IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1353

ROBERT TREASE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of a post-conviction motion in a capital case. The trial and direct appeal record will be referred to as "R. ___" or "Trial Transcript ___;" the post-conviction record will be referred to as "PC __."

REQUEST FOR ORAL ARGUMENT

Mr. Trease has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. *Lightbourne v. State*, 742 So. 2d 238 (Fla. 1999). 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. Mr. Trease, through counsel, accordingly urges that the Court permit oral argument.

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I. INTRODUCTION

Mr. Trease maintains his innocence of the homicide Hope Siegel said at trial he committed. Siegel had said repeatedly outside of court that she had committed the crime alone. The lower court erred by not granting an evidentiary hearing on Appellant's detailed new allegations of innocence and constitutional violations at his capital trial.

II. STATEMENT OF THE CASE

1. The Circuit Court of the Twelfth Judicial Circuit, Sarasota County, Florida, entered the judgments of convictions and sentences under consideration.

2. On September 25, 1995, a Sarasota County grand jury indicted Mr. Trease for First Degree Murder. (R. 31-32.) On February 14, 1996, Mr. Trease was charged by information with armed burglary and robbery with a firearm. (R. 137-38.)

3. After a jury trial, Mr. Trease was found guilty on December 11, 1996. (R. 1846-47.)

4. On December 19, 1996, the jury recommended a sentence of death. (R. 1884-85.)

5. On January 22, 1997, the trial court imposed a sentence of death. (R. 2235.)

6. On direct appeal, this Court affirmed Mr. Trease's convictions and sentences. *Trease v. State*, 768 So.2d 1050 (Fla. 2000).

7. On May 22, 2001, Capital Collateral Counsel-Middle Region (CCC-MR) filed a Motion to Vacate Judgment of Conviction and Sentence on behalf of Mr. Trease. Mr. Trease filed a motion to dismiss counsel and on May 30, 2001, following hearing on the matter, this Court entered an order dismissing CCC-MR as counsel of record and dismissing the Motion to Vacate filed on his behalf. Governor Bush subsequently signed a death warrant setting Mr. Trease's execution for February 6, 2002. During ensuing litigation this Court held that CCC-MR had no obligation or authority to file pleadings on Mr. Trease's behalf. The Governor stayed Mr. Trease's execution *sua sponte* on February 5, 2002, in light of the United States Supreme Court's grant of certiorari in *Ring v. Arizona* 536 U.S., 122 S.Ct. 2428, 153 L.Ed 2d 556 (2002).

8. On June 18, 2002, Mr. Trease filed a Motion to Reinstate Previously Filed Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend.

9. This Court reinstated Mr. Trease's previously filed Motion to Vacate on October 1, 2002.

10. This Court entered an Order appointing undersigned counsel as registry

counsel for Mr. Trease for the purposes of costs on December 8, 2005.

11. An amended Rule 3.850 motion was filed March 21, 2006. The lower court held a *Huff*[1] **hearing on October 5, 2006. Thereafter, on October 11, 2006, *the trial court denied an evidentiary hearing on all claims raised in the amended motion except for the claim of ineffective assistance of counsel at sentencing.* PC. 887-912.**

12. An evidentiary haring was held on the single sentencing claim December 12, 2006. The lower court denied relief in an order entered May 11, 2007. PC 2836-62. A motion for rehearing was denied June 6, 2007. A notice of appeal was filed July 5, 2007.

III. STATEMENT OF THE FACTS

A. THE NEW FACTS

Mr. Trease is on death row based on the testimony of Hope Siegel, his co-defendant. The defense at trial was that Mr. Trease was innocent and that Siegel lied when she testified that Mr. Trease killed Mr. Edenson. In fact, Siegel had gone to Edenson's house alone to obtain money and killed him herself, by herself, after he refused to pay her for sex, as she had confessed to people close to her outside of court. Knowing her truck could be placed at the scene, Siegel put the

murder on Mr. Trease. The defense sought to establish that Siegel: 1) needed money; 2) went to Edenson's on her own to get it; 3) was mentally ill in a way that led to murder when the evening did not go as planned; and 4) that the physical evidence at the crime scene was consistent with her pretrial admissions that she alone killed Edenson, but inconsistent with the story she told at trial that Trease killed Edenson in a burglary/robbery.

Significant new evidence to support each of these defense propositions, evidence which the lower court refused to hear or consider, includes the following:

– Siegel confessed to three people, about whom the jurors did not hear, that *she* committed the crime. One of them was her own defense requested trial mental health expert, to whom she stated that "**she** had **killed** Paul [Edenson]."

– Siegel was undergoing cocaine withdrawal at the time of the offense and her own mental health experts diagnosed her as suffering from severely debilitating mental conditions which are totally consistent with her killing the victim alone;

– Testimony from an FBI chemist about lead bullet analysis, offered (and argued) by the State to bolster Siegel's testimony at trial, was totally bogus and has now been acknowledged to be junk science; and

– Evidence from the crime scene and autopsy supports the fact that Siegel

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[1] *Huff v. State* , 622 So. 2d 982 (Fla. 1993).

was the killer.

These circumstances, in combination with what we already knew about Siegel, remove any confidence that the story she told at trial provides a legitimate basis for the capital judgment in this case.

1. Siegel's confessions

Janene Silkwod shared a cell with Siegel and they became very close friends pre-trial. Silkwood testified at trial that Siegel told her that she had killed Edenson and that Siegel bragged that "she's gonna get away with murder" because Mr. Trease "has a record. He's been to prison before and, uh, she has no record.." Siegel said that "She used to work for, uh, Sarasota Sheriff's Department. There's no way they can believe that she had anything to do with anything like that. And she laughs about it."[2] **The state argued to the jurors that Silkwood was not to**

[2]Siegel told Silkwood that she had prostituted herself before to make money, and that she had previously worked for "Holly," a friend who ran an "escort service." Siegel explained that she needed money to buy crack and that she and Mr. Trease decided that she should call Edenson, obviously already an acquaintance, and offer to have sex with him in exchange for money. She called Edenson and he agreed to give her money after the "date." Siegel drove her truck to Edenson's home. Edenson was wearing a blue bathrobe. He ordered Chinese food. It was delivered. Siegel took the food to the kitchen. Edenson followed her and would not stop talking about sex. She scooped a little rice out onto a plate, but decided that he was not going to leave her alone until they had sex. They went to the livingroom sofa. Siegel related that he was putting his hands all over her and that it was disgusting. "She decided she wasn't going to do anything 'till she got

be believed because she and Siegel had had a falling out.[3]

However, as counsel pled in Mr. Trease's Rule 3.850 Motion, and as counsel proffered to the court below at the *Huff* hearing, Siegel in fact confessed to *many* people. First, post-conviction counsel's investigation revealed that Siegel confessed to Dr. Maher, *her own defense requested mental health expert* – that "she had killed Paul [Edenson]." Rule 3.850, PC at 422.

Also pre-trial, Siegel made similar admissions, *i.e.*, that she alone had stunned, shot, cut, and murdered Edenson, to Heather Ciambrone. Ms. Ciambrone testified to these admissions in a sworn tape-recorded statement

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the money, but he refused to give it to her and she got really mad." Silkwood said Siegel was worried that he wasn't going to pay her and she needed the money for crack – she was edgy because she had not had crack for a while, but had been smoking crack all the time and needed more. She told Edenson to lie down on his stomach on the livingroom floor and close his eyes because she wanted to play a game with him. Siegel sat on him and rubbed his back, and then shocked him with her stun gun she took from her purse. As he lay there, she looked for valuables. Edenson began moving. He threatened to call the police. She ran to her truck, got her handgun, pushed Edenson back down, sat on his back, and fired a shot into his head. Edenson continued to move. Siegel got up, went to the kitchen, got a serrated steak knife and cut his throat three times. Siegel laughed to Silkwood that she had to be careful not to step on Edenson's eye that was laying on the floor. She bragged to Silkwood that she would get away with murder and pin it on Mr. Trease because no one would believe she was capable of doing this alone, especially in light of her size and lack of criminal record. R. pp. 2593-2605.

[3]Another cellmate, Tonya Sterling, testified that Siegel told her that Trease physically made Siegel pull the trigger with his hand. R. 2628. Sterling also conceded that she and Siegel had had a falling out. Thus, the State argued "bias"

but, on advice of counsel, she invoked her Fifth Amendment rights and refused to testify at trial. As was proffered at the *Huff* hearing, Ms. Ciambrone is now prepared to testify, as is *yet another* person to whom Ms. Siegel confessed:

> **And based on our investigation at this point, Your Honor, one other woman, Danielle Leon, who did not testify at trial, in fact was interviewed by the Sarasota Police Department about relationships between Silkwood, Ciambrone, and Siegel, was never asked by anyone what Siegel told her. Ms. Leon will testify consistent with the testimony from Silkwood and the sworn pretrial statement of Ciambrone that in fact that Ms. Hope Siegel told her pretrial that she alone killed the victim and described doing it in the way very similar to what Silkwood testified to at trial.**
>
> **Finally, your Honor, I have spoken, personally interviewed with Ms. Silkwood and Ms. Ciambrone. Both are willing to testify that in fact Ms. Hope Siegel told them these stories. Ms. Ciambrone, as this Court is aware, invoked her Fifth Amendment right. She had a prior murder charge pending at the time. She will testify that the only reason she invoked her Fifth Amendment rights was based upon trial counsel's advice because she had a pending possible capital murder charge against her.**

PC 1162.

2. Siegel's motives and mental state

At trial, the court limited cross-examination of Siegel with respect to her drug use, a limitation which this Court upheld on appeal. Post-conviction

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regarding both of these cellmates.

investigation reveals that Siegel's drug use was highly relevant in that it provided both a motive for the crime and an explanation of why Siegel herself was the likely culprit. As set forth in the Rule 3.850 motion, Siegel's mental health experts believed that she had brain damage and that she had crack cocaine addiction. Her cocaine addiction exacerbated the problems with her already debilitated frontal lobe, even had she not been using crack at the time of the crime. Crack addiction and withdrawal can be as debilitating as being high on crack.

Dr. Maher, Siegel's independent mental health expert pre-trial and at her sentencing, testified during her sentencing about her mental illness at the time of the offense. Dr. Afield testified in later post-conviction proceedings brought by Siegel that although she did not meet the McNaghten criteria for insanity, he thought *she was medically insane at the time of the offense.* He diagnosed her with post-traumatic stress disorder and with traumatic frontal lobe damage to the brain with residual symptomology and depression. When asked what cocaine would do to her mental health problems he opined that it would make things a lot worse. He emphasized that if you take someone like Siegel who suffers from frontal lobe injury and you add cocaine, it would put her out of commission. He explained that she would have no internal controls at the time of the crime.

Dr. Afield also testified that Siegel was "a very sick young lady, terribly

depressed with brain damage, compounded with cocaine abuse." He explained that the frontal lobe of the brain is

> where we do all of our thinking, and it deals with our ability to concentrate, focus, pay attention, use rational judgment. It's where your emotions are located. And what happens when there is damage in those areas, you do have problems with thinking, processing, making things rational, thinking higher things. And your emotional problems are usually an exaggeration of your preexisting difficulties.
>
> For example, I've got a bad temper that I keep in control most of the time, but if I had frontal lobe damage and say a police officer stopped me for going through a red light, I would get out and punch him..... because of the damage to the frontal lobe. That's not a mental problem. That's a physical problem, but it manifests itself in terms of emotional instability, in addition to the ability to think, rationalize, concentrate, and focus.

The jury never learned of the extent of Siegel's mental health problems and addictions, and how they affected her thinking, her need for money, and her behavior.[4]

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[4]At the *Huff* hearing, counsel proffered the following additional new facts in support of an evidentiary hearing:

> In fact, according to Hope Siegel's post-conviction psychiatrist, she was so mentally ill at the time of the crime and at the time of the trial that she was incompetent. In fact, the circuit court here in Sarasota, Florida, based on the allegations of Dr. Afield, granted her an evidentiary hearing. In other words, found that her allegations were. sufficient to warrant a factual dispute. I do not believe, nor am I contending, that Ms. Siegel was incompetent to stand trial or incompetent to testify. I do believe, though, as her experts Dr. Maher

3. Junk science "bolstered" Siegel[5]

Robert Trease was convicted of the murder of Paul Edenson and sentenced to death based upon the testimony of Hope Siegel. "Siegel's testimony was crucial at trial." *Trease v. State*, 768 So.2d 1050, 1052 (Fla. 2000); *id.* at 1054, n. 5 (evidence for conviction sufficient based "especially [upon]) Siegel's" testimony). The state spent large portions of its closing argument looking for things that would corroborate what Siegel testified to. One of the critical points of corroboration for the state was the science of

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> and Dr. Afield said, **this was a woman who was clearly brain damaged, who was clearly in the throws of cocaine addiction, cocaine withdrawal as time goes on, and that those factors are consistent with the crime scene in this case, as I previously reviewed, and consistent with her description of how this crime occurred as she told it to the inmates in the Manatee County Jail**. Both Mayer, who evaluated her pretrial, and Afield, who evaluated her post trial, indicate that her frontal lobe damage and her cocaine addiction, even though she wasn't using cocaine at the time of the crime, were significant factors which would have impacted on her behavior, her emotions, her anger, and her actions. All of those, your Honor, are significant evidence that the jury never heard in this case and should have heard, because they actually indicate that this woman, despite the State's evidence at trial to the contrary, was capable of this type of violence and murder.

PC 1169 (emphasis added).

[5]Appellant filed in this Court a Motion to Vacate Conviction or For Remand Based Upon New Evidence of Junk Science and Innocence (hereinafter "Innocence Motion) on April 7, 2008, raising this FBI lead analysis issue.

metallurgy testified to by the expert FBI agent.

Kathleen Lundy testified at trial that she had been a scientist for the FBI for eleven years specializing in compositional analysis of bullets and shot pellet lead. She had a Bachelor of Science in metallurgy and had taken graduate courses as well, and she had daily training and other course, conference and seminar attendance. She said that she had testified before as an expert, and explained the so-called science of her field. Trial transcript, pp. 2412-16. She explained that she was able to tell by testing whether bullets had the same elemental composition which would suggest that they were manufactured at the same time and place and could end up in the same "boxes." Trial transcript at 2414.

She then testified that the bullet fragments found at the scene matched a bullet removed from a 9 mm Glock pistol in Mr. Trease's possession. She testified that the fragments and the bullet were "analytically indistinguishable" and were manufactured from the same source of lead. Trial transcript 2421. Thus, Mr. Trease's gun, loaded with these bullets, shot the victim.

The State argued to the jurors that this metallurgy corroborated Hope Siegel. The prosecutor argued that the bullet that killed the victim was fired

from "that gun....The FBI told you that. *You heard the metallurgy*." Trial transcript at 2704 (emphasis added). The prosecutor argued that "Hope Siegel testified truthfully.....everything she said we could corroborate." Trial transcript at 2699. He continued:

> It's corroborated by what was found in her car. Remember this shell casing was found underneath the seat of her pickup truck. This shell casing is a Federal brand which the FBI told you was the brand used to kill Mr. Edenson, and this shell casing was fired from this weapon. This shell casing was found in her car, again, evidence of corroboration.

Id. at 2700.

In fact, we now know that the "metallurgy" corroborated nothing. It has now been revealed that the FBI has not just discontinued the use of what is called compositional bullet lead analysis (CBLA), but in fact recognized that the finding of a compositional match between a lead fragment and a box of bullets has no meaning. The lower court refused to consider this new evidence.

In his amended Rule 3.850 motion Appellant raised the issue of the FBI's use of compositional bullet lead analysis (CBLA) in his case:

> 1. Hope Siegel [the co-defendant] testified that Mr. Trease killed the victim with the .9 mm Glock seized from the Pennsylvania apartment where they were staying. The bullet recovered from the scene was too badly fragmented to allow for a ballistics comparison with the Glock. Instead, to bolster Hope Siegel's testimony the State presented the testimony of FBI physical scientist Kathleen Lundy.

Ms. Lundy testified that the fragments recovered from the scene were analytically indistinguishable from a bullet taken from the Glock, and that they were manufactured from the same source of lead.

2. Compositional Analysis of Bullet Lead (CBLA) has been used since the 1960's to convict defendants, but studies have undermined its validity and use. Consequently in 2002, the FBI requested that the National Research Council (NRC) of the National Academy of Science do an independent evaluation of the scientific basis for and use of CBLA. Two years later, the report found the basic analytical technique to be sound, but made several recommendations to ensure the validity of CBLA results. The report also found possible bias in the FBI database and found that the FBI should change the testing it employs in its statistical analysis. Most importantly, the report concluded that the presentation of CBLA testimony should be carefully limited. According to the National Academies' Report in Brief, p. 3, "Attorneys, judges, juries and even expert witnesses can easily and inadvertently misunderstand and misrepresent the analysis of the evidence and its importance."

3. As a result of the NRC report, the FBI undertook an exhaustive 14-month review of the issue, suspending bullet lead examinations while doing so. Following this review, on September 1, 2005, the FBI announced the discontinuation of bullet lead examinations. According to the FBI press release, "One factor significantly influenced the Laboratory's decision to no longer conduct the examination of bullet lead: *neither scientists nor bullet lead manufacturers are able to definitively attest to the significance of an association made between bullets in the course of a bullet lead examination*." (Emphasis added.)[6]

4. Around the time the FBI was requesting an examination

[6]The lower court did not accept these allegations as true. Under this Court's precedent, a trial court considering a motion to vacate must accept the allegations contained in the motion as true. *Lightbourne v. Dugger*, 549 So. 2d 1364, 1365 (Fla. 1989).

of CBLA by the independent NRC, Kathleen Lundy, the same FBI employee that testified for the State against Mr. Trease, admitted in open court that she had lied in a murder case. Subsequently, on January 27, 2003, Ms. Lundy was indicted in Kentucky for lying while testifying for the State in Shane Raglan's trial. ("Raglan Case Scientist Who Lied Is Indicted," Louise Taylor, 1/28/03 Lexington Herald Leader B1, 2003 WLNR 2856888.) According to a media report,

> **[Kathleen Lundy] acknowledged she knowingly gave false testimony in a 2002 pretrial hearing for a man accused of murdering a University of Kentucky football player.**
>
> **Lundy informed her FBI superiors of the false testimony in the Shane Raglan hearing a couple of months after it occurred...**
>
> **Lundy also disclosed she was increasingly concerned that a former lab colleague, retired metallurgist William Tobin, was beginning to appear as a defense witness in cases and openly questioning the FBI's science on gun lead.**
>
> **....**
>
> **In New York, state prosecutors cited the allegations when they dropped plans to call Lundy as a prosecution witness in a murder retrial. "Her value as a witness would be negated," New York City Assistant District Attorney James Rodriguez explained to the judge.**
>
> **....**
>
> **Tobin said he also has gathered evidence that FBI lab experts are stretching their conclusions beyond lab reports when they reach the witness stand.**

> **"Defense lawyers are being ambushed and jurors are being misled," he said. "There is no comprehensive or meaningful data whatsoever to support their analytical conclusions."**

("Wrongdoing at FBI Lab Threatens Cases," 4/16/03 Lexington Herald Leader, 2003 WLNR 2897420.)

5. Having confessed to her superiors,

> **Lundy was subsequently terminated by the bureau, *but not before her superiors tried to convince her that she hadn't really lied*, according to interviews conducted by the U.S. Department of Justice's office of the inspector general...**

("FBI Bullet Test Misses Target," 4/04/2005 Nat'l L.J. 1 [Col. 1].) Kathleen Lundy pled guilty to false swearing on June 17, 2003. ("FBI Agent to Pay $250 Fine for False Testimony," 6/18/03 Cincinnati Post [KY] A8, 2003 WLNR 1882160.)

6. In its September 1, 2005, press release about the discontinuation of CBLA, it is noted,

> **Letters outlining the FBI Laboratory's decision to discontinue these examinations are being sent to approximately 300 agencies that received laboratory reports indicating positive results since 1996. The letters are being sent so that these agencies may take whatever steps they deem appropriate, if any, given the facts of their particular case.**

To date, neither the FBI nor any Florida state agencies have contacted Mr. Trease to inform him of Ms. Lundy's legal difficulties or the CBLA developments.[7] *It appears that a large*

[7][footnote 7 contained in amended rule 3.850 motion]: At least one defendant has been granted a retrial based upon challenges to CBLA testimony.

FOIA suit has been filed against the FBI, and Mr. Trease needs additional time to investigate this issue and the status of the government investigations and litigation.

7. The State presented unchallenged scientific testimony by a now-admitted perjurer in Mr. Trease's trial about an analytical process that has been so discredited it no longer exists. At trial, counsel for Mr. Trease failed to request a *Frye* hearing on the CBLA process. He failed to depose Ms. Lundy; he failed to voir dire Ms. Lundy on her training and qualifications; he failed to ask a single question of Ms. Lundy on cross examination. Ms. Lundy's testimony went entirely unchallenged, and on this issue defense counsel was functionally absent from the trial.

Amended Rule 3.850 Motion, PC Record, Volume 3, pp. 462-467. The lower court summarily denied this claim without allowing an evidentiary hearing:

C. The FBI's metallurgical analysis of the ammunition was voodoo science and the jury was mislead into identification of the murder weapon

The Defendant points to the FBI's evaluation of its Compositional Analysis of Bullet Lead (CBLA) program and its subsequent discontinuance of bullet lead examinations. The Defendant claims that Kathleen Lundy's plea of guilty to false swearing in June, 2003 in Kentucky constitutes a *Giglio* violation because neither the FBI nor any Florida agencies informed the Defendant of Lundy's legal difficulties.

The claim is denied because there is nothing to indicate and, the Defendant does not allege, that Ms. Lundy testified falsely in the defendant's case. The defendant does not allege what defense counsel should have or could have asked of Ms. Lundy to challenge the

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On March 7, 2005, Michael Behn's murder conviction was overturned by a New Jersey appeal court. "Retrial in a New Jersey Killing," 3/08/05 N.Y. Times B6, 2005 WLNR 3529485.

> evidence. Further, since the witness' alleged difficulties occurred in June, 2003, well after the conviction and sentence in this case, it is obvious that the State would not have been aware of the witness' alleged false testimony.

Order denying hearing, PC Record 900, October 10, 2006.

Thereafter, new evidence emerged about the FBI and CBLA. On November 18, 2007, *60 Minutes* reported in its broadcast that it had conducted a joint investigation with the *Washington Post* into the FBI's use of CBLA. Attachment A.[8] **According to the report on *60 Minutes*:**

> **Back in 2002, the FBI lab asked the National Academy of Sciences to conduct an independent review of comparative bullet lead analysis. And 18 months later, its National Research Council came out with a report calling into question 30 years of FBI testimony.**
>
> **It found the model the FBI used for interpreting results was deeply flawed and that the conclusion that bullet fragments could be matched to a box of ammunition so overstated, that it was misleading under the rules of evidence.**
>
> **Dwight Adams was the FBI lab director who commissioned the National Academy of Sciences study that ended up debunking decades of FBI testimony, some of which Kroft read back to him.**
>
> **"Commonwealth versus Daye: 'Two bullet fragments found in Patricia Paglia's body came from the same box of ammunition.'**

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[8]Attachment A to Appellant's Innocence Motion s a printout from the website for CBS News that discusses the content of the November 18th broadcast of *60 Minutes*. All attachments to the Innocence Motion are incorporated into this brief by specific reference.

State versus Mordenti, in Florida: 'It's my opinion that all of those bullets came from the same box of ammunition.' Is that supported by the science?" Kroft asks.

"The science never supported such a statement," Adams replies.

"But this was the testimony that was given by people in the lab for 30 years," Kroft points out.

"You know, I'm sure as you have found that that is the case in some cases. But the science does not support that," Adams says. "This kind of testimony was misleading and inappropriate in criminal trials."

"Did you order a review on all the cases in which this testimony had been given?" Kroft asks.

"No," Adams says. "What we did was to provide this information to the legal community."

A year after the National Academy of Sciences report, Adams decided that the lab would stop doing bullet lead analysis and the FBI notified police departments and the national associations of district attorneys and criminal defense lawyers. The form letters, which underplayed the significance of the problem, said the lab "still firmly supported the scientific foundation of bullet lead analysis," but questions had been raised about its value in the courtroom.

"I've got a copy of the letter that you sent to the National Association of Criminal Defense Lawyers," Kroft tells Adams. "Nowhere in here does it say that the testimony you've been offering for 30 years is no longer valid."

"It's just not in this letter," Kroft says.

"First of all, I don't believe that letter could contain testimonies

regarding 100 or 200 or 300 testimonies," Adams replies.

"This letter that you sent never specifically states the testimony offered by the lab, by lab personnel, was wrong. It's just not in here. Yet, you just acknowledged it to me. Why wasn't it in there? I mean, that's a headline grabber," Kroft asks. "I mean, that should be the first sentence of the release, shouldn't it?"

"This review was about the science of bullet lead analysis. And I determined, based upon that review, that it wasn't an appropriate technique," Adams says.

"Did you tell the Justice Department, 'We have this problem and … you ought to undertake a review of these cases?'?" Kroft asks.

"It's not my position to tell the Department of Justice what they should and should not do," Adams says.

Adams says he sent a memo to FBI Director Robert Mueller, stating "we cannot afford to be misleading to a jury" and "we plan to discourage prosecutors from using our previous results in future prosecutions."

Attachment A to Innocence Motion at 2-3. Apparently when confronted with the story that *60 Minutes* was about to run, the FBI admitted mistakes had occurred:

On Friday, the FBI agreed. It acknowledged that it had made mistakes in handling bullet lead testimony and should have done more to alert defendants and the courts. As a result of the *60 Minutes*-Washington Post investigation, the bureau said it will identify, review and release all of the pertinent cases, and notify prosecutors about cases in which faulty testimony was given.

The FBI also says it will begin monitoring the testimony of all lab experts to make sure it is based on sound scientific principles. FBI

> Assistant Director John Miller said, "We are going to the entire distance to see that justice is now served."

Attachment A to Innocence Motion at 4.[9]

On November 18, 2007, the *Washington Post* also reported on the acknowledgment by the former director of the FBI that the agency's abandonment of CBLA was premised upon a recognition that testimony linking a particular bullet to a particular box of bullets was scientifically unreliable, inaccurate and misleading. Specifically, the *Washington Post* reported:

> **In a May 12, 2005, e-mail, the deputy lab director told LeBeau, "I don't believe that we can testify about how many bullets may have come from the same melt and our estimate may be totally misleading."**

Attachment B at 7.[10] The *Washington Post* indicated that the FBI discovered that not only were the conclusions as to the relationship between a particular bullet and a particular box of bullets scientifically unsupportable, additional problems were identified:

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[9]To date, neither Mr. Trease nor his counsel has received any notice from either the FBI or the State Attorney's Office regarding CBLA and/or acknowledgment as reported by *60 Minutes* that criminal convictions should not be resting upon the inaccurate, unreliable, and scientifically invalid testimony that a particular bullet likely came from the same box as other bullets.

[10]This email is accessible at the *Washington Post* website.

> **In March 2005, the chief of the FBI chemistry unit that oversaw the analysis wrote in an e-mail that he applied one of the new statistical methods recommended by the National Academy of Sciences to 436 cases dating to 1996 and found that at least seven would "have a different result today." Marc A. LeBeau estimated that at least 1.4 percent of prior matches would change.**
>
> **If the FBI employed other statistical methods the number of non-matches would be "a lot more," LeBeau wrote. In fact, when the bureau tested one method recommended by the academy on a sample of 100 bullets, the results changed in the "large majority of the cases," he wrote.**

Attachment B to Innocence Motion at 7. The *Washington Post* reported that the FBI was forced to internally acknowledge its defective work in light of the report from the National Academy of Sciences in 2004:

> **In 2004, however, the nation's most prestigious scientific body concluded that variations in the manufacturing process rendered the FBI's testimony about the science "unreliable and potentially misleading." Specifically, the National Academy of Sciences said that decades of FBI statements to jurors linking a particular bullet to those found in a suspect's gun or cartridge box were so overstated that such testimony should be considered "misleading under federal rules of evidence."**
>
> **A year later, the bureau abandoned the analysis.**
>
> **But the FBI lab has never gone back to determine how many times its scientists misled jurors. Internal memos show that the bureau's managers were aware by 2004 that testimony had been overstated in a large number of trials. In a smaller number of cases, the experts had made false matches based on a faulty statistical analysis of the elements contained in different lead samples,**

documents show.

"We cannot afford to be misleading to a jury," the lab director wrote to FBI Director Robert S. Mueller III in late summer 2005 in a memo outlining why the bureau was abandoning the science. "We plan to discourage prosecutors from using our previous results in future prosecutions."

Despite those private concerns, the bureau told defense lawyers in a general letter dated Sept. 1, 2005, that although it was ending the technique, it "still firmly supports the scientific foundation of bullet lead analysis." And in at least two cases, the bureau has tried to help state prosecutors defend past convictions by using court filings that experts say are still misleading. The government has fought releasing the list of the estimated 2,500 cases over three decades in which it performed the analysis.

For the majority of affected prisoners, the typical two-to-four-year window to appeal their convictions based on new scientific evidence is closing.

Dwight E. Adams, the now-retired FBI lab director who ended the technique, said the government has an obligation to release all the case files, to independently review the expert testimony and to alert courts to any errors that could have affected a conviction.

"It troubles me that anyone would be in prison for any reason that wasn't justified. And that's why these reviews should be done in order to determine whether or not our testimony led to the conviction of a wrongly accused individual," Adams said in an interview. "I don't believe there's anything that we should be hiding."

The Post and "60 Minutes" identified at least 250 cases nationwide in which bullet-lead analysis was introduced, including more than a dozen in which courts have either reversed convictions or now face questions about whether innocent people were sent to prison.

> **The cases include a North Carolina drug dealer who has developed significant new evidence to bolster his claim of innocence and a Maryland man who was recently granted a new murder trial.**
>
> **Documents show that the FBI's concerns about the science dated to 1991 and came to light only because a former FBI lab scientist began challenging it.**
>
> **In response to the information uncovered by The Post and "60 Minutes," the FBI late last week said it would initiate corrective actions including a nationwide review of all bullet-lead testimonies and notification to prosecutors so that the courts and defendants can be alerted. The FBI lab also plans to create a system to monitor the accuracy of its scientific testimony.**

Attachment B to Innocence Motion at 1-2. According to the *Washington Post*, the FBI maintains that letters were previously sent to local prosecutors and police agencies:

> **Current FBI managers said that they originally believed that the public release of the 2004 National Academy of Sciences report and the subsequent ending of the analysis generated enough publicity to give defense attorneys and their clients plenty of opportunities to appeal. The bureau also pointed out that it sent form letters to police agencies and umbrella groups for local prosecutors and criminal defense lawyers.**

Attachment B to Innocence Motion at 2. Specifically, the FBI told the *Washington Post* that it had sent letters "to the more than 300 police agencies it had assisted with the science." Attachment B to Innocence Motion at 7. The FBI did acknowledge "that the 2005 letters 'should have been clearer.'"

Attachment B to Innocence Motion at 3.[11]

In its review of cases in which FBI agents testified in criminal cases as to the relationship between a particular bullet and a particular box of bullets, the *Washington Post* identified four Florida cases. Mr. Trease's case was one of the four Florida cases with CBLA testimony used to obtain a conviction. Attachment C to Innocence Motion.

In the wake of the *60 Minutes* reports and the story in the *Washington Post*, other media outlets have provided additional information. According to the *Blackwell Brief, a blog on criminal investigation and the law*, the FBI has announced that a new "round of letters are being sent to state and local crime laboratories and other agencies on the flaws of Bullet Lead Analysis and requesting that they notify state and local prosecutors that may have introduced Bullet Lead Analysis during the trial." Attachment D to Innocence Motion. In cases in which an FBI analyst testified and a conviction resulted, "prosecutors are being asked to obtain and provide transcripts to the FBI and the Department of Justice (DOJ) of BLA testimony by FBI Laboratory examiners." Attachment D to Innocence Motion

[11]Again, to date neither Mr. Trease nor his attorney has received a letter of any kind from the FBI, nor been provided with a copy of a letter sent to the State Attorney's Office or other law enforcement agency acknowledging problems with CBLA.

at 1. The FBI intends to review the transcripts of such testimony in light of the conclusions the FBI made in 2005 "concerning the **inability** of scientists and manufacturers to definitively evaluate the significance of an association between bullets made in the course of a bullet lead examination." Attachment D to Innocence Motion at 2 (emphasis added). According to the *Lexington Herald Leader*, a small number of cases in Kentucky may be in jeopardy in light of the fact that the assumptions behind CBLA "have been found to have no scientific basis." Attachment E to Innocence Motion at 1. Similarly, the *Baltimore Sun* has reported that the use of "this discredited forensic evidence" may impact some criminal cases in Maryland. Attachment F to Innocence Motion.

The revelations about CBLA that first appeared in a segment of *60 Minutes* and in the *Washington Post* is not just new evidence. It is evidence that government actors presented unreliable, inaccurate, misleading, and invalid testimony at Mr. Trease's trial and that during collateral proceedings these government actors withheld from Mr. Trease and his counsel information impeaching the testimony and withheld knowledge that the testimony was inaccurate and misleading in violation of Mr. Trease's due process rights. Because this information was withheld from Mr. Trease and his attorney, they had no means of learning of the FBI's internal recognition and concession that the CBLA was scientifically invalid

and that no criminal convictions should rest upon it until *60 Minutes* and the *Washington Post* broke the story. This presents issues under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972).[12]

The new information now available establishes that Kathleen Lundy's testimony at Mr. Trease's trial was scientifically invalid. Because Mr. Trease's conviction is premised upon scientifically invalid evidence, and because the denial of collateral relief is premised upon scientifically invalid evidence, his conviction cannot stand; it must be vacated and a new trial ordered. At the very least, this case should be remanded to the trial court for an evidentiary hearing on CBLA.

4. The crime scene is consistent with Siegel's confessions and inconsistent with her testimony

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[12]The information being reported by the national media now indicates that officials with the FBI, a government agency, knew before the 2004 report of problems with the science behind the testimony being given by FBI analysts regarding the relationship between a particular bullet and a particular box of bullets. According to the media accounts, the FBI was aware there was a problem in 2002. The FBI knew before its 2005 announcement that it would discontinue comparative bullet lead analysis, that the testimony that FBI analysts had been giving regarding the relationship between a particular bullet and a particular box of bullets was invalid and misleading, and that criminal convictions should not rest on such testimony. And according to the media reports, the former head of the FBI who in 2005 ordered the analysis discontinued has also revealed that prosecuting attorneys in state criminal prosecutions who had presented the testimony of FBI analysts regarding the relationship between a particular bullet and a particular box of bullets were sent letters advising them the testimony was unreliable.

Siegel testified that Mr. Trease shot the victim once, then tried to break his neck, and then slit his throat with a steak knife. She confessed to others that *she* had killed Edenson by stunning him with a stun gun, shooting him with a handgun, and then slitting his throat. Post-conviction counsel's experts, a crime scene investigator and a pathologist, report that their crime scene analysis shows:

> ●The contact gunshot to the head of the victim was consistent with a right-handed shooter (Siegel is right-handed). Siegel told Detective Robinson that Mr. Trease is left handed, and that the gun was in his left hand when he shot Paul Edenson as Robert Trease was controlling his head with his right hand;
>
> ●The initial weapon (a gun) was abandoned for a second weapon (a knife);
>
> ●Detective Robinson reported that "the reason Edenson was not shot a second time with the handgun is that the gun 'stovepiped'" (meaning that the expended round did not fully eject and therefore the next round was never chambered). Trease would know how to clear the weapon, Siegel would not, and would have had to find another weapon to kill the victim;
>
> ●Siegel reported Mr. Trease held the knife in his right hand with the blade upward and that Trease pulled back Paul Edenson's head with his left hand from behind and cut Edenson's throat in a left to right motion;
>
> ●The autopsy disclosed evidence that the victim may have been shocked with a stun gun on the right arm;[13]

[13]A stun gun taken from Siegel's purse when she was arrested. Siegel made admissions to others that she shocked the victim with her stun gun. The medical

●Siegel's story that Mr. Trease entered the house without a weapon to commit a robbery makes no sense.

●Nothing of value was taken from the scene except a box with marijuana in it that Siegel admits she and the victim had been smoking. This was not the scene of a planned robbery/murder in that cash, jewelry, and other valuables were left at the scene?

At the *Huff* hearing below, counsel proffered the following:

I intend to call Robert Tressel, expert in crime scene reconstruction. I intend to call Jonathan Arden as an expert in pathology and forensic pathology, he's an MD.

PC 1154.

The crime scene in this case, Your Honor, clearly indicates that this was a murder scene that should have been investigated by defense counsel. As *my expert, Bob Tressel, who has done over 500 murder scene evaluations, will tell you,* any time that you see two different murder weapons, it should raise a red flag. Typically when someone is killed there is one instrument used to do that. In this case we have two.

We have, as the Court is aware, one shot to the right side of the victim's head point blank range, and then multiple cuts to the throat. Your Honor, *my crime scene expert will testify that this scene is entirely consistent with the story told by Hope Siegel to Ciambrone, Silkwood, and Leon, and that the crime scene supports that theory of the murder above and beyond the theory presented by the State at trial.*

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examiner found marks on the victim's arm that Appellant's post-conviction experts opine could have been from a stun gun. The stun gun and evidence that it was used in the assault of the victim was significant. Siegel never claimed in her "Trease is guilty" story that he had used a stun gun on the victim; however, in her "I did it" confessions she said *she* had used her stun gun.

Specifically he would testify to the following. That the contact gunshot wound to the head of the victim was consistent with a right-handed shooter. Hope Siegel is right-handed. That there was an abandonment of the second -- of the weapon, the gun. The second weapon, the knife. He will testify that critical evidence obtained by Detective Robinson reported that, quote, "The reason Edenson was not shot a second time with the handgun is that the gun stovepiped, meaning that the extended round did not fully eject, and therefore, the next round was never chambered."

Your Honor, this was an automatic -- the alleged weapon was an automatic Glock, nine-millimeter. The round should eject up the top of the slide. It did not. And what it means by, your Honor, "to stovepipe," is that the round stands up, but it sits there. It doesn't eject fully. The slide goes back and jams the round in.

Mr. Trease was familiar with a nine-millimeter, *as my crime scene expert will testify. Anyone that's familiar with a nine-millimeter would easily know how to clear and eject the stovepipe round.* It is our theory that Ms. Siegel did not know how to do that, which is why she had to resort to a knife.

Finally, Mr. Tressel and Dr. Arden both believe that the knife wounds to the throat are consistent with Ms. Hope Siegel doing it, consistent with the way she explained the crime unfolding by Ciambrone, Silkwood, and Leon.[14]

Further, there is evidence in this case, your Honor, that the victim may have been shot or hit with a stun gun. As this Court will remember, Hope Siegel, when she was arrested in Pennsylvania, had in her bag a stun gun. That stun gun was operating. She had the --actually had the user manual with her in the bag where the stun gun was found.

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[14]As discussed in detail in Argument I - IV, *infra*, the lower court erred by not holding an evidentiary hearing with respect to this proffered evidence.

PC 1163-65.

As Hope Siegel told the three inmates in the county jail, she first stunned the victim with a stun gun, she then shot him, the gun didn't work, and she had to cut his throat. There was evidence on the body that could have been consistent with a stun gun injury. Inexplicably, as my pathologist will testify, there was no photos taken of those wounds.

Finally, it is clear that looking at the crime scene in this case, Ms. Siegel's story just doesn't hold water. According to her, Mr. Trease entered the house with the intent to rob by force and commit murder in order to steal money from the victim, yet he entered the house without a weapon. It's just inexplicable, your Honor. If Ms. Hope Siegel is to be believed, why would Mr. Trease enter the house with a gun in the truck? Nothing in her story fits the crime scene and nothing in her story fits the evidence in this case.

Further, your Honor, if the intent was to commit a robbery and get valuables. There were numerous items of value in plain sight in this house that were never disturbed or taken. ***Again, my crime scene expert will indicate that this is not the scene of a robbery gone bad. This is the scene of the murder consistent with the story told by Hope Siegel to the inmates in the Manatee County Jail.***

We would also, your Honor, as I indicated, present the testimony from Dr. Arden. He is a forensic pathologist. He has looked at evidence and has requested other evidence to look at. He believes that this crime scene is consistent with the story told by Hope Siegel to the inmates at trial. Counsel for the State says, well, that's at odds with the expert at trial, who said it was consistent with Mr. Trease. I totally agree with that, Your Honor, that's a factual dispute. If you take my factual dispute as true, I can be entitled to relief, and therefore, this Court should hold an evidentiary hearing.

Finally, as to the stun gun, *my crime scene evidence expert Bob Tressel*

> *has seen the stun gun.* As of this point in time the user manual for that stun gun that was taken into evidence at the time of the arrest of Ms. Hope Siegel is missing. I've talked to counsel for the State. They're aware of that and I believe there are efforts being made to find that. I believe, your Honor, that this gun, based upon the initial evaluation by my crime scene expert, *he believes also that this gun could have had a significant effect on the victim*, especially given the positioning of the victim, and we would ask the Court to order the State to come up with that user manual.

PC 1065-68.

B. RELEVANT FACTS FROM TRIAL

If Hope Siegel is not credible, Mr. Trease is not guilty. *Trease v. State*, 768 So.2d 1050, 1052 (Fla. 2000)("Siegel's testimony was crucial at trial.").

IV. SUMMARY OF ARGUMENT

1. The lower court did not follow this Court's precedent requiring that an evidentiary hearing be conducted during post-conviction proceedings to resolve disputed questions of material fact.

2. Newly discovered evidence of actual innocence would probably have produced an acquittal had the jury been aware of it. The lower court was obligated to hear this evidence.

3. Trial counsel provided prejudicially ineffective assistance of counsel by not retaining necessary experts, not effectively confronting Hope Siegel's testimony, and by not investigating and discovering persons to whom she had

confessed to being the sole culprit.

4. The State did not disclose material exculpatory evidence, including that the victim's own pistol may have been the murder weapon, that the victim had Hope Siegel's personal cell phone number, and that the testimony the state introduced tying the murder weapon to Appellant was junk science.

5. Defense counsel unreasonably and prejudicially failed to present uncontested evidence during the capital sentencing proceeding that Mr. Trease has significant brain damage, a compelling mitigating circumstance.

6. The lower court judge erred by not allowing interviews of the jurors who violated their oaths and deliberated prematurely, and erred by summarily denying Appellant's claim of juror misconduct.

7. The lower court erred by making no inquiry into whether the jurors saw Mr. Trease shackled during his trial.

V. STANDARD OF REVIEW

With respect to all of the claims upon which the lower court denied an evidentiary hearing (Arguments II - IV, and VI and VII, i*nfra*), the facts presented in this appeal must be taken as true. *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999); *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999); *Lightbourne v. Dugger*, 549 So. 2d 1364 (Fla. 1989). All of the Arguments presented in this appeal are

constitutional issues involving mixed questions of law and fact and are reviewed *de novo*, giving deference only to the trial court's factfindings. *Stephens v. State*, 748 So. 2d 1028, 1034 (Fla. 1999).

VI. ARGUMENT

ARGUMENT I

THE LOWER COURT ERRED BY DENYING AN EVIDENTIARY HARING ON APPELLANT'S CLAIMS FOR RELIEF

This Court has long held that a post-conviction defendant is "entitled to an evidentiary hearing unless 'the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief.'" *Lemon v. State*, 498 So. 2d 923 (Fla. 1986), quoting Fla. R. Crim. P. 3.850. "Under rule 3.850, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief." *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999). *Accord Patton v. State*, 784 So. 2d 380, 386 (Fla. 2000); *Arbelaez v. State*, 775 So. 2d 909, 914-15 (Fla. 2000). An evidentiary hearing is warranted if the claims involve "disputed issues of fact." *Maharaj v. State,* 684 So. 2d 726, 728 (Fla. 1996). In Mr. Trease's case, the lower court granted an evidentiary hearing on only one issue – ineffective assistance of counsel at sentencing -- and erroneously failed to grant an evidentiary hearing on significant

other claims of actual innocence despite detailed new allegations and proffers of evidence. This Court should reverse.

ARGUMENT II

NEWLY DISCOVERED EVIDENCE OF INNOCENCE WARRANTS AN EVIDENTIARY HEARING; IT WOULD VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO EXECUTE MR. TREASE

This Court recognized in *Jones v. State*, 591 So.2d 911 (Fla. 1991), that a new trial is warranted if previously unknown/unavailable evidence would probably have produced an acquittal had the evidence been known by the jury. Impeachment evidence qualifies under *Jones* as evidence of innocence that may establish a basis for Rule 3.850 relief. *Robinson v. State*, 770 So.2d 1176, 1170-71 (Fla. 2000); *see also State v. Mills*, 788 So.2d 249 (Fla. 2001). Evidence of impeachment which qualifies under *Jones* as a basis for granting a new trial must be considered cumulatively in deciding whether in fact a new trial is warranted. *State v. Gunsby*, 670 So.2d 920 (Fla. 1996).[15]

Mr. Trease has consistently denied any involvement in the murder of Mr. Edenson. Siegel, who was clearly involved in the murder, agreed to testify against Mr. Trease in exchange for a plea to second degree murder with a possible sentence of 10 to 20 years. Despite the jury's limited knowledge of

[15]Given the evidence of innocence in this case, it would violate the Eighth and Fourteenth Amendments for the state to execute Appellant. *Herrera v. Collins*, 506 U.S. 390 (1993).

Siegel's motive, character, credibility and lack of trustworthiness, they grappled with her story, asking to be reinstructed on the law of principals, and deliberated for over ten hours before returning a verdict of guilty.

As this Court held on direct appeal, "Siegel's testimony was crucial at trial." *Trease v. State*, 768 So.2d 1050, 1052 (Fla. 2000). As outlined in the New Facts section, *supra*, Section III, A, there is significant new evidence that Siegel is not credible, that she had the motive and the mental state to commit the crime alone, that the state used junk science to bolster her testimony, and that the crime scene is consistent with Siegel's confessions:

– Siegel confessed to three people, *about whom the jurors did not hear*, that *she* committed the crime. One of them was her own defense requested mental health expert, to whom she stated that "**she** had **killed** Paul [Edenson]."[16]

– Siegel was undergoing cocaine withdrawal at the time the offense, was desperate for money, and her own mental health experts diagnosed her as

[16]*See* Section III, A., 1, *supra*. Two people to whom Siegel confessed were not known about at trial, her own appointed mental health expert and Ms. Leon. The third, Ms. Ciambrone, was known about, but she invoked her right to silence so as not to affect her own unrelated criminal case. Ciambrone's charges are now resolved. Thus, her Fifth Amendment concerns no longer exist. Because Ciambrone testimony is now available, her testimony is newly discovered evidence of innocence under *Jones v. State*, 591 So.2d 911 (Fla. 1991). Mr. Trease was diligent and did all that he could to present this testimony at trial.

suffering from severely debilitating mental conditions which are totally consistent with her killing the victim alone;[17]

– Testimony from an FBI chemist about lead bullet analysis, offered (and argued) by the State to bolster Siegel's testimony at trial, was totally bogus and has now been acknowledged to be junk science;[18] **and**

– The crime scene evidence strongly supports that Siegel is the killer consistent with her out of court confessions, and rebuts her story at trial that Mr. Trease was.[19]

The lower court erred by not conducting an evidentiary hearing regarding this compelling newly discovered evidence.[20] **Mr. Trease should be provided a meaningful opportunity to show his innocence.**[21]

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[17]*See* Section III, A., 2, *supra.*

[18]*See* Section III, A., 3, *supra.*

[19]*See* Section III, A, 4, *supra.*

[20]In fairness to the lower court, part of the new evidence about the FBI lead bullet analysis junk science only came to light after the lower court denied relief. *See* Innocence Motion. With respect to all of the other new evidence, the trial court erred by not conducting an evidentiary hearing. See Argument I, supra, and Argument ____, infra.

[21]Petitioner exercised due diligence at trial to obtain all possible exculpatory evidence. If on remand the lower court finds that trial counsel did not exercise due diligence with respect to any of this evidence, than that evidences ineffective assistance of counsel and prejudice.

ARGUMENT III

TRIAL COUNSEL WERE INEFFECTIVE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Lawyers have "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Ineffective assistance of counsel under the Sixth, Eighth, and Fourteenth Amendments occurs when counsel acts contrary to professional norms, with prejudice resulting. In *Williams v. Taylor*, 120 S.Ct. 1495 (2000), the Court cited the ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980), as one source for the "norm" of lawyer behavior. And in *Wiggins v. Smith*, 123 S.Ct. 2527 (2003), the Court cited the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases as providing **the** norm for attorney conduct under the Sixth and Fourteenth Amendments. Thus, "the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the 'prevailing professional norms' in ineffective assistance cases" (*Hamblin v. Mitchell*, 354 F.3d 482, 386 (6th Cir. 2003)) under *Strickland v. Washington*, 466 U.S. 668, 691 (1984).

Prejudice is established when attorney conduct undermines confidence in the result or creates a reasonable probability that the result in the case would have been

different absent the conduct. As will be shown, defense counsel in this case performed unreasonably and prejudicially. Counsel's individual actions, and their cumulative effect, *Williams, supra,* 120 S.Ct at 398, require reversal.

A. Counsel were ineffective in their treatment of Hope Siegel

Given what trial counsel knew about Hope Siegel at trial, they were prejudicially ineffective in confronting, and in responding to the state's shielding, of her.

1. Deposition – Siegel the desperate crack addict/prostitute

Defense counsel deposed Siegel before trial. She testified that she had worked for an "escort service" owned by her friend "Holly." Siegel also worked at a lingerie shop as a "model." As part of her job as an "escort," Siegel would meet with the men who would call the service, dance with the dates, perform oral sex, and engage in sexual intercourse for money. Siegel also engaged in group sex for money with "Holly." Siegel was paid a hundred dollars, per sexual act, in cash.

As a lingerie model at various establishments Siegel would dance and strip off her lingerie for the male customers. Siegel would masturbate the customers. During this employment Siegel became involved with a man named Don Lambert, with whom she prostituted herself. It was during this period Siegel met Mr. Trease as well. She quit her "lingerie modeling" job to open her own "escort service,"

advertised in the newspaper as “Lucious Lucinda”. She had also previously advertised as an escort under the name “Dancing Beauty.” Even after beginning her relationship with Mr. Trease, Siegel continued prostituting herself with Don Lambert.

Siegel was a heavy user of cocaine during this period. She described herself as an addict who used coke on a daily basis. While she and Mr. Trease used drugs together, it was Siegel who would purchase them from dealers she knew because she had the money to do so. She free-based so much she would have convulsions. Her cocaine usage led to her being admitted twice in January 1996 to the hospital emergency room. Siegel also ran in front of a car a few weeks before the murder, in a suicide attempt. This incident led to her being kept over night at Glen Oaks, a psychiatric facility, and the institution of Baker Act proceedings against her. At the time of the homicide she would often use $200 worth of crack cocaine per day. According to Siegel, there was never a break in the crack usage between she and Mr. Trease. They engaged in a cycle of using drugs, sleeping the next day, and then Siegel going out to buy more drugs. Although Siegel was not sure if she smoked crack on the day of the homicide, she knew that she had smoked very recently before that. Siegel also drank more than usual before the homicide. Siegel admitted she was "addicted big time" to Valium and Vicodin up to the date of the

homicide, which she used on the day of the crime. Siegel also tried opium.

2. State's motion in limine

The state filed a motion in limine seeking to prevent testimony at trial that Siegel (1) worked as a lingerie model hooker; (2) used drugs, other than around the time of the crime; (3) had been hospitalized for drug use, and "Baker Acted," and (4) had committed other crimes. R. 509-510. The trial court granted the motion as to #1, and, as to ## 2 and 3, held that if drug use was relevant to her "ability to observe, remember, and recount," then counsel could seek its admission, following the dictates of *Edwards v. State*, 548 So. 2d 656, 658 (Fla. 1989). R. Vol. XIV, at 268. Counsel for Mr. Trease unreasonably agreed to this procedure. Vol. XXII, at 1415.

Thus, the picture of Siegel the jurors were presented with was a false one. She testified that she was a single mother who dated Robert Trease. On the day of the homicide she had a drink or two, maybe a Valium or Vicodin. Against her will, she was forced by Mr. Trease to arrange a date with Paul Edenson for the purpose of finding out if there was a safe at his house. According to Siegel, she was forced to meet Edenson and then became a horrified witness to his murder when Mr. Trease entered the Edenson home to commit a burglary/robbery. Siegel bragged in the jail that "There's no way they can believe that she had anything to do with

anything like that." The sanitized picture the jury had of Siegel made it easy for them to accept her story. However, Siegel was far from the poor, helpless, manipulated girl the State presented to the jury and upon whose testimony the State's case hinged. In reality, according to her own admissions at her deposition, Siegel was a crack addicted prostitute with ample motive of her own to kill Paul Edenson.

3. Defense counsel acted unreasonably and prejudicially

Trial counsel unreasonably failed to effectively reply to the State's motion in limine. No written response was submitted. Moreover, trial counsel failed to rely upon Siegel's admissions to Silkwood and Ciambrone to oppose the motion. Silkwood and Ciambrone gave sworn statements that Siegel said she went to Edenson's house to get money for sex because she needed crack cocaine to feed her addiction. The fact that Siegel was well accustomed to going on "dates" with men she did not know as part of her livelihood as a prostitute was proper evidence of her motive and intent to be at Edenson's house, in addition to impeachment of her claim that she was only at Edenson's house because Mr. Trease forced her to be there. There was ample evidence from Siegel and numerous witnesses that she had traded sex for money before and was in need of money.

Trial counsel never argued that Siegel's crack use, addiction, and prostitution

went to *motive and intent*. Based upon Siegel's admissions to Silkwood and Ciambrone, trial counsel's failure to make these arguments was unreasonable. A jury must have information regarding motive and intent if they are to correctly assess the credibility of a witness. This is particularly true when that witness is crucial to the state's case and there is no independent evidence which establishes the defendant as the perpetrator. **The fact that Siegel was a crack addict with a $200 a day habit, had been subject to a Baker Act, and had previously prostituted herself supplied both motive and intent for her to be at Edenson's to obtain money totally on her own, just as she had confessed to others!**[22] Moreover, this evidence would have underscored the probability of her behaving irrationally and violently.[23] **The lower court erred by not hearing evidence on this claim.**

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[22]*See LaMarca v. State*, 785 So.2d 1209, 1213-14 (Fla.2001)(evidence that a 3rd party had a motive to kill improperly excluded).

[23]The evidence of cocaine use was excluded based upon *Edwards v. State*, 548 So. 2d 656 (Fla. 1989) and *Tullis v. State*, 556 So. 2d 1165 (Fla. 3d DCA 1990). The court ruled that the evidence could not be used to impeach Siegel's credibility because trial counsel failed to show that Siegel was using cocaine at the time of the crime and thus her capacity to accurately testify was impaired. However, this evidence was admissible because it was relevant to Siegel's motive and intent to be at Edenson's home. This is not a case where the defense theory was that Siegel's memory of the crime was defective or lacking. Rather, the defense was that Siegel knew what she did and lied about Mr. Trease. Inexplicably and prejudicially, trial counsel failed to proffer this evidentiary basis.

B. Trial counsel's unreasonable/prejudicial treatment of crime scene evidence

Mr. Trease pled and proffered below that it was unreasonable and prejudicial for trial counsel not to have obtained the assistance of experts to evaluate the crime scene and the manner of death. Both of Mr. Trease's post-conviction experts would have testified that the crime scene and the autopsy results were consistent with Siegel's "by herself sex-for- money-gone-bad" story, as told out of court to her friends, as opposed to her "robbery/burglary" in court story that saved her skin. For example, with the assistance of a crime scene expert and a forensic pathologist, defense counsel could have presented evidence that the victim had been assaulted with a stun gun.[24] **Furthermore, counsel could have demonstrated that the crime scene and the victim's body showed wounds inflicted by a right-handed (Siegel) not a left-handed (Trease) person. Counsel could have shown that the fact that the gun that was used "stovepiped" or jammed is consistent with Siegel's story of her having to use a knife as a second weapon – she was unfamiliar with the gun and did not know how to un-jam it quickly. It is not credible that Trease would have abandoned a gun to look for a knife when he would have known how quickly to make the gun work again. Finally, if the**

[24]The only version of the crime told by Siegel that involved the use of a stun gun was the one that exonerates Mr. Trease–Siegel, alone, used a stun gun.In Siegel's version of the crime that implicates Mr. Trease, there is no use of a stun gun.

purpose of the episode was robbery, why were visible valuables left behind? From all of these and other facts, experts for Appellant could have prepared defense counsel for cross-examination and would have been available to testify that Siegel's out of court confessions were consistent with the forensic evidence.

Counsel unreasonably and prejudicially failed to obtain the assistance of critical experts, and Appellant is entitled to a new trial. It is unreasonable for counsel not to "subject[] all forensic evidence to rigorous independent scrutiny." ABA Guidelines, Commentary to Guideline 1.1.[25] **The lower court's**

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[25]*See Steidl v. Walls*, 267 F. Supp. 2d 919 (C.D. Ill. 2003)(counsel's conduct was deficient in failing to obtain expert assistance or to even cross-examine the state's expert on this point; counsel's conduct was also deficient for failing to prepare and present expert testimony concerning the crime scene; "even if the individual instances of deficient performance were not, considered alone, sufficient, cumulative consideration required relief."); *Cravens v. State*, 50 S.W.3d 290 (Mo. Ct. App. 2001)(counsel ineffective for failing to prepare and present expert testimony of pathologist; testimony could have resulted in "acquittal, hung jury, or conviction of the lesser offense"); *Gersten v. Senkowski*, 426 F.3d 588, 607 (2nd Cir. 2005) (affirming 299 F. Supp. 2d 84 (E.D.N.Y. 2004))(counsel ineffective in sexual abuse case for failing to consult with expert medical witness and psychological expert to rebut the testimony of the state's experts; "In sexual abuse case, because of the centrality of medical testimony, the failure to consult with or call a medical expert is often indicative of ineffective assistance of counsel;" counsel "essentially conceded" that the physical evidence was significant without investigating what a defense medical expert could have shown); *Draughton v. Dretke,* 427 F.3d 286 (5th Cir. 2005)(counsel ineffective for failing to retain a ballistics expert.); *Jacobs v. Horn*, 395 F.3d 92 (3rd Cir.), *cert. denied*, 126 S.Ct.

denial of an evidentiary hearing on these claims was contrary to this Court's consistent precedents requiring an evidentiary hearing on such well pled post-conviction claims.

The lower court found that, because what was alleged at the *Huff* hearing was contrary to what was testified to at trial, no evidentiary hearing was allowed. That is the opposite of the law–*because* what was proffered by post-conviction counsel contradicts what was presented at trial, and/or is not conclusively refuted by the record, an evidentiary hearing was *required*, not foreclosed.

The lower court's ruling on these issues vividly illustrates a misapplication of this Court's precedents *vis-a-vis* post-conviction evidentiary hearings, a misapplication that permeates the order denying an evidentiary hearing on all but one claim:

> With respect to the Defendant's claim regarding counsel's failure to retain an expert to analyze the crime scene, the Defendant's claim is factually insufficient as he fails to allege that an expert would have reached a contrary opinion than what was established at trial. See Bryant 910 So.2d 810 (Fla. 2005).[26] **Although counsel stated at the**

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479 (2005) (petitioner prejudiced by trial counsel's unreasonable failure to develop and present expert testimony supporting diminished capacity defense).

[26]The pertinent portions of *Bryant v. State*, 901 So.2d 810 (Fla. 2005), are at 901 So.2d at 821-22, where this Court wrote:

Case Management/Huff hearing that he had retained an expert, Robert Trestle, to explain that the injuries to the victim are consistent with Hope Siegel's version of events in which she implicates herself, it would appear that if the expert were to testify that the killer was right-handed, it would completely contradict the medical examiner's findings in the autopsy that the perpetrator used his left hand to cut the victim's throat. Therefore, there is no reason to believe that counsel's expert would contradict the medical examiner's testimony that Hope Siegel's trial testimony was consistent with the crime scene evidence and autopsy results. (See attached Tr. 1573-1574).[27] Additionally, the medical examiner's testimony showed that the gunshot wound to the victim could have occurred while the gun was either in the right or left hand of the perpetrator. (See attached Tr. 1596-

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> We recently held that when a defendant alleges ineffective assistance of counsel for failure to call specific witnesses, a defendant is "required to allege what testimony defense counsel could have elicited from witnesses and how defense counsel's failure to call, interview, or present the witnesses would have prejudiced the case." *Nelson v. State*, 875 So.2d 579, 583 (Fla. 2004). Neither in his pleading below nor in his brief before this Court does Bryant allege specific facts about which a confession expert would testify. He has not provided proposed testimony and does not even claim to have obtained an expert. Bryant merely concludes that an expert could testify that "[Bryant's] confession is typical of those which are false." Without more specific factual allegations, such as proposed testimony, this claim is insufficient under *Nelson*.

Id. at 821-22. Unlike the defendant's attorney in *Bryant*, counsel for Mr. Trease "allege[d] specific facts about which .... experts would testify," he "provided proposed testimony" and "obtained ... expert[s], and provided "more specific factual allegations, such as proposed testimony."

[27]This "conclusion" by the lower court defies reason. Counsel advised the Court specifically that his named experts *would* testify and would contradict the medical examiner's testimony from trial. *See* New Facts section, III, A, 4, *supra*.

1598).[28] **The medical examiner did not testify that the victim had been shot with a stun gun, only that there were two abrasions on the victim's arm that were nonimpressive and caused by some sort of blunt impact. (See attached Tr. 1598-1600). At no time did the medical examiner testify that these marks were caused by a stun gun.**[29] **Further, Lt. Hoffmeister testified that the stun gun that was collected from Hope Siegel was tested and it was inoperable. (See attached Tr. 2551). Lt. Hoffmeister tested the stun gun on himself with batteries that he used in the gun to make it operable and he testified that if the stun gun had been pressed against the body long enough time to render a person immobile, there would have been signature marks left on the body. (See attached Tr. 2556-2557). This testimony leads to the logical and contrary conclusion to the Defendant's claim, that no stun gun was used in the crime.**[30] **The Defendant's assertion that nothing was taken of value from the home of the victim is incorrect as a jewelry box was taken, because the victim did not have a safe with valuables. (See attached Tr. 1664-1667).**[31]

The fact that the Defendant entered the home without a weapon does not establish the veracity of Hope Siegel's inculpatory

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[28]Counsel at the *Huff* hearing advised the Court that his named experts would testify that the crime scene evidence and the autopsy indicated that a right handed perpetrator was the culprit. *See* New Facts section, III, A, 4, *supra*.

[29]That was counsel's point at the *Huff* hearing. Counsel advised the Court that his named expert would testify that the injuries were in fact consistent with the use of a stun gun. *See* New Facts section, III, A, 4, *supra*.

[30]Again, this was counsel's point. The stun gun in fact proved to be insufficient as a weapon so Siegel went to a gun and a knife. That does not mean that the stun gun was not used or that it did not leave marks on the victim.

It is not the place of a trial court judge at a *Huff* hearing to look *only* to the trial (especially forensic) evidence, to anoint it as the truth, and to thereby arrive at "the logical and contrary conclusion to the Defendant's claim."

[31]A box with marijuana in it was taken. That is a far cry from a robbery/burglary.

statements because the Defendant was a self-proclaimed martial arts expert.[32] Further, given the victim's dress and manner, he was obviously placed in a vulnerable position. With respect to counsel's failure to obtain an independent pathologist to show that the injuries were consistent with Siegel's admission that she killed the victim, the Defendant's argument is facially insufficient in that he has failed to allege that an independent pathologist would have reached a contrary conclusion than what was established at trial. See Bryant v. State 901 So. 2d 821-22 (Fla. 2005).[33]

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[32]Martial arts was notably not a part of Siegel's robbery/burglary story.

[33]This is wrong. As set forth in the New Facts section, III, A, 4, *supra*, Appellant identified post-conviction experts who had been retained and whose testimony indeed would "completely contradict the [trial] medical examiner's testimony" and would "contradict the medical examiners testimony that Hope Siegel's trial testimony was consistent with the crime scene evidence and autopsy results." PC 891 (order denying a hearing). For example, counsel told the Court at the *Huff* hearing that "[t]here was evidence on the body that could have been consistent with a stun gun injury. Inexplicably, as my pathologist will testify, there was no photos taken of those wounds." And counsel said that

> "my crime scene expert will testify that this scene is entirely consistent with the story told by Hope Siegel to Ciambrone, Silkwood, and Leon, and that the crime scene supports that theory of the murder above and beyond the theory presented by the State at trial."
>
> and "Mr. Tressel and Dr. Arden both believe that the knife wounds to the throat are consistent with Ms. Hope Siegel doing it, consistent with the way she explained the crime unfolding by Ciambrone, Silkwood, and Leon."
>
> And "[a]gain, my crime scene expert will indicate that this is not the scene of a robbery gone bad. This is the scene of the murder consistent with the story told by Hope Siegel to the inmates in the Manatee County Jail."

With respect to the Defendant's argument that counsel should have hired an expert to test the stun gun recovered from Hope Siegel, the Defendant's argument is facially insufficient without an allegation that an independent expert would have reached a contrary conclusion to the testimony offered at trial. See Bryant 901 So.2d 821. Further, the batteries that were in the stun gun when recovered were manufacturer-recommended batteries. (See attached Tr. 2550-2551).

With respect to the Defendant's claim that counsel should have elicited testimony from Detective Robinson that the murder weapon "stove piped" at the time of the crime and that is why the knife was used, which according to the Defendant leads more credence to Hope Siegel's alleged admission to having committed the murder alone, that claim is without merit as the evidence was clear that the Defendant maintained and carried the firearm on a number of occasions since the murder. (See attached Tr. 2081-83).[34] Counsel's argument at the Case Management hearing that

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> And "[w]e would also, your Honor, as I indicated, present the testimony from Dr. Arden. He is a forensic pathologist. He has looked at evidence and has requested other evidence to look at. He believes that this crime scene is consistent with the story told by Hope Siegel to the inmates at trial. Counsel for the State says, well, that's at odds with the expert at trial, who said it was consistent with Mr. Trease. I totally agree with that, Your Honor, that's a factual dispute. If you take my factual dispute as true, I can be entitled to relief, and therefore, this Court should hold an evidentiary hearing."
>
> And, [f]inally, as to the stun gun, *my crime scene evidence expert Bob Tressel has seen the stun gun. ... he believes also that this gun could have had a significant effect on the victim*, especially given the positioning of the victim, and we would ask the Court to order the State to come up with that user manual."

PC 1065-68.

[34]The point of Appellant's argument was that Siegel did not know how to

> **because the Defendant was familiar with firearms and Hope Siegel was not, that somehow substantiates Ms. Siegel's statements that she alone killed the victim is contradicted by the medical evidence as referenced in this order above.**[35]

PC 891 - 894.

Appellant alleged that trial counsel unreasonably and prejudicially failed to obtain the assistance of experts. With expert assistance counsel could have impeached Siegel and rebutted the state's entire case. This is not a matter of quibbling around the edges; either Siegel was truthful or she was the killer. Forensic evidence supports the latter.

C. Counsel's unreasonable/ prejudicial treatment of Siegel's confessions

Trial counsel learned that Siegel admitted to cellmates Silkwood and Ciambrone that she shocked Edenson with a stun gun, then shot him, and then slit his throat, and that Mr. Trease was not present. Counsel also learned that Siegel told cellmate Sterling that Siegel's finger was on the trigger, but that Mr. Trease had physically made her pull it. Other inmates who were housed with Siegel were

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correct a jam, but Mr. Trease would have known how. Because Siegel did not know how, she would have had to find an additional weapon, *i.e*., a knife.

[35]This is simple bootstrapping. The expert testimony that Trease proffered contradicted the evidence the lower court relied upon here. If Trease's new evidence is accepted as true, then the evidence the judge relied upon instead evaporates. That is why a hearing was proper.

identified, but inexplicably, trial counsel failed to attempt to locate or interview these inmates.[36] **Undersigned counsel has found an additional two people to whom Siegel confessed –her own mental health expert, and another cellmate.**

Furthermore, trial counsel did not make reasonable efforts to obtain Ciambrone's testimony. Ciambrone had given a sworn statement confirming that Siegel had admitted to killing Edenson. What Siegel told Ciambrone was consistent with the statement she made to Silkwood. *See* New Facts Section, III, A, 1, *supra*. Mr. Trease's jury was deprived of this significant evidence of his innocence because on advice of counsel Ciambrone invoked her Fifth Amendment rights. Her counsel made clear that she was invoking her right to silence because of the affect her testimony could have on *her* pending charges. The State was also prosecuting Ciambrone for murder. Only the State had the power to offer her use immunity. The State refused to grant immunity and Ciambrone's testimony supporting Mr Trease's innocence was kept from the jury. Trial counsel unreasonably failed to seek a continuance of Mr. Trease's trial until Ciambrone's case was resolved. It has now been resolved, and she is

[36]Under controlling ABA Guidelines, it is unreasonable for counsel not to conduct thorough and independent investigation. Counsel is required to conduct "[c]omprehensive pretrial investigation... searching for any other potential witnesses who might challenge the prosecution's version of events..." Commentary

willing to testify. *See* Argument II, *supra.*

Moreover, trial counsel unreasonably was responsible for Ciambrone's invocation of her Fifth Amendment rights. Trial counsel used the services of private investigator Steele. Steele also was assisting counsel for Ciambrone's co-defendant. When counsel for Ciambrone learned that Steele had spoken to her, he was extremely upset that she had been approached by the co-defendant's investigator. Mr. Trease's counsel should have recognized this and ensured that a different investigator interviewed Ciambrone. The failure to do so was largely responsible for Ciambrone's attorney advising her to invoke her right to remain silent.

Finally, Silkwood testified to Siegel's admission that she alone killed the victim. The State vigorously attached Silkwood's credibility at trial. When trial counsel sought to bring out that the State had previously relied upon Silkwood to prosecute her co-defendant for murder, the State objected. Trial counsel unreasonably failed to rebut the State's objection thereby preventing the jury from knowing that the State had relied upon Silkwood to convict her co-defendant of murder. Trial counsel should have filed a motion asking for an advanced ruling so that he could have proffered Silkwood's testimony at

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to Guideline 1.1.

her co-defendant's trial.

D. Trial counsel's unreasonable/prejudicial treatment of Siegel's mental illness

Trial counsel understood that Siegel's mental diseases and defects were relevant and admissible. He called Dr. Cynthia Bailey, a psychologist, who had treated Siegel following a car accident in 1992, as a witness. Bailey testified that she had seen Siegel because Siegel was having temper control problems, was under stress, and feeling very emotional. Bailey also noted that Siegel had an IQ of 82, or low average. The jury did not get an accurate or complete picture of Siegel's relevant impairments.

Trial counsel should have sought out the records and opinions mental health experts who evaluated Siegel post-crime. As set forth in the New Fact section, III, A, B, *supra*, had counsel done so, he would have learned that Siegel's brain damage and resulting problems were far more significant than was presented to the jury. Siegel's post-conviction expert believed that her crack cocaine addiction exasperated the impairments of her already debilitated frontal lobe, even if she was not high at the exact moment of the crime. For a crack addict, not being high can be as debilitating as being high on crack.

Furthermore, **trial counsel should have moved to have an independent**

mental health expert evaluate Siegel, or, at a minimum, to evaluate her mental health records, including post-crime evaluations.[37] According to evaluators, Siegel had a severe mental illness at the time of the offense. Although she did not meet the McNaghten criteria for insanity, Siegel's post-conviction expert thought she was medically insane at the time of the offense. He diagnosed her with post-traumatic stress disorder and with traumatic frontal lobe damage to the brain with residual symptomology and depression. When asked in later post-conviction proceedings for Siegel if cocaine would exacerbate her mental health problems he opined that it would make things a lot worse and that if you take someone like Siegel who suffers from frontal lobe injury and you add cocaine, it would put her out of commission. He explained that she would have no internal controls at the time of the crime.[38] The jury never learned of the extent of the Siegel's mental health problems and how they could affect her thinking, emotions and behavior.

E. Other Instances of Ineffective Assistance

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[37]The lower court wrote that no hearing was required on this claim because "Defendant does not explain how these records or opinions would have been admissible." PC 896. The court had admitted the testimony of Dr. Bailey, so obviously Siegel's mental condition was considered relevant.

[38]Dr. Afield also testified in Siegel's post-conviction proceedings and opined that she was "a very sick young lady, terribly depressed with brain damage,

1. The operation of the stun gun: Trial counsel unreasonably failed to obtain independent expert testing of the stun gun taken from Siegel's purse upon arrest. Trial counsel failed to effectively challenge the testimony of Lieutenant Hoffmeister who testified that he examined the stun gun and that it was an ineffective weapon. Hoffmeister's testimony could have been challenged as this was critical evidence to Mr. Trease's defense. In fact, Hoffmeister admitted he tested the weapon with batteries that were not in conformity with the manufacturer's specifications. The user manual for the stun gun was found in Siegel's possession. Trial counsel asked no questions regarding this manual. Post-conviction counsel advised the lower court judge during the *Huff* hearing that:

> Finally, as to the stun gun, my crime scene evidence expert Bob Tressel has seen the stun gun. As of this point in time the user manual for that stun gun that was taken into evidence at the time of the arrest of Ms. Hope Siegel is missing. I've talked to counsel for the State. They're aware of that and I believe there are efforts being made to find that. I believe, your Honor, that this gun, based upon the initial evaluation by my crime scene expert, *he believes also that this gun could have had a significant effect on the victim*, especially given the positioning of the victim, and we would ask the Court to order the State to come up with that user manual.

PC 1166. The lower court denied relief on this claim without an evidentiary hearing and without ordering the state to locate and deliver the user manual.

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compounded with cocaine abuse."

2. Junk Science: Trial counsel unreasonably and prejudicially failed to challenge the findings of the FBI's metallurgical analysis of ammunition in this case by Kathleen Lundy as voodoo science, and the jury was misled as to the identification of the murder weapon. *Trial counsel did not even cross-examine Lundy*. *See* New Facts section, III, A, 3, *supra*. This evidence was used by the State to bolster Siegel's credibility, and counsel should have learned how to rebut/exclude it.

3. The mob "hit": There was evidence that the crime was a mob "hit." The State moved to exclude the evidence. Trial counsel failed to effectively respond to this motion. The Court saw no relevance of the mob to this case. The Court declared that it proved nothing and that trial counsel could ask if the State investigated other suspects, but the mob was just speculation or hearsay. Trial counsel again failed to proffer relevant facts and an evidentiary basis for asking about possible connections of the victim to the mob.

The State undermined Silkwood's report of Siegel's admission that she alone killed Edenson with the fact that Siegel had previously told Silkwood that Mr. Trease committed the murder. Actually, Silkwood made clear that Siegel first told her that Mr. Trease killed the victim and that it was a mafia hit. Trial counsel should have advocated that this story from Siegel was not consistent with her

statement on arrest, but another false statement from Siegel designed to further exculpate herself. Trial counsel should have argued that Siegel had learned of the evidence suggesting that the victim had connections to the mob and that she was adjusting her story in light of this discovery. Siegel's credibility was crucial to the outcome and another fabricated story based upon information gained during discovery was legally appropriate impeachment. Trial counsel unreasonably and prejudicially failed to advance this factual basis and evidentiary rationale.

4. *Williams* Rule Evidence: Pre-trial, the State intended to utilize *Williams* Rule evidence. Trial counsel objected, arguing the evidence was being used only to show propensity and bad character. A hearing was held on admissibility, Vol.14, R 258-362), and at that hearing trial counsel unreasonably conceded that evidence relating to the burglary of David Shorin's home was admissible. The evidence showed that Siegel went to Shorin's home on a date to determine if he had valuables. Siegel and Mr. Trease later burglarized Shorin's home *when he was not present*. A safe, guns, and other valuables were taken from Shorin's home, including the alleged gun used in the Edenson murder.[39]

By contrast, according to Siegel's trial testimony, Mr. Trease forced her

[39]We now know that the murder weapon may have been the victim's own gun. *See* Argument IV, *infra*. And

to go to Edenson's home so that she could locate a safe and other valuables as she had done with Shorin. But according to her trial story, their was no modus operandi. Instead of "casing" the home and returning when he was not at home, according to Siegel Mr. Trease forced his way into the house to rob Edenson. Trial counsel unreasonably conceded that this evidence was admissible *Williams* Rule evidence when there was no similarity between the cases.

Trial counsel unreasonably did not effectively advocate that the state's evidence was inadmissible under *Williams* Rule and in the absence of any prior notice.

F. Prejudice

Had counsel acted according to prevailing professional norms, the jurors would have learned that: the state's "crucial" witness had the motive and intent to go on her own to the victim's house and kill him during an escalating confrontation over sex and money, as she had said repeatedly; the forensic evidence was consistent with Siegel's out-of-court statements that she alone was the culprit and inconsistent with her testimony; Siegel's brain damage and cocaine addition made it likely that she was the culprit; and Siegel had confessed to others (not known to the jurors, *i.e., her own expert!*) that she had killed the victim. Counsel's unreasonable actions, taken individually or collectively, undermine confidence in

the result of this case and an evidentiary hearing should have been conducted below.

ARGUMENT IV

MR. TREASE WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

It violates due process for the state not to disclose material exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83 (1963). Evidence is exculpatory if it is favorable in any manner to the defendant, including evidence that would show the bias or motive of a witness. *Banks v. Dretke*, 540 U.S. 668, 701 (2004)(had the jury known of the suppressed evidence it "might well have distrusted" or even "disregarded" state's evidence); *Giglio v. United States*, 405 U.S. 150 (1972)(*Brady* applies to evidence relevant to credibility of government witnesses); *Brown v. Wainright*, 785 F.2d 1457, 1465 (11th Cir.1986)("The thrust of *Giglio* and its progeny [is] to ensure that a jury knows the facts that might motivate a witness in giving testimony"). Exculpatory evidence is material if it undermines confidence in the guilt/innocence or sentencing verdict, *Kyles v. Whitley*, 514 U.S. 419 (1995), without regard to whether "disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles*, 514 U.S. at 435. When two or more pieces of favorable evidence are suppressed, their

materiality "must be considered collectively, not item by item." *Id*., 514 U.S. at 435-36; *see also United States v. Sipe*, 388 F.3d 471,478 (5th Cir. 2004) ("[w]hen there are a number of *Brady* violations, a court must analyze whether the cumulative effect of all such evidence suppressed by the government raises a reasonable probability that its disclosure would have produced a different result").[40] **These principles were violated in Appellant's case, and the lower court erred by not allowing an evidentiary hearing on his claims.**

A. The victim possessed a gun and ammunition of the same type as the alleged murder weapon.

Mr. Trease's jury recommended a death sentence on December 19, 1996, and he was sentenced to death by the trial court on January 22, 1997. Nearly six months later, on June 6, 1997, a .9 mm Beretta and 3 boxes of ammunition, including 2 boxes of Federal .9 mm Luger cartridges, were documented as evidence in Mr. Trease's case. Officer S. Bouley signed a property receipt for the items and noted:

> [G]iven to property from Det. Robinson who removed it from a file of Edenson's. ~~Gun~~ Property handed to N.

[40]When the state not only fails to disclose exculpatory evidence but also allows false testimony to go uncorrected, the Petitioner is required to show less prejudice in order to prevail. When false evidence or argument is presented, reversal is required if there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976); *Napue v. Illinois*, 360 U.S. 264 (1959); *Mooney v. Holohan*, 394 U.S. 103 (1935).

Garber in Property on unk. date.

There is no indication on the receipt whether the gun came from Mr. Edenson's home or business, when it was confiscated, where it had been since Mr. Edenson's death, or why it had suddenly been logged in months after Mr. Trease has been tried and sentenced to death.[41]

Medical examiner Dr. James Wilson testified that the gunshot to the victim's head was made by a .38 or .9 mm handgun. (R. 1538) The State argued that the weapon that shot Mr. Edenson was a .9 mm Glock recovered from the Pennsylvania apartment where Hope Siegel and Mr. Trease were staying. The State's identification of this gun as the murder weapon was far from conclusive, being based upon Siegel's testimony and the metallurgical analysis performed by FBI analyst Kathleen Lundy. *Mr. Edenson's gun was the same caliber and had the same type of ammunition as the purported murder weapon. Mr. Edenson could just as easily have been murdered with his own gun*

[41]The "location taken from" is entered as 2050 Ringling Blvd., the address for the Sarasota Police Department. An 8/29/95 report by Det. Grodoski indicates that a handgun in a box may have taken from Mr. Edenson's business, but there is no subsequent property receipt. The type of ammunition is not detailed, and the detective read the weapon type from the outside of the box without actually opening the box to confirm that there was a weapon of that or any type inside.

as with the gun recovered from the Pennsylvania apartment.[42] **That is one more fact that undermines the state's "crucial witness."**

B. Hope Siegel had a relationship with the victim, Mr. Edenson.

Siegel knew the victim better than the jurors were led to believe. The State's theory of the case at trial was that Mr. Trease forced Hope Siegel to call Mr. Edenson and make a date with him, forced her to go to Mr. Edenson's home, forced her to go to her pick-up truck and get a gun to shoot Mr. Edenson, then forced her to get a knife from Mr. Edenson's kitchen to cut his throat when the gunshot failed to kill him. According to the State, Mr. Trease was the instigator, the mastermind, and Hope Siegel was the mentally challenged young woman coerced into doing his bidding.

One important component of this theory was that Mr. Trease was the one who had initiated a relationship with Mr. Edenson, and thus was the one who chose

[42]At least five friends of the victim told the Sarasota Police that they thought Paul Edenson had at least one gun. Mark Lonstein said Mr. Edenson kept a gun at his business. (Det. Robinson's 9/02/95 report) Robert Friedman believed that Mr. Edenson had bought a handgun a few months before after receiving threats. (Det. Gorevan's 8/29/95 report) Colleen Burns said there would be a handgun and a bag of jewelry in a locked cabinet at the business. (Det. Grodoski's 8/29/95 report) Steve Harrelson said Mr. Edenson told him he had a gun. (Det. Holmes 8/25/95 report) Mr. Harrelson's girlfriend Mary Rykschroeff said she thought Mr. Edenson had a gun in his house in the bedroom. (Det. Holmes' 8/25/95 report.) However, the police kept the gun from the defense.

Mr. Edenson as a target. The State presented testimony and argument that Mr. Trease took a car to Mr. Edenson's business, Bayview Motors, to be sold on consignment, and that "[Trease] went there a few times, sometimes with his girlfriend, Hope Siegel, and sometimes by himself." (R. 1434) During closing arguments, the State emphasized *Mr. Trease's* relationship with Mr. Edenson:

> They asked him, did you know Paul Edenson? Yeah, I knew Paul Edenson; I tried to sell him a car once; I saw him one time and maybe one other time at a restaurant. We know that's not true. You heard from Myles Elginer, Paul Edenson's employee, the man was there three or four times. They said, did you ever enter into a consignment agreement with Mr. Edenson? He said no. We've got the consignment agreement. It's his signature on it.

(R. 2709) In other words, according to the State, Mr. Trease lied about his relationship with Mr. Edenson, and the State had the paper trail to prove it. The State had another paper trail that proved Hope Siegel lied about *her* relationship with Mr. Edenson, but they chose not to present those documents or divulge them to the defense.

Rick Goldman was a friend and customer of Mr. Edenson. Mr. Goldman testified at Mr. Trease's trial that he was present at Bayview Motors on August 17, 1995, between 7:00 and 7:30 p.m., while Mr. Edenson was on the telephone. Mr. Goldman believed Mr. Edenson was speaking with a woman and heard Mr. Edenson giving directions to his home. Mr. Goldman testified on direct

examination that he was not sure if Mr. Edenson had initiated or received the call. On cross-examination, defense counsel reminded Mr. Goldman of his August 20, 1995, statement to Sarasota Police Detective Potter. Mr. Goldman remembered saying that Mr. Edenson had himself dialed a number that was written on the same page on which he had just written Mr. Goldman's beeper number, initiating the call with the woman. However, on redirect, Mr. Goldman said that when he reviewed his statement, he was not sure whether Mr. Edenson had placed or received the call.

Whether Mr. Edenson actually placed that particular call to Siegel on that particular night, *he did have Hope Siegel's personal cell phone number, and the State knew it*. There were numerous phone numbers in Mr. Edenson's office and the Sarasota Police Department (S.P.D.) catalogued those numbers, making contact cards. One contact card prepared by Detective Robinson reads as follows:

705-0747 (off envelope by phone)

"Hope"

Phone records contained in the S.P.D. file confirm that this is indeed Hope Siegel's cellular telephone number.

The S.P.D. got Siegel's most recent cell phone bill from her friend Donald Lambert. According to Detective Gorevan's 8/29/95 Supplementary Offense Report, p. 15, Mr. Lambert was involved with Siegel and "had been giving her

money for some time and paying off many of her bills," including her cellular phone bill. When the police spoke with Mr. Lambert on August 23, 1995, he said he had not heard from Siegel in a week. They had last spoken on Monday or Tuesday, when they argued because he had recently had her cell phone turned off because the bills were too high. *See* Detective Grodoski's report, p. 25. Thus Siegel's cell phone was turned off before August 14th or 15th, and before she called Mr. Edenson on the day he was killed.[43] **Mr. Edenson clearly had a relationship with Siegel that predated the week he was killed.**[44]

The State never told the defense that Mr. Edenson possessed multiple phone numbers for Hope Siegel prior to their date on the night of his murder.

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[43]It seems that Mr. Edenson had another phone number for Hope Siegel as well: "*366-1281 (off envelope by phone)*." It is unclear whether this number was written on the same envelope alongside Siegel's cell phone number, but it was also taken down on a contact card by Detective Robinson. This number also appears numerous times on Mr. Lambert's motel phone records, contained in the S.P.D. file, in a context that suggests it belongs to Hope Siegel.

[44]According to Mr. Goldman, the night Mr. Edenson was killed,

> ... [H]e said uh, I have to get goin', I have an eight o'clock date, an [sic] it sounded strange when he said date because what I remembered was that he had a steady girlfriend or, or fiancee, UNINTELLIGIBLE and I said I thought you had a steady girlfriend an [sic] he kinda laughed and said *this is a not so steady girlfriend or a not so steady*.

(Rick Goldman's 8/29/95 Statement, pp. 5-6). Mr. Edenson doesn't say he's never

This is crucial information that the defense could have used to support their theory that Siegel alone murdered Mr. Edenson. She had a prior relationship with the victim and she killed him.

C. The FBI's metallurgical analysis of ammunition in this case was voodoo science, and the jury was misled as to the identification of the murder weapon.

The allegations set forth in the New Facts section, III, A, 3, *supra*, are incorporated into this argument by specific reference. The state's witness who testified to lead bullet analysis was not credible and her "science," used by the state to bolster Siegel, was worthless.

D. Prejudice

For all we know now, the victim was killed by his "not so steady girlfriend" using his own gun. The state's failure to disclose this evidence undermines confidence in the result and the lower court erred by not conducting an evidentiary hearing on these claims.

ARGUMENT V

APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Appellant does not have an intact, normal, functioning brain, through no fault

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been out with the woman before, but that she's a "not so steady."

of his own. Defense counsel was aware that Appellant had brain damage and did not present this compelling mitigating circumstance to the jurors or, later, at sentencing, to the Court. This constituted unreasonable and prejudicial attorney conduct in violation of the Sixth, Eighth, and Fourteenth Amendments.

A. Brain damage, or even the *possibility* of brain damage, is a powerful mitigating circumstance

"[C]hildhood neglect and abandonment and *possible* neurological damage" are powerful mitigating circumstances. *Abdul-Kabir v. Quarterman*, 550 U.S. ___, ___ (April 25, 2007)(slip op. At 27).[45] **Mr. Trease's attorney presented evidence of childhood abuse during his sentencing proceeding, but did not present readily available evidence that Mr. Trease has brain damage.**

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[45]S*ee also Williams v. Taylor*, 120 S.Ct. 1495 (2000)(counsel ineffective for failing to introduce evidence of troubled childhood *and* diminished mental capacities); *Wiggins v. Smith*, 123 S.Ct. 2527 (2003)(counsel ineffective for failing to present evidence of "dysfunctional background" *and* diminished mental capacities); *Correll v. Ryan*, 465 F.3d 1006 (9th Cir. 2006)("Several experts testified that this type of accident and the symptoms Correll exhibited then and now indicate ***a high likelihood*** of brain impairment."); *Frierson v. Wodword,* 463 F.3d 982 (9th Cir. 2006)(jury never presented with evidence that Frierson suffered multiple severe brain injuries as a child that "***may have*** resulted in organic brain dysfunction; that Frierson suffered from a learning disability, low intelligence, and ***may have*** been borderline mentally retarded . . .." (emphasis added)); *Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003) (counsel ineffective because evidence would have shown Hamblin's unstable and deprived childhood *and* likely suffered from a mental disability or disorder); *Harries v. Bell*, 417 F.3d 631 (6th Cir. 2005)(counsel ineffective for not presenting evidence of defendant's poor mental health *and*

B. Petitioner suffers from significant brain impairment[46]

There was no dispute about it in the hearing before the lower court; Petitioner suffers from brain damage, defense counsel knew it, and defense counsel did not present the sentencers with the available proof. For example: the sentencers were not informed that a mental health professional in the United States Marine Corps had found that Mr. Trease suffered either from a developing thought disorder or organic brain damage at age seventeen (P.C. 236); the sentencers were not told that an EEG taken at the Sarasota Medical Center in 1996 showed that Mr. Trease had an abnormal brain (P.C. 233); and the sentencers were not told that trial counsel's own expert, Dr. Merin, performed neurological testing and also found that Mr. Trease had brain damage. The state offered no refutation of this evidence.

1. Dr. Merin's testimony

Dr. Merin testified in these post-conviction proceedings regarding the results of neuropsychological tests he administered to Mr. Trease in 1996. (P.C. 42). The testing results revealed that Mr. Trease was very much impaired in his ability to

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troubled family background).

[46]The transcript of the limited evidentiary hearing conducted below is contained in volumes 14 and 15 of the PC record, beginning at page 2586 (bottom center) of volume 14. The transcript page numbers referenced in this argument only are the numbers at the top right corner of the transcript pages, not the bottom center numbers.

comprehend a logical sequence of human behavior and also impaired in new learning, *i.e.*, adapting to a new situation. (P.C. 44). Mr. Trease is impaired in "decision-making capabilities," "making judgments," and "understanding consequences of behavior." (*Id*. at 52). Dr. Merin testified before the lower court that Mr. Trease's "prefrontal lobe–the entire brain, the thinking part of the brain was simply not functioning as rapidly as it would in the average personality or even a person with low average intelligence," like Mr. Trease. (P.C. at 53).

Dr. Merin noted that the EEG showed "some sort of inappropriate activity particularly on the right side of the brain, particularly in the temporal lobe area." (P.C. 54; 75). He testified that an impaired right temporal lobe "is very likely to result in outbursts of anger, outbursts of destructiveness, outbursts of behavior that the person otherwise can't explain, an I-don't -now-why-I-did-that type of phenomenon." (P.C. 57). Dr. Merin testified that Mr. Trease had reduced "ability to develop principles, test hypotheses, [and] modify behavior based upon prefrontal lobe" damage. (P.C. 61).[47]

Dr. Merin also testified that Mr. Trease's brain damage was likely the result of heredity and the horrendous abuse he suffered growing up. He

[47]Dr. Merin also testified that Mr. Trease's "prefrontal lobe did not grow right; "there's clearly something wrong with it." (P.C. 75)

concluded that Mr. Trease's social history, upbringing, and brain impairment were all directly related to his conduct in this case. (P.C. 63).

Dr. Merin was available and willing to testify to these facts at sentencing in 1996. Indeed, he was asked by Mr. Thomas Pappas and the Florida Parole Commission in 2001 to submit a report vis-a-vis clemency for Mr. Trease, and he did so – based solely upon information he gathered in 1996. (Ex. A). His 2001 report is extensive, recites that Mr. Trease has brain damage, and explains some of Mr. Trease's history and background.

2. Dr. Crown's testimony

Dr. Barry Crown is an expert in forensic psychology and neuropsychology. (P.C. 107). He performed neuropsychological testing on Mr. Trease in 2006. He too concluded that Mr. Trease suffers from organic brain damage. He testified that Mr. Trease's brain was compromised and thus "the underlying functional behavior would also be compromised and that would include reasoning, judgment, understanding the long-term consequences of immediate behavior, control and modulation of impulsive behavior, and also storing information in memory." (P.C. 111). He also testified that the affects of the damage would be exacerbated if the

damaged person used substances like drugs and alcohol (P.C. 112)[48]**, and that such a damaged person would be more likely to use drugs and alcohol. He testified that Mr. Trease's abuse as a child resulted in a panic disorder and heightened vigilance, and that Mr. Trease's substance abuse was in fact self-medication for anxiety. (P.C. 116.)**

Dr. Crown also testified that the statutory mitigating circumstances of "extreme emotional distress" and "diminished ability to conform behavior" applied. (P.C. 126).

C. Trial counsel unreasonably failed to present readily available mitigating evidence

[48]*See also* P.C. 117 ("a person who is brain compromised ...a smaller amount of substance will have a greater effect").

After the guilt/innocence proceeding had ended, trial counsel advised the Court that he would present no evidence of brain damage unless a brain scan, the PET, provided a "physical confirmation" of it: "I think that absent a physical confirmation of an organic brain injury in the PET scan that Dr. Merin would not even be called as a witness." T. Tr. 2872. This was unreasonable and prejudicial conduct on counsel's part. First, a PET scan is not even the most reliable identifier of brain damage. Neuropsychological testing is, and Dr. Merin had his neuropsychological testing.[49] **Counsel unreasonably failed to know this,**

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[49]Dr. Crown testified several times without contradiction that neuropsychological testing of the type he and Dr. Merin performed was the most reliable indicator of brain damage. For example,

> Q. Assuming that ... Dr. Wood reported the results as normal, the PET scan, would that in any way change your opinion as to organicity for Mr. Trease?
>
> A. No, it wouldn't.
>
> Q. And why is that, Doctor?
>
> A. Well, first, neuropsychological testing has, for example, a higher hit rate, identification of rate of brain damage than most of the other methods of assessing behavior and brain function, other than autopsy.

(P.C. 118); *see also* P.C. 141 (cross-examination)(based on the conclusive evidence of the neuropsych testing...[and because t]he hit rate of the neuropsych testing is much greater than the hit rate of the PET scan, ... there would be no reason to do it [a PET].")

unreasonably began sentencing preparation late, unreasonably addressed the evidence of brain damage, and unreasonably failed properly to prepare his expert.

1. Dr. Merin was prepared to testify to brain damage at sentencing

On September 21, 1996, defense counsel discussed with his investigator hiring Dr. Merin, two months before jury selection began. (P.C. 159). On November 6, 1996, nineteen days before trial, counsel sent a letter to Dr. Merin asking him to perform an evaluation. (P.C. 160). Dr. Merin performed an evaluation on November 15th and 19th, 1996. Exhibit A. Trial began November 25, 1996. Counsel testified that in late November 1996, Dr. Merin contacted his office and advised "that he confirmed a defect or impairment in the central part of the right temporal lobe" (P.C. 219) and that "definitely he feels it could be used in the penalty phase of the trial." (P.C. 220, 182).

2. Trial counsel would not use Dr. Merin unless the PET documented brain damage

It was suggested then, in addition, an EEG might shed light on the matter, and one was performed on November 25, 1996, the day trial started. The EEG showed a mildly significant abnormalcy in the right central temporal lobe. Exhibit E. It was then recommended that, in addition, a PET scan be performed.

Arrangement for this occurred upon the defendant being found guilty. (P.C. 167).

The guilt proceedings ended on December 11, 1996. Sentencing began December 16, 1996. That was the day that counsel told the Court that he would not even call Dr. Merin if the PET scan did not document brain damage. The state spent a day putting on evidence in aggravation. (P.C. 184). On December 17, 1996, defense counsel noted that the PET scan was scheduled for December 18, 1996. Ex. S. The PET scan occurred on December 18, 1996, and it did not reveal brain damage or lesions. (P.C. 169).

3. Post-conviction testimony

Contradicting what he told the Court on the record on December 16, 1996 (*i.e.*, that he would not use Dr. Merin absent PET results), defense counsel testified that he met face to face with Dr. Merin either on the 18th or 19th of December, the last day of sentencing testimony, in order to determine whether to use his testimony. (P.C. 195). According to defense counsel, he decided not to use Dr. Merin because: (1) Merin was not as strong as counsel would have liked in his opinion on brain damage; (2) Merin's scientific testing might be considered "hocus-pocos" by some jurors and not believed (P.C. 232.); and (3) Merin would have to testify about Mr. Trease's anti-social acts (P.C. 228). None of these excuses are reasonable and, given that counsel at trial foreswore using Dr. Merin for the sole reason that the

PET scan did not demonstrate brain damage, these belated "reasons" appear to be post-hoc rationalizations for unreasonable conduct.

The first new reason for not using Dr. Merin, *i.e.*, that he was "wishy-washy" in the midst of sentencing in 1996, is not credible. Dr. Merin was not timid or wishy-washy about his conclusions regarding brain damage when he wrote his report for the State of Florida in 2001 (Exhibit A) or when he testified under oath below. He wrote and swore that Mr. Trease did suffer from brain damage. Neither the State nor the lower court offered any reason that Dr. Merin – who testifies primarily for the *State* (P.C. 8)– would lie under oath about what he found in 1996.[50] **To whatever degree the lower court credited trial counsel's report that Merin was less certain then than he is today, any blame for that would be at counsel's feet. Counsel in 1996 had a duty to consult with this expert and be sure that he was prepared to testify in a reasonable manner, an obligation that takes time to fulfill. Calling the expert into the office on the day he might testify and asking him questions to determine whether to use him–in the middle of a capital sentencing proceeding–is unreasonable attorney conduct.**

[50] Indeed, trial counsel testified that what Dr. Merin wrote in his 2001 report was consistent with what he told him in 1996, but that it was stronger in the report. (P.C. 187). Counsel testified that he probably would have used such evidence if he had had it in 1996. *Id.* He would have had it, had he acted reasonably.

***Williams v. Taylor*, 529 U.S. 362 (2000)(Counsel ineffective in capital sentencing for failure to prepare and present mitigation evidence; counsel did not begin to prepare for the sentencing phase until a week before trial.); *see also Hovey v. Ayers*, 458 F.3d 892 (9th Cir. 2006)(counsel ineffective because his mental health expert was not properly prepared by counsel); *Poindexter v. Mitchell*, 454 F.3d 564 (6th Cir. 2006)(counsel who did not even begin to prepare for mitigation until petitioner was convicted, which was only five days before the sentencing phase began, acted unreasonably); *Williams v. Anderson*, 460 F.3d 789 (6th Cir. 2006)(the trial record reflected that counsel discussed the possibility of a court-ordered psychiatric evaluation and pre-sentence report with the defendant at the table in court only two days prior to sentencing).**

Dr. Merin testified to the hurried manner in which his discussion with trial counsel in the middle of capital sentencing was conducted. He said that he began his discussion with counsel by "referring to the generally anti-social nature of his [Trease's] behavior." (P.C. 66). Then "I didn't quite get to the part where I considered that he had some prefrontal lobe damage" because counsel decided that Merin was going to discuss "anti-social personality" in his testimony, which, in fact, was not the emphasis of his findings. He had found a traumatic and abusive childhood and "organicity," but, as the trial judge was

promised two days earlier, counsel did not wait to hear about organicity (brain damage) during their mid-sentencing meeting. (P.C. 67).

Counsel's second post-hoc rational for not introducing brain damage evidence was that it would be considered "hocus-pocos." But Mercurio admitted that the EEG done by a doctor in Sarasota and which showed "mild impairment" was not hocus-pocos. (P.C. 233). Why did he not use this? He admitted that the psychiatrist in the United States Marine Corps who stated that Trease suffered from organic brain damage was not "hocus-pocos." P.C. 236. Why did he not use this? He admitted that he had two experts at the time of trial "who agree" that Trease had organic brain damage, yet he did not introduce any evidence of organic brain damage. (P.C. 240). And he admitted that he would have used what Dr. Marin wrote in his 2001 report. (P.C. 187). It was unreasonable of defense counsel not to have obtained in 1996 what Dr. Merin wrote in 2001, and testified to in 2006.

Third, counsel's rationalization that Dr. Merin should not testify because he was going to refer to harmful anti-social acts performed by Mr. Trease is groundless. Trial counsel admitted that Dr. Merin did not diagnose Mr.

Trease with an anti-social personality disorder. (P.C. 235).[51] **Rather, Dr. Merin in his meeting with counsel described some anti-social acts that had been committed by Mr. Trease. Trial counsel admitted that this evidence had already been put before the jurors by the state: "It would have [already] been in front of the jury, yes." (P.C. 235).**

D. Counsel's unreasonable actions were prejudicial

If it is unreasonable for counsel not to introduce evidence that a client *might* have brain damage. At the very least, trial counsel knew that Trease *might*. But there was more evidence than "might" – there was an EEG, a military mental health expert, and neuropsychological testing results. Counsel's unreasonable failure to introduce this evidence was prejudicial.

In *Williams* and *Wiggins, supra*, defense counsel failed to present both the mental impairments and abusive, neglectful backgrounds, of their clients. The Supreme Court found prejudice, and both cases were at least as aggravated as this case. In addition, here two statutory mitigating circumstances are supported by the

[51]The evidence of brain damage forecloses a finding of anti-social personality disorder and explains in a mitigating way a history of anti-social actions. Both Dr. Merin and Dr. Crown testified that a person who has brain damage cannot be diagnosed with anti-social personality disorder (P.C. 67, 121), which apparently defense counsel did not know. And anti-social behavior may "be attributed to the organicity, the brain damage." P.C. 142

brain damage diagnosis, a fact that went utterly un-refuted by the state. One juror voted for life imprisonment in this case, without the brain damage evidence. The evidence discussed above "may have warranted greater [mitigating] weight...and the resulting weighing of mitigation and aggravation would have been different." *Orme v. Crosby*, 896 So.2d 725, 73736 (Fla. 2005). The lower court should be reversed.

ARGUMENT VI

THE JURORS ENGAGED IN MISCONDUCT DURING DELIBERATIONS; POST-CONVICTION COUNSEL ARE PREVENTED FROM SPEAKING TO THE JURORS ABSENT COURT AUTHORIZATION; THESE CIRCUMSTANCES VIOLATE THE FIRST, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND FLORIDA LAW Mr. Trease's right to a fair and impartial jury was violated. Jurors engaged in misconduct during the deliberative process, pre-judging the case and engaging in prayer. The lower court denied Appellant's request to interview the jurors.[52]

[52]Petitioner asked several times in his amended Rule 3.850 motion to be allowed to interview the jurors. For example:

Under Florida law, "A party who has reason to believe that the

This Court should reverse, order that juror interviews are appropriate with respect to the allegations in this Argument and in Argument VII, *infra*., and require an evidentiary hearing on Appellant's claims.

The individuals seated on Mr. Trease's jury consistently and repeatedly

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> verdict may be subject to challenge may move the court for an order permitting an interview of a juror or jurors to so determine. The motion shall be filed within 10 days after the rendition of the verdict, unless good cause is shown for the failure to make the motion within that time... If no reason is found to believe that the verdict may be subject to challenge, the court shall enter its order denying permission to interview." Fla.R.Crim.P. Rule 3.575 . While Defendant contends that he is entitled to relief based upon what is now known occurred at his trial, he also contends that any state law prohibition on counsel interviewing the jurors in this case violates his right to a fair trial, to access to the courts, to equal protection, and to be free from cruel and unusual punishment under the Sixth, Eighth, and Fourteenth Amendments. Other defendants in other states freely interview jurors and raise claims of constitutional violations based upon such interviews. Such interviewing routinely uncovers juror misconduct–i.e., improper viewing of the crime scene (*Ex parte Potter*, 661 So.2d 260 (Ala. 1994)), deliberating prematurely (*United States v. Resko,* 3 F.3d 684 (3rd Cir. 1993)), consulting dictionaries for legal terms (*Mayhue v. St. Francis Hosp. of Wichita, Inc.*, 969 F.2d 919 (10th Cir. 1992)), lying during voir dire (*Williams, supra*), and considering matters not in evidence (*Leonard v. United States*, 378 U.S. 544, 84 S.Ct. 1696, 12 L.Ed.2d 1028 (1964) (per curiam)). Mr. Trease ought to be afforded unfettered access to jurors for interviews, and hereby so requests.

P.C. 748. This request was denied. P.C. 907 ('the Defendant's assertion that he

vowed that they would not automatically sentence Mr. Trease to death simply because they had found him guilty of first degree murder. They promised they would not consider the issue of sentence until the appropriate time, that is, only if a verdict of guilt had been returned and they had heard the additional penalty phase evidence and legal instruction. (R. 515, 517, 527-28, 549-50, 589-90, 693-94, 896, 951, 1046-48, 1088-89, 875-76).

Despite all assurances to the contrary, Mr. Trease's jury engaged in premature sentencing deliberations and sentencing. Several jurors chose to speak to the media after Mr. Trease's trial. In fact, an article in the local newspaper contained quotes from jury foreperson Kaye Stilber, as well as Gerry Hunek and Al Scogna. (*Jurors Choose Death Penalty for Trease: Convicted Murderer Robert Trease Will Be Sentenced Jan. 22 to Death or Life in Prison Without Parole*, by Lou Ferrara, Sarasota Herald-Tribune, December 20, 1996.) Ms. Stilber gave at least two nationally televised interviews.[53]

Ms. Stilber, the foreperson of the jury that convicted Mr. Trease, gave an interview to NBC's Today on June 5, 1997. The Timothy McVeigh jury was

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should be allowed to interview the jurors is without merit").

[53]Counsel has obtained a copy of the transcript from Ms. Stilber's Today Show interview. It appears that she also gave an interview to Johnnie Cochran on Court TV.

entering the penalty phase, and Ms. Stilber discussed her experience on the Trease capital jury. She was introduced as someone who "voted for the death penalty in a Florida case last December." (NBC Today, June 5, 1997, transcript, p. 27.) The following exchange occurred between Ms. Stilber and host Matt Lauer:

> **Mr. Lauer: OK. Ms. Stilber, let's talk about the case you were involved with. It basically involved a man who executed a car dealer. Now, you voted for the death penalty. How difficult a decision was that for you?**
>
> **Ms. Stilber: *After we knew that he was guilty and we voted for him to be guilty, it fell together*. It just had to be the death penalty. He did not–during our deliberations we just had a discussion about it, and I looked around and I said, you know, we're are–agonizing over this. We've cried, we've been agonizing over this decision to take his life. And how long did he give Paul Edenson thought when he shot him in the head and then slit his throat three times?**
>
> **Mr. Lauer: Wait a second. You say you agonized over the decision. I understand the decision for the death penalty only took twenty minutes. Is that true?**
>
> Ms. Stilber: Well, yes. *But we had talked about it, you know, during our deliberations, if we found him guilty, what would we do*, and it–it was an awesome responsibility to decide someone's death. I cannot begin to tell you how that felt.
>
> . . . . .
>
> Mr. Lauer: You mention this was an awfully difficult decision for

you in the case you dealt with. You even said that *when it finally became apparent that the jury had voted for death, you became physically sick to your stomach*.

Ms. Stilber: We voted on little yellow slips of paper so that no one would know how the other one voted. And as I turned them over, I knew that I had 11 that were guilty, and I knew that in Florida we have to have the twelve to say he's guilty. As I turned over that last piece of paper, it was–*the stomach fell*, and I looked around and I tried to get my breath, kind of nervous, like I am right now, and I said, 'Ladies and gentlemen, *we found him guilty*.' And we all just were kind of speechless. *We'd had a prayer*, we'd had a quiet time together, we wanted to make the decision that–that felt best for us with the laws of our land. We had no choice.

(Transcript, p. 27-28, emphasis added).

Ms. Stilber's interview clearly indicates that the jurors pre-judged Mr. Trease's case, deciding that death would be the appropriate sentence without regard to what would be presented during the penalty phase. They did not just discuss or deliberate prematurely; *they reached a penalty phase verdict before the penalty phase even began. They either lied under oath during voir dire, or decided to violate their oaths and ignore the law, either of which violates the Sixth, Eighth, and Fourteenth Amendments.* Lying during voir dire violates the right to an impartial jury and the right to fair trial. *Williams v. Taylor*, 529 U.S. 420 (2000). Premature deliberations violate the right to trial by unbiased jurors, fair trial, and

due process, *United States v. Resko*, 3 F.3d 684 (3rd Cir 1993), and the right in a capital case to sentencing by jurors who will listen to and consider all mitigating evidence.[54]

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[54]The lower court denied this claim without an evidentiary hearing, writing that it "inheres in the verdict and, is, therefore, without legal merit. *See Jones v. State*, 928 So.2d 1178 (Fla. 2006). Premature deliberations – agreeing to the punishment before the sentencing hearing even began – was a violation of the jurors' oaths which does not inhere in the verdict. *Cf. Babtist Hospital of Miami v. Maler*, 579 So.2d 97, 100 (Fla. 1991)(agreement to disregard oath is an overt act subject to judicial inquiry)(cited in *Jones, supra*, 928 So.2d at 1191).

In *Holland v. State*, 587 So.2d 848, 872 (1980), the guilt phase had been concluded and the judge and attorneys were discussing the upcoming penalty phase when the judge received a note from the jury, "We, the jury, sentence Gerald James Holland to death." The jury was admonished to refrain from deliberations until testimony and instruction had been presented, and the trial proceeded. The jury deliberated for just over two hours following the penalty phase and again sentenced Mr. Holland to death. On appeal, the Mississippi Supreme Court reversed and remanded for a new sentencing phase.

> The Sixth Amendment, in part, guarantees the criminal defendant the right to a fair trial by an impartial jury. *See Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (applying the sixth-amendment right to states through the fourteenth amendment); *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393, 402 (1977) ("sentencing process ... must satisfy the requirements of the Due Process Clause"); *Turner v. State*, 573 So.2d 657, 670 (Miss.1990) (constitutional guarantees which are applicable to guilt phase are also applicable to sentencing phase); *Dycus v. State*, 440 So.2d 246, 257-58 (Miss.1983) (same).
>
> Jurors must not "discuss a case amongst themselves until all the evidence has been presented, counsel have made final arguments, and

Mr. Trease's jury chose to sentence him to death without the State proving a single aggravating factor, and without giving the defense the opportunity to present a single mitigating circumstance. Moreover, because the jury was contemplating punishment during guilt phase deliberations, Mr. Trease's conviction is tainted as well. His case should be reversed and remanded for a new trial.

Ms. Stilber's media interview demonstrates another egregious

> the case has been submitted to them after final instructions by the trial court." *State v. Washington*, 182 Conn. 419, 438 A.2d 1144, 1147 (1980) (citing several treatises); *accord State v. McGuire*, 272 S.C. 547, 253 S.E.2d 103 (1979); *State v. Drake*, 31 N.C.App. 187, 229 S.E.2d 51 (1976).

587 So.2d 873. In *Gallman v. State*, the South Carolina Supreme Court found trial counsel prejudicially ineffective, reversing and remanding for a new trial, when counsel failed to object to comments by the judge that invited premature deliberations.

> A jury should not begin discussing the case, nor deciding the issues, until all the evidence has been introduced, the arguments of counsel complete, and the applicable law charged.

414 S.E.2d 780, 782 (1992) (citations omitted).

This Court has stated "[i]t is axiomatic that jurors should not discuss a case among themselves prior to deliberations." *Johnson v. State*, 696 So.2d 317, 323 (1997).

constitutional violation that occurred during deliberations at guilt/innocence: the jurors improperly engaged in a group prayer for spiritual guidance about their decision to find Mr. Trease guilty and sentence him to death. These activities violated petitioner's Sixth, Eighth, and Fourteenth Amendment right to fair and impartial juror and to a reliable decision made free of external influence. *See Jones v. Kemp*, 706 F.Supp. 1534 (N.D.Ga. 1989).

ARGUMENT VII

MR. TREASE WAS DEPRIVED OF A FAIR TRIAL, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS, BECAUSE OF EXCESSIVE SECURITY MEASURES AND/OR SHACKLING OF MR. TREASE

It is clear from comments by the Court and counsel on the record that Mr. Trease was shackled during portions of his trial. What is not clear is why Mr. Trease was shackled at some times and not at others, or, indeed, why he was shackled at all. This case should be remanded with directions that the lower court should allow juror interviews so as to determine what the jurors saw.

The following discussion occurred at the bench, during the state's guilt phase case, while the jury was present:

The Court: Let me do something. Is he shackled?

Mr. Mercurio: I don't know. [!!]

The Court: Cecil – I don't think he is.

Mr. Mercurio: *We need to take them off.*

The Court: Make sure he is not first, because –

(DISCUSSION OFF THE RECORD.)

The Court: That's all right. That's all right. I'll talk to you about it. Because what I think we'll do is invite Mr. Trease to join us for our bench conferences and

> our side bars from this point on, but I think we'll do it after this one because I want to make sure he's not shackled. I do not want to invite him up with the jury sitting there.

(R. 1740.)

During a subsequent bench conference during the state's guilt phase case, Mr Trease apparently was not shackled:

> The Court: Is he–he is not shackled?
>
> Mr. Mercurio: No, he's not.

(R. 2446.) However, during the jury's guilt phase deliberations it was noted that Mr. Trease was again shackled. The Court advised that one of the jurors wanted a cigarette break, and Mr. Trease requested that all of the jurors remain together.

> Mr. Mercurio: Are you going to bring them in here to do that?
>
> The Court: No, I'm going to have Cecil go have them take a seat in the jury box and then we'll–see, he's not shackled.
>
> Mr. Mercurio: *He is right now*.
>
> The Bailiff: We can take them off.
>
> The Court: We can take them off in the witness room over there. I don't want them to see the shackles so–

(R. 2796-97.) When the jury reconvened on the morning of December 11, 1996, to resume their guilt phase deliberations, defense counsel noted:

> I'd like to point out to the Court that the *two alternate jurors were present in the courtroom when Mr. Trease was brought into the courtroom in shackles and handcuffs*. So, I just want to make the Court aware of that. At this point I don't have any motions to make with respect to that, but I want to put it on the records that *they were here when he was brought in, unshackled and unhandcuffed*.

(R. 2814-15.)

Neither the state nor any law enforcement personnel ever suggested on the record that Mr. Trease was a security risk or needed to be restrained, and the court did not, on the record, find any justification for shackling. Security measures such as these are excessive and unconstitutional due to the prejudicial effect they have on the jury. They increased the risk that a guilty verdict would be returned, and that a death sentence would be imposed, when it otherwise would not have been, in violation of the Eighth Amendment, and violated Mr. Trease's due process right to be tried by unbiased and unprejudiced jurors. *Deck v. Missouri*, 125 S.Ct. 2007 (2005).[55]

The right to a fair trial is a fundamental liberty guaranteed by the

[55]The practice of having a capital defendant chained or shackled during his penalty phase was expressly disapproved in *Elledge v. Dugger*, 823 F.2d 1439 (11th Cir. 1987), *modified on other grounds*, 833 F.2d 250 (11th Cir.), *cert. denied*, 485

fourteenth Amendment, and the presumption of innocence is the mainstay of that right. Estelle v. Williams, 425 U.S. 501 (1976). "Thus, the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of discretion, that they are justified by a state interest specific to a particular trial." *Deck v. Missouri*, 125, S.Ct. 2007, 2012 (2005). Due to his failure to object and argue against this practice, defense counsel rendered ineffective assistance to Mr. Trease. *See generally Strickland*, 466 U.S. 668; *Illinois v. Allen,* 397 U.S. 337 (1970). The unreasonable and unnecessary shackling of Mr. Trease resulted in a denial of his right to a fair trial and presumption of innocence as guaranteed by the Eighth and Fourteenth Amendments. The lower court erred by denying relief on this claim without an evidentiary hearing.

VII. CONCLUSION

Appellant respectfully requests that this Court reverse the judgment in this case, or remand for a full evidentiary hearing.

U.S. 1014.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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Mark E. Olive

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing is being furnished vie email and U.S. Mail, first class postage prepaid, to all counsel of record, this 25th day of April, 2008.

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MARK E. OLIVE