IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-2043

LOWER COURT CASE NO. 95-1449CF

MICHAEL WAYNE SHELLITO,

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

INITIAL BRIEF OF APPELLANT

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STANDARD OF REVIEW

Mr. Shellito has presented several issues which involve mixed questions of law and fact. The issues regarding the application of the law present questions of law and must be reviewed *de novo*. See Sochor v. State, 883 So. 2d 766, 772 (Fla. 2004). In regard to the facts, under Porter v. McCollum, deference is given only to historical facts. All other facts must be viewed in relation to how Mr. Shellito's jury would have viewed those facts. See Porter v. McCollum, 130 S.Ct. 447 (2009).

REQUEST FOR ORAL ARGUMENT

Mr. Shellito has been sentenced to death. The resolution of the issues in this action will determine whether Mr. Shellito lives or dies. This Court has not hesitated to allow oral argument in other capital cases in similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Shellito, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE[1]

The Circuit Court of the Fourth Judicial Circuit, Duval County, Florida, entered the judgments of convictions and sentences under consideration.

On February 9, 1995, a Duval County grand jury indicted Mr. Shellito for one count of First Degree Murder (R. 1-3).

After a jury trial, Mr. Shellito was found guilty of First Degree Murder on July 21, 1995 (R. 1209). The jury recommended death on August 21, 1995, by a vote of eleven (11) to one (1) (R. 1510). The trial court followed the jury's recommendation and sentenced Mr. Shellito to death on October 20, 1995 (R. 1564).

On direct appeal, this Court affirmed Mr. Shellito's convictions and sentences. Shellito v. State, 701 So. 2d 837 (Fla. 1997), cert. denied, 118 S.Ct. 1537 (1998).

On April 20, 1999, Mr. Shellito filed a preliminary Rule 3.851 motion in order to toll the time in which to file his Petition for Writ of Habeas Corpus in federal court (PC-R. 1-33). Subsequently, Mr. Shellito filed a series of amendments to his Rule 3.851 motion after receiving public records (PC-R. 34-169, PC-R. 255-368, SPC-R. 1078-1184).

On March 12, 2004, the circuit court held a hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993). Thereafter, the circuit court granted Mr. Shellito an evidentiary hearing on some of his claims for relief.

An evidentiary hearing was held on December 12, 2005, April 18-21, 2006, and June 12, 2006. Depositions to perpetuate testimony were taken on June 13, 2006, and submitted to the circuit court for consideration. Closing arguments were filed (SPC-R. 1471-1532, 1534-1606, PC-R. 449-71).

On July 2, 2009, the circuit court denied Mr. Shellito's Rule 3.851 motion (PC-R. 472-511). However, the order was not served on the parties. See PC-R. 512-55.

On August 12, 2010, the circuit court vacated its prior order and entered an amended order denying Mr. Shellito's motion for postconviction relief (PC-R. 556-95; 596-7).

Mr. Shellito timely filed a notice of appeal (PC-R. 598-9).

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[1]The following abbreviations will be utilized to cite to the record: "R. _." – record on direct appeal; "T. ___" – transcript of the trial on direct appeal; "PC-R. _." – record on appeal on postconviction; "SPC-R. ___." - supplemental record on appeal in postconviction; "Ex. ___." – exhibits.

STATEMENT OF FACTS

A. THE TRIAL

At trial, the prosecution presented evidence that on the night that the victim was shot, Mr. Shellito attended a party at the residence of Steven Gill. In the early morning hours of August 31, 1995, Mr. Shellito, Gill and Gill's then-girlfriend, Sunshine Turner, left the party to take Turner home (T. 481-2).

Turner testified that during the drive to her house, Gill and Shellito discussed needing to work and make some money; though they never said it, Turner inferred that they were going to rob someone (T. 484-5). A few blocks from her house, Gill dropped Mr. Shellito off and then took Turner home (T. 485).

At approximately 4:30 a.m., state witness, Michael Green, heard arguing outside of his home (T. 461). He looked out the window and saw a young man fall over near his fence (T. 462). There was also a small, white pick-up truck present, but he could not describe the occupants (Id.).

According to defense witness, John Bennett, he too lived near where the shooting occurred and heard noises in the early morning hours of August 31, 1995 (T. 827). And, he too, looked out his window. He saw a truck and the silhouette of an individual who entered the drivers's side of the truck and drove away (T. 829-30).

Shortly thereafter, Gill and Mr. Shellito returned to the Gill residence, together (T. 429). Bays told the jury that upon their arrival, Mr. Shellito informed them that he had shot someone (T. 430). Bays was the only witness to testify that he saw Mr. Shellito with a firearm before he left with Gill and Turner in the early morning hours of August 31, 1995 (T. 424).

Later that day, yet another party occurred at the Gill residence. Several teenagers again congregated at the Gill residence to consume alcohol and smoke marijuana. Theresa Ritzer and Laterio Copeland told the jury that sometime during the party, Mr. Shellito confessed to shooting the victim earlier that day (T. 708, 759).

In the early morning hours of September 1,1995, law enforcement raided the Gill residence (T. 560). Officer Robert Hurst testified that during the raid, Mr. Shellito left the residence through a bedroom window (T. 563-4). Despite warning him to remain at the scene, Mr. Shellito ran (T. 564). Officer Hurst released his dog, who caught and bit Mr. Shellito (T. 565-6). As Officer Hurst approached, he saw Mr. Shellito with a firearm, which was pointed at the dog (T. 568). Mr. Shellito was shot several times by law enforcement (T. 573).

The firearm that was found a few feet from Mr. Shellito upon his arrest matched the casing that was found at the scene of the

shooting the previous morning (T. 813).

On Mr. Shellito's behalf, the defense presented the testimony of Jabreel Street, who had been incarcerated with Bays at the Duval County Jail[2] (T. 864). Street testified that Bays had asked him to "jump on" Mr. Shellito's case; i.e., learn of information about the case and then provide it to the State as if it had come from Mr. Shellito (T. 865). Street testified that Bays had some paperwork in his cell with Mr. Shellito's name on it – it looked like a police report (Id.). Bays did give Street information about Mr. Shellito's case to use, but Street did not want to "jump on" the case (T. 867).

Also, Mr. Shellito's mother and father testified that Steven Gill told Mrs. Shellito that he had confessed to his attorney that he had killed the victim, but that he would not admit that to law enforcement or the prosecution (T. 962-4, 998-9).

The jury found Mr. Shellito guilty as charged (R. 1209).

After the jury convicted Mr. Shellito of first degree murder, the jury reconvened for the penalty phase. The State's first witness was Ricky Bays. Bays testified that on September 1, 1995, he was with Mr. Shellito when he robbed two people (T. 1316). The first robbery occurred when Mr. Shellito and Bays picked up a hitchhiker. Bays testified that Mr. Shellito had pointed a gun at the hitchhiker, and later told Bays that he wanted to kill the hitchhiker, but another car approached them, so he did not (T. 1317). Bays also testified that Mr. Shellito then robbed a drug dealer for his marijuana (T. 1318).

The State also presented the testimony of Kenneth Wolfenbarger, the hitchhiker, who was robbed. He told the jury that Mr. Shellito had pulled him from the backseat and taken his backpack which contained about $10.00 (T. 1326-8).

The State also introduced the certified copies of Mr. Shellito's convictions for aggravated assault on a law enforcement officer, which arose out of the events surrounding Mr. Shellito's arrest on September 1, 1994, and an aggravated assault from when Mr. Shellito was 17 years of age, when he possessed an air gun (T. 1331-2, 1334-5).

Finally, the State presented the victim's mother who testified as to the impact of the loss of her son (T. 1338-42).

The defense presented scant evidence about Michael Shellito's background, including that when Mike was a few days old, he choked on some milk and turned purple (T. 1403). When his mother took him to the hospital the doctors told her that there may be damage, and she needed to "watch" him (T. 1404). Also, the jury heard that Mike's father was an alcoholic who did not get along well with his son

[2]Bays had been arrested the same night as Mr. Shellito for his (Bays) participation in two armed robberies that occurred hours before the raid on the apartment.

and hit him on a few occasions (T. 1407-8); Mike was placed in special ed in kindergarten and had problems reading and writing (T. 1409, 1412); Mike started hanging around with the wrong crowd as a teenager (T. 1430-1); and Mike was a "nice" kid who took care of pets and helped around the house (T. 1412). Finally, Mike's mother told the jury that there was something psychologically wrong with Michael – he had spent time in hospitals, taken a drug called Tegretol and attempted suicide (T. 1413-8).

During his closing argument, Prosecutor Plotkin minimized any mitigation that had been presented and characterized it as "excuses" (T. 1448, 1466). He also suggested that Mr. Shellito's mother was not a credible witness and she was the only witness to provide anything mitigating (T. 1465-6). Prosecutor Plotkin improperly argued that Mr. Shellito showed no remorse (T. 1468).

No evidence was presented to the trial court before Mr. Shellito was sentenced.

The trial court found two aggravators: 1) prior violent felony; 2) the crime was committed while Mr. Shellito was engaged in the commission of a robbery; and 3) pecuniary gain (merged) (R. 371-402).

As to mitigating evidence presented at the penalty phase, in his sentencing order, the trial judge gave the age mitigator only slight weight because:

> At the time of the murder, the defendant was 6'4" tall, weighed 176 pounds and was 19 years of age. He is now 20 years old. He was and is a physically mature adult male. The murder victim, Sean Hathorne, was 18 years of age.
>
> The defendant's criminal record started at age 13 in Juvenile Court. He was arrested 14 times as a juvenile and adjudged guilty of 4 felonies and committed to HRS. At age 16, he was certified from Juvenile Court to adult Felony Court for prosecution.
>
> The defendant's total criminal records as a juvenile and as an adult shows that he has been arrested 22 times, has been charged with 30 separate crimes and has now been convicted of 8 felonies as an adult. He also has 4 felony convictions as a juvenile.
>
> The defendant was on probation for 2 violent felonies at the time he committed this murder.
>
> The PSI and testimony show that the defendant has been using alcohol and drugs since an early age.
>
> The defendant stated in the PSI that he was primarily supported by "different ladies in the community."
>
> Although young in years, the defendant is old in the ways of the world and vastly experienced in crime. Outlawry, his chosen vocation, and the largess of favored females has been his livelihood.
>
> The defendant's age is a marginal mitigating circumstance and I assign it slight weight.

(Id.).

Furthermore, as to other mitigation presented at trial the trial judge stated:

> The defendant was raised in a stable, lower middle class home with his mother, older sister and brother. His father was an alcoholic, a career Navy man and was away from home on duty about half the time during which the children were growing up. However, the father did take the defendant fishing, go-carting and to the movies on occasion.
>
> The father and mother have gone to Court with the defendant after each criminal episode and have counseled with him about the consequences of his behavior.
>
> The father treated and disciplined all of the children the same. On three occasions, he struck or pushed the defendant but on one of those occasions, the defendant was screaming at the mother and the father stepped in to protect

her.

The defendant did not do well when he started school and was put in a special education class.

His sister and brother excelled in school, both graduated from high school (the brother with honors) and both have become successful, law-abiding citizens. The brother is an E-4 in the Navy and the sister works at AT&T.

Much of the defendant's school problems were behavioral until he was finally dismissed from junior high school in the 8th grade and sent to a disciplinary camp after which he refused to return to high school. Since that time, he lived at home and could not or would not hold a job and set his own life style.

The defendant had a loving relationship with his mother, brother and sister. All children had the same advantages in the home and all were taught morality and the importance of the work ethic.

The defendant would frequently argue with his mother and have temper tantrums and threaten when he could not have his way.

Although he lived at home, he seldom worked and frequently was away, staying with friends and often got money from his mother so he could stay at motels with his girlfriends. He spent much time in the company of older women.

The defendant has, for short periods of time, been in several treatment and diagnostic facilities but without any specific diagnosis of mental illness or other disabling conditions.

This may be a marginal mitigating circumstance and I assign it slight weight.

(Id.).

B. THE DIRECT APPEAL

On direct appeal, this Court found that error occurred at Mr. Shellito's penalty phase when the prosecutor argued that Mr. Shellito lacked remorse. Though this Court held that the prosecutor had asserted a nonstatutory aggravating factor, this Court held that the error was harmless. Shellito v. State, 701 So. 2d 837, 842 (Fla. 1997).

In addition, as to the trial court's consideration of Mr. Shellito's mitigation and this Court's determination of whether Mr. Shellito's death sentence was proportionate, this Court noted that: "Shellito presented no medical or other expert testimony to support his claims of organic brain damage or other impairment. Further, the evidence submitted to support his mental condition was conflicting." Id. at 844.

C. THE POSTCONVICTION PROCEEDINGS

1. Trial Counsel

A few weeks after Mr. Shellito was indicted for the first degree murder of Sean Hathorne, Refik Eler was appointed to represent him (SPC-R. 2047). No other attorney was appointed to assist Eler (Id.). Eler testified that the theory of defense as to the guilt phase was that Stephen Gill "was the shooter" (SPC-R. 2067), and Mr. Shellito was the scapegoat (SPC-R. 2069).

In this regard, though Eler had wanted to present the statements Gill made to law enforcement, he failed to call Detective Hinson for no strategic reason (SPC-R. 2075). Likewise, Eler had no strategic reason for failing to obtain a ruling as to whether the State would be permitted to elicit testimony from Theresa Ritzer regarding an alleged threat Mr. Shellito made to her if he impeached her with her prior inconsistent statements.[3] Rather, Eler admitted that he simply "didn't anticipate" the State's rebuttal evidence (SPC-R. 2179). As to Richard Bays, Eler wanted the jury to believe that he had a grudge against Mr. Shellito (SPC-R. 2181). And while Eler attempted to impeach Bays about his pending criminal charges, he had no idea that on the day that jury selection began in Mr. Shellito's case, the State withdrew its efforts to classify Bays as a habitual violent felony offender (SPC-R. 2182). He would have used that information had he had it (SPC-R. 2184).

Eler also testified about his approach for Mr. Shellito's penalty phase: "depose witnesses, you talk to family members, you get – you have a confidential psyche done." (SPC-R. 2049).

[3]At trial, Ritzer testified that after Mr. Shellito confessed to shooting the victim, he pointed a gun at her head and told her that he would kill her if she ever repeated what he had told her (R. 790-1).

Specifically, in regard to developing mental health issues, Eler filed a motion on April 11, 1995, for the appointment of a confidential expert (R. 17-20). Eler requested a competency evaluation be conducted and made no mention of mitigation (Id., SPC-R. 2054). Indeed, Dr. Ernest Miller's April 21, 1995, report contained only his opinion about Mr. Shellito's competence (Def. Ex. 2). Dr. Miller had only received the arrest and booking report as background information (Def. Exs. 2 and 3). Eler's billing records reflect no other contact with Dr. Miller prior to or after receiving his report (Def. Ex. 4).

Indeed, it was not until June 26, 1995, shortly before trial, that Eler even began to request background records on Mr. Shellito, including his prior mental health treatment records from various hospitals (SPC-R. 2092-3, Def. Ex. 7). Most of the records were not requested until the week before Mr. Shellito's penalty phase commenced, despite the recess between guilt and penalty phase. See Def. Exs. 7, 9, 10, 11, 12, 13, 14, and 15. The records which Eler did receive were just a day or two before the penalty phase was scheduled to commence; most were picked-up the day before (SPC-R. 2098, Def. Exs. 9, 10).[4]

[4]Eler's notes reflect that he was unable to obtain the Grant Hospital records due to the fact that there was no time to pre-pay for the records (Def. Ex. 10). Indeed, Mr. Shellito's postconviction investigator, Rosa Greenbaum testified that the records from Grant were not included in Eler's original trial file when it was provided to postconviction counsel, with the exception of the one page discharge summary that was obtained from the Charter Hospital records (SPC-R. 3421). Ms. Greenbaum obtained the records from Grant Hospital (Id.).

Two days before Mr. Shellito's penalty phase was scheduled to commence, and before he had received most of the background records, Eler faxed Dr. Miller a one page discharge summary from Grant Center Hospital.[5] That same day Eler spoke to Dr. Miller for a few minutes and decided that Dr. Miller would not be helpful because he would do more harm than good in testifying as to Mr. Shellito's competency and/or capacity to appreciate the crime that he committed" (SPC-R. 2123-4). Eler decided that he did not want the jury to know that Mr. Shellito knew right from wrong (SPC-R. 2125). However, Eler admitted that he never discussed with Dr. Miller mental health issues about how the DSM instructs that a mental health examiner should not diagnose antisocial personality disorder without ruling out a diagnosis of organic brain damage; or how organic brain damage may cause an individual to appear as a manipulator (SPC-R. 2129); or how a split between an individual's verbal and performance IQs is a red flag for brain damage; or how Mr. Shellito had been diagnosed with organic brain disorder (SPC-R. 2153); or how Mr. Shellito was diagnosed with borderline intellectual functioning in 1990 (SPC-R. 2137); or Mr. Shellito's use of Prozac when he was a juvenile (PC-R. 2140); or Mr. Shellito's suicide attempts and overdose of Tegretol[6] (SPC-R. 2146; 2152); or the fact that Mr. Shellito was recommended to receive psychiatric treatment (SPC-R. 2150); or that use of drugs and alcohol may exacerbate the deficits caused by brain damage (SPC-R. 2159). Thus, while Eler obtained voluminous records about Mr. Shellito's previous mental health treatment, suicide attempts, diagnosis of organic brain disorder and treatment with drugs (Tegretol, Prozac and Navene), he did not provide the records to Dr. Miller (SPC-R. 2153).

2. Richard Bays

The trial prosecutor, Assistant State Attorney Jay Plotkin testified that Bays had been charged with armed robbery with a firearm by an information, dated September 20, 1994, along with Mr. Shellito (SPC-R. 3290). A week later, Bays was served with a notice of intent to prosecute him as a career criminal by which Bays would have been facing a life sentence, with a fifteen year minimum mandatory, if convicted (SPC-R. 3290-1). Plotkin sent Bays a notice of withdrawal of the habitual violent felony offender on July 17, 1995, the day jury selection began in Mr. Shellito's capital case (SPC-R. 3291), in which Bays was expected to be a key prosecution witness in both establishing Mr. Shellito's guilt and the aggravating circumstances in the penalty phase.

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[5] Alan Chipperfield, a experienced capital trial attorney testified that it is important to gather background materials as quickly as possible, "primarily because the experts need records **in order to reach accurate conclusions**." (SPC-R. 3406)(emphasis added).

[6] Eler had no idea what Tegretol was (SPC-R. 2146).

At the evidentiary hearing, Plotkin attempted to explain why Bays could not be prosecuted as a habitual violent felony offender citing an opinion that had been issued eighteen months prior to Bays' being charged as a habitual violent felony offender and claiming that he had "made a mistake" (SPC-R. 3292-4).[7] Bays' case was continued several times (SPC-R. 3301-3). After his testimony at Mr. Shellito's capital case, Plotkin and Bays negotiated a deal where Bays pleaded to a lesser charge – accessory after the fact to armed robbery, and he received 13 months, less than what he had already served in jail awaiting trial (SPC-R. 3297-8). Plotkin admitted that he made a conscious decision to dispose of Mr. Bays' case after the Shellito case (SPC-R. 3302). That is so because then the cooperating witness, in this case Bays, will testify at (Mr. Shellito's) trial, that there is no deal which is what the State prefers (SPC-R. 3306). Indeed, on cross-examination Plotkin admitted:

> A: There was no specific deal with Mr. Bays.
>
> Q: Was the only deal with Mr. Bays that you testify truthfully and we'll talk about it later?
>
> A: **He knew that if he testified truthfully that would be taken into consideration**.

(SPC-R. 3328).[8]

Plotkin also conceded that he did not correct Bays' false testimony at Mr. Shellito's trial as to what possible sentence Bays was facing (SPC-R. 3345).

After Mr. Shellito's trial, Richard Bays, who was a key witness at both the guilt and penalty phases, was asked how he had been released so quickly on the charges he had (SPC-R. 2886-7). Bays responded that it was either "him or me", referring to Mr. Shellito and admitted that he got a "deal" (SPC-R. 2887). **3. Mental Health and Background Mitigation**

a. Mental Health

In postconviction, Mr. Shellito presented the testimony of Dr. Elias Sarkis, a psychiatrist, Dr. William Riebsame, a psychologist, Dr. Craig Beaver, a neuropsychologist, and Dr. Joseph Wu, a psychiatrist. The experts all agreed that Mr. Shellito suffered from organic brain damage (SPC-R. 2313, 3151).

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[7] A reading of the case Plotkin relied upon in "making a mistake" shows that he, in fact, did not make a mistake and Bays was correctly charged as a habitual violent felony offender. See Johnson v. State, 616 So. 2d 1 (Fla. 1993).

[8] Plotkin believed that Bays knew he could help himself by assisting the State (SPC-R. 3360).

i. Dr. Sarkis

Dr. Sarkis was Mr. Shellito's treating physician when he was a patient at Grant Hospital in 1991 (SPC-R. 2951). Dr. Sarkis explained that Grant was a "large child and adolescent psychiatric hospital located in central Florida" (SPC-R. 2951). Mr. Shellito was in the acute hospital program, so he was getting "more active evaluations" and participating in a lot of different programs (SPC-R. 2951).

Dr. Sarkis conducted an extensive evaluation of Mr. Shellito that included neuropsychological testing, a full psychiatric interview, including obtaining social and background information, medication management, and a speech and language specialist evaluated him as well as a dietician because he had abnormal labs (SPC-R. 2953-4). The EEG conducted on Mr. Shellito's brain showed left anterior and left temporal problems, i.e., the anterior part of the brain corresponds to the frontal lobe which is where the executive functioning occurs (SPC-R. 2955). Executive functions include: "planning, organizing, looking into the future, being able to formulate, you know, your plan for your life or your plan for your day or anything like that." (SPC-R. 2956). Due to the problems with Mr. Shellito's brain, Mr. Shellito was believed to be functioning at a lower age than his chronological age (Id.). The neuropsychological testing was consistent with what was found by the EEG (SPC-R. 2958).

Dr. Sarkis commented about the results of his evaluation:

. . . "the picture was pretty consistent of, you know, somebody that had some brain dysfunction, in addition he was being raised in a very dysfunctional family and was at a great deal of impulsivity and a great deal of frustration tolerance . . ." (SPC-R. 2959). Dr Sarkis went on to say that based on his evaluation, Mr. Shellito:

> had organic brain syndrome, which basically means that his brain is not quite wired the way other people's brains are wired, and his greatest difficulties – they've been there since he was five years old, have been, you know, inadequacy, feelings of inferiority, a great deal of impulsivity, low frustration tolerance and, you know, an anger problem that he really couldn't deal with.
>
> Q: And these – these types of behaviors that you're talking about and problems, I mean the impulsivity, the anger, is that – that's based on things that are going on in his brain?
>
> A: Absolutely.
>
> Q: It's not something he can control?
>
> A: No.

(SPC-R. 2963).

Dr. Sarkis believed that Mr. Shellito responded well to medication and prescribed him Tegretol (SPC-R. 2966). The medicine

helped Mr. Shellito remain calmer because it stabilized the neurons in his brain (SPC-R. 2967). Dr. Sarkis believed that upon discharge Mr. Shellito needed: a structured setting, to be restricted from using drugs and alcohol, and to receive outpatient treatment (SPC-R. 2968). Dr. Sarkis was worried about Mr. Shellito leaving the facility because "his family did not seem structured enough" and he worried that Mr. Shellito would stop taking the medication (SPC-R. 2968). Dr. Sarkis recommended a residential placement, but Mr. Shellito's parents did not follow through with that part of his treatment plan (SPC-R. 2969).

The experts also agreed that the background materials in Mr. Shellito's case were particularly important (SPC-R. 2971)("they absolutely cement the diagnosis"). As Dr. Riebsame explained, the records contained the organic brain disorder diagnosis prior to the offense; the learning disability diagnosis that was made when Mr. Shellito was a young child which "probably reflects the organic brain damage"; the abnormal EEG result; the positive effects of Tegretol; as well as all of the information related to Mr. Shellito's family dysfunction" (SPC-R. 2319). Dr. Sarkis added that the bed wetting until Mr. Shellito was fourteen and episodes of narcolepsy, which were contained in the background records, indicate brain dysfunction (SPC-R. 2974).

ii. Dr. Riebsame and Dr. Beaver

Dr. Riebsame conducted some neuropsychological testing of Mr. Shellito, reviewed voluminous background records and conducted a clinical interview with Mr. Shellito. Likewise, Dr. Beaver conducted neuropsychological testing. Drs. Beaver and Riebsame's neuropsychological testing was consistent with the 1991 neuropsychological testing that showed impairment in Mr. Shellito's executive functioning, i.e., impairment with impulse control, problem solving, planning and foresight (SPC-R. 2315, 3153, 3158-9. Indeed, Mr. Shellito falls in the third percentile as to his executive functioning (SPC-R. 2315). Dr. Riebsame described Mr. Shellito's organic mental disorder as "ominous" because it is "who they are by their biology" (SPC-R. 2442). Dr. Beaver explained that brain damaged individuals experience "a lot of mood variability" and they are "less able to cope or handle stressful or difficult situations" (SPC-R. 3159).

The intelligence testing that was conducted by Dr. Riebsame demonstrated that Mr. Shellito functioned in the borderline range (SPC-R. 2311). Mr. Shellito's IQ score was consistent throughout his academic career, with the first IQ test being administered to him when he was only five years old (SPC-R. 2311). Mr. Shellito's test scores and school records indicated a "learning disability as well as significant attentional problems, problems with concentration, problems with impulse control." (SPC-R. 2312). The split between his verbal and performance IQ scores was significant and was a red flag that Mr. Shellito suffered from organic brain damage (SPC-R. 3157).

Mr. Shellito's background records were consistent and corroborative with the test results. Dr. Riebsame pointed out that Mr.

Shellito's school records indicated that he was non-verbal at the age of five which is unusual (SPC-R. 2316). In addition, educators observed that at school he was eating glue, very hyperactive, aggressive with other children, but withdrawn from adults (Id.). Outside of school, at five, Mr. Shellito was observed wandering around the neighborhood without supervision, smoking cigarettes (SPC-R. 2317).

Dr. Riebsame noted that school officials had referred Mr. Shellito for treatment as a child and that treatment continued through his early and middle adolescence (Id.).[9] Mr. Shellito was treated with various medications, including antidepressants. At this time Mr. Shellito was diagnosed with behavioral problems, including oppositional defiant disorder and conduct disorder[10] (Id.). However, in 1991, Mr. Shellito was institutionalized and subjected to a comprehensive mental health assessment. At that point he was diagnosed with organic brain damage and prescribed Tegretol (Id.).

Dr. Riebsame explained that Tegretol is a mood stabilizing drug (Id.). The records reflected that Tegretol had a beneficial effect on Mr. Shellito because it calmed him down, allowed him to concentrate and sleep better and caused him to be less aggressive (SPC-R. 2318). However, after being released from in-patient treatment, Mr. Shellito:

> makes a suicide attempt, swallowing about 20 Tegretol tablets, gets hospitalized again. That hospitalization makes the recommendation that he be placed in another adolescent psychiatric facility until he's at least 18 years of age. They're aware of what's going on at home as well, those mental health professionals, but the father does not want his son put in this facility. The records suggest it's a financial decision made by the parent.

(SPC-R. 2318).

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[9] Dr. Beaver testified about the difficulties Mr. Shellito faced in school due to his suffering from organic brain damage:

> . . .those persons [with brain damage] have considerable difficulty [in school]. They don't learn at the same rate as other students, school tends to be frustrating for them. They have difficulty conforming their behavior to what's expected in the classroom.
>
> We see, for example, with Mike Shellito from almost the very beginning he was in special classes just for emotionally or learning disabled students. In fact, ended up in a self-contained classroom because his level of difficulties was so substantial.

(SPC-R. 3159).

[10] Dr. Sarkis testified that a diagnosis of conduct disorder is simply a description of behaviors, but does not explain from what the behaviors stem (SPC-R. 2977).

Dr. Riebsame diagnosed Mr. Shellito with bipolar disorder, not otherwise specified, alcohol dependence[11], cannabis dependence and organic brain disorder (SPC-R. 2321, 2323).[12] Dr. Riebsame believed that the bipolar was likely due to the organic brain damage (Id.).

Likewise, Dr. Beaver diagnosed Mr. Shellito with organic brain disorder, a mood regulation disorder, including problems with depression that is reflective of a bipolar type disorder (SPC-R. 3170).

Furthermore, even from the age of five, it was clear that Mr. Shellito's behavior evidenced "severe family dysfunction." (SPC-R. 2327). The records support physical and sexual abuse as well as neglect of Mr. Shellito throughout his life. Dr. Beaver testified that family support is very important for a brain damaged individual (SPC-R. 3162). Dr. Beaver explained that consistent family stability can assist a brain damaged individual to learn the skills needed to master his environment, but a unstable family environment can cause further issues (SPC-R. 3162-3). For example, Mr. Shellito struggled with depression as he moved into his adolescence, which included at least one suicide attempt (SPC-R. 3167).

Indeed, Dr. Beaver noted that Mr. Shellito's father was an alcoholic and his mother used marijuana so his family life contributed to his own abuse of drugs and alcohol (SPC-R. 3166).

Drs. Riebsame and Beaver opined that at the time of the offense, Mr. Shellito suffered from an extreme mental or emotional disturbance based on Mr. Shellito's organic brain damage (SPC-R. 2331, 3172-3). The experts also believed that Mr. Shellito's ability to conform his conduct to the requirements of the law was impaired (SPC-R. 2331, 3174).

Finally, the experts believed that the age mitigator would apply to Mr. Shellito. At the time of the offense, he was eighteen years old and, in addition, he was emotionally and intellectually much younger (SPC-R. 2333, 3174)("probably a mental age . . . [of] 15, 14. Emotionally, given the emotional disturbance, we're looking at someone in their early adolescence, 12 or 13 years of age, so he's a very young person mentally and emotionally."). Mr. Shellito is not mature (Id.).

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[11]Dr. Riebsame explained that it is not uncommon for individuals who suffer from organic brain damage to use alcohol and drugs to self medicate, particularly when their environment offers and supports it, like Mr. Shellito's (SPC-R. 2330). That is so because alcohol and drugs, like marijuana, calms individuals, like Mr. Shellito, though making him further impaired (Id.). Indeed, Mr. Shellito's alcohol and drug consumption would cause him to become even more impulsive (SPC-R. 2469, see also SPC-R. 3161). Dr. Sarkis concurred with Dr. Riebsame'e explanation (SPC-R. 2974-5).

[12]Dr. Riebsame explained that mental health examiners are instructed not to diagnose personality disorders in young offenders, like Mr. Shellito, because the behaviors may be related to psychiatric problems or family dysfunction, like in Mr. Shellito's case (SPC-R. 2325).

As to non-statutory mitigation, Dr. Riebsame noted: Mr. Shellito's parents suffered from their own mental health problems; his parents were physically and emotionally abusive and neglectful of him; his father was an alcoholic (SPC-R. 2336); Mr. Shellito was malnourished as a child (SPC-R. 2454); Mr. Shellito's suicide attempts and episodes of running away from home (SPC-R. 2336); Mr. Shellito's use of alcohol and marijuana shortly before the offense and his longstanding substance abuse (SPC-R. 2469).

iii. Dr. Wu

Dr. Wu interpreted the PET Scan images that were obtained from Mr. Shellito. Dr. Wu testified that the images showed a pattern that was consistent with brain abnormality in the form of organic trauma and bi-polar disorder (SPC-R. 2653-4; 2566). Specifically, Mr. Shellito's images showed abnormalities in his frontal lobe and left temporal lobe (SPC-R. 2566). Dr. Wu explained that the frontal lobe controls an individual's judgment and "ability to inhibit acting out of inappropriate impulses" (SPC-R. 2665). Also, the left temporal lobe controls the regulation of emotions, like depression and mania (Id.). Dr. Wu also had the opportunity to review the background records (Def. Exs. 32, 33, 34), and stated that the information in the records correlated with the abnormalities that were apparent in Mr. Shellito's Pet Scan images (SPC-R. 2663-4).

b. Background Mitigation

In addition to the mental health mitigation, had trial counsel adequately investigated Mr. Shellito's family and personal background he would have discovered a plethora of nonstatutory mitigation.

Michael Shellito's kindergarten teacher, Allison Winnicki-Tycoliz, met the Shellitos when Mike was five years of age. She quickly learned that Mike's father was an alcoholic (SPC-R. 3374). She also learned that Mike was unsupervised and would roam the neighborhood late at night (SPC-R. 3378). Also, Mike was not being fed at home and would eat anything he could get his hands on, including glue, paper and pencils (SPC-R. 3377). He would scavenge through garbage cans in the neighborhood, too (SPC-R. 3378). Ms. Winnicki-Tycloz believed he was malnourished (SPC-R. 3378). As Mike's teacher she provided a chilling description of what she observed about Mike:

> [h]e had problems in the classroom relating to other children and he would have mood swings, he would eat glue and he would eat paper, chew on pencils. He would be fine one minute and then he would just kind of – something would come over him and he couldn't control himself and obviously it was interfering with the education of some of the other children and some of the other children were actually frightened of him.
>
> * * *
>
> . . .[H]e wouldn't talk to a lot of other adults or children and he – I had a lot of compassion and sympathy for Michael and he used to sit on my lap and he would cry and sometimes and he would tell me he didn't want to be like he was but he couldn't help himself, he did not know why he was like that.

(SPC-R. 3375-6). Mike tried to relate to other children, but he just couldn't (SPC-R. 3378). Mike had a fear of adults and would hide under the table and thought that they were going to hit him (SPC-R. 3379). Her observations led her to refer Mike for a psychological evaluation (Id.).

Mike was six years old at the time of the evaluation, but he was operating at the emotional level of a two and a half year old and functioning way below that as far as his IQ and his educational ability (SPC-R. 3376-7). After the evaluation, school officials decided to leave Mike in Mrs. Winnicki-Tycolz' class because it "was the one stability that he had in his life." (SPC-R. 3376).[13]

Throughout Mike's life, his family struggled financially and lived in "very rough" and very poor neighborhoods surrounded by racial tension, violence and drugs (SPC-R. 2495, 2541, 2545). There were no values that were fostered in the neighborhood (SPC-R. 2511). The Shellito's financial woes were exacerbated by Mike's father's alcoholism and his mother's gambling addiction (SPC-R. 2514).

[13]Likewise, Johnnie McKenzie was Mike's school teacher for five years. She taught the emotionally handicapped class at the school Mike attended in Duval County (SPC-R. 3425). Like Ms. Winnicki-Tycolz, she realized that Mike could not work at grade level (SPC-R. 3425). She also noticed signs of abuse and neglect from his parents (Id.). Mike would come to school hungry and disheveled. Ms. McKenzie actually bought Mike a clean set of clothes to change into while he was at school (Id.). "She said that he would start the day in a bad mood everyday, but then by the end of the day he would get a little bit better, but he needed a lot of attention." (Id.).

The violence outside of the Shellito home did not stop when their doors were closed. Rather, both of Mike's parents physically and verbally abused him (SPC-R. 2497; 2516). Mike's mom would hit him with shoes, spoons or whatever she could get her hands on (SPC-R. 2516). Mike's mom also sexually abused him (SPC-R. 2518).[14] After Mike's dad retired from the Navy, he would hit Mike with his hands, but, then that escalated into his fists, brooms and even a knife, once (SPC-R. 2821). Mike's sister, Rebecca Shellito[15], recalled three incidents where the police came to the house because of the beatings (SPC-R. 2822).

And, Mike's parents did not get along and often had altercations over Joe Sr.'s drinking and Migdalia's infidelities and gambling (SPC-R. 2517, 2814). Mike's mom would invite boyfriends to come over and would openly have sex with them (SPC-R. 2518; 2798). Some would move in with her and her children. In addition, Mike's mom would go out with her boyfriends and not return for days at a time (SPC-R. 2799). This pattern started when Mike was about three (Id.). Rebecca recalled a time when her mom left and she and Joe, Jr., went to school, upon their return, they found Mike in a diaper wandering through the garage by himself (SPC-R. 2799). Rebecca had to break into the house to get in (Id.). This scenario was not unusual for the Shellitos (SPC-R. 2800). Mike's mom would leave to "party" and would not make any arrangements for supervision or even food for her children and she would not return for a few days (SPC-R. 2801). If it was a school day, Rebecca and Joe, Jr., would leave Mike home alone (Id.).

Once, while Mike's mom was off with a boyfriend the Shellito house caught fire (SPC-R. 2816-7). The fire started in a bed where Mike was actually sleeping. Luckily, Mike's aunt was at the house and was able to save Mike from the fire (Id.).

Finally, a neighbor reported Migdalia to the police (SPC-R. 2824). She responded to the report by allowing her seventeen year old nephew who had been molesting her nieces to come live at the house (SPC-R. 2823-4). The nephew then proceeded to molest Mike's sister (Id.). When Rebecca told her mom about the sexual abuse, her mom accused her of trying to keep her home (Id.). Rebecca told Mike about the sexual abuse, too (Id.).

Mike's mom used marijuana openly and daily (SPC-R. 2802). Sometimes she would take her children with her when she needed to buy drugs (SPC-R. 2803). Indeed, Rebecca recalled a time when Mike was about eight years old when her mom took her children to buy

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[14]Mike's mom would have him simulate breast feeding through his late teens: "[S]he would say, Michael, act like a baby, and he would put his head in her lap and she would take her boobie out . . ." (SPC-R. 2831).

[15]Rebecca Shellito testified at Mr. Shellito's penalty phase. Her first and only interview with Eler occurred five minutes before she testified (SPC-R. 2838). Rebecca recalled that Eler asked her if her dad drank and what kind of trouble Mike got into (Id.).

drugs (Id.). Just after buying marijuana, a police officer attempted to stop her vehicle (Id.). Mike's mom made her children eat the marijuana so that the police officer would not find it in the car (Id.).

Other times Mike's mom would abandon her children for periods of time due to her own mental health problems[16] (SPC-R. 2519-20). She once left the family and specifically told her husband that she refused to take Mike with her (SPC-R. 2521).

Mike's mom suffered from depression and every few months her children would find her sleeping all the time (SPC-R. 2805). If the children did anything to wake her she would give them a whipping (Id.). A "whipping" comprised of Migdalia hitting her children with anything she could get her hands on – shoes, hangers, electric cords, her hands (SPC-R. 2806-7). At these times anything could set her off (Id.). The whippings were a daily occurrence when Migdalia was depressed, sometimes she would whip her children more than once a day (SPC-R. 2807). Rebecca also recalled: "Now, sometimes when she would be drinking with her friends, that was funny to her. She'd say, watch, I'm going to make them dance" and she hit her children with the wire from the toaster oven (Id.).

During these times, Mike's mom would also tell him and his siblings that they ruined her life and that she wished she'd never had them (SPC-R. 2808).

When Mike was two years old he was placed in foster care (SPC-R. 2790, Def. Ex. 36). Mike's father was at sea and the family was evicted from an apartment. Mike's mom had the children living in her car near the naval base (SPC-R. 2790). The children would spend the day playing in the parking lot or on the jetties (SPC-R. 2793). The family had no money for anything, including diapers for Mike (SPC-R. 2793-4). After living in the car for a month or so, Mike's mom went to the chaplain's office on the base and threatened to kill her children (SPC-R. 2790).

Mike reacted to the instability and uncertainty of his home life by trying to stay away as much as possible (SPC-R. 2500-1). He was often by himself (SPC-R. 2815, 2828, 2921). Rebecca thought Mike was depressed (SPC-R. 2828). He did not have any friends (SPC-R. 2828, 2871). Mike also turned to drugs and alcohol at a young age (SCP-R. 2545, 2872, 2881). In his teenage years, Mike consumed alcohol and marijuana on a daily basis (SPC-R. 2774, 2872-3, 2881-2, 2902-3, 2924). He would drink until he passed out (SPC-R. 2774).

Mike peers also abused him as he was picked on because of his stutter (SPC-R. 2522); they called him "retarded" (SPC-R. 2829) and "a dummy" (SPC-R. 2923). Mike's brother testified that Mike's stutter was so bad that he would get frustrated because he could not

[16] Joe, Jr. believed that his mom suffered from depression due to her own unstable and violent upbringing (SPC-R. 2523). She used marijuana and alcohol to cope with her depression (Id.).

communicate with others (SPC-R. 2522). Those kids took advantage of Mike and made him do silly things for their own amusement (SPC-R. 2526). Mike was a follower and easily influenced by other kids (SPC-R. 2544, 2921-2).

Mike's peers believed he was mentally disturbed and would pick on him for that, too (SPC-R. 2871, 2879, 2923). Johnny Hill recalled that Mike was unpredictable, moody and childish (SPC-R. 2879). Hill elaborated: "sometimes he wouldn't understand what you're saying and he'd think you're talking about him or something . . . " (SPC-R. 2880). Mike's peers made fun of him because of the way he dressed and the fact that he did not have much money (SPC-R. 2872). Oly Antonio testified that Mike reacted to being picked on and made fun of by getting emotionally frustrated; he would cry and talk to himself (Id.).

Mr. Shellito was described as an emotional child and adolescent, he would often cry and isolate himself from his family and peers (SPC-R. 2501-2, 2513, 2780, 2828). Mike's sister testified that as a toddler Mike had temper tantrums and would bang his head against a wall (SPC-R. 2796-7). When Mike entered kindergarten his odd behaviors became more noticeable (SPC-R. 2811). He began to fall asleep at times and places that were unexpected (Id).

And though Mike was a tall teenager, he was not mature (SPC-R. 2542-3; 2780). Rebecca thought he seemed much younger than he was (SPC-R. 2828). His brother, Joe, Jr., testified that Mike was different from other kids, both academically and emotionally (SPC-R. 2513). When Mike did make a friend, he was usually younger because he was more accepted by younger kids (Id.; 2828). Also, Mike could not learn to read (SPC-R. 2522). Those who knew him described him as slow (SPC-R. 2542).

Mike only had one girlfriend as a teenager – she was close in age to him (SPC-R. 2834). But, Mike's mom allowed her friends to ply Mike with beer and have sex with him when he was a teenager (SPC-R. 2833).[17]

Mike moved in with Rebecca when he was seventeen. She recalls that he had a drinking problem and he had difficulty controlling himself when drinking (SPC-R. 2835). He also smoked marijuana on a daily basis while living with her (SPC-R. 2836).

[17]Mike's mom also forced her daughter to have sex with their landlord when Rebecca was sixteen for $250.00 (SPC-R. 2832).

Rebecca Allen[18] had lived with Mike and his girlfriend in the early part of 1994 (SPC-R. 2780). Mrs. Allen testified that Mike was emotional and moody (SPC-R. 2780, 2903). Mike would get upset if Rebecca argued with him; "it was like an emotional roller coaster being around him" (Id.). When Mike consumed alcohol and marijuana, which was a daily occurrence, his emotions intensified (SPC-R. 2781, 2903).

On August 30, 1995, just hours before Mr. Hawthorne was shot, Quinn Edwards and Mike were drinking and smoking marijuana. Edwards testified about what he knew about the hours preceding the shooting:

> A: [Jennifer] had to go check in, but we weren't allowed around her parents. So we was waiting for Jennifer to come back and pick us up. She never came back.
>
> Q: Did she – what do you mean? She just – where were you guys? Where did she leave you?
>
> A: She just dropped us off and said she'd be back. It was in the neighborhood. When she didn't show back up, we ended up getting transportation on our own.
>
> Q: What does that mean?
>
> A: We took a van.
>
> Q: You broke into a van and . . .
>
> A: Yes, ma'am.
>
> * * *
>
> Q: . . .So when you were with Mr. Shellito the night that you stole the van, was he drinking that night?
>
> A: Yes, ma'am.
>
> Q: What was he drinking?
>
> A: He was drinking Schlitz Malt. He was drinking quarts of beer.
>
> Q: After you got the van, where did you two go?
>
> A: We went to Steve Gill's in Colonial Forest. ...

(SPC-R. 2905-6). Edwards also testified that Mike was "drunk" and had been smoking marijuana (SPC-R. 2907-8).

[18] Ms. Allen specifically requested to meet with Mr. Eler about her knowledge of Mr. Shellito, including how emotional he was and how he was a good friend to her (SPC-R. 2783-4). Mr. Eler met with Ms. Allen and she provided him with the information she had about Mike (Id.). She was not asked to testify at the penalty phase.

The night that Mike was arrested, he was seen by his friends at the grocery store between 7:00 and 8:00 p.m. (SPC-R. 2775, 2884). It was apparent that Mike had already been drinking (he had a buzz), and he was buying more beer (Id.).

SUMMARY OF ARGUMENT

Mr. Shellito's trial counsel was woefully deficient at both his guilt and penalty phases. Trial counsel's deficient performance allowed the jury to hear highly prejudicial evidence at the guilt phase without challenging it. And, deprived the jury from hearing substantial evidence of statutory and nonstatutory mitigation at the penalty phase. In addition, trial counsel also failed to challenge the aggravators used against Mr. Shellito and failed to ensure that Mr. Shellito received a proper penalty phase. The evidence presented by Mr. Shellito in postconviction undermines confidence in the outcome of the case. Furthermore, Mr. Shellito was deprived of his right to due process at trial when the prosecution's key witness expected to be, and was, rewarded for his testimony against Mr. Shellito.

Additionally, Mr. Shellito was deprived of his right to competent mental health assistance throughout his trial proceedings.

Relief is warranted.

ARGUMENT

ARGUMENT I

THE CIRCUIT COURT ERRED IN DENYING MR. SHELLITO'S CLAIM THAT HE WAS DENIED AN ADEQUATE ADVERSARIAL TESTING AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE MITIGATING EVIDENCE AND TO ADEQUATELY CHALLENGE THE STATE'S CASE. AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE.

A. DEFICIENT PERFORMANCE

At the time of Mr. Shellito's capital trial, trial counsel had an absolute obligation to investigate and prepare mitigation for his client. See Rompilla v. Beard, 545 U.S. 374, 387 (2005). Likewise, this Court has held: "[A]n attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." State v. Riechmann, 777 So. 2d 342, 350 (Fla. 2000), quoting Rose v. State, 675 So. 2d 567, 571 (Fla. 1996).

In Wiggins v. Smith, 539 U.S. 510 (2002), the United States Supreme Court examined the investigation done by trial counsel in a capital murder case. When defense counsel failed to follow-up on evidence of their client's troubled past, their representation was deemed ineffective assistance of counsel in violation of Strickland. Id. at 534. Throughout the Court's analysis of what constitutes effective assistance of counsel, they turned to the American Bar Association (ABA) Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. See id. at 522-4.

At the time of Mr. Shellito's trial, under the American Bar Association (ABA) Guidelines, trial counsel in a capital case "should comprise efforts to discover **all reasonably available** mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p 93 (1989) (emphasis added)."[19] Indeed, the ABA Guidelines, set forth specific requirements which should be met from the initial appointment on a case through its conclusion. Guideline 11.4.1(c) states, "the investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." In order

[19]The ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases was updated in February 2003. However, references in this case will be from the edition that was in effect from 1989 to February 2003, during the time of Mr. Shellito's trial.

to comply with this standard, counsel is obliged to begin investigating **both** phases of a capital case from the beginning. See id. at 11.8.3(A).[20]

This includes requesting all necessary experts as soon as possible. See Commentary on Guideline 11.4.1(C). The sources of investigative information include:

> Collect information relevant to the sentencing phase of trial, including, but not limited to: Medical history, (mental and physical illness or injury of alcohol and drug use, birth trauma and developmental delays); educational history (achievement, performance and behavior) special education needs including cognitive limitations and learning disabilities); . . . family and social history (including physical, sexual or emotional abuse); prior adult and juvenile record; . . . and religious and cultural influences.

Guideline 11.4.1(D)(2)(C)

[20] It is clear that trial counsel did not prepare for the penalty phase proceeding until after the jury convicted Mr. Shellito. Trial counsel informed the court that he could not "adequately prepare[] for the penalty phase of trial while trying the guilt phase of trial" (R. 205). Trial counsel was concerned with th adequacy of time on his part (SPC-R. 2087).

In Mr. Shellito's case, trial counsel's performance was woefully deficient. Trial counsel failed to discover much of information concerning his 19 year old client's young life.[21] Trial counsel spoke to no potential lay witnesses, other than Mr. Shellito's immediate family members about Mr. Shellito's family life. And, trial counsel's communication with Mr. Shellito's brother and sister was confined to a brief conversation, shortly before their testimony (SPC-R. 2527, 2838, 2842). The extent of trial counsel's investigator's work on the penalty phase was limited to attempting to obtain releases from Mr. Shellito[22] and picking up records from various agencies.

[21]Mr. Shellito was 18 years of age at the time of the crime.

[22]Apparently trial counsel and his investigator were unfamiliar with the language contained in the release required to obtain confidential records, like mental health records, school records and hospital records and thus, obtaining the correct releases required numerous attempts. To make matters worse, trial counsel did not even seek to obtain releases from Mr. Shellito until August 7, 1995, less than two weeks before Mr. Shellito's capital penalty phase was scheduled, eventhough Mr. Shellito's mother had provided information about Mr. Shellito's previous mental health treatment and school on June 26, 1995 (Def. Exs. 7, 9, 50).

Additionally, trial counsel either failed to obtain the records regarding Mr. Shellito's background at all, or obtained them within one or two days of the penalty phase (SPC-R. 2101-5, 2109, 2112, 2119-22, Def. Exs. 9, 50). Trial counsel only supplied a single page of the hundreds of pages he did obtain to his mental health expert (SPC-R. 2113-4; Def. Ex. 16),[23] and his conference with his mental health expert occurred before obtaining a complete set of background records on Mr. Shellito (SPC-R. 2114-5, Def. Exs. 16, 17).[24]

[23]Trial counsel relied on his expert to request background records (SPC-R. 2153).

[24]Perhaps trial counsel failed to pursue background records and a adequate mental health evaluation because he believed that at the time of Mr. Shellito's capital trial, mental health mitigation was viewed as "blaming" a defendant's actions on mental health rather than explaining those actions (SPC-R. 2129). However, such a "strategy" demonstrates a misunderstanding and lack of knowledge of the law.

Trial counsel characterized the mental health and school records as "detrimental" and "bad" and relied on Dr. Miller's opinion diagnosing Mr. Shellito with antisocial personality disorder, which he believed did not amount to mitigation (SPC-R. 2584). However, trial counsel candidly admitted that he did not discuss with his expert: 1) that an expert must rule out brain damage before diagnosing antisocial personality disorder; 2) that Mr. Shellito must have needed medication "for something" when he was prescribed Prozac; 3) that the diagnosis of defiant disorder may be the behavior, or symptom of brain damage; 4) what Tegretol is used to treat; 5) whether Tegretol and/or hyperactivity are relating to brain damage or a symptom of brain damage; 6) what Navane is used to treat; or anything else that the records indicated (SPC-R. 2129, 2140, 2145-6, 2147). And, trial counsel did not believe that even a diagnosis of antisocial personality disorder has been recognized as mitigating[25]; or that drug and alcohol is to be considered valid mitigation[26] (SPC-R. 2567-9, 2584).[27] Trial counsel's

[25]In Morton v. State, this Court held: "Both the United States Supreme Court and this Court have determined that a defendant's antisocial personality disorder is a valid mitigating circumstance for trial courts to consider and weigh. See *Eddings v. Oklahoma, 455 U.S. 104, 107, 115, 71 L. Ed. 2d 1, 102 S. Ct. 869 (1982); Robinson v. State, 761 So. 2d 269, 273 (Fla. 1999),* cert. denied, *529 U.S. 1057, 146 L. Ed. 2d 466, 120 S. Ct. 1563 (2000); Snipes v. State, 733 So. 2d 1000, 1003 (Fla. 1999); Rutherford v. State, 727 So. 2d 216, 224 (Fla. 1998); Wuornos v. State, 676 So. 2d 966, 968, 971 (Fla. 1995).*" 789 So. 2d 324, 329-330 (Fla. 2001).

[26]Contrary to trial counsel's testimony, a defendant's chemical dependency on drugs and/or alcohol constitutes valid mitigation and it is unreasonable to fail to present such evidence to a penalty phase jury. See e.g., Hardwick v. Crosby, 320 F.3d 1127, 1163 n9 (11th Cir. 2003), where the Eleventh Circuit Court of Appeals held:

> To the extent that Tassone has attempted to justify his omission of Hardwick's drug and alcohol addictions as well as his voluntary use of drugs and alcohol during the relevant time period encompassing Pullum's murder as purposeful because of the negative effect this information would have had on the jury, we have found such alleged strategic rationale to be unreasonable. **We concluded that, when 'counsel did not probe [a capital defendant's] drug problems because they believed that a [local] jury would not be sympathetic to an account of voluntary drug use,' this was insufficient strategic reasoning to justify not presenting the evidence to the sentencing jury.** *Brownlee, 306 F.3d at 1054.* Such evidence is critical at the sentencing phase because it is relevant to the mental state of the capital defendant at the time of the murder and to the legal mitigating factor of conforming conduct to the dictates of law. **Tassone's ignorance or misunderstanding of this crucial mitigating evidence cannot masquerade in the guise of strategy.**

(Emphasis added). See also Lockett v. Ohio, 438 U.S. 586, 594 (1978); Parker v. Dugger, 498 U.S. 308, 315 (1991).

[27]Trial counsel's testimony concerning Mr. Shellito's drug and alcohol use is nearly identical to the testimony given by his former law partner in the Hardwick case. The Eleventh Circuit Court of Appeals characterized Tassone's testimony as to this issue as "ignorance or misunderstanding of this crucial mitigating evidence" and ruled that such a faulty belief could not be considered strategic. Hardwick, 320 F.3d at 1163 n9.

failure to obtain the background records in a timely manner does not reflect reasonable professional judgment.

Trial counsel failed to speak to witnesses or uncover background information and records before consulting with his expert. Thus, trial counsel's decisions at the penalty phase cannot be called "strategic" or given any deference. If trial counsel fails to engage in a reasonable investigation prior to the penalty phase, his subsequent decisions do not enjoy deference. Strickland v. Washington, 466 U.S. 668, 690-1 (1984); Wiggins v. Smith, 539 U.S. 510, 521-2 (2003); Henry v. State, 862 So. 2d 679, 685 (Fla. 2003)("A reasonable strategic decision is based on informed judgement.").

Trial counsel's deficient performance continued after the jury recommended the death penalty. Trial counsel failed to present any evidence in mitigation to the sentencing court despite his testimony at the evidentiary hearing that there would be no reason not to present evidence to the sentencing judge so that, at a minimum, the evidence would be before this Court when it conducted its proportionality review (SPC-R. 2163-4) .

Thus, contrary to the circuit court's order (see PC-R. 578)[28], it is clear that trial counsel simply did not understand mitigation and thus, from the little information he did learn about Mr. Shellito, could not determine what other avenues to investigate or how to use the little information he did have. Trial counsel was deficient.

And, trial counsel's deficient performance was not limited to his failure to adequately investigate and present mitigating evidence to challenge the State's case. Trial counsel failed to present a challenge to the aggravating circumstances presented by the State. For example, the jury was instructed "that the first degree murder for which the defendant is to be sentenced was committed for financial gain" (T. 1505). The jury was given no guidance to the elements of this aggravating circumstance in violation of the Eighth Amendment.

The law is clear that the aggravator of "pecuniary gain" is not applicable unless it is the primary or sole motive for the crime. This Court has held that this factor does not apply as a matter of law unless there is "sufficient evidence to prove a pecuniary motivation for the murder itself beyond a reasonable doubt." Peek v. State, 395 So. 2d 492 (Fla 1980); Simmons v. State, 419 So. 2d 316, 318 (Fla. 1982)(followed

[28]Though Mr. Shellito asserts that this Court must conduct de novo review of Mr. Shellito's claim pursuant to Porter v. McCollum, the only ruling that the circuit court made in relation to Mr. Shellito's claim that mitigation was not uncovered and/or presented was that trial counsel made a tactical decision not to present it (PC-R. 578). However, Eler's investigation was not reasonable and he clearly did not understand the law in regard to mental health and background mitigation. Therefore, the circuit court's three sentence analysis relying solely on Eler's testimony is not supported by the facts or the law. The circuit court failed to conduct the "probing and fact-specific analysis" of Mr. Shellito's claim, as is required by the United States Supreme Court in Sears v. Upton, 130 S.Ct. 3529, 3566-7 (2010).

in Rogers v. State, 511 So. 2d 526 (Fla. 1987)); Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988)("[I]t has not been shown beyond a reasonable doubt that the primary motive for this killing was pecuniary gain.").

Mr. Shellito's jury failed to receive any limiting instructions on the aggravator of "pecuniary gain." As a result, the instruction on this aggravator "fail[ed] adequately to inform [Mr. Shellito's] jur[y] what [it] must find to impose the death penalty." Maynard v. Cartwright, 486 U.S. 356, 361-2 (1988). Mr. Shellito's jury must be presumed to have relied on this vague jury instruction. Stringer v. Black 112 S.Ct. 1130 (1992). This was Eighth Amendment error.

Trial counsel also failed to object to the presentation and consideration of non-statutory aggravating factors. During Mr. Shellito's sentencing hearing, the State introduced and argued highly prejudicial nonstatutory aggravating evidence on several occasions. The State elicited evidence regarding the fact that Mr. Shellito's brother and sister did not have legal troubles or difficulties with socialization to highlight the fact that Mr. Shellito did suffer from such problems.

The State, through cross-examination, highlighted the fact that, unlike Mr. Shellito, his brother Joseph graduated from high school with honors and was steadily employed by the United States Navy (T. 1361-1362). The State also highlighted that Rebecca Shellito, Mr. Shellito's sister, also graduated from school and was steadily employed ever since (T. 1378). The State argued this evidence in its closing statement to the jury. In his closing, the State said of Mr. Shellito that "whatever deprivation there was his sister and his brother turned out fine. They have gone on in their lives not to be criminals." (T. 1466). The State further argued that Mr. Shellito "earned" the death penalty, with "his character, his conduct, and his crime." (T. 1449).

The judge then considered, and in fact relied on, the impermissible argument offered by the State when issuing the sentence against Mr. Shellito. In sentencing Mr. Shellito to death, the court dismissed the mitigating evidence and in fact used it as further justification for imposing the death sentence. The court wrote that while the defendant did not do well in school, "his sister and brother excelled in school, both graduated from high school (the brother with honors) and both have become successful, law-abiding citizens." (R. 397).

The sentencers' consideration of improper and unconstitutional nonstatutory aggravating factors violated the Eighth Amendment to the United States Constitution, and prevented the constitutionally required narrowing of the sentencers' discretion. See Stringer v. Black, 112 S.Ct. 1130 (1992); Maynard v. Cartwright, 486 U.S. 356 (1988). These impermissible aggravating factors resulted in a sentence that was based on an "unguided emotional response," in violation of Mr. Shellito's constitutional rights. Penry v. Lynaugh, 492 U.S. 302 (1989).

Trial counsel failed to object to the inaccurate information that was contained in the trial court's sentencing order. Inadmissible

and inaccurate evidence was relied on by the court in sentencing Mr. Shellito to death. For example, the trial court relied on Mr. Shellito's arrest, juvenile record and non-violent felony convictions; inadmissible photographs; statements from witnesses who did not testify at trial and thus, were never cross-examined (like Gill). The trial court did not even know Mr. Shellito's correct name or age at the time of the crime when he sentenced him to death. Trial counsel failed to object to the inaccurate and improper findings made in the sentencing order.[29]

Overall, trial counsel did not meet his obligations under this Court and the United States Supreme Court's caselaw or the ABA Guidelines. Trial counsel's performance was deficient.

B. PREJUDICE

Michael Shellito's story is a complicated one, but compelling, and certainly mitigating. Michael Shellito's troubles began long before he was born. His mother Migdalia, born and raised in Puerto Rico, had seen her mother die when she was a child (SPC-R. 2805). Thereafter, Mrs. Shellito was molested by her father and left home before graduating from high school to avoid the sexual abuse (Id., T. 1400). Mike's father, Joseph, met Migdalia while stationed with the U.S. Navy in Puerto Rico, and they married in 1969 (T. 1400). Their first child, Rebecca, was four years older than Mike and and their son Joe, Jr. was three years older than Mike (SPC-R. 2513, 2790).

Mike was a product on an unplanned pregnancy that occurred while Migdalia and Joe Sr. were divorced. Joe Sr., was not Michael's father (SPC-R. 2858-9). However, Joe Sr., remarried Migdalia while she was pregnant with Mike. Mike was born two weeks premature on October 7, 1975, at the Naval Base in Roosevelt Roads, Puerto Rico.

Joeseph Shellito Sr., was an alcoholic who drank and gambled most of his earnings which left the family impoverished and even homeless at times (T. 1405; SPC-R. 2790-1, 2827-8, 3373). Joe, Sr., was deployed for much of the time when his children were young and when he was home he had little to do with them (SPC-R. 2514, 2798).

Just a few days after Mike's birth Migdalia left him with Joe Sr., who had been drinking heavily as usual. Mike choked on some formula, vomited, and after turning blue, was rushed to a clinic for treatment (T. 1403-4; Def. Exs. 31, 32, 33 (referring to incident throughout)). Doctors told the Shellitos that it wasn't possible to determine whether Mike had suffered any lasting injury until he got older – they would just have to keep an eye on him (Id.).

[29] If trial counsel was provided a copy of a draft sentencing order prior to the sentencing then there is absolutely no reason not to have objected to the trial court's errors.

A few years later, in the fall of 1977, Migdalia and her three small children were evicted from their home and forced to live in their car because Joe Sr., failed to send home funds from his paycheck (Def. Ex. 36). Rebecca recalled that time and explained that her mother drove the car to the parking lot near a Navy ship (SPC-R. 2790-4). Even though Rebecca and Joe Jr., were enrolled in school neither attended (Id.). Instead, she and her two younger brothers played in the parking lot each day. (Id.). The family was able to eat meals on the ship and use the facilities during the daytime (Id.). After several weeks, Mrs. Shellito went to the Navy chaplain's office demanding assistance and threatening to kill her children if she didn't get it (Def. Ex. 36). A police report of the incident states that the children were "dirty, hungry and very fatigued." (Id.). Mrs. Shellito was arrested, charged with child abuse and, after pleading no contest, sent to jail (Id.). The kids were taken into foster care, where they remained for six weeks.

Joe Jr. and Rebecca were placed together, but two-year old Mike was by himself (SPC-R. 2794). Rebecca recalls that her foster home was abusive – she was not allowed to go to school or given food (Id.). She was physically abused and made to sit at a desk each day until it was time to go to bed (Id.). Rebecca's father was given leave to return to Jacksonville, but upon his return, he left his children in foster care (SPC-R. 2795).

Mike's odd behaviors and developmental delays may have been the result of perinatal anoxia, familial dysfunction, or a combination. Mike talked late (and with a severe stutter, though he did not receive speech therapy until 6th grade) but exhibited distress and frustration early (Def. Exs. 32, 33, 34). His sister recalls that when her younger brother was a toddler he acted strangely and had "temper tantrums" where he would bang his head against the wall (SPC-R. 2796-7).

By 1980, when Mike entered kindergarten in Key West, Florida, he had obvious intellectual and emotional deficits. Mike's kindergarten teacher, Allison Winnicki-Tycoliz remembers Mike well (SPC-R. 3373). She recalled that Mike had "severe mood swings" and was functioning much below his chronological age (SPC-R. 3375, 3376). Mike threw tantrums, fell asleep without warning, was afraid to go into the school's cafeteria, and was known to eat glue and pilfer milk (SPC-R. 3375, Def. Ex. 32, 33, 34). Mike would also sit in his teacher's lap and cry; he would tell her that he did not want to be how he was, but he could not help it (SPC-R. 3376). Ms. Winnicki-Tycoliz referred Mike for a psychological evaluation.

That same year, in October 1980, Mike was examined by a Navy physician who agreed with Ms. Winnicki-Tycoliz and found that Mike's behavioral and emotional level was that of a two or two-and-a-half year-old, though he had just turned 5, and recommended he be placed in a program for emotionally handicapped (Def. Exs. 32, 33, 34). The doctor also noted that Mike's father had an alcohol problem for

which he refused treatment (Id.).

The psychological evaluation of Mike occurred in 1981. The school psychologist reported that Mike was aggressive with other children and withdrawn and frightened around adults, "cowering from physical contact." (Def. Ex. 32, 33, 34). Upon their first encounter, Mike dug a hole in the ground and stuck his head into it (Id.). Testing revealed a low tolerance for frustration and moderate or severe deficits in all areas (Id.). She also noted that it had been suggested to Mike's mother that he be seen at the Community Mental Health Clinic but she had only taken him to two therapy sessions, and that "this family appears to be in a state of crisis." (Id.).

Teachers and school personnel also became aware that there were serious problems at the Shellito home. Ms. Winnicki-Tycoliz had been told that Mike was not being fed at home and was eating out of trash cans and breaking into houses for food (SPC-R. 3377-8). Based on these reports as well as other reports of school personnel who noted that Mike and his older sister Rebecca were often unkempt and unsupervised ("Michael's reputation in the community is equally notorious. He has been seen wandering the streets until 10 P.M. and smoking cigarettes."), the Navy's Family Advocacy Program was asked to investigate the possibility of neglect and abuse in the home (Def. Ex. 32, 33, 34).

The Navy soon moved the Shellitos to Jacksonville, leaving Ms. Winnicki-Tycoliz to fear that something awful would happen if Mike did not receive the help he needed (SPC-R. 3397).

When the Shellito children were young, their mother had boyfriends (SPC-R. 2517-8, 2798-801). Some of the boyfriends would move in to the family home and some were purely used to obtain money; at times the children were not allowed to address Migdalia as "mom" because the boyfriends did not like the fact that she had children (SPC-R. 2798-801). At other times, Migdalia would leave her children for days at a time to "party" and spend time with her friends and boyfriends (Id.).[30] During these times, no arrangements were made for supervision, food or care (Id.). Mike's sister recalled him being left home alone when he was still wearing diapers because she and Joe Jr., left for school and their mother had abandoned them (Id.). Mike was left alone often as a child (Id.). Once when Mike's mom left her children tragedy struck and their residence caught fire (SPC-R. 2816-7). The fire started in a bed where Mike was sleeping (Id.). The Shellitos lost everything and received assistance from local charities to obtain the most basic necessities (Id.).

[30]This behavior continued even after Joe Sr., retired form the Navy (SPC-R. 2814, 2820-1). Migdalia's infidelities were a constant source of tension at the Shellito residence which often led to physical altercations (Id.).

The Shellito's new westside neighborhood was a snare of drug and criminal activity (SPC-R. 2494-6, 2541-2, 2545). Within that neighborhood, Mike was mocked as a "retard" because of his stutter and also teased about his ragamuffin appearance (SPC-R. 2502, 2522, 2829, 2871-2, 2923). He cried all the time and had frantic fits of irrational outbursts (SPC-R. 2502, 2513, 2522, 2871-2). Mike had very few friends of his own and was repeatedly described as a "loner" (SPC-R. 2502, 2522, 2815-6, 2828, 2922). Rebecca believed that Mike started showing signs of depression in his early adolescence (SPC-R. 2828). Likely, because of his depression and desire to fit in, Mike became a "follower" who was easily influenced by other kids (SPC-R. 2526, 2544, 2922). And, those kids who would spend time with Mike were usually younger (SPC-R. 2514).

A friend of Joe, Jr.'s recalled that Mike spent a lot of time by himself in the woods – a "Huck Finn" type who took care of little animals, built forts, shared whatever he had and was fiercely loyal (SPC-R. 2500-1, 2509).

While Mike's home life had not improved upon the family's relocation back to Jacksonville, neither had his psychological or education situation. In 1982, Mike again found himself in the emotionally handicapped program and was permanently placed in EH after being evaluated by Duval County Schools (Def. Ex. 32, 33, 34).

A 1983 evaluation by a school psychologist found significant weaknesses in the areas of visual motor integration and emotional well-being (Def. Ex. 32, 33, 34). At almost eight years old, Mike could only recite the alphabet through the letter N (Id.). Responses indicated withdrawal, depression, anxiety and social isolation (Id.). It was suggested that Mike be placed in the specific learning disabilities program as well as the emotionally handicapped program (Id.). In 1986, Mike's teacher wrote that even though he tried to perform assigned tasks, he was functioning on a third-grade level (Id.). When his family moved to Orange Park in Clay County in 1988, Mike was again placed in EH classes (Id.).

Though most school personnel who interacted with Mike seemed to find him an annoying distraction, Mrs. Johnnie McKenzie, taught Mike for five calendar years in the EH. At one time, in her review, Mrs. McKenzie commented that Mike tried very hard, was helpful and trustworthy, but he needed a lot of attention (Def. Exs. 32, 33, 34, SPC-R. 3425). It was clear to her that he had a lot of problems at home (Id.), and he was teased a lot and had trouble fitting in at school (SPC-R. 3432-3). By the end of the school day Mike would be in a good mood, but when he returned each morning he would be somber and withdrawn again (SPC-R. 3425). She saw clear signs of neglect in that he had very poor hygiene, never had money for lunch, and would often complain that he'd had no dinner the night before (Id.). She made a special efforts with him that other teachers did not care to make, buying him a set of clothes to wear at school, feeding him, and filling out the

paperwork to obtain speech therapy, since his parents were not seeking help (SPC-R. 3426). Mike was socially promoted through school, though he did not have equivalent academic skills (SPC-R. 3427).

Mrs. McKenzie, like previous teachers suspected that Mike was being abused and neglected. Mrs. McKenzie was correct. Migdalia suffered from depression and would fall into several-day-periods where she would sleep all day and night (SPC-R. 2517, 2523-4, 2805). During those periods, which seemed to occur every few months, Migdalia was severely physically and verbally abusive to her children every day, and sometimes more than once a day (SPC-R. 2497-8, 2805-8). If the children made too much noise or did "anything" to "set her off", she would give them "whippings" – which meant beating them with shoes, hangers, electric cords, or if nothing was available her bare hands and tell them that she wished she had never had children (Id.). Often, the violence escalated to the point where, if Joe Sr. was home on leave, he would send his wife to Puerto Rico for several weeks until she stabilized (SPC-R. 2809).

The violence did not stop there. Joe Sr., was alternately distant and cruel, subjecting his children to physical and emotional abuse. Joe Sr., would hit Mike with his fists, brooms or his hands (SPC-R. 2821-2). Once, Joe Sr., even used a knife when he whipped Mike (Id.). Mike would cry when beaten and on a handful of occasions the beatings were so severe that investigations were undertaken (SPC-R. 2822). In addition, Mike's mom and dad often had physical altercations about money and Migdalia's infidelities (SPC-R. 2814-5).

Mike's mom also used marijuana everyday, and gave marijuana to her children when they were very young (SPC-R. 2523, 2802). As well, Migdalia engaged in sexually inappropriate behavior involving her children (SPC-R. 2830-1). When Mike was a teenager, she would have him simulate breast feeding and would request that he show her his genitalia (Id). Migdalia once arranged for her sixteen year old daughter to have sex with the landlord in exchange for money (SPC-R. 2831-2). Likewise, Migdalia's friends would provide a young Mike with alcohol in order to have sex with him (SPC-R. 2833-4).

A third psychological evaluation conducted in June, 1989 found Mike to be a "slow learner" with very weak verbal ability and the vocabulary of a nine-year-old (Def. Exs. 32, 33, 34).[31] This evaluation, unlike the one done in 1983, found that visual motor integration was a relative strength for him because he was only one grade level behind. Personality measures found him to be defensive and evasive with "family strains...apparent." (Id.). In March of 1990, the school's Child Study Team noted that Mike had severe learning disabilities and academic deficits and referred him to Charter for treatment of severe behavioral problems (Id.). At the Charter Counseling Center, hospitalization was recommended (Id.).

[31]Mike would have been 13 when this evaluation was conducted, and his functioning was still significantly delayed.

Mike was admitted to Charter Hospital of Jacksonville in May 1990 to address his "maladaptive behavior." Doctors there believed that Mike's father's alcoholism was a great problem in the Shellito family, causing his parents to fight often, and that Mike's low IQ (mildly retarded verbal skills) and attention deficits contributed to his difficulties within his family and in other social situations (Def. Exs. 32, 33, 34). At Charter, Mike was prescribed the antidepressant medications Tofranil and Prozac, but did not respond well (Id.). When he was released in July, the discharge summary stated that "his poor frustration tolerance often results in a tendency to react with quick and uncontrollable behavior. He feels insecure and inadequate and experiences some depression." (Id.). The final diagnoses were oppositional defiant disorder, borderline intellectual functioning and a specific learning disability (Id.).

Over the course of the next year, Mike's situation got worse rather than better. At age fifteen, he was still wetting the bed (SPC-R. 2831). In November 1990 he was arrested with a stolen motorcycle (Def. Ex. 6). Instead of returning to a residential therapeutic placement, he was incarcerated at HRS' Short Term Offender Program for four months, during which time he apparently received no psychiatric care (Id.). After he was released, easily influenced by his more intelligent peers, he and another youth were arrested for setting fire to a storage facility in August 1991 and Mike spent 45 days in the Duval Detention Center (Def. Exs. 6, 32, 33, 34). As a result of his involvement with the juvenile justice and child welfare systems, Mike was assessed by Gateway Community Services and found to be in need of substance abuse treatment, and he voluntarily enrolled in their program (Def. Exs. 32, 33, 34). A September 1991 evaluation diagnosed him with conduct disorder and major depression. One clinician suspected he was having hallucinations: he had told his mother "something's walking in my head." (Id.). A handwritten note indicated he could not read or write (Id.).

Under court order in October 1991, Mike was again admitted for inpatient psychiatric treatment, this time at Grant Center Hospital. At the time he was described as a danger to himself and others and prescribed Vistaril for agitation (Def. Exs. 32, 33, 34). When he was released a month later, his attending psychiatrist's summary noted suicidal threats, sleepwalking, insomnia, enuresis until age 14, paranoia and signs of neurological impairment (an abnormal electroencephalogram) (Id.). Social history revealed that Mike's mother had been involved with men other than his father (Id.). Incidents with staff led his psychiatrist to write: "It is consistent with Michael's character to make empty threats. Observed acts of violence have been of an impulsive nature and not planned out." (Id.). Nonetheless, Mike was a difficult patient; isolation did not achieve desired results and he was placed on the anti-seizure medication Tegretol to control his "rage outbursts." (Id.). At one point, Mike told staff at Grant that "something is missing in my head . . . maybe a tumor in there . . . I know something is wrong." (Id.). He seemed to respond well to Tegretol, feeling "in much better control." (Id.). But his doctor was still

concerned about his prognosis: "His unstable family and living situation is very likely to make outpatient management very difficult." (Id.).

Mike himself wanted to remain in treatment, telling staff that he was afraid he would "blow" if released (Def. Exs. 32, 33, 34). The doctor believed Mike's learning disability would significantly affect his ability to learn social as well as educational skills (Id.). Final diagnosis was of an organic brain disorder, undifferentiated conduct disorder and developmental language and reading disorder; long-term residential treatment was recommended (Id.). In fact, staff abandoned the first discharge plan because they felt it was not safe to send him home, and HRS was unwilling to support Mike's return to juvenile detention or a secure treatment facility (Id.). The only option offered by HRS was for Mike to return home and wait for an opening in a group home or halfway house. Mike himself felt these would be inadequate, telling one psychiatrist that, "they have just a fence there . . . I'd just leave . . . that's not the place for me to get help." (Id.). A week later he was released from Grant and sent home with his prescription for Tegretol.

Two months later, in January 1992, Mike was still at home and was arrested again—this time for stealing seven mice from a pet store to feed his snake (Def. Exs. 6, 32, 33, 34). The next day, distressed about this arrest and the family conflict it engendered (his mother had threatened to divorce Joe and leave the family because of Mike's problems), he attempted suicide by taking an overdose of 15-20 Tegretol pills and was rushed to the Naval Hospital (Id.). Doctor's notes reflect that Mike had made suicidal threats to his mother that day (Id.). She ignored these threats, leaving Mike alone with his bottle of pills to attend a party (Id.). Because the Naval Hospital did not have the resources to deal with Mike's psychiatric problems, he was transferred to Baptist Hospital.

At Baptist he was diagnosed as having conduct disorder, oppositional defiant disorder, dysthymic disorder and a major depressive episode. Though his progress was better than it had been at Grant, doctors at Baptist also felt Mike needed long-term inpatient treatment and referred him to a facility in Mobile, Alabama (Id.). But Mike's father said he could not afford the co-payments, having exhausted his insurance benefits and savings, and wanted him placed through HRS (Id.). Mike was discharged from Baptist after less than two weeks at his father's demand, with plans to enter the halfway house a few days later (Id.). In the late 1980s and early 1990s, Mike's dependence on alcohol and drugs increased. Everyone who knew Mike in the summer of 1994, knew he was drinking alcohol and smoking marijuana every day (SPC-R. 2774, 2781, 2835-6, 2873, 2882-3, 2903, 2923-4). And, whether a result, or a symptom, Mike became more unstable (SPC-R. 2873-4, 2903, 2923-4). Indeed, in the hours preceding the shooting, people who saw Mike testified that he was extremely drunk (SPC-R. 2906, 2913-4). Mike continued to drink throughout the next day and night of his arrest (SPC-R. 2774-5). When he was admitted to the hospital after being shot by police, his blood alcohol content was almost twice the legal limit (Def. Ex. 24).

All of the experts who thoroughly evaluated Mr. Shellito, including conducting neurological testing, agree that he suffers from organic brain damage that impairs his functioning and behavior (SPC-R. 2303, 2313, 2962-3, 3151). Indeed, the PET Scan that was conducted corroborates the finding of organic brain damage (SPC-R. 2655, 2762-3). Mike's behavior is the result of his brain damage which causes him to be moody, emotional, immature, reactive and impulsive (SPC-R. 2314-5, 2963, 3159-61).[32] And these problems only worsen with the use of drugs and alcohol (SPC-R. 2974-5, 3161).[33] Because of his neurological impairment, Mike has always been at a few years behind in his cognitive and emotional development (SPC-R. 2330-1, 2980, 3151-3). Likewise, the experts agree that Mike's mood disorder suggests that he suffers from bi-polar disorder (SPC-R. 2321, 3169-70).

On the night of the crime, Mike's mental problems establish mental health mitigating factors. Mr. Shellito's depression, organic brain syndrome, and other mental health issues establish that on the night of the crime Mr. Shellito was under the influence of extreme mental and emotional disturbance (SPC-R. 2331, 3027, 3172-3). The experts also agreed that Mr. Shellito's capacity to appreciate the criminality of his actions and conform his conduct to the requirements of the law was impaired (SPC-R. 2332, 3027, 3173-4), in addition to establishing nonstatutory mitigating factors.

The experts also agreed that a characterization of Mike as "mature" was not accurate, and that the statutory mitigator of his age applied in his case due to his immaturity and emotional and mental deficits caused by the brain damage (SPC-R. 2334-5, 2980, 3174-5). Though he was eighteen years of age, he was functioning as a thirteen to fifteen year old (SPC-R. 2334-5, 3027).

Trial counsel recognized at the evidentiary hearing that it was important to explain to the jury how Michael Shellito came to be who he is (SPC-R. 2581). Indeed, Mr. Shellito's history did just that and established compelling statutory and non-statutory mitigating evidence. Yet, due to trial counsel's deficient performance and failure to know the law, the jury and sentencing judge did not hear a complete

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[32]Dr. Joseph Wu testified that the PET Scan showed a pattern that was consistent with organic brain damage and bi-polar disorder due to the decrease in activity in Mr. Shellito's left temporal lobe and frontal lobe (SPC-R. 2652-55). Dr. Wu explained that the frontal lobe controls judgment and impulses and the temporal lobes regulate emotions (SPC-R. 2664-5_. Dr. Wu's review of the background records correlated with the abnormalities seen in the Pet Scan (SPC-R. 2663-4).

[33]Trial counsel testified that it would be significant if an expert were to testify that the use of drugs and/or alcohol exacerbate the problems associated with organic brain damage (SPC-R. 2158). However, because trial counsel never consulted with a mental health expert concerning the effects of drugs and alcohol on an individual suffering from brain damage, he did not have the benefit of such "significant" evidence.

or accurate story of how Michael Shellito came to be who he is.

Trial counsel's deficient performance caused Mr. Shellito to be prejudiced. Prejudice, in the context of penalty phase errors, is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or that the deficiencies substantially impair confidence in the outcome of the proceedings. Strickland, 466 U.S. at 695. "In assessing prejudice, [this Court] must reweigh the evidence in aggravation against the totality of mitigating evidence." Wiggins v. Smith, 539 U.S. 510, 538 (2003).

Prejudice is established in circumstances similar to Mr. Shellito's case. See Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995)(prejudice established by presenting of "substantial mitigating evidence" in postconviction); Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992)(prejudice established by "strong mental mitigation" which was "essentially unrebutted"); Bassett v. State, 541 So. 2d 596, 597 (Fla. 1989).[34]

In Wiggins v. Smith, the United States Supreme Court examined and identified similar evidence to that presented on Mr. Shellito's behalf in finding that the mitigation "'might well have influenced the jury's appraisal' of Wiggins moral culpability." 539 U.S. 510, 538 (Fla. 2003). The mitigation in Wiggins consisted of severe privation and abuse, an alcoholic mother, absentee mother, sexual abuse, being placed in foster care and diminished mental capacities. Id. at 535. In Mr. Shellito's case, he too, suffered from severe privation and abuse due to his absentee and alcoholic father and an unstable, absentee mother. He also experienced sexual abuse. And, like Wiggins, all of the mental health experts who have conducted a comprehensive evaluation of Mr. Shellito agree that he suffers from mental health disorders. In addition, he suffered from a severe and debilitating addiction to alcohol and drugs and was intoxicated in the hours preceding the crime. And, Mr. Shellito was 18 when the crime occurred, though his mental and emotional age was surely less than 18.

The only statutory mitigating factor found in Mr. Shellito's background and mental health at the time of the offense was Mr. Shellito's age, and it was only given slight weight by the Court (R. 395-6). The only other mitigating factor, again assigned slight weight by the trial court, was the "short periods" of time that the Court recognized Mr. Shellito was in treatment for mental problems (R. 398). The above evidence was critical evidence that would have rebutted the existence of all or most of the aggravating circumstances. Indeed, a thorough investigation would have shown that every "fact" relied on in finding insufficient mitigation in the court's sentencing order is

[34]Prejudice was found in these cases despite the existence of numerous aggravating circumstances. See, Hildwin (four aggravating circumstances); Phillips (same); Bassett (three aggravating circumstances).

unfounded.

The mitigation presented at Mr. Shellito's evidentiary hearing was qualitatively and quantitatively different from that presented at trial. Indeed, in comparison, to Wiggins, and the defendant's in Williams v. Taylor, 529 U.S. 362 (2000), and Rompilla v. Beard, 125 S.Ct. 2456 (2005), Mr. Shellito has shown prejudice. After reweighing the plethora of mitigation against the two aggravators, neither of which are considered "weighty", there can be no doubt that Mr. Shellito established prejudice.

Likewise, trial counsel's failure to challenge the State's case and aggravation also prejudiced Mr. Shellito. Indeed, as this Court has already found, nonstatutory aggravation was injected into Mr. Shellito's sentencing calculus. Had the circuit court[35] conducted the "probing and fact-specific analysis" of prejudice that the United States Supreme Court called for in Sears v. Upton, 130 S.Ct. 3529, 3566-7 (2010), and that is called for now, there is no doubt that confidence in Mr. Shellito's death sentence is undermined. Relief is warranted.

[35]The circuit court conducted no analysis as to the prejudice prong of Mr. Shellito's claim.

ARGUMENT II

THE CIRCUIT COURT ERRED IN DENYING MR. SHELLITO'S CLAIM THAT HE WAS DENIED AN ADEQUATE ADVERSARIAL TESTING AT THE GUILT PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE MR. SHELLITO'S DEFENSE AND TO ADEQUATELY CHALLENGE THE STATE'S CASE. AS A RESULT, THE CONVICTIONS ARE UNRELIABLE.

Counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland v. Washington, 466 U.S. 668 (1984). Strickland requires a defendant to establish unreasonable, deficient attorney performance, and prejudice resulting from that deficient performance. Counsel's highest duty is the duty to investigate and prepare. Where, as here, counsel unreasonably fails to investigate and prepare, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable.

Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance in his or her performance in other portions of the trial. Washington v. Watkins, 655 F.2d 1346, 1355, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). See also Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Even a single error by counsel may be sufficient to warrant relief. Nelson v. Estelle, 626 F.2d 903, 906 (5th Cir. 1981)(counsel may be held to be ineffective due to single error where the basis of the error is of constitutional dimension); Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979)("sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard"); Strickland v. Washington; Kimmelman v. Morrison.

Shortly after Mr. Shellito was indicted for first-degree murder, on February 22, 1995, Refik Eler was appointed to represent him. Trial began on July 17, 1995, less than five months after Mr. Eler was appointed. Mr. Eler was sole trial counsel.

Trial counsel's ineffectiveness was apparent during voir dire wherein defense counsel failed to question jurors about their views regarding the major issues in Mr. Shellito's case. The potential jurors were never questioned about their views regarding drugs, alcohol, abuse or mental illness.[36]

[36]The circuit court suggests that Eler "chose not to question the potential jurors about their views on drug and alcohol abuse and mental illness because it was his experience that in Duval County the jury venire are not sympathetic to drug, alcohol or mental illness as an excuse for behavior, and may even consider it as aggravation." (PC-R. 563). However, if that is true, then there was an even greater need to question the jury about these topics to make sure that the jurors who were selected for Mr. Shellito's jury could and would follow the law. Trial

counsel's belief otherwise was unreasonable and cannot be considered tactical.

Also, defense counsel abdicated his role during voir dire by "stipulating" to the removal for cause of 12 potential jurors (T. 298-307). Defense counsel initially objected to the removal of only 4 of these jurors, failing to reserve an objection to the removal of 2 of those jurors (T. 298-307). Of the 12, several were never questioned by the defense. These potential jurors were removed for cause as a result of their views about the death penalty despite the fact that counsel made no attempts at rehabilitation. This was deficient performance. Defense counsel's efforts to rehabilitate jurors whom he did question were insufficient. This was also deficient performance.

And, despite having a peremptory challenge available, trial counsel also allowed jurors to remain on the panel who had friends and/or relatives employed by law enforcement agencies (T. 165, 175), and who had technical knowledge and information that was germane to the issues in the case. For example, Ms. Hill, who ultimately served as the jury's forewoman, was a practicing nurse for five years and took courses where life saving techniques for injuries such as gunshot wounds were taught (T. 256-57). She also minored in psychology in college (T. 259). Mr. Rutledge, through his work as a security guard, had specialized in firearms training, including training on the different grades and velocities of different types of guns and training on ballistics (T. 270-71). Mr. Wilson had fingerprint training, including how to obtain latent prints (T. 264). Not only did counsel fail to utilize his remaining peremptory strike on any of these jurors, counsel also failed to determine if these individuals could disregard their specialized training during deliberations.

"[P]art of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." Morgan v. Illinois, 504 U.S. 719, 729 (1992) (italics omitted). Trial counsel was completely ineffective in neglecting to remove biased jurors and to attempt rehabilitation of other jurors, thereby prejudicing Mr. Shellito.

Moreover, due to the limited time to prepare for a capital trial some witnesses listed by the State in discovery were never deposed or spoken to and other key witnesses were deposed only a few weeks before trial began.[37] The hurried nature of the preparation caused trial counsel to overlook critical information which severely prejudiced Mr. Shellito. For example, trial counsel testified that the defense at trial was that Mr. Shellito did not commit the crime – that Steven Gill did. In fact, in his opening statement, trial counsel told the jury that Mr. Shellito was the perfect scapegoat and that when Gill testified they would be hearing from the person who killed the victim (T. 378). Gill never testified at Mr. Shellito's trial – instead he invoked his fifth amendment privilege to be free from self-incrimination (T. 952).[38] Despite

[37]These witnesses included Theresa Ritzer, Detective Highsmith, Sunshine Turner, and Sergeant Justice.

[38]Gill's attorney invoked his fifth amendment privilege against self incrimination (T. 952). The jury was not present when this occurred (T. 952).

this development, trial counsel had ample opportunity to introduce a great deal of evidence that would have placed serious suspicion on Gill and would have supplied reasonable doubt as to Mr. Shellito's involvement in the crime.

Trial counsel failed to elicit testimony that would have placed suspicion directly on Gill. John Bennett testified at trial that he was awoken by tires squealing and that he only saw a silhouette moving around in a truck before it drove away (T. 829). This testimony was inconsistent with Bennett's deposition, in which he testified that he not only heard tires squealing, but heard a shot before seeing someone get in a truck, which then drove away (T. 928). Bennett's deposition indicated that the truck, presumably Gill's truck, and presumably Gill himself, were present when the shots were fired.[39] This fact combined with Bennett's testimony that he saw a silhouette enter the driver's side of the truck, was critical evidence that suggested Gill was actually the shooter, not Mr. Shellito.

Trial counsel further failed to elicit substantial additional testimony against Gill. Migdalia Shellito, Mr. Shellito's mother, testified at trial that Gill confessed to her (T. 963-64). Mrs. Shellito further testified that she informed trial counsel of this confession, as well as tried to call the lead detective on the case, and spoke to courtroom personnel on the matter (T. 972, 973, 981-92). To refute this testimony, the State Attorney called a court clerk, Debbie Dlugosz, who testified that Mrs. Shellito never told her another individual confessed to the murder (T. 1017). Mrs. Shellito's testimony was dismissed by the prosecutor who claimed there was no one to substantiate her story. This was untrue. Mrs. Shellito had spoken to the investigator for trial counsel about Gill's confession on April 10, 1995, a full three months before trial, yet trial counsel failed to use information he had in his possession to substantiate the testimony (Def. Ex. 50).

Trial counsel's testimony that he did not want to place his investigator on the witness stand for fear that he could be questioned about other aspects of the investigation was unreasonable and demonstrates a fundamental misunderstanding of the law. The circuit court accepted this ridiculous and uninformed testimony to suggest that trial counsel made some sort of tactical decision. However, the State would not have been able to ask any questions concerning other aspects of the investigation because those would have been protected by the attorney-client privilege. The information about Mrs. Shellito having told Mr. Marx about Gill's confession would have been admissible as an exception to the hearsay rules under Florida Statute § 90.801(2)(b) (1995), which allowed a prior consistent statement to be used "to rebut an express or implied charge against the declarant of improper influence, motive, or recent fabrication."

[39]Turner had indicated that Gill let Mr. Shellito out of the truck and he was on foot. Contrary to the comments by the circuit court, there is no evidence that the truck Bennett observed was not Gill's.

So, while the prior consistent statement of Mrs. Shellito would have been admissible for the limited purpose of rebutting the State's attack of Mrs. Shellito's credibility, no other information about the investigation would have become admissible. If trial counsel truly made a strategic decision, rather than overlooking the evidence, the decision was unreasonable and based on a misunderstanding of the law, as was the circuit court's acceptance of such testimony.

Also, trial counsel attempted to question Detective Hinson, who spoke at length to Gill, regarding the statements that Gill made about the night of the crime. Counsel asked Detective Hinson what Gill told him, and was unable to fully examine the witness regarding the contents of Mr. Gill's statements because the statements were considered hearsay (T. 846). Trial counsel was only able to elicit that Det. Hinson was concerned about the truthfulness of Gill, as he was with any witness he interviewed (T. 857). But, even when Gill became unavailable as a witness, counsel failed to recall Detective Hinson to testify as to the statements Gill had made regarding his role in the crime. Counsel would have been able to introduce the now-admissible statements made by Gill about the night of the crime. Trial counsel had no recollection of any strategic reason for not re-calling Detective Hinson (SPC-R. 2075).

Trial counsel was also ineffective in failing to present evidence of Mr. Shellito's intoxication in the hours preceding the crime and also in the hours preceding his arrest. Much evidence was available at the time of trial that Mr. Shellito was severely addicted to alcohol and marijuana (SPC-R. 2774, 2781, 2835-6, 2872-3, 2881-2, 2902-3, 2924), and he was drinking alcohol and smoking marijuana close in time to the crime (T. 470, SPC-R. 2907-8, 2913-4, Def. Ex. 2), and his arrest (2775, 2884, Def. Ex. 2)("[Mr. Shellito] asserts that he was sufficiently intoxicated that he did not even feel the gunshot wounds). Indeed, when Mr. Shellito was admitted to the hospital after being shot by police, his blood alcohol content was almost twice the legal limit (Def. Ex. 24). Trial counsel testified at the evidentiary hearing that there was no question that Mr. Shellito was using drugs and alcohol shortly before the crime (SPC-R. 2570).

Counsel could have used the evidence of Mr. Shellito's intoxication in a number of significant ways at trial. Counsel failed to develop a defense of voluntary intoxication and failed to present evidence of intoxication to rebut specific intent and premeditation. Witnesses were available who could have testified to Mr. Shellito's intoxication on the night of the crime, but defense counsel failed to call these witnesses to the stand. Contrary to trial counsel's testimony and the circuit court's acceptance of that testimony, it would not have been inconsistent to maintain that Gill committed the crime and not Mr. Shellito (SPC-R. 2570). Trial counsel could have presented evidence that his client was too intoxicated to drive or shoot the victim, thus, it must have been Gill.

Likewise, because the State introduced evidence about Mr. Shellito's behavior at the time of his arrest, trial counsel could have and

should have introduced evidence to explain that behavior. Mr. Shellito was intoxicated (SPC-R. 2775, 2884, Def. Exs. 2, 24). Trial counsel failed to even investigate or uncover such evidence. Thus, any decisions that trial counsel claims to have made cannot be considered strategic. See Wiggins v. Smith, 539 U.S. 510 (2003); Henry v. State, 862 So. 2d 679, 685 (Fla. 2003)("A reasonable strategic decision is based on informed judgement.").

Trial counsel failed to consult an expert about Mr. Shellito's drug and alcohol use and what import those issues had to the guilt phase of the trial.[40] At the evidentiary hearing, mental health experts explained that Mr. Shellito's brain damage caused him to be impulsive, exercise poor judgment and have less control of his mood or management of his behavior (SPC-R. 2315, 2963, 3153, 3158-9). Thus, when Mr. Shellito used alcohol and marijuana, which he was drawn to because of his neurological impairments, his control was further diminished (SPC-R. 2330, 2469, 2974-5, 3161). Mr. Shellito's intoxication preceeding the crime and his arrest changes the picture of what actually occurred on those evenings.

Florida law on the voluntary intoxication defense is clear and long-standing, dating from the 19th century. See Garner v. State, 28 Fla. 113 (Fla. 1891). "Voluntary intoxication is a defense to the specific intent crimes of first-degree murder and robbery." Gardner v. State, 480 So. 2d 91, 92-93 (Fla. 1985)(citations omitted). Voluntary intoxication could have been employed as a defense to Mr. Shellito's first-degree murder charge and could have rebutted the necessary element of specific intent and premeditation.

Use of Mr. Shellito's long history of drug and alcohol abuse, evidence of his intoxication at the time of the offense and an appropriate mental health expert would have prevented a verdict of guilty of first-degree murder since there could not have been any finding of specific intent or premeditation. Prejudice from counsel's failure is clear because Mr. Shellito could not have formed specific intent for robbery or premeditated murder. See Bunney v. State, 603 So. 2d 1270 (Fla. 1992). An effective attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). In Mr. Shellito's case, trial counsel did not.

Trial counsel was also ineffective in cross-examining witnesses. Throughout the trial, counsel failed to impeach witnesses with inconsistent statements. However, in the case of witness Teresa Ritzer, trial counsel opened the door to highly prejudicial testimony. Ritzer

[40]Trial counsel testified that he relied on an expert to assist him with issues concerning mental state, yet he failed to consult his expert about Mr. Shellito's intoxication preceding the crime or the arrest would have the elements of the charges (SPC-R. 2050-1).

testified before the jury that following the crime, Mr. Shellito possessed a firearm and had confessed to shooting the victim in a failed robbery (T. 759). Ritzer also testified that when Mr. Shellito told her the story his voice was "kind of like he was enjoying it, like he was proud." (T. 760).

Trial counsel had deposed Ritzer shortly before trial was scheduled to begin. During her deposition she informed trial counsel that she had provided a written statement to law enforcement upon being brought to the Police Memorial Building on September 1, 1994 (T. 784). Prosecutor Plotkin had not previously produced this statement in discovery and did not have the statement for trial counsel during the deposition (Id.).

The day before Ritzer testified, and after Mr. Shellito's capital trial commenced, Prosecutor Plotkin provided trial counsel with Ritzer's initial statement in which she told law enforcement: "she never saw or heard anything suspicious . . . " the night of the crime (T. 764). Trial counsel asked Ritzer about her statement and the fact that she did not tell law enforcement about Mr. Shellito's "confession" (T. 764). On re-direct, the State was allowed to ask Ritzer why she changed her statement:

> Q: What was it about Mr. Shellito's life or death that mattered to you with regard to giving a statement to the police?
>
> A: Because he had threatened me, threatened my life earlier that if I talked for --
>
> Q: And when you say threatened your life earlier, when are you referring to?
>
> A: Earlier that night.
>
> Q: And what did he do with regard to threatening your life?
>
> A: He held a gun to my head.
>
> Q: And can you tell the members of the jury what he said to you when he held the gun to your head?
>
> A: He told me that if I talked then he would kill me because he had killed before.
>
> Q: And when – when in regards to when he was telling you about shooting someone did that happen?
>
> A: Right before he told me about the way he murdered the guy.
>
> Q: Now ma'am, what was your state of mind when you refused to give the police a statement?
>
> A: I was scared.

(T. 790-1).

Because of the State's untimely production of the statement, trial counsel admittedly did not know how Ritzer would explain the change in her statements (SPC-R. 2590-1).[41] However, trial counsel should have moved for a Richardson hearing at which he could have moved the trial court to exclude the testimony of Ritzer altogether. Or, at a minimum, trial counsel should have requested a continuance to depose Ritzer about the statement. Rather than find out Ritzer's explanation before asking her any questions, trial counsel blindly asked her about her original statement. Yet, trial counsel never even objected to the testimony because it was more prejudicial than probative. Trial counsel's performance was deficient.[42]

The prejudice from trial counsel's performance is obvious – the jury heard that Mr. Shellito placed a gun to a witness' head and threatened her life while also making the statement that he "had killed before." These uncharged acts undoubtedly prejudiced the jury to convict Mr. Shellito.

No adversarial testing occurred at the guilt phase of Mr. Shellito's capital trial. Relief is warranted.

[41]Clearly, the State knew what Ritzer's explanation would be for changing her statement, because at the conclusion of the cross-examination, the State immediately informed the court that it needed to proffer Ritzer's re-direct "in an abundance of caution" (T. 776). Yet, the State never told trial counsel about this alleged threat before trial or upon production of Ritzer's initial statement.

[42]The circuit court suggests that trial counsel's confronting Ritzer about her prior inconsistent statement was tactical (PC-R. 569). However, trial counsel failed to investigate the reason for why Ritzer changed her story. Had he done so, he would certainly have realized that having a witness testify to threats of murder by a defendant refute "powerful" cross examination material and in Mr. Shellito's case allow the jury to hear incredibly prejudicial evidence. Trial counsel's performance cannot be considered tactical, and even if it was, was not reasonable.

ARGUMENT III

THE CIRCUIT COURT ERRED IN DENYING MR. SHELLITO'S CLAIM THAT HE WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE.

At Mr. Shellito's evidentiary hearing, evidence was introduced that undermines the prosecution's case. Indeed, at the evidentiary hearing, through the testimony of Prosecutor Plotkin, the State conceded that Richard Bays testified falsely. Bays' testimony was false in two respects: First, Bays testified that he was facing life in prison due to his status as a habitual offender. He was not. Second, Bays testified that he was not receiving any benefit for his testimony. He did in fact receive a benefit.

Seven days after Bays was charged with armed robbery, Prosecutor Plotkin filed a Notice of Intent to prosecute Bays as a career criminal. (SPC-R. 3290, Def. Ex. 29). Charging Bays as a career criminal meant that he was facing a life sentence for the charges he was facing (Id.).

However, the day before Bays testified at Mr. Shellito's capital trial, Prosecutor Plotkin filed a pleading withdrawing the notice to classify Bays as a career criminal.[43] The basis of the withdrawal was that:

> Pursuant to Johnson [v.State, 616 So. 2d 1 (Fla. 1993)] Aggravated Battery was not a proper qualifying offense on December 10, 1990 (the date of the Defendant's conviction) because the legislature violated the dual subject rule when it enacted legislation including Aggravated Battery as an offense that would qualify a defendant as a HVFO.

[43]The timing of the notice of withdrawal is equally exculpatory in that the defense could have shown that on the eve of testifying, the prosecutor extended a benefit to Bays in exchange for his testimony.

(Def. Ex. 29). Mr. Shellito's trial counsel was not served with a copy of the pleading and he was unaware that the notice had been withdrawn (SPC-R. 2182, 2598).[44]

[44] If trial counsel had received a copy of the pleading, then he was ineffective in failing to question Bays or correct his false testimony.

The Johnson opinion had been decided on January 14, 1993, over eighteen months before Prosecutor Plotkin filed the notice of intent as to Bays. Prosecutor Plotkin spent "a year or so" prosecuting repeat offenders in Judge Olliff's courtroom and was a division chief in Judge Southwood's division when Judge Southwood was also handling repeat offenders (Deposition, June 13, 2006, p. 4)[45]. Prosecutor Plotkin's only explanation for the withdrawal was that he had made a mistake in filing the notice of intent in September, 1994 (SPC-R. 3295).[46] But, Prosecutor Plotkin did not make a mistake in attempting to treat Bays as a career criminal because Johnson did not disallow defendants from being habitualized if the prior used to habitualize fell between October 1, 1989 - May 2, 1991, but rather effected only those cases where the current offense – where a prosecutor wanted to habitualize a defendant – occurred between October 1, 1990 - May 2, 1991.[47] Thus, the window period did not effect the prior aggravated batteries, like Bays'. See Johnson, 616 So. 2d at 4 ("We hold that chapter 89-280 violates article III, section 6, of the Florida Constitution. However, we conclude that chapter 91-44's bienniel reenactment of chapter 89-280, effective May 2, 1991, cured the single subject violation as it applied to all defendant's sentenced under section 775.084 whose offenses were committed after that date."). The reason used to justify the withdrawal of the intent to classify Bays as a career criminal was bogus.

At Mr. Shellito's capital trial Bays testified that he was facing a life sentence on his pending charges (T. 434). He was not. Prosecutor Plotkin who knew that Bays was testifying falsely sat mute. Likewise, Bays' false testimony was not corrected before or during the penalty phase in Mr. Shellito's case.

[45]Simultaneously with his Initial Brief, Mr. Shellito has filed a motion to supplement the record with the depositions taken on July 13, 2006, and the exhibits introduced at that time.

[46]Considering Prosecutor Plotkin's experience, his explanation rings hollow.

[47]If a defendant committed a crime today, and had a previous aggravated battery that occurred between October 1, 1989 - May 2, 1991, that defendant could be habitualized. The window period shut as of May 2, 1991 and was not a concern at the time Bays was charged with armed robbery and the prosecutor filed a notice to prosecute him as a career criminal.

Bays also testified that he was not promised anything for his testimony at Mr. Shellito's trial (T. 434). Again, Bays' testimony was untruthful, but Prosecutor Plotkin sat mute. At the evidentiary hearing Prosecutor Plotkin testified that he had made a conscious decision to dispose of Bay's case after Mr. Shellito's so that there would be no specific deal for the jury to hear (SPC-R. 3302, 3332-3). Yet, Bays knew that if he testified "truthfully" that would be taken into consideration. (SPC-R. 3329).[48] In fact, Bays testimony was taken into consideration – a week after Mr. Shellito was sentenced to death, Bays entered a plea to accessory after the fact and received 13 months in jail, he was released that same day (SPC-R. 3297-8, Def. Ex. 45, 46, 49). Prosecutor Plotkin failed to notify trial counsel or the jury that Bays knew he would receive consideration in exchange for his testimony.

To prove a Giglio violation has occurred, a defendant, like Mr. Shellito must show that: 1) the testimony given was false; 2) the prosecutor knew the testimony was false; and 3) the statement was material. Guzman v. State, 868 So. 2d 498, 505 (Fla. 2003). As to the materiality prong, this Court has explained "that false evidence is material 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" Id. at 506, quoting United States v. Agurs, 427 U.S. 97, 103 (1976). Further, "[t]he State, as the beneficiary of the Giglio violation, bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt." Guzman, 868 So. 2d at 506.

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[48] In Napue v. Illinois, the Supreme Court reviewed a petitioner's claim that the State had violated Brady and Giglio, in failing to reveal that a promise for consideration was made. 360 U.S. 264 (1959). In Napue, a State witness testified that he had not received any promise for consideration in return for his testimony. Id. at 265. However, it was later revealed that the witness and the State had discussed that a recommendation for a reduction of the witness' sentence would be made and possibly effectuated. Id. at 266. The United States Supreme Court held that the witness' testimony that he "had been promised no consideration for his testimony" was false and the dealings with the prosecution was the type of consideration that must be revealed. And, where, as here, the State knows of such a promise and fails to correct the witness' testimony, a Giglio violation occurs. Napue, 360 U.S. at 269-70.

Likewise, in United States v. Bagley, the United States Supreme Court reviewed a situation where the State failed to respond to defense counsel's request that the State reveal any deals that had been made with witnesses. 473 U.S. 667, 683 (1985). As in Mr. Shellito's case, no "specific" deal had been made with the State witness, however, the Court found that the "**possibility of a reward had been held out to [the State witnesses]" . . . This possibility of a reward gave [the State witnesses] a direct, personal stake in respondent's conviction. The fact that the stake was not guaranteed through a promise or binding contract, . . . served only to strengthen any incentive to testify falsely in order to secure a conviction**." Id. (Emphasis added).

Thus, as in Napue and Bagley, despite the fact that there was no "specific" promise made to Bays, he and the prosecutor expected that his testimony against Mr. Shellito would be taken into consideration (SPC-R. 3329), a fact that was not revealed to the jury.

Mr. Shellito has proven that the jury heard false testimony and that the prosecutor knew that the testimony was false. The only issue is whether or not the false testimony was material to Mr. Shellito's conviction and/or sentence of death. The State has not met its burden to show that Bays' untruthful testimony is harmless beyond a reasonable doubt.[49]

[49]The circuit court conducted no analysis of Mr. Shellito's Giglio claim.

Bays was a critical witness for the prosecution both at the guilt and penalty phases of Mr. Shellito's capital trial. Bays was the only witness to place the murder weapon in Mr. Shellito's hands before the crime.[50] He also testified that Mr. Shellito admitted to shooting the victim. And, he was also the only witness who testified at the penalty phase that Mr. Shellito wanted to kill Mr. Wolfenbarger, but did not because a car approached them.[51]

Furthermore, the evidence of the deal and Bays' false testimony supports defense witness, Jabreel Street's testimony that Bays was trying to recruit jailhouse snitches to provide testimony against Mr. Shellito in order to reduce his time. Bays' false testimony creates serious doubt about his credibility and the truth of his entire testimony.

Indeed, because "'the jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend'", Gorham v. State, 597 So. 2d 782, 785 (Fla. 1992), quoting Napue v. Illinois, 360 U.S. 264 (1959), Mr. Shellito is entitled to a new trial and/or a new penalty phase.

The facts surrounding Bays' false testimony also establish a Brady violation occurred at Mr. Shellito's guilt and penalty phases. A prosecutor must comply with due process and disclose evidence "that is both favorable to the accused and 'material either to guilt or punishment'". United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963).

In Strickler v. Greene, 527 U.S. 263, 281 (1999), the Supreme Court reiterated the "special role played by the American prosecutor" as one "whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." See Hoffman v. State, 800 So. 2d 174 (Fla. 2001); State v. Huggins, 788 So. 2d 238 (Fla. 2001); Rogers v. State, 782 So. 2d 373 (Fla. 2001). Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or sentencing phase of the trial would have been different. Garcia v. State, 622 So. 2d 1325, 1330-31 (Fla. 1993). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. 419, 434 (1995); Strickler v. Greene, 527 U.S. at

[50]Who had the murder weapon prior to Gill and Mr. Shellito leaving the residence was important because John Bennett and Michael Green testified that a pick-up truck was present at the scene of the shooting; Gill and Mr. Shellito left the party and returned together; and Gill was described as acting "paranoid" upon returning to the party.

[51]Surely testimony that Mr. Shellito intended to kill another individual was highly prejudicial to the jury's recommendation of death.

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This Court has indicated that the question is whether the State possessed exculpatory "information" that it did not reveal to the defendant. Young v. State, 739 So. 2d 553 (Fla. 1999). And, "[c]ourts should consider not only how the State's suppression of favorable information deprived the defendant of direct relevant evidence but also how it handicapped the defendant's ability to investigate or present other aspects of the case." Rogers v. State, 782 So. 2d at 385. This includes impeachment presentable through cross-examination challenging the "thoroughness and even good faith of the [police] investigation." Kyles v. Whitley, 514 U.S. at 446.

As stated previously, the prosecutor in Mr. Shellito's case failed to reveal that he had withdrawn the notice of intent to classify Bays as a career criminal. Trial counsel testified that he was unaware of the reduction in Bays' possible sentence (SPC-R. 2182, 2598). Certainly, the prosecutor who filed the notice of withdrawal was aware of it.

There is no doubt that Bays was aware that he was being offered consideration for his testimony. Following Mr. Shllito's trial, Bays was asked how he had been released so quickly on the charges he had (SPC-R. 2886-7). Bays responded that it was either "him or me", referring to Mr. Shellito and admitted that he got a "deal" (SPC-R. 2887).

Again, the only issue remaining is whether the suppressed information about the withdrawal and Bays' expectation of a deal was material. The evidence was, at a minimum, critical impeachment evidence of Bays. And, as stated previously, the evidence also supported the defense's argument that Bays' entire testimony was false because he was attempting to curry favor with the State and save himself.[52] Trial counsel testified at the evidentiary hearing that he would have liked to have been provided the suppressed information (SPC-R. 2182).

The circuit court's suggestion that Bays' testimony "mirrors that of others at trial" (PC-R. 576), is not supported by the record. As stated previously, Bays supplied evidence for the prosecution that came from no other witness.

Mr. Shellito has proved both a Giglio and a Brady violation occurred at his capital trial. Relief is warranted.

[52]Trial counsel could have completely destroyed Bays' credibility and the good faith of the prosecution by showing the circumstances of the withdrawal of the notice and the bogus reasoning included in the pleading.

ARGUMENT IV

THE CIRCUIT COURT ERRED IN DENYING MR. SHELLITO'S CLAIM THAT HE WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE MENTAL HEALTH EXPERT WHO EVALUATED MR. SHELLITO DID NOT RENDER ADEQUATE MENTAL HEALTH ASSISTANCE AS REQUIRED BY AKE V. OKLAHOMA.[53]

Mr. Shellito was denied his rights under the Federal Constitution to a professional, competent, and appropriate mental health evaluation for use in the aid of his defense – both at the guilt phase and penalty phase of his capital trial. Mr. Shellito's trial counsel was ineffective for failing to secure the background materials necessary for an adequate and appropriate evaluation. Mr. Shellito's mental health evaluation at trial did not comport with constitutional standards because the evaluation was based on incomplete information. In addition, the results of the examination Mr. Shellito did receive during his trial were never made known to his sentencer.

A criminal defendant is constitutionally entitled to competent and appropriate expert psychiatric assistance. Ake v. Oklahoma, 470 U.S. 68 (1985); Morgan v. State, 639 So. 2d 6 (Fla. 1994). What is required is a "psychiatric opinion developed in such a manner and at such a time as to allow counsel a reasonable opportunity to use the psychiatrist's analysis in the preparation and conduct of the defense." Blake v. Kemp, 758 F.2d 523, 533 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background, see O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984), and to assure that the client is not denied a professional and professionally conducted mental health evaluation. See Fessel; Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991); Mason v. State, 489 So. 2d 734 (Fla. 1986); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984).

> The United States Supreme Court has recognized the pivotal role that the mental health expert plays in criminal cases:
> [W]hen the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder or behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can

[53] Contrary to the circuit court's suggestion, Mr. Shellito's claim is not procedurally barred (PC-R. 576). All of the information underlying Mr. Shellito's claim was not included on the record on appeal and only surfaced during the postconviction investigation.

> merely describe symptoms they might believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity, and tell the jury why their observations are relevant.

Ake, 470 U.S. at 80 (citations omitted).

Generally accepted mental health principles require that an accurate medical and social history be obtained because it is often only from the details in the history that organic disease or major mental illness may be differentiated from a personality disorder. R. Strub & F. Black, Organic Brain Syndrome, 42 (1981). This historical data must be obtained not only from the patient but from sources independent of the patient because patients are frequently unreliable sources of their own history, particularly when they have suffered from head injury, drug addiction, and/or alcoholism. Consequently, a patient's knowledge may be distorted by information obtained from family and their own organic or mental disturbance, and a patient's self-report is thus suspect:

> **[I]t is impossible to base a reliable constructive or predictive opinion solely on an interview with the subject**. The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information in the defendant, relevant medical and psychiatric history, and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant.

Bonnie & Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case of Informed Speculation, 66 Va. L. Rev. 727 (1980)(Cited in Mason, 489 So. 2d at 737)(emphasis added).

In Mr. Shellito's case, counsel failed to provide his client with "a competent psychiatrist . . . [to] conduct an appropriate examination and assist in evaluation, preparation, and presentation of a defense." Ake, 470 U.S. at 83 (1985). Assistance of appropriate mental health experts, provided with a history of Mr. Shellito's background, would have been able to educate the jury as to Mr. Shellito's behavior and draw a critical conclusion between his actions and his background. Dr. Miller's memorandum to Mr. Shellito's trial counsel, itself, illustrates the limitedness of his evaluation. In Dr. Miller's letter to trial counsel, he stated:

> "...the patient provided history and a mental status examination was done. I further reviewed information which you provided including the Arrest and Booking report and the absentee booking report. These data combined are the basis now of the following report..."

(Def. Ex. 2). In fact, the only material trial counsel provided to Dr. Miller were the Arrest and Booking reports from an Aggravated Assault and Armed Robbery charge, not even the homicide for which Mr. Shellito was being tried. Dr. Miller relied on Mr. Shellito's self-report regarding his education, previous psychiatric care, and family history, all which would have been refuted by school and medical records had

Mr. Shellito's trial attorney been diligent in providing them to Dr. Miller.[54]

[54]When Dr. Miller conducted his evaluation of Mr. Shellito he believed that Mr. Shellito had no history of previous psychiatric care – a belief that was completely erroneous and refuted by the background materials introduced at the evidentiary hearing.

Furthermore, Dr. Miller's evaluation was performed only to determine whether Mr. Shellito was competent to stand trial.[55] The report demonstrates that guilt phase issues, such as Mr. Shellito's alcohol consumption and drug use, and mitigation were not even contemplated (Def. Ex. 2).

Mr. Shellito had a well-documented mental health treatment history (See Def. Exs. 32, 33, 34). Mr. Shellito was not only institutionalized on more than one occasion, but was prescribed serious pharmaceuticals both before and after his hospital stays (Id.). Mr. Shellito had other emotional and physical problems including substance abuse, suicidal ideation and a number of depressive episodes throughout his life (Id.).

Mr. Shellito was also diagnosed as suffering from organic brain disorder, as well as learning disabilities and attention deficit hyperactivity disorder (Id.). Mr. Shellito was also intoxicated on the night of the crime (T. 470, SPC-R. 2907-8, 2913-4, Def. Ex. 2). Despite this wealth of available information, none was provided to Dr. Miller to assist him in his evaluation.

[55]The circuit court did not assess Mr. Shellito's claim as to the guilt phase issue.

Had trial counsel gathered all of the background materials and requested a comprehensive psychological evaluation, that included neuropsychological testing, he would have learned that due to Mr. Shellito's brain damage, the use of drugs and/or alcohol would have exacerbated Mr. Shellito's impulsivity, ability to plan and moodiness (SPC-R. 2496, 2974-5, 3161).[56]

The failure to gather independent historical data prior to evaluating Mr. Shellito rendered this evaluation incomplete and constitutionally infirm. Mr. Shellito's judge and jury were not able to "make a sensible and educated determination about the mental condition of the defendant at the time of the offense," Ake, 470 U.S. at 81, not only because the evaluation was incomplete, but because Mr. Shellito's trial counsel failed to bring it to the attention to the judge or jury.

Likewise, a wealth of compelling mitigation was never presented to the judge and jury charged with the responsibility of deciding whether Mr. Shellito would live or die. Important, necessary, and truthful information was withheld from the jury, and this deprivation violated Mr. Shellito's constitutional rights. See Penry v. Lynaugh, 492 U.S. 302 (1989); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

> In discussing the statutory mental health mitigating factors, this Court recognized that:
> A defendant may be legally answerable for his actions and legally sane, and even though he may be capable of assisting his counsel at trial, he may still deserve some mitigation of sentence because of his mental state.

Perri v. State, 441 So. 2d 606, 609 (Fla. 1983). Armed with evidence that counsel had or could have discovered, a mental health expert would have conclusively established statutory mitigation (SPC-R. 2331, 3027, 3172-3), and would have presented substantial nonstatutory mental health mitigating evidence (SPC-R. 2332, 3027, 3173-4). Mr. Shellito's judge and jury received an incomplete portrait of the person they sentenced to die. As a result, Mr. Shellito was deprived of the full impact of substantial and compelling statutory and nonstatutory mitigating evidence.

Dr. Miller's report was based on incomplete information and as a result was not helpful to Mr. Shellito's case. The only additional information provided to Dr. Miller was a 1 page discharge summary from Grant Hospital, which was not faxed to Dr. Miller until 2 days before the penalty phase (Def. Ex. 16). At this point, the evaluation of Mr. Shellito had been completed. Mr. Shellito's trial attorney, during

[56] In and of itself, Mr. Shellito's use of drugs and alcohol in the hours preceding the crime was evidence that should have been explained to the jury through a mental health expert because it caused Mr. Shellito to be unable to form the specific intent required to commit first-degree murder or robbery.

the penalty phase, only submitted some records to the jury as an exhibit, without any accompanying expert explanation which would have provided substantial mitigation. Trial counsel's performance led this Court to comment that "Shellito presented no medical or other expert testimony to support his claims of organic brain damage or other impairment." Shellito v. State, 701 So. 2d 837, 844 (Fla. 1997).

In Mr. Shellito's case, sources of information necessary for an expert to render a professionally competent evaluation were not investigated and what information was available was never presented. As a result, Mr. Shellito's judge and jury were unable to "make a sensible and educated determination about the mental condition of the defendant at the time of the offense." Ake, 470 U.S. at 80. Relief is warranted.

ARGUMENT V

THE CIRCUIT COURT ERRED IN DENYING MR. SHELLITO'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE PROSECUTOR'S ARGUMENTS AT THE PENALTY PHASE WHICH PRESENTED IMPERMISSIBLE CONSIDERATIONS TO THE JURY, MISSTATED THE LAW AND FACTS, AND WERE INFLAMMATORY AND IMPROPER.

Unchallenged prosecutorial argument during Mr. Shellito's trial and sentencing proceedings violated the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The prosecutor's arguments were fraught with improper comments, misleading comments, and comments which relied on facts not in evidence. Defense counsel's failure to object to these blatantly improper comments constituted ineffective assistance of counsel. No reasonable tactic exists for this failure.

> Non-statutory aggravation was argued to the jury when the prosecutor argued:
> He gunned the victim down around 4:00 o'clock, 4:30, Wednesday, August 31st, 18 hours later with his dream gun he pulled it on another vulnerable victim on Kenneth Wolfenberger. Like Sean Hathorne, Kenneth Wolfenberger was an easy target. Unlike Sean Hathorne fortunately for Kenneth Wolfenberger he was saved by the lights. Remember what Richard Bays told you, **the defendant wanted to kill Kenneth Wolfenberger**.

(T. 1454)(emphasis added). Mr. Shellito was never charged with attempted murder and no such testimony was ever produced by the state. This constitutes prejudicial error.

In addition, the prosecutor attempted to bolster his closing argument by informing the jury that "[w]e don't always seek the death penalty in every murder" (T. 1446). Such a comment leaves the jury with the impression that Mr. Shellito's case had been compared to other cases and required them to recommend death. The prosecutor, in effect, told the jury that the case had already been judged and the proper recommendation should be for death. This argument was highly prejudicial and was error.

Although a decision to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, 430 U.S. 349, 358 (1977) (opinion of Stevens, J.), here, because of the prosecutor's inflammatory argument, death was imposed based on emotion, passion, and prejudice. See Cunningham v. Zant, 928 F.2d 1006, 1019-20 (11th Cir. 1991).

Arguments such as those presented in Mr. Shellito's case have been long-condemned as violative of due process and the Eighth Amendment. See Drake v. Kemp, 762 F.2d 1449, 1458-61 (11th Cir. 1985)(en banc). Such arguments render a sentence of death fundamentally unreliable and unfair. Drake, 762 F.2d at 1460 ("[T]he remark's prejudice exceeded even its factually misleading and legally

incorrect character ....").

The State was also guilty of misstating the law regarding the jury's role in sentencing Mr. Shellito (see T. 106-107, 194, 196, 1306, 1306-1307, 1447, 1448, 1449, 1462, 1504, 1506, 1508, 1509), and shifted the burden to Mr. Shellito to show that death was not the appropriate penalty (See T. 1307, 1448 ("I submit to you that mitigation in this case can be characterized as excuses, not sufficient to outweigh the clear aggravation in this case"), 1449, 1459-1460, 1460, 1465, 1467).

"[A] prosecutor's concern in a criminal prosecution is not that it shall win a case, but that justice shall be done. While a prosecutor may strike hard blows, he is not at liberty to strike foul ones." Berger v. United States, 295 U.S. 78 (1935). This Court has called such improper prosecutorial commentary "troublesome," Bertolotti v. State, 476 So. 2d 130, 132 (Fla. 1985), and when improper conduct by the prosecutor "permeates" a case, as it did here, relief is proper. Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990); see also Ruiz v. State, 743 So. 2d 1 (Fla. 1999).

Defense counsel's unreasonable failure to object to the improper commentary of the prosecution prejudiced Mr. Shellito. No tactical or strategic reason for failing to object is applicable. Relief is warranted.

ARGUMENT VI

THE CIRCUIT COURT ERRED IN DENYING MR. SHELLITO'S CLAIM THAT THE SENTENCING COURT ERRED BY FAILING TO INDEPENDENTLY WEIGH AGGRAVATING AND MITIGATING CIRCUMSTANCES, CONTRARY TO MR. SHELLITO'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. THE OFFICE OF THE STATE ATTORNEY PREPARED THE SENTENCING ORDER IN MR. SHELLITO'S CASE.[57]

[57]The circuit court ruled that Mr. Shellito's claim is procedurally barred because it could have been raised on direct appeal. The court's ruling is in error. Mr. Shellito's claim is based on evidence that was not in the record on appeal before this Court. Indeed, the evidence of the error came from the files that were disclosed in postconviction from the Office of the State Attorney. The circuit court also suggests that Mr. Shellito has not produced evidence to demonstrate that Judge Olliff did not prepare his own order. Apparently the court overlooked the unsigned order that was in the State Attorney's file that appears to be a draft of the final order. Because, the orders are different and the final order actually attached a photo that was not admitted at the trial, Mr. Shellito has demonstrated, at a minimum, that the State assisted the trial judge in drafting the sentencing order.

Prosecutor Plotkin conceded at the evidentiary hearing that his files contain a draft sentencing order (SPC-R. 3308). The order is unsigned (Def. Ex. 30). Prosecutor Plotkin had no independent recollection of how he came into possession of the draft order, but he testified that it was Judge Olliff's practice to provide a draft copy of the sentencing order to the parties in advance of the sentence (SPC-R. 3314). Prosecutor Plotkin denied drafting the sentencing order in Mr. Shellito's case (Id.).

Likewise though Judge Olliff could not recall whether he provided a draft order in the Shellito case, he testified that it was his practice to prepare the order and provide it to the parties in advance of the hearing (Deposition, June 13, 2006, p. 8).[58] He recalled drafting the sentencing order in the Shellito case (Id.).

However, the file of Mr. Shellito's trial attorney contains no drafts or unsigned copies of the sentencing order (SPC-R. 3423).

A comparison on the draft order that came from the State Attorney's Office with the order filed by the Court raises several issues: corrections were made to the final order, i.e., Mr. Shellito's name was changed in the caption of the order and small portions of text were removed; the fonts in the order appear to be different at different places; and the Court relied on photographs which were not in evidence in imposing a sentence of death (See Def. Ex. 30).

None of the witnesses could explain how these changes were made, why there were different fonts and how the judge obtained access to photos that were not in evidence.[59] The obvious answer to the question is that the State assisted Judge Olliff in preparing the sentencing order.

In State v. Riechmann, the State prepared the order sentencing the defendant to death. This Court held:
We therefore approve the evidentiary hearing judge's findings and conclusion, which he summarized as followed:

> **When the cumulative effect of the trial counsel's deficiency is viewed in conjunction with the improper actions of the trial judge and prosecutor during the penalty phase,** the Court is compelled to find, under the circumstances of this case, that confidence in the outcome of the Defendant's penalty phase has been undermined, and that the Defendant has been denied a reliable penalty phase proceedings [sic].

777 So. 2d 342, 352 (Fla. 2000) (citations omitted) (emphasis added). Certainly, the fact that either the State prepared the sentencing memo

[58] Simultaneously with his Initial Brief, Mr. Shellito has filed a motion to supplement the record with the depositions taken on July 13, 2006, and the exhibits introduced at that time.

[59] At the time of the sentencing Judge Olliff had retired and assumed senior status. He did not have a judicial assistant to assist him with word processing.

or assisted the Court demonstrates that the trial court failed to weigh the aggravating and mitigating circumstances in its sentencing order entitles Mr. Shellito to relief. Relief is warranted.

ARGUMENT VII

THE CIRCUIT COURT ERRED IN DENYING MR. SHELLITO CLAIM THAT HE WAS DENIED DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION WHEN A TRIAL WITNESS HAD CONTACT WITH JURY OUTSIDE THE PRESENCE OF MR. SHELLITO OR HIS COUNSEL.

During Mr. Shellito's capital trial, the trial court clerk, Debbie Dlugosz was called to testify. The State called Ms. Dlugosz to rebut Mr. Shellito's mother's testimony that Steve Gill confessed to her. Mrs. Shellito testified that she had told Ms. Dlugosz about the confession, but Ms. Dlugosz did not recall the conversation. After Ms. Dlugosz testified, the court excused the jury.

Ms. Dugosz did not recall that Judge Olliff sent her to deliver a note to the jury (SPC-R. 3275-6), however, she testified that she did deliver the evidence and other items to the jury as she was required to do as the clerk of the court (Id.).

The fact that Ms. Dugosz had contact with the jury after being a witness constituted an ex parte communication with the jury. Such conduct was improper and violated Mr. Shellito's right to a fair trial and due process. Relief is warranted.

ARGUMENT VIII

THE CIRCUIT COURT ERRED IN DENYING MR. SHELLITO'S CLAIM THAT HIS DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT.

Mr. Shellito suffers from organic brain damage which impairs his functioning and development (SPC-R. 2321, 2323, 2959, 3170). Throughout Mr. Shellito's life his functioning – be it cognitive or emotional has been at least a few years below his chronological age (SPC-R. 2333, 2956, 3174, 3375, 3376). Thus, while Mr. Shellito was 18 years of age at the time of the crime for which Mr. Shellito was convicted and sentenced to death, he was reported to have the mental and emotional age of less than 18 years, which renders the application of the death penalty in his case cruel and unusual. His execution would therefore offend the evolving standards of decency of a civilized society, see Trop v. Dulles, 356 U.S. 86 (1958), would serve no legitimate penological goal, see Gregg v. Georgia, 428 U.S. 153, 183 (1976), and would violate the Eighth and Fourteenth Amendments to the United States Constitution. See Roper v. Simmons, 543 U.S. 551 (2005). As the United States Supreme Court held in Roper:

> Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, . . . [a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions. * * * The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. * * * The third broad difference is that the character of a juvenile is not as well formed as that of an adult. * * * These differences render suspect any conclusion that a juvenile falls among the worst offenders. * * * **From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.**

543 U.S. at 569 (citations omitted; emphasis added).

While Mr. Shellito was 18 years old chronologically, **he was not functionally, developmentally, cognitively or emotionally**, when the crime occurred. Mr. Shellito's organic brain damage and mood disorder, as well as the circumstances of being raised in a severely dysfunctional family, resulted in Mr. Shellito operating at a mental and emotional age significantly below his chronological age at the time of the crime.

In Mr. Shellito' case, his chronological, cognitive and emotional age warrant Eighth Amendment relief. "There is no dispute that a defendant's youth is a relevant mitigating circumstance that must be within the effective reach of a capital sentencing jury if a death sentence is to meet the requirements of Lockett and Eddings." Johnson v. Texas, 113 S. Ct. 2658, 2668 (1993) (citations omitted). The kinds of characteristics attributed to youthful offenders, "a lack of maturity and an underdeveloped sense of responsibility", Id. at 2668-2669, are

precisely those characteristics attributable to Mr. Shellito. And, these very same traits "often result in impetuous and ill-considered actions and decisions." Id. at 2669. Relief is warranted.

CONCLUSION

Based upon the foregoing, Appellant, MICHAEL SHELLITO, urges this Court to grant him relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to Thomas D. Winokur, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, FL 32399-1050, on July 25, 2011.

CERTIFICATION OF TYPE SIZE AND STYLE

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