IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC07-1964
LT CASE NO.: 96-1277

DONALD BRADLEY
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA
INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant, Donald Bradley, will be referred to herein as "Appellant," "Defendant," or "Bradley." Collateral counsel for the State of Florida will be referred to as "the State." Trial counsel for Bradley, Alan Chipperfield, will be referred to as "trial counsel," or "Chipperfield." The State Attorney[s] for Defendant's trial will be referred to as "the Prosecution." All numbers in brackets are references to the record on this appeal, paginated consecutively in seven volumes.

STATEMENT OF THE CASE AND FACTS

This is an appeal from an Order Denying Defendant's Motion for Postconviction Relief entered 14 June 2007 [1203]. Appellant timely noticed this appeal [1231]. The order of the collateral court contains an efficient procedural history and factual background of the guilt and penalty phases of Appellant's trial and his direct appeal, as well as the material stages of the collateral proceedings from which Appellant takes this instant appeal [1168-71]. This Court's decision in Bradley v. State, 787 So. 2d 732 (Fla. 2001), provides a more detailed description of the trial proceedings. Appellant now summarizes the testimony of trial counsel Chipperfield from the evidentiary hearing held 15 September 2005, recounting his handling of Appellant's trial.

DIRECT EXAMINATION

After his introduction on the record and recount of how he came to be involved in Bradley's case [793], trial counsel testified to his awareness at the time of the indictment that there was a potential issue regarding burglary, as well as his familiarity with the tenets of the collateral attack and this Court's opinions regarding the direct appeal [798-9]. Chipperfield admitted that issues regarding the burglary charge were not preserved at trial, despite factual support based on the evidence[1] [800-2]. He claimed that any such challenge would have been inconsistent with the Defendant's theory of the case and Chipperfield's own understanding of the law [803-4].

Trial counsel had asked for a special verdict form, based on his hope to eliminate the felony murder charge in the penalty phase[2] [805-6]. Having noted that Appellant's motion for postconviction relief was concerning to him [807-8], Chipperfield testified that if he would have had evidence showing Linda Jones as more culpable, he would have advised Appellant not to proceed with alternate defenses[3] [809-10]. This admission clearly brings the lack of preservation of the burglary issue back to the forefront and much more significant. With reference to

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[1] Chipperfield acknowledged the relevance of challenging the burglary charge based on the consent of Linda Jones.

[2] Chipperfield requested this special verdict form despite not having preserved through objection a challenge against the burglary charge.

[3] The record is replete to show that Bradley's primary defense was having an alibi, and that alternatively it was the independent act of Linda Jones – wife of the victim at the time – who dealt the definitive blow ending the victim's life.

reports of the Florida Department of Law Enforcement ["FDLE"] dated 12 October 1997, trial counsel discovered on direct examination that duct-tape found in the bathroom at the crime scene matched tape found in the garage, according to fracture markings resembling sawed edges, and that all such tape was attributable to the only female allegedly at the scene [811-7]. Chipperfield acknowledged that knowing of the absolute match regarding this tape at the time of trial would have supported his argument at trial that Linda's behavior immediately after the crime evinced her greater culpability[4] [818-21].

None of the unused tape ultimately discovered at the scene matched that which was used to bind the victim and his murderous spouse [823]. A fire poker was removed from the scene, and in the garage to the home was the teal Buick of the Joneses which had blood in the trunk and from which was missing the tire iron; neither the poker nor trunk of the car were tested for blood matching the victim [824-6]. Trial counsel absolved himself of having selected the theory of defense with which to proceed at trial, noting that Defendant had chosen how to proceed [826]. Despite his argument regarding the independent act of Linda Jones as having killed her husband, Chipperfield failed to utilize strong evidence in support of that notion [828].

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[4] Despite her involvement in the crime, Linda Jones was sentenced only to life in prison [1104, 1133], compared to Bradley's sentence of death. The other Co-Defendants received nominal sentences.

Trial counsel acknowledged both the fact of sharing a blood spatter expert with counsel for Linda Jones [829], as well as the prospect for prejudice resulting from such sharing [831]. Yet, trial counsel dismissed the notion of prejudice merely by asserting his conclusion at the time that an independent opinion for his client was not all that important [832].

The hearing continued with trial counsel's treatment of the mental health history of Bradley. Trial counsel testified that it was his practice to obtain evidence of mental health mitigation throughout proceedings [836]. In this particular case, he hired a psychologist – Dr. Krop – then chose not to have the doctor testify at the penalty phase [837]. Chipperfield testified to the importance of knowing a defendant's family's medical and mental health history [838], and to having known that Bradley's sister Pam was suicidal, his grandfather had died in a mental institution, and his uncle exhibited extremely violent behavior [840].

Trial counsel was aware that Bradley had a long-standing drug problem [842]; that he suffered from depression and a moderately severe mental disorder [843]; that without medications, he showed increased risks for anxiety, anger, violence, and possibly bi-polar disorder [844]; that he exhibited rage and mood swings and had used cocaine and cannabis for ten years [845]; that he in fact had been medically diagnosed with bi-polar disorder and was a risk for violent

behavior without his medication [846]. Despite this knowledge, trial counsel[5] chose not to present it to the jury [849-50].

Trial counsel failed to provide the penalty-phase jury with mitigation regarding Appellant's lack of a criminal record, yet did request such a mitigator for the trial judge to consider at the *Spencer*[6] hearing [851]. Chipperfield admitted that he should have offered all of the evidence regarding the mental infirmity of Bradley and members of his family to the judge at the *Spencer* hearing, even if not to the penalty-phase jury [852]. Chipperfield read from the trial judge's sentencing order regarding the lack of a mitigator for extreme emotional disturbance, despite its prominence for Linda Jones [854].

Segueing into addressing trial counsel's statements in his closing argument that might have alienated the jury, Chipperfield testified to his estimation of Clay County as conservative and liking the death penalty [855-6]. Collateral counsel addressed Chipperfield's closing statements concerning a quote from Martin Luther King, Jr.; heavy metal, t-shirt art and tattoos; homeless drifters and the

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[5] Despite his use of the pronoun "we" throughout this exchange, Chipperfield's reference to "our thinking process . . . in a lot of cases" during the same paragraph suggests that it was he and other members of the office of the public defender generally who decided it would be best not to present such evidence. While Bradley may have chosen the theory of defense upon which to proceed at the guilt phase, it appears that he was not part of this decision respecting evidence of mental infirmity in the penalty phase.

[6] Spencer v. State, 615 So. 2d 688 (Fla. 1993) (establishing sentencing procedure for capital cases).

Defendant, and the quality of life of an inmate; the prospect of working versus receiving workers' compensation; and the abnormality of the Jehovah's Witness denomination [856-60]. Chipperfield acknowledged the possibility of such statements alienating the jury [861]. Collateral counsel noted the cumulative effect of trial counsel's errors before tendering the witness [862].

CROSS-EXAMINATION

Trial counsel was asked about and expanded upon his experience as a criminal defense attorney [863-4]. Often being the object of motions for postconviction relief, Chipperfield has never been found ineffective. As a member of the death penalty steering committee, he had helped arrange continuing education seminars [866].

Regarding the instant trial, despite having evaluated evidence of Defendant's presence at the scene as "real strong," trial counsel propounded the alibi defense as primary [867]. Agreeing with the State that he had effectively handled the brothers McWhite as key witnesses of the prosecution, as well as covered Cindy Bradley's possession of the flip phone, trial counsel again pinned the choice of the alibi defense on the Defendant. Recalling significant dates in the chronology of events, as well as his assistance by Curt Davidson as his second chair in this case and help from other good attorneys, and his regular communication with Appellant, trial

counsel testified to having watched the trial of Linda Jones to get a feel for the witnesses that would probably testify in Bradley's trial as well [869-71].

Trial counsel noted that Appellant had been very involved in his own defense [872], and developed different theories, ultimately deciding which would be best [873]. Trial counsel even had filed a motion for Appellant to serve as co-counsel, but later withdrew the motion [Id.].

Trial counsel had a relationship with Assistant State Attorney Collins that fostered trust regarding discovery duties [873]. Chipperfield knows the decision in State v. Delgado[7] and its relationship to this case, and he knew that a charge of burglary was dismissed against Linda Jones [875]. Trial counsel opined at the time that no legal basis existed to challenge the burglary charge against Bradley[8] [876].

After briefly discussing *voir dire* and selection of the trial jury [876-7], trial counsel elaborated upon his assessment of the lack of physical evidence linking Defendant to the scene, as well as his presentation of the different defense theories to the jury [877-8]. He testified to his presentation at trial of evidence regarding *luminol* testing, an unknown print on some of the tape recovered, the crowbar shape on the floor, and differences in the physical positioning of the victim at different times. Chipperfield opined that he did the best he could [879].

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[7] 776 So. 2d 233 (Fla. 2000).

[8] Trial counsel represented throughout the hearing that the burglary charge could not be challenged consistently with Bradley's alibi defense.

He testified further that he had presented evidence of blood in the car in the garage, and tape in the cinderblock in the garage [880]. *Luminol* revealed blood in the car, but it was not collected for testing [Id.]. Trial counsel was aware of testimony at trial that blood was found in the car, and there was no way to know whether a tire iron had been removed [881]; that all defendants had used the garage for ingress and egress and that Bradley had allegedly cut Linda loose [882]. There had been testimony in the trial of Linda Jones that the pieces of tape from the bathroom and garage door, which were matched, had actually been cut by "pinking shears" [883]. Trial counsel performed or received research on duct tape, all of which evidence and research related only to the back-up defense [883-4].

Chipperfield admitted that timing was an issue concerning Linda's 911 call [884], and that neither law enforcement nor the medical examiner had found the murder weapon or any definitive evidence of precisely what might have been used as such [885]. A neighbor had seen a van leaving the scene and there had been blood on the washcloth but not on the mop [886]. No blood was found on a black bar or on a metal pipe, and Chipperfield agreed that greater involvement by Linda Jones would not necessarily disprove Bradley's guilt of a lesser included offense [887]. Trial counsel had requested an independent act instruction because the evidence supported the theory [888].

Trial counsel had not believed grand jury testimony of Detective Waugh regarding Linda's involvement would have been admissible, and Chipperfield did not think Linda had ever confessed [888]. He also filed pre-trial motions to preclude and objected again at trial to testimony of Janice Cole regarding alleged confessions by Linda [Id.]. After acknowledging the uselessness at trial of a "man boat" allegedly at the scene, Chipperfield thought he remembered cross-examining Michael Clark at trial [889]. Trial counsel could have done no more regarding the flip phone, aside from having the Defendant himself testify [Id.].

James Freeman had been the FDLE agent to examine a total of five Caucasian head hairs retrieved from the hands of the victim, none of which were consistent with those of Linda Jones or Appellant, and none of which were submitted for DNA testing [890-2]. Although trial counsel could not remember if DNA testing would even have been available at the time, he supposed that DNA testing could have "come back to Donald" [893].

Trial counsel had visited the scene of the crime after his appointment to represent Bradley [893]. He consulted with blood spatter expert Herbert McDonald, whose services trial counsel shared with counsel for Linda Jones [894-5]. McDonald instructed Chipperfield that none of the blood evidence at the scene would assist the Defendant, which advice trial counsel believed [Id.]. Having also consulted with Stewart James, a *luminol* expert from south Florida, trial counsel

ultimately decided not to have him testify [896]. Chipperfield did, however, present his own FDLE witnesses, which he thought at the time both bolstered the credibility of the defense, and had been utilized to the best extent possible [896-7].

Considering the trial testimony of medical examiner Dr. Arruza, trial counsel "actually got her to say that the injuries could be consistent with a crowbar or tire tool," and to contradict the testimony of the brothers McWhite, at least to some degree [898]. Trial counsel opined there had been nothing to be gained from calling as a witness a separate medical examiner, as the opinion of the only other expert consulted by Chipperfield may have been more helpful to the prosecution [900]. The primary defense was that due to a lack of physical evidence linking Bradley to the scene, he was not there and did not kill the victim [901].

Cross-examination of Chipperfield continued with consideration of his performance *vis a vis* the penalty phase. The prosecution entered its exhibits three and four: a chronology of Appellant's life from his birth to his arrest, and a memorandum to one Lynn Mullaney in Clay County regarding early penalty phase research [903-4]. Records reviewed by trial counsel included mental health, criminal, divorce, child support, school, and medical [904-5].

Trial counsel had prior experience in death penalty cases with psychologist Dr. Krop and family therapist Roger Szuch, and for that reason he consulted with them regarding Appellant's case [905-6]. Chipperfield supplied his experts with

some[9] of the records and notes from interviews with third parties about Appellant [907]. Pursuant to his own manner of conduct, Dr. Krop had directly met with and examined Appellant three times between his arrest and trial – including once immediately before the trial [910-1].

Trial counsel also had conducted his own limited research regarding anxiety and depressive disorders [912]. After remembering using "Auto Track" to embellish Appellant's background, Chipperfield testified that the experts provided no analysis that would benefit Appellant [913]. Specifically regarding Roger Szuch, trial counsel did not use him at all at the penalty phase because of the lack of a nexus between Bradley's "mental and physical and sex abuse [as] a child," and his commission of the crime [915]. Supposedly, he was over his childhood [916].

Trial counsel elected not to present evidence through the testimony of women with whom Defendant had previously been romantically involved because of allegations of prior abuse toward them [917]. Similarly, trial counsel presented no evidence through either of his consulted experts Krop and Szuch because of his assessment of the risk of what might happen on cross-examination [918]. Because of its remoteness from the time of the crime and his lack of personal diagnosis, Dr. Krop had not ultimately found that Bradley's possible bi-polar disorder was related to the crime [920].

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[9] Trial counsel subjectively and unilaterally selected excerpts from the collection of records to show to his experts, *infra*.

Through Bradley's family, trial counsel presented evidence at the penalty phase of "extensive abuse from his childhood and extensive issues of dysfunction throughout the family . . . including being abandoned by his father and physical and emotional abuse . . . and anxiety attacks and drug problems" [921]. When asked his strategic decisions regarding drug abuse evidence, trial counsel offered the following:

> Well, I – again, I wanted the jury to think that this was an aberration in behavior for Donald Bradley and that he was otherwise a productive, hard working member of society and drugs go against that. You can – you can put both in, but I didn't think it would serve us best to put psychological testimony on because it kind of conflicts with what I was trying to show to the jury, that this was an aberration in his behavior and he's normally not like that. [922-3].

In light of the trial testimony of the McWhites, trial counsel considered the notion of a panic attack to account for Defendant's behavior [924]. Trial counsel also explained his decision not to use expert witnesses Krop and Szuch in terms of their potential to have contradicted the brighter testimony from Defendant's family [925]. Having tried to show the extensive involvement of Linda Jones and arguing that Bradley also should get a life sentence, trial counsel did not request a jury instruction on the mental mitigator because "It's too hard to prove extreme or substantial," despite having presented six other mitigators [926]. Trial counsel also received from the trial court, *sua sponte*, a mitigator for Bradley's lack of a

criminal history, based on his presentation to the trial judge that Linda Jones was not very different from Bradley in that respect [927].

RE-DIRECT EXAMINATION

Revisiting trial counsel's failure to request a mental health mitigator for Appellant, Chipperfield distinguished Bradley's condition from that of Linda Jones [933], but acknowledged being unaware of **any** formal diagnosis of mental illness allegedly suffered by Ms. Jones [934]. Meanwhile, Bradley had a documented history of mental illnesses, medications therefor, and other problems [934-5]. Aside from six pages excerpted from care unit records, which trial counsel hand-selected from a larger packet, he sent to his experts summaries of divorce, child support, criminal, and school records, sworn statements of some trial witnesses, and interviews with some of Defendant's family [936-8].

After Appellant had filed his petition for postconviction relief, trial counsel had reviewed his file and highlighted parts of the care unit records that showed that Appellant had been diagnosed in the past with bi-polar disorder and had been prescribed the medication *Haldol*, with *Lithium* referenced as an alternate medication in case of side effects [938-9]. Trial counsel admitted not sending the full care unit records, particularly the sections containing Defendant's elevated potential for violent behavior without medication, again for fear of the ramifications on cross-examination [940-3]. Still, Chipperfield acknowledged

again[10] the foregone utility of presenting his experts at the *Spencer* hearing to the trial judge [944].

Recalling the State's elicitation of his noteworthy experience and reputation as a defense attorney, trial counsel acknowledged his fallibility and the prospect of embarrassment that would befall him upon a possible sentence mitigation due to his ineffective assistance for Appellant, but stated further that he would be bothered more for a former client to die due to his misinformed performance [947-8].

Regarding specific evidentiary matters referred to by the State, Chipperfield acknowledged that he could have had Defendant's van tested for both DNA and chemicals which might have been used to clean-up blood [948-51]. Trial counsel admitted not testing the washcloth found in the bathroom any further than merely to ascertain that what was on it was in fact blood [951-2]. Redirect examination concluded with trial counsel elaborating upon his interaction with counsel for Ms. Jones, Mark Green [952-3], with whom trial counsel shared a blood spatter expert. Trial counsel also provided his own research regarding duct tape to Mr. Green [Id.]. Chipperfield could not recall whether both he and Mr. Green, or only Mr. Green, had consulted with Dr. Dunton, the additional medical examiner from Atlanta who was not utilized as an expert at trial [Id.]

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[10] See p 852 of the Record.

RE-CROSS EXAMINATION

Chipperfield acknowledged the different legal postures applicable to Linda Jones and Appellant respecting the charges against each for burglary based on Ms. Jones having been an otherwise rightful occupant of the home where the crime occurred [954]. Trial counsel also acknowledged having written Dr. Krop regarding Appellant's use of certain pain medications, but counsel was unable to recall whether he had actually discussed with Dr. Krop whether those medications would have interacted with Appellant's anti-depressant at the time to affect his behavior in a manner increasing his tendency for violence [954-5]. Finally, Dr. Krop had discussed Appellant's rage with Appellant at a meeting when trial counsel was present, which discussions were not fruitful in the opinion of Chipperfield to Appellant's case during the penalty phase [956-7].

FURTHER TESTIMONY

Upon further redirect examination, trial counsel learned that Appellant had needed medication for – thereby evincing that he was suffering from – panic disorder at the time of the crime [957-8]. The rage discussion with Dr. Krop was consistent with testimony from both the brothers McWhite who testified at trial about Appellant's physical and mental state at the scene [Id.]. Trial counsel again acknowledged the utility of such evidence at the *Spencer* hearing.

The final cross examination by the State revealed that Dr. Krop also knew about the prior spousal abuse by Appellant toward his ex-wife, which trial counsel acknowledged could have been elicited on cross examination at trial [961].

SUBSEQUENT MATTERS

Trial counsel was excused and the evidentiary hearing suspended upon the possible necessity for further evidence. No further evidence ever was submitted. The State [1042-1108] and Appellant's collateral counsel [1109-39] submitted written closing arguments. The collateral court issued a written opinion for its order denying Appellant's motion for postconviction relief [1168-1204]. Appellant assigns error to issues I, II, III, and XVIII of that order.

PRESERVATION AND STANDARD OF REVIEW

Appellant submits that all issues on this appeal have been preserved below, evident on the Record in Appellant's *Amended Motion to Vacate Judgment of Convictions and Sentences with Special Request for Leave to Amend* [382-457], *Closing Argument on Defendant's Amended Motion to Vacate Judgment of Convictions and Sentences with Special Request for Leave to Amend* [1109-39], and in the evidentiary hearing itself. The grounds asserted herein were asserted and ruled upon below.

The standard of review governing this appeal is *de novo*. Stephens v. State, 748 So. 2d (1028 Fla. 1999) (holding that both prongs of *Strickland* are mixed

questions of law and fact, requiring *de novo* review while deferring to the trial court's factual findings when supported by competent evidence). The collateral court stated the test for ineffective assistance claims as follows:

> In order to prevail on a claim of ineffective assistance of counsel, the Defendant must show that: (1) counsel's performance was outside the wide range of reasonable professional assistance, and (2) counsel's deficient performance prejudiced the defense, that is, that the outcome would likely have been different but for the alleged ineffective assistance. Strickland v. Washington, 466 U.S. 668, 687 (1984); Cherry v. State, 659 So. 2d 1069,1072 (Fla. 1995). The standard is reasonably effective counsel, not perfect or error-free counsel. A claimant seeking post conviction relief based on ineffective assistance of counsel faces a heavy burden, which requires as a first prong, that the movant must identify the specific omission and show that counsel's performance falls outside the wide range of reasonable professional assistance. In evaluating this prong, courts are required to (a) make every effort to eliminate the distorting effects of hindsight by evaluating the performance from counsel's perspective at the time, and (b) indulge in a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment with the burden on the claimant to show otherwise. Coleman v. State, 718 So. 2d 827 (Fla. 4th DCA 1998).

[1171]

Appellant respectfully adds to this presentation the following:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. . .
> When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentences--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.

Downs v. State, 453 So. 2d 1102, 1108 (Fla. 1984) (citing Strickland v. Washington, 466 U.S. 668, 694-6 (1984)).

SUMMARY OF THE ARGUMENT

Despite his extensive experience, trial counsel was ineffective in the preparation and presentation of Appellant's trial defense in both the guilt and penalty phases. Trial counsel's lack of knowledge at the time resulted in three substantial errors, which cumulatively subverted the entire trial strategy and resulted in Appellant's death sentence.

Regarding the guilt phase, trial counsel failed to realize the existence and utility of evidence inculpatory against Appellant's co-perpetrator, whose own trial resulted in her sentence of life imprisonment. Unaware of the greater culpability of his co-perpetrator, Appellant offered the primary defense of an alibi, and alternatively that the independent act of this co-perpetrator killed the victim. The prejudice was manifest in the inherently contradictory theories.

Regarding the penalty phase, trial counsel withheld key evidence of Appellant's mental infirmity from his defense experts. This precluded competent evaluation of Appellant by these experts and resulted in the lack of any mitigation evidence regarding Appellant's documented condition. Therefore, even trial counsel was unaware at the time of Appellant's actual condition.

Stemming directly from the same lack of knowledge regarding evidence inculpatory against Appellant's co-perpetrator, trial counsel failed to preserve for direct review the issue whether a charge of burglary was legally sufficient. The failure to challenge the charge affected both the guilt and penalty phases: Appellant was convicted of an additional crime and had counted against him an additional statutory aggravator based on that additional crime.

The errors were all based on trial counsel's lack of knowledge, and were inextricably interconnected to the chosen trial strategy. Because their roots were founded by a fundamental lack of knowledge, these errors cannot be dismissed as strategic or tactical decisions. Counsel's performance was outside the wide range of reasonable professional assistance and Appellant was prejudiced. Confidence in the outcome is undermined and the integrity of Appellant's death sentence is tainted.

ARGUMENT

Before and after Appellant's trial, Alan Chipperfield has garnered more experience in the field of capital criminal defense than probably any other attorney in the Fourth Judicial Circuit, and perhaps even the State of Florida. His local reputation is of the highest esteem, both professionally and personally. In fairness, he is an excellent criminal defense attorney. Despite these accolades, each trial must be reviewed on an individual basis. Regrettably, the quality of his conduct at

trial and during the preparation thereof was below that of reasonably effective counsel.

The State brought to light at the evidentiary hearing just how much trial counsel did toward the preparation of Appellant's defense. Much of the cross-examination of Chipperfield on this record reads as asserting the sufficiency of the evidence of Bradley's guilt[11]. Bradley's guilt has been conclusively determined, and he does not contest it for purposes of this Proceeding. His complaint is that due to trial counsel's ineffective assistance, he will be put to death rather than let to die naturally in prison as his Co-Defendant, Linda Jones, who put the wheels of this crime in motion.

ISSUE I: WHETHER TRIAL COUNSEL'S INEXHAUSTIVE INVESTIGATION OF DUCT TAPE EVIDENCE CONTRIBUTED DIRECTLY TO THE OUTCOME OF DEFENDANT'S TRIAL, THEREBY RENDERING COUNSEL INEFFECTIVE

This issue was part of the second claim below [1174-89 at 1183]. Appellant abandons for this appeal those claims under *Brady*[12], *Giglio*[13], & Newly Discovered Evidence [1174-6]. Further, Appellant narrows the claim of ineffective assistance of counsel on this appeal to Chipperfield's failure to investigate the duct tape evidence and the resulting failure to utilize the same to its

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[11] [879-89, 897-8, 903-5] The State addressed at the evidentiary hearing more issues than those to which Appellant now assigns error.

[12] Brady v. Maryland, 373 U.S. 83 (1963).

[13] Giglio v. United States, 405 U.S. 150 (1972).

fullest exculpatory potential, particularly relating to the independent act of Linda Jones. Regarding trial counsel's duty to investigate, this Court has stated:

> [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.
> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.

Squires v. State, 558 So. 2d 401, 402 (Fla. 1990) (citing Strickland v. Washington, 466 U.S. 668, 691 (1984))

After briefly alluding to Defendant's claim "that counsel rendered ineffective assistance when he failed to discover certain evidence," the collateral court misstates the issue as Defendant regrettedly having chosen the alibi defense [1176-8]. This oversimplification that Chipperfield simply failed to utilize more evidence in support of the independent act, fails to consider the nexus between trial counsel's lack of investigation of the duct tape and Defendant's choice of an alibi as his primary defense. The issue is not merely that the Defendant now thinks "he should have pursued the independent act defense as his primary" [1178]. The real issue is trial counsel's failure to even discover the utility of the evidence.

Bradley does not contest that he was intimately involved in the selection of his defense based on the evidence trial counsel was aware of and shared with him.

Defendant's choice of that primary defense, however, was not well-informed. Trial counsel failed to examine the FDLE reports thoroughly enough to discover the exact match of the pieces of tape recovered from the bathroom and garage of the Jones home [811-7]. This is evidence which would have allowed the Defendant to make the most informed decision whether to present alternate theories of his defense.

Chipperfield admitted on the record both that he would have counseled Defendant differently with stronger evidence of Linda's greater culpability [809-10], as well as that he truly did not know about the duct tape exact match [811-7]. There had been other evidence at trial showing the erratic nature of the behavior of co-perpetrator Linda Jones after the murder. Yet, nothing else argued at trial showed as convincingly as this perfectly-matched duct tape that Linda Jones actually struck the fatal blow: she sawed herself loose and went out to the garage for the decisive murder weapon.

Appellant does not now offer that this is what happened beyond a reasonable doubt[14] [*cf* 1184]. Appellant's point is that while deciding his theory of defense before his trial, his lack of knowledge of the duct tape perfect match is what formed his decision to argue this theory as a "back-up." This particular evidence

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[14] Bradley regrets that a line of argument in his *Amended Motion to Vacate Judgment of Convictions and Sentences* regarding the independent act of Linda Jones may have been inartfully pled, as the collateral court's opinion suggests, labeling its treatment as procedurally barred legal argument [1188].

intimates that the independent act of Linda Jones actually killed the victim, and more so than any other evidence actually offered at trial in support of this notion.

For the collateral court to note that "trial counsel argued, and the jury was instructed, on the independent act doctrine" [1188] is irrelevant. There never would have been alternate theories of defense if trial counsel would simply have investigated competently. Chipperfield's individual extra research regarding duct tape [883-4], and the fact that he presented the lack of fingerprints on the duct tape [1183], dodges the point that he failed to discover what was presented directly to him. No extra research was necessary, just to read the FDLE documents fully, and to do so carefully.

The collateral court's attention to and characterization of the Defendant as bemoaning that he should have used the independent act of Linda Jones as his primary defense implicitly acknowledges the prejudice. Bradley was clearly prejudiced: what actually was the strongest theory of defense was relegated to alternative status due to his lawyer's failure to examine documents provided him.

The collateral court dismisses Appellant's claims regarding counsel's use at trial of other evidence [1185-7], but counsel's limited use of all this other evidence would have been bolstered significantly to show the very strange behavior by Linda. The court notes precisely what Chipperfield argued regarding the independent act of Linda Jones, and such was consistent with the evidence at trial.

It remains that none of this other evidence was as convincing as the unknowingly perfectly-matched duct tape to show that Linda Jones *must have* entered the garage, because the tape found there was attributable to nobody else but her.

Moreover, the use of this other evidence was a *back-up* argument [1185]. Appellant maintains that despite the obvious contention that there should have been only one theory of defense, if trial counsel had examined the evidence carefully and thoroughly, there only would have been one theory of defense. Therefore, allowing for acceptance of responsibility and gaining credibility with the jury.

Applying Strickland and its progeny, the specific omission of which Bradley complains is trial counsel's failure to investigate competently the FDLE documents which would have shown the greater culpability of Linda Jones. Counsel had no perspective at the time, because he failed to investigate, and such was not a strategic decision. It was simply ineffective. There was no decision here of trial counsel not to investigate based on representations by the Defendant. Quite to the contrary, Bradley's insistence on the alibi defense was due directly to Chipperfield's lack of knowledge, which was not the result of reasoned judgment. It follows that this failure to carefully read information regarding evidence potentially exculpatory to the Defendant, was outside the wide range of reasonable professional assistance due Bradley under the Constitution.

Bradley was prejudiced. He was uninformed as to the full extent of the direct evidence of culpability of his co-perpetrator, and for that reason he chose the alibi defense as primary. The apparent inconsistency between Bradley's chosen primary and back-up theories is painfully self-evident and loses credibility. That it would have been better to have only one theory of defense is obvious, as is the fact that such would have been the case but for trial counsel's ineffective assistance.

Whether the jury would have found differently regarding Bradley's guilt is impossible to say. Still, it is reasonably probable that his presentation of alternate defenses prejudiced him to the extent that he was convicted of first-degree murder and sentenced to death instead of being convicted of some lesser crime and/or being sentenced merely to a prison term. He could have gained credibility with the jury and Court by accepting responsibility for his actions and then show evidence of the independent act of Linda Jones. If the evidence of greater culpability would have shown that Linda Jones, not Bradley, struck the fatal blow, it is quite probable that Bradley would have been sentenced to life, not death.

In light of a salient and vigorous defense on the unique theory of the independent act of Linda Jones having killed the victim, a jury quite reasonably would have found Bradley guilty of some lesser crime. If not convicted of first degree murder, then Bradley could not have been sentenced to death. Still, even if with a single theory of defense, Bradley might have been convicted anyway of the

higher crime of first degree murder, it cannot be said that he still would have been sentenced the same way. This point will be corroborated *infra*.

ISSUE II: WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR WITHHOLDING EVIDENCE OF DEFENDANT'S MENTAL HEALTH FROM EXPERT WITNESSES, THEREBY PRECLUDING ITS POSSIBLE UTILITY AS MITIGATION AGAINST A SENTENCE OF DEATH

This issue is derivative of Defendant's claim three below [1190]. Trial counsel repeatedly asserted his rationale for not presenting evidence of certain mental health mitigation evidence [913-25]. In front of the penalty-phase jury, he feared possible repercussions on cross-examination of his witnesses, and he thought that evidence of drug dependency would counteract his theory that this crime was an aberration in behavior by the Defendant. Yet, Chipperfield thrice acknowledged his error in not presenting any of this same evidence to the trial judge at the Spencer hearing [851-2, 944, 959]. Nonetheless, the real issue is not only trial counsel's failure to present such evidence to the jury or court, but also his having withheld from defense experts information pertinent to an accurate diagnosis of Defendant's mental state. There is no allegation that Bradley was involved in any way with the decision to withhold records from the mental health professionals.

The collateral court relied upon Gore v. State, 846 So. 2d 461, 469-70 (Fla. 2003) to support its finding that the Defendant failed to substantiate his claim of Chipperfield's ineffectiveness [1190]. In Gore, trial counsel provided his experts

with all of the information necessary for their evaluations of that defendant, and this Court held that the collateral court's findings were supported by the postconviction record. Id. Such is not the case here. Not only was this collateral court's reliance on Gore misplaced, but its findings are not supported by substantial competent evidence.

According to the collateral court, Appellant "presented no documents or evidence overlooked by either Doctor in forming their opinions" [1190]. This is inaccurate. Technically speaking, defense experts Szuch and Krop did not overlook anything presented to them. The problem is that trial counsel did not present all relevant information to them. While they did not overlook anything, they also did not look over *everything*.

Contrary to the collateral court's written findings, Appellant showed at the evidentiary hearing that trial counsel indeed failed to present the experts with all of the care unit records, particularly those sections regarding Appellant's increased risk of violent behavior without medication [940-3]. For the collateral court to assert that "neither doctor's opinions support the Defendant's contentions" is therefore, insubstantially, supported by the record: the experts never were given the materials necessary to evaluate Appellant fully.

Moreover, it is meritless for the collateral court to assert that Appellant "has failed to establish any error on the part of counsel in investigating mental health

mitigation" [1190]. Trial counsel's unilateral decision to withhold certain reports precluded defense experts from performing their relegated aspects of the mitigation investigation. As a result, trial counsel's "strategic decisions not to present certain evidence to the jury for its consideration in mitigation" [1190] were based only on his own guesses as to the implications of the information in the withheld care unit records, and not on the professional and competent advice of defense experts Szuch and Krop.

Any justifiable strategic decision made by Chipperfield regarding the doctors could only have been with respect to whether either doctor would testify based on their discoveries. It is without justification for Chipperfield to have withheld the information upon which the doctors would have formulated their opinions. To prevent the doctors from fully investigating his client cannot reasonably constitute a strategic decision comporting with the duty to investigate. Quite certainly, such was no strategic decision at all.

Beyond trial counsel's withholding records from his experts and precluding accurate investigation, the collateral court erred further in relying on <u>Gore</u>. Despite its defendant's own mental infirmity, there was no evidence in <u>Gore</u> of any drug use at the time of the crime. In the instant case, Bradley was suffering from panic attacks, and taking medication therefor, at the time of the crime.[957-8]. Bi-polar personality disorder, combined with poly-substance usage, are the types of

serious mental health disabilities from which a jury could determine that statutory mitigation existed. All of this evidence was withheld from defense experts by trial counsel, and was not presented to the penalty-phase jury or the sentencing judge.

The issue of the utility of such evidence remains. According to trial counsel, there were two reasons not to present this evidence[15]: the Prosecution would have cross-examined the doctors in front of the jury regarding Bradley's drug use and his family's history of violence [918], and such would have thwarted the efforts to present Bradley as an otherwise normal person whose participation in this event was an aberration worthy of sympathy [922-3]. For the following reasons, such excuses cannot overcome Chipperfield's failure even to present his experts with the pertinent information respecting Bradley's mental state, and the resulting failure to present the same to the jury or judge.

It is perhaps universally intuitive as attorneys, that a learned judge is more capable of objectivity in the face of egregious evidence of violence than a jury of twelve lay people would be. Doubtless, it was for this reason that Chipperfield admitted at the evidentiary hearing that he should have presented the doctors to the judge as witnesses at the Spencer hearing. Even had he done so, such would not excuse his withholding evidence pertinent to Defendant's mental state from those

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[15] Mind that the presentation of the evidence really is a red herring when one considers that Chipperfield *withheld* the evidence from his experts in the first place.

experts, and *ipso facto* from the sentencing court. One must reconcile Chipperfield's remorse toward the foregone utility of informing the sentencing court at the Spencer hearing of Bradley's mental infirmity [852-4] with his confession of not having sent the full care unit records, particularly the sections containing Defendant's elevated potential for violent behavior without medication [938-44].

Trial counsel's second motivational strand offered in excuse for his failure to present mental health mitigation evidence, is that the archetype with which he aspired to associate the Defendant was that of the "productive, hard working member of society" [923]. Since the guilt phase was already over, Chipperfield knew well of the testimony by both of the brothers McWhite regarding the behavior of Bradley the night of the crime [924]. Such behavior, trial counsel admitted, would be consistent with panic attacks suffered by the Defendant [957-8]. The problem is that Chipperfield apparently did not know at the time of the trial that Defendant was still a victim of panic attacks [957-8]. This lack of knowledge, based simply on a failure to read with sufficient care documents provided to him[16], clearly falls outside the wide range of reasonable professional assistance required by the Constitution. Coleman, *supra*.

[16] This is the second instance of simply failing to read [811-21].

Chipperfield attributed his failure to even request an instruction on mental health mitigation to the difficulty of proving it, stating "It's too hard to prove extreme or substantial" [926]. Trial counsel's unfamiliarity of Bradley's propensity to experience panic attacks at the time of the crime, certainly would have contributed to such difficulty. Chipperfield cannot be said to have elected strategically not to send to his doctors something which he did not even know existed. Trial counsel cannot reasonably assert having based a strategic decision on a fundamental lack of knowledge. *Cf*: Squires, 558 So. 2d at 402.

It is important to note that this mitigator was assigned to Linda Jones "extreme or substantial" condition. Counsel by no means seeks to minimize the significance of infidelity in our society. But simply stated, Linda Jones' husband was having an extra-marital affair. It is not the case that a physician documented bi-polar disorder, panic attacks and the need for medication. The victim was cheating on his wife and she was upset. If the trial court could find "extreme or substantial", then clearly trial counsel was wrong about the difficulty in proving that mitigator.

Without the mental health mitigator for extreme mental disturbance[17], the sentencing court was provided statutory mitigators only for Bradley's lack of a criminal record and his age at the time, to which the court afforded little weight, as

[17] §921.141(6)(b), Fla. Stat. (1995).

well as non-statutory mitigating circumstances concerning his family relationships and character in the community, to which the court afforded "some" weight. *See* Bradley, 787 So. 2d at 745-6.

In comparing the proportionality of Bradley's sentence on direct appeal, this Court twice alluded to both McDonald v. State, 743 So. 2d 501, 507 (Fla. 1999), and Gordon v. State, 704 So. 2d 107, 117 (Fla. 1997), beginning and ending the discussion of the issue of proportionality with these cases. Bradley, 787 So. 2d at 746, 747. These two cases are the most directly on point with Bradley's: the four aggravating factors in all three cases were identical[18], arising from a murder for hire. This Court also demonstrated its prior affirmations of death sentences in light of less aggravation than that present in Bradley's case. Bradley, 787 So. 2d at 746 (referencing also *Sliney v. State*, 699 So. 2d 662 (Fla. 1997) and *Hayes v. State*, 581 So. 2d 121 (Fla. 1991)).

The distinguishing element of all these cases from the current discussion is the statutory mitigator regarding mental infirmity, erroneously neglected in Bradley's trial due to the ineffectiveness of his trial counsel. *McDonald* and *Gordon* were co-defendants whose separate appeals arose from their mutual trial, and mental infirmity was not at issue in any way. *Sliney* also had no mental infirmity at issue.

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[18] Burglary, HAC, CCP, and pecuniary gain

In Hayes, a majority of this Court found no reversible error on the record to overturn the trial court's upward departure from the jury's recommendation of death to instill the death penalty. Hayes, 581 So. 2d at 127. The trial court had rejected the statutory mitigator of extreme mental or emotional disturbance despite strong evidence thereof. Id. at 126. Two justices, Barkett and Kogan, dissented in part from the opinion to assert that the death sentence was disproportionate due to uncontroverted mitigating evidence. Id. at 127-8.

While *Hayes* had his conviction upheld despite the presentation of mitigation evidence regarding his mental infirmity, that case differs from Appellant's in three key ways. First, evidence of mental infirmity was presented to the jury in Hayes. Second, that evidence was not withheld by trial counsel from the experts engaged to evaluate the defendant's mental state. Third, two justices of this Court agreed that death for *Hayes* was a disproportionate penalty.

This Court should not construe Bradley's position now as procedurally barred legal argument regarding the proportionality of his sentence, but rather as an illustration of the application of the legal standard warranting a finding of trial counsel's ineffectiveness. Based on the trial record at the time, the sentence seemed proportionate. However, since trial counsel was both ignorant of some, and intentionally withheld, other key evidence from his defense experts – thereby precluding competent evaluation of Defendant by those experts – the sentencing

court did not have the necessary information to comport with an individualized determination of sentence for Bradley. *Cf*: Wike v. State, 698 So. 2d 817 (Fla. 1997)(holding that the sentence should consider all evidence relevant to the crime). Therefore, this Honorable Court was also without that information on Direct Appeal.

Because of trial counsel's errors in both withholding documented material information of Defendant's mental state from his experts, as well as failing to discover Defendant's susceptibility to panic attacks, none of this information was presented to the sentencing court. In light of the severity of Bradley's heretofore unknown mental infirmity at the time of the crime, there is a reasonable probability that a fully-informed sentencer "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Downs, *supra*.

ISSUE III: WHETHER COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESERVE FOR DIRECT APPELLATE REVIEW THE LEGAL SUFFICIENCY OF THE CRIME OF BURGLARY

This was Bradley's first issue below [1172-4]. The essence of the collateral court's decision respecting this issue is that the law at the time of Appellant's trial was inapplicable to the Defendant's theory of the case. The court treated the issue in large part as trial counsel's failure to anticipate changes in the law [1173]. The

real issue is trial counsel's failure to preserve the issue for review, not the inevitable change in the law according to Delgado[19].

It is self-evident, and therefore a well-grounded reason against a finding of ineffective assistance of counsel, that lawyers are not fortune-tellers. There is a distinction, however, between failing to anticipate a change in the law and failing to preserve a cognizable issue based on evidence available. Chipperfield admitted at the evidentiary hearing that the issue of consented entry respecting the charge of burglary could sensibly have been addressed with regard to Linda Jones [798, 802, 876]. His responsibility at the time was not to see the future, but to preserve the issue. That this Court ultimately clarified the law in Delgado only corroborates the legitimacy of the unpreserved issue[20].

Citing distinct instances from the evidentiary hearing, the collateral court found that trial counsel was justified to think he was without a basis to attack the charge [1173]. Yet, the court elaborates that any such attack would have been "inconsistent with the defense the Defendant chose to present" [1173].

Appellant has shown that his "choice" of defense was largely uninformed as to the relative culpability of his co-perpetrator[21]. It would be unjust to ignore the significance of trial counsel's lackluster investigation regarding evidence

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[19] Delgado v. State, 776 So. 2d 233 (Fla. 2000) (announcing the requisite circumstances constituting "remaining in" with regard to burglary)
[20] Appellant addresses the applicability of *Delgado's* reasoning to his case *infra*.
[21] Issue I, *supra*, regarding ineffective investigation

inculpatory against Linda Jones as having affected the entire trial strategy. Failing to discover the absolute match on the pieces of duct tape not only resulted in the uninformed "choice" of the alibi defense over the back-up defense of Linda's independent act, but also led directly to trial counsel's lack of a basis to attack the burglary charge.

Had Appellant been counseled effectively regarding the duct tape and chosen the more sensible defense of Linda's independent act, there would have been no inconsistency for Defendant to allege his invitation. Still, Mr. Jones, the victim, was co-owner of the home into which Linda Jones invited Bradley and the brothers McWhite, who had testified that the victim had instructed them and Appellant to leave [876]. Strickland's second prong – a reasonable probability of a different outcome – is therefore substantiated.

While it clearly was not the law at the time of Appellant's trial, this Court's reasoning in Delgado requiring a burglar to remain in a structure surreptitiously would arguably have been applicable to the facts of this case. In Delgado, the defendant was an acquaintance of the victims and the evidence showed that he did not enter the home of the victims against their will, bringing his actions within the ambit of the crime burglary. Delgado, 776 So. 2d at 234-5.

As a co-owner and co-occupant, any guests of Linda Jones would reasonably have the implied consent of her spouse to visit her at her home upon her invitation.

As at least one McWhite testified, only after he knew of their purpose did Mr. Jones ask Linda's invitees to leave. The consent of Linda would reasonably have been granted on behalf of her husband – insofar as his awareness would have warranted at the time of arrival of the invitees. With a privilege to be inside the home, Bradley and the brothers McWhite could not have committed a burglary under Delgado's rationale.

Delgado clearly states its own non-applicability to convictions finalized before its announcement, and Appellant does not contest that notion now. Delgado, 776 So. 2d at 241. Appellant's treatment of Delgado is to illustrate the prejudice of trial counsel's ineffectiveness. The law changed. Because of trial counsel's failure to preserve the issue, this Court never considered whether the law would have changed based on the facts of Appellant's case. No one can anticipate a change in the law, but such is immaterial to the preservation of the issue. *Delgado's* trial attorney could not have known that the law would change, but he gave his client the opportunity to try on direct appeal.

The collateral court ended its discussion of the burglary preservation issue defining Chipperfield's failure as a tactical decision [1173-4]. Predicated upon the same absence of knowledge of Linda's greater culpability that led to Defendant's "choice" of the alibi defense, trial counsel's failure to preserve the burglary issue cannot be labeled a strategic decision.

By analogy, such would be akin to a salesperson making a warranty of the fitness of a product for a particular purpose without having read the entire product manual, nevertheless persuading the customer to forego the opportunity to purchase the item he really needed while it was on sale at a discount. For the very reason unknown to the salesperson, the purchased product is unfit for the customer's particular purpose. When he returns and complains, the customer is told that he is stuck with merchandise ineffective to meet his needs, and the other product he could have bought is out of stock.

Chipperfield did not read the FDLE reports thoroughly regarding duct tape evidence, and Bradley was left with an ineffective defense. Unfortunately, unlike the hypothetical customer, Bradley cannot simply drive to the next Wal-Mart.

If a burglary was legally impossible, then so would have been a conviction based on a charge of felony murder grounded upon burglary. *Cf*: Chastine v. State, 691 So. 2d 487 (Fla. 4th DCA 1997). With a legally insufficient charge of felony murder and the coincidental return of a general verdict by the jury, Bradley's conviction could not stand, regardless of the sufficiency of evidence of premeditation. Steverson v. State, 787 So. 2d 165 (Fla. 2d DCA 2001); [388].

If a burglary was legally impossible, then so would have been the sentencing court's finding of the statutory aggravator for commission during a burglary[22].

[22] §921.141(5)(d), Fla. Stat. (1995).

While this Court has upheld sentences of death against defendants whose circumstances evince less aggravation than Appellant's[23], the absence of the statutory aggravator for commission during a burglary redistributes the balance of factors determining the imposition of a death sentence. Particularly when considered with the addition of the statutory mitigator for extreme mental or emotional disturbance[24], confidence in the sentence of death is undermined, as Appellant's last assignment of error now illustrates.

ISSUE IV: WHETHER TRIAL COUNSEL WAS INEFFECTIVE IN LIGHT OF THE CUMULATIVE EFFECT OF HIS ERRORS

This was Bradley's issue XVIII below [1202]. The collateral court denied relief on these grounds, citing Defendant's failure to "set out the errors," and "to demonstrate error in the other claims" [1203]. Appellant submits that his *Closing Argument on Defendant's Amended Motion to Vacate Judgment of Convictions and Sentences with Special Request for Leave to Amend* [1109-39] sets out the particular errors raised here for review[25]. Moreover, Appellant has demonstrated how the collateral court's opinion is unsubstantiated by the record regarding issues I through III herein. These individual errors must be examined through a lens which properly reveals their inextricable interdependence.

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[23] Bradley, 787 So. 2d at 746.

[24] Issue II, *supra*.

[25] Although it lacks a separate heading and was merged with argument under Bradley's issue III below, the portions of issue II below regarding the duct tape evidence were presented as grounds and ruled upon by the collateral court.

Cumulative error is a cognizable ground to find trial counsel ineffective and order a new sentencing proceeding. *Cf*: State v. Gunsby, 670 So. 2d 920 (Fla. 1996). In Gunsby, the collateral court granted a new penalty phase proceeding based upon ineffective assistance of counsel. Id. at 922. The state appealed, and the defendant cross-appealed demanding a new guilt phase as well, which this Court granted, rendering the penalty phase moot. Id. at 923. The new trial was grounded upon counsel's failure to discover evidence, and *Brady* violations. Id.

Gunsby differs from Appellant's case in several respects. *Gunsby's* trial counsel was just out of law school Id. at 922, compared to Bradley's tenured attorney. *Gunsby* was mentally retarded Id., whereas Bradley's mental infirmity was not as permanent. Finally, the cumulative error in Gunsby included *Brady* violations as well as failure to discover evidence Id., and Bradley was only prejudiced by errors of the latter type by his trial counsel. Regardless, these distinctions are immaterial to the point of law that cumulative errors of trial counsel constituting ineffective assistance warrant a new penalty proceeding[26].

Because of his failure to read FDLE documents carefully, trial counsel Chipperfield did not know of the exact match among shards of duct tape [811-7] which evinced the greater culpability of co-perpetrator Linda Jones [818-21]. He also admitted that he would have counseled Appellant differently regarding the

[26] Appellant submits that Gunsby does not hold this direct point. Yet, if cumulative error can warrant an entire new trial, then surely it can support a re- sentencing.

prospective defense theories had trial counsel known of evidence further inculpating Linda Jones [809-10]. Bradley's choice of his leading theory of defense was uninformed and therefore meaningless. It resulted in the presentation of absurdly inconsistent theories of defense which prejudiced Bradley: the mere inclusion by Chipperfield of closing argument and jury instructions regarding the independent act of Linda Jones was as meaningless as Bradley's "choice" of his defense theory [828].

Stemming from the same lack of thorough investigation regarding the matching duct tape, Defendant's election of the alibi defense solidified another inconsistency which subverted the entire trial strategy. Because he could not acknowledge his presence at the scene of the crime, Defendant was unable to challenge in any way the charge of burglary [800-4]. Had trial counsel known of Linda's greater culpability, he would have counseled Defendant against the alibi defense, and Defendant would have challenged the burglary charge, preserving it for direct review. The law changed, but not for Bradley[27]. Prejudice ensued since Bradley was convicted of an additional crime and as a result received an additional statutory aggravator. The affirmative choice of the independent-act defense would have been corroborated by a challenge to the burglary charge. Instead, trial

[27] Whether the facts of Appellant's case would have warranted the abrogation of the "remaining in" element of burglary is irrelevant to the prejudicial effect of trial counsel's lack of information as to the overall trial strategy.

counsel's misguided defense resulted in Defendant's inability to avail himself of either.

After propounding an inconsistent defense, trial counsel failed to offer significant evidence of mitigation against Defendant's sentence of death [840-52]. Chipperfield withheld substantial portions of Defendant's medical records from defense experts, precluding their ability to evaluate Defendant competently [838-43]. Sadly, this "tactical decision" [1191] also was due to trial counsel's lack of knowledge [957-8]. Prejudice resulted from the foregone utility of any of this evidence as mitigation against a death sentence: Chipperfield thrice acknowledged his error in not presenting any of this same evidence to the trial judge at the Spencer hearing [851-2, 944, 959].

These three errors all were due to trial counsel's lack of knowledge. As such, they cannot reasonably be considered strategic or tactical decisions. Squires, *supra*. Indeed, they were serious mistakes to which trial counsel admitted. Appellant submits that when an entire trial strategy, as here, was ill-advised due to trial counsel's lack of knowledge, such undermines confidence in the outcome of the proceeding to an extent warranting re-sentencing based on counsel's ineffectiveness. Strickland v. Washington, 466 U.S. 668, 694-6 (1984). The integrity of Appellant's death sentence is tainted by the ineffective assistance of his trial counsel.

CONCLUSION

Appellant has demonstrated the particular errors and the prejudice resulting directly therefrom. Chipperfield's ignorance to the issues addressed herein, falls outside the wide range of reasonable professional assistance. Coleman, *supra*. This conclusion is undistorted by hindsight, and any presumption of counsel's reasonable judgment is unsubstantiated: he simply did not read carefully. Id. The prejudice was evinced at trial in the absurdity of alternate defenses and the lack of significant mitigation evidence of Bradley's then-existing mental infirmity, resulting in a sentence of death. Appellant requests this Honorable Court to commute Bradley's sentence to life, or in the alternative, set aside his sentence of death and remand for resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Office of the Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050, via U. S. Mail this ______ day of September, 2008.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief is typed in Times New Roman font, and it is in size 14 font.

Respectfully submitted,

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