

IN THE SUPREME COURT OF FLORIDA
CASE NUMBER: SC2023-1476

LOWER TRIBUNAL CASE NUMBER: 11-2009-CF-002298

MESAC DAMAS,
APPELLANT,

v.

STATE OF FLORIDA,
APPELLEE.

_____/

ON APPEAL FROM THE TWENTIETH JUDICIAL CIRCUIT,
IN AND FOR COLLIER COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF THE APPELLANT

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REQUEST FOR ORAL ARGUMENT

Mr. Damas respectfully requests oral argument by counsel pursuant to Florida Rule of Appellate Procedure 9.320. The resolution of the issues involved in this action may determine whether Mr. Damas lives or dies. This Court has granted oral argument in other capital cases in a similar procedural posture. A full opportunity to argue the issues at oral argument is appropriate in this case because of the seriousness of the claims at issue and the penalty that the State seeks to impose on Mr. Damas.

PRELIMINARY STATEMENT REGARDING REFERENCES

References to the record of the direct appeal of Mr. Damas' judgment of conviction and death sentence are of the form R-[page number] or SV [volume number] R [page number]. References to the record of postconviction proceedings are of the form PCR-[page number]. Exhibits generally refer to defense exhibits unless otherwise indicated. References to the exhibits from the postconviction hearing are of the form Ex-[letter]. References to the exhibits from the record on appeal are of the form D-Ex- [number]. Generally, Mesac Damas is referred to as "Mr. Damas" and the State

of Florida is referred to as “the State.”

STATEMENT OF THE CASE AND FACTS

Acting under the influence of his mental illness, Mr. Damas killed his family and fled to Haiti. The authorities brought him back from Haiti where he was later met with a six-count indictment for first-degree murders. (R-24-25). The State sought death on each count. (R-39). Mr. Damas then began waiving most of his rights, one-by-one, or at least attempted to do so.

He waived his right to a jury trial on the issue of his guilt despite incorrectly believing that he had already pleaded guilty. (R-2823-2835, 2856-2859). There would be no determination of guilt or sanity at the time of offense. Mr. Damas next waived his right to a penalty phase jury (R-2875, 2883) and to present mitigation (R-2836). Mr. Damas' waiver of these rights was a product of his mental illness and without any rationale.

Mr. Damas did not fare as well when he attempted to assert his right to self-representation under *Faretta v. California*, 422 U.S. 806 (1975). The court allegedly conducted a *Faretta* inquiry in 2011 and denied Mr. Damas self-representation. (R-227; R-364-78). In 2017, the court conducted the *Faretta* hearing at which Mr. Damas

answered the trial court's questions about his age, education, mental health, arrest record, and employment history. (SVRI-3760-61).

On July 24, 2017, the trial court denied Mr. Damas' request to represent himself on the basis that he "failed to adequately articulate his answers to this court's *Faretta* colloquy and failed to demonstrate sufficient understanding of the legal process in order to represent himself." (R-1355-1357).

The court then conducted a *Spencer/Koon*/Sentencing hearing on October 23-24, 2017. The State called three witnesses: Dr. Manfred Borges, a medical examiner; Jessica Gerster, an investigator; and Mackindy Dieu, the brother of Guerline Dieu. Defense counsel presented two witnesses: Dr. Mark Rubino, a neurologist; and Dr. Elizabeth McAlister, a cultural expert (R-2907-3281).

The trial court found that the aggravating factors outweighed the mitigating factors. (R-2131-32). The court sentenced Mr. Damas to death for all six murders. (R-2029-39). This Court affirmed Mr. Damas' convictions and sentences. *Damas v. Florida*, 260 So. 3d 200 (Fla. 2018).

Mr. Damas' incompetence

Mr. Damas' competency became an issue early in the case and remained an issue through postconviction. Because of his mental illness, Mr. Damas was difficult to process through the court system, making it impossible for his case to be determined fairly and constitutionally. In 2014, the court found Mr. Damas incompetent and DCF placed him in the GEO Care facility. He was returned from GEO Care and reevaluated for competency by two doctors. (R-585-88). The court found him competent.

In 2015, the Public Defender (PD) filed a certification of conflict. (R-2043), after representing him for years. That office was replaced by two conflict attorneys, James Ermacora and Kevin Shirley, after the Regional Conflict Counsel (RCC) also had a conflict.

On July 21, 2017, the court found Mr. Damas competent based on Dr. Herkov's and Dr. Kling's reports, to which the State and the defense stipulated. (SVR2-3797-98). No further competence hearings occurred before Mr. Damas' was sentenced to death.

On March 20, 2020, postconviction counsel filed a Motion for Determination of Competency. (PCR-675). The postconviction court appointed Dr. Julie Harper and Dr. Donald A. McMurray to evaluate

Mr. Damas for competency. (PCR-1245-48). On April 6, 2021, the court found Mr. Damas competent. (PCR-1507). On November 14, 2022, the court again found Mr. Damas competent following a renewed competency motion and a hearing. (PCR-2629-2637).

The postconviction hearing

The postconviction court set an evidentiary hearing on two of Mr. Damas' postconviction claims. Mr. Damas' postconviction counsel moved to waive his presence at the evidentiary hearing. (PCR-2618). The court denied the motion, without prejudice, and Mr. Damas was transported to attend the hearing. (PCR-2627). The evidentiary hearing lasted three days and included testimony from twelve witnesses, each discussed below as relevant.

The postconviction court's order

The postconviction court issued an order on July 28, 2023, denying all claims. (PCR-3665). For Claim I the court found that counsel did not perform deficiently and that there was no prejudice. (PCR-3675-77).

For Claim II the court found that Mr. Damas failed to demonstrate any entitlement to relief. (PCR-3689). The court found he failed to establish deficiency or prejudice. (PCR-3688). The court

blamed “the defense's inability to present evidence of some of the stronger mental health mitigators [on Mr. Damas]’ refusal to cooperate.” (PCR-3688).

For Claims III and IV, the Court reiterated the February 14, 2022 order, which detailed the court’s bases for denial. (PCR-3689-91).

SUMMARY OF ARGUMENT

Mr. Damas was incompetent before he waived his rights, when he waived his rights, and during all proceedings against him. His counsel throughout the proceedings were deficient in performing the duty of counsel to raise and properly litigate competency challenges when there was overwhelming evidence that Mr. Damas was incompetent. Counsel merely acquiesced to whatever the appointed experts said and did not challenge the purported evidence finding him competent.

Mr. Damas was no more competent to proceed in postconviction, culminating with his bizarre behavior and non-appearance at most of the evidentiary hearing. Mr. Damas’ significant denials of constitutional rights were never fully raised because Mr. Damas was incompetent during postconviction.

Because Mr. Damas was incompetent, he had an even greater need for the assistance of effective counsel. He received less than even the bare minimum that the law requires. Counsel were ineffective because they waited to do the work needed to develop mitigation and then, as Mr. Damas decompensated, failed to develop much mitigating evidence at all. Mr. Damas was sentenced to death without consideration of compelling mitigation that showed he should not be sentenced to death.

STANDARD OF REVIEW

This case involves mixed questions of law and fact which this Court reviews *de novo*. *Cromartie v. State*, 70 So. 3d 559 (Fla. 2011); *see also, Stephens v. State*, 748 So. 2d 1028, 1030 (Fla. 1999).

ARGUMENT

I. MR. DAMAS HAS BEEN INCOMPETENT SINCE HIS ARREST. HIS CONVICTION AND DEATH SENTENCE WERE UNCONSTITUTIONAL BECAUSE TRIAL COUNSEL WERE INEFFECTIVE AND FAILED TO CHALLENGE HIS COMPETENCY FULLY AND WHEN NECESSARY, THUS VIOLATING HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The sad truth of this case is that Mr. Damas was not, and is not now, competent to proceed. Trial counsel were ineffective for failing

to challenge his competency effectively.

The U.S. Supreme Court has made clear that the trial of an incompetent defendant violates due process, *Drope v. Missouri*, 420 U.S. 162, 171 (1975), and that this due process right cannot be waived, *Pate v. Robinson*, 383 U.S. 375, 384 (1966), *Nelson v. State*, 43 So. 3d 20 (Fla. 2010).

At the heart of these claims is Mr. Damas' mental illness and how it rendered him incompetent to proceed during trial, sentencing and in postconviction. Mr. Damas' mental illness prevented the State from proceeding against him at all stages. Long have courts held that the state was prohibited from proceeding against the incompetent. "[T]he prohibition is fundamental to an adversary system of justice. *Drope at 171–72 (1975)(citation omitted)*. Indeed, "It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Id.* at 171

Further, "the conviction of an accused person while he is legally incompetent violates due process [.] State procedures must be adequate to protect this right." *Pate*, 383 U.S. at 378. In Mr. Damas'

case, they were not. In *Robinson*, the Court found defendant had not “deliberately waived the defense of his competence to stand trial by failing to demand a sanity hearing as provided by Illinois law.” *Id.* at 384. The Court held that “it [was] contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently ‘waive’ his right to have the court determine his capacity to stand trial. *Id.* at 384 (citation omitted).

In *Dusky v. U.S.*, 362 U.S. 402 (1960), the U.S. Supreme Court considered whether the record supported a finding of the petitioner’s competency to stand trial. *Id.* at 402. The Court found that the lower court record did “not sufficiently support” such a finding. *Id.*; (internal quotation marks omitted). The Court also held that “it was not enough [for the trial court] to find that “the defendant (is) oriented to time and place.” *Id.*; (internal quotation marks omitted). The Court required the test to be “whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.” *Id.*; (internal quotation marks omitted). The Court held:

In view of the doubts and ambiguities regarding the legal

significance of the psychiatric testimony in this case and the resulting difficulties of retrospectively determining the petitioner's competency as of more than a year ago, we reverse the judgment of the [the court below] affirming the judgment of conviction, and remand the case to the [the trial court] for a new hearing to ascertain petitioner's present competency to stand trial, and for a new trial if petitioner is found competent.

Id. at 403. Likewise, because of the doubts and ambiguities of Mr. Damas' competency, this Court should remand for a new hearing to determine his competency and a new trial if he is found to be so.

In *Drope*, the Court made clear the important role of defense counsel in ensuring the incompetent are not tried:

Like the report itself, the motion for a continuance did not clearly suggest that petitioner's competence to stand trial was the question sought to be resolved. While we have expressed doubt that the right to further inquiry upon the question can be waived, *see Pate v. Robinson*, 383 U.S. at 384, [] it is nevertheless true that judges must depend to some extent on counsel to bring issues into focus.

Id. at 176–77. Moreover, as this Court recognized, “[a] trial court does have the responsibility of ensuring the competency of a defendant throughout the course of trial proceedings.” *Kilgore v. State*, 688 So. 2d 895, 898–99 (Fla. 1996).

Drope also recognized the complex legal analysis required by the courts:

[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated.

Id. at 180. This requires a probing inquiry by the courts to fulfill the constitutional mandate against trying the incompetent. While psychological opinions are important, competency is ultimately a legal issue. See *Id.* at 175, Footnote 10. Competency is an ongoing question and overtime a defendant may become incompetent. *Id.* at 181–82.

The standard for pleading guilty or waiving the right to counsel is not higher than the competency standard for standing trial. *Godinez v. Moran*, 509 U.S. 389, 391 (1993). “[C]ompetence to plead guilty or to waive the right to counsel [is not] measured by a standard that is higher than (or even different from) the *Dusky* standard.” *Id.* at 398.

A. THE PROCEEDINGS AGAINST MR. DAMAS TOOK PLACE WHILE HE WAS INCOMPETENT BECAUSE TRIAL COUNSEL WERE INEFFECTIVE WHILE CHALLENGING MR. DAMAS' COMPETENCY TO PROCEED, AND FOR FAILING TO MOVE FOR A COMPETENCY HEARING PRIOR TO THE SENTENCING HEARING, THUS ALLOWING AN INCOMPETENT PERSON TO BE FOUND GUILTY AND SENTENCED TO DEATH. MR. DAMAS WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

This Court should reverse because:

It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial. Thus, Blackstone wrote that one who became 'mad' after the commission of an offense should not be arraigned for it 'because he is not able to plead to it with that advice and caution that he ought.' Similarly, if he became 'mad' after pleading, he should not be tried, 'for how can he make his defense?

Drope, at 171 (citations omitted). This section addresses the fundamental issue of "how [could Mr. Damas] make his defense" while incompetent. Mr. Damas had a right to make his defense because the Constitution guarantees him that right. His incompetence, however, served him up on a silver platter. Without "sufficient present ability to assist counsel with his defense and to understand the proceedings against him" Mr. Damas could not

defend himself. This is unacceptable because the State does not avoid its constitutionally required burdens of proof because someone suffers from a mental illness that renders him defenseless to the overwhelming power of the State.

Without Mr. Damas' competence, none of the rights in the Constitution could protect him. Mr. Damas waived a jury trial and pleaded guilty without being capable of reasonably consulting with his counsel. He waived a jury trial for penalty phase when a jury was his best opportunity to avoid execution. While certainly counsel were ineffective in what counsel did present and failed to present, Mr. Damas' ability to consult with counsel to develop important mitigation denied him a fair sentencing and a just determination of whether he should live because Mr. Damas could not provide the basic facts for counsel to represent him.

Mr. Damas' incompetency rendered him unable to consult with counsel to develop mitigation, thus violating the Eighth Amendment's ban on cruel and unusual punishment. While Mr. Damas' case involved terrible aggravation, this still needed to be balanced against his mitigation. Mr. Damas' incompetency meant that the court that sentenced him to death did so without a full understanding of all of

the factors that contributed to Mr. Damas' actions. "[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). Because of Mr. Damas' incompetency, the courts could not make "an individualized determination on the basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862, 879 (1983).

This Court should consider that the withdrawal of the PD after approximately 4 years, showed the difficulty in representing Mr. Damas. (See R-604). The PD did not disclose the nature of the conflict in its motion to withdraw, merely describing the attorney client relationship as "so adverse and hostile to those of another client and/or an attorney within the Office of the PD that a conflict of interest exists." (R-603). The motion concluded that: "As a result of this conflict of interest, the PD cannot adequately or ethically continue to represent the Defendant." (R-603). The RCC filed a similar motion to withdraw that was equally as vague which was also

granted. (R-606).

While a conflict can arise from different circumstances, the reasonable conclusion was that the PD saw that Mr. Damas' incompetency, which the court refused to recognize, made it impossible for the PD to ethically and zealously represent him. The PD pushed the case onto the RCC and the RCC moved to get rid of Mr. Damas. This ended when the court appointed counsel that would be willing to go along with the experts' findings of competency and move Mr. Damas' case through the system.

The trial court understood the difficulty in dealing with Mr. Damas but chose to allow Mr. Damas to go forward. The court knew he was incredibly tangential and hyper-focused on religion thus, interacting with Mr. Damas, was futile. If the court found it impossible to deal with Mr. Damas, what chance did his attorneys or experts have? As difficult as Mr. Damas could be, this does not overcome his right to be tried while competent, or not at all. This Court made this principle clear in *Lane v. State*, 388 So. 2d 1022 (Fla. 1980):

We reject the state's contention that if Lane is incompetent, it is only through his own actions and the cycle will surely repeat itself. Intentional action by a

defendant does not avoid or eliminate the necessity of applying the test of whether a defendant has the sufficient present ability to assist counsel with his defense and to understand the proceedings against him. The record is clear in this case that there was doubt concerning the appellant's present competency at the time of trial. We find the law required further examination and hearing in this cause. Under the circumstances, we find that the judgment entered must be vacated.

Id. at 1026. While the courts, experts and, worst of all, his trial counsel, blamed Mr. Damas' incompetence on him, Mr. Damas was still incompetent. Disfavor of what the court saw as Mr. Damas' volition was an improper consideration.

With all of these rights in the balance, this Court must look to the ineffective assistance of counsel to grant relief. The loss of these rights, however, should weigh heavy on this Court in deciding the ineffectiveness, especially when considering prejudice.

While Mr. Damas was never competent, counsel were ineffective at four points:

There were four specific points of time when counsel were ineffective for failing to adequately challenge competency: 1) the October 8, 2014 hearing, 2) the August 18, 2017 hearings. Here, defense counsel performed deficiently when they improperly stipulated to his competency and failed to raise any challenge to the expert reports. Additionally, counsel were ineffective for failing to file

a competency motion at two additional points: 3) The September 5, 2017 hearing and 4) The October 23-24 hearing. Counsel should have raised bona fide doubts as to Mr. Damas' ability to proceed.

1. October 8, 2014 Hearing

On this date, counsel had a duty to challenge Mr. Damas' competency fully and failed to rise to the occasion. Mr. Damas was found incompetent several months earlier on March 19, 2014, and the October 8, 2014 hearing was the first opportunity at which the court was going to address competency again. The hearing came as a result of Dr. Mandelblatt's of GEO Care filing a Notice of Restoration of Competency on April 28, 2014, and Mr. Damas' discharge from GEO Care. The court ordered that Mr. Damas be re-evaluated for competency. (R-569-71). Dr. Mandelblatt, Dr. Herkov and Dr. Schaerf, all found that Mr. Damas was competent. (R-3664, 3709, 3696). The October 8, 2014 hearing should have addressed what circumstances had changed in Mr. Damas' mental status since the court found him incompetent. The ultimate question was whether those purported changes were sufficient for the State to carry its burden rebutting the presumption of incompetency in place from the court's prior finding. *Molina v. State*, 946 So. 2d 1103, 1105 (Fla.

Dist. Ct. App. 2006) (“Once found incompetent, a presumption clings to the criminal defendant that the state of incompetence persists until a court, after proper notice and a hearing, finds otherwise) (citing *Jackson v. State*, 880 So.2d 1241 (Fla. 1st DCA 2004); *Sledge v. State*, 871 So.2d 1020 (Fla. 5th DCA 2004)).

Under these circumstances, it became critical at the hearing for defense counsel to challenge the accuracy of the reports from Dr. Mandelblatt, Dr. Herkov, and Dr. Schaerf, and argue to the Court that the State had failed to present evidence rebutting the presumption that Mr. Damas remained incompetent. Rather than do so, however, defense counsel stipulated to Mr. Damas’ competency: Your Honor, the defense would agree that we have **no objection to the findings**, the report of Dr. Mandelblatt dated April 23rd of this year and the reports of Drs. Herkov and Sharrif [*sic*], both dated October 6th, also 2014.” (PCR-1099-1100).

In *Dougherty v. State*, 149 So. 3d 673, 678 (Fla. 2014), this Court held that “nothing in our precedent or the State's argument persuades us that a defendant can stipulate to the ultimate issue of competency, even where the written reports reach the same conclusion.” This Court noted that “[e]ven in a situation where all the

experts opine that a defendant is competent, the trial court could presumably disagree based on other evidence such as the defendant's courtroom behavior or attorney representations.” *Id.* This Court determined that the language of rule 3.212(c)(7) and rule 3.212(b), which governs competency in criminal cases, does not allow parties to stipulate to the issue of competency. *Id.* (internal citations omitted). This Court further held that where the trial court has previously concluded that a defendant is incompetent and his competency has yet to be restored, a defendant cannot stipulate that he is competent. *Id.* at 678. Under Florida law at the time of Mr. Damas’ hearing on October 8, 2014, where he had not been restored to competency, counsel were not permitted to stipulate to Mr. Damas’ competency.

In assessing an attorney’s performance at any critical stage of a proceeding, *Strickland* requires an assessment of the reasonableness of counsel’s actions or omissions under the circumstances. *Strickland v. Washington*, 466 U.S. 668, 688 (1984)

The issue before the court at the October 8, 2014 hearing was a legal matter rather than a medical question and the reports prepared by the experts who had examined Mr. Damas were merely

advisory. See *Dougherty*, 149 So.3d at 677–78 (citing *McCray v. State*, 71 So. 3d 848, 862 (Fla. 2011)). While the parties were permitted to “stipulate to deciding competency based on the written expert reports rather than live expert testimony, the defendant and the other parties [could] not stipulate to competency itself, particularly when the defendant was previously adjudicated incompetent, as the trial court must make an independent determination on the issue.” *Id.* at 678 (citing *Fowler v. State*, 255 So.2d 513, 515 (Fla. 1971)).¹ But, rather than require the court to render its own independent factual determinations under Fla. R. Crim. P. 3.210-3.212 and Fla. Stat. §916.12, defense counsel failed to present any evidence challenging the expert reports’ findings that Mr. Damas was competent and stipulated to competency.

All counsel should have known that competency was the primary issue in the case. Michael Orlando, Mr. Damas’ original attorney from the PD, testified that almost immediately following his appointment he met with Mr. Damas at the Collier County Jail

¹ See also *Presley v. State*, 199 So. 3d 1014, 1018 (Fla. Dist. Ct. App. 2016); *Blow v. State*, 902 So.2d 340, 342 (Fla. 5th DCA 2005) (citing *Sledge v. State*, 871 So. 2d 1020, 1021 (Fla. 5th DCA 2004)).

several times and described Mr. Damas' behavior during those meetings as "mentally unstable." (PCR-2885). He noted Mr. Damas was preoccupied with the Bible during their meetings and would continually talk about it. (PCR-2885-86). Based on his interactions with Mr. Damas, Orlando had concerns regarding Mr. Damas' mental health and competency. (PCR-2886). Given those concerns, Orlando explained that his strategy at the time was to continue to try to develop a rapport with Mr. Damas while looking to obtain a mental health professional—a psychologist or psychiatrist—to address a potential insanity defense and investigate any issues related to competency. (PCR-2887).

Orlando explained, in similar cases, it was part of his regular practice to obtain medical records. (PCR-2889-90). Orlando testified that the working theory of defense was developing an insanity defense where they would "front-load mitigation." (PCR-2890). While he did not believe an insanity defense was unrealistic, he still saw it as a vehicle to provide an opportunity to present the available mitigation in Mr. Damas' background. (PCR-2890).

Orlando noted the importance of retaining the appropriate experts, as he was wary of getting a number of doctors involved in

Mr. Damas' case because he felt doing so could potentially push Mr. Damas to "shut down." (PCR-2891). Orlando testified that he believed the success of Mr. Damas' defense would hinge on the selection of the mental health expert who evaluated him. (PCR-2954). He remarked that he felt that it was critical that an expert have the "cultural connection" and the ability to "weave together" Mr. Damas' cultural background and upbringing and connect it to his current mental state and "how he got there." (PCR-2954-2955). Orlando did not have the opportunity to do so, however, prior to his departure from the PD.

Neil McLoughlin, one of the two PD attorneys assigned to Mr. Damas' case following Orlando's departure recall whether Mr. Damas had been evaluated for competency at the time he was assigned to the case, only that Mr. Damas was evaluated "six or eight" times during the four years he was assigned to the case. (PCR-2979-80). McLoughlin was unable to recall any specifics about the results of any of those evaluations, only that he believed it had "gone both ways, competent and incompetent." (PCR-2980). Despite his inability to reliably recall specifics, McLoughlin still agreed, however, that competency was a primary issue. (PCR-2981).

During his representation, McLoughlin made efforts to develop a rapport with Mr. Damas but Mr. Damas refused to discuss anything except religion. (PCR-2982). McLoughlin characterized Mr. Damas as a “religious fanatic” who was only interested in discussing his religious beliefs. (PCR-2982). He tried to go over the facts of Mr. Damas’ case with him but he was unsuccessful. (PCR-2983). Before the 2010 competency evaluation, McLoughlin tried explain the process to Mr. Damas but was unsuccessful because, “[h]e didn’t care what I said, I told him what was happening, but there was no communication.” (PCR-2988). McLoughlin did not recall the defense first attempting a confidential evaluation of Mr. Damas before filing their initial competency motion in 2010. (PCR-2989).

Despite disagreements between the experts who had evaluated Mr. Damas, McLoughlin could not recall what defense strategy was discussed prior to the June 16, 2011 competency hearing. (PCR-2989-90). He also could not recall who attended this hearing or the eventual outcome of the hearing. (PCR-2990). However, following the hearing, there were still competency issues and he believed that Mr. Damas was incompetent and not feigning any symptoms. (PCR-2990). In McLoughlin’s opinion, Mr. Damas was “in an alternate

reality.” (PCR-2990).

McLoughlin could not recall anything related to the March 2014 competency litigation when the court found Mr. Damas incompetent and committed him to GEO Care. (PCR-2991-92). He incorrectly believed Mr. Damas had been admitted to GEO Care on several occasions and that Mr. Damas had remained at the facility for “three or four months” (PCR-2992) when Mr. Damas had only been admitted one time for a matter of a few weeks. McLoughlin also inaccurately recalled that Mr. Damas had been receiving psychotropic medication while at the facility. (PCR-2992). McLoughlin was unaware of anyone from the defense making any contact with Mr. Damas or the facility during this time. (PCR-2992-93).

McLoughlin also could not provide any specifics of the competency litigation following Mr. Damas’ release from GEO Care. McLoughlin did not recall that the court had appointed two experts to determine whether Mr. Damas’ competency was restored. (PCR-2993). He mistakenly believed that the results of those experts’ evaluations had been that Mr. Damas was incompetent. (PCR-2993). McLoughlin did not independently recall the October 8, 2014 competency hearing. (PCR-2993).

Generally, McLoughlin's preparation for the hearing would have been to review the evaluations. (PCR-2994). Significantly, McLoughlin was not able to recall any reason as to why the record reflected that the defense stipulated to competency. (PCR-2994). McLoughlin was unable to remember any reason the defense team did not challenge to the experts' reports and opinions, or the records from GEO Care. (PCR-2995).

While it was his practice to review orders following hearings, McLoughlin could not provide reasoning as why he did not review the order from the October 8, 2014 competency hearing and he could not recall that defense stipulated to competency. (PCR-2995). When asked how many times in his prior experience handling other competency cases that he stipulated to competency, McLoughlin testified "rarely" but that he had done so "maybe one, two, three times." (PCR-2995). Mr. McLoughlin never spoke with new counsel after the PD withdrew. (PCR-2997)

Kathleen Fitzgeorge was the Chief Assistant for the PD when she was first appointed to represent Mr. Damas. (PCR-3036). Fitzgeorge explained that when she first took over they were not doing "a whole lot" to litigate competency. (PCR-3040). Once she took over

the case, Fitzgeorge recalled that the issue of Mr. Damas' competency came to the "forefront" of the case and she wanted to secure experts to evaluate his competency. (PCR-3040). She recalled that McLoughlin had worked with Dr. Silver previously and she had worked with Dr. Schaerf "quite a bit," so they reached out to retain them. (PCR-3040). After the experts met with Mr. Damas, Fitzgeorge "felt very confident that we had an issue" and the defense then moved for court ordered evaluations of Mr. Damas. (PCR-3041).

Fitzgeorge testified that she, McLoughlin, and Kelley attended a June 2011 competency hearing on the defense motion. (PCR-3053-54). At that hearing, Fitzgeorge recalled that the defense examined all three doctors and presented argument in support of the defense motion. (PCR-3055). The court ultimately found Mr. Damas competent but the defense team still had concerns regarding his competency. (PCR-3055).

Fitzgeorge characterized the defense team's relationship with Mr. Damas during this period as "sometimes very good, sometimes not so good." (PCR-3047). She remarked that Mr. Damas was a difficult client, particularly so in court. (PCR-3048). During the meetings where Mr. Damas would speak with them, Fitzgeorge

characterized his presentation as “there were times where he was alert, oriented—time, place, all of that. And other times when he was solely focused on religious aspects.”(PCR-3048-49). She explained that during the times of intense focus on religion, there would be “no discussion” between Mr. Damas and his defense team. (PCR-3049)

After Mr. Damas was found incompetent and sent to GEO Care, other than receiving updates from the facility, Fitzgeorge did not recall the defense team having any contact with Mr. Damas while he was there. (PCR-3059). Following Mr. Damas’ release from the treatment facility, the defense team attempted to meet with him in-person and would see him frequently. (PCR-3061). She further noted that when Mr. Damas would come to court, he would end up speaking out against his defense teams’ advice, telling the judge what he wanted to happen with his case. (PCR-3062). Despite this behavior, Fitzgeorge testified that she “really didn’t have more concerns about his competency” because he seemed “outward and conversive and responsive to questions.” (PCR-3062). She “felt [Mr. Damas] clearly understood what we were doing, why we were doing it, what role we played, so we were proceeding along, preparing for trial.” (PCR-3062).

Fitzgeorge recalled two doctors were appointed to re-evaluate Mr. Damas and both determined he was competent to proceed. Fitzgeorge testified that prior to October 18, 2014 competency hearing, the defense spoke with both the experts and Mr. Damas but she was not able to recall anything specific. (PCR-3062-63). She remembered that the team discussed challenging the reports but that “we were pretty much all onboard with it” and were “comfortable relying upon the doctors’ reports.” (PCR-3063).

Fitzgeorge confirmed that, when asked by the court as to how the defense wished to proceed at the outset of the October 8, 2014 hearing, the defense indicated to the court that it had no objection and were going to rely upon the experts’ reports. (PCR-3064). She also confirmed that there was no additional argument or witness examination performed by the defense at the hearing because they were “relying upon the reports from the doctors.”(PCR-3068). While she claimed to normally review all court orders, and believed she had done after the hearing, Fitzgeorge confirmed that she did not file anything attempting to address any confusion or error in the court’s order record stating that the defense stipulated to competency at the hearing. (PCR-3068).

The failure by Mr. Damas' defense team to raise any challenges to the reports and stipulating to competency was deficient. The testimony from the evidentiary hearing and the record on appeal established that no objectively reasonable strategy attributable to defense counsel's failure to actively litigate the issue of Mr. Damas' competency at the October 8, 2014 hearing. Neither McLoughlin nor Fitzgeorge were capable of providing any rational answer as to why they failed to present argument or witness testimony challenging the expert reports. While Fitzgeorge attempted to explain that they were merely relying upon the reports and not acquiescing to the findings, there is nothing in the record establishing the defense made any effort to argue that the State had failed to overcome the legal presumption that Mr. Damas remained incompetent. *Molina*, 946 So. 2d at 1105. Fitzgeorge failed to take action to correct the court's order finding that the defense stipulated to competency at the hearing. (PCR-3068). McLoughlin remembered very little and was equally unavailing.

While Fitzgeorge testified the reasoning behind their failure to present argument at the hearing was because they "had the expert reports," that logic is not objectively reasonable under the

circumstances. Notwithstanding defense counsel's stipulation to competency, the failure to present any argument or testimony at the hearing where there existed ample avenues to challenge the expert's reports and findings constituted deficient performance under *Strickland*. The reports from Dr. Schaerf and Dr. Herkov stated that they relied largely on recent records documenting Mr. Damas' care and treatment at GEO Care and the Jail. However, had counsel reviewed those records and presented them along with argument at the hearing, there was a reasonable probability that the court would have found that Mr. Damas had not been restored to competency.

There was ample evidence that Mr. Damas remained incompetent; defense counsel should not have stipulated to competency and should have presented argument. Records from Dr. Mandelblatt's report, Geo Care, and the renewed competency evaluations, all established that Mr. Damas was still exhibiting the same deficits in functioning that had previously served as the basis for diagnoses that he suffered from underlying mental illnesses. Challenges to the reports' inconsistencies, contradictions, and lack of record support, would have alerted the court that Mr. Damas was suffering from an underlying mental illness and was incompetent to

proceed, just as he was eight months earlier.

Defense counsel had readily available evidence to challenge the expert reports finding a purported change in Mr. Damas' competency status. Records refuted that Mr. Damas was feigning his symptoms. The sole basis for Dr. Mandelblatt's opinion that Mr. Damas' behavior was volitional was the observation that Mr. Damas had been capable on occasion of communicating with staff employees about topics other than religion. (See R-3716, et seq.). That finding, however, ignored that those interactions had nothing to do with Mr. Damas' understanding of his legal proceedings or appreciation of the charges against him. Defense counsel could have also challenged the inconsistencies and lack of credibility of Dr. Herkov's and Dr. Schaerf's renewed competency evaluations. Counsel could have argued neither doctor conducted additional testing of Mr. Damas and were basing the bulk of their evaluations on review of records that contradicted their findings. Counsel could have highlighted that both experts' reports were inconsistent with their earlier evaluations just a few months prior, and that their supposed justifications for the reversal lacked credibility. Both Doctors' earlier reports established that Mr. Damas' behavior was consistent with a diagnosis that he

was suffering from an underlying mental disorder and that Mr. Damas' hyper-religiosity negated attempts at meaningful interaction. (R-3693, 3695, 3698).

Their reports also noted Mr. Damas still continued to maintain that he did not have a lawyer—other than Jesus Christ, his savior or God (R-3694, 3699), he continued to maintain he was possessed by demons at the time of the crime (R-3699), he continued to state that the only judge he would acknowledge was God and the law of Jesus (R-3699), and he continued to demand that he be referred to only as “Child of God.” (R-3693; 3698).

Dr. Schaerf's report even noted that Mr. Damas had stated to him that he was “ready to get out of here, the streets are paved with gold in heaven” and that “in 1948 to today with Israel, we have 29 years until World War III.” (R-3694). And, by referencing the jail and treatment center records, defense counsel could also have provided ample evidence that Mr. Damas' behavior was neither volitional nor the byproduct of manipulation.

Had counsel capitalized on the readily available evidence that was at their disposal and raised effective argument to the court it would have refuted a finding of competency. Effective argument from

defense counsel would have questioned what had changed about the circumstances of Mr. Damas' current mental functioning that they now found him competent. Mr. Damas had only been at the Treasure Coast Treatment facility for 20 days, approximately, when Dr. Mandelblatt authored her report. (R-3664).

Mr. Damas had received minimal treatment for his condition and no psychotropic medication—treatment which both Dr. Herkov and Dr. Schaerf had in noted would be necessary for Mr. Damas to return to competency. (R-3658, 3662). His behavior at both the treatment center and upon his return to jail remained consistent with earlier behavior that both doctors had cited as supportive of a diagnosis of an underlying mental illness. He acted out and behaved erratically at the treatment facility, getting into physical altercations and refusing to participate in treatment sessions because his delusional belief that it was against his religion. (R-3671-72). At the Jail, he continued to remain preoccupied with religion, was still behaving bizarrely and erratically, and was still delusionally believing that his participation in the legal process would result in his suffering from God. Yet, despite that evidence—which was consistent with their prior diagnoses and finding of incompetence—both Dr. Herkov

and Dr. Schaerf had now about-faced and joined Dr. Mandelblatt's findings and opinions that Mr. Damas was manipulative, merely feigning his symptoms, and malingering without being challenged by counsel.

The testimony from the postconviction evidentiary hearing, along with the record on appeal, establishes that defense counsel performed deficiently by improperly stipulating to competency at the October 8, 2014 hearing. The prejudice from counsel's failure to challenge competency at the hearing is reflected in the court's subsequent order. In finding Mr. Damas competent, the court relied exclusively on the reports from Dr. Mandelblatt, Dr. Herkov, and Dr. Schaerf. (R-585-88). The court found that while Mr. Damas remained focused on religion, he was utilizing it as a defense against talking about the crimes and as a tactic to preclude answering questions he wished not to answer. (R-586-87). The court further determined that Mr. Damas' ability to engage in appropriate behavior and communicate intelligently was volitional and not a symptom of any underlying mental illness. (R-587). The court noted it reached these determinations where there had been no evidence presented at the hearing indicating Mr. Damas was not competent. (R-587).

Given the evidence of Mr. Damas' longstanding and well-documented history of erratic behavior, and the recent records from the Geo Care and the jail establishing that he was still exhibiting those behaviors, reasonably competent counsel should have been alerted to the continued questions about Mr. Damas' competence to proceed. *Faulk v. State*, 284 So. 3d 1158, 1165 (Fla. 1st DCA 2019) (To satisfy the deficiency prong [of *Strickland*] based on counsel's handling of a competency issues, the postconviction movant must allege specific facts showing that a reasonably competent attorney would have questioned competence to proceed.") (Quoting *Thompson v. State*, 88 So. 3d 312, 319 (Fla. 4th DCA 2012)). At the October 8, 2014 hearing, counsel should have argued that Mr. Damas was still incompetent. At minimum, defense counsel should have ensured that the court require the State to overcome the presumption of incompetency that attached at the March 19, 2014 Court's order finding Mr. Damas incompetent. *Molina*, 946 So. 2d at 1105.

Given Mr. Damas' history and the court's recent finding that he was incompetent, the constitutional due process rights at stake at the October 8, 2014 hearing were essential. Defense counsel had significant responsibilities to protect Mr. Damas' due process right

not to be tried while incompetent. *Drope; Medina v. California*, 595 U.S. 437 (1992). Counsel's failure to present any challenge to Mr. Damas' competency, and draw the court's attention to the inconsistencies and inaccuracies in the expert reports, constituted deficient performance under *Strickland* where no reasonable counsel would have failed to present arguments raising bona fide doubts as to Mr. Damas' competency.

Whatever lucid interval the PD experienced with Mr. Damas, his obstructive mental state soon returned while his new counsel were representing him. New counsel, never moved for a competency evaluation. Lead counsel Shirley would often drive to Naples to meet with Mr. Damas only to have Mr. Damas refuse the visit. (PCR-3416). Shirley testified that Mr. Damas, "was hard to talk to []. Mr. Damas just wanted to talk about his religious beliefs and those types of things. He did not provide any information that would advance a defense. Especially in the guilt phase. . . . [N]ot knowing Mr. Damas, I don't know if his conduct was a level of competence or if he was malingering. I'm not -- I don't -- I have the wrong letters after my name to assess that." (PCR-3417). He also recalled something about "malingering" in what he reviewed from Mr. Damas' history but he

did not focus on the records from the treatment center as much as “maybe [he] should have because it was [his] understanding [Mr. Damas’] competency had been restored. (PCR-3418-19).

Investigator Murray “got very limited information from Mr. Damas directly because there were many times that he wasn't interested in coming to visits.” (PCR-3302). Mr. Damas' behavior at the sentencing hearing included “putting tissues in his ear, putting his head down on the table, making outbursts” but this did not cause any concern about Mr. Damas’ competency. (PCR-3301). Second chair Ermacora claimed this was “pretty much par for the course with Mr. Damas within court hearings . . . the fact that he acted out in court, that was just what he did.” (PCR-3201-02).

Shirley blamed Mr. Damas’ incompetency on Mr. Damas.

Again, it all goes back to Mr. Damas and he wouldn't listen to us in any event, but I can't remember exactly when the discussion was and, in fact, I mean, he just wouldn't listen to us.

(PCR-3187-88). Shirley had a client whom “didn't want to talk to” counsel and “didn't want to help [counsel] with his defense.” (PCR-3396). Shirley’s “view of it, it wasn't because of [Mr. Damas’] incompetency” but rather because “for some reason he did not want

to talk to us. He did not want to help [counsel] . . .there[] could be one of a dozen different reasons.” (PCR-3396). Unfortunately, the reason Mr. Damas acted so self-harmfully was because he was incompetent. This was hardly the interaction between counsel and client that the Sixth Amendment right to counsel requires and was precisely the failure that the right to be competent protects against.

2. August 18, 2017 Hearing

By the next competency hearing, roughly three years since the court found Mr. Damas competent had elapsed. During that period, Mr. Damas’ behavior continued to raise legitimate concerns as to his overall functioning and his mental health continued to wax and wane. The impetus for the August 18, 2017 hearing came on the heels of Mr. Damas’ wildly erratic behavior at two prior hearings held on June 23, 2017 and July 21, 2017. Due to Mr. Damas’ behavior and comments at those hearings, the court ordered him to be re-evaluated for competency.²

² During the June 23, 2017 hearing, Mr. Damas requested permission to discharge counsel, represent himself, enter a plea of guilty, and waive his right to a jury trial. (R-1210-1311). At the subsequent *Faretta* hearing on July 21, 2017, the court noted it had issues with Mr. Damas’ behavior and ordered a renewed competency evaluation. (R-1318-21). The court denied Mr. Damas’ request to represent himself, finding that Mr. Damas had failed to adequately articulate his answers to the court’s *Faretta* colloquy, failed to

At the outset of the competency hearing, the court noted:

Court: It appears from those evaluations [Dr. Herkov and Dr. Kling] that both doctors are of the opinion that Mr. Damas is competent to enter a plea, competent to waive his right to a jury for purposes of sentencing, and for all other matters that might arise.

The court asked the defense and State to stipulate to the admission of the reports, which both did. (SV2R-3797-98). The court then entered an “an order at this time upon the stipulation by Counsel.” (SV2R-3798).

As was the case at the earlier competency proceeding, counsel failed to raise any additional argument or challenges at the hearing. Ultimately, the court found that Mr. Damas was competent. The court found that Mr. Damas’ in-court behavior was elective and his responses appropriate, rational, and intelligent. (R-1737). Additionally, the court determined that Mr. Damas’ desire to enter a

demonstrate sufficient understanding of the legal process, and at times, provided “rambling and disjointed statements, stating things such as “God is my lawyer.”” (R-1355-57). The court order noted “it was apparent [Mr. Damas] could not understand the plea process, and related matters involved in a death case, without the assistance of counsel.” (R-1355-57). Noting the distinction between competency for the right to self-representation and the right to enter a plea, the court determined that, based on his behavior and comments at that hearing, a competency evaluation was necessary. (R-1355-57).

plea of guilty and waive his penalty phase proceedings was logical based upon his “cultural frame of reference.” (R-1737). Of course, there was never a culturally competent expert such as Dr. McAlister considered.

Counsel’s failure to raise any challenge to Mr. Damas’ competency where there existed bona fide concerns and corroborating record support as to his diminished mental functioning, constituted deficient performance under *Strickland*. The testimony at the evidentiary hearing established that counsel’s failure to raise effective challenges to Mr. Damas competency did not come from any strategy but rather acquiescence. Virtually nothing was done leading up to the August 2017 competency hearing to challenge Mr. Damas’ competency because counsel felt no obligation to raise the issue, even though the competency evaluation was at the request of the court. (PCR-3281). Counsel’s failure to raise challenges to the issue of Mr. Damas’ competency despite there existing bona fide concerns at that time, constituted deficient performance under *Strickland*.

At the evidentiary hearing, Shirley testified that, during the period leading up to the August 18, 2017 competency hearing, he

could not recall what, if any, experts they were planning on calling, but noted that if competency was going to be something they were going to challenge, they should have had a competency expert. (PCR-3408). He recalled that there was a “competency evaluation or two” before trial but he did not “consult” with either doctor. (PCR-3408-09). Shirley noted that during this period he would attempt to see Mr. Damas only once every few months and that on many occasions those attempts were fruitless because Mr. Damas refused meet with him. (PCR-3409).

Shirley was not able to recall any strategy as to how the defense was going to litigate the issue of Mr. Damas’ competency prior to the August 18, 2017 competency hearing. (PCR-3410). Shirley was aware that Mr. Damas had been found incompetent and sent to a facility. While he looked at the records, he testified he did not focus on them because Mr. Damas was supposedly restored to competency. (PCR-3418). When asked about the defense’s eventual stipulation to the expert reports at the August 18, 2017 hearing, Shirley testified, “[w]ell you know. In all candor, in hindsight we should’ve probably attacked it just to make a record.” (PCR-3410). What Shirley called record preservation was actually the effective assistance that Mr.

Damas was denied.

Ermacora's testimony was likewise problematic. Ermacora had little to no contact with Mr. Damas prior to the sentencing hearing. He could not recall if any of the competency evaluations indicated that Mr. Damas required psychotropic medications to be treated and restored to competency. (PCR-3143). He was unaware of whether Mr. Damas was taking any psychotropic medication at the time, testifying that he would have been surprised if Mr. Damas was not because "that is usually the main method of restoring competency. Chemicals." (PCR-3142).

Ermacora was aware that competency evaluations could become stale over time; he was not sure when staleness became an issue. (PCR-3143). In Ermacora's view, absent some indication that Mr. Damas had become incompetent again he did not believe he was under any requirement to have Mr. Damas re-evaluated merely because he had previously been found incompetent and a substantial amount of time had passed since the last evaluation. (PCR-3144). Ermacora further testified that Mr. Damas' comments at the June 23, 2017 hearing failed to give anyone on the defense team any reason to question Mr. Damas' competency. (PCR-3185).

Ermacora also could not recall what the defense strategy was going into the August 18, 2017 competency hearing, testifying that he was “sure they discussed it” but unable to recall any specifics. (PCR-3189). He noted that their outlook going into the hearing was that they “had two experts saying Mr. Damas was competent and no cause for concern within the defense team by any of Mr. Damas’ behavior as support to believe Mr. Damas was incompetent at the time.” (PCR-3188-89). In Ermacora’s view, there was no issue where “they had dealt with the expert reports at that point.” (PCR-3189).

Contrary to both attorney’s testimony, the transcripts from the June 23, 2017 and July 21, 2017 hearings did not reflect that Mr. Damas “behaved and responded appropriately, rationally, and intelligently.” (R-1736). At both hearings, Mr. Damas made numerous outbursts, incoherently rambled about being tortured by guards at the prison and being possessed on the night of the crime by demons. (R-1285-86; 1288, 1291). He stated he wanted his attorneys removed because he only believed in God as his Lord, (SV1R-3753), and interrupted the court’s attempt to conduct any colloquy with him. (SV2R-3756-57, 3762, 3766-67). Mr. Damas struggled with understanding what the court meant by “legal proceedings,” and he refused to provide straightforward answers to

the court. (SV2R-3761).

Based on his behavior and statements at the hearings, no objectively reasonable counsel would have felt there was “no cause for concern” as to Mr. Damas’ current functioning/competency. Effective counsel should have raised challenges to the reports from both Dr. Kling and Dr. Herkov. Counsel should have capitalized on the fact Dr. Herkov’s report noted Mr. Damas had been relatively uncooperative with counsel in preparing their defense, had refused to meet with them on several occasions, and remained religiously focused. (R-3686). Dr. Kling’s report was also suspect. Dr. Kling conducted no psychological testing and was not able to conduct a personal interview with Mr. Damas. (R-3681). While he spoke with medical personnel and looked at medical charts, he noted that Mr. Damas had not been seen by anyone from the mental health staff in two years. (R-3681). His assessment consisted entirely of reviewing five prior competency evaluations of Mr. Damas since 2014.

Had counsel challenged the reports at the time of the August 18, 2017 hearing, counsel could have shown the court the experts’ inconsistencies and lack of credibility. Counsel could have established that Dr. Herkov had conducted no additional testing of Mr. Damas and his “clinical interview” with Mr. Damas consisted of an “approximately [one] hour” meeting with him in a booking area at

the jail. (R-3687). Counsel could have argued that the bulk of Dr. Herkov's report reflected Mr. Damas continued to remain hyper-focused on religion and his lack of concern with any potential trial or sentence of death because God had already redeemed him. (R-3687). Counsel could have argued that Dr. Herkov failed to review any recent or updated medical records and was, essentially, basing his diagnosis on nothing more than a brief meeting with Mr. Damas and review of Dr. Mandelblatt's report. Defense counsel could have also directed the court's attention to the paucity of Dr. Kling's report; a report which was based on nothing more than review of other experts' work dating back to 2014 and upon conversations with a few unnamed individuals whose credentials, experience, and training were not even listed. Counsel could have shown that Dr. Kling was not basing his opinion on any clinical examination he conducted with Mr. Damas or any testing, and merely affirming the prior reviews.

Given the circumstances, no reasonable counsel would have failed to challenge the issue of Mr. Damas' competency. *Thompson*, 88 So. 3d at 319; *see also Faulk*, 284 So. 3d at 1165. Counsel should have argued against the veracity of the reports and their subsequent findings. At minimum, counsel should have provided argument to the court challenging the sources of information relied upon by each expert, the lack of any meaningful interaction with Mr. Damas during

their assessments, and the fact that neither of the experts based their opinions on any recent testing. Counsel should have also noted to the court that recent records from the Collier County Jail and the Treasure Coast Treatment Center continued to raise significant questions as to his current mental functioning. And counsel should have likewise noted to the court the repeated instances where Mr. Damas displayed erratic and bizarre behavior at prior hearings, particularly at the most recent hearing on August 18, 2017 where Mr. Damas gave unresponsive answers and made incoherent statements which were consistent with his previous diagnoses of delusions based on hyper-religiosity.

Counsel needed to ensure the court make a reasoned, fact-based finding regarding Mr. Damas' competency, supported by the record and that followed the law. Additionally, if the record did not support any of the court's factual determinations, timely objections should have been raised to preserve the issue for appeal. Rather than insist on the appropriate factual determinations, defense counsel acquiesced. Counsel failed to present argument challenging the findings by Dr. Kling, Dr. Herkov and Dr. Mandelblatt, or object to the court's procedure in reaching its competency determination. The result was that the court decided Mr. Damas' competency without the proper safeguards and without the effective assistance of counsel.

3. September 5, 2017 Hearing

Even though the court found Mr. Damas competent following the August 18, 2017 hearing, counsel remained obligated to raise the issue at any subsequent hearing where they had reasonable grounds to believe Mr. Damas was not competent. Mr. Damas' behavior at the September 5, 2017 hearing was consistent with his behavior at prior hearings held in June and July, and should have prompted counsel to raise competency once again. Additionally, testimony from the evidentiary hearing established that prior to the September 5, 2017, hearing, counsel were aware of the possibility that Mr. Damas intended to plead guilty, waive his rights to presentation of mitigation, and jury sentencing. Given that knowledge, and because of Mr. Damas' behavior raising legitimate doubts as to his competency, counsel's failure to raise the issue at the September 5, 2017 hearing constituted deficient performance under the circumstances.

Shirley testified at the evidentiary hearing that prior to the September 5, 2017 hearing, he had "concerns" heading into the hearing and "reason to believe" Mr. Damas was potentially going to enter a guilty plea and waive his right to a jury trial and sentencing. (PCR-3411). While his billing records indicated a meeting with Mr. Damas on September 4, 2017 for 1.5 hours at the jail, Shirley

testified that was the “full extent of time” he met with Mr. Damas to go over any information prior to the hearing. (PCR-3412). Despite the 1.5-hour meeting listed in his billing records, Shirley testified that he did not recall having an in-person meeting with Mr. Damas prior to the hearing to discuss the significance of the rights Mr. Damas would possibly be waiving at the hearing. (PCR-3410). Shirley stated that he also had no recollection of anyone going over any of the defense’s mitigation worksheet prior to the September 5, 2017 hearing with Mr. Damas. (PCR-3413).

Ermacora testified that despite Mr. Damas’ numerous questionable comments at recent hearings, he had no concerns over Mr. Damas’ competency at the time of the September 5, 2017 hearing. (PCR-3185). When he arrived at that hearing, Ermacora testified the defense was prepared to move forward. (PCR-3211). Like Shirley, Ermacora also confirmed that his billing records listed a meeting with Mr. Damas the day prior to the hearing for 1.1 hours, but he was certain he did not review the contents of their mitigation spreadsheet with Mr. Damas at that time. (PCR-3190-91, 3197).

During the course of the September 5, 2017 hearing, Mr. Damas made several comments that should have caused legitimate concern regarding his competency. Mr. Damas’ comments at the hearing showed he did not possess a coherent or clear understanding of the

adversarial process. At the opening of the hearing, it was obvious he was under the impression he had already pleaded guilty and waived all of his legal proceedings. (R-2823-24, 2826). After being instructed by the court that was not the case, Mr. Damas stated that he wished to plead guilty and waive his penalty phase jury so that he could avoid the State showing potential jurors pictures of his deceased wife and children. (R-2833). Mr. Damas told the court that he had lost ten pounds from fasting and didn't want any jury or witnesses because he did not care. (R-2834).

Mr. Damas showed a complete lack of understanding of the legal system and the adversarial process was reiterated at the close of the hearing, when he noted to the court that "this could have happened the first day I got arrested or maybe in the first week. But there was a lot of things, process, process. What I don't understand is the law over here, because I am not from here. I came here when I was 20 years old, so I don't even know a lot of things about the laws over here." (R-2899).

Despite Mr. Damas' difficulties engaging the court and providing coherent answers regarding the adversarial process, the Court still conducted a colloquy to assess his competency to enter his plea and waivers. The court asked Mr. Damas whether he had reviewed the reports and agreed with their findings. (R-2849-52). Mr.

Damas responded that he had not done so. (R-2850). Nevertheless, the court still inquired with Mr. Damas, an untrained layperson, if he agreed with Dr. Herkov's and Dr. Kling's reports. (R-2850-52). Mr. Damas, as he did much of the hearing, simply acquiesced to the court's questions.

Under these circumstances, and in light of Mr. Damas' mental health history, reasonable counsel would have requested a continuance and moved for a renewed competency evaluation at the September 5, 2017 hearing. Reasonable counsel should have known that the judge had only been assigned to the case four days prior (R-1794) and had no prior experience with Mr. Damas from which to contextualize his behavior. Nevertheless, the court noted at the beginning of the hearing that it had reviewed the entirety of the file (see R-2821), but the sheer volume of the records related to the issue of Mr. Damas' competency made that unlikely.

Counsel's failure to raise the issue of Mr. Damas' competency at the hearing was not part of any objectively reasonable strategy. The record showed defense counsel were not capable of making a reasoned decision as to Mr. Damas' competency based on their own interactions with him. As the transcripts from the August 18, 2017, August 25, 2017, and September 5, 2017 hearings indicate, defense

counsel were having considerable difficulty even speaking with Mr. Damas. These difficulties communicating with Mr. Damas, coupled with Mr. Damas' mental health issues pre-trial, should have triggered objectively reasonable counsel to litigate the issue of his competency at each stage of the proceedings. Given all the outbursts, repeated evaluations—some finding him incompetent—and the inability to meaningfully engage with Mr. Damas, reasonable counsel would have raised the issue at the September 5, 2017 hearing before moving forward with the entering of a guilty plea and waiver of his penalty phase jury and presentation of mitigation evidence.

4. October 23-24, 2017 Hearing

Similarly, Mr. Damas' behavior during the course of the October 23-24, 2017 *Koon/Spencer/Sentencing* proceedings should have also raised bona fide concerns as to his current competency. At the time of the hearing in October 23-24, 2017, nearly three months had passed since the evaluations from Dr. Kling and Dr. Herkov. These reports did not speak to Mr. Damas' present ability to consult with his lawyers with a reasonable degree of rational understanding or his present rational and factual understanding of the proceedings against him. Both Dr. Kling and Dr. Herkov's reports were too stale at the time of October 23-24 hearing to be relevant to the issue of Mr.

Damas' present competence. *See Brockman v. State*, 852 So. 2d 330, 333-34 (Fla. 2d DCA 2003). Because the reports were stale by this time, defense counsel should have raised competency when Mr. Damas' behavior occurred.

At the evidentiary hearing, Ermacora testified that following the September 5, 2017 hearing, he could not recall whether he attempted to meet with Mr. Damas' in person. He noted that if his billing records reflected he did not, he would not doubt it since meeting with him was a "waste of time." (PCR-3197-98). He also could not confirm whether anyone else from the defense team met with Mr. Damas prior to the hearings in October 23-23, 2017, and could only guess that it was likely Murray had done so. (PCR-3198). Moreover, he discounted Mr. Damas' bizarre behavior at the October 2017 hearing, testifying that he had no concerns about it where it was "par for the course with Mr. Damas." (PCR-3201).

Mr. Damas' behavior at the hearing should have raised legitimate concerns regarding Mr. Damas' competency. The record from the October 23-24, 2017 hearing reflected Mr. Damas lacked the ability to communicate with his lawyer or understand the nature of the charges against him. Just as with prior hearings, Mr. Damas'

behavior at this hearing was bizarre, erratic, and irrational. When the court attempted to address him directly following presentation of witnesses and defense counsel's proffer of additional mitigation evidence pursuant to *Koon v. Dugger*, 619 So. 2d 246 (Fla. 1993), Mr. Damas continued to sit silent as he had before. (R-3153). Rather than speak directly to the court, Mr. Damas scribbled a note on nearby paper indicating he would not speak for three days. (R-3155). No explanation was provided at the time as to why he would not speak or why it was for three days.

At other portions of the hearing, Mr. Damas remained sitting with his head down at defense counsel table. (R-3189). On the second day of the hearing, after the court tried to obtain a verbal response, Mr. Damas wrote yet another note asking the court "should I obey you, or God? You want me to disobey God by breacking (sic) my vow to Him and obey you. Who think (sic) you are woman. Go ahead continue your work. May my blood be unpon (sic) your shoulder. C.O.G." (R-2786, D-Ex(Court #1); R-3191). When the court moved on to what it deemed the *Spencer* portion of the hearing and attempted to provide Mr. Damas an opportunity to address the court, rather than do so, he sat silent. (R-3194). Moreover, after the State's closing arguments, defense counsel noted to the court that Mr. Damas had been sitting in court for some time with Kleenex jammed into his ears

because he refused to listen. (R-3257).

Mr. Damas' behavior at the hearing contradicted Dr. Kling's and Dr. Herkov's July/August 2017 reports that Mr. Damas was competent. (R-3683, 3689). More importantly, it refuted Ermacora's testimony that Mr. Damas' behavior did not prompt him to raise the issue of Mr. Damas' competency. Under the circumstances, reasonable counsel would have raised the need for a renewed competency determination prior to moving forward with hearing. Counsel's failure to do so constituted deficient performance that fell below well-established professional norms under *Strickland*.

Counsel's failure to litigate Mr. Damas' competency effectively at both the September 5 and October 23-24 hearings violated his right to due process. Counsel's failure to safeguard Mr. Damas' due process rights had a prejudicial impact on his case moving forward by permitting what amounted to tainted and insufficient competency determinations to serve as the court's basis for accepting Mr. Damas' guilty plea and waivers of penalty phase jury and presentation of mitigation evidence. It cloaked the issue of Mr. Damas' competency with the presumption of correctness that he was responsible for rebutting moving forward.

Had defense counsel raised effective challenges to Mr. Damas' competency at each hearing, there is at least a reasonable probability

that he would have been found incompetent. The record from both hearings reflect that Mr. Damas was incapable of communicating with counsel in any meaningful fashion and that he lacked a rational understanding of the proceedings against him. His behavior at the proceedings, much like throughout numerous pre-trial hearings, raised “real, substantial and legitimate doubt as to [his] mental capacity...to meaningfully participate and cooperate with counsel.” *Adams v. Wainwright*, 764 F. 2d 1356, 1360 (11th Cir. 1985). The transcript of the hearings of his guilty plea and *Spencer*/Sentencing hearing, as noted above, were replete with instances where Mr. Damas refused to speak, or when he did, was incapable of providing appropriate answers to the questions posed to him. His responses to the court demonstrated his continued fixation with hyper-religiosity and his inability to understand the nature of the proceedings. He provided no indication he understood the range or severity of the penalty he was facing, the nature or extent of the mitigation that was available in his case, or how it may have any impact on his overall sentencing determination. His behavior was consistent with attributes that experts had previously found were clear indicators that he was suffering from delusional thinking and mental illnesses.

Because of counsel’s failure to litigate Mr. Damas’ competency, his due process right not to be tried while incompetent was violated.

Thompson, 88 So. 3d at 219-20 ([t]he focus of the prejudice inquiry is on actual prejudice, whether, because of counsel's deficient performance, the defendant's substantive due process right not to be tried while incompetent was violated.). The factual record in Mr. Damas' case establishes that there is a real, substantial, and legitimate doubt as to his competency throughout postconviction and subsequently at the time of his guilty plea, waivers, and sentencing.

The lower court sentenced an incompetent person to death. This Court should reverse.

B. MR. DAMAS WAS INCOMPETENT DURING POSTCONVICTION VIOLATING HIS RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT AND DENIED A REMEDY FOR VIOLATIONS OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Damas was never mentally present for the evidentiary hearing and seldom physically present. Before the hearing began, the county jail attempted to transport Mr. Damas to the hearing. Mr. Damas was not in court at the beginning of the evidentiary hearing. (PCR-2835). This was because Mr. Damas would not "cuff up" to be transported to court. (PCR-2836). Mr. Damas' counsel were concerned with Mr. Damas confinement to a restraint chair if forced

to come to court. (PCR-2836-37). Ultimately, the court ordered Mr. Damas brought from the jail, in a restraint chair if he refused. (PCR-2857).

After a recess, Mr. Damas was present and the court attempted to determine his intentions. (PCR-2865). Mr. Damas responded by asking the court “to stop talking . . . [because his] head hurt.” When the court explained that the court needed to ask him these questions, Mr. Damas responded, “You want to kill me like George Floyd, go ahead. That's what you want to do. That's what they're doing downstairs. That's why [] they are charging me.” (PCR-2866-67). The court continued to try to engage Mr. Damas and his responses continued to be unintelligible or unrelated to the questions. When Mr. Damas continued mumbling, the court asked his attorney if he could understand his mumbles. (PCR-2869). Counsel discerned that Mr. Damas’ head was hurting because he had not had anything to drink or eat since he arrived in the jail. (PCR-2869). Mr. Damas then just stayed in the chair mumbling unintelligibly and complaining about his head hurting. (PCR-2870).

The court considered keeping Mr. Damas in court. The State moved to have Mr. Damas returned to the jail. (PCR-2873). Mr.

Damas stated that:

[T]hey going to kill me like George Floyd. Momma, (unintelligible). They torture me. Ah, they won't give me water. They won't give me food. They won't give me my medication. My eyes are burning. They're going to kill me, Momma, like George Floyd, Momma. (Unintelligible.) [] Your son is gone. Your son is gone, Momma. (Unintelligible.) I see you in heaven. I see you in heaven. I see you in heaven.

(PCR-2873). The court found that Mr. Damas' screaming was volitional. (PCR-2874-75). After a recess, counsel reported that Mr. Damas wanted to go back to the jail but did not want to view the proceedings by video monitor. (PCR-2970). Counsel clarified that Mr. Damas only said that it was for the afternoon proceedings. (PCR-2971). The court instructed the bailiffs to have Mr. Damas released from the chair and brought to court. (PCR-2972-73).

Mr. Damas never made it to court. Jail personnel informed the court that Mr. Damas got out of the chair without incident but then refused to come to court, indicating that he wanted to go back to the jail to lay down. (PCR-2998). The court returned Mr. Damas to the jail because "he has through his actions primarily and the few words that [the court] heard which have not been responsive [] he has made himself unavailable or voluntarily absented himself from this stage of

the proceedings.” (PCR-3003).

The next day, the bailiff informed the court that Mr. Damas again refused to come to court. Counsel could not go to the jail because of the number of witnesses and would not waive Mr. Damas’ presence unless he knowingly, voluntarily, and intelligently waived it. (PCR-3032-33). The jail brought Mr. Damas to court but waited outside of court until the witness examination was finished. (PCR-3051).

After a recess, counsel attempted to speak with Mr. Damas but Mr. Damas was unresponsive. (PCR-3085). After trying to ask Mr. Damas questions to which he did not respond, the court found that Mr. Damas was “in the restraint chair, per jail requirements, and laying back in the chair with his eyes closed and unresponsive to the [c]ourt's questions.” (PCR-3086). The court decided to proceed with Mr. Damas present in the courtroom. (PCR-3087). Mr. Damas was refusing medication, food, and drink. (PCR-3089). See <https://winknews.com/2022/11/15/mesac-damas-removed-from-courtroom-after-yelling-during-death-row-appeal-hearing/>

The court spoke to Mr. Damas before the lunch break. (PCR-3127). Mr. Damas was again unresponsive and the court ordered Mr.

Damas returned to court after the break, observing that, “for the entirety of the last hour or more . . . [Mr. Damas] remained reclined in the restraint chair, eyes closed, and nonresponsive.” (PCR-3127).

The next time the court heard from Mr. Damas was when he began grunting during witness testimony. (PCR-3159). Counsel was unable to discern what Mr. Damas’ grunts were regarding. (PCR-3160). The court asked Mr. Damas if he was requesting something and Mr. Damas’ answered, “A chance.” (PCR-3160). The court excused Mr. Damas for a medical evaluation after Mr. Damas reported chest pains. (PCR-3160).

Later, a deputy informed the court that Mr. Damas had been checked by EMTs and taken to the hospital for chest pains. (PCR-3192-93). The court proceeded without Mr. Damas the next morning. (PCR-3282). The deputy later reported that Mr. Damas was still in the hospital but the hospital would likely release him later that day. (PCR-3282).

Counsel spoke with someone from the jail, during the lunch break and informed the court that Mr. Damas was still in the hospital, thus ameliorating the concerns over his transport to the day’s hearing. (PCR-3366). Since the testimonial portion of the

evidentiary hearing was over, the court ordered that Mr. Damas could return to prison. (PCR-3436).

In *Carter v. State*, this Court recognized the right to a judicial determination of a defendant's competency during postconviction proceedings. 706 So. 2d 873, 875 (Fla. 1997). In doing so, this Court reasoned:

There can be no question that a capital defendant's competency is crucial to a proper determination of a collateral claim when the defendant has information necessary to the development or resolution of that claim. Unless a death-row inmate is able to assist counsel by relaying such information, the right to collateral counsel, as well as the postconviction proceedings themselves, would be practically meaningless.

Id. (internal citation omitted). Mr. Damas was found competent to proceed in postconviction. (PCR-2629-2637). Mr. Damas was as incompetent during postconviction as he was during the pendency of his of his criminal case. This violated Mr. Damas rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

Mr. Damas' behavior at the evidentiary hearing showed he was incompetent during all of his postconviction. Mr. Damas refused to speak and engage with postconviction counsel and current counsel has never met him. The postconviction court should not have found

him competent by the court's November order because his mental illness made it impossible for him to exercise his rights in postconviction. This Court should reverse and allow Mr. Damas to proceed in postconviction if he is ever competent again.

II. TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO CONDUCT A TIMELY AND ADEQUATE MITIGATION INVESTIGATION THUS DENYING MR. DAMAS' RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

If indeed Mr. Damas was incompetent and the court would not recognize his incompetency, or he was somehow competent, his need for the effective assistance of counsel was great because of his profound mental illness and brain damage.

Because counsel were not diligent in their investigation, substantial mitigation evidence was never developed or presented to the court. The evidence presented at the sentencing hearing was incomplete and unconvincing. Counsel deficiently failed to adequately investigate and prepare for the penalty phase of the capital proceedings.

The evidence presented at the postconviction hearing established that counsel's performance was deficient because their

representation fell below an objective standard of reasonableness measured by prevailing professional norms. *Strickland*, at 688. The evidence presented by Mr. Damas also established prejudice, or that there is a reasonable probability that but for his counsel's deficiency, the result of the proceeding would have been different. *Id.* at 687.

Deficiency

Counsel's representation failed to meet Sixth Amendment standards because they failed to reasonably investigate and prepare for Mr. Damas' capital sentencing. Counsel were not able to provide any reasonable strategy or tactic for failing to timely investigate and develop mitigation or timely present it to Mr. Damas prior to his guilty pleas and waiver. *See, Porter v. McCollum*, 558 U.S. 30 (2009). Counsel failed to adequately prepare, develop, and present mitigation evidence that Mr. Damas suffers from serious mental health diagnoses and severe brain damage.

Because of counsel's ineffective and incomplete presentation, the court mistakenly believed that Mr. Damas was not mentally ill but rather malingering. The truth was that Mr. Damas has severe brain damage that affects his decision-making and behavior and he suffers from serious mental illness. Counsel had a duty to offer all

available mitigation. Counsel were deficient for not doing so.

Failure to conduct a timely and adequate mitigation investigation and fully advise Mr. Damas prior to his eventual guilty pleas, waivers, and sentencing

At the evidentiary hearing, Mr. Damas showed that his mental health issues and his corresponding competency issues were both well-known and longstanding. No one could meet Mr. Damas and reasonably conclude that he was not mentally ill and probably cognitively impaired.

Mr. Damas' first attorneys noticed. Michael Orlando testified that he met with Mr. Damas several times and described Mr. Damas' behavior during those meetings as "mentally unstable." (PCR-2884). Fitzgeorge explained that when she first took over they "felt very confident that [they] had an issue" with respect to Mr. Damas' competency. (PCR-3040). She recounted their efforts at speaking with Mr. Damas' family and friends at that time was "[j]ust general representation at that point" but that it was her understanding that would become a feature of the mitigation later on. (PCR-3041). She described the efforts to develop mitigation as a "joint effort, a work in progress," taking information from the family, Mr. Damas, and gathering as much background information as they could on the

family to see “what makes him tick”. (PCR-3042). Moreover, she noted that the fact Mr. Damas was from Haiti meant there were certainly many cultural influences in his upbringing that they felt would be important in his case. (PCR-3042-43).

Besides mitigation specialists, the PD hired a neuropsychiatrist, Dr. Merikangas, a cultural expert, Dr. McAlister, and another expert to consult with them on the case Dr. Agharkar. (PCR-3043). They were also planning to conduct MRI, PET, and CT scans of Mr. Damas. (PCR-3043). Fitzgeorge testified that the defense made the decision to obtain scans after working with the experts and learning of Mr. Damas’ car accident and obtaining records from urgent care. (PCR-3044). Following Dr. Merikangas’ scan review, it was his opinion that there was possible organic or structural brain damage. (PCR-3045). Dr. Merikangas recommended additional testing which was not conducted prior to the PD withdrawing from the case. (PCR-3045). Had the PD stayed on the case, Fitzgeorge testified the next step would have typically been to have a neuropsychologist conduct the additional testing. (PCR-3045).

Following the 2011 competency hearing, Fitzgeorge testified that the defense was still investigating an insanity defense, Mr.

Damas' mitigation background, and trying to speak with Mr. Damas. (PCR-3056). After Mr. Damas was found incompetent in 2014, Fitzgeorge testified the defense focused on moving forward—developing witnesses, conducting depositions, “a lot of behind the scenes work,” and the “litigation aspect of it.” (PCR-3060).

Donna Murray, an investigator with the PD assigned to Mr. Damas' case at that time, was tasked with developing mitigation. Murray conducted interviews, obtained records, and worked on developing a social history. (PCR-3293-94). She tried to meet with Mr. Damas and to speak with family members and gather work and educational history to put together a comprehensive “narrative of his life history.” (PCR-3295). Murray obtained records of Mr. Damas' schooling, citizenship, employment, hospital records, DCF records, and “basically everything that [she] could find that had [his] name on it.” (PCR-3294).

Murray detailed her efforts to build a social history in Mr. Damas' case in a memorandum. (PCR-3297-98). She also prepared a report dated June 7, 2012. (PCR-3302; Ex-I). Referencing her report, Murray recounted her efforts to meet with Mr. Damas' parents twice—once alone and another time with Dr. McAlister. (PCR-3301-

02). She recalled that Mr. Damas' parents had provided some of the information contained in the report, along with his brother, but that she struggled with obtaining almost anything directly from Mr. Damas. (PCR-3302).

When the PD withdrew from the case, it was well-known that extensive investigation into his mental health background and other mitigation would be required. There were still critical pieces of his mitigation profile to investigate, develop, and present. Ermacora and Shirley, however, failed to capitalize on the work of the PD and to continue developing the mitigation in a timely manner.

Before withdrawing in March 2015, Fitzgeorge authored a memo of the work that had been done for successor counsel. (PCR-3060) (Ex-A). As Fitzgeorge explained, the memo listed the PD's work with several experts, efforts at developing mitigation related to: potential brain damage issues, competency issues, the cultural aspects of Mr. Damas' Haitian background, possible organic structural brain damage, and possible other mitigating factors such as family abuse and neglect, extreme poverty, and a toxic home environment. (PCR-3072-76). Fitzgeorge later spoke with Ermacora and provided him with everything she felt was significant for mitigation. (PCR-3078).

Despite being the lead attorney, Shirley testified he had little to do with the mitigation investigation. It was his understanding that he was responsible for the guilt phase and Ermacora was responsible for handling mitigation. (PCR-3384). He also was not aware of what had been done by the prior defense team to develop mitigation or if they had secured mental health mitigation experts. (PCR-3385). He remarked that Mr. Damas “may have some mental health mitigators,” but was unable to recall any specifics. (PCR-3386).

After appointment, Shirley only recalled speaking briefly with the PD and receiving a thumb drive file. (PCR-3386). He also could not recall any of the experts the PD was working with prior to withdrawing from the case or recall any specifics as to the contents of Fitzgeorge’s mitigation memo. (PCR-3388). Outside of being aware of Mr. Damas’ prior competency issues, he testified he did not “delve into any of it any deeper than that” because he let Ermacora discuss that “at length with Fitzgeorge.” (PCR-3387).

Ermacora testified at the evidentiary hearing that “almost immediately” after becoming appointed to the case he reached out to Fitzgeorge at the PD. (PCR-3098). Fitzgeorge briefed him on “everything that had been done” with respect to their mitigation

investigation and provided him with a thumb drive with all of the PD's work containing all their documents and reports. (PCR-3098). Ermacora believed that Dr. McAlister had already been hired by the defense as a cultural expert and that Dr. Merikangas had also been contacted because of "his report, relating to the injuries" that Mr. Damas had suffered from a motor vehicle accident and that Dr. Merikangas' report was "partly" what was provided to him at that time. (PCR-3099). Ermacora believed the PD had developed other mitigation circumstances as well. (PCR-3099). He was unable, however, to recall any specific mitigation that the PD had developed, just that there was a "theory per se." (PCR-3099).

Despite knowing the significance of Mr. Damas' mitigation background and knowing the mitigation work that had been done, neither counsel did anything substantive with it. Fitzgeorge's memo listed each of the expert witnesses being utilized—all six of them—and included detailed descriptions of the substance of their work. Specifically, the memo noted Dr. Merikangas had reviewed brain scans taken from Mr. Damas' 2009 automobile accident and MRI and PET scans taken in December 2014 indicating that Mr. Damas suffered from possible organic/structural brain damage. (Ex-A). It

also noted their work consulting with Dr. McAlister, and her progress speaking with Mr. Damas' mother to assist in aiding them in understanding the Haitian/Creole cultural background. (*Id.*). Moreover, it noted the PD were using Dr. Agharkar for consultation and understanding of the "big picture" in developing mitigation, particularly mental health and brain damage evidence mitigation. (*Id.*)

Beyond discussing the experts that the PD used, the memo also had attached to it a memorandum that Fitzgeorge had submitted to the State detailing potential mitigation they expected to present at trial. The memo noted "significant brain damage of longstanding nature since birth" and significant traumatic brain damage due to head traumas. (*Id.*). It noted their ability to present evidence of malformation of Mr. Damas' brain and its impact on his decision-making, impulse control, and perception of his environment. (*Id.*). It also listed several areas related to Mr. Damas' social history, including information related to his upbringing and childhood, the early exposure to poverty and violence, and the influence of cultural and religious influences resulting in delusions. (*Id.*). Most significantly, it also included a copy of Dr. Merikangas' letter, which

detailed his review of the 2014 brain scans and his recommendation that additional testing was necessary for a complete diagnosis of Mr. Damas' brain damage and functioning. (*Id.*).

When Ermacora and Shirley took over the case in March 2015, they had the details of the prior mitigation investigation and many potential avenues for pursuing additional mitigation—both mental health and social history mitigation. Unfortunately, the evidentiary hearing established that the defense failed to build on the mitigation that had already been developed or follow up on the potential leads for additional mitigation suggested by the Fitzgeorge memorandum and attachments. With the information provided by the PD, reasonable counsel would have conducted a timely investigation into further cultivating the already discovered mitigation and further investigating and developing the potential leads into Mr. Damas' mitigation. Counsel's efforts, or lack thereof, were untimely, and anemic, falling below acceptable practices within the professional community for capital cases at that time.

Counsel's failure to conduct a timely investigation continued from September 3, 2015 through March 10, 2017 while the case was stayed pursuant to *Hurst v. Florida*, 577 U.S. 92 (2016). Billing

records from both attorneys established that counsel did not investigate Mr. Damas' mitigation background. (Ex-C, J). Shirley acknowledged that the he was not taking any proactive measures to conduct any investigation into Mr. Damas' mitigation during this period. (PCR-3402). Ermacora's records showed that the only work he performed during the stay consisted of filing pro forma death-penalty-related motions (PCR-3146). Other than that, his billing records reflect that the only other work he performed during the stay was a meeting with Murray on October 21, 2015, to discuss a "motion and experts." (PCR-3146). Ermacora even conceded at the evidentiary hearing that his records reflected that he did not work with any experts until March 2017 and that the decision to have those experts appointed at that time was the result of suggestions by Murray. (PCR-3147, 3150). In attempting to justify the lack of any investigation during this period, Ermacora testified "[i]f there weren't any motions filed, there weren't any motions filed. I suspect that perhaps I was waiting to see what would happen with respect to *Hurst*, because depending on how things went, who knows. We may

have not needed experts.” (PCR-3147).³ He also conceded a lot of their work may not have had to do with mitigation and it was not done with the same urgency. (PCR-3213).

After the *Hurst* stay ended in March 2017, counsel’s efforts continued to be dilatory. While the defense was successful in having several experts appointed the same day the *Hurst* stay ended, the defense did nothing substantive with the experts until months later. While Ermacora testified that the defense efforts at developing mitigation during this period included working with Dr. McAlister to develop Mr. Damas’ cultural mitigation (PCR-3170), he ignored the fact that Dr. McAlister did not complete her work on the case until the last minute.

While Ermacora testified that the defense “also considered—there was a lot of stuff in Mr. Damas’ background, as I said, and a lot of it goes back to his history in Haiti and all the illness in his family and the background that he was exposed to.” (PCR-3170-71). He also admitted that the defense teams’ efforts to develop Mr.

³ Ermacora’s justification for the defense teams’ lack of diligence during the *Hurst* stay was unreasonable because *Hurst* and its progeny did not address the death penalty itself – just how it was determined.

Damas' social history actually consisted of delegating it to Murray. (PCR-3171-72).

Regarding Mr. Damas' family mitigation, Ermacora testified, "[t]hat information would come out through Dr. McAlister and perhaps through Ms. Murray." (PCR-3175). He also admitted though that he was not sure "what there was in [Mr. Damas'] family history necessarily" other than "all this information about what he was exposed to when he was younger, so I guess that is part of his family history, if you will" (PCR-3185).

Murray's testimony further corroborated that counsel were not developing mitigation following the lifting of the *Hurst* stay. Murray testified that when she returned to Mr. Damas' case as a mitigation specialist around March 2017, she continued the investigation into Mr. Damas' background and looking into potential expert witnesses. (PCR-3307-08). While she recalled that Dr. Merikangas had previously provided a "report" and that the defense had considered a cultural expert, she did not believe the defense had retained anyone at that point in time. (PCR-3308-09). Murray was unaware, at that time, whether counsel had been developing Mr. Damas' mitigation background. (PCR-3308-09).

Murray testified that the “mitigation spreadsheet” listing numerous mitigators the defense was attempting to develop was a “joint effort” of her and Ermacora. (PCR-3313). Ermacora had initially put together the spreadsheet and that she then added to it as she gathered information from different experts and after reviewing the social history. (PCR-3314). She was unable to recall any meetings where she went over the contents of the spreadsheet with Mr. Damas or whether there had been any meetings where either attorney had gone over the spreadsheet with Mr. Damas. (PCR-3314).

Contrary to Ermacora’s testimony, the evidence from the hearing and the record on appeal directly refute his testimony that the defense was diligently working with the appointed experts and conducting a timely an adequate investigation into Mr. Damas’ mitigation after the stay.

Ermacora testified that the defense retained Dr. Wu in order to continue his prior involvement from when the PD represented Mr. Damas. (PCR-3156). Ermacora noted that Dr. Wu’s expertise was in analyzing imaging and they were considering using him for that purpose. (PCR-3156). Despite having Dr. Wu, Ermacora testified they also hired Dr. Rubino “who had expertise in that regard.” (PCR-3156).

Ermacora noted, however, that the defense used Dr. Rubino instead of Dr. Wu at the *Spencer*/Sentencing hearing once the court denied the request for funds for Dr. Wu to travel to see Mr. Damas. (PCR-3156). Despite the fact the defense was ultimately forced to use Dr. Rubino in lieu of Dr. Wu, Ermacora testified it was of no consequence because Dr. Rubino “had, in fact, the same expertise, so we were satisfied with using Dr. Rubino.” (PCR-3156).

Ermacora testified that he also consulted with Dr. Wu and that he received an estimate. (PCR-3157) (Ex-B). Ermacora characterized the estimate as relating solely to review of Dr. Wu’s prior work in the case. (PCR-3158). Ermacora testified that Dr. Wu’s invoice not recommending additional testing or work did not give him any cause for concern because “we already had the PET scan from radiology.” (PCR-3159).

Regarding Dr. Rubino, Ermacora testified that he moved to have him appointed based upon recommendation from Donna Murray. (PCR-3166). In Ermacora’s estimation, “Dr. Rubino...had basically the same expertise as Dr. Wu.” (PCR-3166). Ermacora could not recall, however, attempting to have Dr. Rubino meet with Mr. Damas in person (PCR-3166) or whether Dr. Rubino was deposed prior to

testifying. (PCR-3167).

Ermacora also explained that the defense also had Dr. Ouaou appointed because he was a neuropsychologist and Mr. Damas had suffered a traumatic brain injury and had a “long documented history” of serious mental dysfunction, alcohol abuse, drug abuse, and mental illness. (PCR-3151). Ermacora recalled providing Dr. Ouaou with “all the previous mental health records” they had. (PCR-3150). While Ermacora stated that he attempted to facilitate an in-person meeting with himself, Dr. Ouaou, and Mr. Damas, and testified to an independent recollection of that occurring, he could not point to anywhere in his billing records where he had billed for such meetings. (PCR-3154-55).

Significantly, Ermacora testified that it was not until September 2017, just prior to trial, when the defense moved to have “additional testing” conducted. (PCR-3161-62). According to Ermacora’s recollection, the timing of the motion for additional testing came about only after Dr. Ouaou had made the request and assured them that he would have “access to that technology—that type of machinery—whatever you want to call it” and that he could “get [the

testing] done in time” (PCR-3164).⁴ Since Dr. Ouaou was a neuropsychologist, he would not have used any machinery besides a computer, probably. Dr. Wu needed quite a bit of machinery to do further testing but counsel would have to arrange the testing.

Contrary to Ermacora’s testimony, the experts described a much different account of counsel’s efforts. Dr. Ouaou testified that the defense hired him on Mr. Damas’ case in March of 2017, but did not become actively involved in the case “until several months later.” (PCR-3007). He only recalled speaking with Ermacora on the phone a “couple of times” briefly. (PCR-3007-08). His understanding was that he was hired to evaluate Mr. Damas neuropsychologically for purposes of mitigation and sentencing, and that there “might be a history of head injury or brain damage.” (PCR-3008).

As part of that work, counsel provided Dr. Ouaou with records of Mr. Damas’ car accident and “some discovery.” (PCR-3009). Dr.

⁴ Review of the record on appeal does not reflect any motion filed by the defense for additional testing to be conducted by Dr. Ouaou in early September. This is also consistent with Dr. Ouaou’s testimony that despite attempting to conduct *initial* testing with Mr. Damas on several occasions, he was unsuccessful. The record on appeal does reflect, however, that the defense filed a motion for additional testing to be conducted by Dr. Wu on September 1, 2017. (R-1819-20).

Ouaou did not recall, however, reviewing any records of Mr. Damas' MRI or PET scans. (PCR-3009). Based upon his review, Dr. Ouaou felt "it seemed there was something there worth investigating neuropsychologically" that required neuropsychological testing. (PCR-3010).

Dr. Ouaou attempted to meet with Mr. Damas several times but was unsuccessful. (PCR-3010).⁵ Dr. Ouaou was unaware when he met with Mr. Damas on August 23, 2017, that Mr. Damas was set for trial on September 5, 2017. (PCR-3011). Had he known this, it would create a time crunch, not allowing him enough time to prepare a neuropsychological report and evaluation. (PCR-3012).

Although listed as witness, Dr. Ouaou did not recall having any discussion with counsel about testifying in Mr. Damas' case. (PCR-3012). Dr. Ouaou was surprised that counsel listed him as a witness because he "didn't have anything to contribute." (PCR-3012). Had he been called he had no idea what he would have testified about, as the testing he was attempting to conduct was merely the initial stages.

⁵ Specifically, Dr. Ouaou attempted to see Mr. Damas on four occasions: July 10, 2017; July 27, 2017; August 23, 2017; and October 16, 2017. (PCR-3010).

(PCR-3013-14). In similar cases, Dr. Ouaou noted he would want to do additional follow up testing and interviews with Mr. Damas before he could provide an accurate and competent diagnosis. (PCR-3013-14). Despite his March of 2017 appointment, counsel did not ask him to see Mr. Damas until July 2017. (PCR-3017).

Dr. Wu became involved in Mr. Damas' case after Ermacora emailed him in September 2016 asking for an estimate for an analysis. (PCR-3263). Ermacora requested that Dr. Wu look into whether Mr. Damas had sustained any traumatic head injuries at the time of the offense and whether any evidence of brain injury could support mitigation that would challenge imposition of the death sentence. (PCR-3264). Dr. Wu sent Ermacora an estimated budget. (PCR-3265). Outside of the email correspondence, Dr. Wu had no record of any phone conversations with Ermacora. (PCR-3265).

Based on the September 2016 email, Dr. Wu understood his role was to review brain imaging and determine if there were any abnormalities in the imaging. (PCR-3265). As part of the budget estimate he sent on September 6, 2016, Dr. Wu included a recommendation for a PET scan analysis and a MRI-DTI analysis. (PCR-3266). He also recommended an MRI quantitative volumetric

and explained its significance as there are numerous MRI sequences that can be “highly indicative of various kinds of, you know, traumatic brain injury, or schizophrenia, or other things”. (PCR-3268).

He did not provide counsel a timeframe for the testing because he did not know the timeline of the case. (PCR-3269). Dr. Wu noted, however, that these types of tests are extremely helpful where they provide several different forms of imaging, which can help, determine and corroborate the existence of brain abnormalities and can assist in diagnosing different disorders such as traumatic brain injury, alcohol spectrum disorder, or schizophrenia. (PCR-3270).

After recommending the additional testing, Dr. Wu’s next communication with Ermacora came six months later on March 7, 2017, when Ermacora emailed him. (PCR-3270-71). Ermacora’s email told Dr. Wu that the case had been “on hold” for about a year and that it looked as though they were going to be moving forward. (PCR-3271). Dr. Wu confirmed that he reviewed the motion for funding and the proposed budget estimate counsel sent and that it reflected the recommendation for the additional testing he had made during their first communication back in September 2016. (PCR-

3273).

Dr. Wu's records showed his next defense communication was approximately four months later on July 11, 2017, when he had a telephone call with Ermacora and received an email containing a copy of Dr. Merikangas' letter detailing results of Mr. Damas' previous MRI scans. (PCR-3285). Until that date in July 2017, Dr. Wu had not received any records to review from the defense team. (PCR-3336). Roughly a month later on August 16, 2017, he received another email that the MRI/PET scan CDs from Merikangas would be forwarded the next day, on August 17, 2017. (PCR-3336). When he eventually received the CD from the defense, Dr. Wu testified he was "puzzled" because he only saw the PET DICOM CD in his file and he did not receive a copy of the MRI file. (PCR-3336-37).

Despite the defense first contacting him in September 2016 and his appointment in March 2017, Dr. Wu did not perform any work on Mr. Damas' case until July 11, 2017. (PCR-3337). Following his receipt of Dr. Merikangas' letter in July 2017 and the PET DICOM CD in August 2017, the next date he received any records was on September 5, 2017. (PCR-3337). Dr. Wu's recommendation following his review of Dr. Merikangas' letter was that Mr. Damas still needed

the MRI DTI scan and MRI quantitative volumetric analyses. (PCR-3339).⁶

On September 6, 2016, Dr. Wu sent an estimate detailing the costs to analyze the PET and MRI data and the DTI MRI quantitative volumetric data. (PCR-3343). He also recalled sending over second estimate that also included estimates for costs for travel and court testimony, but he was not able to verify the date he sent it. (PCR-3342-43). No one from the defense ever contacted him, however, to discuss having him travel to Florida to meet with Mr. Damas or anyone from the defense team in person. (PCR-3489). He also did not prepare a formal report in Mr. Damas' case because he was waiting for further instructions. (PCR-3346).

Following an email from Donna Murray on September 19 or 22, 2017, Dr. Wu never received any other communication from the defense so he just "assumed that, you know, they decided that they

⁶ The only additional communication Dr. Wu received in the case was an email from Donna Murray dated September 22, 2017. (PCR-3342). In that email, Murray indicated that she would let Dr. Wu know once Dr. Ouaou had seen Mr. Damas so that the two experts could discuss Dr. Ouaou's findings and Dr. Wu could then complete his own clinical correlation. (PCR-3342).

didn't need me . . . that's the last I heard of the case." (PCR-3347). He was unaware of whether any of the additional testing he recommended was ever performed. (PCR-3347). Dr. Wu believed that the additional testing he had recommended--both the quantitative volumetric and diffusion tensor imaging—would have been extremely helpful with diagnosing any neurological factors from which Mr. Damas suffers and would have provided significant information beyond what a PET scan offered. (PCR-3348). Dr. Wu noted that both tests are extraordinarily helpful in terms of helping in the clinical assessment of a patient. (PCR-3348).

In Dr. Wu's opinion, the additional testing would have enabled him to provide a more thorough diagnosis in this case. (PCR-3348). For example, with quantitative volumetrics, Dr. Wu explained he would be able to look at whether or not there were specific areas of atrophy or enlargement in Mr. Damas' brain and it would enable him to see certain patterns that are associated. (PCR-3348). In cases with enlargement of ventricles in the brain (something that Dr. Merikangas noted are present in Mr. Damas' scans), the enlarged ventricles are typically associated with cases of schizophrenia or traumatic brain injury. (PCR-3348). Dr. Wu testified that these

additional tests—the diffusion tensor imaging and the MRI quantitative volumetric—can “prove very valuable and complements [the] information that can be assessed through the—the PET scan.” (PCR-3348-50).

The additional tests would have assisted Dr. Wu in determining whether a diagnosis of schizophrenia was accurate. (PCR-3350). Schizophrenics often have enlarged ventricles in their brains and that additional testing which showed such abnormalities in Mr. Damas’ brain could have helped provide additional objective evidence of abnormalities consistent with schizophrenia. (PCR-3350). Had he been called to testify in 2017, Dr. Wu “certainly” would have testified and he thought it was important to try to provide the court with such valuable information about a defendant’s background. (PCR-3350).

Dr. Rubino became involved in Mr. Damas’ case after mitigation specialist Donna Murray contacted him. (PCR-3223). He recalled speaking with defense attorney James Ermacora two or three times, “but not that much.” (PCR-3223). His understanding of his role in the case was to evaluate head injuries that Mr. Damas suffered in a car accident and to determine how it affected his behavior. (PCR-3224). He was given records to review of the crash, EMS records,

competency reports from Dr. Herkov, Dr. Schaerf, and Dr. Silver, a report from Dr. Merikangas, and records of Mr. Damas' PET and MRI scans. (PCR-3224).

With respect to Dr. Merikangas report, Dr. Rubino disagreed with Dr. Merikangas' finding that the scans showed hypermetabolism in parts of Mr. Damas brain but noted that in situations where the temporal lobe is being effected, individuals exhibit a tendency to be much more irritable and angry and struggle with controlling their behavior. (PCR-3278). Dr. Rubino further explained that the ventricular asymmetry present in Mr. Damas' brain was indicative of some form of developmental trauma. (PCR-3279). Dr. Rubino noted that with asymmetry it can be congenital, developmental, and associated with mental health disorders and that in cases of full blown atrophy, that is usually an indication that it is related to trauma. (PCR-3279).

In circumstances where the right ventricle is larger, like in Mr. Damas' case, often that is associated with mental health disorders such as schizophrenia and bipolar disorder. (PCR-3279). Additionally, he explained, in circumstances where the frontal lobe is atrophied, that is typical of a brain injury in someone Mr. Damas'

age. (PCR-3280). Dr. Rubino testified that this type of injury causes impaired judgment, effectiveness, and loss of appreciation of criminality of an act or culture. (PCR-3280). Dr. Rubino further testified that the injuries to Mr. Damas' brain were consistent with records of the concussion he suffered as a result of a car accident just prior to the crime. (PCR-3280). Dr. Rubino explained how in circumstances where an individual has had a concussion such as Mr. Damas, the typical recovery time can be up to a year, and during that time individuals often report feeling easily agitated and angry. (PCR-3281).

Following his review of Dr. Merikangas' report, Dr. Rubino recommended that an MRI with a newer, much higher powered magnet than that which was previously available at the time of the last MRI scans. (PCR-3229). Dr. Rubino also recommended diffusion tensor imaging testing (DTI). (PCR-3229). The use of DTI imaging was important, Dr. Rubino explained, because it is more sensitive to subcutaneum injuries than a regular MRI. (PCR-3230). Dr. Rubino confirmed that he provided the defense team with a prescription for this testing to be performed dated August 25, 2017. (PCR-3230-31) (Ex-F). To his knowledge, though, that the testing was never

conducted. (PCR-3231).

Review of Dr. Rubino's billing records entered into evidence at the hearing reflects that following his appointment to the case in March 2017, he did not perform any work on the case until August 14, 2017. (PCR-3234) (Ex-G). The first entry in his invoice dated August 14, 2017, listed a phone call with mitigation specialist Murray for a half an hour. (PCR-3234). The substance of the conversation was about Mr. Damas' Haitian culture and how it may have influenced his behavior. (PCR-3234-35). The next entry in his invoice occurred roughly two months later on October 15, 2017, several weeks after Mr. Damas' guilty pleas and waivers. (Ex-G).

Dr. McAlister, the defense's cultural expert, testified she had little interaction with the attorneys and only recalled speaking with Ermacora for about 15 minutes on one occasion. (PCR-3048). While she and Ermacora emailed back and forth on other occasions, it was mostly about billing or logistics. (PCR-3048)

Dr. McAlister understood her role on Mr. Damas' case was to learn about the case and to help the mitigation specialist understand the role religion played in Mr. Damas' life. (PCR-2949-50). The defense team asked her to help them understand the broader context

of the political history of Haiti and the history of migration of Haitians to the United States. (PCR-2949-50). The only records the defense team provided were from the police investigation and some basic facts about Mr. Damas' having fled to Haiti following the crimes. (PCR-2950). Dr. McAlister explained, "The way I understood it, I was to help—you know, help build the steps—build the information for a possible working theory of mitigation." (PCR-2950).

Prior to deposition, Dr. McAlister's records indicated she had only one six-minute call with one of Mr. Damas' attorneys. (PCR-2952). While she did not recall what they spoke about during the conversation, Dr. McAlister believed it could not have been much because of the length. (PCR-2958). Besides the phone call, Dr. McAlister "had absolutely no preparation whatsoever." (PCR-2950-51). Prior to her testifying, Dr. McAlister also did not have any conversations with anyone from the defense team to prepare her. (PCR-2951).

Dr. McAlister's records also showed she met with Mr. Damas at the last minute prior to sentencing on October 21 and again on October 22, 2017 for 4 hours. (PCR-2952-53). During that meeting, Dr. McAlister noted it was difficult to interview Mr. Damas, as he was

rambling and difficult to keep on topic. (PCR-2953). She recalled that Murray was also present at the meeting but that neither she nor Murray went over anything related to mitigation with Mr. Damas. According to Dr. McAlister, if Murray did go over anything at that meeting it was very general and not an in-depth conversation about mitigation. (PCR-2954).

The testimony from the above experts at the evidentiary hearing established that counsel failed to conduct a timely investigation and communicate with their experts. Defense counsel's comments at the June 23, 2017 hearing—roughly 10 weeks before the September 5, 2017 trial date and roughly three and a half months after having their experts appointed—established that the defense still had not developed their mitigation strategy. There, counsel informed the court that they only had two expert witnesses at present and that neither had authored reports because it was “not of the nature of their anticipated testimony...” (R-1276). While counsel noted they were diligently working on preparing their experts, the evidence from the evidentiary hearing refuted that statement. Neither Ermacora nor Shirley had even met with the two witnesses that eventually testified—Dr. Rubino or Dr. McAlister—at that point in time. Both Dr.

Wu and Dr. Ouaou testified that they were not in frequent communication with anyone from the defense team and directly refuted any contention that counsel were working “diligently” with either of them. Additionally, counsel made no mention of Dr. Rubino at that hearing when discussing the potential experts they were currently planning on utilizing.

Counsel’s evidentiary testimony showed the poor state of counsel’s investigation to date and their erroneous belief it was permissible to wait until after the guilt phase had concluded to disclose their penalty phase witnesses. (R-1281).⁷ While there was additional back and forth as to whether that was indeed appropriate in Mr. Damas case, counsel’s testimony further corroborated that defense counsel were being dilatory in conducting their investigation.

By July 7, 2017, the date the court ordered expert reports be filed, nothing was filed by the defense. According to Ermacora, the defense’s failure to comply with the court’s deadline for expert reports

⁷ In response to inquiry from the court about the timing for disclosing of defense expert reports and witnesses, defense counsel stated: “I know that some of these prosecutions, the way they go, is in fact the Defense doesn’t disclose their penalty phase—sorry—yeah, their penalty phase expert witnesses to the State until after the guilt phase is done and then there’s a recess.” (R-1281).

was not of any concern because the court “wouldn’t have precluded [the defense] from presenting evidence just because of the deadline.” (PCR-3186).

Incredibly, three weeks later on July 21, 2017, counsel informed the court that it still had not yet gotten to the point of “describing to Mr. Damas the mitigation that we have thus far.” (SV1R-3772). When asked about those comments at the evidentiary hearing, Ermacora attempted to justify the defense teams’ unpreparedness by deflecting the blame on Mr. Damas, and testifying that “it all goes back to Mr. Damas” and his unwillingness to meet with them in-person and speak to them. (PCR-3187).

Thereafter, on August 18, 2017, the defense filed an Additional Witness List and Notice of Intent to Present Expert Testimony of Mental Mitigation, listing twelve witnesses and five expert witnesses. (R-1752-54, 1756-57). Notably, the list contained witnesses not previously mentioned by the defense at the July 27, 2017 hearing. Thus, a few weeks before the trial date, it appears counsel were intending on calling several witnesses as part of its mitigation.

Despite having had the PD’s mitigation memo listing Dr. Merikangas’ recommendation that additional testing was necessary

and Dr. Wu's recommendation corroborating that recommendation as early as his initial consultation with Ermacora in September 2016, it was not until a year later, on September 1, 2017, that defense counsel finally filed a motion for additional testing. (R-1819-20). Counsel filed the motion the same time in "early September," that Dr. Rubino testified he conducted his only meeting with Mr. Damas. (R-3059). Thus, four days before Mr. Damas' was set to go to trial on September 5, 2017, the record establishes counsel had yet to develop all of Mr. Damas' mental health mitigation.

When asked about the timing of the defense motion for additional testing from September 2017, Ermacora testified that his initial consultation with Dr. Wu resulted only in him receiving an estimate related solely to review Dr. Wu's prior work in his case. (PCR-3157-58) (Ex-B). Ermacora further testified that Dr. Wu's invoice did not contain any suggestion for additional testing or further work because "we already had the PET scan from radiology." (PCR-3159). After looking over his records, Ermacora then confirmed that the defense also had the results of prior MRI scans conducted by the PD. (PCR-3159, 3161). Ermacora then testified that it was not until just prior to trial, that Dr. Ouaou had suggested the additional testing be performed and that the defense finally moved to have

additional testing performed on September 1, 2017, four days before the scheduled trial date. (PCR-3162).

The record, however, directly refutes Ermacora's testimony on these points. Dr. Merikangas' letter, provided to the defense by the PD "Fitzgeorge memo," clearly recommended that additional testing as far back as 2015. (Ex-A). Additionally, Dr. Wu testified that even as early as his first correspondence with the defense in September 2016, he provided a proposed budget that included an estimate for the additional testing that the defense eventually requested in their September 1, 2017 motion for additional testing. (PCR-3265-66, 3343). Dr. Wu also reiterated that same recommendation in March 2017 when he had additional communication with Ermacora. (PCR-3273).⁸ Contrary to Ermacora's testimony, the defense was on notice of the need for additional testing from the beginning of their appointment in 2015 and Dr. Wu told them of the need for the

⁸ Whether due to mistake or confusion, Ermacora's testimony that the defense motion for additional testing in early September requested testing to be conducted by Dr. Ouaou is not supported by the record. The record reflects that the defense motion that was filed on September 1, 2017 was a request for additional brain imaging to be conducted by Dr. Wu. (R-1819-20). No other defense motions for additional testing are reflected in the record on appeal during that time.

additional testing much earlier in time at two subsequent junctures.

Ermacora's additional attempts at justifying the late timing of the request are also contradicted by other portions of his testimony or the record and, in some instances, amount to further admissions that the defense failed to review and advise Mr. Damas of the available mitigation prior to his guilty plea and waivers at the September 5, 2017 hearing. When confronted with the timing of the motion for additional testing on September 1, 2017, Mr. Damas' subsequent guilty plea and waiver on September 5, 2017, and then the ultimate denial of the motion on September 27, 2017—Ermacora remarked “okay, that may be accurate. Again, we weren't going to need that—he entered the plea that date and we didn't have the *Spencer* hearing and we weren't going to need it. And frankly, I didn't know he was going to plead until we showed up that day, at least that is my recollection.” (PCR-3165). Ermacora further explained that the defense was “gearing up for the guilt phase trial, and obviously along with the mitigation but we didn't need our mitigation evidence at that point when he entered his plea.” (PCR-3165).

Despite the fact Ermacora testified they had “worked on mitigation for a long time,” were “ready to go” and “certainly would

have been ready for mitigation if it had come up” at the September 5, 2017 hearing (PCR-3204), the record failed to support that testimony. Ermacora was working with expectation that the guilt phase would last “a month, maybe longer,” and that it was his working assumption that following a finding of guilty, they were a “good month and a half to two months away from the mitigation.” (PCR-3212). With respect to mitigation timing, Ermacora testified, “if he is found not guilty, what a waste of time and money when we already know we are not going to need them. Let’s make sure he’s even found guilty if we do it—the mitigation phase.” (PCR-3212) Ermacora’s comments at the hearing make clear that he was waiting until after the guilt phase to fully conduct his mitigation investigation. This was clearly unreasonable because any attorney would know that with no insanity defense, a guilty verdict was certain. Indeed, where is the great defense that would have made penalty phase unnecessary?

The evidentiary hearing also established that the defense team’s representation at the September 5 and October 23-24, 2017 hearings that someone from the defense team had gone over the “mitigation spreadsheet” with Mr. Damas prior to both hearings was not accurate. The billing invoices for both Ermacora and Shirley do not

reflect any meeting with Mr. Damas where either attorney reviewed the mitigation they had developed with Mr. Damas. Shirley had no involvement in putting together the mitigation worksheet and did not recall anyone going over the document with Mr. Damas prior to the September 5 or the October 23-24 hearings. (PCR-3413-14). While Shirley's billing invoice lists a meeting on September 4, 2017, just one day prior to the September 5, 2017 hearing, the meeting lasted only 1.5 hours, not nearly sufficient time to review the entirety of the mitigation with Mr. Damas. (Ex-J). Similarly, Ermacora's invoice also lists one meeting for 1.1 hours on September 4, 2017, the same day before Mr. Damas' guilty plea and waiver. (Ex-C). Last, mitigation specialist Murray—the person primarily responsible for updating the mitigation spreadsheet—testified that she could not recall anyone going over the mitigation with Mr. Damas at any point in time and or any discussion amongst the defense team prior to the September 5, 2017 hearing about going over the extent of the available mitigation with Damas. (PCR-3314-15).

Ermacora testified at the hearing that he did not go over any of the mitigating evidence with Mr. Damas ahead of time prior to the September 5, 2017 hearing. (PCR-3190), In Ermacora's estimation,

doing so would have been fruitless where Mr. Damas would not have listened or been helpful. (PCR-3190). He likened talking to Mr. Damas as a “waste of time,” not because of any competency concerns but because Mr. Damas showed no interest in taking an active role in his defense. (PCR-3190). Ermacora was adamant that prior to the September 5, 2017 hearing that Mr. Damas was aware of the fact he was facing the death penalty and wanted the death penalty and did not want them to present mitigation evidence. (PCR-3190). Given those circumstances, Ermacora testified, “he knew what the consequences were, he wanted them. What did we have to explain to him?” (PCR-3190). Ermacora confirmed that despite having billed for a meeting with Mr. Damas on September 4, 2017, for 1.1 hours, he could not recall going over the substance of the 47 mitigator spreadsheet at that meeting. (PCR-3190-91, 3197). (Ex-D).

Contrary to the comments by defense counsel that they had gone over everything with Mr. Damas prior to the September 5, 2017 hearing (R-3185-86), the record does not support this. Mr. Damas was not fully advised of all the readily available mitigation prior to the September 5, 2017 hearing. He could not have been when counsel later admitted that there was additional mitigation developed

after that hearing that Mr. Damas was unaware. In the absence of being provided that opportunity to consider all of the available evidence had counsel conducted a diligent and comprehensive investigation, Mr. Damas' guilty pleas and waivers cannot be recognized as knowing, voluntary, and intelligent. *State v. Lewis*, 838 So. 2d 1102, 1113 (Fla. 2002) ("Although a defendant may waive mitigation, he cannot do so blindly; counsel must first investigate all avenues and advise the defendant so that the defendant reasonably understands what is being waived and its ramifications and hence is able to make an informed, intelligent decision.").

Failure to effectively prepare and present mitigation testimony at the *Spencer/Sentencing* hearing

The evidence presented at the evidentiary hearing also establishes that counsel were ineffective in their preparation and presentation of mitigating evidence at the October 23-24 *Spencer/Sentencing* hearing. As was the case at the September 5, 2017 hearing, counsel failed to conduct a timely investigation and to advise Mr. Damas of all the readily available mitigation prior to the *Spencer/Sentencing* hearing. Counsel's presentation of mitigation at the hearing and their subsequent *Koon* proffer, counsel were also deficient where they failed to present an accurate picture of Mr.

Damas' mitigation background and the circumstances of the defense's mitigation investigation to the sentencing court.

Following the September 5, 2017 hearing, on September 27, 2017, the court denied the defense motion requesting additional MRI and PET scan testing, noting that it found the costs for the additional MRI and PET scans were not reasonable and necessary to assist the defense in the scheduled *Koon* and *Spencer* hearings. (R-1873-74). The court determined that the original testing by prior defense counsel would suffice for addressing both the last aspect of the *Koon* hearing, and for the *Spencer* hearing. (R-1873-74). Six days later, on October 2, 2017, the court also issued an order denying defense counsel's *ex parte* motion for authorization of travel fees and witness expenses for Dr. Joseph Wu, M.D. (R-1881).

During the next three weeks leading to the *Spencer*/Sentencing hearing, the defense still had not decided the mitigation for the hearing. Notices of Taking Deposition filed in the record on appeal indicate that as late as October 13, 2017 — ten days before the hearing — the State was still working under the impression the defense was intending on calling Dr. Rubino, Dr. Ouaou, Ron McAndrew, and Dr. McAlister. (R-1896-1903). Dr. Ouaou's

deposition was cancelled three days later on October 16, 2017, the same day that Dr. Ouaou submitted a letter to defense counsel stating that he had been unsuccessful in his attempts to meet with Mr. Damas in-person. (R-904, 2776, D-Ex-3).⁹ On October 19, 2017, just four days before the *Spencer*/Sentencing hearing, defense counsel filed and the court granted an *ex parte* motion for access to the Jail for Dr. McAlister meet with Mr. Damas. (R-1913-1914). The evidentiary hearing showed, however, that no one from the defense team went over the substance of the “mitigation worksheet” with Mr. Damas at that meeting, or any other, to advise him as to the mitigation evidence available for him.

While Murray testified that she met with Mr. Damas after his September 5, 2017 hearing and prior to the October 23-24, 2017 sentencing hearing, she was not certain when that meeting occurred or whether she was with either of Mr. Damas’ attorneys—only that she believed it may have been Shirley. (PCR-3317). She did recall, however, that she and Dr. McAlister met with Mr. Damas in person

⁹The letter indicated that Dr. Ouaou had attempted to meet with Mr. Damas on three occasions: July 10, 2017; July 27, 2017; and August 23, 2017. (R-2776).

prior to the October 23-24, 2017 hearing. (PCR-3317-18).¹⁰ Murray testified they did not specifically go over any of the mitigation in the worksheet during that meeting but that the purpose of the meeting was “mostly for Dr. McAlister to do her evaluation.” (PCR-3318). Murray also confirmed that Dr. McAlister could also not have gone over anything on the mitigation worksheet with Mr. Damas at that meeting either because Dr. McAlister would not have had access to the document. (PCR-3318). Murray confirmed that she also had no knowledge of whether either of Mr. Damas’ attorneys went over the mitigation worksheet with him prior to his sentencing as well. (PCR-3319). Murray agreed that while Dr. McAlister did testify at the *Spencer* hearing to some of the spreadsheet information, there were 47 mitigators listed in the spreadsheet, the majority of which Dr. Rubino or Dr. McAlister did not present. (PCR-3327).

Ermacora also could not confirm whether anyone from the defense team met with Mr. Damas prior to the October 23-24, 2017 hearing, and could only “guess” that it was likely Murray had done

¹⁰ Murray testified that Mr. Damas had initially refused to meet with them when they attempted to do so two days before the hearing on October 21, 2017, but finally agreed to meet with both her and Dr. McAlister the next day on October 22, 2017. (PCR-3318).

so. (PCR-3198). He had no recollection of anyone from the defense team going over any additional mitigation that the defense had purportedly been developing with Mr. Damas prior to the hearing. (PCR-3201). Shirley, likewise, had no independent recollection of meeting with Mr. Damas prior to the hearing and was unaware of anyone from the team meeting with Mr. Damas. (PCR-3414-15). This contradicted counsel's statement at the October 23-24 hearing to the court that there had been a meeting just one day before the hearing at which Dr. McAlister and Donna Murray reviewed the entire list of mental mitigation with Mr. Damas. (PCR-3085, 3096).

Counsel were also ineffective in failing to diligently prepare and present the witnesses that testified at the *Spencer*/Sentencing hearing. Dr. Rubino's billing records confirmed that counsel's communication with him was sporadic at best. Dr. Rubino's billing indicated that at one point between his appointment to the case, from August 14, 2017 and October 15, 2017, he had no communication with the defense. (PCR-3235). The following day on October 16, 2017, Dr. Rubino's invoice listed a telephone call with Ermacora to discuss his MRI and PET scan review that lasted a mere seven minutes. (PCR-3235). In advance of his eventual deposition by the State, Dr. Rubino

testified that his invoice confirmed he conducted all of his preparation without assistance of the defense. (PCR-3235-36). Dr. Rubino could only vaguely recall speaking with someone from the defense team during this time, either Murray or Ermacora, and that the conversation focused on trying to “figure out about schizophrenia and what else it would mean.” (PCR-3236).¹¹

Prior to his deposition on October 17, 2017, Dr. Rubino could only generally recall that he believed someone from the defense team spoke with him. (PCR-3237). He testified, however, that he was certain the defense team knew in advance of his deposition what he would be talking about, specifically “traumatic brain injury evidence, the acute concussion evidence, as well as the findings supportive of schizophrenia.” (PCR-3238). Despite believing that the defense was aware of prospective deposition testimony, the defense did not tell him how they planned to utilize what he was going to testify in their

¹¹ Dr. Rubino also testified about the circumstances of his in-person meeting with Mr. Damas. He noted that during his meeting he was unable to accomplish anything because Mr. Damas was tangential, uncooperative, and would not answer any questions. (PCR-3237). Dr. Rubino explained that Mr. Damas “was just not normal. I was asking so many questions and he didn’t respond. He would go off on a tangent. I don’t know what he was talking about, but it was not what I asked him.” (PCR-3237).

mitigation theory. (PCR-3238).

Prior to testifying at the *Spencer/Sentencing* hearing, Dr. Rubino “studied the evidence of the brain injury and the findings that support schizophrenia” but he did not get any feedback or instruction from the defense team on how to utilize it at the hearing. (PCR-3238). Despite having provided evidence of schizophrenia at the *Spencer/Sentencing* hearing, Dr. Rubino testified he was not qualified to render such a diagnosis. (PCR-3239). He further noted that despite the fact it was not typical for someone in his field to render a diagnosis of schizophrenia, the defense was aware he was going to testify to it at the sentencing hearing. (PCR-3239).

Despite being on notice that Dr. Rubino was going to testify to a diagnosis outside his area of expertise, counsel presented him anyway. Counsel’s failure to recognize that Dr. Rubino was not qualified to testify to Mr. Damas’ schizophrenia diagnosis was objectively unreasonable under the circumstances. *See Hinton v. Alabama*, 571 U.S. 263, 275 (2014) (holding that the selection of expert witnesses is unchallengeable strategic choice when made **after thorough investigation of the law and facts**). Ermacora’s belief that Dr. Rubino had “the same expertise” as Dr. Wu was

entirely inaccurate. (PCR-3156). As Dr. Rubino explained, his practice did not regularly deal with diagnosing individuals with schizophrenia. (PCR-3239). He was not qualified to render such a diagnosis. (R-3096-3097; PCR-3239). Counsel's failure to understand this point and effectively present Mr. Damas' schizophrenia diagnosis through an appropriately qualified expert such as Dr. Ouaou (a neuropsychologist) or Dr. Wu (a psychiatrist with expertise in brain imaging) instead of Dr. Rubino (a neurologist) constituted deficient performance under *Strickland* that cannot be attributed to any objectively reasonable strategy. *Hinton* at 274 ("ignorance of a point of law that is fundamental to his case [,] [which] combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance []").

Evidence in the record and from the evidentiary hearing also establishes that defense counsel's explanations provided during their eventual *Koon* proffer were inaccurate and misleading. While counsel argued during the *Koon* proffer that the reason the defense was unable to present testimony from both Dr. Ouaou and Dr. Maher was due to Mr. Damas' uncooperativeness (R-3132-48), that is only half of the story. The reality is that as a result of counsel's lack of diligence

early on, by the time they attempted to have their experts meet with Mr. Damas, the attorney-client relationship had completely broken down and Mr. Damas was no longer on speaking terms with counsel. While counsel argued that the reasoning for not using Dr. Ouaou was due to Mr. Damas' non-cooperation, the real reason was because they waited until the last minute to attempt to utilize both him and other experts to develop additional mitigation that was critical to Mr. Damas' background.

Counsel waiting until the last minute to conduct their mitigation investigation limited their ability to obtain and develop mitigation. Dr. Ouaou testified the timing during which the defense requested he eventually attempt to meet with Mr. Damas and conduct a clinical assessment made him nervous due to how close it was in proximity to the scheduled dates for Mr. Damas trial and sentencing hearings. (PCR-3012). Dr. Ouaou was adamant that under that short window of time, it was not sufficient to conduct the proper battery of tests he typically conducts as his normal practice in such cases. (PCR-3012). Similarly, Dr. Wu was also emphatic that he had repeatedly recommended additional testing needed to be performed from the time he was first appointed to the case and that

the additional testing would have been extremely helpful in diagnosing Mr. Damas' underlying mental health issues. (PCR-3265-66, 3273, 3348). However, because the defense ignored the recommendations for additional testing until filing a request for additional testing on September 1, 2017, the testing was denied because of the late timing and the court's determination that they were not necessary *after* Mr. Damas' guilty plea and waiver at the September 5, 2017 hearing.

While defense counsel comments during the *Koon* proffer intended to blame Mr. Damas, the truth is by being dilatory in developing Mr. Damas' mitigation, they had all but assured that his non-cooperation would be a self-fulfilling prophecy. Mr. Damas' defense team knew he struggled with competency, and symptomatic of his waxing and waning mental health was often a reluctance to engage with his defense team members. By waiting until the last minute and then rushing in experts in the hopes of developing mitigation, counsel ensured the eventual outcome that transpired. Under the circumstances, no reasonable counsel would have waited until such a late stage in the preparation of Mr. Damas' case to attempt to conduct such critical mitigation investigation, particularly

in a case such as Mr. Damas' where everyone who had worked on his case acknowledged the central role mitigation and mental health issues would have in his sentencing. As a result of defense counsel's failure to effectively develop Mr. Damas' mitigation background in a timely fashion, the court was left with the misleading impression that he was simply being uncooperative and feigning symptoms all in the guise of attempting to delay his case, when in fact that was not entirely accurate.

Defense counsel's failure to timely investigate and explore all possible avenues of mitigation and, in turn, timely inform Mr. Damas of that information rendered their performance deficient. Given the circumstances, reasonable counsel would have realized that timely developing and advising Mr. Damas of all readily available mitigation was necessary to his making an informed decision. As such, this is not a case where reasonable professional judgment supports counsels' decision to limit the scope and timing of their investigation. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Counsel's failure to diligently investigate Mr. Damas' mitigation background and fully advise him of all that was readily available impaired his ability to make an informed, intelligent waiver of his rights. *Reynolds v. State*,

99 So. 3d 459, 495 (Fla. 2012) (Counsel must “investigate all avenues and advise the defendant so that the defendant reasonably understands what is being waived and its ramifications and hence is able to make an informed, intelligent decision) (citing *Lewis v. State*, 838 So. 2d 1102, 113 (Fla. 2002) (additional citations omitted).

Mr. Damas Was Prejudiced

Under *Strickland*'s prejudice standard, a “petitioner must show only a reasonable probability that the outcome would have been different,” i.e., a “probability sufficient to undermine confidence in the outcome”; he “need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” *Hardwick v. Crosby*, 320 F. 3d 1127, 1160 (11th Cir. 2003) (quoting *Strickland*, at 693-94). To determine whether trial counsel was ineffective in the penalty phase, a court must “evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the [evidentiary hearing] in reweighing it against the evidence in aggravation.” *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000). For penalty phase, prejudice exists where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or that the

deficiencies substantially impaired confidence in the outcome of the proceedings. *Wiggins*, 539 U.S. at 534. The U.S. Supreme Court has made clear that,

[A]lthough . . . it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying that the undiscovered “mitigating evidence, taken as a whole, ‘might well have influenced the jury’s appraisal’ of [Mr. Damas’] culpability,” and the likelihood of a different result if the evidence had gone in is “sufficient to undermine confidence in the outcome” actually reached at sentencing.

Rompilla v. Beard, 545 U.S. 374, 393 (2005) (internal citations omitted).

In *Sears v. Upton*, 561 U.S. 945 (2010), the U.S. Supreme Court held that there can still be deficient performance and prejudice, even when counsel presents some mitigation evidence at trial. *Sears*, 561 U.S. at 954-56. The fact that trial counsel hired experts and presented a cultural expert witness does not preclude a finding of deficient performance. In *Parker v. State*, 3 So. 3d 974, 983-85 (Fla. 2009), this Court found deficient performance even though trial counsel presented five mitigation witnesses and one mental health expert on the defendant’s behalf. As in *Parker*, the additional information that was available but was either ignored or not

discovered by defense counsel would have “fleshed out the ‘bare bones’” presented at *Spencer*/Sentencing proceeding and provided a more accurate picture of Mr. Damas’ mitigation. *Parker*, 3 So. 3d at 983-85.

Had defense counsel conducted a timelier and more comprehensive investigation, there was more readily available mitigation to be unearthed and a much greater likelihood that counsel would have been effective at obtaining it. The issue of Mr. Damas’ neurological functioning and organic/structural damage to his brain was critical to the defense theory of mitigation and its arguments in support of both statutory and non-statutory mitigation.

A timelier and more comprehensive investigation would have permitted defense counsel to obtain the additional MRI and PET scan testing which was ultimately denied by the court. In essence, the defense mitigation theory was that these untreated mental health issues, coupled with the damage to his brain and/or any traumatic brain injury, were contributing factors to why Mr. Damas committed the crimes. Yet, despite its primacy in the defense theory of mitigation, counsel failed to follow up on the prior testing and report from Dr. Merikangas indicating the need for further testing.

Had counsel been diligent in their request for testing and fees for Dr. Wu's testimony, the court's consideration of the defense motion would likely have been different. By the time defense counsel submitted the request for additional testing and it was considered by the court in September, Mr. Damas had pleaded guilty and waived his rights. Following the September 5, 2017 hearing, the court only considered what the court found necessary for its consideration of the mental health mitigation defense counsel were going to present. The court's consideration of the motion was tainted because Mr. Damas had waived presentation of mitigating evidence and that the primary purpose for presenting evidence of mitigation was to satisfy the standards under *Koon*. This was vastly different from the case posture prior to the September 5, 2017 hearing and is precisely why the Sixth Amendment imposes a duty on counsel to conduct timely investigate mitigation. By conducting a timely investigation, counsel avoids the prejudice that results if a client becomes despondent or the court rules adversely based on time. If counsel had conducted a timely investigation and submitted motions for the additional testing prior to the August hearings, there was a much greater likelihood the testing, which was critical to the presentation of Mr. Damas' mitigation background, would have been granted by the court.

Similarly, had defense counsel conducted a timely investigation

and in turn, provided their experts with sufficient time to prepare, defense counsel would have had the opportunity to present the additional witnesses listed in its Notice of Intent to Present Mental Mitigation Testimony—witnesses which would have provided greater support for the mitigation evidence counsel did present. Testimony from Dr. Wu, Dr. Ouaou, and Dr. Maher, (experts in psychiatry, neuropsychology, and forensic psychology), would have provided greater context and clarity as to how Mr. Damas’ mental health factored into his mitigation background. Their testimony would also have helped better explain and corroborate the testimony of Dr. Rubino and would certainly have provided the greater support the court found lacking in rejecting the statutory mitigators. (R-2072-76).

The additional evidence would have also refuted the court’s determination in its sentencing order that the sole basis of Mr. Damas’ mental illness had only come from competency reports. (R-2074). The experts’ additional reports, testing, and testimony would have not only provided support for the diagnoses in the competency evaluations; it would also have expounded upon it and provided greater accuracy and credibility. It would have tied into the testimony of Dr. Rubino and provided support for his findings. It would have also negated the court’s discounting of the mitigation evidence on the

basis that Mr. Damas had failed to present diagnoses and findings from qualified experts in the appropriate medical field or forensic disciplines. (R-2072-74). Most significantly, the additional evidence would have discredited the report and opinions of Dr. Mandelblatt, which served as the lynchpin for the court's determination that Mr. Damas was merely malingering and manipulating the system while feigning his mental health issues. (R-2075).

A timely investigation would also have led to the opportunity to foster a more conducive working relationship with Mr. Damas. Defense counsel were aware from the records and files that Mr. Damas was a reluctant client. Given this knowledge, any objectively reasonable attorney would have been cognizant of the need for repeated and timely efforts to cultivate a rapport with Mr. Damas. While many of the experts that evaluated and/or met with Mr. Damas noted he was reluctant to speak with them and was, at times, very difficult, their reports and accounts likewise noted that those who made repeated attempts were at times successful in communicating with him. That fact was also consistent with defense counsel's comments that their own investigator, Donna Murray, had been successful at building a rapport with Mr. Damas over the course of her repeated visits and conversations with him.

Along with presenting a disjointed and inaccurate mitigation

picture, counsel's failure to conduct a timely investigation also severely prejudiced Mr. Damas' waivers of his penalty phase jury and presentation of mitigation evidence. Defense counsel's comments at the *Spencer/Sentencing* hearing raise concerns as to whether Mr. Damas' waiver of presentation of mitigation evidence and his penalty phase jury was knowing, voluntary, and intelligent. Defense counsel's comments reflected the fact that their investigation and advisement of Mr. Damas of all the mitigation that was readily available was not complete or timely. Dr. Rubino's testimony at the *Spencer/Sentencing* hearing noted that he had only met with Mr. Damas in "early September" for about an hour and a half. (R-3059). By counsel's own admission, Mr. Damas had not met with Dr. McAlister "for the better part of 4 hours"¹² by the date of his guilty plea and waiver on September 5, 2017, nor had they even gone over with Mr. Damas the substance of either Dr. Rubino or Dr. McAlister's testimony—the only two witnesses who were eventually presented by defense counsel at the October 23-24, 2017 hearing. (R-3185). Despite the fact those two witnesses ultimately testified, it did not relieve counsel of going over the substance of their mitigation

¹² To be clear, Dr. McAlister interviewed Mr. Damas twice. Once a day or so before in person and once either in person or by video. (R-3005). It was not Dr. McAlister's responsibility to advise Mr. Damas of his mitigation.

evidence prior to Mr. Damas' September 5, 2017 waiver in order to fully advise him of all the mitigation that was readily available.

Had counsel been more proactive in their investigation, they would have had ample time to obtain the additional information, reports, and testing which were vital to assembling a holistic picture of Mr. Damas' mitigation background. They certainly would have had more ideal conditions to cultivate that information than those which were present following Mr. Damas voicing his desire to discharge counsel and represent himself at the June 23, 2017 and July 21, 2017 hearings, the entering of his guilty pleas and waivers, and during the weeks prior to his October 2017 *Spencer*/Sentencing hearing. Most significantly, the defense would most certainly had much better footing upon which to request the additional MRI and PET scans which were vital to the mitigation background they were attempting to develop. Rather than develop that additional mitigation in a timelier fashion, however, defense counsel waited and was ultimately frustrated in their attempts. Their failure to do so constituted deficient performance which prejudiced Mr. Damas. See *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U. S. 374 (2005), *Strickland v. Washington*, 466 U.S. 668 (1984).

Mr. Damas' case highlights the reasoning behind the requirement under the Sixth Amendment that counsel conduct a

timely and diligent investigation. The requirement that counsel conduct an investigation in a timely manner contemplates that any constitutionally adequate mitigation investigation takes time and requires that counsel make the necessary efforts to discover all of the readily available mitigation evidence in a defendant's background. See *Williams*, 529 U.S. at 415. (O'Connor, J., concurring) (noting counsel's duty to conduct the "requisite, diligent" investigation into [a] client's background); *Wiggins v. Smith*, 539 U.S. at 523 (noting that ABA guidelines provide that investigation into mitigation evidence "should comprise efforts to discover all reasonably available mitigating evidence) (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989)). The failure to conduct a timely investigation impacts not only that which goes undiscovered but also that which goes unrepresented to the defendant as they contemplate any potential decision not to present certain mitigation or waiver of presentation of mitigation altogether. As this Court noted in *Lewis v. State*:

[T]he obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated-this is an integral part of a capital case. Although a defendant may waive mitigation, he cannot do so blindly; counsel must first investigate all avenues and advise the defendant so that the defendant reasonably understands what is being waived and its ramifications and hence is able to make an informed, intelligent decision.

838 So. 2d at 1113. (footnote omitted).

It is axiomatic that Mr. Damas could not waive something for which he had not been informed. *Id.* A waiver of a constitutional right cannot be knowing, intelligent, and voluntary where the defendant is unaware of what is being waived. Following that logic, it is impossible for Mr. Damas' waiver of presentation of mitigating evidence to have been constitutionally valid where he was neither aware of all of the readily available mitigation or provided sufficient opportunity to go over it and understand its significance before waiving its presentation. Counsel's comments to the court at the sentencing hearing (R-3185) were incorrect because there was more to Mr. Damas' mitigation background than that which defense counsel had gone over with Mr. Damas prior to the September 5, 2017 hearing.

Counsel's failure to perform a proper investigation, develop readily available but previously unknown mitigation, and present that evidence in a consistent and comprehensive manner, was objectively unreasonable. If counsel had met their constitutional obligations the court would have learned of powerful mitigation evidence that would have both corroborated and expanded upon the mitigation presented. Had counsel conducted an exhausting and timely investigation, incorporated the mitigation into an accurate and

holistic mitigation strategy, and presented it to both Mr. Damas and the court, there is a reasonable probability that Mr. Damas would not have waived presentation of mitigation and been sentenced to death. *Rompilla, Wiggins; Williams, Strickland.*

When Mr. Damas was strapped to a restraint chair and the court asked him what he wanted he said “a chance.” (PCR-3160). Whatever irrational waivers Mr. Damas made, he wanted a chance then too. Because his counsel were deficient and he was prejudiced, he never had a chance. This Court should reverse.

III. MR. DAMAS WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING FLORIDA LAW BECAUSE HE WAS DENIED ACCESS TO PUBLIC RECORDS.

Mr. Damas raises this issue here, substantively, and to preserve this issue for later review. Mr. Damas filed demands for additional public records pursuant to Rule 3.852(g) and (i). The court held a public records hearing on January 17, 2020. On March 12, 2020 the court issued an Order On Defendant’s Demands For Additional Public Records, denying Mr. Damas’ demands for additional public records from the State Attorney’s Office, the DOC, FDLE, Collier

County Sheriff's Office, Twentieth Circuit Medical Examiner's Office, Miami-Dade Police Department and the JQC. (PCR-652-73).

The court determined three other agencies were not required to comply, and two only if Mr. Damas submitted a waiver. The court also issued an Order On Second *In Camera* Inspection of Exempt Records, finding that none contained any *Brady* material nor were they improperly exempted or redacted in contravention of Chapter 119, Florida Statutes. (PCR-648-50).

Postconviction proceedings are governed by strict time limitations, but also by due process. *Easter v. Endell*, 37 F.3d 1343 (8th Cir. 1994); *Huff v. State*, 622 So. 2d 982 (Fla. 1993). This Court ruled that collateral counsel must seek and obtain all public records with bearing on a motion to vacate a conviction and sentence. See *Porter v. State*, 653 So. 2d 375, 377-78 (Fla. 1995). However, the State bears a concomitant obligation to provide requested materials. *Ventura v. State*, 673 So. 2d 479, 481 (Fla. 1996). The denial of access to public records in his case results in Mr. Damas being denied his rights to due process, and equal protection of the law.

The denial of the records requests under Rule 3.852(g) and (i) is unconstitutional as applied here. This Court promulgated Rule 3.852

to streamline the process for capital defendants seeking postconviction relief. Death row inmates obtain discovery in support of their postconviction claims through Rule 3.852. Without a meaningful opportunity for discovery, virtually no defendant would be granted a new trial for violations of *Brady v. Maryland*, 373 U.S. 83 (1963).

Without the requested records, Mr. Damas is denied the full panoply of armaments to challenge his conviction and sentence. *Holland v. State*, 503 So. 2d 1250 (Fla. 1987). This denied Mr. Damas his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. Mr. Damas is entitled to challenge the violations under the U.S. and Florida Constitutions. *Spalding v. Dugger*, 526 So. 2d 71 (Fla. 1988). Due to the denial of public records, Mr. Damas was denied a full and fair postconviction process, and accordingly, due process.

CONCLUSION AND RELIEF SOUGHT

This Court should reverse.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to opposing counsel by e-filing through the portal.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the applicable word count and font requirements contained Florida Rule of Appellate Procedure Rule 9.045. The brief contains 24,670 words of the allotted 25,000 and uses Bookman Old Style 14-point font.

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