Electronically Filed 09/26/2013 02:36:22 PM ET

RECEIVED, 9/26/2013 14:38:46, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC13-632

DERRICK MCLEAN
Appellant,

v.

Capital Postconviction Case
Lower Tribunal No. 2004-CF-015923

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

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# INITIAL BRIEF OF APPELLANT

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Mark S. Gruber
Florida Bar No. 0330541
CAPITAL COLLATERAL
REGIONAL COUNSEL
MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
813 740 3544
Counsel for Appellant

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## REQUEST FOR ORAL ARGUMENT

Undersigned counsel for the Appellant respectfully requests the opportunity to present oral argument pursuant to Fla.R.App.P. 9.320. This is a capital case, the resolution of the issues presented will determine whether Derrick McLean will live or die, and a complete understanding of the complex factual, legal and procedural history of this case is critical to the proper disposition of this appeal.

## JURISDICTIONAL STATEMENT

This is a timely appeal from the trial court's final order denying an original motion for postconviction relief from a judgment and sentence of death. This Court has plenary jurisdiction over death penalty cases. Art. V, § 3(b)(1), Fla. Const.; *Orange County v. Williams*, 702 So. 2d 1245 (Fla. 1997).

## PRELIMINARY STATEMENT ABOUT THE RECORD

The original record on appeal comprises twenty-eight consecutively numbered volumes. The pages of the first thirteen volumes are numbered consecutively from one to 2,059. Volume fourteen begins renumbering the pages sequentially from page one through 1994 which concludes volume twenty-six. Volume twenty-seven begins renumbering the pages sequentially from page one through 276 which concludes volume twenty-eight. References to the record on direct appeal are designated "R" followed by the volume and page number.

The postconviction record comprises ten consecutively numbered volumes. The pages of the first eight volumes are numbered consecutively from one to 1259. The pages of the ninth and tenth volumes are consecutively numbered from one through 298. References to the postconviction record are in the form PC-R [volume number] / [page number].

## STATEMENT OF THE CASE AND FACTS

The facts of this case were recited in the direct appeal decision at *McLean v. State*, 9 So.3d 1045 (Fla. 2010). The evidence presented by the State at trial showed as follows. Theothlus Lewis and his wife Shirley Lewis were next door neighbors to Jahvon Thompson in the Silver Pine Apartments. Lewis was watching television when he heard two booms and thought it was loud music next door. Lewis went next door to stop the noise. One of two armed men in the apartment opened the door and motioned Lewis to come in. He was not masked. Lewis also saw a masked man, who was later identified as co-defendant James Jaggon, with the victim, Jahvon Thompson, coming from the hallway area. The first gunman then kept searching through the apartment while the masked person stood guard with the gun.

After concluding the search, the first gunman told the guy with the mask to go outside and if he saw the girl next door to shoot her. The first gunman remained standing by the door. Sensing something was wrong, Theo Lewis dove to the floor

and crawled towards the back of the apartment. As soon as Lewis turned around he felt a bullet go across his ear. Lewis then realized he was shot in the back. Several other shots were fired. The perpetrators fled. After a few moments, Lewis got up and started towards the door. Lewis saw that Jahvon had been shot. Lewis went to his apartment and his wife called 911. R19, 792 – 810.

According to the direct appeal opinion what happened next was as follows:

> Meanwhile, Lewin and Jaggon drove off, McLean left the scene on foot, and the three men met up at a nearby restaurant. McLean, still carrying the blue pillow sham from the apartment, got into the car with Lewin and Jaggon, and Lewin pulled the car out onto the road. A police officer, who was driving an unmarked car in the vicinity and had been notified of the shooting, saw the gold Buick pass by, and he activated his lights and initiated pursuit. Lewin sped up and attempted to elude the officer but soon crashed into the marked patrol car of a sheriff's deputy who was investigating an unrelated incident nearby. The deputy, who was in his marked car, saw the Buick coming at him and ran from his vehicle in order to get out of the way. Lewin's car struck the marked car, sending it into the deputy, who was struck in the hip and thrown fifteen to twenty feet. The deputy saw Jaggon sitting in the front passenger seat of the Buick. He also saw McLean running from the Buick.

*State v. McLean*, 29 So.3d 1048.

Soon thereafter a canine officer located a person that met Lewin's Captain Ellis' description. R20, 874-85. Another canine officer also came to the scene to do tracking. R20, 923. Approximately thirty yards into woods near the crash site the dog came across some items that looked like they were freshly placed there. They

were black and white full finger batting gloves, a baseball hat and a shirt. *Id.* 925.

About a week later the police were given information from an anonymous "Crimeline" tip about a third person named "Derrick." This was suspected to be a reference to Lewin's cousin, Derrick McLean. R20, 944-45.

On December 9th a photo lineup including McLean was presented to Lewis, who said he was "90% sure" that the photograph of the defendant was the shooter. R20, 951. The defendant was arrested on an unrelated probation violation warrant. Lewis then identified the defendant in the live lineup. R20, 957.

James Jaggon is serving a prison sentence of twenty three years as part of an agreement to testify in this case. R20, 1024. Lewin also testified in exchange for a plea to a twenty-year sentence for burglary of a dwelling and attempted home invasion robbery. Their testimony about the events leading up to the robbery was recounted in the trial court's sentencing order:

> On November 24, 2004, James Jaggon and Maurice Lewis planned to rob Jahvon Thompson's apartment. James, 15 years old at the time, knew Jahvon through playing basketball with him at the local YMCA. James also knew that Jahvon's father sold marijuana from the apartment and believed that a large amount would be present on this particular day. Maurice did not feel comfortable doing the robbery with James alone because of his young age so he contacted the defendant, his cousin, and spoke to him about assisting them. The defendant agreed. James and Maurice picked him up from his apartment. The defendant entered the vehicle with a gun, a set of batting gloves and a

> mask. James and Maurice already had guns with them.
>
> As they traveled to Jahvon's apartment, all three discussed how the robbery would occur. Maurice would remain in the vehicle as the getaway driver. He would monitor the robbery by way of the speaker on his cellular telephone. The defendant and James would go to the apartment to commit the robbery. The defendant would also have the speaker on his cellular phone on so that Maurice could hear what transpired. No one discussed shooting or killing anyone during the course of the robbery, although they agreed to bring guns with them. Maurice believed this would be an easy robbery because James knew Jahvon. Neither Maurice nor the defendant knew Jahvon or his father.

R11, 1765. As the court noted, "James and Maurice were arrested that day and interviewed by Detective Joel Wright of the Orlando Police Department. Initially, both lied about what occurred at Jahvon's apartment. Through other investigative leads, the defendant was developed as a suspect. James and Maurice also changed their stories and implicated the defendant." *Id.* 1768.

Law enforcement recovered gloves and a shirt in the woods adjacent to the car crash. DNA recovered from the gloves and the shirt matched the defendant's DNA. R22, 1285-90. The blue pillow sham had a few brownish stains that tested presumptively positive for blood. R22, 1303. The stain contained the DNA profile of McLean. *Id.* 1292-93, 1303.

After the defendant rejected an offer to plead guilty in exchange for a life

sentence, the case proceeded to a jury trial, where he was convicted as charged. This Court described the penalty phase testimony this way:

> During the penalty phase, the defense offered expert testimony regarding McLean's psychological, mental, and emotional health as well as testimony from McLean's older brother. One defense psychologist diagnosed McLean with an organic brain impairment, although the psychologist had no medical records or diagnostic studies to confirm any brain injury. Another defense psychologist testified that McLean had some history of substance abuse and functioned at the emotional level of an adolescent. Both psychologists diagnosed McLean with borderline personality disorder but found that he was of average intelligence. McLean's brother testified to a history of some family dysfunction.
>
> The jury voted nine to three in favor of a death sentence. After conducting a *Spencer* hearing, the trial court followed the jury's recommendation, finding that the three aggravating factors outweighed several mitigating factors. Of the aggravators, the court found (1) that when McLean committed the murder, he had been previously convicted of a felony and placed on felony probation (moderate weight); (2) that McLean was previously convicted of a felony involving the use or threat of violence, based on McLean's prior armed robbery conviction and the contemporaneous conviction for the attempted first-degree murder of Lewis (great weight); and (3) that McLean committed the murder during the commission of a robbery (great weight). The trial court found two statutory mitigating circumstances: (1) McLean's mental or emotional disturbance at the time of the crime (little weight); and (2) McLean's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law (little weight). The court also found six categories of nonstatutory mitigating

> circumstances: (1) mental health issues (no weight); (2) substance abuse issues (little weight); (3) disparate treatment of codefendants (no weight); (4) family problems (little weight); (5) brain injury (little weight); and (6) miscellaneous factors, such as poor grades in high school, good behavior in court, and lack of positive role models in his youth (little weight).

*State v. McLean,* 29 So. 3d 1045, 1049. A timely petition for a writ of certiorari predicated on *Ring vs. Arizona*, 536 U.S. 584 (2002) was denied. *McLean v. Florida*,131 S.Ct. 153 (Oct. 04, 2010).

A timely Motion to Vacate Judgments of Conviction and Sentence was filed October 4, 2011 pursuant to Florida Rule of Criminal Procedure 3.851. The claims raised were:

Claim I: Counsel's failure to call an expert in misidentification deprived him to his rights to a fair trial and capital sentencing under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and the corresponding provisions of the Florida Constitution.

Claim II: Mr. Mclean's convictions are constitutionally unreliable in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments as established by newly discovered evidence; to wit: recantation by co-defendant James Jaggon

Claim III: Mclean's state and constitutional rights were violated by the institutional destruction of relevant and potentially exculpating evidence; to wit: the crimeline tape

Subclaim: Defense counsel provided ineffective assistance of counsel by failing to assert institutional destruction of evidence as an independent ground for relief

Claim IV: The defendant received both ineffective assistance of counsel and a failure of due process when he was excluded from the hearing on his *pro se* motion

to replace or discharge counsel

Claim V: The defendant received ineffective assistance of counsel due to counsel's failure to employ a cell phone expert

Claim VI: Counsel provided ineffective assistance of counsel by failing to employ the aid of a mental health expert or other third parties in plea discussions with the defendant

Claim VII: Mr. Mclean received ineffective assistance of counsel during the penalty phase from failure to investigate and present available mental and developmental mitigation

Claim VIII: Florida's lethal injection method of execution is cruel and unusual punishment and would deprive Mr. McLean of due process and equal protection of the law in violation of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and corresponding portions of the Florida Constitution.

Claim IX: Fla. Stat. 945.10 prohibits Mr. Mclean from knowing the identity of the execution team members, denying him his constitutional rights under the Sixth, Eighth, and Fourteenth Amendments and corresponding provisions of the Florida Constitution.

Claim X: Mr. Mclean's Eighth Amendment right against cruel and unusual punishment will be violated as Mr. Mclean may be incompetent at time of execution.

Claim XI: Cumulative error deprived the defendant of the fundamentally fair trial guaranteed under the Sixth, Eighth, and Fourteenth Amendments.

The postconviction court granted an evidentiary hearing on claims one through seven. The hearing was conducted on September 4-5, 2012, with written closing arguments submitted shortly thereafter. The court entered an order denying all claims for relief on February 15, 2013. This appeal follows.

## STANDARD OF REVIEW

Claims of ineffective assistance of counsel are governed by *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). To establish deficiency under *Strickland*, the defendant must prove that counsel's performance was unreasonable under "prevailing professional norms." *Morris v. State*, 931 So.2d 821, 828 (Fla.2006) (quoting *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052). To establish prejudice, the defendant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052). Both prongs of the *Strickland* test present mixed questions of law and fact. For this reason, the Court employs a mixed standard of review—deferral to the factual findings of the circuit court that are supported by competent, substantial evidence, but *de novo* review of legal conclusions. See *Sochor v. State*, 883 So.2d 766, 771–72 (Fla.2004).

In *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527 (2003), the United States Supreme Court held that "*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather a reviewing court must consider the reasonableness of the investigation said to

support that strategy." *Wiggins v. Smith*, 539 U.S. 510, 527 (2003). "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness." *Id.* at 521 (quoting *Strickland*, 466 U.S. at 690-91).

Prejudice, in the context of claims of penalty phase ineffective assistance of counsel, is shown where, absent the deficient performance, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or the deficiencies substantially impair confidence in the outcome of the proceedings. *Lynch v. State*, 2 So.3d 47, 70 (Fla.2008); *Floyd v. State*, 18 So. 3d 432, 453 (Fla. 2009).

## SUMMARY OF ARGUMENT

In his first claim for relief Appellant argues that trial counsel's failure to call an expert in misidentification deprived him to his rights to a fair trial and capital sentencing Defense counsel did not seek to use an expert in the field of eyewitness identification to challenge this aspect of the State's case either during the suppression hearing or at trial. At the evidentiary hearing, collateral counsel's

expert, Dr. Brigham, testified consistently with the report he wrote about this case, which was attached to the Rule 3.851 motion and ultimately admitted in evidence. This evidence could have been presented to the court but was not due to ineffective assistance of trial counsel. Counsel's failure to at least explore the use of an eyewitness expert whether due to a mistaken view of the status of the law or simply because no one thought of it was deficient performance under the first prong of *Strickland.*

As for prejudice, after a court hearing that they attended, both Shirley and Theothlus Lewis identified Maurice Lewin, not McLean, as the shooter. With regard to forensic corroborating evidence, when the police searched Lewin's Buick they found the marijuana in a pillow case. They took the marijuana out of the pillow case, placed it on top of the case on the back seat in the car and took a picture of it. In other words, the marijuana, the container it was in, and the whole interior of the car were hopelessly contaminated. The car belonged to Maurice Lewin, McLean along with any number of other people had been in and out of it numerous times. There is no evidence that the shooter bled at any time during this incident. In fact, there is no crime scene evidence connecting Derrick McLean to the apartment where the shooting took place. No blood, hair, fingerprints, DNA or anything else.

The sentence of death also rests in a large part on the credibility of the

co-defendants' testimony about McLean's state of mind and his role in the crime. Absent that, the evidence indicates that this was simply a drug related robbery gone bad. The totality of facts from the trial proceedings, evaluated along with the evidence presented either at the postconviction evidentiary hearing undermines confidence in outcome of the trial sufficient to warrant relief.

Claim II is that defense counsel provided ineffective assistance of counsel by failing to prevent the institutional destruction of potentially exculpatory evidence. Destruction of potentially exculpatory evidence, including impeaching, evidence, is an issue that arises frequently in postconviction proceedings. It often arises in the context of destroyed tissue samples such as might be obtained by examining physical evidence that might have trace amounts of blood, skin tissue, hair and so on, which could be analyzed for DNA. This situation is somewhat different because it concerns the recording of an anonymous tipster who likely was a family member and possibly an actual or potential witness, perhaps even a co-defendant or member of a co-defendant's family, and who received a significant amount of money for his or her information. "Access to evidence" cases cited herein implicitly recognize the prosecutor's duty to retain material evidence for the use of the defense and require sanctions for violation of the duty. When the State routinely destroys evidence, in this case of a person claiming to have relevant knowledge of the identity of a murder

suspect and who received a monetary reward for informing on the defendant, the judiciary is excluded entirely and forever from any sort of oversight role, and the prosecution is freed from even any sense, let alone reality, of accountability. McLean further argues that defense counsel was ineffective for failing to take any action to have the tape preserved, either by way of a subpoena duces tecum or otherwise.

Claim IV is that Mr. Mclean received ineffective assistance of counsel during the penalty phase from failure to investigate and present available mental and developmental mitigation. Counsel provided ineffective assistance by their failure to investigate and present evidence of the mental disorder, Adult Attention Deficit Hyperactivity Disorder, through the defense mitigation expert, Dr. Eisenstein. Moreover they failed to adequately investigate the defendant's background so as to provide adequate factual support this diagnosis. Counsel was ineffective for failing to investigate the Defendant's background, hire the necessary mental health experts, provide the experts with available background material, supervise the administration of available mental health tests, and present a wealth of available mitigation to the jury in this case. The balance of aggravators and mitigators was altered by counsel's deficient performance, and relief should be granted.

This Brief also contends that the defendant received both ineffective

assistance of counsel and a failure of Due Process when he was excluded from the hearing on his *pro se* motion to replace or discharge counsel (Claim III); that Florida's lethal injection method of execution is cruel and unusual punishment (Claim V); that Fla. Stat. 945.10 prohibits Mr. Mclean from knowing the identity of the execution team members, denying him his constitutional rights (Claim VI); that Mr. Mclean's Eighth Amendment right against cruel and unusual punishment will be violated as he may be incompetent at time of execution (Claim X); and that cumulative error deprived the defendant of the fundamentally fair trial guaranteed under the sixth, eighth, and fourteenth amendments (Claim XI).

## ARGUMENT

### CLAIM I

**COUNSEL'S FAILURE TO CALL AN EXPERT IN MISIDENTIFICATION DEPRIVED HIM TO HIS RIGHTS TO A FAIR TRIAL AND CAPITAL SENTENCING UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.**

The defendant filed three Motions to Suppress Evidence related to the photographic and live lineup of the defendant. R9, 1321-40. The defendant argued that the photographic and live lineups were overly suggestive and should be suppressed. The defendant also argued that he was entitled to have legal counsel

present when the photographic lineup was shown to Mr. Lewis and when the live lineup was conducted at the Orange County Jail. Finally, the defendant argued that the photographic and live lineup should be suppressed based upon a violation of due process rights. R9, 1328. After hearing, the trial court denied the defendant's motion to suppress. R10, 1502.

Detective Wright interviewed Mr. Lewis the following day at a local hospital. R3, 296. Mr. Lewis described the shooter as five foot nine, two hundred to two hundred and twenty pounds and light brown complexion wearing a black shirt with blue jeans. Detective Wright showed Mr. Lewis a lineup containing a picture of Maurice Lewin. Mr. Lewis indicated that the shooter was not included in any of the photographs. Days later, Lewis was shown another photographic lineup containing the photographs of individuals who may have been involved. Again, Mr. Lewis indicated that the shooter was not included in the group of photographs.

The next week, Detective Wright spoke to Mr. Jaggon's father. During this conversation, Detective Wright learned that a person named "Derrick", Maurice Lewin's cousin, may have been involved in the shooting. On December 6, 2004 an anonymous call to crime line indicated that a person named "Derrick" was the shooter. Through further investigation, Detective Wright learned that Derrick McLean used to live with Maurice Lewin. R3, 296- 301.

On December 9, 2004 Mr. Lewis and Shirley Smith attended a bond hearing for Maurice Lewin. R3, 310-11. Although neither testified at that hearing, they had the opportunity to observe the inmates seated in the courtroom that day, including Mr. Lewin. After leaving the courtroom, Ms. Smith remarked to Mr. Lewis that one inmate seen in the jury box may have been the shooter. *Id.*

Mr. Lewis agreed with Ms. Smith that Mr. Lewin looked like the shooter. R3, 344. Detective Campbell, who assisted Detective Wright in the investigation, told Ms. Smith not to speak to Mr. Lewis about the case because he did not want her to taint Mr. Lewis' testimony or ability to identify the third suspect. *Id.* Detective Campbell also told them that there are people that may look like people, but that doesn't necessary mean that's them. He also informed them that they would later be show lineups to identify potential suspects. Later that same day, Detective Wright presented Mr. Lewis with a photographic lineup for his review. Mr. Lewis pointed to the third photograph and said that he was 90% sure that he knew this individual was the shooter. R3, 312.

Defense counsel did not seek to use an expert in the field of eyewitness identification to challenge this aspect of the State's case either during the suppression hearing or at trial. At the evidentiary hearing, Dr. Brigham testified consistently with the report he wrote about this case, which was attached to the Rule

3.851 motion and ultimately admitted in evidence. This evidence could have been presented to the Court but was not due to ineffective assistance of trial counsel.

> In my judgment, the Derrick McLean case is precisely the kind of case in which scientifically-based expert testimony on eyewitness memory would have been especially helpful at trial or an evidentiary hearing. A qualified expert witness could have testified about those factors that were relevant to the case and are supported by strong scientific research. This testimony would not attempt to discredit any particular witness or to invade the province of the jury in deciding how to evaluate the evidence in the case. Rather, the purpose of the expert testimony would be to provide the jurors with up-to-date, relevant information, which is not already part of their "common knowledge", describing what science has found about factors that affect the accuracy of eyewitness identifications. The jurors could then have used this information in whatever way they wished, along with all of the other trial evidence, in coming to a well-considered and informed decision. The absence of such expert testimony detracts from the likelihood that jurors will evaluate eyewitness evidence in the most fair and appropriate manner.
>
> In the McLean case, there are a number of factors that would have affected the quality and accuracy of the memories encoded by the sole eyewitness, Theothlus Lewis, Jr.. Mr. Lewis knocked on the door of an apartment unit to ask them to turn the music down. The door was opened by a man brandishing a handgun, who demanded that Lewis come into the apartment. Mr. Lewis was made to sit on the couch while the man and a second man who was also armed (and wore a mask over his face) demanded money from him and the apartment's resident. After a short time the men began to leave and Mr. Lewis was certain he would be killed. He crawled away from them

and was shot in the back, seriously wounding him. The apartment's resident was shot and killed.

There are a number of factors in the situation that Mr. Lewis faced that would make it difficult for a person to encode a strong, accurate memory of the assailants' faces. In brief, these are: (1) High stress. Mr. Lewis was held at gunpoint, threatened, and eventually shot. As noted earlier, research shows that high stress interferes with the encoding of memory, although many citizens believe otherwise. (2) Weapon focus. Both assailants had handguns and pointed them at Mr. Lewis, who testified that he paid a lot of attention to the weapons. Mr. Lewis testified that, "I was basically looking at the gun", and "That's all I seen, was a gun". Research has found that the presence of a weapon interferes with the encoding of an accurate memory of the person(s) holding that weapon. (3). Divided attention. The fact that there were two perpetrators means that the witness had to divide his attention between the two of them, leaving less attention paid to each individual. (4). Motion. The two assailants were in constant motion, making it more difficult for a witness to encode an accurate memory of their faces. (5). Two-week retention interval. Mr. Lewis identified Derrick McLean from a photograph lineup two weeks after the incident. He had been shown two other photograph lineups before that. Two weeks is a relatively long retention interval (a retention interval of less than one week is most often the case), and research shows that the longer the retention interval, the weaker the memory trace that remains. This is due to two factors - simple forgetting, and interference from new information. Studies have shown that exposure to other facial photographs, either in mug books or in earlier photo lineups (i.e., new information, the need to repeatedly compare the memory image of the perpetrator with new facial images), weakens and degrades one's memory for the face of the perpetrator. (6). Developing a composite sketch. Mr. Lewis worked

with the police to develop a composite facial sketch of the assailant who did not wear a mask. Scientific studies have shown that working on a composite sketch weakens a person's facial memory, because it encourages one to employ a featural memory approach, rather than a configural memory approach. The featural approach leads to a less accurate facial memory than does the configural approach. (7). Biased lineup instructions. In order to avoid bias, law enforcement administering a lineup are expected to tell witnesses that the perpetrator "may or may not" be present in the lineup. This phrase is part of the standard instructions employed throughout the U.S. In the present case, a detective told the witness that "the suspect is in the lineup", thereby increasing the psychological pressure on the witness to make a positive identification. (8). Exposure to a live lineup containing the suspect and five fillers, two weeks after having seen a photo lineup containing the suspect and five different fillers. Mr. Lewis made a tentative identification after seeing the photo lineup and a positive identification after seeing the live lineup. The suspect, McLean, was the only person who was in both lineups. Therefore, Mr. Lewis's identification of McLean from the live lineup could easily have resulted from a feeling of familiarity stemming from having seen McLean's face two weeks previous in the photo lineup, rather than from his memory of the crime scene. Unfortunately, in such a situation, there is no way that the witness himself, or anyone else, can ascertain whether the subsequent identification was produced by the memory of the crime scene, or by the memory of the photo seen in the earlier lineup. Indeed, the picture in the photo lineup was viewed under much more favorable conditions for memory than was the assailant's face in the crime situation.

If a qualified scientist, an eyewitness memory researcher, had been called to testify as an expert, he or she could have testified about the factors enumerated above. As

> noted, such testimony would not draw conclusions about the likely accuracy of the specific witness's identification, but instead would have provided the jurors with scientifically-based information that they could use, along with all of the other evidence, in evaluating the likely accuracy of the eyewitness identification in this case.
>
> PC-R9, 96-100, Brigham, Report Summarizing Scientific Research on Factors That Affect the Accuracy of Eyewitness Memory, with Particular Reference to the Usefulness of Expert Testimony about these Factors, State of Florida v. Derrick McLean, Case No. 48-2004-CF-15923-O. (September, 2011) (PC-R Def. Ex. 4); testimony at PC-R 6, 125-52.

In *McMullen v. State*, 714 So.2d 368 (Fla. 1998) this Court explained that Florida follows a "discretionary" view regarding the admissibility of expert witness testimony concerning the reliability of eyewitness testimony. *Id.* at 370. The potential usefulness of this type of expert testimony to the defense is shown by articles cited in Justice Anstead's separate opinion in *McMullen v. State*, 714 So.2d 368, 377 (Fla. 1998), which held that expert testimony regarding eyewitness identifications is (and always has been) admissible. *Id. citing United States v. Downing*, 753 F.2d 1224 (3d Cir.1985); *Skamarocius v. State*, 731 P.2d 63 (Alaska Ct.App.1987); *State v. Chapple,* 135 Ariz. 281, 660 P.2d 1208 (1983); *People v. McDonald*, 37 Cal.3d 351, 208 Cal.Rptr. 236, 690 P.2d 709 (1984); *People v. Campbell*, 847 P.2d 228 (Colo.Ct.App.1992); *People v. Beckford*, 141 Misc.2d 71,

532 N.Y.S.2d 462 (N.Y.Sup.Ct.1988); *People v. Lewis*, 137 Misc.2d 84, 520 N.Y.S.2d 125 (N.Y.Co.Ct.1987); *State v. Whaley*, 305 S.C. 138, 406 S.E.2d 369 (1991); *State v. Moon*, 45 Wash.App. 692, 726 P.2d 1263 (1986); Sally M.A. Lloyd-Bostock & Brian R. Clifford, *Evaluating Witness Evidence: Recent Psychological Research and New Perspectives* (1983); Nathan R. Sobel, *Eyewitness Identification: Legal and Practical Problems* (2d ed. 1983); Gary L. Wells & Elizabeth F. Loftus, *Eyewitness Testimony: Psychological Perspectives* (1984); Cathy M. Holt, *Expert Testimony on Eyewitness Identification: Invading the Province of the Jury?*, 26 Ariz.L.Rev. 399 (1984); Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases,* 69 Cornell L.Rev. 934 (1984); Kassin, et al, *The "General Acceptance" of Psychological Research on Eyewitness Testimony, Am. Psychologist,* Aug. 1989, at 1089; Cindy J. O'Hagan, *When Seeing is Not Believing: The Case for Eyewitness Expert Testimony,* 81 Geo.L.J. 741 (1993); Steven D. Penrod & Brian L. Cutler, *Eyewitness Expert Testimony and Jury Decision making*, L. & Contemp.Probs., Autumn 1989, at 43. *Id.* ***This body of research and legal authority - including* McMullen *itself - was in existence long before the trial in this case.***

Defense counsel failed to even consider the employment of such an expert due to counsel's incorrect view that Florida law absolutely prohibited the admissibility

of such testimony. At the evidentiary hearing, although defense counsel tried to waffle out of it, she confirmed her testimony from her recently taken deposition:

> Q. Did you and [co-counsel] McClellan ever consider employing an eyewitness identification expert in this case?
>
> A. The case law at that time and at this time does not allow you to put on an expert in front of the jury in eyewitness identification, period.

PC-R7, 1051. Likewise, co-counsel said "I recall discussions in that regards the identification of Mr. McLean, how it came about, the issues surrounding that. Was there a specific conversation about hiring an expert, no . . ."

> Q. Was there a belief at the time with regard to the admissibility or inadmissibility of such testimony or did that even factor in?
>
> A. At that point it didn't even factor in. It wasn't an issue that was contemplated.

RC-R6, 895-96. The postconviction court's reading of the record on this point is not a fair reading of the record. See PC-R7, 1166-67 ("At the hearing, Ms. Cashman testified that she was aware of existing case law at the time of trial that generally precluded the introduction of such expert identification testimony. She did not say that she thought she was precluded from consulting with or presenting such an expert at trial."). The postconviction court asserted a distinction without a

difference. The argument here is that counsel's failure to at least explore the use of an eyewitness expert whether due to a mistaken view of the status of the law or simply because no one thought of it was deficient performance under the first prong of *Strickland*. The arrest and trial in this case took place between 2007 and 2008. Dr. Brigham was the expert witness in question in McMullen in 1998 and has been publishing professional articles, testifying in criminal cases, giving presentations to judges and lawyers and so on since then. There are other experts who could have provided this testimony as well. As he said, he was never contacted in connection with case until CCRC did so. PC-R 6, 963.

**Prejudice**

McLean has never conceded guilt to any credible source. In fact, he complained in a series of letters that he was being pressured by his defense lawyers to take the State's offer to have him plead to life. He only agreed to appear in court for that apparent purpose in order to voice his complaints about being pushed into a plea publicly. That is what prompted the *Nelson* hearing. Needless to say, his insistence that he was not guilty made the defense position in the penalty phase problematic. It also allowed the prosecution to capitalize on the fact that many of McLean's family members did not go along with the defense efforts to plead for

mercy in one form or another because neither McLean nor his family members thought he committed the crime in the first place.

With regard to the DNA evidence; when the police searched Lewin's Buick they found the marijuana in a pillow case. They took the marijuana out of the pillow case, placed it on top of the case on the back seat in the car and took a picture of it. In other words, the marijuana and the whole interior of the car were hopelessly contaminated. The car belonged to Maurice Lewin, McLean along with any number of other people had been in and out of it numerous times. There is no evidence that the shooter bled at any time during this incident. In fact, there is ***no*** crime scene evidence connecting Derrick McLean to the apartment where the shooting took place. No blood, hair, fingerprints, DNA or anything else. The DNA from the baseball cap worn supposedly worn by the shooter matched Lewin, not McLean. Jaggon was a "possible contributor" to both the baseball cap and the ski mask.

After a court hearing that they attended, both Shirley and Theothlus Lewis identified Maurice Lewin, not McLean, as the shooter. Their identification of McLean was compromised. Both of the co-defendants were given good deals for their testimony. Their testimony was inherently suspect by its very nature. By the time they agreed to speak about the incident, they had ample opportunity to review

the discovery, learn what was known and so on. In other words, they were in a position to manufacture any story that could serve their interests.

There is no doubt that the victim was killed by gunshots fired during the course of a home invasion robbery. The identification of McLean at the shooter was the key issue in the case. It rested on a DNA match to evidence that easily could have been contaminated with that of McLean and perhaps many other individuals by being in Maurice Lewin's car and being moved around in that environment by the police among others, on an identification by Theo Lewis that he had already contradicted by his courthouse identification of Lewin, and on the "turned" testimony of two co-defendants. The sentence of death also rests in a large part on the credibility of the co-defendants' testimony about McLean's state of mind and his role in the crime. Absent that, the evidence indicates that this was simply a drug related robbery gone bad. The totality of facts from the trial proceedings, evaluated along with the evidence presented either at the postconviction evidentiary hearing undermines confidence in outcome of the trial sufficient to warrant relief.

## CLAIM II

## DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO PREVENT THE INSTITUTIONAL DESTRUCTION OF POTENTIALLY EXCULPATORY EVIDENCE

This claim was raised as a component of Claim III in the motion for postconviction relief. The postconviction court addressed it this way:

> Mr. McLean asserts his state and constitutional rights were violated by the institutional destruction of relevant and potentially exculpating evidence; to wit, the Crimeline tape. He further asserts, as a sub claim, that counsel was ineffective for failing to assert the institutional destruction of said evidence as an independent ground for relief.
>
> To the extent Mr. McLean claims his state and constitutional rights were violated by the institutional destruction of the Crimeline tape, this is an issue that should have been raised at trial and, if properly preserved, on direct appeal. Therefore, this claim is procedurally barred from collateral attack in a motion for postconviction relief.

PC-R7, 1172. The lower court denied the ineffective assistance component of the claim on the merits.

> Here, counsel cannot be ineffective for failure to obtain the tip records when there is no indication that said records would have been particularly helpful to the defense or that the State would have been required to produce such information. Mr. McLean has simply alleged that the tipster may have had a personal agenda against him but fails to state how the tipster's identity or the Crimeline tape itself would have been evidence favorable to Mr. McLean. . . Clearly the information obtained identifying Mr. McLean and implicating him in the robbery and murder is incriminating, but there is no indication or argument that the tip was "exculpatory" constituting

> Brady material or even subject to disclosure pursuant to *Harklerode* [*v. State*, 567 So.2d 982 (Fla. 5th DCA 1990].
>
> Mr. McLean has also failed to show that the tape still existed at the time when counsel became involved in the case. Both William McClellan and Ms. Cashman stated that they were interested in the name of the tipster and had discussed obtaining the information. Ms. Cashman testified that it was her understanding that the tape would have been destroyed within 30 days of being made. However, counsel still filed a Motion to Compel production of the Crimeline tape and the identity of the tipster several months later as part of conducting full and complete discovery even though she reasonably believed the tape would have already been erased. She further testified that she alternatively deposed Detective Joel Wright about the information obtained from the tip and how it was used in his investigation. Finally, Mr. McLean has not established that the destruction of the Crimeline tape constitutes bad faith destruction of evidence. . . . The loss or destruction of evidence that is potentially useful to the defense violates due process only if the defendant can show bad faith on the part of the police or prosecution . . . The Crimeline tape was destroyed pursuant to institutional policy, not in bad faith.

PC-R7, 1172-74, *citing inter alia Arizona v. Youngblood*, 488 U.S. 51 (1988).

According to the reports that were released in discovery, the tipster got $2000.00 for the tip and was quite adamant about getting the money. The tipster also complained about the defendant not being arrested quickly enough, indicating that the tipster had a personal agenda against him. PC-R 9, 150-54. The tipster also claimed that the murder weapon was a shotgun, which was not the case. PC-R 9,

153. The State's eventual response to efforts by defense counsel to get some more information about the tape or the tipster was that the tape (or other recording) of the original calls was "reprocessed" after a short period of time. The policy with regard to crimeline tipsters and their rewards is to set up blind escrow accounts and then apparently to destroy any information that would allow the receiver of the reward money to be tracked down at a later date. In short as a matter of institutional policy, the State destroyed evidence that may be relevant and exculpatory.

Trial counsel filed a "Motion to Compel Discovery #6," which demanded disclosure of the tipster's identity, asserted that "the defense was provided the name of James Jaggon at a hearing previously held on discovery issues and later told verbally by the state that was not the correct person." R5, 685. A hearing on the defendant's motion took place on April 5, 2005. An excerpt from the transcript reads as follows:

> MS. CASHMAN: As I stand before you today, there is one issue out there specifically as regards to this and as discovery goes on there may be others that become apparent. We would ask that the Court grant this motion because it basically says the State has to comply with Brady.
>
> One of the things that has come to our attention in reviewing discovery is that a witness called Crimeline and that was how the investigators focused in and picked my client as a target.

Normally, this is in information that is confidential and it's my understanding based on experience I have with these Crimeline tips being used in cases, is that is confidential and the person is given a number in that law enforcement is not to breach that confidentiality at the choice of the person who calls in the tip.

In this case law enforcement put in their report that it was, in fact, a family member that called in the tip, and they gave a description, but they didn't give the actual name.

THE COURT: Family member of your client . . .

MS. CASHMAN: Yes, ma'am, family member of my client. They have not given any of the specifics which they would be required to do whether they have to give the name or not of whether money was provided to this individual who called in, and if so how much money and the dates and times and chronology of that.

While we have information in police officer's reports, we haven't been given the name of which officer was spoken to from Crimeline and all of this we believe it would be impeaching information because it is someone who benefitted financially and called and provided information that became the basis of focusing on my client as a target of the investigation. . . .

THE COURT: Okay. With regard to the information that the defense has requested in this case concerning the individual that provided the tip, it is my understanding that the State is agreeable to providing that information to the defense and that information will include the documents generated with regard to the tip and with regards to the payment of any money that may have been made in this case.

> It is my understanding that after the defense receives that information, that if we need to have a further hearing on the defense request for disclosure of this information with regard to this witness, then we can have a further hearing on it.
>
> So with regard to the defendant's Motion for Disclosure of Impeaching Information, with regard to the individual that called and gave the tip, the State is agreeing to produce that information so the record will reflect that the motion is granted based upon the State's agreement to produce that information with regard to that individual.

R1, 79 et seq. Defense counsel had been appointed to represent the defendant the day after he was arrested, on December 18, 2004. R5, 524. A motion to compel disclosure of any information regarding compensated informants was first made around March 10, 2005. R5, 622-24. The defense motion to compel disclosure of the Crimeline information specifically was not made until May 4, 2005, and the hearing on it took place a few weeks later, on May 27. This time the State objected to providing the name or names of whoever called in information. R1, 123-27.[1] After some discussions which appeared to confirm that procedures such as the use of a blind escrow account were used to assure the anonymity of the paid informer, the court denied the motion without prejudice. *Id.* Trial counsel did not pursue the matter further, and the issue was not raised on appeal.

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[1]There may have been six callers altogether. R3, 409.

**Argument**

Destruction of potentially exculpatory evidence, including impeaching, evidence, is an issue that arises frequently in postconviction proceedings. It often arises in the context of destroyed tissue samples such as might be obtained by examining physical evidence that might have trace amounts of blood, skin tissue, hair and so on, which could be analyzed for DNA. This situation is somewhat different because it concerns the recording of an anonymous tipster who likely was a family member and possibly an actual or potential witness, perhaps even a co-defendant or member of a co-defendant's family, and who received a significant amount of money for his or her information.

Bad faith destruction of material evidence is a denial of due process pursuant to *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988), and *Kelley v. State*, 569 So.2d 754 (Fla. 1990). In *Youngblood,* the Court set a minimum standard regarding the destruction of possible exculpatory evidence. "Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 58; see *Kelley v. State*, 569 So.2d 754 (Fla. 1990). Conversely, where bad faith has been shown, the loss or destruction of such evidence requires dismissal of the

charges or depending on the level of prejudice, suppression of the state's secondary evidence.

Here, however, McLean argues that his rights were violated by the institutional, i.e. common practice, destruction of relevant and potentially exculpating evidence. A duty to preserve evidence is simply the logical extension of the Supreme Court's rulings in *Brady v. Maryland*, 373 U.S. 83 (1963) and other decisions "in what might loosely be called the area of constitutionally guaranteed access to evidence." *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982) at 867.

In *Brady, supra*, the Supreme Court held that the prosecution has a duty to disclose, upon request, all evidence favorable to the accused and material either to guilt or punishment. *See also Moore v. Illinois*, 408 U.S. 783, 794 (1972). The rule was later clarified in *United States v. Agurs*, 427 U.S. 97 (1972). There it was emphasized that the overriding concern of the *Brady* rule is the "justice of the finding of guilt." *Id.*, at 112. To the extent suppression of evidence results in denial of a fair trial, it violates due process. *Id.*, at 114.

In *United States v. Bryant*, 439 F.2d 642 (D.C. Cir. 1971), the court applied the reasoning of Brady in the context of lost evidence. The court found that the duty to disclose favorable evidence upon request was meaningless if it could be

circumvented by the expedient of destroying the evidence before it was requested. It therefore held that "before a request for discovery has been made, the duty of disclosure is operative as a duty of preservation." *Bryant*, 439 F.2d at 651. *Bryant* simply says that such evidence may not be destroyed before the request occurs. Bryant, however, does not require that every loss of evidence be deemed a violation of due process. Relying on *United States v. Augenblick*, 393 U.S. 348 (1969), the court further held that loss or destruction of evidence does not violate due process concepts if the government shows that it has developed rigorous procedures designed to preserve the evidence and has followed the procedures in good faith. 439 F.2d at 651-652. Here, the government developed procedures to destroy the evidence.

In the wake of *Bryant*, concerns were raised about the problem later addressed in *Agurs*, that is, how were investigating agencies to know which evidence to preserve? The pragmatic judicial response evidences concern that no insuperable burdens be placed on investigating agencies. In *Bryant* itself, the evidence was characterized as highly relevant as it was crucial to guilt or innocence. But in keeping with the idea that it is not the prosecutor's function to determine what evidence is necessary for an adequate defense, the court established a duty to preserve all evidence that "might be favorable." *Id.*, at 652, n. 21, and related text.

*Bryant* and progeny have simply been logical extensions of *Brady* and *Agurs*, necessary to effectuate the spirit of those cases and, more importantly, to obtain that which was their overriding concern: a fair trial through an uncorrupted fact-finding process.

The existence of the duty to preserve does not depend solely on the *Brady/Agurs/Bryant* line of cases. It also finds support in *United States v. Valenzuela-Bernal, supra*, and cases discussed therein. In *Valenzuela-Bernal*, the Supreme Court assessed the defendant's claim that he had been denied both due process and the right to compulsory process when the government deported two witnesses to his crime before the defense had the opportunity to interview them. *Valenzuela-Bernal* held that the government had no absolute duty to detain the witnesses; this holding was a recognition of the government's duty to enforce the immigration laws. *Id.*, at 864-66. Yet implicit in the decision is the notion that the government had the duty not to deport the witnesses if they could supply material evidence. Thus, sanctions were held appropriate if the defendant could show that the deportation deprived him of material, favorable evidence. *Id.*, at 873-74. The Supreme Court stated that if the defendant could have shown that the witnesses' testimony would have been favorable and material, he would have shown a due

process violation that so infected the fairness of the trial as to make it "more a spectacle or trial by ordeal than a disciplined contest." *Id.*, at 872.13

In recognition of the fact that the defendant had no access to the witnesses, *Valenzuela-Bernal* found it proper to relax the degree of specificity required in showing materiality compared to that required in a *Brady* situation or in a situation where the defendant claims impairment of the ability to mount a defense due to post-indictment delay. *Id.*, at 869-70. See *Barker v. Wingo*, 407 U.S. 514 (1972).

Finding the deported witness situation more closely analogous to the undisclosed informer situation, the Supreme Court held that the same showing of materiality should be applied in order to obtain sanctions: the defendant must make some plausible showing that the deported witnesses' testimony would have been material and favorable. *Id.*, at 873-74. A showing of the events to which the witness might testify, and the relevance of those events to the crime charged, may demonstrate the required materiality. *Id.*, at 871. Reversal is required if there is a "reasonable likelihood that the testimony could have affected the trier of fact." *Id.*, at 873-74.

*Valenzuela-Bernal* and other "access to evidence" cases cited therein implicitly recognize the prosecutor's duty to retain material evidence for the use of the defense and require sanctions for violation of the duty. When the State routinely

destroys evidence, in this case of a person claiming to have relevant knowledge of the identity of a murder suspect and who received a monetary reward for informing on the defendant, the judiciary is excluded entirely and forever from any sort of oversight role, and the prosecution is freed from even any sense, let alone reality, of accountability. The postconviction scheme put in place by Rue 3.852 allows the State to keep information secret during the trial and direct appeal proceedings, but then disclose it after a death penalty conviction becomes final. Even then, a great deal of such disclosure is submitted under claims of exemption and disclosed only after the Court has conducted an ex parte in camera review of it. This level of protection is routine in a wide variety of legal circumstances, such as when a subpoena duces tecum is issued for material thought to be relevant to any sort of legal proceeding. The opposing party can file for a protective motion, but he cannot simply destroy it. While the information may not turn out to be helpful to the defense, the defendant should at least have the consolation of knowing that it has been reviewed by an independent authority who has concluded that it would not have made any difference. McLean further argues that defense counsel was ineffective for failing to take any action to have the tape preserved, either by way of a subpoena duces tecum or otherwise.

## CLAIM III

**THE DEFENDANT RECEIVED BOTH INEFFECTIVE ASSISTANCE OF COUNSEL AND A FAILURE OF DUE PROCESS WHEN HE WAS EXCLUDED FROM THE HEARING ON HIS *PRO SE* MOTION TO REPLACE OR DISCHARGE COUNSEL**

The postconviction court denied this claim in part because "presented no evidence in support of this claim at the postconviction evidentiary hearing." The record support for this claim comes, however, from the trial record. The defendant wrote a letter to the trial court requesting that he be assigned new counsel. R9, 1309. The trial court held a *Nelson* hearing and the defendant claimed that his counsel was pushing him to take a plea; not investigating his claim of alibi; and taking too long to develop mitigation evidence and depose the co-defendants. R3, 263-64. Counsel requested an in camera hearing to respond to the alibi issue. R3, 265. Counsel approached the bench without the defendant and state and detailed their efforts to investigate the defendant's alibi claim. The trial court found that defendant's counsel was providing effective assistance of counsel, and would not discharge counsel. The trial court advised the defendant that he could keep current counsel, hire new counsel or represent himself. R3, 266-74)

A *Nelson* claim was raised on direct appeal. The Court ruled that McLean was not entitled to a hearing anyway:

> B. The Nelson Hearing
> McLean argues that the trial court erred in conducting a portion of the Nelson hearing in camera, outside McLean's presence. We disagree.
>
> Before trial, McLean sent a letter to the trial court requesting that he be assigned new counsel, and the trial court held a Nelson hearing to consider McLean's several grievances. During the Nelson hearing, McLean told the court that he had provided his counsel with the names of alibi witnesses but that "they never wanted to go speak to the people." The trial court allowed defense counsel to respond in camera, outside the earshot of McLean or the State, to that particular issue so that it would not be on record with the State. Defense counsel adequately explained, to the trial court's satisfaction, her investigator's discussions with the alibi witnesses identified by McLean and her decision not to pursue their use as witnesses.
>
> No error occurred when McLean could not hear a portion of the Nelson hearing proceedings because McLean was not entitled to a Nelson hearing on the issue being discussed. This Court has held that a defendant is not entitled to a Nelson hearing "where a defendant presents general complaints about defense counsel's trial strategy and no formal allegations of incompetence have been made." Morrison v. State, 818 So.2d 432, 440 (Fla.2002); see also Sexton v. State, 775 So.2d 923, 931 (Fla.2000) (holding that the defendant was not entitled to a Nelson hearing when he "was merely noting his disagreement with his attorney's trial strategy ... and was not asserting a sufficient basis to support a contention that his attorney was incompetent"). Here, McLean's argument regarding

> the alibi issue raised disagreement with trial strategy and did not assert a sufficient basis to support a contention that his attorneys were incompetent. See Morrison, 818 So.2d at 442. Furthermore, as in Morrison, 818 So.2d at 442, the trial court made "sufficient inquiry to determine whether there was reasonable cause to believe that counsel was not rendering effective assistance." Therefore, we find McLean's Nelson argument to be without merit.

*McLean*, 1050-51

Ineffective assistance of counsel claims generally are not cognizable on direct appeal. The contention here is that, whether or not McLean was entitled to a full press *Nelson* hearing, he was entitled to be effectively present at the hearing on his own *pro se* motion. Counsel could and should have been the one to enforce this right, not the one to take it away. ABA Guidelines address counsel's obligation to meaningfully consult with counsel's client. Guideline 10.5(c)(1)-(4) provides that:

> Counsel at all stages of the case should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case, such as:
>
> 1. the progress of and prospects for the factual investigation, and what assistance the client might provide to it;
> 2. current or potential legal issues;
> 3. the development of a defense theory;
> 4. presentation of the defense case . . . .
>
> Counsel failed to meet these standards.

## CLAIM IV

## MR. MCLEAN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE FROM FAILURE TO INVESTIGATE AND PRESENT AVAILABLE MENTAL AND DEVELOPMENTAL MITIGATION

Counsel provided ineffective assistance by their failure to investigate and present evidence of the mental disorder, Adult Attention Deficit Hyperactivity Disorder, through the defense mitigation expert, Dr. Eisenstein. Moreover they failed to adequately investigate the defendant's background so as to provide adequate factual support this diagnosis. At trial Dr. Eisenstein, a clinical psychologist with a subspecialty in neuropsychology and over 30 years of experience, gave expert testimony for the defense. He provided favorable mental health mitigation testimony on Mr. McLean's behalf, however defense counsel failed to present to present any evidence regarding Dr. Eisenstein's diagnosis of ADHD and failed to offer any argument as to why this condition was mitigating. In fact, it was presented only as a part of the State's cross-examination of Dr. Eisenstein in an effort to discredit the rest of his testimony. During cross examination the following exchange occurred:

> Q. Along with the diagnosis of borderline personality and organic brain impairment, have you ever told anyone that

there was a different diagnosis that you had for Mr. McLean?

A. No.

Q. Do you remember having a conversation last week in the evening hours between Mr. Lewis and myself, along with defense counsel, about Mr. McLean over the telephone?

A. Correct.

Q. And did you discuss the fact that you diagnosed him with attention deficit disorder at that time?

A. I mentioned that -- I may have mentioned that as well, correct.

Q. But now your diagnosis is borderline personality?

A. Well, part of the organic brain impairment includes attention deficit disorder. That's not -- that's not mutual exclusive.

Q. Normally, to diagnose someone with attention deficit disorder, usually there are signs of inattentiveness, hyperactivity, prior to the age of seven, correct?

A. Correct.

Q. You have no information as to how Mr. McLean did in school prior to the age of seven?

A. Correct.

Q. You have no information how he did at all in his elementary school years?

A. Correct.

Q. In fact, you had no school records at the time he spoke to you?

A. Correct.

Q. And now you have perhaps how he was his ninth grade year?

A. Correct.

Q. You would agree with me that those are incomplete school records and you really have no idea how Mr. McLean did in school?

A. Correct. . .

R24, 1757-58.

Dr. Eisenstein agreed that he had discussed his diagnosis of ADHD during that telephone conversation with defense counsel participating in it. PC-R 6, 823. However, he said that he did not recall any further discussions with defense counsel about it prior to trial. PCR6, 825. He said that neither of the defense attorneys asked him to look further into the issue. *Id.* Moreover, Defense counsel did not contact him about ADHD or anything else between the time he testified at trial and the Spencer hearing, where he could have offered further testimony clarifying or explaining his views. *Id.*

In fact, ADHD is potentially a significant mitigator where it is backed up by the appropriate testing, institutional records review, and other appropriate developmental background data. As the postconviction court observed, both "ADD" and "ADHD" were referenced during the evidentiary hearing. Dr. Eisenstein explained that ADD is subdivided into whether or not the issue is primarily an attention problem or a problem of hyperactivity. ADHD is focused more on hyperactivity and thought processes and conduct verses the inability to pay attention for a period of time. It is a mental disorder marked by inattention, distractibility, hyperactivity, disinhibition, impulsivity and disorganization. PC-R6, 823. It impairs all functioning, whether it be cognitive, emotional, learning, self-regulation and self-monitoring. It affects the individual in "all aspects of life." *Id.* 823-24.

In the postconviction proceedings Dr. Eisenstein's evaluation and conclusions were supported by standardized inventories, and self-reported history. PC-R6, 825-29. He administered two standardized inventories designed to address the issue of ADHD, the ASRS-7 Symptom Checklist and the Wender Utah Rating Scale for attention deficit/hyperactivity disorder. PC-R6, 826. He also administered the T.O.V.A., Test of Variables of Attention, a standardized computer test designed to address the presence of the disorder. PC-R6, 831-36, PC-R9, 42-48 (Def. Ex. 1). Dr.

Eisenstein's conclusions as the result of his postconviction evaluation of McLean were that:

> Results are indicative of longstanding problems with attention, distractibility, impulsivity and disinhibition. Objective data confirm our diagnoses of Attention Deficit Hyperactivity Disorder. These problems manifest themselves in many areas of functioning. Academic ability and school performance as well as occupational functioning are greatly impacted. Life skills and social skills, including problems of executive functioning, organization, problem solving, reasoning, decision making skills and human interactions are significantly effected [sic].

PC-R9, 52.

The first prong of Strickland is demonstrated here in the form of deficient awareness or attention to the value of the diagnosis as a mitigator, failure to investigate the issue simply by inquiring further of the expert as well as conducting a pointed investigation of available background records and witness interviews and the like, failure to prepare and present Dr. Eisenstein on this issue when he did appear, and failure to follow up by contacting him at all, or by calling him to testify at the Spencer hearing.

The prejudice under the second prong of *Strickland* is explicitly exemplified by the Court's finding in the sentencing order: "In number 30 [of the proffered mitigators], the defendant argues that Dr. Eisenstein diagnosed him as suffering

from ADHD. The record in this case does not establish that the doctor made that diagnosis; thus this mitigator had not been established." R11, 1776. In other words, counsel's failure to investigate and present the testimony that was later presented at the evidentiary hearing had a clearly identifiable and significant impact on the sentencing in this case.

The fact that the Court declined to find the existence of the proffered mitigating circumstance rather than finding that it existed but assigning it reduced weight is itself significant. "The United States Supreme Court has held that a sentencing jury or judge may not preclude from consideration any evidence regarding a mitigating circumstance that is proffered by a defendant in order to receive a sentence of less than death." *Trease v. State*, 768 So. 2d 1050, 1055 (Fla. 2000), citing *Hitchcock v. Dugger*, 481 U.S. 393, 394, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). "The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence." *Campbell v. State*, 571 So. 2d 415, 419 (Fla. 1990) (footnotes omitted) receded from on other grounds in *Trease, supra*. The question whether a proffered mitigator exists is a mixed question of law and fact which is reviewable on direct appeal. *Trease, supra*. Hence counsel's failure to investigate, prepare and

present any of the available evidence to support the proffered mitigator had an adverse impact on the entire sentencing analysis at both the trial and the appellate level. "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 the deficiencies substantially impair confidence in the outcome of the proceedings." *Gaskin v. State*, 737 So.2d 509, 516 n. 14 (Fla.1999) receded from in part on other grounds by *Nelson v. State*, 875 So.2d 579, 582-83 (Fla.2004), *see Hoskins v. State*, 75 So. 3d 250, 254 (Fla. 2011). Counsel was ineffective for failing to investigate the Defendant's background, hire the necessary mental health experts, provide the experts with available background material, supervise the administration of available mental health tests, and present a wealth of available mitigation to the jury in this case. The balance of aggravators and mitigators was altered by counsel's deficient performance, and relief should be granted.

## CLAIM V

**FLORIDA'S LETHAL INJECTION METHOD OF EXECUTION IS CRUEL AND UNUSUAL PUNISHMENT AND WOULD DEPRIVE MR. MCLEAN OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND**

**CORRESPONDING PORTIONS OF THE FLORIDA CONSTITUTION.[2]**

The Eighth Amendment to the United States Constitution prohibits the "unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153, 173, (1976) (plurality opinion), and procedures that create an "unnecessary risk" that such pain will be inflicted. *Cooper v. Rimmer*, 379 F. 3d 1029, 1033 (9th Cir. 2004). The Eighth Amendment has been construed by the Supreme Court of the United States to require that punishment for crimes comport with "the evolving standards of decency that mark the progress of a maturing society." *Roper v. Simmons*, 543 U.S. 551, 561, 125 S. Ct. 1183 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 01, 78 S. Ct. 590 (1958) (plurality opinion)). Executions that "involve the unnecessary and wanton infliction of pain," *Gregg*, 428 U.S. at 173 (plurality opinion), or that "involve torture or a lingering death," *In re Kemmler*, 136 U.S. 436, 447, 10 S. Ct. 930 (1890), are not permitted. Florida's present method of execution by lethal injection entails an unconstitutional level of risk that it will cause extreme pain to the condemned inmate in violation of the Eighth and Fourteenth Amendments of the U.S. Constitution and the Florida Constitution's prohibition against cruel and unusual punishment.

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[2]Counsel acknowledges that this and the following claims are not supported by current case law.

## CLAIM VI

**FLA. STAT. 945.10 PROHIBITS MR. MCLEAN FROM KNOWING THE IDENTITY OF THE EXECUTION TEAM MEMBERS, DENYING HIM HIS CONSTITUTIONAL RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.**

Section 945.10, Fla. Stat. (2006) exempts from disclosure under Section 24(a), Article I of the Florida Constitution (the right to access public records): "(g) Information which identifies an executioner, or a person prescribing, preparing, compounding, dispensing, or administering a lethal injection." This statute was found to satisfy the Florida constitutional requirement that such exemptions provide a meaningful exemption that is supported by a thoroughly articulated public policy in this case based upon concerns for the safety of those involved in executions. *Bryan v. State*, 753 So. 2d 1244, 1250-51 (Fla. 2000).

Federal courts have found that concerns that execution team members would be publicly identified and retaliated against was an overreaction, supported only by questionable speculation. *California First Amendment Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002). Importantly, that court pointed out that numerous high profile individuals are involved with the implementation of executions, including a warden, a governor and judges, and there is a significant history of safety around

these publicly known officials. *Id.* at 882. Pennsylvania courts have likewise found safety concerns as a basis for protecting the identity of execution witnesses as wholly unsupported speculation. *Travaglia v. Dept. of Corrections*, 699 A.2d 1317, 1323 n.5 (Pa. Commw. Ct. 1997).

The litany of states that have had challenges to the manner in which lethal injection is used as a means of execution has consistently grown as additional problems with executions in these states have been noted. These states include Florida (where a moratorium was placed on all executions following problems in the execution of Angel Diaz); Maryland (where executions were stayed when chemicals leaked onto the floor during a previous execution. *Oken v. Sizer*, 321 F. Supp. 2d 658, 659 (D. Md. 2004)); Ohio (where two recent executions were marked by long delays related to venous access, including one in which the inmate's hand swelled because of improper venous access and litigation regarding lethal injection is pending. See *State v. Rivera*, Case No. 04CR065940, Lorraine County, Court of Common Pleas); California (where a federal district court held that execution protocols violated the Eight Amendment based in part on execution team members who were disciplined for smuggling drugs into prison and another diagnosed with post-traumatic stress disorder. *Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. 2006)); and Missouri (where a federal district court temporarily put a halt to

executions after hearing testimony from a medical doctor involved in executions that the doctor had been sued for malpractice more than twenty times and had his privileges had been revoked at two hospitals *Taylor v. Crawford*, 2006 WL 1779035 (W.D. Mo. 2006), and where a nurse employed in executions by both the federal government and Missouri was on probation for multiple charges and had to receive permission from his probation officer in order to travel to some executions.)

The recent problems with lethal injections documented in numerous states raise specific concerns about Eighth Amendment considerations. In order to avoid the infliction of unnecessary pain during an execution, it is essential that the inmate be properly anesthetized prior to and during the injection of the other chemicals. Evidence of inmates: (1) taking longer than expected times to die; (2) writhing, twitching and exhibiting other signs of pain after the administration of at least two of the drugs; (3) having improper amounts of drugs in their system post-mortem; (4) having chemicals spill out onto the death chamber floor; and (5) showing signs of not being completely unconscious after the period expected by the administration of the anesthetic, all point to problems with the drugs not being properly administered by competent personnel.

Moreover, the exemption violates Art. X, §25(a), Fla. Const. The provision generally known as Amendment 7, adopted in 2004 by Florida's electorate, states:

> In addition to any other similar rights provided herein or by general law, patients have a right to have access to any records made or received in the course of business by a health care facility or provider relating to any adverse medical incident.

Art. X, §25(a), Fla. Const. Amendment 7 thus provides an avenue for patients to get access to records of a health care provider's adverse medical incidents. See *Fla. Hosp. Waterman, Inc. v. Buster*, 984 So.2d 478, 486 (Fla. 2008). The Florida Supreme Court has recognized that this popularly adopted amendment affects, or even abrogates, statutes that previously exempted records of investigations, proceedings, and records of peer review panels from discovery in civil or administrative actions. See *Buster*, 984 So.2d at 488-89; *Advisory Op. to Att'y Gen. re: Patients' Right to Know About Adverse Med. Incidents*, 880 So.2d 617, 620-21 (Fla.2004). "[O]ne of the primary purposes of the amendment is to provide a patient contemplating treatment by a medical provider access to that provider's past history of adverse medical incidents." Buster, 984 So.2d at 489 n. 6. "[A]mendment 7 is self-executing and does not require legislative enactment." *Id.* at 492.

The exemption for the identity of the execution team members also conflicts with FL ST §381.026, the "Florida Patient's Bill of Rights and Responsibilities." This statute states:

> (4) (b) Information.--

> 1. A patient has the right to know the name, function, and qualifications of each health care provider who is providing medical services to the patient.

*Id.*

## CLAIM X

## MR. MCLEAN'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS MR. MCLEAN MAY BE INCOMPETENT AT TIME OF EXECUTION.

An evidentiary hearing is not required for this claim. It is being preserved for federal review.

In accordance with Fla. R. Crim. P. 3.811 and 3.812, a prisoner cannot be executed if "the person lacks the mental capacity to understand the fact of the impending death and the reason for it." This rule was enacted in response to *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595 (1986).

The undersigned acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Until the death warrant is signed, the issue is not ripe. This is established under Florida law pursuant to Section 922.07, Florida Statutes (1985) and *Martin v. Wainwright*, 497 So. 2d 872 (Fla. 1986). Likewise, the issue is not ripe under federal law until the death warrant is signed. See *Poland v. Stewart*, 41 F. Supp. 2d 1037 (D. Ariz 1999) (holding that such claims truly are not ripe unless a death warrant has

been issued and an execution date is pending); *Martinez Villareal v. Stewart*, 523 U.S. 637, 118 S. Ct. 1618 (1998) (dismissing Respondent's *Ford* claim as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time); *Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853 (1993) (holding that the issue of sanity [for the *Ford* claim] is properly considered in proximity to the execution).

Given that federal law requires that in order to preserve a competency to be executed claim, the claim must be raised in the initial petition for habeas corpus, and in order to raise an issue in a federal habeas petition, the issue must be raised and exhausted in state court. Hence, the filing of this petition.

## CLAIM XI

**CUMULATIVE ERROR DEPRIVED THE DEFENDANT OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.**

All other allegations and factual matters contained elsewhere in this motion are fully incorporated herein by specific reference.

Cumulative error in the case at hand deprived Mr. McLean of his constitutional right to a fundamentally fair trial, which is guaranteed under the Sixth, Eighth, and Fourteenth Amendments. See *Heath v. Jones*, 941 F.2d 1126 (11th Cir.

1991); *Derden v. McNeel*, 938 F.2d 605 (5th Cir. 1991). "[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695-96. Cf. *State v. Gunsby*, 670 So. 2d 920 (Fla. 1996) ("[W]hen we consider the cumulative effect of the testimony presented at the rule 3.850 hearing and the admitted Brady violations on the part of the State, we are compelled to find, under the unique circumstances of this case, that confidence in the outcome of Gunsby's original trial has been undermined and that a reasonable probability exists of a different outcome"), citing *Cherry v. State*, 659 So.2d 1069 (Fla.1995) (cumulative effect of numerous errors in counsel's performance may constitute prejudice); *Harvey v. Dugger*, 656 So.2d 1253 (Fla.1995) (same). This consideration is important here, where this motion raises numerous separate claims based on counsel's failure to object and prosecutorial misconduct, among others. Even if the Court is not persuaded that relief should not be granted on any one of them, the Court must consider their cumulative effect.

## CONCLUSION

Based on the foregoing, the circuit court improperly denied Mr. McLean relief on his Rule 3.851 motion. Relief is warranted in the form of a new trial, a new sentencing proceeding, or any other relief that this Court deems proper.

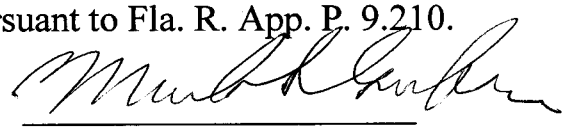
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been electronically filed with the Clerk of the Court, and furnished by E-MAIL to Scott A. Browne, Assistant Attorney General at: Scott.Browne@myfloridalegal.com, capapp@myfloridalegal.com, and by U.S. Mail to Derrick McLean, DOC #996584, Union Correctional Institution, 7819 NW 228th Street, Raiford, FL 32026.

Mark S. Gruber
Florida Bar No. 0330541
Julie Morley
Florida Bar No. 0085158
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
(813) 740-3544
Counsel for Appellant

## CERTIFICATE OF COMPLIANCE

**I HEREBY CERTIFY** that the foregoing Initial Brief was generated in Times New Roman 14-point font pursuant to Fla. R. App. P. 9.210.



Mark S. Gruber
Florida Bar No. 0330541
Julie Morley
Florida Bar No. 0085158

CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
(813) 740-3544
Counsel for Appellant