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

APPELLANT'S DISCHARGED ATTORNEYS' INITIAL BRIEF

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's Order After *Durocher* Hearing granting Mr. Trease's request to dismiss undersigned appellate counsel and to end all further appeals. 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 __;" and the *Durocher* hearing will be referred to as "DH __."

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.

TABLE OF CONTENTS

PRELIMINARY STATEMENT i

REQUEST FOR ORAL ARGUMENT ii

TABLE OF AUTHORITIES v

I. INTRODUCTION 1

II. STATEMENT OF THE CASE 1

III. SUMMARY OF ARGUMENT 4

IV. STANDARD OF REVIEW 5

V. ARGUMENT 5

I. To Preserve the Integrity of the Criminal Justice System, this Court Should Order a New Trial Without Regard to Petitioner's Stated Desires–Junk Science Contributed to the Judgment in this Case 5

A. Stark new evidence of innocence – the FBI disavows CBLA 5

B. The State Intended for the Jurors to Consider CBLA 9

1. Siegel's confessions 11

2. Siegel's motives and mental state 13

3. Junk science "bolstered" Siegel 16

a. The crucial witness 16

b. This is junk 18

4. The crime scene is consistent with Siegel's confessions and inconsistent with her testimony 32

C. The State cannot show beyond a reasonable doubt that the jurors did not rely up its junk science.. 36

II. In Addition to Preserving the Integrity of the Criminal Justice System in Florida, this Court Should Preserve the Eighth and Fourteenth Amendments 37

A. "Society's duty to see that executions do not become a vehicle by which a person could commit suicide" demands that this Court decide Mr. Trease's appeal 37

B. Mr. Trease's brain damage and conditions of confinement . … . 44

VI. CONCLUSION.. 49

TABLE OF AUTHORITIES

CASES

Atkins v. Virginia, 536 U.S. 304 (2002) 39, 44

Berger v. United States, 295 U.S. 78, 88 (1934) 41

Brady v. Maryland, 373 U.S. 83 (1963) 31, 40

Cabana v. Bullock, 474 U.S. 376 (1986) 41

California v. Brown, 479 U.S. 538 (1987) 41

Coy v. Iowa, 487 U.S. 1012 (1988) 40

Durocher v. Singletary, 623 So.2d 482 (Fla. 1993) .... passim

Flanagan v. State, 625 So.2d 827 (Fla. 1993) 36

Ford v. Wainwright, 477 U.S. 399 (1986) 38

Gaskin v. State, 737 So.2d 509 (Fla. 1999) 5

Giglio v. United States, 405 U.S. 150 (1972) 31

Gregg v. Georgia, 428 U.S. 153 (1976) 41

Hamblen v. State, 527 So.2d 800 (Fla. 1988) 37, 39, 47

Herrera v. Collins, 506 U.S. 390 (1993) 39, 42

Huff v. State, 622 So.2d 982 (Fla. 1993) 3, 15, 33

In re Murchison, 349 U.S. 133 (1955) 40

In re Winship, 397 U.S. 538 (1970) 40

Jackson v. Virginia, 443 U.S. 307 (1979) 40

Klokoc v. State, 589 So.2d 219 (Fla. 1991) 48

Lightbourne v. Dugger, 549 So.2d 1364 (Fla. 1989) 5, 19

Lightbourne v. State, 742 So.2d 238 (Fla. 1999) ii

McCleskey v. Zant, 111 S. Ct. 1454 (1991) 41

Oregon v. Hass, 420 U.S. 714 (1975) 41

Panetti v. Quarterman, 127 S. Ct. 2842 (2007) 43

Peede v. State, 748 So.2d 253 (Fla. 1999) 5

Pulley v. Harris, 465 U.S. 37, 68 (1984) 41

Ramirez v. State, 810 So.2d 836 (2002) 5, 8, 36

Rochin v. California, 342 U.S. 165, 172 (1952) 39

Rogers v. State, 276 Ga. 67 (2003) 44

Roper v. Simmons, 543 U.S. 551 (2005) 39

Spaziano v. Florida, 468 U.S. 447 (1984) 39

State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) 8, 36

Stephens v. State, 748 So.2d 1028 (Fla. 1998) 5

Strickland v. Washington, 466 U.S. 668 (1984) 40

Taylor v. Illinois, 484 U.S. 400 (1988) 40

Tison v. Arizona, 481 U.S. 137 (1987) 41

Trease v. State, 768 So.2d 1050 (Fla. 2000) .... *passim*

United States v. Havens, 446 U.S. 620 (1980) 41

United States v. Nixon, 418 U.S. 683 (1974) 41

STATE STATUTES

Fla.R.Crim.P. Rule 3.850 .... 18, 49

OTHER SOURCES

J. Frank and B. Frank, *Not Guilty* 11-12 (1957) 41

John Kaplan, *The Problem of Capital Punishment*, 1983 U. Ill. L. Rev. 555. . . .40

Charles E. Silberman, *Criminal Violence, Criminal Justice* 262 (1978) 40

See 60 Minutes/ Washington Post Joint Investigation, "Evidence of Injustice," September 14, 2008, http://www.cbsnews.com/stories/2007/11/16/60minutes/main3512453.shtml. . . . . .passim

""FBI Bullet Test Misses Target. "" 4/04/2005 Nat''l L.J. 1 [Col. 1.] 21

""Raglan Case Scientist Who Lied Is Indicted, "" Louise Taylor, 1/28/03 Lexington Herald Leader B1, 2003 WLNR 2856888 20

""Retrial In Jersey Killing, "" 3/8/05 N.Y. Times B6, 2005 WLNR 3529485 22

""Wrongdoing at FBI lab Threatens Cases, "" 4/16/03 Lexington Herald Leader, 2003 WLNR 2897420 .... 21, 30

I. INTRODUCTION

Mr. Trease continues to maintainshis innocence of the homicide of Paul Edenson and new evidence establishes that junk science contributed to his wrongful conviction. Despite his innocence and his compelling constitutional claims supporting his innocence, Mr. Trease wants to die. The lower court determined that Mr. Trease's request to die was knowing, intelligent and voluntary under *Durocher v. Singletary*, 623 So.2d 482 (Fla. 1993). To preserve the integrity of the criminal justice system, this Court should order a new trial without regard to Mr. Trease's stated desires because junk science unconstitutionally contributed to his wrongful conviction in this case. Due process and the Eighth Amendment and "society's duty to see that executions do not become a vehicle by which a person could commit suicide," demands that this Court decide Mr. Trease's appeal from the denial of his Rule 3.850 Motion. Mr. Trease's desire to die is significantly influenced by his organic brain damage and the conditions of
his confinement.

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

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

appeal was filed July 5, 2007.

13. On April 7, 2008, Appellant filed a Motion to Vacate Conviction or For Remand Based On New Evidence of Junk Science and Innocence which this Court denied on April 18, 2008.

14. On April 25, 2008, Appellant filed his Initial Brief.

15. On May 5, 2008, Mr. Trease filed am Emergency Motion to Dismiss Appellant Counsel and End All Further Appeals.

16. On May 9, 2008, the State filed a Motion to Relinquish Jurisdiction to conduct a *Durocher* hearing. The Court granted the motion on June 19. 2008.

17. On October 6, 2008, the lower conducted a *Durocher* hearing. On October 23, 2008, the lower Court entered an Order After *Durocher* Hearing granting Mr. Trease's motions. Undersigned counsel filed a timely notice of appeal.

III. SUMMARY OF ARGUMENT

1. To preserve the integrity of the criminal justice system, this Court should order a new trial without regard to Mr. Trease's stated desires because junk science contributed to his wrongful conviction in this case.

2. Due process and the Eighth Amendment and "society's duty to see that executions do not become a vehicle by which a person could commit suicide,"

demands that this court decide Mr. Trease's appeal from the denial of his Rule 3.850 Motion.

IV. STANDARD OF REVIEW

With respect to all of the claims upon which the lower court denied an evidentiary hearing, 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).

V. ARGUMENT

I. To Preserve the Integrity of the Criminal Justice System, this Court Should Order a New Trial Without Regard to Petitioner's Stated Desires–Junk Science Contributed to the Judgment in this Case

> In order to preserve the integrity of the criminal justice system in Florida, particularly in the face of rising nationwide criticism of forensic evidence in general, our state courts–both trial and appellate–must apply the *Frye* test in a prudent manner *to cull scientific fiction and junk science from fact*.

Ramirez v. State, 810 So.2d 836, 853 (2002)(emphasis added)(footnote omitted).

A. Stark new evidence of innocence – the FBI disavows CBLA

In October of 2007, the State's position on Mr. Trease's request to waive his appeals was that Mr. Trease was just "manipulating the justice system to delay the instant proceeding." Doc. Entry Dated 10/15/07at p.5. However, on May 9th, 2008, the State's position was that this Court should relinquish jurisdiction to the trial court for a hearing pursuant to *Durocher v. Singletary*, 623 So.2d 482 (Fla. 1993). Doc. Entry Dated 5/9/09. What had changed?

The motion to relinquish was filed within days, if not hours, of counsel for the State receiving evidence of Mr. Trease' s innocence from the United States Department of Justice. On May 5, 2008, Lon S. Arend, an Assistant State Attorney in the Twelfth Judicial Circuit, sent a letter to the Assistant Attorney General in this case, Mr. Stephen Ake, enclosing "a letter dated April 28, 2008 from Melissa Ann Smrz of the FBI in reference to" Robert Trease. Attachment 1, hereto. Ms. Smrz was the Acting Assistant Director of the FBI. In her letter Ms. Smrz referred to FBI compositional bullet lead analysis (CBLA) expert testimony that had been introduced at Mr. Trease's trial and wrote that "as you may know, the FBI suspended performing bullet lead analysis in 2004 and ceased all examinations and testimony on bullet lead analysis in 2005." Attachment 2, hereto. The FBI was "conducting a review of testimony previously provided" nationwide "to determine whether examiners correctly stated the significance of a

match between the elemental composition of bullet fragments and the composition of bullets known to be associated with a defendant." *Id.*

The Acting Assistant Director of the FBI wrote that "after reviewing the testimony" *in Mr. Trease's* case "it is the opinion of the FBI Laboratory" that

> the examiner did not provide any information to the jury that would allow them to understand the large number of bullets made from a single melt of lead. Without this knowledge, ***the jury may have misunderstood the probative value of this evidence***.

Id. (emphasis added). On May 7, 2008, the Acting Assistant Director of the FBI sent the same letter about the testimony in Mr. Trease's case to the Chief Judge of the Twelfth Judicial Circuit. Attachment 3, hereto.

These letters, never before presented to any Court, finally reflect a written repudiation of CBLA by the FBI. The significance of this FBI written disavowal of CBLA cannot be overstated. The same letters were sent about the Jimmy Ates case in Okaloosa County, Florida, see attachment 4, hereto, which, less than six (6) weeks ago, resulted in Ates' release from prison after serving ten years for the murder of his wife. According to the press release from the Innocence Project of Florida, Inc., dated December 17, 2008, Ates' release was the first in the nation since "the FBI's disavowal of Comparative Bullet Lead Analysis." Attachment 5,

hereto.[2]

As will be shown, it is indisputable that critical, expert, testimony in Mr. Trease's case was false. Under this Court's precedents, in order for the erroneous admission of an expert's testimony to be harmless the state must show beyond a reasonable doubt that the error "'did not contribute to the verdict or, alternatively stated, that there was no reasonable possibility that the error contributed to the conviction.'" *Ramirez v. State*, 542 So.2d 352, 356 (Fla. 1989), quoting *State v. DiGuilio*, 491 So.2d 1129, 1138 (Fla. 1986).

Before the FBI's written disavowal of CBLA, the State was content with

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[2] CBS' *60 Minutes* and the Washington Post conducted a joint investigation into the FBI's use of CBLA, the results of which were first broadcast on November 18, 2007, on *60 Minutes*. Among other things, it was discovered that in May 2005, the deputy lab director of the FBI Chemistry unit overseeing CBLA reported that "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." *See* 60 Minutes/ Washington Post Joint Investigation, "Evidence of Injustice, September 14, 2008, http://www.cbsnews.com/stories/2007/11/16/60minutes/main3512453.shtml. ***Robert Trease's case was one of four identified in Florida as being implicated by the findings.***

Even before the written disavowals of CBLA by the FBI, "a half dozen defendants …[had] already won their freedom or a new trial by appealing bullet lead testimony." *Id.* Petitioner has been raising this claim as well, and these written disavowals from the FBI now reveal that he has been correct all along. *See* Motion to Vacate Conviction or For Remand Based Upon New Evidence of Junk Science and Innocence, filed in this Court April 7, 2008.

requiring his case to move forward without regard to Mr. Trease's shifting position. With the FBI's written disavowals, the State would have to show that there is no "reasonable possibility that the error affected the verdict." *Id*. The State filed its motion for a *Durocher* hearing.

This Court has instructed all Courts in Florida to reject junk science. Counsel asks that this Court do so in this case, to protect and preserve the integrity of the criminal justice system in Florida.

B. The State Intended for the Jurors to Consider CBLA

There is a reasonable possibility that the State's use of CBLA testimony in this case contributed to the verdict. In order to show this possibility, counsel must discuss all of the evidence about the crime for which Mr. Trease was convicted, and the evidence that was proffered to, but not considered by, the Rule 3.850 court below.

Hope Siegel, Mr. Trease's co-defendant, testified against him. If she was not credible, he was not guilty – "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 bolstered her credibility with FBI testimony about CBLA.

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 in Petitioner's Rule 3.850 proceeding, 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 was the killer.

These circumstances – especially the FBI repudiation of CBLA – 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."[3] The state argued to the jurors that Silkwood was not to be believed because she and Siegel had had a falling out.[4]

[3]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 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.

[4]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" regarding both of these cellmates.

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 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 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.[5]

3. Junk science "bolstered" Siegel[6]

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[5]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 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).

[6]As noted above, 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.

a. The crucial witness

Again, "Siegel's testimony was crucial at trial." *Trease, supra,* 768 So.2d at 1050. The state spent large portions of its closing argument looking for things that would corroborate that to which Siegel had testified. One of the critical points of corroboration for the state was the science of 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.

b. This is junk

In fact, we now know that the "metallurgy" corroborated nothing. We know that the FBI has not just discontinued the use of CBLA, but in fact has 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. *Today we know something in addition to what was proffered to the lower court--that the FBI has finally put its disavowal of CBLA in writing to the Chief Judge*

below and to the prosecutor.

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.)[7]

4. Around the time the FBI was requesting an examination 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

[7]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).

> 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. [note–letters were later sent in May of 2008][8] ***It appears that a large 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, with the following language:

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

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

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 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. As noted *supra*, 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.[9] 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.

[9]Attachment A to Appellant's Innocence Motion is 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.

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.' 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.

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:

[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]

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[11] Neither Mr. Trease nor his attorney has received a letter from 2005 or been provided with a copy of a letter sent to the State Attorney's Office or other law enforcement agency acknowledging problems with CBLA from 2005.

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 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), *Giglio v. United States*, 405 U.S. 150

(1972).

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

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;[12]

●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*

[12] 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 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.

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. 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.[13]

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

[13]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.

user manual with her in the bag where the stun gun was found.

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.

C. The State cannot show beyond a reasonable doubt that the jurors did not rely up its junk science

"The trustworthiness of expert scientific testimony is especially important because oftentimes 'the jury will naturally assume that the scientific principles underlying the expert's conclusions are valid.'" *Ramirez v. State*, 810 So.2d 836, 844 (2002), quoting *Flanagan v. State*, 625 So.2d 827, 828 (Fla. 1993). The state took advantage of a "science" at Mr. Trease's trial, and the scientific principles underlying the state's expert's conclusions were invalid.

This Court cannot let a person convicted with junk science be executed. "The focus is on the effect of the error on the trier of fact." *Sate v. Di Guilio*, 491 So.2d 1129, 1139 (Fla. 1986). The state, having used its junk science to support its "crucial" witness' testimony, cannot now argue or show that "'there is *no*

reasonable probability that the error contributed to the conviction.'" *Ramirez, supra*, 542 So.2d at 356, quoting *DiGguilio, surpra*, 491 So.2d at 1138 (emphasis in *Ramirez*). The junk evidence "cannot be viewed as harmless error, particularly in view of the fact that there was some limited evidence from which the jury could infer that [the accused] did not commit the offense." *Ramirez*, *supra*, 542 So.2d at 356. Indeed, unlike in Ramirez, here there was significant, not limited, evidence of Mr. Trease's innocence. To allow the conviction in this case to stand would violate due process of law under the Fourteenth Amendment and would violate the Eighth Amendment right to be free from cruel and unusual punishment.

II. In Addition to Preserving the Integrity of the Criminal Justice System in Florida, this Court Should Preserve the Eighth and Fourteenth Amendments

A. "Society's duty to see that executions do not become a vehicle by which a person could commit suicide" demands that this court decide Mr. Trease's appeal

This Court has recognized "society's duty to see that executions do not become a vehicle by which a person could commit suicide." *Hamblen v. State*, 527 So.2d 800 (Fla. 1988). Allowing Mr. Trease to be executed without addressing the significant constitutional issues which directly challenge the propriety of his capital conviction would be more than assisted suicide – it would be murder. Although this Court has held that capital defendants can knowingly, intelligently and

voluntarily waive the right to postconviction counsel and postconviction proceedings, *Durocher v. Singletary,* 623 So.2d 482, 483 (Fla. 1993), Mr. Trease's case questions the limits of that rule within the context of the Eighth and Fourteenth Amendments.

At the *Durocher* hearing below, Mr. Trease was adamant that he was innocent of the crimes for which he was convicted and sentenced to death. *Durocher* Hearing, October 2, 2008 (*hereinafter* DH) at 13. He did not kill Paul Edeson. *Id.* He did not enter his house on the night of the murder. *Id.* He did not assault him, shoot him, or cut him. *Id.* He is innocent. Mr. Trease has continually, consistently and vigorously denied guilt and professed his innocence since he was arrested. P.C. 151-2 (testimony of trial counsel Frederick Mecurio). He understands the issues involved in his case and admits: "There are good issues. I probably have the . . . the best death row case that you will ever see." DH. 19. When the lower court asked him if he understood that if his postconviction proceedings were successful he could get a new trial or resentencing, Mr. Trease responded: "yes, I'm well aware of that and well aware of that I would more likely win, seeing that I'm not guilty." DH. 8. In light of Mr. Trease's continued denial of guilt and his compelling constitutional claims supporting his innocence, the Eighth and Fourteenth Amendments prevent this Court from allowing Mr. Trease

to waive postconviction review and consent to execution.

Due process and the Eighth Amendment impose substantive and procedural limitations on society's ability to execute its citizens. Many of those limitations are absolute and cannot be waived. The Eighth Amendment forbids the execution of individuals who are not competent to be executed. *Ford v. Wainwright,* 477 U.S. 399 (1986). The Eighth Amendment forbids the execution of individuals who are mentally retarded. *Atkins v. Virginia,* 536 U.S. 304 (2002). The Eighth Amendment forbids the execution of individuals who were under the age of 18 when their crimes were committed. *Roper v. Simmons*, 543 U.S. 551 (2005). The Eighth Amendment forbids the execution of individuals who are actually innocent. *Herrera v. Collins*, 506 U.S. 390 (1993). None of these Eighth Amendment protections can be waive by the defendant. A defendant who is not competent under *Ford,* can not consent to be executed. Nor can a juvenile, a person with mental retardation, or someone who is innocent, consent to being executed. In these cases, "society's duty to see that executions do not become a vehicle by which a person could commit suicide" overrides the "individual's right to control his destiny." *Hamblen v. State*, 527 So.2d 800, 802 (Fla. 1988). Mr. Trease's case presents such a situation. His innocence and his compelling constitutional claims supporting his innocence require that this Court resolve those issues before

allowing him to be executed.

Society recoils at State execution of an innocent person. Such a barbaric act is "at odds with contemporary standards of fairness and decency," *Spaziano v. Florida*, 468 U.S. 447, 465 (1984), and would be "bound to offend even hardened sensibilities." *Rochin v. California*, 342 U.S. 165, 172 (1952). As Judge Learned Hand recognized, our justice system in fact is "haunted by the ghost of the innocent man" executed. Charles E. Silberman, *Criminal Violence, Criminal Justice* 262 (1978); *see also Pulley v. Harris*, 465 U.S. 37, 68 (1984) ("The execution of someone who is completely innocent . . . [is] the ultimate horror case.") (Brennan, J., dissenting) (quoting John Kaplan, *The Problem of Capital Punishment*, 1983 U. Ill. L. Rev. 555, 576) (internal quotations omitted). The "natural abhorrence civilized societies feel at killing" an innocent person, *Ford*, 477 U.S. at 409, requires that the law remove that possibility as much as is humanly possible. The Fourteenth Amendment provides protection so that "no person can be punished criminally save upon proof of some specific criminal conduct," *Schad v. Arizona*, 111 S. Ct. 2491, 2497 (1991), beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307 (1979). A vast array of due process protections helps to assure that no innocent person is convicted of a crime.[14]

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[14] *See, e.g., Coy v. Iowa*, 487 U.S. 1012 (1988) (defendant has the right to confront witnesses against him); *Taylor v. Illinois*, 484 U.S. 400 (1988) (defendant has right to present witnesses in his own defense); *Strickland v. Washington*, 466

Second, as a matter of substantive Eighth Amendment law, "a person who has not in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used may not be sentenced to death," *Cabana v. Bullock*, 474 U.S. 376, 386 (1986), and if such a sentence is imposed the "Eighth Amendment violation can be adequately remedied by *any* court that has the power to find the facts and vacate the sentence," *id.* at 386, and "prevent the execution . . ." Id. at

U.S. 668 (1984) (defendant has right to the effective assistance of counsel); *In re Winship*, 397 U.S. 538 (1970) (state must prove defendant's guilt beyond a reasonable doubt); *United States v. Wade*, 388 U.S. 218 (1967) (defendant has right to counsel at post-indictment lineup); *Brady v. Maryland*, 373 U.S. 83 (1963) (state has affirmative duty to disclose exculpatory evidence); *In re Murchison*, 349 U.S. 133 (1955) (defendant is entitled to a fair trial before impartial tribunal).

It is common (and tragic) knowledge that mistakes are made in criminal trials. "[O]ur system of criminal justice does not work with the efficiency of a machine--errors are made and innocent as well as guilty people are sometimes punished. The sad truth is that a cog in the machine often slips: memories fail; mistaken identifications are made; those who yield the power of life and death itself – the police officer, the witness, the prosecutor the jurors, and even the judge – become overzealous in their concern that criminal be brought to justice." Foreword, J. Frank and B. Frank, *Not Guilty* 11-12 (1957).

"[A]rriving at the truth is a fundamental goal of our legal system," *United States v. Havens,* 446 U.S. 620, 626 (1980) (citing *Oregon v. Hass*, 420 U.S. 714, 722 (1975)). "[T]he twofold aim [of criminal law] is that guilt shall not escape or innocence suffer." *United States v. Nixon*, 418 U.S. 683, 709 (1974) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1934)). Whenever the state discovers a mistake has been made the laws must allow corrective action.

390; *cf. Tison v. Arizona*, 481 U.S. 137 (1987).[15] The most basic equitable principle is that courts must prevent a fundamental miscarriage of justice. *Cf. McCleskey v. Zant*, 111 S. Ct. 1454, 1471 (1991). The execution of an innocent person is the paradigm of a fundamental miscarriage of justice.

In *Herrera v. Collins*, 506 U.S. 390 (1993), the United States Supreme Court addressed the issue of whether a colorable claim of actual innocence was cognizable in habeas corpus proceedings. Although not specifically resolved, a majority of the Court spoke to the issue. Justice O'Connor and Justice Kennedy unequivocally stated that "the execution of a legally and factually innocent person would be a constitutionally intolerable event." *Herrera*, at 419. Justice White "assume[d] that a persuasive showing of 'actual innocence' . . . would render unconstitutional the execution of Petitioner. . ." *Id*. at 429. Justice Blackmun, joined by Justices Stevens and Souter, found that "nothing could be more contrary to contemporary standard of decency, or more shocking to the conscience, than to

[15] "The death penalty is said to serve two principle social purposes: retribution and deterrence of capital crimes by prospective offenders." *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (opinion of Stewart, Powell, & Stevens, JJ.). Executing innocent persons would not deter crime, and because retribution has as its benchmark "that punishment should be directly related to the personal culpability of the criminal defendant," *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring), obviously there is no retribution in executing an innocent person. Such an execution could serve no other function than the gratuitous infliction of suffering.

execute a person who is actually innocent." *Id*. at 430 (citations omitted). Finally, Chief Justice Rehnquist, assumed "for the sake of argument in deciding [Herrera], that in a capital case a truly persuasive demonstration of 'actual innocence' . . . would render the execution of a defendant unconstitutional." *Id*. at 417. Thus, at least five Justices[16] who unequivocally found that the United States Constitution, specifically the Eighth Amendment's prohibition against cruel and unusual punishment, prohibits the execution of an innocent person.

Due Process and the Eighth Amendment require that this Court address Mr. Trease's compelling constitutional claims supporting his innocence before he is executed. The new evidence proffered above as to the CBLA claim alone demands that his appeal be heard. No court has reviewed this claim in light of the new evidence. Due process demand that Mr. Trease's claims of innocence be heard. Recently, the United States Supreme Court re-emphasized the need for fair determinations of Eighth Amendments claims. *Panetti v. Quarterman,* 127 S. Ct. 2842 (2007). The Supreme Court held:

> It is uncontested that petitioner made a substantial showing of incompetency. This showing entitled him to,

[16]As this synopsis of the plurality opinion in *Herrera* demonstrates, a truly compelling argument that seven of the nine justices of the United States Supreme Court found that the execution of someone who is actually innocent violates the United States Constitution and would be an independent cognizable claim in federal habeas corpus proceedings.

> among other things, an adequate means by which to submit expert psychiatric evidence in response to the evidence that had been solicited by the state court. And it is clear from the record that the state court reached its competency determination after failing to provide petitioner with this process, notwithstanding counsel's sustained effort, diligence, and compliance with court orders.

Id. at 2855. The Supreme Court concluded that "due to the state court's unreasonable application of *Ford,* the factfinding procedures upon which the court relied were 'not adequate for reaching reasonably correct results' or, at a minimum, resulted in a process that appeared to be 'seriously inadequate for the ascertainment of the truth.'" *Id.* at 2859. Similarly, Mr. Trease makes a substantial showing that the State used false testimony to wrongly convict him, yet no Court will review this claim because of Mr. Trease's waiver. Under these unique circumstances, there must be judicial review of his claims of innocence. *See also*, *Rogers v. State*, 276 Ga. 67, 68 (2003) (holding that a capital defendant may not waive an *Atkins* claim where his mental capacity is challenged or otherwise appears to be in question and requiring an adjudication to determine eligibility for death).

B. Mr. Trease's brain damage and conditions of confinement

Although Mr. Trease is innocent, he has asked to be executed. This Court must consider that Mr. Trease's desire to die is significantly influenced by his brain

damage and the conditions of his confinement.

Appellant does not have an intact, normal, functioning brain, through no fault of his own. There was no dispute about it in the hearing before the lower court; Petitioner suffers from brain damage. 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); an EEG taken at the Sarasota Medical Center in 1996 showed that Mr. Trease had an abnormal brain (P.C. 233); and the defense expert at trial, Dr. Merin, performed neurological testing and also found that Mr. Trease had brain damage. The State offered no refutation of this evidence.

Dr. Merin testified in these postconviction 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 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 -know-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).[17] 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 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. 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

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

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)[18], 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).

In short, Mr. Trease's vacillation about his appeals are a direct result of his organic brain impairment. His impairments from trauma and brain damage are further exacerbated by being under a continuous death warrant since 2000. H. 10. For the past eight years, he has been denied many of the normal privileges given to death sentenced inmates in Florida, such as contact visits with family and friends and yard privileges with other inmates. H. 11-12. Mr. Tease explained "it is a question of how long one wants to be endured living the life I have to live. . . . I'm essentially tired of living the life that I'm living, and I'm just not going to do it any

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

longer." H. 7. Mr. Trease has lost hope and wants to die, but he has not wavered in his innocence. His impairments and loss of hope cannot stand in the way of "society's duty to see that executions do not become a vehicle by which a person could commit suicide." *Hamblen v. State*, 527 So.2d 800 (Fla. 1988). For the same reasons that this Court determined that a capital defendant cannot waive a direct appeal before this Court, *see Klokoc v. State,* 589 So.2d 219, 221-2 (Fla. 1991), there are unique circumstances, such as those found in Mr. Trease's case involving new evidence and constitutional claims relating to innocence, where there must be an Eighth Amendment exception to the otherwise sound reasoning of *Durocher.*

VI. CONCLUSION

Appellant's Discharged Attorneys respectfully requests that this Court allow counsel to continue to represent Mr. Trease on appeal before this Court and that this Court adjudicate Mr. Trease's appeal from the denial of his Rule 3.850 motion.

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.

____

Thomas H. Dunn

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 26th day of January, 2009.

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Thomas H. Dunn