IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-961

ANDREW RICHARD LUKEHART,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

Lower Tribunal Case No. 96-2645-CF

INITIAL BRIEF OF APPELLANT

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PRELIMENARY STATEMENT

This appeal arises from the denial of Appellant's motion for postconviction relief by Circuit Court Judge William Wilkes, Fourth Judicial Circuit, Duval County, Florida, following an evidentiary hearing. This proceeding challenges both Appellant's convictions and his death sentence.

The following abbreviations will be used to cite the record in this cause, with appropriate page number(s) following the abbreviation:

"R" -- record on direct appeal to this Court;

"PCR" -- postconviction record on appeal in this proceeding.

REQUEST FOR ORAL ARGUMENT

Appellant has been sentenced to death and is, therefore, in peril of execution by the state of Florida. If this Court grants relief, it may save his life; denial of relief may hasten his death. This Court generally grants oral arguments in capital cases in the current procedural posture. Appellant, therefore, moves this Court, pursuant to Florida Rule of Appellate Procedure 9.320 (and case law interpreting the rule), to grant him oral argument in this case and to set aside adequate time to fully air and discuss the substantial issues presented, and for undersigned counsel to answer any questions this Court may have regarding the instant appeal.

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STATEMENT OF CASE

Lukehart was tried in Duval County, Florida, and convicted of first-degree felony murder and aggravated child abuse. Jury trial commenced on February 24, 1997 (R 330). On February 27, 1997, the jury found Lukehart guilty as charged (R 1324), and recommended death by a vote of 9-3 (R 1639). On April 4, 1997, the Court imposed the death sentence. On direct appeal Lukehart raised twelve issues[1].

[1] Twelve issues were raised on direct appeal: 1) The trial court erred in refusing to suppress Lukehart's statements (rejected on merits at 912-920); 2) The trial court erred by limiting cross-examination (error but harmless at 920); 3) Lukehart's convictions of first-degree murder and aggravated battery are invalid because of insufficient evidence of premeditation and the lack of a felony independent of the homicide (found lack of evidence to show premeditation; sufficient for felony murder theory; rejected double jeopardy claim on merits at 921-922); 4) The trial court erred in instructing the jury on justifiable or excusable homicide (rejected on merits at 923); 5) Lukehart's death sentence is disproportionate (rejected on merits at 926); 6) The trial court erred in finding that the aggravator of murder in the course of a felony cannot be based on a felony that constitutes the homicidal act (rejected on merits at 923); 7) the trial court erred in giving instruction on the aggravator of a crime committed while on felony probation and trial court erred in finding it in violation of *ex post facto* provisions(error but harmless at 925); 8) The trial court erred in finding both murder in the course of a felony and that the victim was under twelve as aggravators (improper doubling)(error but harmless at 925); 9) The victim-under-twelve aggravator and the standard jury instruction on the aggravator are unconstitutional(procedurally barred; would reject on merits because not found as separate aggravator at 925-926); 10) The trial court erred in allowing a collateral crime to be a feature of the penalty phase (procedurally barred; harmless at 927); 11) The

The Court affirmed Lukehart's conviction and death sentence on direct appeal, but remanded for a re-sentencing on his aggravated child abuse conviction. Lukehart v. State, 776 So.2d 906 (Fla. 2000), *rehearing denied* (January 23, 2001). Petition for Writ of Certiorari was denied on June 25, 2001. Lukehart v. Florida, 533 U.S. 934 (2001).

On September 27, 2001, Lukehart filed a "shell" Motion to Vacate Judgment and Sentence. On November 28, 2001, the State filed a Motion to Dismiss Shell Motion. On January 31, 2002, Lukehart filed a Response to the State's Motion to Dismiss. On June 17, 2002, the trial court granted the Motion to Dismiss, and allowed Lukehart to file, on or before June 25, 2002, an Amended Motion for Postconviction Relief. The Defendant was given leave to supplement the Motion with any additional grounds or to further refine existing grounds based upon public record disclosures that occurred after June 25, 2002. On June 20, 2002, Lukehart filed a Motion to Vacate Judgment of Conviction and Sentence and Memorandum of Law with Special

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prosecutor's comments during penalty phase closing argument were fundamental errors (procedurally barred; no reversible error regarding prosecutor argument to hold defendant responsible despite background at 927); and 12) The trial court erred regarding the sentence for the noncapital conviction and the restitution orders at 927. Lukehart v. State, 776 So.2d 906 (Fla. 2001).

Request for Leave to Amend, raising a total of seventeen claims. On September 23, 2003, Lukehart filed a First Amended Motion to Vacate Judgment of Conviction and Sentence and Memorandum of Law with Special Request for Leave to Amend, also raising a total of seventeen claims[2]. On October 14, 2003, the State filed an Objection to Motion to Amend the Postconviction Motion. On October 16, 2003, Lukehart filed the Defendant's Response to State's Objection to Motion to Amend the Postconviction Motion. On October 11, 2004, the trial court conducted a Huff hearing and granted Lukehart an evidentiary hearing on Claim Three

[2] Seventeen claims were raised in Lukehart's Amended Postconviction Motion: 1) reinstate Shell Motion; 2) Death Sentence violates Ring v. Arizona, 122 S.Ct. 2428 (2002); 3) Ineffective assistance of counsel at guilt and penalty phase; 4) Ineffective assistance of counsel by failing to object to jury instructions; 5) Aggravator of "Less Than Twelve Years of Age" is unconstitutional; 6) Ineffective assistance of counsel in failing to require court to read instruction of Caldwell v. Mississippi 472 U.S. 320 (1985); 7) Jury interview; 8) Lethal injection is cruel and unusual punishment; 9) Lukehart may be incompetent to be executed; 10) Florida's death penalty is unconstitutional; 11) Trial counsel and expert were ineffective pursuant to Ake v. Oklahoma, 470 U.S. 68 (1985); 12) Trial counsel was ineffective in failing to object to improper statements by prosecutor; 13) Defendant may be mentally retarded; 14) Florida's death penalty statutes violate equal protection; 15) Florida's death penalty statutes violates the Eighth Amendment; 16) Trial court failed to find mitigation; and 17) Cumulative error In addition, Lukehart raised an additional issue of ineffective assistance of counsel for failing to file a motion to cease Lukehart's medication. This issue was tried by implied consent by the parties. **See issue II**.

(ineffectiveness of trial counsel at guilt and penalty phases).

On February 27, 2007, the trial court heard arguments on the Defendant's Motion for Leave to Amend. At that time, the State filed a second Objection to the Defendant's Motion to Amend Postconviction Motion. On February 28, 2007, the trial court entered an Order Granting the Defendant's Motion for Leave to Amend, and set the evidentiary hearing for May 9-10, 2007. On June 1, 2007, the Defendant filed the Defendant's Evidentiary Hearing Closing Arguments and Memorandum in Support of a New Trial and/or New Penalty Phase, and the Defendant's Motion to Amend Pleading to Conform with Evidence. The State filed a Proposed Order on June 20, 2007. On March 27, 2009, the trial court entered its order denying Appellant's postconviction motion.

STATEMENT OF FACTS

On direct appeal this Court found the facts to be as follows:

> The victim in this case, five-month-old Gabrielle Hanshaw, was killed by Lukehart, who lived in Jacksonville with Gabrielle's mother, Misty Rhue, along with Rhue's other daughter, Ashley, and Rhue's father and uncle. On February 25, 1996, Lukehart and Rhue spent Sunday afternoon running errands in Rhue's car with the two children. When the four returned to their house on Epson Lane, Rhue took two-year-old Ashley, who had been ill, to her room for a nap, and Lukehart cared for Gabrielle, the baby, in another room. At one point, Lukehart entered the room and took a clean diaper for the baby. At approximately 5 p.m., Rhue heard her car starting in the diveway, looked out the window, and saw Lukehart driving away in her white Oldsmobile. Rhue searched the house for the baby and did not find her Thirty minutes later, Lukehart called from a convenience store and told Rhue to call the 911 emergency number because someone in a blue Chevrolet Blazer had kidnapped the baby from the house. After Rhue called 911, Jacksonville Sheriff's Detectives Tim Reddish and Phil Kearney went to the Epson Lane house.
>
> Shortly thereafter, Lukehart appeared without shirt or shoes in the front yard of the residence of a Florida Highway Patrol trooper in rural Clay County. At about that same time, the car that Lukehart had been living was discovered about a block away from the trooper's house. The car was off the road and had been abandoned with its engine running. Law enforcement officers from the Clay County Sheriff's Office and the Jacksonville Sheriff's Office interviewed Lukehart and searched in Clay County for the baby during the ensuing eighteen hours. At about noon on Monday, February 26, Lukehart told a lieutenant with the Clay County Sheriff's Office that he had dropped the baby on her head and then shook the baby and that the baby had died at

Misty Rhue's residence. Lukehart said that when the baby died, he panicked, left Rhue's residence, and threw the baby in a pond near Normandy Boulevard in Jacksonville. Law enforcement officers searched that area and found the baby's body in a pond.

On March 7, 1996, Lukehart was indicted on one count of first-degree murder and one count of aggravated child abuse. The trial was held February 26 and February 27, 1997. During the trial, the State put into evidence the testimony of law enforcement officers who were involved in the search for the baby and who were with Lukehart during the evening of February 25 through the morning of February 26, 1996. The State also presented statements made by Lukehart. The State presented the testimony of the medical examiner, who testified that the baby's body revealed bruises on her head and arm that occurred close to the time of death and that prior to death the baby had received five blows to her head, two of which created fractures.

Lukehart chose to testify in his defense at trial. Before Lukehart testified, the trial court appropriately advised him that he had a right not to testify and that if he did testify, he would be subject to cross-examination. In his testimony, Lukehart said that while he was changing the baby's diaper on the floor at Rhue's residence, the baby repeatedly pushed up on her elbows. He forcefully and repeatedly pushed her head and neck onto the floor "until the last time I did it she just stopped moving, she was just completely still." Lukehart testified to being six-feet one-inch tall and weighing 225 pounds. He stated that he used "quite a bit" of force to push the baby down. He testified that he tried mouth-to-mouth resuscitation, and when the baby did not revive, he panicked and grabbed the baby and over to a rural area. He said that when he stopped and was in the process of getting out of the car, he accidentally hit the baby's head on the car door Lukehart testified that he threw the baby into the pond where her body was found. He admitted that he had not told law enforcement officers the truth in his earlier accounts of the incident and that, although he did not intend to

> kill the baby, he was responsible for her death. He said that he eventually told Lieutenant Jim Redmond of the Clay County Sheriff's Office that he was responsible for the baby's death and that he had revealed the location of the baby's body because "I felt bad, I felt guilty."

Lukehart v. State, 776 So.2d 906, 910 (Fla. 2000).

However, at the evidentiary hearing conducted on May 9 and 10, 2007, the following additional and/or contradictory facts were established:

Prior felony:

3.850 Motion - Mr. Edwards (Lukehart's trial attorney) did not file a 3.850 motion to vacate Lukehart's prior felony. However, facts were available for a claim that Amy Grass (Lukehart's prior violent felony attorney) was ineffective for the following reasons: (1) Ms. Grass knew that Lukehart was “going to snap” while incarcerated and he wanted to get out of jail (Exhibit 1). (2) Lukehart pled guilty only because he wanted to get out of jail and trial had not been set (PCR 1354), not because he was guilty (PCR 1354). (3) Ms. Grass knew that the evidence pointed to Plummer (Jillian French's mother) as the true guilty party of Lukehart’s prior violent felony charge (PCR 1232). (4) Grass requested Doctor Krop (Psychologist) to evaluate Lukehart to determine whether he was a danger to himself or others if he remained in jail (Exhibit 1). (5) Krop’s 7-

16-94 evaluation failed to provide that determination. Krop's evaluation recommended Lukehart be placed in an in-patient facility—rather than probation—because Lukehart would not be able to successfully complete probation. Krop's evaluation revealed that Lukehart suffered a number of mental disorders which caused him to lose control. (6) Grass knew about Krop's diagnosis and recommendation, but went forward with Lukehart's plea upon the conditions of probation, even though Lukehart requested in-patient services (Exhibit 1), without informing the court.

Mitigation of Prior Felony - Edwards did not investigate substantial aspects of the prior felony, and as a result did not attempt to mitigate the prior felony. Evidentiary hearing evidence revealed the following: Brenda Page (present when Jillian was injured) testified that Edwards never spoke with her (a fact Edwards admitted at the evidentiary hearing), although she was available to testify at Lukehart's trial in this case (PCR 1198). Page testified at the evidentiary hearing about the events leading up to Jillian French's injuries. She testified that she, her two kids, Lukehart, her boyfriend Bobby Nye, Monica Plummer, and Jillian French (Plummer's eight-month-old child) lived together in Baldwin, Florida (PCR 1265-1266). Plummer relocated from Maine because her mother was

attempting to gain custody of Jillian (PCR 1267). Lukehart, not Plummer, took responsibility for feeding and bathing Jillian (PCR 1268; PCR 1346). Lukehart was very loving, kind, caring, and responsible for Jillian (PCR 1268; PCR 1346). Plummer was jealous of the relationship Lukehart had with Jillian because he paid more attention to the child than he did to her (PCR 1268). Page observed Plummer slapping and pinching Jillian (PCR 1269). On several occasions, when Page and Lukehart returned home from work, they observed burn marks, cuts, and black-and-blue marks on Jillian while she was in Plummer's care (PCR 1269; PCR 1347). Once, Lukehart suspected Jillian's leg might be broken. He urged Plummer to take Jillian to the hospital, but Plummer refused (PCR 1270; PCR 1347). Plummer, a drug-user, had struck Page when Plummer attempted to commit suicide (PCR 1270-1271). Bobby Nye, Page's boyfriend, reported to her on several occasions that Plummer had hit Jillian (PRC 1271). Prior to the day Jillian was admitted to the hospital, Plummer tossed Jillian across the room; Jillian landed on the bed and bounced onto the floor with a thump (PCR 1271-1273; PCR 1348) and, at first, the child did not make a sound. Then, they heard Jillian start screaming and crying (PCR 1272; PCR 1349).

On April 14, 1997, Lukehart gave Jillian a bath. He left her for a moment and when he returned he found Jillian lying in a tub of running water She was not moving; he thought she was drowning so he yanked her from the tub and started CPR (PCR 1350). He snatched her up and ran next door, called 911, and went to the hospital with Jillian (PCR 1271-1272; PCR 1349-1352). When he was told about her broken arm and leg, he thought he might have hurt Jillian when he grabbed her from the tub (PCR 1353). However, Dr. Capellea testified that the fracture to the right arm and left leg were older injuries[3]. Later, Lukehart was arrested.

Capellea, the intern who assisted Coe's treatment of Jillian French (R 473), was called by the State during the penalty phase (R 1350-1357). Although Coe was the attending physician for Jillian French (R 437-48) Capellea testified Jillian suffered from a subdural hematoma (R 459). Edwards did not cross-examine Capellea.

While Lukehart was in jail awaiting trial for the prior violent offense, he reported to Grass that (1) he didn't want to be convicted of a felony (Exhibit 1); (2) he

[3] Trial counsel filed a Motion in Limine to prevent testimony regarding older injuries, which was granted (R 321). However, Capellea testified about the old injuries anyway, which went unobjected to by trial counsel or by the court (R 1353). Counsel's failure to make a contemporaneous objection was deficient performance. Cash v. State, 875 So.2d 829 (Fla. 2nd DCA 2004)

was having problems in jail, he was suffering paranoia, and he was ready to snap (Exhibit 1); (3) he wanted in-patient treatment, as suggested by Krop's evaluation (Exhibit 1); (4) that the only thing he did wrong was to leave the child unattended in the tub (Exhibit 1).

Page testified that Lukehart often took the blame for the wrong-doing of others and gave examples (EH 189). Lukehart's family members also testified that he would take the blame for others (PCR 1287-1288; 1301).

At the evidentiary hearing, Edwards said he didn't remember Brenda Page, nor that her deposition had been filed with the clerk before trial (PCR 1195-1196). When Edwards was informed about the focus of what Page's testimony would have been at trial, he admitted that technically it would be mitigating. However, his decision not to call Page to testify was, "Again, I'm opening that door to a crime that Lukehart has admitted to" (PCR 1196-1197). The State opened the door by calling three witness and introducing a certified copy of the prior conviction.

Medication:

Trial counsel knew that before Lukehart was put on medication, Lukehart had explained to law enforcement that he had dropped Gabrielle Hanshaw (PCR 1163). Trial counsel also knew that Lukehart was being medicated from the time

of his arrest through trial, but did not know what the effects the medication caused (PCR 1167-1168). When Lukehart was questioned by the trial court prior to his testimony, the court was not informed by anyone that Lukehart was on medication (R 1167-1171).

Lukehart was taking Sinequan, Vistaril, and Mellaril (PCR 1095). The medication is likely to cause confusion (PCR 1095); produce a patchy memory (PCR 1096); and confabulation, which is an involuntary response to make sense out of a situation, to insert a person's best judgment information about what may have occurred or what may occur (PCR 1094); that confabulation is not related to a fabrication—the person actually believes what they are saying(PCR 1095). Lukehart may have actually believed that he pushed the child's head down to coincide with the medical examiner’s findings, because in terms of perception, in terms of recollection, in terms of attempting to fill in the gaps in his own thought patterns, in his own memory, and in his own recollections he would have involuntarily chosen things to fill in the gaps, and that's the nature of confabulation (PCR 1098).

Mitigation and Live Testimony:

Four of Lukehart’s family members testified in person at the evidentiary hearing: Randall Lukehart (father) (R

1526), Bonnie Lukehart (mother) (R 1545), Melissa Smith (cousin) (R 1518), and Bryan Smith (brother-in-law) (R 1538). The following family members testified by deposition: Stephanie Repko (cousin) (R 1385), Llewellyn Scram (uncle) (R 1410), Kathleen Vanentine (aunt) (R 1416), Evelyn Uphold (aunt) (R 1420), and Kimberly Scram (cousin) (R 1424).

Much of trial counsel's evidence at the penalty phase was introduced by reading depositions. Counsel failed to obtain live witnesses so the jury could evaluate them in person, especially Llewellyn Scram, who was a prisoner and easily transportable. Edwards testified that some of the family members wanted to be present, but couldn't afford the expense (PCR 1203); Ms. Repko testified at the evidentiary hearing to that fact.

Edwards testified that a non-recorded discussion took place in chambers with the court regarding funds to transport witnesses. The result of that discussion: take family members' depositions rather than incur travel expenses necessary for their appearance (PCR 1204). Edwards also testified that he did not formally file a motion requesting the court for funds to transport and house the witnesses for the trial (PCR 1204). Yet, Edwards did request and receive approval for his personal travel and

expenses.

Lukehart was severely prejudiced because the jury only heard words read from a cold document. Llewellyn Scram was certainly available since he was in prison for sexual battery. His personal appearance was essential for the jury to evaluate in person, while looking him in the eye to ascertain what Lukehart and his family had suffered through Scram’s own hands.

Testimony at the evidentiary hearing revealed that Lukehart’s family members possessed additional background information about Lukehart that was not testified to at the penalty phase, mainly because counsel didn’t meet with them prior to their testimony to explain what was needed (PCR 1286; 1298; 1311; 1327), and counsel’s demeanor was cold and judgmental (PCR 1296; 1311; 1328).

The background information would have included: The loss of Lukehart’s parents’ first child after a difficult pregnancy (PCR 1315); Randall Lukehart, Jr. was two hours old when he died (PCR 1314); his parents’ devastation eased somewhat when Lukehart was born in 1973 (PCR 1314); Lukehart was placed in an incubator due to a high fever (PCR 1315); Lukehart’s mother, Bonnie Lukehart, abused alcohol during her pregnancy (PCR 1315). His father, Randall Lukehart, was an alcoholic with an established

history of mental illness who routinely physically and verbally abused Lukehart, his sister, Jennifer, and their mother (PCR 1317).

Lukehart's childhood was marked by the sustained and corrosive effects of his father's beatings coupled with explosive outbursts of verbal and emotional abuse (PCR 1317). Lukehart once told his cousin, Melissa Smith, that the anal sex with Luke (Llewellyn) Scram was so painful and traumatic that it would make him vomit (PCR 1299).

Lukehart's family history includes three generations of incestuous sexual abuse, alcoholism, severe mental health problems, and suicide (PCR 1318, 1333-1335). Lukehart's aunts were sexually abused by their father (PCR 1319). Ms. Lukehart left her husband several times. At one point, in order to escape the abuse, she was forced to wrap Lukehart and his sister in a blanket and lower them through an open window so they could escape to safety (PCR 1317).

By 1978, when Lukehart was approximately five years old, Randall Lukehart stopped inking. However, sobriety brought increased amounts of verbal abuse and the tone became more harsh and intimidating to Lukehart (PCR 1333-1337).

Nearly every relative for three generations suffers from clinical depression requiring treatment and/or medication (PCR 1302). At least four ancestors committed suicide (PCR 1302, 1319). Several others, including his mother and father and Lukehart, have contemplated suicide on multiple occasions (PCR 1302). Lukehart's father was discharged from the Navy in 1966 after being diagnosed as a schizophrenic (PCR 1334).

Lukehart was also subject to loss and emotional isolation. He and his family endured the death of several close family members. Lukehart lost his grandmother at an early age. Lukehart's Uncle Norman forced his wife to watch him commit suicide by placing a gun in his mouth and pulling the trigger (PCR 1320).

In addition, his Uncle Donny's death was enormously devastating. Donny became a paraplegic after a car accident several years earlier; he finally died from complications. Lukehart was especially close to his uncle and emulated him. He told many people he should have died instead of his uncle, and he attempted suicide shortly thereafter (PCR 1321-1322).

Lukehart stopped showing affection (PCR 1322). At school, Lukehart was a poor student who found analytical and abstract issues problematic. Lukehart endured another

long period of maladjustment and his behavioral and attendance problems led to his being expelled in the ninth grade. Lukehart's peer group soon capitalized on Lukehart's vulnerability and steadfast loyalty that would cause Lukehart to routinely take the blame for things which he did not do (PRC 1289). Lukehart was a "follower" who was easily manipulated by dares and he was willing to "take the fall" for anything (PCR 1288). Lukehart had run away from home several times, and his parents rarely showed interest in him (PCR 1325).

SUMMARY OF ARGUMENT

ISSUE I - Lukehart did not commit the prior violent felony. The State's arguments in the penalty phase tethered the prior violent felony to this case as if they were symbiotic. Trial counsel knew it was his obligation to attack the prior felony and he had evidence to do so, but failed to either seek it out or present it.

ISSUE II - Lukehart was on medication from the time of his arrest through trial, which caused confusion and confabulation. Trial counsel knew he was on medication, but failed to learn about its effects, he did not inform the court about his client being on medication, he did not request a motion to cease the medication, or request an instruction to the jury regarding the effects of the medication. This resulted in Lukehart admitting to false memories he believed were true.

ISSUE III - The defense theory was that Lukehart lacked the intent for the underlying felony. Krop could have testified that Lukehart's intermittent explosive disorder may cause his actions to appear intentional to a layperson, but these actions were, in actuality, uncontrollable and thoughtless. Trial counsel failed to call Krop during the guilt phase.

ISSUE IV - Appellant filed his "shell" motion prior to the effective date of Fla.R.Crim.P. 3.851, which provided that the prior rule in effect was controlling, pursuant to Fla.R.Civ.P. 1.190(c), Appellant's Amended Motion should relate back to his original pleading.

ISSUE V - Law enforcement's claim of Baker Acting Appellant was a pretext to maintain custody of Appellant without arrest in violation of his Fourth Amendment rights in conjunction with, not separately from, Appellant's Fifth Amendment rights to the United States Constitution. Trial counsel failed to raise Appellant's Fourth Amendment claim in the Motion to Suppress or at the suppression hearing.

ISSUE VI - The jury’s instructions about the underlying felony (Aggravated Child Abuse) and the same felony in Count II was confusing and incorrect. Trial counsel failed to object to the instruction and to the State's arguments and/or provide a proposed instruction.

ISSUE VII - Trial counsel failed to either object to or request the trial court to read the proposed instruction to the jury that the State agreed to and the court granted. The instruction informed the jury that the court must give great weight to the jury's recommendation.

ISSUE VIII - Some witnesses provided deposition testimony at the penalty phase because trial counsel failed to insist that the court approve funding for their appearance. As a result, substantial mitigation was not presented and the jury was unable to view the demeanor, attitude, voice inflections, and concern these witnesses possessed.

ISSUE IX - Trial counsel failed to object to prosecution’s improper comments during the penalty phase. Such comments denigrated Appellant's mitigation by calling them excuses on six occasions and inflamed the jury’s parental passion about protecting children.

ISSUE X - Florida's law prohibiting interviewing jury members violates Lukehart’s Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution.

ISSUE XI - Execution by lethal injection violates the Eighth Amendment to the Constitution.

ISSUE XII - Errors which may not by themselves be reversible, together may cumulatively be sufficient to warrant reversal.

ISSUE I

WHETHER THE TRIAL COURT ERRED IN FINDING TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ATTACK LUKEHART'S PRIOR VIOLENT FELONY AGGRAVATOR IN VIOLATION THE FIFTH, SIXTH, AND EIGHTH AND FOURTEENTH CONSTITUTIONAL AMENDMENTS?

The standard of review for Ineffective Assistance of Counsel is *de novo,* pursuant to Strickland v. Washington, 466 U.S. 668 (1984), which requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice.

The postconviction trial court denied this claim for two reasons: (1) "It appears the Defendant is asserting that trial counsel should have retried his guilt of the underlying conviction used as an aggravator in the penalty phase of this trial. This is residual doubt as to the aggravator" (PCR 1426); and (2) "After reviewing the file regarding the prior conviction and discussing the case with the Public Defender who handled the case, trial counsel concluded that the Defendant's plea had been knowingly, voluntarily, and intelligently entered (EH Vol. 1 at 122.) Trial counsel testified that there was no basis to set aside the plea, and he has an ethical obligation not to file frivolous motions" (PCR 1426-1427).

First, Appellant is not arguing residual doubt as the basis for ineffective assistance of counsel, although this

court, as well as some federal courts, have acknowledged the benefit of residual/lingering doubt a jury may have. Hannon v. State, 941 So.2d 1109, 1130(Fla. 2006)(It is certainly logical that a jury of laypersons is less likely to recommend death if they have some lingering concerns about guilt than if there is absolute certainty on the issue of guilt.); Blankenship v. Hall, 542 F.3d 1253, 1280 (11th Cir. 2008)(This strategy was eminently reasonable. "Creating lingering or residual doubt over a defendant's guilt is not only a reasonable strategy, but is perhaps the most effective strategy to employ at sentencing." Parker, 331 F.3d at 787-88.).

Most importantly, the postconviction trial court's findings that trial counsel is not obligated to retry Appellant's guilt on the aggravator is wrong, as well as its reliance upon trial counsel's conclusion that no basis existed to attack the prior felony because Appellant's plea was knowing, voluntary and intelligently made.

Counsel has a duty to investigate and mitigate a prior felony, where possible, when the state intends to use it as an aggravator.

> The prosecution was going to use the dramatic facts of a similar prior offense, and Rompilla's counsel had a duty to make all reasonable efforts to learn what they could about the offense.

Reasonable efforts certainly included obtaining the Commonwealth's own readily available file on the prior conviction to learn what the Commonwealth knew about the crime, to discover any mitigating evidence the Commonwealth would downplay and to anticipate the details of the aggravating evidence the Commonwealth would emphasize. Without making reasonable efforts to review the file, defense counsel could have had no hope of knowing whether the prosecution was quoting selectively from the transcript, or whether there were circumstances extenuating the behavior described by the victim. The obligation to get the file was particularly pressing here owing to the similarity of the violent prior offense to the crime charged and Rompilla's sentencing strategy stressing residual doubt.

* * *

The notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense. As the District Court points out, the American Bar Association Standards for Criminal Justice in circulation at the time of Rompilla's trial describes the obligation in terms no one could misunderstand in the circumstances of a case like this one:

"It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. **The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty."** 1 **ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.).**

"[W]e long have referred [to these ABA Standards] as 'guides to determining what is reasonable.'" Wiggins v. Smith, 539 U.S., at 524 (quoting Strickland v. Washington, 466 U.S., at 688), and the Commonwealth has come up with no

> reason to think the quoted standard impertinent here.

Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005)(emphasis added). Further, this Court in Green v. State, 975 So.2d 1090 (Fla. 2008) cited to Rompilla's findings as follows:

> First, counsel knew that the prosecution intended to seek the death penalty by proving Rompilla had a significant history of felony convictions indicating the use or threat of violence. Second, the prior offense court file was readily available and relatively small. Third, the prior offense was similar to the crime charged. And fourth, there was a great risk that testimony about a similar violent crime would hamstring counsel's chosen defense of residual doubt.

Deficient Performance

It was crucial for trial counsel to investigate and present evidence to mitigate the prior violent felony by either filing a 3.850 motion and/or presenting mitigating evidence at the penalty phase and Spencer hearing. It was unrefuted that such evidence was available to trial counsel.

3.850 Motion - At the evidentiary hearing, trial counsel stated that he didn’t file a 3.850 motion on the prior violent felony case because he was unaware of any basis to vacate the judgment and sentence (PCR 1200).

However, Lukehart’s plea amounted to a manifest injustice (Williams v. State, 316 So.2d 257 [Fla. 1975])

because he was actually innocent (Sawyer v. Whitney, 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.1d 269 [1992]).

Trial counsel possessed ample evidence to file a good faith 3.850 motion alleging that Lukehart's plea was not knowing and voluntary; the result of counsel's (Amy Grass - Lukehart's prior violent felony attorney) ineffective performance for the following reasons: (1) Ms. Grass knew that Lukehart was "going to snap" in jail and he wanted to get out of jail (Exhibit 1). (2) Lukehart pled guilty only because he wanted to get out of jail, and trial had not been set (PCR 1354). (3) Ms. Grass knew that the evidence pointed to Plummer (Jillian French's mother) as the guilty party, not Lukehart (PCR 1232). (4) Grass requested Krop to evaluate Lukehart to determine whether he was a danger to himself or others if he remained in jail (Exhibit 1). (5) Krop's 7-16-94 evaluation failed to provide that determination. Krop's evaluation recommended Lukehart be placed in an in-patient facility—rather than probation—because Lukehart would not be able to successfully complete probation. Krop's evaluation revealed that Lukehart suffered a number of mental disorders which caused him to lose control. (6) Grass knew about Krop's diagnosis and recommendation, but went forward with Lukehart's plea without informing the court about Lukehart's mental

condition or seeking evaluation of competency to enter the plea.

There is no question that Edwards was armed with sufficient facts to make a good faith claim that Lukehart's plea was not knowingly, voluntarily, and intelligently made.

But, even assuming that a 3.850 Motion would not have prevailed, Edwards was not relieved from presenting the available mitigation for the prior violent felony to the jury in the instant case, as described below.

Mitigation of Prior Violent Felony - The record in this case and the evidence presented at the evidentiary hearing unquestionably establish that Lukehart was innocent of the prior violent felony offense to which he pled guilty. As such, trial counsel was obligated to investigate and present evidence to mitigate the prior violent felony aggravator. Rompilla v. Beard, Supra.

The facts establishing that Lukehart did not commit the prior violent felony—which went unheard by the jury, the trial court, and this court—are as follows:

Brenda Page testified at the evidentiary hearing that Edwards (Lukehart's trial counsel in this case) never spoke with her, (Edwards admitted this fact at the evidentiary hearing) although she was available to testify at

Lukehart's trial in this case (PCR 1198). At the evidentiary hearing, Page testified about the events leading up to Jillian French's injuries. She testified that she, her two kids, Lukehart, her boyfriend Bobby Nye, Monica Plummer, and Jillian French (Plummer's eight-month-old child) lived together in Baldwin, Florida (PCR 1265-1266). Plummer relocated from Maine because her mother was attempting to gain custody of Jillian (PCR 1267). Lukehart, not Plummer, took responsibility for feeding and bathing Jillian (PCR 1268; PCR 1346). Lukehart was very loving, kind, caring, and responsible for Jillian (PCR 1268; PCR 1346). Plummer was jealous of the relationship Lukehart had with Jillian because he paid more attention to the child than he did to her (PCR 1268). Page observed Plummer slapping and pinching Jillian (PCR 1269). On several occasions, when Page and Lukehart returned home from work, they observed burn marks, cuts, and black-and-blue marks on Jillian while she was in Plummer's care (PCR 1269; PCR 1347). Once, Lukehart suspected Jillian's leg might be broken. He urged Plummer to take Jillian to the hospital, but Plummer refused (PCR 1270; PCR 1347). Plummer, a ug-user, had struck Page when Plummer attempted to commit suicide (PCR 1270-1271). Bobby Nye, Page's boyfriend, reported to her on several occasions that Plummer had hit

Jillian (PRC 1271).

Prior to the day Jillian was admitted to the hospital, Plummer tossed Jillian across the room; Jillian landed on the bed and bounced onto the floor with a thump (PCR 1271-1273; PCR 1348) and, at first, the child did not make a sound. Then, they heard Jillian start screaming and crying (PCR 1272; PCR 1349).

On April 14, 1997, Lukehart gave Jillian a bath. He left her for a moment and when he returned he found Jillian lying in a tub of running water. She was not moving; he thought she was owning so he yanked her from the tub and started CPR (PCR 1350). He snatched her up and ran next door, called 911, and went to the hospital with Jillian (PCR 1271-1272; PCR 1349-1352). When he was told about her broken arm and leg, he thought he might have hurt Jillian when he grabbed her from the tub (PCR 1353), when in fact those injuries were older[4]. Later, Lukehart was arrested.

Capellea, the intern who assisted Dr. Coe's treatment of Jillian French (R 473), was called by the State during the penalty phase (R 1350-1357). Although Coe was the attending physician for Jillian French (R 437-48), Capellea

[4] Trial counsel filed a Motion in Limine to prevent testimony regarding older injuries, which was granted (R Vol. XIII, p321). However, Capellea testified about the old injuries anyway, which went unobjected to by trial counsel or by the court (R Vol. XVIII, p1353).

testified. Edwards did not cross-examine Capellea.

While Lukehart was in jail awaiting trial for the prior violent offense, he reported to Grass that (1) he didn’t want to be convicted of a felony (Exhibit 1); (2) he was having problems in jail, he was suffering paranoia, and he was ready to snap (Exhibit 1); (3) Lukehart wanted in-patient treatment, as suggested by Krop’s evaluation (Exhibit 1); (4) that the only thing he did wrong was to leave the child unattended in the tub (Exhibit 1).

Page testified that Lukehart would take the blame for the wrong-doing of others on several occasions and gave an example (EH 189). Lukehart’s family members also testified that he would take the blame for others (PCR 1287-1288; 1301).

At the evidentiary hearing, Edwards could not remember Brenda Page or that her deposition had been filed with the clerk before trial (PCR 1195-1196). When informed of what Page's testimony would have contained at trial, Edwards admitted that technically it would be mitigating. However his strategy not to call Page to testify was: "Again, I'm opening that door to a crime that Lukehart has admitted to" (PCR 1196-1197). Apparently Edwards, for what ever reason, did not hear the testimony by the three witnesses presented

by the state describing the prior felony, or the introduction of the certified copy of the prior conviction.

Edwards' alleged strategy amounted to no more than a terse conclusion with no factual basis without first investigating what Page would have testified to. Edwards expressed no facts which Page, Lukehart, or Coe/Capellea would have testified to that the State hadn't already presented in great detail. In actuality, the opposite is true. Page, Lukehart, and Coe would have provided explanations for all of Jillian's injuries, as described above, which would have cast great doubt upon the State's aggravator so that little, if any, weight would have been given to it. Counsel's performance was deficient.

Prejudice - The legal circumstances of Lukehart's case are remarkably similar to that in Rompilla because both had prior violent felonies that were similar to the current charge, the prior felony was utilized by the state to obtain a death recommendation, but went unmitigated even though evidence was available. Lukehart's case is more egregious because Edwards had competent substantial evidence to establish that Lukehart did not commit the prior offense. Edwards alleged strategic choice not to open the door of the admitted prior offense is an unreasonable

explanation in light of the fact that the State had already slammed opened that door.

Edwards knew his obligation was to “dispel it, that it doesn’t exist (PCR 1193),” yet he failed to attempt to investigate or mitigate the prior violent offense. Edwards testified he knew his opponent, Angela Corey (Assistant State Attorney). Therefore, he had to know that Corey would aggressively demand great weight be placed on the prior violent felony to facilitate a death penalty recommendation. During penalty phase closing argument, Corey made many damning comments about how Lukehart treated Jillian French, some of which are as follows:

- Jillian French was only eight months old when this man abused her to the point where she had to be rushed to the hospital with retina hemorrhages, a bruised brain and other injuries. (R 1577-1578).
- He cruelly beat one baby, Jillian French (R 1578).
- And it's what he did to Jillian French that makes it even more compelling for you to recommend the electric chair for Lukehart. (R 1578-1579).
- He knew two years before he bashed Jillian French's head (R 1580).
- It's what he did to Jillian that makes him deserve to die. (R 1591).
- We're here about Lukehart and what he did because nobody twisted his arm before he twisted Jillian French's arm (R 1593-1594).

- This aggravating factor all by itself weighs more than anything you'll ever hear, more than anything else I can tell you about, and more than Edwards can tell you about to let you think or to make you think that the mitigation outweighs the aggravation just this one by itself. The fact that he had already hurt Jillian French severely and then killed Gabrielle is enough for you to recommend the death penalty. (R 1595).
- none of it outweighs the fact that he hurt Jillian French so severely and that he killed Gabrielle Hanshaw. (R 1603).
- the fact that he hurt Jillian French and killed Gabrielle Hanshaw clearly and completely outweighs anything else about this man and therefore you should recommend death. (R 1608).

As in Rompilla, this was a case where the State didn't just introduce a certified copy of the prior conviction, the State presented a number of witnesses who testified about the prior offense (an assisting attending physician, an Assistant State Attorney, and a probation officer). In addition, as described above, the State went well beyond the legal boundaries and incorporated the prior offense in a symbiotic manner with the present offense to persuade the jury that Lukehart should "die for what he did to Jillian French (R 1591)."

Although the trial court did not assign specific weight to the prior violent felony in its sentencing order, this Court found the prior violent felony aggravator extremely weighty.

> This case is significantly aggravated by the existence of the prior conviction for felony child abuse.
>
> * * *
>
> Thus, Lukehart's prior felony aggravator is an exceptionally weighty aggravating factor under the circumstances of the present case.

Lukehart, 778 So.2d at 926.

Justice Anstead, in his dissenting opinion on direct appeal in this case, pointed out: "The bottom line is that our approval of the death sentence here is dramatically inconsistent with our case law involving other child murders." Lukehart, 776 So.2d at 930. The only perceptible explanation for the majority upholding Lukehart's death sentence as compared to prior cases must be the prior violent felony, as suggested above.

Certainly, had Edwards either filed a 3.850 motion attacking the prior offense and/or presented available mitigating evidence to the jury, probably a different result would have prevailed either before the jury or this court.

> "This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, **that is not the test. It goes without saying that the undiscovered "mitigating evidence, taken as a whole, `might well have influenced the jury's appraisal'** of [Lukehart's]

culpability" Rompilla, 545 U.S. 374 (emphasis added.)

Wherefore, this Court should find that Appellant's counsel was ineffective and should either commute Lukehart's sentence or grant him a new penalty phase trial.

ISSUE II

WHETHER COUNSEL WAS INEFFECTIVE IN FAILING TO LEARN THE EFFECTS OF THE MEDICATION LUKEHART WAS TAKING, INFORMING THE COURT AND THE JURY, IF NECESSARY, THAT LUKEHART WAS ON MEDICATION AND ITS EFFECTS, MOTIONING THAT MEDICATION CEASE, AND REQUESTING A CONTINUANCE IN VIOLATION OF LUKEHART'S FOURTH, FIFTH, SIXTH, AND EIGHTH AMENDMENTS TO THE CONSTITUTION?

The standard of review for Ineffective Assistance of Counsel is *de novo,* pursuant to Strickland v. Washington, 466 U.S. 668 (1984), which requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice.

This issue was not raised in Appellant's 3.850 Motions[5]. The substance of this issue was brought out at the evidentiary hearing and presented to the court in Appellant's Motion to Amend Pleading to Conform with Evidence (PCR 971-974). Although the postconviction trial

[5] Lukehart filed his first postconviction motion prior to October 1, 2001; therefore, Fla.R.Crim.P. 3.850 applies, not 3.851. In addition, pursuant to Fla.R.Civ.P. 1.190 amendments relate back. See Issue IV below.

court acknowledged in its order denying Appellant's postconviction motion that Appellant filed the Motion to Amend Pleading to Conform with Evidence (PCR 1398), the court failed to discuss the substance of the issue in its order, though deemed to have been pled pursuant to Fla.R.Civ.P. 1.190(b).

Fla.R.Civ.P. 1.190(b) states:

> **When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.** Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment, but failure to so amend shall not affect the result of the trial of these issues. If the evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended to conform with the evidence and shall do so freely when the merits of the cause are more effectually presented thereby and the objecting party fails to satisfy the court that the admission of such evidence will prejudice the objecting partying maintaining an action or defense upon the merits.

Although undersigned counsel could find no Florida case specifically addressing Fla.R.Civ.P. 1.190(b) in a postconviction case, there are a number of cases that have approved the utilization of other subsections in Fla.R.Civ.P. 1.190 in a postconviction setting. Rosier v. State, 603 So.2d 120 (5th DCA 1992); Boyd v. State, 801

So.2d 116 (4th DCA 2001); Saucer v. State, 779 So.2d 261 (Fla. 2001); Bryant v. State, 901 So.2d 801 (Fla. 2005).

In Allen v. Butterworth, 756 So.2d 52 (Fla. 2000), this Court acknowledged that postconviction cases are quasi civil in nature as they are derived from Habeas Corpus proceedings.

Pursuant to Fla.R.Civ.P. 1.190(b), the issue was tried by implied consent. In support, Appellant contends as follows: (1) the evidence presented at the evidentiary hearing, as described below, went without objection by Appellee at the hearing, nor did they file any objection to Appellant's Motion to Amend Pleadings to Conform With the Evidence; (2) the State cross-examined Dr. Barry Crown (PCR 1107-1108) and Appellant (PCR 1387-1388) about the medication; (3) this issue was not complex, (4) there was not a lot of evidence presented on the issue, and (5) this issue is meritorious because the jury was required to weigh confabulated testimony without knowledge that Appellant was on medication that affected his belief as to the truth.

Deficient Performance

At the evidentiary hearing, Edwards testified he knew from Krop that Lukehart was on medication, but did not know the effects of the medication (PCR 1167-1168).

At trial the court questioned Lukehart about his decision to testify (R 1167-1171). Neither the court nor counsel asked Lukehart if he was presently taking medication. Appellant could find no record entries indicating that counsel had notified the court at any time that Lukehart was on medication.

Dr. Crown testified at the evidentiary hearing that the Defendant was prescribed three types of medication starting from the time of his incarceration and continuing through trial.

> Q. Were you aware of from your records you read that Lukehart at the time that he was in the Duval County Jail and during the trial was on medication?
>
> A. Yes, I did read that in the records.
>
> Q. What type of medication was he on?
>
> A. He was on an antidepressant sleeping medication, he was on a tranquilizer, and he was on an antipsychotic. The drugs specifically were Sinequan, Vistaril, and Mellaril.

(PCR 17).

At the evidentiary hearing, Edwards testified that he knew Lukehart was on medication only because Krop told him so, but Edwards did not know about the side effects.

> Q. No. I mean, his records, like if there were any -- do you know if he had any DRs?
>
> A. I don't know.

Q. Do you know if he had any medication, any medical problems?

A. I know that through Krop.

Q. Okay. He was on medication when he was talking to you on three times. Are you aware of that?

A. No.

Q. So you don't know how that medication would have affected his ability to answer any of your questions or even to talk to you, do you?

A. I do not.

(PCR 89).

Dr. Crown testified at the evidentiary hearing that the medication Lukehart was taking causes the side effects of confusion and confabulation.

BY REITER:

Q. Is it possible that given the drugs he was on it could have affected Lukehart's memory as to what took place that day?

A. Yes.

Q. Not being on drugs at the time of the offense and the time he gave the statement to the police, would his memory have been more accurate or would his memory be stronger at that time, without drugs?

A. Likely different and likely stronger.

Q. If he could be confused as to his memory at the time of the trial because he was on medication, based upon your evaluation of him, does confabulation mean that -- does that sound like confabulation to you, given the fact there were two separate stories?

A. Yes, it does.

Q. And could he have -- could in your opinion he have believed both of those stories at the time he gave it?

A. Certainly at each individual time, yes.

Q. If Lukehart was told by his lawyer that his original version of events did not comport with the Medical Examiner's Office -- medical examiner's testimony of the events, could it have affected his memory regarding what happened?

A. Yes, it could have affected his memory and his total thought processes.

Q. In what way?

A. In terms of perception, in terms of recollection, in terms of attempting to fill in the gaps in his own thought patterns, in his own memory, and in his own recollections. To the extent that he thought about it and there were gaps, he would have involuntarily chosen things to fill in the gaps, and that's the nature of confabulation.

(PCR 19-20).

Edwards should have investigated the effects of the medication Lukehart was taking. Had he done so, he would have discovered that confusion and confabulation were likely to occur. Having that information, trial counsel should have motioned the court to cease the medication and request a continuance until the effects of the medication evaporated. At that time it would have been the obligation of the state to show that continued medication was

necessary.

> To be sure, trial prejudice can sometimes be justified by an essential state interest. See Holbrook v. Flynn, 475 U.S. 560, 568-569, 106 S.Ct. 1340, 1345-1346, 89 L.Ed.2d 525 (1986); Allen, supra, 397 U.S., at 344, 90 S.Ct., at 1061 (binding and gagging the accused permissible only in extreme situations where it is the "fairest and most reasonable way" to control a disruptive defendant); see also Williams, supra, 425 U.S., at 505, 96 S.Ct., at 1693 (compelling defendants to wear prison clothing at trial furthers no essential state policy). Because the record contains no finding that might support a conclusion that administration of antipsychotic medication was necessary to accomplish an essential state policy, however, we have no basis for saying that the substantial probability of trial prejudice in this case was justified.

Riggins v. Nevada, 504 U.S. 127, 138 112 S.Ct. 1810, 118 L. Ed.2d 479 (1992). Absent a favorable ruling by the trial court ceasing the medication, counsel should have called Krop to explain the effects of the medication to the jury.

> We also are persuaded that allowing Riggins to present expert testimony about the effect of Mellaril on his demeanor did nothing to cure the possibility that the substance of his own testimony, his interaction with counsel, or his comprehension at trial were compromised by forced administration of Mellaril. Id. at 137.

The court in Riggins held that calling an expert did not sufficiently protect Riggins' rights. At least though, Riggins had a benefit Lukehart did not: and expert testifying to the effects of Mellaril, the same drug Lukehart was taking.

Counsel was deficient in failing to inform the court about Lukehart's medication, motioning the court to cease the medication and requesting a continuance, and/or calling Krop to testify about the effects of the medication. As a result, Lukehart was prejudiced.

Prejudice

Although undersigned counsel could find no case involving confabulated testimony caused by medication, confabulated testimony caused by hypnosis has been discussed in Stokes v. State, 548 So.2d 188, 191 (Fla. 1989):

> Another serious problem associated with the use of hypnotically refreshed testimony involves the tendency of the hypnotic subject to "confabulate," or invent details that he or she does not actually recall. Much research into the effects of hypnosis on the human memory has revealed that a hypnosis subject will invent or fabricate facts that he or she does not actually remember. **Worse still, the subject is unable to distinguish between these confabulations and the true facts. In other words, hypnosis tends to force the subject to invent memories and to believe that they are true.** Thus, neither the hypnotist nor the subject is able to separate fact from fantasy when the hypnosis session is completed. (emphasis added.)

The court in Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704, 98 L. Ed.2d 37 (1987), held that a state's per se evidentiary rule disallowing the hypnotically refreshed testimony of a defendant violates a defendant's

constitutional rights. However, the court did not proclaim that such testimony could not be disallowed on a case-by-case basis. Id. at 61.

> **Of course, the right to present relevant testimony is not without limitation. The right "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."** Id., at 295, 93 S.Ct., at 1046.11 But restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify. Id. at 55. (emphasis added.)

* * * *

> The more traditional means of assessing accuracy of testimony also remain applicable in the case of a previously hypnotized defendant. Certain information recalled as a result of hypnosis may be verified as highly accurate by corroborating evidence. Cross-examination, even in the face of a confident defendant, is an effective tool for revealing inconsistencies. Moreover, a jury can be educated to the risks of hypnosis through expert testimony and cautionary instructions. Indeed, it is probably to a defendant's advantage to establish carefully the extent of his memory prior to hypnosis, in order to minimize the decrease in credibility the procedure might introduce. Id. at 61.

* * * *

> **The State would be well within its powers if it established guidelines to aid trial courts in the evaluation of posthypnosis testimony and it may be able to show that testimony in a particular case is so unreliable that exclusion is justified.** Id. at 61. (emphasis added.)

This court in Morgan v. State, 537 So.2d 973, 976 (Fla. 1989), indicated, as the court did in Rock, that safeguards should be in place to ensure the reliability of hypnotic testimony.

The court in Rock suggested that reliability can be tested via corroborating evidence and cross-examination. However, devoid of Krop's testimony, cross-examination in this case hinted that Lukehart was a liar instead of enlightening the jury about actual facts. Jury members could only understand the true nature of Lukehart's testimony with the assistance of Krop's testimony about the effects of the medication.

Whether confabulation is caused by hypnosis or medication, the result is the same: the subject is unable to distinguish between these confabulations and the true facts.

To rebut any corroborating evidence that Lukehart pushed the child's head down, the State presented Dr. Florio's (Medical Examiner) testimony that such a result would be unlikely because the force necessary to cause the injury would require the equivalent of a fall from at least four feet, and that the child would have been unconscious upon any of the impacts, making it impossible for the child

to raise herself up more than once (R 1151-1154).

In addition, during the penalty phase the State emphatically suggested to Krop (R 1500-1501), as well as to the jury, in closing that a five-month-old child could not raise itself up off the floor (R 1260-1262, 1270-127). Even Dr. Jack Daniel (defense expert witness) agreed at the evidentiary hearing that it would be highly unusual that a five-month-old child could do that (PCR 1197). The State also argued to the jury that Lukehart conveniently changed his testimony to fit Florio's testimony (R 1261).

There was no corroborating evidence to support Lukehart's trial testimony that he pushed the child's head down. His trial testimony, under the influence of medication, was unreliable and wouldn't have been permitted had Edwards first learned of the effects of the medication and informed the court.

Lukehart was entitled to testify before the jury drug-free. As a result of trial counsel's failure to request that the medication cease, and/or informing the jury of the effects of the medication, the jury was left with the only reasonable conclusion—Lukehart was lying. Trial counsel's deficient performance greatly prejudiced Lukehart.

ISSUE III

WHETHER THE POSTCONVICTION COURT ERRED IN FINDING THAT APPELLANT'S COUNSEL WAS NOT INEFFECTIVE IN FAILING TO CALL DR. KROP IN THE GUILT PHASE OF THE TRIAL IN VIOLATION OF APPELLANT'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

The standard of review for Ineffective Assistance of Counsel is *de novo,* pursuant to Strickland v. Washington, 466 U.S. 668 (1984), which requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice.

The postconvicton court denied this claim because "tactical decisions do not constitute ineffective assistance,..." (PCR 1405). The postconviction court's order cites to specific testimony of trial counsel in support of its ruling:

> He explained that the prosecutor in this case had a policy not to depose mental health experts who testified in the penalty phase; she just read the expert's reports. However, if trial counsel had listed Krop as a guilt phase witness, the prosecutor would have deposed him. (E.H. Vol. I at 101). Trial counsel testified that he was afraid this would open the door to the **Defendant's conduct after killing the infant**, and that he had to walk on "egg shells" during his examination of Krop at the penalty phase. (E.H. Vol. I at 108, 109, 133). (emphasis added).

(PCR 1406).

The postconviction court's reliance on trial counsel's explanation that the State would depose Dr. Krop if he listed him as a guilt phase witness is specious at best and belies the record. Trial counsel filed an Amended Reciprocal Discovery (R 71) on January 28, 1997. Krop was listed as witness number 27. There were a total of 28 witness listed and no specific designation as to what phase any witness would testify at, or that he was an expert.

The postconviction court's reliance on trial counsel's explanation that this would open the door to the Defendant's conduct after killing the infant totally ignores the trial record. The State's entire case in chief contained witness after witness busting the door open about what Lukehart did and said before, during, and after allegedly killing the infant. This explanation makes no sense and is patently unreasonable.

In finding that trial counsel was not ineffective, the court's order states: "This Court finds that because tactical decisions do not constitute ineffective assistance, counsel's performance was not deficient. Sonzer v. State, 419 So. 2d 1044 (Fla. 1982); Gonzalez v, State, 579 So. 2d 145, 146 (Fla. 3d DCA 1991) ("Tactical decisions of counsel do not constitute ineffective assistance of counsel.")" (PCR 1406).

The cases[6] cited by the postconviction court in support for its ruling were either taken out of context or analyzed too narrowly. In addition, the postconviction court failed to analyze counsel's performance in the context of "objective reasonableness" pursuant to Strickland. A number of Florida courts have refused to blindly rubberstamp counsel's claim of strategy in avoidance of a finding of ineffective assistance. Mathis v. State, 973 So.2d 1153 (Fla. 1st DCA 2006), Bowers v. State, 929 So.2d 1199 (Fla. 2nd DCA 2006), Light v. State, 796 So.2d 610 (Fla. 2nd DCA 2001), Cabrera v. State, 766 So.2d 1131 (Fla. 2nd DCA 2000), and Ridenour v. State, 768 So.2d 480 (Fla. 2nd DCA 2000).

> As additional grounds for reversing, we find merit in Ridenour's claim that defense counsel was ineffective in failing to call certain witnesses to support his claim of self-defense. The trial court denied relief, finding that this was a matter of trial tactics. According to his testimony at the postconviction hearing, the defense attorney's avowed tactic was to introduce the statements of these witnesses through inadmissible hearsay evidence. **This is not the type of trial tactic or strategy which this court will accept as reasonable.** Roesch v. State, 627 So.2d 57, 58 n.3 (Fla. 2d DCA 1993) (noting that court will not defer to patently unreasonable decisions by defense counsel that are labeled as trial tactics).

[6] This Court in Sonzer v. State, 419 So.2d 1044 (Fla. 1982) did not preclude review of unreasonable strategy. In Gonzalez v. State, 579 So.2d 145 (Fla. 3d DCA 1991) counsel and the defendant specifically agreed on the strategy. That is not the situation in this case.

Id. at 481. (emphasis added).

Deficient performance

Clearly, Edwards' defense strategy was to attempt to show that Lukehart did not possess the requisite intent. During his opening statement at the guilt phase, Edwards stated:

> The judge has said he will instruct you on the law at the end of the case, but look for the factors that make up a violation of the law. Aggravated child abuse, willful torture, malicious punishment, and the intention in these facts. (R 689).
>
> * * * *
>
> And I would suggest there's no evidence of specific intent for aggravated child abuse. (R 691).

During his closing argument to the jury at the guilt phase, Edwards stated the following:

> Aggravated child abuse is the underlying felony as we all know now. And I believe the Court will tell you there are three elements that must be proven beyond a reasonable doubt in aggravated child abuse. First is that Lukehart committed a battery against Gabrielle Hanshaw by intentionally causing bodily harm. Notice intentionally. Specifically meant to do it.
>
> There's another element that she, of course, is under 18 years of age. And I would submit to you frankly that's the only element that the State has proven as to aggravated child abuse. Because the other element requires the State to prove to you that Lukehart Lukehart in committing the battery intentionally or knowingly caused Gabrielle Hanshaw great bodily harm. There is no

> evidence in front of you that that has occurred, none. (R 1244). (emphasis added).
>
> * * * *
>
> He told you unequivocally that he did not intend to cause great bodily harm or harm at all to Gabby, but it happened. (R 1253).
>
> * * * *
>
> But, you know, if you spank a child too hard and the reaction calls them to hurt or break their neck, that's the same, there's no intent. (R 1292).

At the evidentiary hearing Edwards indicated what his defense strategy was:

> Q. And as part of that they had to show a particular specific intent with regard to the aggravated child abuse, that he either knowingly or intentionally caused great bodily harm. That's one of the obligations for them to prove.
>
> A. Yes, sir.
>
> Q. What was your theory of defense for that?
>
> A. Intent; there was no intent.

(PCR 1177).

Other than Lukehart's own testimony, trial counsel put forth no other evidence to support or explain how Lukehart's actions did not constitute intent. However, supporting evidence was available through Krop regarding the diagnosis of Intermittent Explosive Disorder and the

effect of the medication Lukehart was taking.

Krop had diagnosed Lukehart in 1994 with intermittent explosive disorder (R 1467). He would have testified as to the symptoms, how the disorder affects thought process, and how a layperson might misinterpret an episode as a deliberate act.

In describing the disorder Krop stated:

> Basically it involves an individual in which there are several discrete episodes of failure to resist the impulse, the degree of aggressiveness expressed during the episodes is grossly out of proportion to any precipitating psycho social stressor.. (R 1467).

At the evidentiary hearing, Dr. Crown testified to additional symptoms and affects of intermittent explosive disorder.

> Q. Okay. Krop testified that Lukehart suffers from intermittent explosive disorder. Do you agree with that?
>
> A. I do.
>
> Q. Could you describe to the court basically what that entails.
>
> A. Intermittent explosive disorder is an episodic disorder that involves atypical reactive behavior which is inappropriate to the situation.
>
> Q. What does that mean exactly?
>
> A. It means that it's an impulse control disorder that involves acting out in an aggressive manner towards some object or person.

Q. But when you say inappropriate or disproportional, what does that mean?

A. It's explosive, is the easiest way to explain it, but it's also the inappropriate way of dealing with something. Rather than simply expressing anger, it reverts to rage and discontrol.

Q. Okay. Does it also include a situation where a person suffering from that disorder may react violently to a small situation that normal people would not get upset over?

A. That's what I meant by rage. It's an atypical -- an exaggerated response to a situation that might not even provoke the concern of another individual.

Q. Does that disorder prevent an individual from forming an intent to commit an act?

A. No.

Q. So that person who suffers from that type of disorder has the ability to do that?

A. Yes.

Q. When a person is acting in an episode, is it possible for a layperson who's watching that to misconstrue that act as being deliberate?

A. Certainly.

Q. And is it possible during the period of that episode that the person who is striking out doesn't realize or intend to hurt someone?

A. Yes. Since it's discontrol, it's as if the cognitive processes shut down. Thought isn't involved.

(PCR 1091-1092).

It was not uncommon in Florida to have an expert testify about symptoms and affects of psychological disorders. Krop also testified on behalf of defendants in Hickson v. State, 630 So.2d 172 (Fla. 1993) and Mizell v. State, 773 So.2d 618 (Fla. 1st DCA 2000). Both courts ruled that an expert may testify about the symptoms and affects of the psychological condition and answer hypothetical questions.

Edwards provided no objective reasonable explanation by failing to call Krop to testify in the guilt phase. Such testimony would have supported the defense that Lukehart did not intend to hurt the child and that outside observers may mistakenly consider the actions as intentional.

Krop would also have provided testimony at the guilt phase about the effects of the medication Lukehart was taking. Trial counsel knew that before Lukehart was on medication, his client told law enforcement that he had dropped the child (PCR 1163). Trial counsel also knew that Lukehart was being medicated from the time of his arrest through trial, but did not know what the effects the medication caused (PCR 1167-1168). When Lukehart was questioned by the trial court prior to his testimony the court was not informed by anyone that Lukehart was on medication (R 1167-1171).

Had trial counsel investigated the effects of Lukehart's medication, he could have had the medication stopped or had Krop testify to the jury as follows: (1) that Lukehart was taking Sinequan, Vistaril, and Mellaril (PCR 1095); (2) that the medication is likely to cause confusion (PCR 1095); (3) that his memory would be patchy (PCR 1096); (4) that the medication could cause confabulation - meaning an involuntary response to make sense out of a situation, to insert a person's best judgment information about what may have occurred or what may occur (PCR 1094); (5) that confabulation is not related to a fabrication. The person actually believes what they are saying (PCR 1095). (6) that Lukehart may have believed that he pushed the child's head down to support the medical examiner’s scenario because in terms of perception and recollection, while attempting to fill in the gaps of his memory, he would have involuntarily chosen certain elements to fill in the gaps, and that's the nature of confabulation (PCR 1098).

Counsel's performance was deficient in failing to properly investigate Lukehart's diagnosis and medication, and/or to call Krop to testify in the guilt phase.

Prejudice

Without the benefit of hearing about Lukehart's intermittent explosive disorder and the medication he was taking, the jury was left with only Lukehart's testimony as the explanation for his actions. As a result of trial counsel's failure, the jury was not presented with a viable consideration for a lesser-included offense.

Unfortunately, the jury only heard Lukehart’s inconsistent statements about how the child was injured. According to the prosecution, Lukehart's trial testimony was contrived to match the testimony of the medical examiner, and that his testimony was not corroborated by the evidence. The prosecution persuasively argued to the jury that a five-month-old child could not raise itself upon its elbows. In addition, the prosecution pointed out that the medical examiner indicated that any one of the impacts would have rendered the child unconscious and therefore could not raise herself up more than once, even if it were possible for her to do so at all. The alternative the jury was left with was to believe that Lukehart was lying. Therefore, any claim by Lukehart's testimony that he had no intent to hurt the child was fruitless without some explanation about the inconsistencies of his actions.

Presenting Krop at the guilt phase to testify about the side effects of Lukehart's medication would have given the jury a plausible explanation for Lukehart's apparent inaccurate description of how he injured the child. In addition, explaining the symptoms and affects of intermittent explosive disorder to the jury would have allowed them to understand that his actions may have been prompted from his disorder without the intent or thought process to injure the child.

Notwithstanding the postconviction trial court's finding, trial counsel was ineffective in failing to call Dr. Krop during the guilt phase.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S AMENDED POSTCONVICTION MOTION TO RELATE BACK TO THE FILING OF HIS SHELL MOTION?

On September 27, 2001, Lukehart filed a "shell" Motion to Vacate Judgment and Sentence (PCR 1-62). On November 28, 2001, the State filed a Motion to Dismiss Shell Motion (PCR 147-188). On January 31, 2002, Lukehart filed a Response to the State's Motion to Dismiss (PCR 200-217). On March 11, 2002, the trial court granted the State's Motion to Dismiss (PCR 268-269). On June 17, 2002,

the trial court allowed Lukehart to file an Amended Motion for Postconviction Relief on or before June 25, 2002 (PCR 402-402). The Defendant was given leave to supplement the Motion with any additional grounds or to further refine existing grounds based upon public record disclosures that occurred after June 25, 2002. On June 20, 2002, Lukehart filed a Motion to Vacate Judgment of Conviction and Sentence and Memorandum of Law with Special Request for Leave to Amend (PCR 403-545), raising a total of seventeen claims. On September 23, 2003, Lukehart filed a First Amended Motion to Vacate Judgment of Conviction and Sentence and Memorandum of Law with Special Request for Leave to Amend (PCR 662-734). On October 14, 2003, the State filed an Objection to Motion to Amend the Postconviction Motion (PCR 751-754). On October 16, 2003, Lukehart filed the Defendant's Response to State Objection to Motion to Amend the Postconviction Motion (PCR 755-756).

On February 27, 2007, the trial court heard arguments on the Defendant's Motion for Leave to Amend. At that time, the State filed a second Objection to the Defendant's Motion to Amend Postconviction Motion. On March 5, 2007, the trial court entered an Order Granting the Defendant's Motion for Leave to Amend (PCR 894-896).

In Appellant's First Amended Motion to Vacate Judgment and Sentence, Appellant requested, at page 6, the court reinstate his "shell" motion as it was filed prior to October 1, 2001. In addition, Appellant requested the postconviction court to allow his amended motion to relate back to the time of the filing of his "shell" motion in order to expand his time to file for federal relief. The postconviction court denied this claim stating: "However, the Defendant does not need to toll his federal habeas time limit, as all that is needed is one day remaining of the federal one-year time limit, after state postconviction litigation is complete" (PCR 1400). Further, in denying this claim the postconviction court referred to Appellant's motion as a "3.851 Motion" (PCR 1399).

However, because Appellant filed his original motion prior to October 1, 2001, Fla.R.Crim.P. 3.851 states that the prior rule in effect applies, which in this case is Fla.R.Crim.P. 3.850. Hannon v. State, 941 So.2d 1109 (Fla. 2006).

> **RULE 3.851. COLLATERAL RELIEF AFTER DEATH SENTENCE HAS BEEN IMPOSED AND AFFIRMED ON DIRECT APPEAL**
>
> **(a) Scope.** This rule shall apply to all motions and petitions for any type of postconviction or collateral relief brought by a prisoner in state custody who has been sentenced to death and whose

> conviction and death sentence have been affirmed on direct appeal. It shall apply to all postconviction motions filed on or after October 1, 2001, by prisoners who are under sentence of death. **Motions pending on that date are governed by the version of this rule in effect immediately prior to that date.** (emphasis added).

Notwithstanding the postconviction court's belief that only one day is necessary to file a federal habeas petition, prior to the effective date of Fla.R.Crim.P. 3.851 it was common practice for postconviction defendants to file a "shell" motion in order to reserve time to file a federal habeas petition. Knight v. State, 928 So.2d 387 (Fla. 2005)(shell motion filed 11/7/2000 - amended motion filed 8/23/2002); Hartley v. State, 790 So.2d 1008 (Fla. 2008); Branch v. State, 952 So.2d 470 (Fla. 2006); Moore v. State, 820 So.2d 199 (Fla. 2002); Miller v. State, 926 So.2d 1243 (Fla. 2006)(shell motion filed 9/27/2001 - amended motion filed 3/11/2002).

Florida Rules of Civil Procedure, Rule 1.190 (c) specifically provides for amended pleadings to relate back.

> **(c) Relation Back of Amendments.** When the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment shall relate back to the date of the original pleading.

Substantial case law provides for such a result: Bryant v. State, 901 So.2d 810 (Fla. 2005)(Had the circuit

court stricken the motion with leave to amend, the amended motion Bryant filed in March 2003 would have been timely because it would have related back to the original filing. See generally Fla.R.Civ.P. 1.190(c)); Spera v. State, 971 So.2d 754 (Fla. 2007).

The postconviction court erred in failing to follow this Court's long line of cases relating amendments back to the original pleading. As in Bryant, the postconviction court's dismissing of Appellant's shell motion with leave to amend allowed the amended motion to relate back to the filing of the shell motion.

It is imperative to the Appellant to have this Court resolve this issue, as the federal courts look to the state courts rules regarding time frames when assessing whether a Petitioner's federal habeas was timely filed. This Court's ruling also affects Appellant's ability to have sufficient time to file his federal habeas petition, if necessary, on time.

ISSUE V

WHETHER THE COURT ERRED IN FINDING TRIAL COUNSEL WAS NOT INEFFECTIVE BY FAILING TO ESTABLISH THAT APPELLANT'S STATEMENTS WERE ADMITTED INTO EVIDENCE IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE CONSTIUTION BECAUSE LAW ENFORCEMENT'S USE OF "BAKER ACT" WAS A PRETEXT TO OBTAIN CUSTODY AND DERIVE A STATEMENT WITHOUT THE PRESENCE OF AN ATTORNEY?

The standard of review for Ineffective Assistance of Counsel is *de novo,* pursuant to Strickland v. Washington, 466 U.S. 668 (1984), which requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice.

The Appellant filed a Motion to Suppress his statements (R 89-91), which he contended were obtained by coercion. However, nowhere in the Motion to Suppress does trial counsel mention: (1) illegal custody, (2) pretext in using Baker Act, (3) Fourth Amendment Right, nor (4) Fifth Amendment right. In claim three of his First Amended Motion to Vacate Judgment and Sentence, Appellant claimed that trial counsel was ineffective by failing to establish that Defendant’s custody was merely a “pretext.” Law enforcement utilized the Baker Act to maintain illegal custody of Lukehart without placing him under arrest.

In denying this claim the postconviction court stated: "In subclaim nine the Defendant alleges trial counsel was

ineffective for failing to include the policy regarding Baker Acts in the Motion to Suppress. Violation of a local policy is not a basis for suppression. Evidence is suppressed, under the exclusionary rule, because it violates the constitution, not because it violates a local policy" (PCR 1407).

The postconviction court's analysis of Appellant's claim is only partially accurate. Appellant's claim was not just about law enforcement's violation of local policy, but that the application in violation of the statute and policy violated Appellant's Fourth and Fifth Amendment rights. Perhaps the postconviction court misapprehended Appellant's claim.

Policy can certainly be the basis for suppression when considering a violation of the Fourth Amendment in conjunction with the Fifth Amendment.

In Florida v. Wells, 495 U.S. 1, 110 S.Ct. 1632, 109 L.Ed.2d (1990), the court held the following:

> In the present case, the Supreme Court of Florida found that the Florida Highway Patrol had no policy whatever with respect to the opening of closed containers encountered during an inventory search. We hold that absent such a policy, the instant search was not sufficiently regulated to satisfy the Fourth Amendment and that the marijuana which was found in the suitcase, therefore, was properly suppressed by the Supreme Court of Florida. Id. at 4.

In addition, courts have found that an illegal arrest that ultimately results in a confession may be suppressed regardless whether Miranda[7] warnings are provided.

Brown v. Illinois, 422 U.S. 590, 601, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975)

> Miranda warnings thus far have not been regarded as a means either of remedying or deterring violations of Fourth Amendment rights. Frequently, as here, rights under the two Amendments may appear to coalesce since the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment.

In United States v. Causey, 818 F.2d 354, 359 (5th Cir. 1987), the Court held:

> The illegality of the initial police conduct is decisive, regardless whether the police thereafter conduct a search or a custodial interrogation. The Supreme Court explicitly stated in Brown v. Illinois, 22 and reiterated in Dunaway v. New York, 23 that a violation of the fourth amendment by an **arrest without probable cause is not automatically cured by the later provision of Miranda warnings and a subsequent voluntary confession.** The primary taint is the violation of the fourth amendment by the unlawful arrest, the continuing effect of which is to make the confession inadmissible. Whether a subsequent fifth amendment violation occurred is a conceptually distinct issue.
>
> Moreover, the only reason to make a pretextual arrest to interrogate is to exert the coercion of custodial questioning to elicit

[7] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

> information unavailable by an interview on a purely voluntary basis. Such an arrest presents concerns identical to those that arise when the police, lacking probable cause, arrest a suspect solely in order to search him, and then use the evidence obtained from the search either directly or to extract a confession. The degree of intrusiveness of an arrest made as a pretext to question is not less than the degree of intrusiveness of an arrest made as a pretext to search. **In each case, a suspect is unlawfully deprived of his freedom and detained so that the police may pursue an ulterior motive.** (emphasis added).

Counsel failed to argue in his Motion to Suppress or show at the suppression hearing that law enforcement illegally took Appellant into custody utilizing the Baker Act in order to obtain a confession, a violation of the Fourth and Fifth Amendments to the Constitution. Law enforcement's subsequent Miranda warnings did not cure the taint of taking Appellant into custody based upon a pretext.

Facts

At a deposition conducted on May 7, 1996, Clay County Sgt. Glenn Zier testified that the Sheriff’s policy was to transport an individual to a receiving facility when an officer Baker Acts that individual.

> Q. Okay. What are the sheriff’s office policies for dealing with somebody who’s presenting themselves as wanting to commit suicide? (R 690)

* * *

A. Oh, okay. I see.

Talk to the person to find out if the person is suicidal or not. Talk to any family members or any relatives or any witnesses that present to determine if the requirements of a Baker Act can be met, or determine if the person – you know, determine if he's trying to commit suicide. You know, ask him, Do you want to kill yourself? Or, What are you doing?

Usually if he has a bona fide attempt, you know, he'll just tell me, Hey, I'm going to Baker Act this guy, and he Baker Acts him. If he has an actual suicide, he calls me and then we have to get detectives and photographers and everybody else out there.

Q. If somebody is actually dead?

A. Yeah.

Q. So in terms of Baker Act then, you what, seek medical intervention, I guess?

A. **No, sir. Baker Act would be where the law enforcement officer just takes that person to a receiving facility for commitment for psychiatric evaluation** (R 691) (emphasis added).

A suppression hearing was conducted on February 21, 1997 (R 1730). At that hearing, Jeff Gardner, a Clay County deputy, testified as follows: When Deputy Gardner arrived at Trooper Davis' residence the Defendant was in handcuffs (R 1768). When Deputy Gardner took possession of the Defendant[,] Trooper Davis' cuffs were removed and the Defendant was re-cuffed with Deputy Gardner's cuffs (R 1778). According to Deputy Gardner, he had no probable cause to arrest the Defendant (R 1770).

When asked why the Defendant was kept in handcuffs, Deputy Gardner responded that he firmly believed that the Defendant was a danger to himself and that he detained Lukehart in accordance with the Baker Act (R 1777). Deputy Gardner testified at the evidentiary hearing that he did not transport Lukehart to a receiving facility (PCR 1256). When asked why he didn't transport the Lukehart to a receiving facility, he stated:

> No. I was very – I mean, I never had the chance to ever get to that point, sir. You know, I continued the investigation where I took him to the front of my vehicle, and, you know, I never – **he was taken out of my custody before I would have even had a chance to do that** (PCR 1259). (emphasis added).

On the surface, that statement is true, but it belies what actually happened immediately after Deputy Gardner took the Defendant into custody. As soon as Lukehart was put into the patrol car, Deputy Gardner should have taken the Defendant to a medical facility. Instead, Deputy Gardner took Lukehart back to the disabled automobile where he permitted Duval County law enforcement to question Lukehart. In addition, Deputy Gardner relinquished custody of Lukehart, either voluntarily or involuntarily, as he testified. Lukehart claims that the Baker Act was invoked as a pretext to allow Duval County to interrogate him without an arrest, nor to provide him with an attorney.

Certainly, Lukehart was not free to go, nor was he informed that he could. Had Lukehart been transported to a medical facility, as dictated by statue and Clay County's policies, he would not have been subjected to the subsequent custody and interrogation by Duval County law enforcement in a patrol car while suffering from potential mental infirmities and driven between two counties.

At the suppression hearing, Duval County Deputy RG. Davis testified that he kept Lukehart handcuffed because Lukehart had tried to commit suicide and "Clay County had him under a Baker Act for that" (R 1736). He also testified that Lukehart was not free to go and that the Lukehart was continuously in handcuffs (R 1743). Deputy Davis transported Lukehart to Epson Lane (Lukehart's residence) in his patrol car (R 1741-2), not to a receiving facility as required. At the evidentiary hearing, Deputy Davis was questioned about why he transported Lukehart to Duval County after he was Baker Acted by Clay County. Davis' response was that Detective Reddish told him to (PCR 1146-1147). Deputy Davis also testified at the evidentiary hearing that to his knowledge Lukehart had not been transported to a receiving facility (PCR 1146-1147).

Section 394.463, Florida Statutes (1995), states:

> (1) CRITERIA—A person may be taken to a receiving

> facility for involuntary examination if there is reason to believe that he or she is mentally ill and because of his or her mental illness:
>
> (b)2. There is a substantial likelihood that without care or treatment the person will cause serious bodily harm to himself or herself or others in the near future, as evidenced by recent behavior.
>
> (2) INVOLUNTARY EXAMINATION
>
> (a)2. A law enforcement officer **shall** take a person who appears to meet the criteria for involuntary examination into custody and **deliver the person or have him or her delivered to the nearest receiving facility for examination.(emphasis added).**

At the evidentiary hearing, Lukehart testified that Clay County Deputy Jeff Gardner told him that he was Baker Acted and that a Duval County Deputy told him that he would be taken to a psychiatric facility (PCR 1370-1371). Lukehart's belief that he would be taken to a psychiatric facility was corroborated by his recorded conversation between him and Misty Rhue while in the patrol car: "LUKEHART: you know I'm going to the nut house. They're taking me to the nut house tonight. You know that, don't ya?" "RHUE: No, I don't." "LUKEHART: They're taking me there. Baker. I got, they, this happen, when they arrest…they got me in Clay County." (State's Trial Exhibit 17).

At the evidentiary hearing, Lukehart testified he was not taken to a medical facility and he did not want to be Baker Acted (PCR 1372-1373).

Law enforcement's actions amounted to an illegal arrest and a pretextual application of the Baker Act, which violated Lukehart's Fourth, Fifth, Sixth, and Fourteenth amendments to the United States Constitution, as well as Florida's constitution.

Certainly, Lukehart was **unlawfully deprived of his freedom and detained so the police could pursue an ulterior motive.** Lukehart was never transported to a receiving facility, which indicates that the Baker Act was merely a pretext to question Lukehart without arresting him.

As a result, Lukehart's statements were introduced against him at trial. In addition, Lukehart led officers to Gabrielle Hanshaw's body while he was in illegal custody.

Counsel was ineffective for failing to present and argue to the court that the alleged Baker Act was a pretext and violated Lukehart's Fourth and Fifth Amendment rights. Lukehart was prejudiced by counsel's failure because, ultimately, Lukehart's statements and actions were used against him at trial.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN FINDING THAT COUNSEL WAS NOT INEFFECTIVE BY FAILING TO PROPERLY ARGUE AND OBJECT TO JURY INSTRUCTIONS AND THE STATE'S IMPROPER ARGUMENTS REGARDING INSTRUCTIONS?

The standard of review for Ineffective Assistance of Counsel is *de novo,* pursuant to Strickland v. Washington, 466 U.S. 668 (1984), which requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice.

In denying this claim, the postconviction court stated: "The standard is reasonably effective counsel, not perfect or error-free counsel. Coleman v. State, 718 So. 2d 827, 829 (Fla. 4th DCA 1998). A review of the record does not establish that counsel's performance was so deficient as to fall outside the wide range of professional assistance" (PCR 1405). The court's finding suggests that counsel's performance did constitute at least some deficiency. However, the court's order fails to consider prejudice.

This Court found on direct appeal that "the record supports the jury's finding that Lukehart is guilty of aggravated child abuse," Lukehart, 776 So.2d at 922. However, this Court was not presented on direct appeal with the question of whether: (1) there were confusing terms in

the standard instruction regarding the specific intentional requirement, (2) the State's closing remarks regarding "intentional," after the State had agreed in the charge conference that the elements required "intentional was proper," and (3) whether re-proposal of requested instruction after the State's guilt phase remarks during closing should have been made?

The jury was given confusing instructions that did not clearly delineate the differing requirements of intent. The following instructions were given to Lukehart's guilt phase jury regarding aggravated child abuse as applied to first-degree felony murder:

> I will now define the crime of aggravated child abuse as it pertains to the crime of first degree murder. Before you can find the defendant guilty of aggravated child abuse by committing aggravated child - battery upon a child, the State must prove the following three elements beyond a reasonable doubt: The first element is a definition of **battery**, one, Lukehart [Anew]Richard Lukehart **committed a battery** against Gabrielle Hanshaw by intentionally causing bodily harm to Gabrielle Hanshaw, two, Lukehart Richard Lukehart in committing **the battery** intentionally or knowingly caused Gabrielle Hanshaw great bodily harm, and three, Gabrielle Hanshaw was under the age of 18 years.

(R 1300)(emphasis added).

The trial court's instructed the jury on count two, aggravated child abuse, as follows:

> Before you can find the defendant guilty of aggravated child abuse by committing aggravated battery upon a child the State must prove the following three elements beyond a reasonable doubt: The first element is a definition of battery, one, Lukehart Richard Lukehart committed a **battery** against Gabrielle Hanshaw by intentionally causing **bodily injury** to Gabrielle Hanshaw, two, Lukehart Richard Lukehart in committing the battery intentionally or knowingly caused Gabrielle Hanshaw great bodily harm or **permanent disability or permanent disfigurement,** three, Gabrielle Hanshaw was under the age of 18 years.

(R 1305)(emphasis added).

The instruction in Lukehart's case is not so different than that given in Morris v. State, 557 So.2d 27 (Fla. 1990), where this Court found that the trial court's instruction was an error by allowing to the jury to find the defendant guilty of felony murder if they found the simple battery.

> Morris asserts on appeal that the trial court committed error in instructing the jury on felony murder by aggravated child abuse. Under the statutory scheme as reflected in the standard jury instructions, the jury should have been charged on aggravated child abuse in this form: 1) Morris willfully tortured Matthew; or 2) intentionally struck him and in the process thereof intentionally caused him great bodily harm; and 3) Matthew was a child. Instead, it was instructed: 1) Morris willfully tortured Matthew; or 2) intentionally struck him; or 3) intentionally caused him great bodily harm; and 4) Matthew was a child. This instruction erroneously informed the jury that it could find Morris guilty of first-degree murder by aggravated child abuse if it found an underlying offense of simple battery, i.e., intentionally

> striking Matthew. The guilty state of mind required under the given instruction was an intent to strike Matthew, as opposed to the statutorily required mental state of intent to cause great bodily harm. Id. at 29.

In Morris, this court found the instruction error, but harmless. In this case the error is more egregious. First, the definition by the court for aggravated child abuse for felony murder was different than its definition for count two, aggravated child abuse. That fact alone was confusing, such that the jury had to pick a definition to utilize. To make matters worse, the State diminished their responsibility to prove intent.

> And Mr. Edwards wants you to believe that the word intentional is tantamount to premeditation or tantamount to some sort of a motive (R 1266).
>
> * * *
>
> But I think Mr. Edwards wants to make us prove motive when he tries to say that intentionally means we've got to show that he wanted to do her harm (R 1267).
>
> * * *
>
> "And remember, the state does not have to prove motive either for premeditated murder **or to show that he intentionally caused the harm"** (R 1269).

Defense counsel failed to object or to re-request that his proposed instruction be given. At the jury instruction charge conference (R 1224) the following occurred:

> THE COURT: All right. Aggravated child abuse is found on page nine, that's the second count of the indictment.

MS. COREY: We agree.

EDWARDS: Your honor, I would ask that you add a sentence to aggravated child abuse at the end, for that I would cite case of Florida versus G and many cases like it, I will give you the cite, 624 So.2d 284, each and every case it talks about aggravated child abuse and aggravated battery say specific intent crimes.

And I would ask the Court to add a sentence at the end to say that aggravated child abuse is a specific intent crime, that is, **you must find that Lukehart specifically intended to cause great bodily harm to Gabrielle Hanshaw.**

THE COURT: Well, what does paragraph two say? Says Lukehart Richard Lukehart in committing the battery intentionally or knowingly caused -

EDWARDS: I'm looking for the word specific.

THE COURT: Hum?

MS. COREY: We object, Judge, intentional is used in the first two elements.

Under section (A) of the aggravated child abuse statute, an aggravated battery is required. But in this case, the trial court instructed the jury that aggravated child abuse occurs if a "battery" is committed upon a child. This is not in conformity with the element required. The word "battery" was not further qualified with the term "aggravated" and, thus, was incorrect. Simple battery is not sufficient to satisfy the statutory elements of aggravated child abuse. Simple battery requires only an actual and intentional touching that results in great

bodily harm (or permanent disability, or permanent disfigurement) See Fla. Stat. 784.041. Aggravated battery requires intentionally or knowingly causing great bodily harm. See Fla. Stat. 784.045.

Trial counsel should have vigorously requested the court to provide a specific instruction as he suggested during charge conference. Failing that, when the State diminished "intent" in their closing argument, trial counsel should have objected and re-proposed an instruction to clarify “intent” to the jury. Finally, trial counsel should have objected to the differing and confusing instruction for aggravated child abuse.

Without instructions that meaningfully distinguish the elements of the offenses, Lukehart’s jury was bound to find the most severe offense. This is true, even though a lesser offense would have been more legally and factually appropriate. Trial counsel rendered deficient performance for failing to properly litigate this issue and Lukehart was prejudiced because his jury was given inadequate and confusing jury instructions.

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN FINDING COUNSEL NOT INEFFECTIVE BECAUSE CALDWELL CLAIM WAS PROCEDURALLY BARRED?

The standard of review for Ineffective Assistance of Counsel is *de novo,* pursuant to Strickland v. Washington, 466 U.S. 668 (1984), which requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice.

In denying this claim the postconviction court made the following finding: "This claim is procedurally barred as Caldwell claims should be raised on direct appeal" (PCR 1411). However, the cases cited by the court in support of its finding were cases where the 3.850 motion declared the court's action as error and not ineffective assistance of counsel, as Appellant has in this case.

Appellant acknowledges the Florida Supreme Court has previously held that Florida's standard jury instructions conform to Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985). Floyd v. State, 850 So.2d 383 (Fla. 2002), cert. denied, 72 U.S.L.W. 3447 (U.S. Jan. 12, 2004); Brown v. State, 721 So.2d 274 (Fla. 1998); Burns v. State, 699 So.2d 646 (Fla. 1997).

Here, the issue goes beyond merely the question of the instruction. The issue also goes to the conduct of the

trial, where parties agree and the court approves of the agreement.

Trial counsel filed a motion requesting an instruction concerning the jury's complete role as co-sentencer Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985) and Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986). (R 146). A pretrial hearing was conducted wherein the motion was considered. The State agreed to the instruction and the court granted it. (R 148; R 317).

However, at no time during the court's instructions or the State's argument to the jury, where the jury's role was mentioned, did trial counsel remind the court of its previous order, or to make a contemporaneous objection to the court's instructions (R 1558-1575). Counsel's failure to object was deficient performance. Cash v. State, 875 So.2d 829 (Fla. 2nd DCA 2004).

During the opening instructions of the penalty phase, the court stated:

> Final decision as to what punishment shall be imposed rests solely with the Judge of this Court; however, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant (R 1340).

Again, during the closing instructions at the penalty phase, the court stated:

> As you've been told the final decision as to what punishment shall be imposed is a responsibility of the judge... (R 1633).

Due to the Court's instruction that the jury's role is advisory only and that punishment is solely with the Court, an intolerable danger that the jury's sense of responsibility for its advisory sentence was diminished, thereby rendering Lukehart's death sentence unreliable. Adams, supra, at 1529. Trial counsel requested in his motion that any mention of the jury's role should include that the court would provide an instruction that the jury's verdict will be given great weight, and their recommendation could only be overruled under rare circumstances; the Court granted the motion.

Further, at the evidentiary hearing, trial counsel acknowledged that he felt the instruction was important, but he didn't know why he didn't object to the instructions or request the instruction during the State's closing argument (PCR 1190-1191).

Trial counsel was ineffective in failing to require the trial court to read the instruction to the jury. This failure prejudiced Lukehart because the jury was informed that their recommendation was advisory only, and that the ultimate sentence was the responsibility of the court. In addition, the agreement to instruct the jury was violated.

The Florida Supreme Court has allowed additional instructions, notwithstanding the standard jury instructions, be given to a jury when the court deems that additional instructions are necessary to fully inform the jury.

ISSUE VIII

WHETHER THE POSTCONVICTION COURT ERRED IN FAILING TO FIND THAT APPELLANT'S COUNSEL WAS NOT INEFFECTIVE BY PRESENTING DEPOSITION TESTIMONY DURING THE PENALTY PHASE RATHER THAN LIVE TESTIMONY, AS WELL WAS ADDITIONAL MITIGATION?

The standard of review for Ineffective Assistance of Counsel is *de novo,* pursuant to Strickland v. Washington, 466 U.S. 668 (1984), which requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice.

The postconviction court denied this claim because: "Trial counsel presented both his father's physical abuse and his uncle's sexual abuse to the jury and the items were found to be nonstatutory mitigation" (PCR 1408). However, due to counsel's failure to present the witnesses live, rather than by deposition, there is a reasonable probability that the weight of the nonstatutory mitigators were diminished; it is quite likely that the jury felt if the witnesses didn't care enough about Lukehart to show up

at the trial, then why should they care.

Four of Lukehart's family members testified in person at the evidentiary hearing: Randall Lukehart (father) (R 1526), Bonnie Lukehart (mother) (R 1545), Melissa Smith (cousin) (R 1518), and Bryan Smith (brother-in-law) (R 1538). The following family members testified by deposition: Stephanie Repko (cousin) (R 1385), Llewellyn Scram (uncle) (R 1410), Kathleen Vanentine (aunt) (R 1416), Evelyn Uphold (aunt) (R 1420), and Kimberly Scram (cousin) (R 1424).

During the penalty phase, a substantial portion of trial counsel's evidence was reading depositions into the record. Counsel failed to seek or to obtain live witnesses so the jury could evaluate them in person—especially Llewellyn Scram, who was in prison and easily transportable. Edwards testified that some of the family members wanted to be present, but couldn't afford the expense (PCR 1203), Ms. Repko testified at the evidentiary hearing to that fact.

Edwards testified that a non-recorded discussion took place in chambers with the court about funds to transport witnesses. The result of that discussion was to take family members' depositions rather than incurring the travel expenses necessary for their appearance (PCR 1204). Edwards

also testified that he did not formally file a motion requesting the court for funds to transport and house the witnesses for trial (PCR 1204).

> Q. Did you seek the courts to -- a motion to ask the court for funds to pay for the costs for the witnesses to come down?
>
> A. I had a discussion with the court that was in chambers, is my recollection. I don't know the exact issue, **but the discussion was whether or not we're entitled to penalty phase witness expenses to come and have to pay room and board when there would be a less expensive way to do it, which is for me to go to depose them.**
> Now, I have looked through my file. I don't see a motion that I filed to incur costs to pay for those folks to come here.
>
> Q. Okay.
>
> A. But I do recall having that discussion.
>
> Q. Okay. Was that discussion recorded?
>
> A. No.
>
> Q. Did you pursue further the request officially to have the county pay for -- I guess '96 it was the county, is that right, was paying for these bills?
>
> A. Yes, siR
>
> Q. Did you pursue further after that discussion to have money appropriated for that travel?
>
> A. No, and -- well, no is your answeR

(PCR 1203-1204)(emphasis added).

Lukehart was severely prejudiced because the jury only heard words read from a cold document. Llewellyn Scram was

certainly available since he was in prison for sexual battery. His personal appearance was essential for the jury to evaluate in person, while looking him in the eye to ascertain what Lukehart and his family had suffered by his own hands.

The above-referenced witnesses testified at the evidentiary hearing that they possessed additional background information about Lukehart that was not testified to at the penalty phase or deposition, because counsel didn't meet with them prior to their testimony to explain what was needed (PCR 1286; 1298; 1311; 1327), and counsel's demeanor was cold and judgmental (PCR 1296; 1311; 1328).

The loss of Lukehart's parents' first child after a difficult pregnancy (PCR 1315); Randall Lukehart, JR was two hours old when he died (PCR 1314); his parents' devastation eased somewhat when Lukehart was born in 1973 (PCR 1314); Lukehart was placed in an incubator due to a high fever (PCR 1315); Lukehart's mother, Bonnie Lukehart, abused alcohol during her pregnancy (PCR 1315). His father, Randall Lukehart, was an alcoholic with an established history of mental illness who routinely physically and verbally abused Lukehart, his sister, Jennifer, and their

mother (PCR 1317).

Lukehart's childhood was marked by the sustained and corrosive effects of his father's beatings coupled with explosive outbursts of verbal and emotional abuse (PCR 1317). Lukehart once told his cousin, Melissa Smith, that the anal sex with Luke Scram was so painful and traumatic that it would make him vomit (PCR 1299).

Lukehart's family history includes three generations of incestuous sexual abuse, alcoholism, severe mental health problems, and suicide (PCR 1318, 1333-1335). Lukehart's aunts were sexually abused by their father (PCR 1319). s. Lukehart left her husband several times. At one point, in order to escape the abuse, she was forced to wrap Lukehart and his sister in a blanket and lower them through an open window so they could escape to safety (PCR 1317).

By 1978, when Lukehart was approximately five years old, Randall Lukehart stopped inking. However, sobriety brought increased amounts of verbal abuse and the tone became more harsh and intimidating to Lukehart (PCR 1333-1337).

Nearly every relative for three generations suffers from clinical depression requiring treatment and/or medication (PCR 1302). At least four ancestors committed suicide (PCR 1302, 1319). Several others, including his

mother and father and Lukehart, have contemplated suicide on multiple occasions (PCR 1302). Lukehart's father was discharged from the Navy in 1966 after being diagnosed as a schizophrenic (PCR 1334).

Lukehart was also subject to loss and emotional isolation. He and his family endured the death of several close family members. Lukehart lost his grandmother at an early age. Lukehart's Uncle Norman forced his wife to watch him commit suicide by placing a gun in his mouth and pulling the trigger (PCR 1320).

In addition, his Uncle Donny's death was enormously devastating. Donny became a paraplegic after a car accident several years earlier; he finally died from complications. Lukehart was especially close to his uncle and emulated him. He told many people he should have died instead of his uncle, and he attempted suicide shortly thereafter (PCR 1321-1322).

Lukehart stopped showing affection (PCR 1322). At school, Lukehart was a poor student who found analytical and abstract issues problematic. Lukehart endured another long period of maladjustment and his behavioral and attendance problems led to his being expelled in the ninth grade. Lukehart's peer group soon capitalized on Lukehart's vulnerability and steadfast loyalty that would cause

Lukehart to routinely take the blame for things which he did not do (PRC 1289). Lukehart was a “follower” who was easily manipulated by dares, and he was willing to “take the fall” for anything (PCR 1288).

Lukehart had run away and had been kicked out of his parents’ home several times, and his parents rarely showed interest in him or his treatment thereafter (PCR 1325).

Although trial counsel presented some evidence, the additional evidence shown above was omitted because counsel failed to properly investigate.

Trial counsel failed to examine Lukehart’s prevalent and significant family history for evidence of mental illness. Additionally, Lukehart experienced nightmares on numerous occasions and had reported suicidal ideations (PCR 1302).

The jury also never knew that Lukehart suffered from head injuries prior to the offenses (PCR 1315). Due to his brain impairment, he is not capable of handling situations like a “normal person.” Had trial counsel been diligent, he would have discovered (and thus been able to present to the jury and effectively argue) the above evidence in conjunction with what was presented to better support additional statutory and nonstatutory mitigation, as well as challenge the aggravating factors.

While the postconviction court may have considered the above additional family testimony irrelevant to the issue because nonstatutory mitigators were found, the court made no reference to his and counsel's complicity in failing to allow the witnesses to appear live, nor the effect the absence of live witnesses and additional testimony may have had on the weighing of those mitigators and the evidence as a whole.

A strong preference exists in law for live testimony. Fisher v. Perez, 947 So.2d 648 (Fla. 3rd DCA 2007); LoBue v. Travelers Ins. Co., 388 So.2d 1349, 1351 (Fla. 4th DCA 1980)(noting that the right to present evidence and call witnesses is perhaps the most important due process right of a party litigant).

This court remanded to the trial court a summary denial of a 3.851 motion in Freeman v. State, 761 So.2d 1055 (Fla. 2000), because:

> Although the trial court allowed Sorrells' testimony from the Epps case to be read to the jury, **we cannot say that the live testimony, especially in conjunction with the other mitigating evidence that the defense now alleges will be produced at an evidentiary hearing, would not make a more substantial impact on the jury.** This is the type of issue that the trial court must consider in the context of all the evidence presented at the hearing. (emphasis added).

Subsequently, in Freeman v. State, 858 So.2d 319 (Fla. 2003), this Court affirmed the trial court's denial of Freeman's postconviction motion. However, this Court affirmed the trial court's denial because it was a tactical decision.

> Furthermore, as the trial court found, **trial counsel's failure to subpoena Sorrells was a tactical decision to prevent the State from knowing who the defense witnesses were**. Although trial counsel stated that he did not subpoena Sorrells because he thought Sorrells would voluntarily appear, he also stated that, at the time of this trial, there was no discovery regarding penalty phase witnesses and if he did not subpoena a witness, the prosecutor would not know who his witnesses would be. Trial counsel stated, "I saw no reason to assist the State in preparing to meet any of my witnesses." **Thus, the trial court's finding that this was a tactical reason is supported in the record.** Id. at 338.

Tactical reasoning was not the declared basis why trial counsel did not call live witnesses in this case, financial reasoning was the basis. Implied in trial counsel's description of what took place in chambers was that the trial court wanted to utilize the cheapest method to present witnesses.

This court's reasoning for reversing in Freeman I, still applies in this case. The postconviction court failed to consider the impact on the jury due to the absence of live witnesses. The court made no reference whatsoever to this concern.

During pre-trial, trial counsel filed a Motion to Incur Costs for Depositions and Travel (R 52), and a Motion to Perpetuate Testimony (R 55 & 57), which the court granted (R 58). It seems ironic that trial counsel had no difficulty requesting personal travel costs to take depositions, but didn't include any motions for funds to have the witnesses appear. The only plausible explanation is that the trial court, during the conversation in chambers, instructed counsel to utilize the cheapest method.

Appellant contends that trial counsel was ineffective in failing to present live witnesses at the penalty phase; at the least, he should have made a formal written request to put the conversation that transpired in chambers on the record[8]. As a result, Appellant was prejudiced because the jury was unable to see and hear the demeanor, emotion, and explanation of the witnesses. The jury was also left with the feeling that if the witnesses were unwilling to appear live, then why should they place any weight on the deposition testimony.

[8] As a result of failing to place on the record the conversation with the court in chambers about paying for transportation and housing for the witnesses, Appellant was unable to present to this Court on direct appeal the trial court's error in failing to approve costs to allow live witnesses because of money.

ISSUE IX

WHETHER THE COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO OBJECT TO IMPROPER COMMENTS BY THE PROSECUTOR DURING GUILT AND PENALTY PHASE ARGUMENT IN VIOLATION OF APPELLANT'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS?

The standard of review for Ineffective Assistance of Counsel is *de novo,* pursuant to Strickland v. Washington, 466 U.S. 668 (1984), which requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice.

The postconviction court denied this claim finding: "A review of the comments cited by the Defendant as improper shows they were logical conclusions that could be awn from the evidence presented at trial. Counsel can not be ineffective for failing to raise a meritless objection" (PCR 1406).

In fact, the issue about some of the comments made by the prosecutor was raised on direct appeal as fundamental erroR This Court held that the issue was procedurally barred, but also ruled as follows:

> Even if the claim were not barred, our review of the record reveals no reversible error in the closing argument in which the prosecutor asked the jury to hold Lukehart responsible for his actions despite his deprived background. We have permitted wide latitude in arguing to a jury. See Breedlove v. State, 413 So.2d 1, 8 (Fla. 1982). The prosecution may properly argue that the

> defense has failed to establish a mitigating factor and may also argue that the jury should not be swayed by sympathy. See Valle v. State, 581 So.2d 40, 47 (Fla. 1991). Thus, even if this claim were preserved, we would find it to be without merit.

Lukehart, 776 So.2d at 927.

The comments appellate counsel complained about appear at page 97 of Appellant's initial brief on direct appeal:

> "were preyed upon by this defendant." V19T1578. Time after time she argued not that the aggravators outweighed the mitigators, but that Lukehart deserves to die: "It's got to stop, ladies and gentlemen. And it has to stop here and it has to stop now. Lukehart Lukehart deserves to die," V19T1578; "Lukehart Lukehart deserves to die," V19T1579; "this man deserves the electric chair," V19T1581; "he deserves to die," V19T1582; "this man deserves to die," V19T1582; "It's what he did to Jillian that makes him deserve to die," V19T1591; "this defendant deserves to die for what he's done," V19T1596.

Appellant takes no issue with this Court's finding that the prosecution may argue a mitigating factor that was not clearly established by the defense, nor should the jury be swayed by sympathy. However, the prosecutor’s comments were made solely to inflame the jury, thus swaying sympathy toward her point of view.

An adult victim may elicit a certain amount of sympathy from the jury, but since our society is extremely protective of their young, this sympathy is heightened when the victim in an infant. The above-

referenced comments by the prosecutor were made only to inflame the parental passions and protectiveness of the jury.

> They couldn't say "Mommy, get me away from this man, don't let him hurt me any more." (R 1577).
>
> Victims without voices, babies, they are the most defenseless and vulnerable of all God's creatures. They couldn't walk, they couldn't talk, all they needed was to be changed and fed and loved. And all they needed was to be kept away from a man like Lukehart. (R 1578).
>
> They were preyed upon by this defendant who knew they were defenseless,... (R 1578).
>
> And it's what he did to Jillian French that makes it even more compelling for you to recommend the electric chair for Lukehart. (R 1578-1579).
>
> And what we have here, ladies and gentlemen, is just the worse of it, we have a child that hasn't even reached a year yet, hasn't even reached half of a year yet, a five month old baby. (R 1586).
>
> It doesn't get any worse than killing a five month old baby. (R 1587).
>
> You're going to sink it like the biggest bo[u]lder you could find, and the reason is he attacked the most vulnerable of our society: A baby. (R 1588).
>
> It’s what he did to Jillian that makes him deserve to die. (R 1591).
>
> And yes, ladies and gentlemen of the jury, I'll say it again, Misty Rhue is as much to blame as is Jillian French's mother as is -- as are all of

> these mothers who let these men come into their lives and those men become more important to them than the babies that they've put out of their own bodies. Yes, these women are wrong, but there's no law right now that lets us prosecute them just for having these men in their homes. So if you want to blame Misty Rhue, like I told you the last time, go back there, write it down on a piece of paper and find her guilty of having this man in her home, of ever subjecting her child to him at all. And I'll sign that form when it comes out, I'll vote for guilty in this case, too, but we're not here to convict Misty Rhue and we're not here to convict Jillian French's mother who was wrong and who s. Dunlap happened to get enough evidence to at least prosecute for misdemeanor of child neglect. (R 1593).
>
> We're here about Lukehart and what he did because nobody twisted his arm before he twisted Jillian French's arm (R 1593-1594).
>
> So when you weigh his age I suggest that you take into consideration the age of our victim and see which is more compelling, the fact that he was 22 when he committed this brutal crime and knew better, or the fact that Gabrielle was five months old and couldn't even speak up for herself? (R 1598).
>
> But it's not our job to prove motive and it's not your job to try to understand. (R 1600).
>
> He didn't kill a man capable of fighting back, he didn't kill a woman capable of fighting back. He killed a baby. (R1607).

In addition, the State denigrated the mitigation on numerous occasions during closing argument by calling them an "excuse."

> So how long for the rest of his life is he to be excused for what Luke Scram did to him? (R 1600).

> He hadn't lost his sister recently, he had lost her several years before that, there was not a stress producing event that should **excuse** this man from the death penalty. (R 1602).
>
> Where is the cycle of violence going to stop? It stops here and it stops now because there are no more **excuses**. (R 1604).
>
> Ladies and gentlemen, you can't **excuse** this man because he was raped or because his father was an alcoholic because it doesn't take much common sense to know that a baby is helpless and that you're not suppose to hurt a baby. (R 1607).
>
> You should give him mitigation, you should say what a shame, this man had such good talent but you can't **excuse** him because he can aw cartoons, and you can't **excuse** him because he's clever; you must hold him accountable. (R 1608).

These types of comments by prosecutors were condemned in Brooks v. State, 762 So.2d 879 (Fla. 2000)(Further, the prosecutor's characterization of the mitigating circumstances as "flimsy," "phantom," and repeatedly characterizing such circumstances as "excuses," was clearly an improper denigration of the case offered by Brooks and Brown in mitigation.) Urbin v. State, 714 So.2d 411 n14 (Fla. 1998).

> "Although this legal precept--and indeed the rule of objective, dispassionate law in general--may sometimes be hard to abide, the alternative--a court ruled by emotion--is far worse." Jones v. State, 705 So.2d 1364, 1367 (Fla.1998). Similarly, in King v. State, 623 So.2d 486 (Fla.1993), we cautioned against prosecutors injecting "elements of emotion and fear into the jury's deliberations" Id. at 419.

* * *

> The transcript reflects that the prosecutor improperly denigrated the evidence of mitigation throughout his argument and repeatedly labeled the mitigation as "excuses," employing the pejorative term no less than eleven times. We conclude that this argument was improper, especially in view of the fact that the State presented no evidence to rebut the mitigation and the trial judge found and gave weight to all of the proffered mitigators. Id. at n14.

Appellant contends that these comments were improper and trial counsel was ineffective in failing to object.

ISSUE X

WHETHER THE TRIAL COURT ERRED IN FINDING NO MERIT TO LUKEHART'S CLAIM THAT HE WAS DENIED HIS RIGHTS UNDER THE FIRST, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND IS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN PURSUING HIS POST-CONVICTION REMEDIES BECAUSE OF THE RULES PROHIBITING LUKEHART'S LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF CONSTITUTIONAL ERROR WAS PRESENT?

The Appellant acknowledges that this Court has previously ruled in opposition of this issue. However, the issue is being presented here for future preservation.

A study has found that capital jurors in Florida fail to apply the statutory sentencing guidelines in the manner required by Florida law, due process, and the Eighth Amendment to the United States Constitution. See William S. Geimer & Jonathan Amsterdam, Why Jurors Vote Life or

Death: Operative Factors in Ten Florida Death Penalty Cases, 15 Am.J.Crim.L. 1 (1988) (study focusing on North Florida capital cases). Existing research results, combined with this evidence, indicate that at least some of the jurors in Lukehart's case would have committed any of several overt acts that would invalidate his sentence. Studies show that jurors: have misled counsel and the court during voir dire; considered extraneous matters and extrinsic influences; believed death mandatory in a case such as this; failed to follow the requirements of 921.141, Florida Statutes in finding Lukehart eligible for the death penalty; applied inappropriate, nonstatutory and constitutionally unacceptable aggravating factors in selecting death as the appropriate punishment for Lukehart; or, acted so that any combination of these factors contributed to his death sentence. The conclusions reached in these studies indicate Lukehart would have been prejudiced by such overt acts and extraneous influences. Unless Lukehart or his representatives are permitted to conduct discreet, anonymous interviews with the jurors in this case, Lukehart will be denied due process and equal protection under the laws. His access to the courts will be impaired, and his postconviction proceedings will not meet the standards of due process demanded in death cases.

Furthermore, Rule 4-3.5(d)(4) is unconstitutionally vague. The language of the rule fails to put counsel on notice of what behavior is subject to disciplinary action. By its terms, the rule requires only that counsel provide notice to the court and opposing counsel of her intention to interview jurors. The rule is to be interpreted in accordance with the complementary evidentiary rule found in 90.607(2)(b), Florida Statutes. This means the eventual determination of whether the attorney's conduct was proper will be made on the basis of information that could not have been known to the attorney before the interview took place, i.e., whether the juror can testify to overt prejudicial acts or extraneous influences on the verdict. Because the cases describing what evidence, once discovered through juror interviews, inheres in the verdict and what does not, counsels are unable to determine in advance of conducting interviews whether their actions will subject them to discipline. Lukehart will be denied due process of law and access to the courts if counsels are not permitted to interview jurors in preparation for postconviction proceedings.

ISSUE XI

WHETHER THE TRIAL COURT ERRED IN DENYING LUKEHART'S CLAIM THAT HE IS DENIED HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE EXECUTION BY ELECTROCUTION AND LETHAL INJECTION ARE CRUEL AND/OR UNUSUAL PUNISHMENTS?

The Appellant acknowledges that this Court has ruled in opposition to this claim. However, this issue is being presented here for future preservation.

The practice of executing Florida's condemned by means of judicial electrocution unnecessarily exposes Lukehart to substantial risks of suffering and degradation through physical violence, disfigurement, and torment. These risks inhere in Florida's practice of judicial electrocution and have been repeatedly documented. See, Provenzano v. Moore, 744 So.2d 413 (1999)(Shaw, J., dissenting, joined by Anstead, J.); Jones v. State, 701 So.2d 70, 82-88 (Fla. 1997)(Shaw, J., dissenting, joined by Kogan & Anstead, JJ.); id., at 71 (Anstead, J., dissenting, joined by Kogan & Shaw, JJ.); Buenoano v. State, 565 So.2d 309 (Fla. 1990); Jones v. State, 701 So.2d 70 (Fla. 1997); and Jones v. Butterworth, 691 So.2d 481 (Fla. 1997).

Persons such as Lukehart face an unconstitutional risk of being tormented, degraded, and dehumanized by Florida's

practice of botching judicial electrocutions. Florida's manner of effectuating judicial electrocution necessarily entails substantial and constitutionally intolerable risks that Lukehart will become the victim of a "somewhat ghastly" display of violence, disfigurement, and degradation. The State of Florida has purportedly extended a “choice" to Lukehart, but it is no choice at all and the legislation enacting the "choice" is unconstitutional. Should Lukehart be forced to make such a choice, this adds to his psychological torture. This waiver provision is unconstitutional. Accordingly, Lukehart may not be executed by lethal injection without violating the constitutions of the United States and Florida. The law enacting lethal injection is unconstitutional, is an unconstitutional special criminal law, and violates the prohibition against ex post facto laws. Lukehart’s rights guaranteed by the Eighth and Fourteenth Amendments will be violated.

ISSUE XII

WHETHER LUKEHART'S TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS?

Lukehart did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F.2d 1126 (11th CiR 1991); Derden v. McNeel, 938 F.2d 605 (5th CiR 1991). The sheer number and types of errors involved in his trial, when considered as a whole, virtually dictated the sentence Lukehart would receive. State v. Gunsby, 670 So.2d 920 (Fla. 1996). In Jones v. State, 569 So.2d 1234 (Fla. 1990) this Florida Supreme Court vacated a capital sentence and remanded for a new sentencing proceeding before a jury because of "**cumulative errors** affecting the penalty phase" Id. at 1235 (emphasis added). The flaws in the system, which sentenced Lukehart to death, are many. They have been noted throughout this pleading and also in Lukehart's direct appeal. There has been no adequate harmless error analysis. While there are means for addressing each individual error, the fact remains that addressing these errors on an individual basis will not afford adequate safeguards against an improperly imposed death sentence—

safeguards that are required by the Constitution. Repeated instances of ineffective assistance of counsel and error by the trial court significantly tainted the process. These errors cannot be harmless.

CONCLUSION AND RELIEF SOUGHT

Appellant prays for the following relief, based on his prima facie allegations demonstrating violation of his constitutional rights:

That his convictions and sentences, including his sentence of death, be vacated and a new trial provided.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Charlemane Milsap, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050 on September 21, 2009.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the type used in this brief is Courier New 12 point.

/s/ Michael Reiter____
Michael Reiter