" if he needed an expert on the Larzelere case, but the bottom line is, at the time of the Larzelere case, Wilkins was a tax

evader, a drunk, a methamphetamine junkie, and now is a convicted perjurer. Had he presented the testimony of someone like concrete expert John Whelan, there is a reasonable probability that the jury would have acquitted. The jury went to the deliberation room with the idea that the concrete in Ms. Larzelere's basement matched the concrete that encased the weapons found in Pellicer Creek. Affirmative exculpatory evidence of a "no match" is much stronger than a simple closing argument claiming lack of evidence of a match, which is all Jack Wilkins provided to the jury. The lower court was wrong to deny guilt phase relief based on the weak post-hoc justifications of Jack Wilkins as to why he did not consult experts.

Wilkins is the same attorney who the State concedes, "wrote his response to the bar complaint [that contributed to his prison term] over the weekend after the defense had rested and before closing arguments were given." (State's Answer Brief at page 85). The State claims on page 86 "that [the bar complaint] response is not so lengthy that it is likely it took many hours to prepare." The bar complaint response, written as Wilkins was supposed to be preparing for closing argument, would have taken at least four hours to prepare. It is noted that the Larzelere trial took place in Daytona. Wilkins' office was in Bartow. The round-trip drive alone from Daytona to Bartow would be over four hours, according to Mapquest. The bar complaint response did take more than a few hours to prepare. Jack Wilkins was not focused on his first capital murder trial. He was focused on formulating a response to the bar complaint which would keep himself out of prison. There can be no confidence in the outcome of this trial.

CONCLUSION AND RELIEF SOUGHT

Wherefore, in light of the facts and arguments presented in this appeal, Appellee/Cross-Appellant, Virginia Larzelere, respectfully moves this Honorable Court to:

Affirm the post conviction court's order vacating the sentence of death and ordering a new penalty phase, and reverse the court's order denying guilt phase relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Cross-Reply Brief of the Appellee/Cross-Appellant has been furnished by United States mail to all counsel of record on this ___ day of November, 2006.

_____

David Dixon Hendry
Fla. Bar No.0160016
Assistant CCC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive, Suite 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

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

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

Virginia Larzelere
DOC# 842556
Lowell Correctional Institution
Women's Unit Annex
11120 N.W. Gainesville Road
Ocala, FL 34481-1479

CERTIFICATE OF COMPLIANCE

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

_____

David Dixon Hendry
Fla. Bar No.0160016
Assistant CCC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
(813)740-3544
Attorney for Appellee/Cross-Appellant