DOCKET NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

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MICHAEL WAYNE SHELLITO,

Petitioner,

vs.

MARK S. INCH, Secretary,
Florida Department of Corrections, et al.,

Respondents.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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COUNSEL FOR PETITIONER

QUESTION PRESENTED

1. Whether the petitioner has demonstrated that jurists of reason could disagree with the federal courts' resolution of his constitutional claims or that such jurists could conclude that the issues presented are adequate to deserve encouragement to proceed further, thereby entitling petitioner to the issuance of a COA?

NOTICE OF RELATED CASES

Per Supreme Court Rule 14.1(b)(iii), the following cases relate to this petition:

Underlying Trial:
Circuit Court of Duval County, Florida
State of Florida v. Michael Wayne Shellito, Case No. 95-1449 CF
Judgement Entered July 21, 1995

Appellate Proceedings:
Florida Supreme Court (Case No. 60-86,931)
Shellito v. State, 701 So. 2d 837 (Fla. 1997)
Conviction and Sentence Affirmed: September 11, 1997

Petition for Writ of Certiorari:
United States Supreme Court
Shellito v. Florida, 118 S.Ct. 1537 (1998)
Certiorari Denied: April 20, 1998

Initial Postconviction Proceedings:
Circuit Court of Marion County, Florida
State of Florida v. Michael Wayne Shellito, Case No. 95-1449 CF
Judgement Entered August 12, 2010 (denying motion)

Appellate Proceedings:
Florida Supreme Court (Case No. SC10-2043)
Shellito v. State, 121 So. 3d 445 (Fla. 2013)
Affirmed: July 3, 2013

Appellate Proceedings:
Eleventh Circuit Court of Appeals (Case No. 20-13981)
Shellito v. Sec'y, Dept. of Corrs.
Order Denying COA: March 2, 2021

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Petitioner, **MICHAEL WAYNE SHELLITO**, is a prisoner in Florida. He urges this Honorable Court issue its writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals.

CITATION TO OPINION BELOW

The Eleventh Circuit's March 2, 2021, order denying Mr. Shellito's Application for COA is Attachment A to this petition; the district court's order denying Mr. Shellito's petition and application for COA is Attachment B to this petition. The Florida Supreme Court's opinion affirming the

state circuit court's denial of postconviction relief is Attachment C to this petition.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals on the basis of 28 U.S.C. Section 1254(1). The Eleventh Circuit entered its order denying Mr. Shellito's Application for COA on March 2, 2021.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in relevant part:

> No persons . . . shall . . . be deprived of life, liberty or property, without due process of law.

The Sixth Amendment to the Constitution of the United States provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

PROCEDURAL HISTORY

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

After a jury trial, Mr. Shellito was found guilty of First Degree Murder on July 21, 1995 (R. 1209). The jury recommended

death on August 21, 1995. The trial court followed the jury's recommendation and sentenced Mr. Shellito to death on October 20, 1995 (R. 1564).

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

On April 20, 1999, Mr. Shellito filed a preliminary Rule 3.851 motion which was subsequently amended (PC-R. 34-169, PC-R. 255-368, SPC-R. 1078-1184).

An evidentiary hearing was held on December 12, 2005, April 18-21, 2006, and June 12, 2006. Depositions to perpetuate testimony were taken on June 13, 2006, and submitted to the state circuit court for consideration.

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

The Florida Supreme Court affirmed as to the guilt phases issues, but reversed as to the ineffective assistance of penalty phase counsel and remanded for a new penalty phase. *Shellito v. State*, 121 So. 3d 445 (Fla. 2013).

Mr. Shellito was re-sentenced to life without the possibility of parole on July 14, 2017.

On July 11, 2018, Mr. Shellito, through *pro bono* counsel filed a petition for writ of habeas corpus relating to his conviction for First Degree Murder (Doc. 1).

On July 31, 2020, the district court entered its order denying Mr. Shellito's petition (Doc.17). At the conclusion of

the order, the court stated that a certificate of appealability was denied (Doc. 17). Judgment was entered on August 3, 2020 (Doc. 18).

On November 18, 2020, Mr. Shellito filed an application for COA with the Eleventh Circuit Court of Appeals. On March 2, 2021, the Eleventh Circuit denied Mr. Shellito's application.

FACTS RELEVANT TO QUESTIONS PRESENTED

A. THE TRIAL

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

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

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

According to defense witness, John Bennett, he too lived near where the shooting occurred and heard noises in the early morning hours of August 31, 1995 (T. 827). And, he too looked out his window. He saw a truck and the silhouette of an

individual who entered the drivers's side of the truck and drove away (T. 829-30).

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

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

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

The firearm that was found a few feet from Mr. Shellito upon his arrest matched the casing that was found at the scene of the shooting the previous morning (T. 813).

On Mr. Shellito's behalf, the defense presented the testimony of Jabreel Street, who had been incarcerated with Bays

at the Duval County Jail[1] (T. 864). Street testified that Bays had asked him to "jump on" Mr. Shellito's case; i.e., learn of information about the case and then provide it to the State as if it had come from Mr. Shellito (T. 865). Street testified that Bays had some paperwork in his cell with Mr. Shellito's name on it – it looked like a police report (*Id.*). Bays gave Street information about Mr. Shellito's case to use, but Street did not want to "jump on" the case (T. 867).

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

B. POSTONVICTION PROCEEDINGS

1. Trial Counsel

A few weeks after Mr. Shellito was indicted for the first degree murder of Sean Hathorne, Refik Eler was appointed to represent him (SPC-R. 2047). Eler testified that the theory of defense as to the guilt phase was that Gill "was the shooter" (SPC-R. 2067), and Mr. Shellito was the scapegoat (SPC-R. 2069).

In this regard, though Eler had wanted to present the statements Gill made to law enforcement, he failed to call Detective Hinson for no strategic reason (SPC-R. 2075). Likewise, Eler had no strategic reason for failing to obtain a

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

ruling as to whether the State would be permitted to elicit testimony from Theresa Ritzer regarding an alleged threat Mr. Shellito made to her if he impeached her with her prior inconsistent statements.[2] Rather, Eler admitted that he simply "didn't anticipate" the State's rebuttal evidence (SPC-R. 2179).

As to Bays, Eler wanted the jury to believe that he had a grudge against Mr. Shellito (SPC-R. 2181). And while Eler attempted to impeach Bays about his pending criminal charges, he had no idea that on the day that jury selection began in Mr. Shellito's case, the State withdrew its efforts to classify Bays as a habitual violent felony offender (SPC-R. 2182). He would have used that information had he had it (SPC-R. 2184).

2. Richard Bays

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

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

expected to be a key prosecution witness in establishing Mr. Shellito's guilt.

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

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

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

(SPC-R. 3328).[4]

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

After Mr. Shellito's trial, Bays, who was a key witness, was asked how he had been released so quickly on the charges he had (SPC-R. 2886-7). Bays responded that it was either "him or me", referring to Mr. Shellito and admitted that he got a "deal" (SPC-R. 2887).

3. Mental Health

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

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

to cope or handle stressful or difficult situations" (SPC-R. 3159).

Dr. Riebsame diagnosed Mr. Shellito with bipolar disorder, not otherwise specified, alcohol dependence[5], cannabis dependence and organic brain disorder (SPC-R. 2321, 2323). Dr. Riebsame believed that the bipolar was likely due to the organic brain damage (*Id.*).

In addition to the mental health mitigation, trial counsel could have easily learned that Mr. Shellito turned to drugs and alcohol at a young age (SCP-R. 2545, 2872, 2881). In his teenage years, Mr. Shellito consumed alcohol and marijuana on a daily basis (SPC-R. 2774, 2872-3, 2881-2, 2902-3, 2924). He would drink until he passed out (SPC-R. 2774).

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

---

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

Rebecca Allen[6] had lived with Mr. Shellito and his girlfriend in the early part of 1994 (SPC-R. 2780). Allen testified that Mr. Shellito was emotional and moody (SPC-R. 2780, 2903). Mr. Shellito would get upset if she argued with him; "it was like an emotional roller coaster being around him" (*Id.*). When Mr. Shellito consumed alcohol and marijuana, which was a daily occurrence, his emotions intensified (SPC-R. 2781, 2903).

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

> A: [Jennifer] had to go check in, but we weren't allowed around her parents. So we was waiting for Jennifer to come back and pick us up. She never came back.
>
> Q: Did she – what do you mean? She just – where were you guys? Where did she leave you?
>
> A: She just dropped us off and said she'd be back. It was in the neighborhood. When she didn't show back up, we ended up getting transportation on our own.
>
> Q: What does that mean?
>
> A: We took a van.
>
> Q: You broke into a van and . . .
>
> A: Yes, ma'am.
>
> * * *

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

Q: . . .So when you were with Mr. Shellito the night that you stole the van, was he drinking that night?

A: Yes, ma'am.

Q: What was he drinking?

A: He was drinking Schlitz Malt. He was drinking quarts of beer.

Q: After you got the van, where did you two go?

A: We went to Steve Gill's in Colonial Forest.

...

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

THE FEDERAL COURTS' RULINGS

In its order denying Mr. Shellito's claim that his right to due process had been violated due to the prosecutor's conduct in dealing with Richard Bays, the district court found that Mr. Shellito had not "rebutted with clear and convincing evidence the state court's determination that there was no promise or agreement entered into between Bays and the State whereby Bays' testimony in Petitioner's murder case was agreed to be offered in consideration for the state's disposition of Bays' armed robbery case." (Doc. 17, 17). The district court focused on the fact that the "agreement occurred after the disposition of Mr. Shellito's case" (Doc. 17, 17).

And, while the district court recognized, Bays' testimony was false (Doc. 17, 21), the court relied on the other evidence to determine that it was not significant, citing to *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

As to Mr. Shellito's claim of ineffective assistance of counsel, the district court found that Eler "had significant experience in death penalty proceedings." (Doc. 17, 24; *see also* Doc. 17, 32). And, specifically as to the allegation concerning the testimony of John Bennett, the district court found that Bennett's trial testimony about the individual entering the driver's side of the vehicle was more "certain and beneficial" than the impeachment evidence (Doc. 17, 35).

As to trial counsel's failure to present the testimony of defense investigator Don Marx to counter the State's impeachment of Mr. Shellito's mother, the district court deferred to the Florida Supreme Court's determination that trial counsel had made a strategic decision not to present the evidence.

The district court also concluded that a defense of intoxication was "incompatible with the trial strategy" (Doc. 17, 40).

Finally, as to trial counsel's unreasonably opening the door to highly prejudicial testimony from Theresa Ritzer, the district court determined that the Florida Supreme Court's ruling was not contrary to or an unreasonable application of *Strickland* (Doc. 17, 42).

In its order denying Mr. Shellito a COA, the district court stated: "Upon due consideration, this Court will deny a certificate of appealability." (Doc. 17, 49 n.13).

In its order denying Mr. Shellito's application for COA, the Eleventh Circuit Court of Appeals simply stated that Mr.

Shellito "failed to make a substantial showing of the denial of a constitutional right."

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW WHETHER MR. SHELLITO WAS ENTITLED TO A CERTIFICATE OF APPEALABILITY ON THE ISSUES HE RAISED.

A. Denial of a constitutional right

As this Court has explained, a state prisoner whose habeas petition has been denied by a federal district court meets the standard for a COA if he shows that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented [are] 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)). That is, a COA must issue where the petitioner "demonstrate[s] that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id*. Given that the Eleventh Circuit failed to conduct an appropriate overview of the claims and a general assessment of their merits, *Miller-El v. Dretke*, 537 U.S. 322, 336 (2005), Mr. Shellito submits that this Court should grant certiorari to address whether on the record in this case, he has established his entitlement to a COA.

Mr. Shellito submits that jurists of reason could find that his petition states a valid claim of the denial of a constitutional right. Mr. Shellito asserted in his petition that

his right to due process was violated and that he was denied his right to effective assistance of counsel.

B. Due process violations

1. The State failed to disclose the benefits that critical witness Richard Bays was promised or correct his clearly false testimony.

The State clearly violated Mr. Shellito's right to due process. Indeed, at the evidentiary hearing, through the testimony of ASA Plotkin, the State conceded that Richard Bays testified falsely. Bays' testimony was false in two respects: First, Bays testified that he was facing life in prison due to his status as a habitual offender. He was not. Second, Bays testified that he was not receiving any benefit for his testimony. However, he was aware that he would receive a benefit and he did in fact receive a benefit.

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

However, the day before Bays testified at Mr. Shellito's capital trial, Plotkin filed a pleading withdrawing the notice to classify Bays as a career criminal.[7] The basis of the withdrawal was that:

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

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

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

The *Johnson* opinion had been decided on January 14, 1993, over eighteen months before Plotkin filed the notice of intent as to Bays. Plotkin spent "a year or so" prosecuting repeat offenders in Judge Olliff's courtroom and was a division chief in Judge Southwood's division when Judge Southwood was also handling repeat offenders (Deposition, June 13, 2006, p. 4). Plotkin's only explanation for the withdrawal was that he had made a mistake in filing the notice of intent in September, 1994 (SPC-R. 3295).[8] But, Plotkin did not make a mistake in attempting to treat Bays as a career criminal because *Johnson* did not disallow defendants from being habitualized if the prior used to habitualize fell between October 1, 1989 - May 2, 1991, but rather effected only those cases where the current offense – where a prosecutor wanted to habitualize a defendant – occurred between October 1, 1990 - May 2, 1991.[9] Thus, the window period

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

[9]If a defendant committed a crime today, and had a previous aggravated battery that occurred between October 1, 1989 - May 2, 1991, that defendant could be habitualized. The window period shut as of May 2, 1991 and was not a concern at the time Bays was (continued...)

did not effect the prior aggravated batteries, like Bays'. *See Johnson*, 616 So. 2d at 4 ("We hold that chapter 89-280 violates article III, section 6, of the Florida Constitution. However, we conclude that chapter 91-44's bienniel reenactment of chapter 89-280, effective May 2, 1991, cured the single subject violation as it applied to all defendant's sentenced under section 775.084 whose offenses were committed after that date."). The reason used to justify the withdrawal of the intent to classify Bays as a career criminal was false.

At Mr. Shellito's capital trial Bays testified that he was facing a life sentence on his pending charges (T. 434). He was not. Plotkin who knew that Bays was testifying falsely sat mute.

Bays also testified that he was not promised anything for his testimony at Mr. Shellito's trial (T. 434). Again, Bays' testimony was untruthful, but Plotkin sat mute.

At the evidentiary hearing Plotkin testified that he had made a conscious decision to dispose of Bay's case after Mr. Shellito's so that there would be no specific deal for the jury to hear (SPC-R. 3302, 3332-3). Yet, Bays knew that if he testified "truthfully" that would be taken into consideration. (SPC-R. 3329). In fact, Bays testimony was taken into consideration – a week after Mr. Shellito was sentenced to death, Bays entered a plea to accessory after the fact and received 13 months in jail, he was released that same day (SPC-

[9](...continued)
charged with armed robbery and the prosecutor filed a notice to prosecute him as a career criminal.

R. 3297-8, Def. Ex. 45, 46, 49). Plotkin failed to notify trial counsel or the jury that Bays knew he would receive consideration in exchange for his testimony.

In addition, following Mr. Shellito's trial, Bays was asked how he had been released so quickly on the charges he had (SPC-R. 2886-7). Bays responded that it was either "him or me", referring to Mr. Shellito and admitted that he got a "deal" (SPC-R. 2887).

Bays was a critical witness for the prosecution. Bays was the only witness to place the murder weapon in Mr. Shellito's hands before the crime.[10] He also testified that Mr. Shellito admitted to shooting the victim.

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

Trial counsel testified at the evidentiary hearing that he would have liked to have been provided the suppressed information (SPC-R. 2182).

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

2. The district court's ruling is debatable.

Mr. Shellito submits that jurists of reason would find it debatable as to whether the district court was correct in its rulings denying his petition.

In denying Mr. Shellito's claim, the district court focused on the fact that the "agreement occurred after the disposition of Mr. Shellito's case" (Doc. 17, 17). However, the district court's ruling is debatable among jurists of reason as its decision is contrary to *United States v. Bagley*, 473 U.S. 667 (1985). In *Bagley*, this Court explained that a prosecutor must reveal the possibility of a reward or benefit:

> 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. at 683 (emphasis added).

In Mr. Shellito's case, the trial prosecutor admitted that he held out the possibility of a reward without guaranteeing what specific benefits Bays would receive:

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

(SPC-R. 3328).[11] Plotkin also admitted that he made a conscious decision to dispose of Bays' case after the Shellito case (SPC-R.

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

3302). That is because when the cooperating witness, in this case Bays, will testify at (Mr. Shellito's) trial, there is no deal which is what the State prefers (SPC-R. 3306). Thus, there is clear and convincing evidence that Bays knew the State intended to reward him if he testified against Mr. Shellito. *See also Napue v. Illinois*, 360 U.S. 264, 265-266 (1959).

Furthermore, it is indisputable that Bays' testimony in Mr. Shellito's capital trial was false. Due to the State's original designation of Bays' as a career criminal, he was facing a life sentence, with a fifteen year minimum mandatory, if convicted (SPC-R. 3290-1). However, after the withdrawal of the habitual violent felony offender notice, Bays was no longer facing any minimum mandatory sentence (SPC-R. 3291). So, when Bays testified at the trial that he was facing the minimum mandatory sentence, his testimony was categorically false. The State knew it was false because the State had withdrawn the notice. Therefore, overlooked by the district court was the State's absolute constitutional duty to correct Bays' testimony. Indeed, had trial counsel been aware that the State had withdrawn the notice the day before Bays' testimony, he certainly would have used both the timing and the State's "mistaken" understanding of the law to establish that pressure was applied to Bays from the moment he was questioned on the night of the crime.

Though the district court characterized the State's behavior as creating a "nebulous expectation of help" and relies on Bays' consistent statements about the crime (Doc. 17, 19), to find that no due process violation occurred, Mr. Shellito submits that

Plotkin's testimony, in and of itself, establishes that a due process violation occurred. And, because Bays was a critical prosecution witness, it was imperative that the jury be aware of the interactions between the State and Bays in order to accurately gauge the reliability of his testimony.

Moreover, as the district court recognized, Bays' testimony was false (Doc. 17, 21). However, in assessing the impact of the testimony, the district court overlooked the fact 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. Thus, it was imperative that Mr. Shellito establish the unreliability of his testimony. Mr. Shellito's defense hinged on the evidence that Steven Gill fired the single, fatal shot at the victim. Mr. Shellito's defense was supported by the eyewitness testimony, so Bay's untruthfulness, expectation of benefits and relationship with Gill would have severely undermined his testimony.

And, specifically as to the *Giglio* analysis, it is the State's burden to demonstrate that the there was no reasonable likelihood that the false testimony affected the judgement of the jury. In light of Bays' inculpatory testimony, Mr. Shellito submits that the State did not meet this burden.

Finally, the district court's reference to *Brecht v. Abrahamson*, 507 U.S. 619 (1993), overlooks the fact that it was not Shellito's burden to satisfy the *Brecht* standard and is debatable because it is contrary to this Court's opinion in *Kyles v. Whitley*, 514 U.S. 419, 435-36 (1995):

> Third, we note that, contrary to the assumption made by the Court of Appeals, 5 F. 3d, at 818, **once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review.** Assuming, *arguendo*, that a harmless-error enquiry were to apply, a *Bagley* error could not be treated as harmless, since "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," 473 U.S., at 682 (opinion of Blackmun, J.); *id.*, at 685 (White, J., concurring in part and concurring in judgment), necessarily entails the conclusion that the suppression must have had "'substantial and injurious effect or influence in determining the jury's verdict,'" *Brecht v. Abrahamson*, 507 U. S. 619, 623 (1993), quoting *Kotteakos v. United States*, 328 U. S. 750, 776 (1946). This is amply confirmed by the development of the respective governing standards. Although *Chapman v. California*, 386 U. S. 18, 24 (1967), held that a conviction tainted by constitutional error must be set aside unless the error complained of "was harmless beyond a reasonable doubt," we held in *Brecht* that the standard of harmlessness generally to be applied in habeas cases is the *Kotteakos* formulation (previously applicable only in reviewing nonconstitutional errors on direct appeal), *Brecht*, *supra*, at 622-623. Under *Kotteakos* a conviction may be set aside only if the error "had substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos*, *supra*, at 776. *Agurs*, however, had previously rejected *Kotteakos* as the standard governing constitutional disclosure claims, reasoning that "the constitutional standard of materiality must impose a higher burden on the defendant." *Agurs*, 427 U.S., at 112. *Agurs* thus opted for its formulation of materiality, later adopted as the test for prejudice in *Strickland*, only after expressly noting that this standard would recognize reversible constitutional error only when the harm to the defendant was greater than the harm sufficient for reversal under *Kotteakos*. **In sum, once there has been *Bagley* error as claimed in this case, it cannot subsequently be found harmless under *Brecht*.**

(Footnote omitted)(emphasis added). *See also Avilla v. Galaza*, 297 F.3d 911, 918, fn 7 (9th Cir. 2002)("We need not conduct a harmless error review of *Strickland* violations under *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), because '[t]he *Strickland* prejudice analysis is complete

in itself; there is no place for an additional harmless-error review.' *Jackson v. Calderon*, 211 F.3d 1148, 1154 n. 2 (9th Cir. 2000), *cert. denied.*, 531 U.S. 1072, 121 S.Ct. 764, 148 L.Ed.2d 665 (2001)."

The *Brady* and *Giglio* violations which occurred at Shellito's capital trial are debatable among jurists of reason.

C. Ineffective assistance of trial counsel

1. Trial counsel was deficient in representing Mr. Shelltio.

Trial counsel was ineffective at Mr. Shellito's capital trial. Due to his inexperience and the limited time to prepare for the capital trial some witnesses listed by the State in discovery were never deposed or spoken to and other key witnesses were deposed only a few weeks before trial began.[12] The hurried nature of the preparation caused trial counsel to overlook critical information which severely prejudiced Mr. Shellito. For example, trial counsel testified that the defense at trial was that Mr. Shellito did not commit the crime – that Steven Gill did. In fact, in his opening statement, trial counsel told the jury that Mr. Shellito was the perfect scapegoat and that when Gill testified they would be hearing from the person who killed the victim (T. 378). Gill never testified at Mr. Shellito's trial – instead he invoked his fifth amendment privilege to be free from self-incrimination (T. 952).[13] Despite this development,

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

[13]Gill's attorney invoked his fifth amendment privilege (continued...)

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

Trial counsel failed to elicit testimony that would have placed suspicion directly on Gill. John Bennett testified at trial that he was awoken by tires squealing and that he only saw a silhouette moving around in a truck before it drove away (T. 829). This testimony was inconsistent with Bennett's deposition, in which he testified that he not only heard tires squealing, but heard a shot before seeing someone get in a truck, which then drove away (T. 928). Bennett's deposition indicated that the truck, presumably Gill's truck, and presumably Gill himself, were present when the shots were fired.[14] This fact combined with Bennett's testimony that *he saw a silhouette enter the driver's side of the truck*, was critical evidence that suggested Gill was actually the shooter, not Mr. Shellito.

Trial counsel further failed to elicit substantial additional testimony against Gill. Migdalia Shellito, Mr. Shellito's mother, testified at trial that Gill confessed to her (T. 963-64). Mrs. Shellito further testified that she informed trial counsel of this confession, as well as tried to call the lead detective on the case, and spoke to courtroom personnel on

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[13](...continued)
against self incrimination (T. 952). The jury was not present when this occurred (T. 952).

[14]Turner had indicated that Gill let Mr. Shellito out of the truck and he was on foot.

the matter (T. 972, 973, 981-92). To refute this testimony, the State Attorney called a court clerk, Debbie Dlugosz, who testified that Mrs. Shellito never told her another individual confessed to the murder (T. 1017). Mrs. Shellito's testimony was dismissed by the prosecutor who claimed there was no one to substantiate her story. But, this was untrue. Mrs. Shellito had spoken to the investigator for trial counsel about Gill's confession on April 10, 1995, a full three months before trial, yet trial counsel failed to use information he had in his possession to substantiate the testimony (Def. Ex. 50).

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

Trial counsel was also ineffective in failing to present evidence of Mr. Shellito's intoxication in the hours preceding

the crime and also in the hours preceding his arrest. Much evidence was available at the time of trial that Mr. Shellito was severely addicted to alcohol and marijuana (SPC-R. 2774, 2781, 2835-6, 2872-3, 2881-2, 2902-3, 2924), and he was drinking alcohol and smoking marijuana close in time to the crime (T. 470, SPC-R. 2907-8, 2913-4, Def. Ex. 2). Trial counsel testified at the evidentiary hearing that there was no question that Mr. Shellito was using drugs and alcohol shortly before the crime (SPC-R. 2570).

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

Likewise, because the State introduced evidence about Mr. Shellito's behavior at the time of his arrest, trial counsel could and should have introduced evidence to explain that behavior. Mr. Shellito was intoxicated (SPC-R. 2775, 2884, Def. Exs. 2, 24).

Trial counsel failed to consult an expert about Mr. Shellito's drug and alcohol use and what import those issues had to the guilt phase of the trial.[15] At the evidentiary hearing, mental health experts explained that Mr. Shellito's brain damage caused him to be impulsive, exercise poor judgment and have less control of his mood or management of his behavior (SPC-R. 2315, 2963, 3153, 3158-9). Thus, when Mr. Shellito used alcohol and marijuana, which he was drawn to because of his neurological impairments, his control was further diminished (SPC-R. 2330, 2469, 2974-5, 3161). Mr. Shellito's intoxication preceding the crime changes the picture of what actually occurred on that evening.

Trial counsel was also ineffective in cross-examining witnesses. Throughout the trial, counsel failed to impeach witnesses with inconsistent statements. However, in the case of witness Teresa Ritzer, trial counsel opened the door to highly prejudicial testimony. Ritzer testified before the jury that following the crime, Mr. Shellito possessed a firearm and had confessed to shooting the victim in a failed robbery (T. 759). Ritzer also testified that when Mr. Shellito told her the story his voice was "kind of like he was enjoying it, like he was proud." (T. 760).

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

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

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

> Q: What was it about Mr. Shellito's life or death that mattered to you with regard to giving a statement to the police?
>
> A: Because he had threatened me, threatened my life earlier that if I talked for --
>
> Q: And when you say threatened your life earlier, when are you referring to?
>
> A: Earlier that night.
>
> Q: And what did he do with regard to threatening your life?
>
> A: He held a gun to my head.
>
> Q: And can you tell the members of the jury what he said to you when he held the gun to your head?
>
> A: He told me that if I talked then he would kill me because he had killed before.

Q: And when – when in regards to when he was telling you about shooting someone did that happen?

A: Right before he told me about the way he murdered the guy.

Q: Now ma'am, what was your state of mind when you refused to give the police a statement?

A: I was scared.

(T. 790-1).

Because of the State's untimely production of the statement, trial counsel admittedly did not know how Ritzer would explain the change in her statements (SPC-R. 2590-1).[16] However, trial counsel should have moved for a *Richardson* hearing at which he could have moved the trial court to exclude the testimony of Ritzer altogether. Or, at a minimum, trial counsel should have requested a continuance to depose Ritzer about the statement. Rather than find out Ritzer's explanation before asking her any questions, trial counsel blindly asked her about her original statement. Yet, trial counsel never even objected to the testimony because it was more prejudicial than probative. Trial counsel's performance was deficient.

The prejudice from trial counsel's performance is obvious – the jury heard that Mr. Shellito placed a gun to a witness' head and threatened her life while also making the statement that he

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

"had killed before." These uncharged acts undoubtedly prejudiced the jury to convict Mr. Shellito.

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

2. The district court's ruling is debatable.

Reasonable jurists could debate the issue of trial counsel's ineffectiveness at his capital trial. In rejecting Mr. Shellito's claim, the district court found that Eler "had significant experience in death penalty proceedings." (Doc. 17, 24; *see also* Doc. 17, 32). However, Mr. Shellito's case was Eler's first capital case as lead counsel. Furthermore, Eler has been found deficient in several cases, including capital cases, and in Mr. Shellito's case. *See State v. Morrison*, 236 So. 3d 204 (Fla. 2016)(reviewing ineffective assistance of counsel of Eler in 1997 capital case); *Shellito v. State*, 121 So. 3d 445 (Fla. 2013); *Douglas v. State*, 141 So. 3d 107 (Fla. 2012)(finding Eler's performance to have been deficient in a capital case.); *Spargo v. State*, 132 So. 3d 354 (Fla. 1st DCA 2014); see also https://www.jacksonville.com/news/crime/016-08-24/story/matt-shirks-top-assistant-has-been-ineffective-four-times ("Last December, Rob Smith, an attorney and research fellow at Harvard University, published a story on Slate.com that **listed Eler as one of the worst defense attorneys in the country**.")(emphasis added).

Specifically, as to the allegation concerning the testimony of John Bennett, the district court overlooked the specific error that trial counsel committed - failing to elicit that Bennett had

heard the shot and then seen the silhouette of the individual move to and enter the driver's side of the vehicle. Mr. Shellito agrees with the district court's conclusion that Bennett's trial testimony about the individual entering the driver's side of the vehicle was more "certain and beneficial" (Doc. 17, 35), but there was no reason for trial counsel to fail to elicit the information about hearing the shot. Because trial counsel's entire strategy at the guilt phase was to cast blame on Gill, it was deficient for trial counsel to fail to elicit the specific timing Bennett provided during his deposition.

As to trial counsel's failure to present the testimony of defense investigator Don Marx to counter the State's impeachment of Shellito's mother, Migdalia, it is surely debatable that trial counsel cannot be said to have made a strategic decision when he was unaware that Mrs. Shellito had spoken to his investigator as it contradicts this Court's opinions. *See Strickland v. Washington*, 466 U.S. 668, 690-1 (1984); *Wiggins v. Smith*, 539 U.S. 510, 535 (2003).

Also, the district court concluded that a defense of intoxication was "incompatible with the trial strategy" (Doc. 17, 40). However, trial counsel failed to investigate this defense, despite numerous red flags that a youthful Shellito was addicted to and had used alcohol and marijuana on the evening of the crime. Had trial counsel investigated, he would have discovered a wealth of evidence that formed the basis for a strong voluntary intoxication defense, including mental health testimony (*See* SPC-R. 2774, 2781, 2835-6, 2872-3, 2881-2, 2902-3, 2924, T. 470, SPC-

R. 2907-8, 2913-5, Def. Ex. 2, SPC-R. 2963, 3153, 3158-9; SPC-R. 2330, 2469, 2974-5, 3161). And, it would not have been inconsistent to maintain that Gill committed the crime and not Shellito (SPC-R. 2570) while also presenting the evidence that Shellito was too intoxicated to drive or shoot the victim, thus, it must have been Gill.

Finally, as to trial counsel's unreasonably opening the door to highly prejudicial testimony from Theresa Ritzer, the district court determined that the Florida Supreme Court's ruling was not contrary to or an unreasonable application of *Strickland* (Doc. 17, 42).

The Florida Supreme Court's decision was based upon an unreasonable determination of the facts and is clearly debatable. First, trial counsel testified that he simply "didn't anticipate" the State's rebuttal evidence (SPC-R. 2179). Thus, the notion that trial counsel made a strategic decision to open the door to the highly prejudicial testimony makes no sense.

Further, because trial counsel had not been provided with the report until after he deposed Ritzer, he could have requested a recess to inquire about the initial statement and why her testimony was inconsistent with her initial statement. Trial counsel's failure to investigate Ritzer's initial statement caused him to allow inadmissible and highly prejudicial testimony to be heard by the jury. In and of itself, this deficiency undermines confidence in Shellito's conviction.

CONCLUSION

Petitioner submits that certiorari review is warranted to review the decision of the Eleventh Circuit in this cause.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail, first class postage prepaid to Holly M. Simcox, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32301, on this 13th day of July, 2021.

Respectfully submitted,

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