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

REPLY BRIEF OF APPELLANT

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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?

Appellant's initial brief suggested two methods and reasons for trial counsel to attack Appellant's prior violent felony: (1) File a 3.850 motion to set aside the judgment and conviction so that it couldn't be used as an aggravator in his penalty phase and/or (2) Present testimony at the penalty phase to establish that Appellant did not commit the prior offense in order to diminish the weight of the aggravator.

(1) Filing a 3.850 Motion

Appellee's answer brief, at page 21, relies upon State v. Kilgore, 976 So.2d 1066 (Fla. 2007)[1] to support their argument that trial counsel's performance was not deficient by not filing a 3.850 motion because: "Counsel is not authorize[d] to file a post-conviction motion[s] attacking the prior conviction." However, Appellee's reliance on Kilgore has no merit. The analysis utilized by this Court in Kilgore was based upon interpretation of statutory

[1] **This case was certified to this Court by the Second District Court of Appeals in Kilgore v. State 933 So.2d 1192, 1197 (Fla. 2nd DCA 2006).**

provisions for postconviction counsel.

> **Florida has an explicit statutory scheme in place to provide postconviction counsel to all capital defendants, including Kilgore. Because Kilgore has no constitutional right to postconviction counsel, whether CCRC is authorized to represent a death-sentenced individual in a collateral postconviction proceeding attacking the validity of a prior violent felony conviction depends upon the construction and interpretation of the scope of responsibility and authority granted both to CCRC and private registry counsel in chapter 27, Florida Statutes (2002).**

Kilgore, 976 So.2d at 1068.

The statutes listed by this court in support of its ruling were not in effect in 1991, which is when Appellant's trial was conducted.

Appellant contends the Second District's finding below is more applicable in the instant case:

> **We conclude that the statutes providing representation to death sentenced inmates should be interpreted to encompass the right to effective assistance of counsel in collateral proceedings such as this one, to attack both the conviction and the death sentence. If a primary aggravating circumstance is a prior first-degree murder or violent felony conviction, and if there are valid grounds to seek to invalidate it, CCRC should, as a matter of effective representation, pursue that course. The statute itself directs CCRC to challenge a death sentence and seeking to invalidate a prior conviction in this context is a direct attack on the sentence. However, even if the statute was intended to prevent CCRC from representing the inmate in such collateral proceedings, such a limitation would not be permitted because it would deny the inmate effective assistance of counsel. (emphasis added).**

Kilgore, 933 So.2d at 1197. The Second District's rational applies more appropriately to Appellant's situation for two reasons: (1) the statutes relied upon by this Court in Kilgore was not in existence at the time of Appellant's trial and (2) Kilgore was a postconviction representation, which does not allow a claim of ineffective assistance of postconviction counsel. However, the instant case was a trial, which does provide for ineffective assistance.

(2) Present testimony at the penalty phase

Also, at page 21 of Appellee's Answer Brief it is claimed that trial counsel's performance was not deficient because: "Furthermore, counsel is not permitted to relitigate a prior conviction during the penalty phase of a capital trial." Yet, at page 22 of the Answer Brief, the Appellee acknowledges: "Counsel can attack the weight of the aggravator using the facts of the underlying crime but not its existence." That latter premise is exactly one of the claims Appellant has made.

It is inconceivable how the Appellee can reconcile their incongruent positions: Appellant cannot relitigate a prior offense, but can attack the weight of the aggravator, and none of the evidentiary hearing testimony would have been admissible at the penalty phase. How would the

Appellee suggest Appellant attack the weight of the prior offense without relitigating the issue without testimony?

Appellee relies upon Melton v. State, 946 So.2d 994 (Fla. 2006) in support of their argument and statement at page 21 of the brief: "Furthermore, counsel is not permitted to relitigate a prior conviction during the penalty phase of a capital trial."

The instant case is substantially distinguishable from Melton. Melton presented the exact same evidence at both evidentiary hearings (prior offense and postconviction). The trial court in the first conviction (Saylor - victim) found the evidence wasn't credible, to which the appellate court agreed. In Melton's death case (Carter - victim) this Court found that Melton could not relitigate the issue in the second postconviction proceeding. Id. at 1005.

In Melton this Court stated: "We agree with the State that Melton may not relitigate the Saylor murder conviction in these proceedings." Id. at 1005. Appellant contends that the statement referred to above pertains to the second postconviction hearing, not the first, as suggested by the State in this case.

In addition, at page 24 of the Answer Brief, Appellee suggests that Appellant's reliance on Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) is

misplaced, because that court found counsel ineffective for failing to review defendant's prior conviction file, while Mr. Edwards did read Lukehart's file. Appellee fails to cite the rest of the case, as well as other cases applying the reason why failing to review prior conviction files is ineffective. The purpose of reviewing files is to find potential evidence that might diminish the weight of an aggravator, not reviewing for reviewing sake only as suggested by the Appellee.

This Court recognized Rompilla's reasoning in Melton, but found that Metlon's counsel did attempt to mitigate the prior conviction. Melton, 949 So.2d at 1006. This Court also recognized Rompilla in Green v. State, 975 So.2d 1090 (Fla. 2008). Green's attorney failed to review his prior offense because Green told him he had committed the offense. However, this Court found counsel's performance deficient. "First, defense counsel Parker's performance was deficient. Parker knew that the State would submit evidence of the prior violent felony and that the prior case file was readily available, yet he failed to obtain and review the file." Id. at 1112.

As early as 1981, this Court recognized a defendant's right to present evidence regarding a prior conviction to mitigate its effect. Francois v. State, 407 So.2d 885

(Fla. 1981)(Conversely, a defendant must be allowed to present evidence pertaining to the degree of his or her involvement in and the circumstances of the events upon which previous convictions are based.)

The fact that Mr. Edwards read the file doesn't absolve his failure to speak with Brenda Page or call her as a witness. She was the only other person—besides the Appellant—who could have declared that Jillian French's head injury was sustained when Monica Plummer threw her daughter across the room (this incident occurred two or three days before Appellant's arrest). In addition, Brenda Page could delineate the relationship between Appellant and Jillian French, the relationship between Monica Plummer and Jillian French, and the relationship between Appellant and Monica Plummer. All of the above indicates that the person who caused the head injury to Jillian French was not the Appellant, but Jillian French's mother - Monica Plummer.

In addition, Dr. Jack Daniels (Forensic Pathologist Defense Expert) testified at the evidentiary hearing that Jillian French's head injury probably occurred days prior to the date she was admitted to the hospital, which supported Brenda Page's testimony.

There are many similarities between the instant case and Rompilla.

There is an obvious reason that the failure to examine Rompilla's prior conviction file fell below the level of reasonable performance. Counsel knew that the Commonwealth intended to seek the death penalty by proving Rompilla had a significant history of felony convictions indicating the use or threat of violence, an aggravator under state law. Counsel further knew that the Commonwealth would attempt to establish this history by proving Rompilla's prior conviction for rape and assault, and would emphasize his violent character by introducing a transcript of the rape victim's testimony given in that earlier trial. App. 665-666. There is no question that defense counsel were on notice, since they acknowledge that a "plea letter," written by one of them four days prior to trial, mentioned the prosecutor's plans. Ibid. It is also undisputed that the prior conviction file was a public document, readily available for the asking at the very courthouse where Rompilla was to be tried. (emphasis added). Id. at 383.

*** * ***

With every effort to view the facts as a defense lawyer would have done at the time, it is difficult to see how counsel could have failed to realize that without examining the readily available file they were seriously compromising their opportunity to respond to a case for aggravation. 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. Without making efforts to learn the details and rebut the relevance of the earlier crime, a convincing argument for residual doubt was certainly beyond any hope. (emphasis added). Id. 285.**

In Rompilla, counsel failed to obtain the prior conviction file, which contained mitigation. In the instant case, counsel failed to interview Brenda Page. The end result is the same.

At page 19 of the Answer Brief, Appellee suggests that trial counsel's failure to speak with or call Brenda Page as a witness was a strategy because: "The file also reflected that Lukehart admitted the charged offense to the mother of the infant and that he had harmed the infant on prior occasions. (E.H. May 10, 2007 at 117)."

What Mr. Edwards, trial counsel, actually said at page 117, was:

> **A. Because that would open the door to a great number of things. One, I believe those notes reflect that he was confronted with Ms. Plummer's statement regarding the events -- he, Mr. Lukehart -- and that he admitted to the offense; he admitted that he had harmed the child, not only once but at a prior occasion; and if I was going to open that door, that would have been a major mistake.**

Defense Exhibit 1, (Amy Grass-Gilmore's notes) (PCR Vol. V, p916-930) makes no mention whatsoever about Appellant admitting to anyone, let alone Ms. Plummer, that he had committed the prior offense for which he plead guilty. In fact, the notes consistently reflect that Appellant denied having committed the prior offense.

Trial counsel was ineffective by failing to attack the prior violent felony be either filing a 3.850 motion or mitigating the aggravator by calling Brenda Page.

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?

At page 26 and 27 of Appellee's Answer Brief, they claim that this issue was not raised in Appellant's postconviction motion. That statement is correct. However, a Motion to Amend the Pleadings to Conform with the Evidence was filed. Appellee also states that because Appellant failed to obtain a ruling on his Motion to Amend the Pleadings to Conform with the Evidence the motion was waived. Under most circumstances Appellee would be correct. However, pursuant to Fla.R.Civ.P. 1.190, no such

requirement is necessary:

> **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...**

In addition, Appellee suggests that Fla.R.Crim.P. 3.851 applies and not Fla.R.Civ.P. 1.190. Appellee is incorrect for two reasons: (1) Appellant filed his postconviction motion pursuant to Fla.R.Civ.P. 3.850, not 3.851, and (2) Florida appellate courts have previously utilized Fla.R.Civ.P. 1.190 for decisions involving postconviction proceedings.

At page 29 of Appellee's Answer Brief it states: "If this Court allows the State’s silence to be interpreted as an implied consent to an amendment to the pleadings, the State will certainly start objecting to every question that could possibly open the door to that type of abuse." Fine, let them object. Although important, it is not only their silence that makes Fla.R.Civ.P. 1.190 applicable. As contended in Appellant's Initial Brief, such other factors are to be considered as well: (1) whether the State had the opportunity to cross-examine, (2) whether the issue is complex, (3) how much evidence is presented, (4) whether the State was prejudiced, and (5) whether the interests of justice is better served.

At page 28 of the Answer Brief, Appellee states they do object to the amendment for this issue. Sure, now they object; they didn't seem to care when the motion was filed.

At page 29 and 30 of the Answer Brief, Appellee states that the side effects of the medication taken by Appellant were speculation. However, Dr. Crown didn't speculate. He said the medication was "likely to create confusion" (PCR 1095), and "not being able to make linear sense," and "patchy remembering" (PCR 1096).

Appellee contends Appellant failed to show trial counsel was ineffective because the dosage wasn't provided, the prescribing doctor wasn't called, and the records weren't introduced. Appellee misses the point. Even if all of those items were presented, there would still be speculation (as described by Appellee) as to whether Appellant suffered confabulation as a side effect. The dosage isn't the criterion, it is the symptomology that is crucial to establish whether side effects occurred. While not on medication, Appellant first stated he dropped the child. When Appellant was taking medication, he changed his statement to match the medical examiner's report. During trial, his memory was “patchy” at best.

The point is to avoid the possibility of side effects influencing a defendant at trial. Counsel should have:

learned about the possible side effects, informed the court that Appellant was on medication, requested the medication be stopped, and requested a continuance to allow the Apppellant's side effects to cease, whatever they might have been.

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?

Appellee argues that diminished capacity is not viable in Florida. Appellee is correct. However, Appellee incorrectly characterizes Appellant's intermittent explosive disorder as a claim of diminished capacity. Not so. Appellant has never contended that his acts were involuntary or that he could not form the requisite intent to commit the crime charged. He claims that a lay person may misconstrue his actions as intent to cause bodily harm, when in fact intermittent explosive disorder may be no more than striking out without intent to harm.

At page 34 of the Answer Brief, Appellee cites to Evans v. State, 946 So.2d 1 (Fla. 2006), as support for the proposition: "exceptions for conditions which are commonly understood and may be explained to the jury without the

assistance of a mental health expert, such as medication, epilepsy, infancy, and senility." However, the Court in Evans held that Evan's attempt to show he was incapable of forming intent was not proper. In addition, the Court held that such a defense in that case was inconsistent. The court in Evans cites to Chestnut, infra. as support. However, Chestnut is distinguished below in Mizell.

In addition, Appellee fails to explain why State v. Mizell, 773 So.2d 618 (Fla. 2nd DCA 2000) doesn't apply to Appellant's situation.

> **The State correctly notes that Florida law rejects diminished capacity evidence. See *Chestnut v. State*, 538 So.2d 820, 825 (Fla.1989) (holding that evidence of an impaired mental condition, that does not rise to Florida's definition of insanity, is not admissible to show that the defendant could not have formed the intent necessary to commit the crime). The State is incorrect, however, in its characterization of PTSD as diminished capacity evidence in this case. We view the PTSD evidence offered in this case as state-of-mind evidence, quite analogous to battered spouse syndrome (BSS) testimony that has in fact been approved many times. Id. at 620.**

At the guilt phase, trial counsel could have presented Dr. Krop to testify about the symptoms of intermittent explosive disorder and answer hypothetical questions regarding the facts in this case.

At page 34 of the Brief, Appellee concludes no prejudice resulted because Appellant testified he used

quite a bit of force to repeatedly push the child's head down. Assuming that testimony to be true, Dr. Crown's testimony provided the explanation of the disorder and how a lay person might misconstrue that action as intent to cause harm.

> **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). Appellee's description of Appellant's actions clearly falls within the explanation by Dr. Crown.

Trial counsel was ineffective by failing to present expert testimony to explain the symptoms of intermittent

explosive disorder and answer hypothetical questions regarding the facts in this case.

ISSUE IV

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

Appellee argues that this issue is not preserved for appeal. While Appellee may be correct that the language in Appellant's postconviction motion for this issue is somewhat inarticulate (PCR 665-667), it is quite clear Appellant was seeking his amended motion to relate back to the filing of his Shell Motion. The Amended Motion specifically states: "Mr. Lukehart moves this court to reinstate his *shell* 3.850 motion, thereby allowing his amended motion to relate back in time to his original *shell* motion; and therefore providing Mr. Lukehart ample time to file his Federal Habeas petition, should one be necessary." (PCR 667). This issue was preserved.

Appellee's Answer Brief cites no applicable cases that contradict this Court's previous rulings that when the court grants a party the ability to amend, the amendment relates back to the original filing. Appellee cites to Gonzalez v. State, 990 So.2d 1017 (Fla. 2008) in support of no prejudice. However, the trial court in Gonzalez did not

grant leave to amend, this Court did. The facts are distinguishable from this case.

Appellee suggests that six days is sufficient to file a federal habeas because: "Basically, all Lukehart has to do is redraft the direct appeal brief and the postconviction appeal brief into a federal habeas petition. And he can start doing so while this appeal is pending." (Answer Brief p40-41). Counsel wishes it were that easy. First, counsel must be appointed by the Federal Court before beginning the federal habeas; and second, the federal habeas must be structured for federal issues and research cases supporting the issues utilizing federal formats and procedures. In addition, without the reasoning behind this Court's ruling, Appellant would be speculating about which issues to present, some of which might be unnecessary.

While Appellant contends this Court's prior rulings dictate that Appellant's amended motions relate back to the date of the Shell Motion, Appellant is concerned that without a specific finding by this Court, Appellant may miss his federal deadline. The Federal Courts look to State's rules and opinions to decide when the federal time limits start and stop.

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?

Appellee argues that the exclusionary rule does not apply to policies or statutes *per se*. In support, they cite to Jenkins v. State, 978 So.2d 116 (Fla. 2008). Appellant generally agrees, with certain exceptions (see initial brief). Appellee claims that Appellant asserts trial counsel was ineffective for failing to include an argument that the officer violated a Baker Act policy in the motion to suppress Lukehart's confession as it pertained to Miranda.

Unfortunately, Appellee and the trial court have failed to understand Appellant's claim. Trial counsel incorrectly filed and argued a motion to suppress based upon Miranda warnings as a violation of Appellant's Fifth Amendment to the United States Constitution and Florida Constitution. However, Appellant's claim is that trial counsel was ineffective in failing to motion and argue Appellant's Fourth Amendment of the United States Constitution and Florida Constitution was violated because

he was seized without probable cause.

Appellant was taken into custody purportedly pursuant to Florida Baker Act. However, the Baker Act was utilized as a pretext to maintain custody of the Appellant, as explained in Appellant's initial brief.

Appellee states Appellant failed to prove a violation of local policy because the policy wasn't introduced. Apparently, Appellee apparently believes only written evidence is of value. Appellee totally ignored the testimony of Clay County Sgt. Glenn Zier that the Sheriff's policy was to transport an individual to a receiving facility when an officer Baker Acts that individual. (R 690-691). Notwithstanding Clay County's policy, the Baker Act Statute also requires taking the person to a receiving facility.

Appellant relies upon the case law cited in his initial brief establishing that even policies can be a violation of the Fourth Amendment. The Baker Act in this case was nothing more than a pretext to take Appellant into custody to obtain a statement or confession. Any subsequent Miranda warnings were irrelevant.

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?

Appellant will rely upon his argument in his initial brief.

ISSUE VII

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

Appellee's brief speaks only to this Court's prior finding that trial counsel is not ineffective for failing to object to an instruction based upon Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Appellant doesn't disagree with Appellee's general proposition. However, Appellee totally fails to consider Appellant's position that an order and agreement were in place. The trial court and the state agreed with the proposed instruction of the Appellant. The trial court violated the agreement by failing to read to the jury the proposed instruction.

On February 10, 1997, Appellant's trial counsel filed a Motion to Prohibit Misleading References to the Advisory Role of the Jury at sentencing (R. Vol. I, p146). That Motion requested the Court to instruct the jury that the

law requires the judge to give great weight to the jury's recommendation, and the judge may reject the recommendation only if the facts are so clear and convincing that virtually no reasonable person could differ. The instruction was to be read to the jury each time the prosecutor referenced the jury's advisory.role (R. Vol. I, p146).

On February 21, 1997, the trial court entered an order granting the Motion (R. Vol. I, p149). To make matters worse, trial counsel failed to object to the given instruction and to remind the court of the agreed instruction. At the evidentiary hearing, trial counsel did not know why he didn't object.

Parties should be able to rely upon orders of the court, whether prejudice occurs or not.

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?

Appellee's argument about this issue primarily coincides with the trial court's order. It is notable that Appellee utterly fails to make argument for: live testimony versus deposition testimony, the in-chambers conversation

concerning the cheapest way to obtain testimony, or trial counsel's failure to formally petition the court for funds to transport witnesses.

Appellant will rely upon the authorities cited in his initial brief on this issue.

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?

Inasmuch as Appellee has not added any additional argument from that of the trial court's order, Appellant will rely upon his argument in his initial brief.

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?

Appellant will rely upon his argument in his initial brief.

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?

Appellant will rely upon his argument in his initial brief.

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?

Appellant will rely upon his argument in his initial brief.

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 PL-01, Tallahassee, Florida 32399-1050 on February 22, 2010.

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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