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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....ii

ARGUMENT IN REPLY..... 1

ARGUMENT I: TRIAL COUNSEL WAS INEFFECTIVE AT THE PENALTY PHASE.....4

ARGUMENT II: TRIAL COUNSEL WAS INEFFECTIVE AT THE GUILT PHASE..... 29

ARGUMENT III: MR. SHELLITO'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED (BRADY/GIGLIO).....30

ARGUMENT IV: AKE V. OKLAHOMA.....34

ARGUMENT V: TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO IMPROPER PROSECUTORIAL ARGUMENTS... 35

ARGUMENT VI, VII & VIII.....35

CONCLUSION.....35

CERTIFICATE OF SERVICE.....36

CERTIFICATION OF TYPE SIZE AND STYLE.....36

TABLE OF AUTHORITIES

Page

Ake v. Oklahoma, 470 U.S. 68 (1985) 34

Besaraba v. State, 656 So. 2d 441 (Fla. 1995) 11

Blanco v. Dugger, 691 F.Supp. 308 (S.D. Fla. 1988) 17

Buckrem v. State, 355 So. 2d 111 (Fla. 1978) 12

Carter v. State, 560 So. 2d 1166 (Fla. 1990) 11-12

Caruso v. State, 645 So. 2d 389 (Fla. 1994) 11

Chandler v. U.S., 218 F.3d 1305 (11th Cir. 2000) 1

Clark v. State, 609 So. 2d 513 (Fla. 1992) 11

Cooper v. State, 856 So. 2d 969 (Fla. 2003) 24

Cooper v. Sec'y. Dep't of Corr.,
646 F.3d 1328 (11th Cir. 2011) 3, 24, 25-27

Farr v. State, 621 So. 2d 1368 (Fla. 1993) 11

Ferrell v. Hall, 640 F.3d 1199 (11th Cir. 2011) 3

Ford v. State, 955 So. 2d 550 (Fla. 2007) 1-2

Groover v. State, 489 So. 2d (Fla. 1986) 17

Grovesnor v. State, 874 So. 2d 1176 (Fla. 2004) 5

Haliburton v. Singletary, 691 So. 2d 466 (Fla. 1997) 1

Hardwick v. Crosby, 320 F.3d 1127 (11th Cir. 2003) 12

Harrington v. Richter, 131 S.Ct. 770 (2011) 3

Heiney v. Dugger, 558 So. 2d 398 (Fla. 1990) 12

Henry v. State, 862 So. 2d 679 (Fla. 2003) 9

Huddleston v. States, 475 So. 2d 204 (Fla. 1985) 12

Johnson v. Sec'y. Dep't of Corr.,
643 F.3d 907 (11th Cir. 2011) 3, 4, 24

Johnson v. Upton, 615 F.3d 1199 (11th Cir. 2010) 3

Kokal v. Dugger, 718 So. 2d 138 (Fla. 1998) 11

Kyles v. Whitley, 514 U.S. 419 (1995) 32
Lockett v. Ohio, 438 U.S. 586 (1978) 11, 28
Mahn v. State, 714 So. 2d 391 (Fla. 1998) 11
Mendyk v. State, 592 So. 2d 1076 (Fla. 1992) 11
Miller v. State, 770 So. 2d 1144 (Fla. 2000) 11
Morgan v. State, 639 So. 2d 6 (1994) 34
Morton v. State, 789 So. 2d 324 (Fla. 2001) 9
Napue v. Illinois, 360 U.S. 264 (1959) 31
Nibert v. State, 574 So. 2d 1059 (Fla. 1990) 11
Norris v. State, 429 So. 2d 688 (Fla. 1983) 12
Parker v. Dugger, 498 U.S. 308 (1991) 12
Porter v. McCollum, 130 S.Ct. 447 (2009) 1, 2, 22-23, 24
Porter v. State, 788 So. 2d 917 (Fla. 2001) 2
Rimmer v. State, 59 So. 3d 763 (2010) 17
Robinson v. State, 684 So. 2d 175 (Fla. 1996) 11
Rompilla v. Beard, 545 U.S. 374 (2005) 1
Ross v. State, 474 So. 2d 1170 (Fla. 1985) 12
Sears v. Upton, 130 S.Ct. 3529 (2010) 1, 3
Smith v. Cain, 2012 WL 43512 (Jan. 10, 2012) 32-33
Sochor v. State, 883 So. 2d 766 (Fla. 2004) 2
Songer v. State, 544 So. 2d 1010 (Fla. 1989) 12
Strickland v. Washington, 466 U.S. 668 (1984) 1, 9
United States v. Bagley, 473 U.S. 667 (1985) 30-31
Walton v. State,__ So. 3d __ (Fla. 2011) 3
Wiggins v. Smith, 539 U.S. 510 (2003) 1, 9, 22
Williams v. Taylor, 529 U.S. 362 (2000) 1

ARGUMENT IN REPLY

The State exerts much effort in an attempt to urge a standard of review that is contrary to and an unreasonable application of established federal law. See Answer Brief at 14-25 (hereinafter "AB at ___"). There is no question that Strickland v. Washington, 466 U.S. 668 (1984), and its progeny govern the correct legal standard and principles that must be applied in reviewing ineffective assistance of counsel claims. However, the State fails to recognize that those standards are found in Strickland, Williams v. Taylor, 529 U.S. 362 (2000), Wiggins v. Smith, 539 U.S. 510 (2003), Rompilla v. Beard, 545 U.S. 374 (2005), Porter v. McCollum, 130 S.Ct. 447 (2009), and Sears v. Upton, 130 S.Ct. 3259 (2010). Rather, the State urges this Court to accept incorrect legal standards, from courts other than the United States Supreme Court (AB at 15, citing Haliburton v. Singletary, 691 So. 2d 466 (Fla. 1997) and Chandler v. U.S., 218 F.3d 1305 (11th Cir. 2000)). Mr. Shellito urges this Court to disregard the flawed standards set forth by the State.

Indeed, a review of the opinions Williams, Wiggins, Rompilla, Porter, and Sears provide the correct standards and the prevailing professional norms expected of trial counsel.[1] Furthermore, the State cites to Ford v. State, 955 So. 2d 550 (Fla. 2007), which relied on Sochor v. State, 883 So. 2d 766 (Fla. 2004), in suggesting that this Court must defer to the

[1]Williams was tried in 1985. Wiggins was tried in 1989. Rompilla was tried in 1988. Porter was tried in 1986. Sears was tried in 1993. Thus, all of the principles and obligations set forth in those opinions must be utilized in reviewing trial counsel's performance in Mr. Shellito's case and determining whether prejudice ensued. Mr. Shellito was tried in 1995.

circuit court's fact findings. However, in Sochor this Court relied upon the language in Porter v. State, 788 So. 2d 917 (Fla. 2001), to justify its rejection of the mitigating evidence presented by the defense's mental health expert at a postconviction evidentiary hearing. It was exactly this analysis and deference that the United States Supreme Court found was contrary to or an unreasonable application of Strickland in Porter v. McCollum:

> The Florida Supreme Court's decision that Porter was not prejudiced by his counsel's failure to conduct a thorough - or even cursory - investigation is unreasonable. The Florida Supreme Court did not consider or unreasonably discounted mitigation adduced in the postconviction hearing. * * * Yet neither the postconviction trial court nor the Florida Supreme Court gave any consideration for the purpose of nonstatutory mitigation to Dr. Dee's testimony regarding the existence of a brain abnormality and cognitive defects. While the State's experts identified perceived problems with the tests that Dr. Dee used and the conclusions that he drew from them, it was not reasonable to discount entirely the effect his testimony might have had on the jury or the sentencing judge.

130 S. Ct. at 454-55.

The United States Supreme Court did not, as the State suggests, merely apply Strickland to the facts in Porter's case or simply "reverse the Eleventh Circuit". (AB at 18). In Porter, the United States Supreme Court indicated that this Court's decision in *Porter v. State* was contrary to or an unreasonable application of clearly established federal law, i.e. Strickland v. Washington. Also, contrary to the State's position, (AB at 19), this Court has now recognized that Porter constitutes an "evolutionary refinement and development of the Strickland analysis". Walton v. State, ___ So. 3d ___ (Fla.

2011). Mr. Shellito, whose trial proceedings occurred in 1995, must received the same evolutionary refinement that Porter received in 1986.

And, contrary to the State's position (see AB at 21), Mr. Shellito is also entitled to a probing, fact-specific inquiry of his ineffective assistance of counsel claims. Sears v. Upton, 130 S.Ct. 3529 (2010).

The State maintains that "the Eleventh Circuit has treated Porter as a fact-bound, non-fundamental, decision." (AB at 23). This is simply not true. The Eleventh Circuit Court of Appeals has applied the Porter principles to numerous cases over the past two years – principles regarding how to correctly analyze a claim of ineffective assistance of counsel. See Johnson v. Sec'y Dep't of Corr., 643 F.3d 907, 935-6 (11th Cir. 2011); Cooper v. Sec'y. Dep't of Corr., 646 F.3d 1328 (11th Cir. 2011); Ferrell v. Hall, 640 F.3d 1199 (11th Cir. 2011); Johnson v, Upton, 615 F.3d 1318, 1343 (11th Cir. 2010).

In addition, the State's reliance on Harrington v. Richter, 131 S.Ct. 770 (2011), is misplaced (AB at 24). Richter is not relevant to the issue in Mr. Shellito's case because in Richter, the Supreme Court addressed whether 28 U.S.C. § 2254 (d)'s limitation on relief applies when a state court's denial of a claim on the merits takes the form of a "summary disposition," *i.e.*, a state court order which neither explains the reasons for the disposition nor identifies which elements of a multi-part constitutional test the prisoner's allegations failed to satisfy.

By its own terms, the rule announced in Richter effects the handling of claims for habeas relief previously rejected by state courts via summary disposition. As the Eleventh Circuit recently explained in Johnson v. Sec'y. Dep't of Corr., 643 F.3d 907, 930, fn 9 (11th Cir. 2011):

> The Supreme Court's recent decision in *Harrington v. Richter*, ____ U.S. ____, 131 S.Ct. 770, 784 (2011), where the state supreme court had issued a summary order denying relief, tells us that "[w]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." **The Court's instruction from *Harrington* does not apply here because the Florida Supreme Court did provide an explanation of its decision** which makes clear that it ruled on the deficiency prong but did not rule on the prejudice prong, and it is also clear that the trial court's ruling on the prejudice prong did not address counsel's investigation and presentation of nonstatutory mitigating circumstances evidence.

(Emphasis added). Thus, Richter does not change the analysis that must be conducted in Mr. Shellito's case.

ARGUMENT I: TRIAL COUNSEL WAS INEFFECTIVE AT THE PENALTY PHASE

Initially, the State argues that this Court must affirm the circuit court's order because the order "contains pinpoint citations" (AB at 30). However, this assertion makes no sense. Citations to the record cannot cure the limited, flawed legal analysis or the fact that the circuit court either completely ignored or discounted to irrelevance all of the evidence Mr. Shellito presented in support of his claim.

Furthermore, the circuit court erroneously analyzed Mr. Shellito's claim in a piecemeal fashion. However, a

reviewing court must analyze trial counsel's performance in its entirety to determine if trial counsel was deficient and if prejudice ensued. See Grovesnor v. State, 874 So. 2d 1176, 1181 (Fla. 2004)("Counsel's effectiveness is determined according to the totality of the circumstances. *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052.").

Also, like the circuit court, the State relies on trial counsel's characterizations of his performance to argue that he was not deficient (AB at 30). For example, the State asserts that trial counsel "prepared for the penalty phase from the beginning" (AB at 30). However, this assertion is made based on trial counsel's testimony at the evidentiary hearing. The objective facts demonstrate that trial counsel made no effort to develop mitigation "from the beginning". Rather, through a fortuitous meeting with Mr. Shellito's parents, approximately three (3) weeks before trial[2], the Shellitos provided much information about Michael's background. But, trial counsel failed to follow up on any of the information until after Mr. Shellito was convicted and the penalty phase was a week away.[3] And, trial counsel never spoke to a single mitigation witness other than Mr. Shellito's

[2]As trial counsel's billing reflects, this meeting concerned guilt phase issues. See Def. Ex. 4. However, during the meeting Mr. Shellito's mother, Migdalia, offered some background information about her son.

[3]Furthermore, the State suggests that trial counsel obtained mental health documents at this meeting. This suggestion is not based on the evidence. Trial counsel testified that it could have been photos or cards or perhaps he had received documents from the Public Defender's Office (SPC-R. 2090-1). However, trial counsel agreed that the PD's Office only had the case for a mere six (6) days before moving to withdraw (SPC-R. 2090).

parents.[4]

Mr. Shellito presented unrebutted evidence that trial counsel bungled the attempts to obtain records and ended up receiving some records on August 16th, others on August 17th and some records were never received.[5] See Def. Ex. 9 and 10. At the most, trial counsel spent less than a few hours reviewing voluminous records that require much more time to read, summarize and understand (Def. Ex. 4 and 5). And, only a single page of the hundreds of pages of mental health and background material was sent to a mental health expert to review (Def. Ex. 16).

Mr. Shellito agrees that this Court must determine whether trial counsel was deficient based on a review of what trial counsel actually did (AB at 32). However, Mr. Shellito disagrees that this Court should blindly accept the testimony of trial counsel, Refik Eler, when his estimony was rebutted by lear and convincing evidence.[6]

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[4]Trial counsel spoke to Mr. Shellito's siblings at the courthouse shortly before they testified (SPC-R. 2527, 2838, 2842)

[5]The State again relies on trial counsel's testimony that he had sent out subpoenas for the records in June, 1995 (AB at 31). However, what the State fails to include in it's argument is that the subpoenas were worthless because trial counsel had no idea how to correctly draft a request and release for the confidential records. Thus, while trial counsel may have started the ball rolling, the ball came to an abrupt halt and did not start rolling again for several weeks, until August 10th when he made another attempt to obtain the records. And, trial counsel never obtained records from Grant Hospital (Def. Ex. 10).

[6]The State suggests that trial counsel was given "an additional month of preparation time in between the guilty verdict and the evidentiary part of the jury penalty phase (AB at 32). However, of that "month" trial counsel spent less than twenty (20) hours working on Mr. Shellito's case and none of those hours occurred before August 10th which was just eight days before the penalty phase was scheduled to commence. Of that time, 3.5 of the hours were spent preparing and attending depositions by the State; almost 3 hours was spent preparing and review the State's *proposed* jury instructions; three days before the charge conference, trial counsel spent 2.5 hours researching aggravating circumstances; two days before the scheduled commencement of the penalty phase trial counsel spent 2.5 hours meeting with Mr. Shellito; and finally, the day before the scheduled commencement of the evidentiary hearing trial counsel met with Mr. Shellito's parents for 3.0 hours (Def. Ex. 4 and 5).

In yet another attempt to mislead this Court, the State suggests that Mrs. Shellito denied any sexual molestation and neglect of her son and denied her son had any history of depressive episodes and substance abuse (AB at 30). However, these were not denials to trial counsel, as the State would have this Court believe. They were denials made in the wake of incidents where Mr. Shellito was being evaluated by educational and mental health professionals and his parents were essentially being judged. Indeed, these denials were in the wake of Mrs. Shellito having neglected and mistreated her son and having left her son, though he had threatened to commit suicide, and gone out to party with her friends (Def. Ex. 32, 33, 34). And, Mrs. Shellito, who is a mother who, when Michael was just a toddler, threatened to kill him and his siblings (Def. Ex. 35).

So, first it is important to correctly characterize Mrs. Shellito's denials because they cannot excuse trial counsel's failure to investigate Mr. Shellito's background since they were contained in records trial counsel obtained just a day or so before the penalty phase was scheduled to commence. In addition, Mrs. Shellito's denials are completely refuted by the records themselves and the testimony Mr. Shellito presented at the evidentiary hearing. There is no doubt that Mr. Shellito suffered extreme abuse and neglect, including sexual and physical abuse at the hands of his mother, depression and drug and alcohol abuse. The context of Mrs. Shellito's denials was

a mother trying to save her own skin rather than help her son.

The State also argues that trial counsel made a strategic decision not to present Dr. Miller because he diagnosed Mr. Shellito with antisocial personality disorder and that decision was "informed and reasonable" (AB at 32-3). The State's argument, like the circuit court's order is rebutted by clear and convincing evidence and by the legal standards governing ineffective assistance of trial counsel.

First, Dr. Miller made a diagnosis of antisocial personality disorder based on a brief meeting with Mr. Shellito in which Dr. Miller believed Mr. Shellito had no "previous psychiatric care", no "mental illness, alcoholism, epilepsy or suicide" in his family and that Mr. Shellito only drank at parties (Def. Ex. 2). At the time Dr. Miller diagnosed Mr. Shellito, trial counsel had provided only an arrest and booking report for his review (Def. Ex. 3). And, Dr. Miller's purpose was simply to evaluate Mr. Shellito for competency to proceed and sanity, not mitigation. Thus, it is indefensible to characterize trial counsel's decision as "informed and reasoned". Indeed, Dr. Miller's opinion was not "informed and reasoned" because he had no accurate information about Mr. Shellito. Because trial counsel failed 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.").

Second, contrary to the State's position (AB at 48), antisocial personality disorder has been recognized by this Court and the United States Supreme Court as mitigation. See Morton v. State, 789 So. 2d 384, 329-330 (Fla. 2001)("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, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Robinson v. State,* 761 So.2d 269, 273 (Fla.1999), *cert. denied,* 529 U.S. 1057, 120 S.Ct. 1563, 146 L.Ed.2d 466 (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)")(emphasis added). Trial counsel's failure to know the law is unreasonable.

Third, trial counsel unreasonably failed to understand the significance of antisocial personality disorder. As Mr. Shellito's experts explained, a personality disorder is simply a description of an individual's behavior. Thus, it is important to determine what causes the behaviors. In Mr. Shellito's case, he suffers from organic brain damage, depression and an alcohol and drug dependence (SPC-R. 2313, 2963, 3151, 3170). Therefore, his behaviors are caused by physiological problems of which he has no control. In

addition, individuals who suffer from antisocial personality disorder are often the victims of horrendous childhood abuse and neglect, as Mr. Shellito was at the hands of his parents. Therefore, his behaviors can be explained by his past. Thus, while Mr. Shellito may meet the criteria for antisocial personality disorder this is simply the beginning of the mitigation story. Trial counsel unreasonably limited his investigation of why Mr. Shellito would be diagnosed with antisocial personality disorder. What trial counsel would have found had he investigated would have established valid, compelling mitigation for Mr. Shellito, i.e., that Mr. Shellito suffers from organic brain syndrome, depression, has needed mood stabilizing drugs and antidepressants, and suffers from alcohol and drug dependence and was a victim of horrendous childhood physical, sexual and emotional abuse and neglect.

Finally, even when trial counsel collected voluminous records on Mr. Shellito, he sent Dr. Miller a single page at 3:10 p.m. on August 16th (2 days before the scheduled penalty phase), and followed up with a brief phone conference in which Dr. Miller reiterated that Mr. Shellito was competent to proceed and not insane at the time of the crime (Def. Ex. 16). Thus, trial counsel failed to consider what mental health mitigation was available. Trial counsel's investigation of Mr. Shellito's mental health mitigation was woefully deficient.

The State also defends trial counsel's performance in

relation to the mitigation that was established based on Mr. Shellito's history of drug and alcohol dependence and use of intoxicants on the night of the crime (AB at 33, 48). But, again, trial counsel failed to investigate the evidence of intoxication, both on the night of the crime and throughout Mr. Shellito's young life.[7] So, trial counsel's "strategy", or more accurately put, rationalization, cannot be found to be strategic.

In addition, trial counsel misunderstood the impact of Mr. Shellito's drug and alcohol dependence. Contrary to the State's position (AB at 48), chronic alcohol and drug abuse constitutes mitigation under Florida and United States Supreme Court law. See Lockett v. Ohio, 438 U.S. 586, 594 (1978); Miller v. State, 770 So. 2d 1144, 1150 (Fla. 2000); Mahn v. State, 714 So. 2d 391, 400-1 (Fla. 1998); Kokal v. Dugger, 718 So. 2d 138, 142 (Fla. 1998); Robinson v. State, 684 So. 2d 175, 179 (Fla. 1996); Besaraba v. State, 656 So. 2d 441, 447 (Fla. 1995); Caruso v. State, 645 So. 2d 389, 397 (Fla. 1994); Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993); Mendyk v. State, 592 So. 2d 1076, 1080 (Fla. 1992); Clark v. State, 609 So. 2d 513, 516 (Fla. 1992); Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990); Carter v. State, 560 So. 2d 1166, 1169 (Fla.

[7]The State again attempts to mislead this Court into believing that Mr. Shellito and his parents denied any history of drug or alcohol abuse to trial counsel. The denial by Mr. Shellito's parents was contained in mental health records that trial counsel did not have when making decisions about mitigation. Further, trial counsel would have apparently made his decision regardless of what was presented to him since he failed to know the law. And, finally, the records conclusively support that there was no "normalcy" in Mr. Shellito's life, despite the State's attempt to use the denials to establish that the jury would have believed that Mr. Shellito's life was normal.

1990); Heiney v. Dugger, 558 So. 2d 398, 400 (Fla. 1990); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989); Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985); Huddleston v. States, 475 So. 2d 204, 206 (Fla. 1985); Norris v. State, 429 So. 2d 688, 690 (Fla. 1983). And, intoxication at the time of the offense is mitigating. Parker v. Dugger, 498 U.S. 308, 315 (1991); Norris v. State, 429 So. 2d 688, 690 (1983); Buckrem v. State, 355 So. 2d 111, 113-4 (Fla. 1978). Trial counsel's failure to know the law was unreasonable, not strategic.[8] See Hardwick v. Crosby, 320 F.3d 1127, 1163 n9 (11th Cir. 2003).[9]

The State also relies on trial counsel's testimony that he placed some of the records into evidence so the State could not "cross-examin[e] those things" and because some of the records "reflected negatively on Shellito's character" (AB at 34). Apparently trial counsel and the State have never reviewed the exhibits that were supposed to let the jury "know there was a mental issue going on" but keep out all of the negative information because on the

[8]Even if this Court were to accept that it was reasonable for trial counsel to assume that the jury would not follow the law, there is no reason that trial counsel did not present the evidence of Mr. Shellito's alcohol and drug dependence and use of alcohol and drugs on the night of the crime at the Spencer hearing. Surely, it is unreasonable for trial counsel to believe that the trial court would not follow the law. And, if that were the case, then it was unreasonable for trial counsel not to move to disqualify the trial court.

[9]The State attempts to distinguish Hardwick by contending that the while the Court in Hardwick found that trial counsel misapprehended the law, here, trial counsel was aware that he could pursue additional evidence but decided not to (AB at 56). The State's contention is false. At issue in Hardwick was trial counsel's misapprehension about what constituted mitigation. Specifically, Hardwick's counsel, Tassone, whom Eler consulted in Mr. Shellito's case, believed that evidence of alcohol and drug dependence and use was negative. That is exactly the same reason that trial counsel spouted at Mr. Shellito's evidentiary hearing as to why he failed to investigate and present Mr. Shellito's battle with alcohol and drugs to the jury and trial court. Thus, Hardwick is directly on point and demonstrates that Mr. Shellito's trial counsel's performance was deficient.

very first page of the exhibit in the very first sentence, the "Relevant Health Problems/History" is described as: "**aggressive behavior, homicidal and suicidal threats**" (Def. Trial Ex. 2)(admitted at trial)(emphasis added). And while Mr. Shellito was diagnosed with organic mental disorder, he was also diagnosed with a conduct disorder. Had the jury gotten past the information about Mr. Shellito's homicidal thoughts they would have seen that the second page had a quote from Mr. Shellito's parents about his problem: "Behavior problems. He does not listen to anyone. Gets mad quickly and gets in trouble. Trouble in school; talks back at teachers. **Problems with the Law.**" (Def. Trial Ex. 3)(emphasis added). Mr. Shellito's parents also outlined some of the "problems with the Law" when Mr. Shellito had been arrested and the jury would have learned that Mr. Shellito's legal history dated back to when he was 13 years old.[10] On that same page, Mr. Shellito's parents denied any "ongoing or specific problems in the home contributing to Michael's problems" and indicated that Mr. Shellito had no problem reaching his milestones (Id).

So, the idea that "Eler made the decision not to present negative testimony or evidence of anti-social

[10]In some of those cases, charges had been dropped or were never even filed. And, of course Mr. Shellito had been a juvenile. Thus, none of this information was admissible or relevant to whether the jury should recommend life or death.

personality disorder" is ridiculous.[11] Trial counsel presented evidence that Mr. Shellito was having homicidal thoughts, that he was aggressive and got in trouble at home and at school and had problems with the law without any context. However, had trial counsel presented the testimony of a qualified mental health professional or someone who previously treated Mr. Shellito, like Dr. Sarkis, trial counsel would have been able to explain that Mr. Shellito suffered from organic brain damage and depression and lived in an unstable, unsupportive home. Trial counsel could have established that when Mr. Shellito got in trouble, or did not listen, or got mad quickly, or talked back to his teachers, or stole mice to feed his snake, or got in trouble with the law, it was not because he was a bad kid. Instead Mr. Shellito's brain is damaged and he cannot control his emotions or use good judgment. The jury would have realized that a five year old Michael, who cried and told his kindergarten teacher that he did not want to be how he was but he could not help it (SPC-R. 3376), was telling the truth and not being a "manipulator".

Furthermore, the State and trial counsel are under the unreasonable belief that if a record indicates that an individual could plan or did not have a thought disorder that he could not establish mitigation and the State would

[11]Later, the State argues that Dr. Riebsame's testimony about the fact that Mr. Shellito exhibits many of the characteristics of someone with antisocial personality disorder, though he attempted to soften it with an explanation, "was precisely the type of information Mr. Eler reasonably did not want the jury to know and reasonably did not want the State to use to open the door to highlight Shellito's extensive history of bad conduct." (AB at 38). Yet, the State ignores that the jury did hear this information without explanation and trial counsel opened the door all on his own. See Def. Trial Ex. 2, 3).

have been able to establish non-statutory aggravation (SPC-R. 2252-4)(AB at 36). However, this just demonstrates how unknowledgeable trial counsel was about mental health mitigation. Surely, just because Mr. Shellito did not demonstrate a thought disorder did not mean that he was not brain damaged, depressed, bi-polar or had a low IQ. A thought disorder is generally associated with schizophrenia; Mr. Shellito has never contended that he suffers from schizophrenia.

Also, though the State wants this Court to accept trial counsel's belief that prior bad acts would be admissible through cross examination of an expert (AB at 35, 36), neither the State nor trial counsel could explain how the evidence was admissible. For example, if Mr. Shellito did not assert that he was a good candidate for incarceration, which he never did, then the evidence about his difficulties in jail, would not be admissible as the State suggests (AB at 35). And, while some of the symptoms of Mr. Shellito's mental health problems are aggression and acting out, in a complete context those are not "negative". And, they would explain why Mr. Shellito behaves as he does.

Indeed, in this vein, the State excerpts portions of Dr. Sarkis' testimony in an attempt to persuade this Court that his testimony would not have been helpful (AB at 36-7). But, of course, this Court does not conduct its analysis by reviewing sound bites, particularly ones that

are irrelevant.[12] Rather, a review of Dr. Sarkis' entire testimony establishes that he was an incredibly helpful witness who explained Mr. Shellito's brain damage and depression and how those conditions caused him to exhibit impulsive, aggressive behaviors. However, when on medication, Mr. Shellito responded with "excellent control of his behaviors."[13] Dr. Sarkis also testified that Mr. Shellito had always suffered from the major mental illness of organic brain damage, though the nomenclature had changed with his experience (SPC-R. 3002-5).[14]

The State also fails to show how Dr. Beaver's testimony that Mr. "Shellito never indicated any major head trauma, was not insane, was competent, was not delusional, not psychotic, and not mentally retarded (AB at 37), is relevant to whether or not trial counsel failed to develop compelling statutory and non-statutory mental health mitigation. The State chooses to ignore, that Dr. Beaver concurred with the other experts that Mr. Shellito suffered from organic brain damage and explained that brain damaged individuals experience "a lot of mood variability" and they are "less able to cope or handle stressful or difficult

[12]The State identifies that Dr. Sarkis testified that Mr. Shellito "knew right from wrong" (AB at 37), but fails to identify how this testimony is negative or undercuts the mental health mitigation. Likewise, the State identifies that an EEG showed "no lateralized or epileptic form abnormalities" (AB at 37), but fails to identify that the EEG did indicate brain damage. These irrelevant and incomplete sound bites demonstrate how far the State has to reach in order to defend trial counsel's deficient performance.

[13]The State fails to include that in this particular quote Dr. Sarkis was discussing his records in which he indicated how Mr. Shellito was progressing while on medication (AB at 37). The State seems to disregard the context, and thus the truth of Dr. Sarkis' testimony.

[14]The State again distorts the record (AB at 37). Dr. Sarkis explained that organic brain damage is a major mental health disorder, though he did not characterize it as such in his records.

situations" (SPC-R. 3159).

The State argues that Groover v. State, 489 So. 2d 15 (Fla. 1986), stands for the proposition that a capital defendant cannot establish statutory mental health mitigation when that defendant denies committing the crime (AB at 38). A review of Groover shows that the State has distorted this Court's opinion. First, this Court indicated that Groover's trial counsel was not ineffective, **at the guilt phase**, for failing to assert a voluntary intoxication defense because trial counsel advanced a theory that Groover, though present, had not actually committed the murders. Id. at 16. In addition, this court found that trial counsel was not ineffective, **at the guilt phase**, in asserting a defense of duress or coercion, when he advanced a theory that Groover's "role in these killings was presented at trial to be based on appellant's domination by Parker" Id. Thus, Groover does not stand for what the State suggests it does. Rather, there are numerous capital defendant's who have denied committing the crimes with which they have been convicted, but who then presented mental health mitigation – both statutory and non-statutory. See Rimmer v. State, 59 So. 3d 763, 780-1 (2010); Blanco v. Dugger, 691 F.Supp. 308 (S.D. Fla. 1988).

And, the State also incorrectly infers that just because mental health mitigation does not rise to the level of statutory mitigation, it is not mitigating (AB at 39).

Contrary to the State's assertion, Dr. Riebsame's testimony was not cumulative to the evidence presented

during the penalty phase (AB at 39). The trial court failed to consider anything about Mr. Shellito's mental health in evaluating the age mitigator. See R. 371-402. Instead, the trial court erroneously focused on Mr. Shellito's physical characteristics and his behavior that led him to be involved in the juvenile justice system at the age of 13 (Id.) – neither of which is relevant to determining maturity or whether the age mitigator should apply to Mr. Shellito. The trial court's only mention of Mr. Shellito's mental health in terms of mitigation was reflected by a single sentence in the trial court's order: "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." (R. 399). Mr. Shellito's mental health mitigation, that was presented at his evidentiary hearing was not cumulative to that presented at trial.

The State's discussion of Drs. Wu and Holder is similarly misguided. Dr. Wu testified about the latest PET Scan technology and interpretation of various patterns (SPC-R. 2653-4, 2566). Thus, Dr. Wu's purpose was simply to demonstrate that the latest technological advance in brain imaging corroborates the previous diagnoses and the abnormal EEG results (SPC-R. 2663-4). Though Dr. Holder disputed Dr. Wu's conclusions, he had no training or experience in using PET Scan images in the field of psychiatry. And, he did not dispute that Mr. Shellito suffers from organic brain damage or other mental health

illnesses (SPC-R. 3129-31).

The State also defends trial counsel and outlines a list of evidence that was presented in the penalty phase and states that trial counsel "weaved" (sic) the evidence into his closing argument.[15] However, the major flaw in the State's argument is that it does not reflect that the State obliterated the mitigation through cross examination of the witnesses and when in closing argument the prosecutor told the jury that the mitigation were simply "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). The State argued:

> Now, some of the mitigation that you will hear about, you will hear about the defendant's age. He was 18 at the time of the murder, almost 19. He's now almost 20. He's an adult. He can drive, he can vote, he can be in the military, he can murder, he can commit adult crimes.
>
> In March of 1994 the criminal justice system in Clay County called him an adult. That situation started a year earlier, March of '93 when he was only 17 but he was convicted as an adult. He went to jail in Clay County for about a year. He's a seasoned criminal. He commits adult crimes, he's out on the streets, he stays in hotels often with older women, he's not a child, he's had opportunities in the system and hasn't learned. He should, ladies and gentleman, pay the consequences.
>
> * * *
>
> Another mitigating circumstance is what we call the nonstatutory mitigator that you will consider is that you can consider any aspect of the defendant's character or record or other circumstance of the offense. . . .
>
> * * *
>
> You will probably hear some argument and you've heard some evidence regarding the defendant's low intelligence,

[15]Trial counsel's discussion of the background records he introduced from his closing argument is found on pages 1478-85. A review of the argument demonstrates that trial counsel did not understand the mitigation and did not know how to explain it to a jury. Thus, the closing is without context, unexplained and incohesive; it is not persuasive and trial counsel never once mentions that the law recognizes the evidence as mitigation. For example, trial counsel mentions in passing a suicide attempt. But, his only comment is: "That is not normal" (R. 1484).

his background, and why this is mitigation. I will not spend a great deal of time on the records, you will have some of them to take back with you. The defendant has had some difficulties, I'm not going to deny that. I'm not sure exactly to what extent they will go, you've heard some conflict in the evidence that you will have to decide on but you would not expect a Christian background of a murderer. The question is, though, do these difficulties, does this problem that has surfaced at some point in his life when you look at each of these occurrences, does it outweigh the obvious weighty aggravators in this case because that is your duty, that is what you must do.

We know in the records it talks of the defendant throwing tantrums when he doesn't get his way. Sean Hathorne, it was quite beyond a tantrum when he didn't get his way.

We know the records say he has the average ability to reason, to organize and perceive. He knew what he was doing.[16] And anything else that you hear about is an excuse.

How many murderers are A students? How many people with difficult backgrounds kill because of those difficult backgrounds?

The only evidence you got was largely from the mother, Mrs. Shellito. You recall her testimony in the guilt phase. You heard some evidence of what doctors said and you'll hear or have the records **but no doctors testified**. **Doctors often have fancy names for insignificant problems. At the very least fancy names for problems that are not sufficient to warrant mercy, not sufficient to excuse murder and, that is what you have to keep in mind**.

The defendant was deprived, therefore he is depraved. That is an excuse. Whatever deprivation there was his sister and brother have turned out fine. They have gone on in their lives not to be criminals, not to commit murders and not to do it out of greed. One bad apple in a family is not mitigation, ladies and gentleman.

The defendant doesn't help himself, the mother says that he's not capable of any violence except for self-defense. So whatever problems he may or may not have had in his own mind they didn't cause him even, according to her, to commit this murder. She spoke of peer pressure and that people he hung around with getting him in trouble. The cross examination of these witnesses speaks for itself, the wrong person to hang out with, the bad influence, the violent criminal is him.

I did it but I have these problems and it wasn't consistent with who I am. Because I helped around the house. Who had the gun? The weapon of his dreams. Who forced him to take it with him? Who forced him to use it?

[16]It is exactly this evidence and argument that trial counsel, the circuit court and now the State asserts that trial counsel was reasonably attempting to avoid. But, clearly, trial counsel did not.

> Mr. Eler will ask you to pardon the defendant from complete accountability. The mitigation I submit is an attempt to divert you away from his true conduct and his true character. It is up to you to make this decision, you are the only person who heard the evidence, **you are the expert on the facts in both the guilt and penalty phase. Do not let some papers substitute for your judgement**. . . .
>
> * * *
>
> If you want to know who he is, what Michael Shellito is, look at him at the time he executed Sean Hathorne, he doesn't care, except for money. He has no mercy. What does he want? Mercy. What did he show Sean Hathorne? Nothing. This is a man who was proud of his accomplishment, this is a man who sat there and watched a shirt change colors while the blood dripped out of his victim's body.
>
> I ask you yo show that murderer the same amount of mercy he showed the victim 18 year old Sean Hathorne. If you do, ladies and gentleman, he will be held completely accountable.

(R. 1461-8)(emphasis added).

Further, there was simply no context for the records that were introduced. Thus, at the time of the trial, the State dismissed and discounted to irrelevance the mitigation that trial counsel did present. The trial court's sentencing order makes clear that the court, too, found very little mitigation in trial counsel's presentation of evidence. See R. 371-402.

It is important to point out that the State urges this Court to find that Mr. Shellito's mitigation was "negative" (AB at 49). In doing so the State ignores the United States Supreme Court's opinion in Porter v. McCollum, 130 S.Ct. 447 (2009).[17] In Porter, the Supreme Court found that this Court had unreasonably applied the Strickland standard when this Court

[17]The State argues that Mr. Shellito "would replace the broad discretion of his trial counsel with the rules of a non judicial organization" when addressing the ABA Guidelines set forth in Mr. Shellito's Initial Brief (AB at 54). Mr. Shellito is asking for no such thing. Rather, both the United States Supreme Court and this Court have repeatedly turned to the ABA Guidelines that were in effect at a particular time "as guides to determining what is reasonable." Wiggins v. Smith, 539 U.S. 510, 524 (2003). Mr. Shellito has likewise turned to those guides to demonstrate that his trial counsel's performance was unreasonable.

unreasonably discounted Porter's mitigation to irrelevance for reasons similar to those urged by the State, here. The Porter Court held:

> The Florida Supreme Court either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing. Under Florida law, mental health evidence that does not rise to the level of establishing a statutory mitigating circumstance may nonetheless be considered by the sentencing judge and jury as mitigating. See, *e.g., Hoskins v. State,* 965 So.2d 1, 17-18 (Fla.2007) *(per curiam)*. Indeed, the Constitution requires that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor." *Eddings v. Oklahoma,* 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Yet neither the postconviction trial court nor the Florida Supreme Court gave any consideration for the purpose of nonstatutory mitigation to Dr. Dee's testimony regarding the existence of a brain abnormality and cognitive defects. While the State's experts identified perceived problems with the tests that Dr. Dee used and the conclusions that he drew from them, it was not reasonable to discount entirely the effect that his testimony might have had on the jury or the sentencing judge.
>
> Furthermore, the Florida Supreme Court, following the state postconviction court, unreasonably discounted the evidence of Porter's childhood abuse and military service. It is unreasonable to discount to irrelevance the evidence of Porter's abusive childhood, especially when that kind of history may have particular salience for a jury evaluating Porter's behavior in his relationship with Williams. It is also unreasonable to conclude that Porter's military service would be reduced to "inconsequential proportions," 788 So.2d, at 925, simply because the jury would also have learned that Porter went AWOL on more than one occasion.

Id. at 454-5. Apparently, the State has learned nothing from Porter. However, in Porter the United States Supreme Court made clear evidence that establishes recognized mitigation cannot be dismissed or discounted.

Furthermore, trial counsel and the State cannot justify why, if the evidence were too negative to be placed before a

jury, it was not presented to the judge so that the ultimate sentencer was provided with the evidence and this Court would have had all of the evidence of mitigation in determining whether Mr. Shellito's sentence was proportionate.[18] Surely, the trial court and this Court would have understood and followed the law.

> And, like Porter, the evidence presented in postconviction was not cumulative or weak and Mr. Shellito is not challenging the manner in which it was presented, as the State suggests (AB at 49, 51, 55). Rather, the evidence about the physical, sexual and emotional abuse inflicted upon Mr. Shellito by his mother was never known to the jury. Likewise, the jury heard no evidence about Mr. Shellito's history of alcohol and drug dependence. And, the jury heard scant evidence about Mr. Shellito's mental health problems and how his organic brain damage, bi-polar disorder, depression, low IQ, learning disabilities and suicide attempts impacted his life. Mr. Shellito's case is not "a case in which the new evidence 'would barely have altered the sentencing profile presented to the sentencing judge.'" Porter, 130 S.Ct. at 454, quoting Strickland v. Washington, 466 U.S. 668, 700 (1984). Mr. Shellito's mitigation was powerful and explained much

[18]The State weakly suggests that trial counsel's strategy applies equally to the Spencer hearing (AB at 52). However, this cannot be true. Trial counsel based his post hoc rationalizations, or strategy, as the State characterizes it, on his belief that the jury would view the evidence as negative. However, there is no doubt that Mr. Shellito's mitigation constitutes valid, recognized mitigation. Therefore, trial counsel could not be using the same rationale to the presentation of evidence before the judge. The reality was that trial counsel did not understand the mitigation and never contemplated presenting it to the trial court.

about him and the crime.

The State relies on Cooper v. State, 856 So. 2d 969 (Fla. 2003), despite the fact that the Eleventh Circuit has now found that, like Porter, this Court's analysis of Mr. Cooper's ineffective assistance of counsel at the penalty phase claim was an unreasonable application of Strickland.[19] Cooper v. Sec'y Dep't of Corr., 646 F.3d 1328 (11th Cir. 2011). As to whether Cooper's trial attorney's performance was deficient, the Eleventh Circuit held:

> . . . [W]e conclude Cooper has established his attorneys' performance was deficient. With regard to performance, the Florida Supreme Court concluded, "the preparation of Cooper's attorneys for the penalty phase and their decisions regarding what evidence to present at trial were entirely strategically reasonable." *Cooper II,* 856 So. 2d at 975. Even affording that decision AEDPA-deference, we conclude it is contrary to, or an unreasonable application of, clearly established federal law as set out in *Strickland.* Under the prevailing standards in 1984, the year of Cooper's trial, Cooper's attorneys did not conduct an adequate background investigation and unreasonably decided to end the background investigation after only talking to Cooper, Cooper's mother and Dr. Merin. *See Williams v. Taylor,* 529 U.S. 362, 395-98, 120 S. Ct. 1495, 1514-15 (2000)(basing an obligation to conduct a thorough background investigation on standards set forth in 1980); *see also Wiggins,* 539 U.S. at 522, 123 S. Ct. at 2535-36 (stating *Williams v. Taylor* was squarely governed by *Strickland* and did not create new law); *accord Johnson v. Sec'y, DOC,* __ F.3d __, 2011 WL 2419885, at *25 (11th Cir. 2011) (failing to conduct a reasonable background investigation and resulting failure to present mitigating evidence was deficient under AEDPA); *Williams v. Allen,* 542 F.3d 1326, 1342 (11th Cir. 2008) (same).
>
> The question under *Strickland* is whether Cooper's

[19] Cooper v. Sec'y. Dep't of Corr., 646 F.3d 1328 (11th Cir. 2011) was decided on July, 21, 2011. The State filed its Answer Brief on October 28, 2011. The State has failed to explain why it has relied on an opinion that is no longer good law. It is also important to note that the Jones and Davis opinions on which the State relies are being challenged in federal district court with the benefit of Porter, Cooper and Johnson v. Sec'y. Dep't of Corr., 643 F.3d 907 (11th Cir. 2011) – all cases in which this Court's Strickland analysis of a penalty phase ineffectiveness claim has been found to be contrary to and an unreasonable application of federal law. Mr. Shellito asserts that this Court's analysis in Jones and Davis was equally contrary to and an unreasonable application of Strickland.

> trial counsel "conducted an adequate background investigation or reasonably decided to end the background investigation when [they] did." *See Johnson,* 2011 WL 2419885, at *22. Cooper's attorneys did neither. . . .
>
> Further, Koch and Crider knew that Cooper was abused by his father through the deposition testimony of Dr. Merin. Once they decided not to call Dr. Merin, who "was our only vehicle" for testimony concerning Cooper's background "with the exception of Cooper's mother," to testify before the jury, they did nothing further to develop background information to support their mitigation theory. We agree with the district court that Cooper's mitigation argument would have had much more credibility if Cooper's brother or sister, at a minimum, had been called to support Cooper's arguments. Instead, the jury heard nothing about the abuse inflicted on Cooper by his father and brother, hearing only of the abuse Cooper's father inflicted on Cooper's mother. Dr. Merin actually testified that Cooper's father was "exceptionally abusive, both physically and verbally," before the judge, but there was no testimony as to the specifics of the abuse directed toward Cooper.

Cooper 646 F.3d at 1351-2. The Eleventh Circuit also addressed this Court's prejudice analysis:

> After a thorough review of the evidence presented at Cooper's sentencing and the evidence presented at the postconviction evidentiary hearing, we agree with the district court that the Florida Supreme Court's finding that the mitigation evidence presented at the evidentiary hearing was cumulative to that presented at sentencing was an unreasonable determination of the facts. Specifically, as support for its holding that Cooper was not prejudiced by counsel's performance, the Florida Supreme Court found that "a substantial part of the information regarding Cooper's disadvantaged childhood was presented at Cooper's trial.
>
> During Cooper's penalty phase, Cooper's mother testified that Cooper's father was both violent and emotionally abusive to Cooper during his formative years." *Cooper II,* 856 So. 2d at 976. However, this was not Kokx's testimony. Kokx testified as to the abuse Cooper's father inflicted on her and that Cooper witnessed. According to Kokx, the extent of the abuse inflicted on Cooper was the emotional abuse of his father not being involved in his life and getting whipped by a belt, sometimes leaving marks. Kokx's testimony did not begin to describe the horrible abuse testified to by Cooper's brother and sister. Further, Kokx did not testify to any of the abuse suffered by Cooper at the hands of his brother, Donnie. Kokx was also away for periods of Cooper's life when she and Cooper's father were separated and could have missed much of the abuse Cooper suffered. Although Kokx's testimony

revealed that Cooper's home life was volatile, to characterize her testimony as revealing a "substantial part" of Cooper's "disadvantaged childhood" is a great exaggeration. Thus, the state court's decision on prejudice was "based on an unreasonable determination of the facts in light of the evidence presented in the State court. . . .

* * *

This case is strikingly similar to this Court's recent decision in *Johnson.* Like the defendant in *Johnson,* "[t]he description, details, and depth of abuse in [Cooper's] background that were brought to light in the evidentiary hearing in the state collateral proceeding far exceeded what the jury was told." *Id.* There was a wealth of mitigating evidence that was not presented to Cooper's jury. Cooper asserts this evidence entitles him to both statutory and non-statutory mitigation.

As to statutory mitigation, the unpresented mitigating evidence would support a finding that Cooper is entitled to the mitigator of age of the defendant at the time of the crime, § 921.141(6)(g), Fla. Stat., despite the sentencing judge's explicit rejection of this mitigator. The sentencing judge did not have the full story of Cooper's abusive background. When Cooper committed the crimes at age 18, he was barely removed from being violently abused by his father and brother throughout his childhood. The evidence presented at the evidentiary hearing would support a finding of the statutory mitigator of age at the time of the crime

* * *

The evidence presented at the evidentiary hearing would also support multiple categories of nonstatutory mitigation based on Cooper's childhood and family background. The evidence presented at the evidentiary hearing strongly supports a mitigator that Cooper's father and older brother severely abused him throughout his childhood and teenage years. The evidence also supports a mitigator that Cooper began using drugs and alcohol at age 11 to escape his family and the abuse. This drug use included the use of inhalants, which, according to the psychological expert at the postconviction evidentiary hearing, could have contributed to neurological deficits. Cooper was abandoned by his mother for stretches of time. Further, Cooper had only a seventh-grade education and had learning deficits. Although Cooper's IQ was not made an issue at the penalty phase of his trial, Cooper's IQ was tested by the postconviction expert, Dr. Fisher. This "test data revealed that he functions at a borderline level of intelligence (full scale IQ approximately 75) . . . [which] places him approximately 6 points above the mentally retarded range." Further, although testing did not reveal that Cooper had any psychotic processes, Cooper had a history of depression and suicidal gestures. We also credit the mitigating evidence presented at sentencing, specifically that Cooper was willing to confess to the

> crime.
>
> During the penalty phase, the jury heard very little that would humanize Cooper, see *Porter*, 130 S. Ct. at 454, and the mitigation evidence presented in postconviction proceedings "paints a vastly different picture of his background" than the picture painted at trial, *see Williams v. Allen,* 542 F.3d at 1342. While the jury heard a small sliver of his volatile upbringing, the jury heard nothing of Cooper's life of horrific abuse rendered by both his father and brother, his use of drugs and alcohol beginning at age 11 to escape his family and the abuse, his abandonment by his mother for short stretches of time, his seventh-grade education and learning deficits, and his depression. Further, all of the nonstatutory mitigating evidence strengthens the two categories of statutory mitigation supported by the evidence: age and substantial domination. Cooper was barely removed from this horrific abuse when he committed the crimes at age 18. Likewise, he was barely removed from the domination by his father and brother when he was dominated by Walton.

Cooper, 646 F.3d at 1353-5.

It is not surprising that the State would rely on this Court's opinion in Cooper to argue that Mr. Shellito's claim was correctly denied. Mr. Shellito's claim is strikingly similar to Cooper's claim of ineffective assistance of counsel at the penalty phase. And, in light of the Eleventh Circuit's opinion in Cooper, there can be no doubt that Mr. Shellito has established both deficient performance and prejudice in his case.

The State's argument that Mr. Shellito has not adequately presented portions of his claim is meritless (AB at 56, 58). A review of Mr. Shellito's claim demonstrates that he identified his trial counsel's deficiencies and the prejudice that resulted. Indeed, as to Mr. Shellito's claim that trial counsel failed to object to inaccurate information contained in the sentencing order, Mr. Shellito stated in his Intial Brief:

> 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.

(Initial Brief at 42). Thus Mr. Shellito identified the inaccuracies and objectionable information contained in the sentencing order.

Penultimately, Mr. Shellito would dispute the idea that it is "inconsequential" that the trial court did not use Mr. Shellito's correct name (AB at 58). A capital defendant is entitled to an individualized sentencing proceeding. Lockett v. Ohio, 438 U.S. 536, 605 (1978). The trial court's cut and paste analysis would seem to defeat the principle set forth in Lockett.

Finally, trial counsel's failure to investigate and present evidence that would have established the age mitigator was not considered on direct appeal and therefore does not preclude consideration of this portion of Mr. Shellito's claim. See AB at 59-60. Law of the case cannot be established when an entirely different constitutional issue was addressed, though involving the same underlying facts.

Relief is warranted.

ARGUMENT II: TRIAL COUNSEL WAS INEFFECTIVE AT THE GUILT PHASE

The State ignores much of Mr. Shellito's evidence and argument supporting his claim. Mr. Shellito will address the few matters that the State did address.

The State asserts that Mr. Shellito did not "sufficiently" plead his claim regarding Teresa Ritzer. However, a review of Mr. Shellito's Rule 3.851 motion establishes that Mr. Shellito specifically identified trial counsel's failure to depose Ritzer in a timely manner (PC-R. 269) and also averred: "In the one case where counsel did attempt to impeach witness Theresa Ritzer, he was ignorant of the law and elicited testimony damaging to Mr. Shellito." (PC-R. 273). Thus, Mr. Shellito adequately pleaded his claim and presented testimony relating to trial counsel's deficient performance in investigating, preparing and cross-examining Ritzer.

Furthermore, as to the statement Gill made to Mr. Shellito's mother, the State argues that Migdalia's conversations with trial counsel and his investigator were inadmissible because they were hearsay (AB at 72). However, because the State impeached Migdalia indicating that her testimony was a recent fabrication, her prior consistent statements were admissible. See Sec. 90.801 (2)(b). And, contrary to the State's assertion, Migdalia did inform Mr. Marx about Gill's statements to her on April 10th, over three months before Mr. Shellito's trial (Def. Ex. 50).

The State incorrectly contends that a voluntary intoxication defense was not available to him (AB at 73).

The State misunderstands the law. Voluntary intoxication was a recognized defense at the time of Mr. Shellito's trial in 1995. Florida Statute §775.051 abolished the voluntary intoxication defense, effective on October 1, 1999. Also, there was no requirement that the defendant not know what had occurred during the shooting in order to present a defense of voluntary intoxication.

Relief is warranted.

ARGUMENT III: MR. SHELLITO'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED (BRADY/GIGLIO)

The State begins to address Mr. Shellito's claim by arguing that he did not assert a Giglio claim in his Rule 3.851 motion (AB at 74). However, there is no doubt that the evidence presented at the evidentiary hearing and the pleadings following the evidentiary hearing notified the State that Mr. Shellito was now aware that the State presented false testimony at his trial. Therefore, Mr. Shellito has properly preserved his claim.

The State also attempts to defeat Mr. Shellito's claim by urging a standard to assess Mr. Shellito's violations of due process that is contrary to and an unreasonable application of federal law. First, it is contrary to federal law to suggest that Shellito has to prove the existence of a deal. See AB at 76. In United States v. Bagley, the United States Supreme Court held:

> 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**.

473 U.S. 667, 683 (1985)(emphasis added). Mr. Shellito need not prove that the prosecutor struck a deal with Bays. Rather, at a minimum, what the prosecutor did in Mr. Shellito's case was what was done in Bagley – he held out the possibility of a reward.

Further, the State's argument that a "witness' subjective belief that the prosecutor would help is not the basis for a Brady or Giglio claim" (AB at 76) is equally ignorant. 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). There, 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. The Supreme Court held: "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". Napue, 360 U.S. at 269 (1959).

Mr. Shellito has established that his right to due process was violated by the prosecutor's actions and Bay's testimony at trial. There is no doubt, that a minimum, whether spoken or unspoken, a promise for leniency was held

out to Bays.

The State also argues that the circuit court credited Plotkin's testimony at the evidentiary hearing (AB at 77). However, Plotkin's testimony was rebutted by clear and convincing evidence. In addition, under Kyles v. Whitley, the materiality standard it is not for the court conducting the materiality review to make credibility findings that would have been for the jury to make had the undisclosed information been turned over to the defense. 514 U.S. 437, 449, n. 19 (1995)("JUSTICE SCALIA suggests that we should "gauge" Burns' credibility by observing that the state judge presiding over Kyles's postconviction proceeding did not find Burns's testimony in that proceeding to be convincing, and by noting that Burns has since been convicted for killing Beanie. *Post*, at 471-72. Of course neither observation could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials.")

Moreover, recently, in Smith v. Cain, 2012 WL 43512 (January 10, 2012), the Supreme Court addressed the prejudice/materiality prong of a Brady claim. The Supreme Court concluded that the first degree murder conviction at issue could not stand and reversed the decision denying postconviction relief. In reaching this decision, the Supreme Court explained:

> The State and the dissent advance various reasons why the jury might have discounted Boatner's undisclosed statements. They stress, for example, that Boatner made other remarks on the night of the murder indicating that he could identify the first gunman to enter the house, but not the others. **That merely leaves us to speculate about which of Boatner's contradictory declarations the jury would have believed**. The State also contends that Boatern's

> statements made five days after the crime can be explained by fear of retaliation. Smith responds that the record contains no evidence of any such fear. Again, **the State argument offers a reason that the jury *could* have disbelieved Boatner's undisclosed statements, but gives us no confidence that it *would* have done so.**

2012 WL 43512 at page 4 (italics in original)(bold emphasis added). Clearly, the Supreme Court imposed the burden upon the State to convince the Court that confidence in the guilty verdict remained. See Smith, 2012 WL 43512 at page 8 (Thomas, J., dissenting)("Instead of requiring Smith to show a reasonable probability that Boatner's undisclosed statements would have caused the jury to acquit, the Court improperly requires the *State* to show that the jury would have given Boatner's undisclosed statements no weight.")(italics in original).

While the State attempts to show that Bays' false testimony and expectation of a benefit was not prejudicial and was harmless[20], there is no disputing that Bays was the only witness to place the murder weapon in Mr. Shellito's hands before the crime. He also testified that Mr. Shellito admitted to shooting the victim. And, he was 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.

Furthermore, the evidence 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.

Relief is warranted.

[20]The State asserts that Bays was facing a life sentence whether he was charged as a habitual violent felony offender or not (AB at 78). But what the State conveniently ignores is that Bays' was no longer facing a minimum mandatory of 15 years.

ARGUMENT IV: AKE V. OKLAHOMA

The State is incorrect in asserting that Mr. Shellito's mental state was irrelevant to the issues in his case because he denied committing the murder (AB at 80). 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).

Furthermore, an expert is needed to do more than determine whether a defendant is mentally retarded (AB at 80). Here, Mr. Shellito's mental health issues concerned, intoxication on the night of the crime, his history of suicide attempts, drug and alcohol dependence, his diagnosis of organic brain damage, depression, conduct disorder, low IQ and learning disabilities. There were a plethora of mental health issues which needed to be explored in Mr. Shellito's case. However, sending a single page of records and no other background materials to an expert who conducted no testing or collateral interviews violated Mr. Shellito's right to effective mental health assistance.

Also, curiously, the State suggests that Dr. Holder somehow contradicted Mr. Shellito's mental health experts (AB at 80). He did not. Dr. Holder disputed Dr. Wu's interpretation of the PET Scan data, not the opinions that Mr. Shellito suffered from organic brain damage, bi-polar disorder, depression, low IQ or learning disabilities.

Relief is warranted.

ARGUMENT V: TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO IMPORPER PROSECUTORIAL ARGUMENTS.

The State incorrectly asserts that Mr. Shellito's claim is barred (AB at 80). The State made no objection to the circuit court when the court granted Mr. Shellito an evidentiary hearing on his claim and developed his claim at the evidentiary hearing.

In addressing Mr. Shellito's claim the State ignores the relevant portions of the argument that Mr. Shellito claims were objectionable. See AB at 86, 87. Rather, the State focuses on other parts of the prosecutor's argument to claim that his arguments were proper. The State's response does not make sense.

Furthermore, the State's argument that "given the state of the law in 1995, when this case was tried, including Bertolotti at six years old, it was not unreasonable for trial counsel not to object to the prosecutor's argument", (AB at 90), is laughable. The assertion that it was reasonable for trial counsel to be unaware of caselaw that was six years old when he was defending Mr. Shellito is simply unsupportable.

Relief is warranted.

ARGUMENTS VI, VII and VIII:

Mr. Shellito rests on the evidence presented at the evidentiary hearing and the arguments before the circuit court and this Court. Relief is warranted.

CONCLUSION

Mr. Shellito again 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 Stephen R. White, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, FL 32399-1050, on January 26, 2012.

CERTIFICATION OF TYPE SIZE AND STYLE

This is to certify that the Initial Brief of Appellant has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

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