IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-1185

THE STATE OF FLORIDA,

Appellant/Cross-Appellee,

vs.

JIMMIE LEE CONEY,

Appellee/Cross-Appellant.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, CRIMINAL DIVISION

INITIAL BRIEF OF APPELLANT

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POINT ON APPEAL

THE COURT BELOW ERRED IN FINDING, AFTER AN EVIDENTIARY HEARING UNDER RULE 3.850, THAT DEFENDANT'S COUNSEL WAS INEFFECTIVE DURING THE PENALTY PHASE OF TRIAL FOR FAILING TO HAVE DEFENDANT EXAMINED BY MENTAL HEALTH PROFESSIONALS AND PROPERLY INVESTIGATE DEFENDANT'S BACKGROUND FOR MITIGATING EVIDENCE.

STATEMENT OF THE CASE AND FACTS

A. TRIAL AND DIRECT APPEAL

This is a State appeal from the lower court's grant, after an evidentiary hearing pursuant to Fla. R. Crim. P. 3.850, of a new sentencing proceeding before a new jury.

On April 25, 1990, Defendant was charged with the first degree murder of Patrick Southworth and first degree arson of an occupied structure. (D.A.R. 1-2).[1] Jury selection began on February 12, 1992, and was concluded on February 14, 1992. (D.A.R. 642-840, 967-1232). Trial began on February 14, 1992. (D.A.R. 1268). On February 26, 1992, the jury returned a guilty verdict as to both charges. (D.A.R. 241-42, 2643).

The penalty phase began on March 9, 1992. (D.A.R. 2656). On March 10, 1992, the jury recommended the imposition of the death penalty by a vote of 7-5. (D.A.R. 288-89, 2296).

A sentencing hearing was held on March 27, 1992. (D.A.R. 2897-2919). On March 27, 1992, Defendant was sentenced to thirty years in prison for arson charge, consecutive to the death sentence to imposed on the murder charge. (D.A.R. 308-10, 2917-19). In a written sentencing order, the trial court found the following aggravating circumstances:

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[1] The terms "D.A.R." and "D.A.T." will be used to refer to the record and transcript prepared on direct appeal in *Coney v. State*, Florida Supreme Court case no. 80, 072. The terms "R." and "T." refer to the record and transcript in the instant post-conviction appeal.

> 1. The capital felony was committed by a person under sentence of imprisonment.
>
> 2. The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
>
> 3. The defendant knowingly created a great risk of death to many persons.
>
> 4. The murder was committed while the defendant was engaged in the commission of an arson.
>
> 5. The murder was especially heinous, atrocious or cruel.

(D.A.R 312-316). The trial court considered all statutory mitigating circumstances and found them to be inapplicable. (D.A.R. 316). The trial court also considered the non-statutory mitigation evidence presented by Defendant and concluded that the evidence presented in no way mitigated the acts of Defendant in the instant case. (D.A.R. 316). Accordingly, the trial court sentenced Defendant to death. (D.A.R. 316).

On direct appeal, the Florida Supreme Court found the following historical facts of the instant crimes:

> Jimmie Coney set his putative jailhouse lover ablaze. Coney was incarcerated in the Dade Correctional Institution (DCI) serving a 420-year sentence for sexual battery, robbery, burglary with assault,

and attempted murder, all arising from the assault of a twelve-year old girl in 1976. While at DCI, Coney's homosexual lover, Patrick Southworth, spurned him. Coney obtained a key to Southworth's cell, entered at about 5 a.m., April 6, 1990, doused him with a flammable liquid, and set him afire. Southworth was burned over a large portion of his body, remained consciousness, and died the following day. No one saw the crime take place except Southworth, who awoke when the liquid was splashed on him. An empty "butt can" was found under Southworth's bunk, and a shoebox containing empty soda cans, tissue paper, and cell keys was found in a garbage container near the fire. The cans contained trace amounts of a flammable liquid and the keys fit Southworth's cell door.

A prison official testified at trial that Southworth told him shortly after he was burned that when he felt the liquid poured on him he looked up and saw James Coney. He said Coney set him on fire because he, Southworth, is a homosexual. The paramedic who treated the victim testified that Southworth told him that his lover set him on fire because he Southworth, left him. The prison officer who accompanied Southworth to the hospital testified that Southworth told him that Jimmie Coney did it because he, Southworth, would no longer have sex with him.

Inmate Young testified that a week before the murder Coney asked him to get some lacquer thinner from the prison auto shop. Young gave him the liquid in a soda can. Inmate Hoover testified that Coney and Southworth were often seen together touching and that Coney introduced Southworth to Hoover as "his boy," i.e., his homosexual lover. On the day before the murder, Coney seemed angry at

> Southworth and told Hoover, “I’m going to get that motherfucker…. I’m going to burn his ass.” Coney’s cellmate, inmate Jones, testified that at 4 a.m. on the night of the murder, Coney awoke, took the shoebox later found near the fire from under his bed, poured paint thinner from two soda cans into a ‘butt can,” left the cell, and returned later announcing, “I got the key.”

Coney v. State, 653 So.2d 1009, 1010-11 (Fla. 1995).

On appeal, Defendant raised the following grounds for relief:

> I.
>
> THE TRIAL COURT ERRED IN DENYING THE DEFENSE REQUEST FOR A JURY INSTRUCTION ON WEIGHING THE EVIDENCE OF DYING DECLARATIONS, IN VIOLATION OF THE CONFRONTATION CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.
>
> II.
>
> THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE INTO EVIDENCE OVER DEFENSE OBJECTION STATEMENTS MADE BY THE DECEDENT CONCERNING HIS OPINION AS TO THE MOTIVE OF [DEFENDANT], IN VIOLATION OF THE CONFRONTATION CLAUSES OF THE FLORIDA AND UNITED SATES CONSTITUTION.
>
> III.
>
> [DEFENDANT]’S INVOLUNTARY ABSENCE FROM A NUMBER OF CRUCIAL STAGES OF THE TRIAL REQUIRES REVERSAL OF HIS JUDGMENTS OF CONVICTION AND SENTENCE OF DEATH AS HIS ABSENCE THWARTED THE FUNDAMENTAL FAIRNESS OF THE PROCEEDINGS, IN VIOLATION OF

FLA.R.CRIM.P. 3.180 AND THE DUE PROCESS CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS.

IV.

THE TRIAL COURT ERRED IN RESTRICTING DEFENSE COUNSEL'S QUESTIONING OF PROSPECTIVE JURORS, IN VIOLATION OF [DEFENDANT]'S RIGHT TO A FAIR AND IMPARTIAL JURY GUARANTEED BY THE FLORIDA AND UNITED STATES CONSTITUTIONS.

V.

THE TRIAL COURT ERRED IN VARIOUS OTHER RULINGS MADE DURING THE COURSE OF THE TRIAL.

VI.

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO CALL THE MOTHER OF THE VICTIM OF [DEFENDANT]'S PRIOR VIOLENT FELONY OFFENSE TO THE TESTIFY AT THE PENALTY PHASE CONCERNING THE HORRORS SHE EXPERIENCED WHEN SHE ARRIVED HOME TO FIND HER DAUGHTER AFTER SHE HAD BEEN BRUTALLY RAPED AND STRANGLED, IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS, AND THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

VII.

THE PROSECUTOR'S ARGUMENT TO THE JURY DURING THE PENALTY PHASE REPEATEDLY URGING THEM TO CONSIDER THE IMPACT AND MESSAGE THEIR SENTENCE RECOMMENDATION WOULD HAVE ON THE COMMUNITY WAS IMPROPER AND INFLAMMATORY AND CONSTITUTED A NONSTATUTORY AGGRAVATING FACTOR, IN VIOLATION OF FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

VIII.

> [DEFENDANT]'S SENTENCE OF DEATH IS UNCONSTITUTIONAL AND DISPROPORTIONAL TO LIFE SENTENCES OF SIMILARLY SITUATED DEFENDANTS CONVICTED OF MURDERS INVOLVING DOMESTIC DISPUTES, IN VIOLATION OF FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.
>
> IX.
>
> THE TRIAL COURT ERRED IN IMPOSING THE DEATH PENALTY BASED UPON THE AGGRAVATING CIRCUMSTANCE THAT THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS, IN VIOLATION OF FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.
>
> X.
>
> THE TRIAL COURT ERRED IN FAILING TO FIND AND WEIGH ANY NONSTATUTORY MITIGATING CIRCUMSTANCES WHERE THE UNCONTROVERTED EVIDENCE PRESENTED AT THE PENALTY PHASE ESTABLISHED A SUBSTANTIAL NUMBER OF VALID NONSTATUTORY MITIGATING CIRCUMSTANCES, IN VIOLATION OF FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTIONS.

This Court affirmed Defendant's conviction and sentence in its opinion issued on January 5, 1995, after striking the great risk of death to many persons aggravator. *Coney v. State*, 653 So.2d at 1011 n. 2. Rehearing was denied on April 27, 1995.

On or about March 24, 1997, Defendant filed a motion for post-conviction relief reserving the right to amend the motion

following receipt of documents requested pursuant to Rule 3.852 of the Florida Rules of Criminal Procedure and Chapter 119 of the Florida Statutes. Defendant filed his Amended Motion to Vacate Judgments of Conviction and Sentence on or about August 5, 1999. (D.A.R. 21-155) In his Amended Motion to Vacate, Defendant raised the following claims, verbatim:

CLAIM I

> [DEFENDANT] IS BEING DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, BECAUSE ACCESS TO THE FILES AND RECORDS PERTAINING TO [DEFENDANT]'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA. STAT., AND RULE 3.852, FLORIDA RULES OF CRIMINAL PROCEDURE.

CLAIM II

> [DEFENDANT]'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION WERE VIOLATED BY COUNSEL'S DEFICIENCIES OR BEING RENDERED INEFFECTIVE BY STATE ACTION.

CLAIM III

> [DEFENDANT] WAS DENIED A FAIR ADVERSARIAL TESTING AT THE GUILT PHASE OF HIS CAPITAL TRIAL. EVIDENCE NOT PRESENTED TO [DEFENDANT]'S JURY DUE TO STATE MISCONDUCT

AND DEFENSE COUNSEL'S INEFFECTIVENESS, FAILURE BY DEFENSE COUNSEL TO PROPERLY INVESTIGATE AND TO CROSS-EXAMINE WITNESSES, AS WELL AS EVIDENCE THAT IS NEWLY DISCOVERED, PROVES THAT [DEFENDANT] IS INNOCENT. [DEFENDANT] WAS DENIED HIS RIGHT TO A FAIR TRIAL BECAUSE THE JURY DID NOT RECEIVE THE NECESSARY INFORMATION TO ASSESS HIS GUILT OR INNOCENCE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

CLAIM IV

[DEFENDANT] WAS DENIED HIS RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND MENTAL HEALTH EXPERTS AT THE GUILT/INNOCENCE AND SENTENCING PHASES OF HIS CAPITAL TRIAL, WHEN CRITICAL INFORMATION REGARDING [DEFENDANT]'S MENTAL STATE WAS NOT PROVIDED TO THE JURY AND JUDGE, ALL IN VIOLATION OF [DEFENDANT]'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.

CLAIM V

[DEFENDANT] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE MITIGATING EVIDENCE, FAILED TO PROVIDE THE MENTAL HEALTH EXPERTS WITH THIS MITIGATION, AND FAILED TO ADEQUATELY CHALLENGE THE STATE'S CASE AND TO OBJECT TO UNCONSTITUTIONAL JURY

INSTRUCTIONS AND TO ADEQUATELY OBJECT TO EIGHTH AMENDMENT ERROR. COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, [DEFENDANT]'S DEATH SENTENCE IS UNRELIABLE.

CLAIM VI

[DEFENDANT] WAS ABSENT FROM CRITICAL STATES OF THE TRIAL IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM VII

[DEFENDANT] IS DENIED HIS FIRST, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS [sic] TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION AND IS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN PURSUING HI POST-CONVICTION REMEDIES BECAUSE OF THE RULES PROHIBITING [DEFENDANT]'S LAWYERS FROM INTERVIEWING JURORS TO DETERMINE IF JUROR MISCONDUCT OR OTHER CONSTITUTIONAL ERROR WAS PRESENT.

CLAIM VIII

[DEFENDANT] IS DENIED HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND UNDER THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION BECAUSE EXECUTION BY ELECTROCUTION IS CRUEL AND/OR UNUSUAL PUNISHMENT.

CLAIM IX

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AS APPLIED IN THIS CASE, BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY.

CLAIM X

THE EIGHTH AMENDMENT WAS VIOLATED BY THE SENTENCING COURT'S REFUSAL TO FIND AND/OR CONSIDER THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD.

CLAIM XI

THE FLORIDA SUPREME COURT FAILED TO CONDUCT A CONSTITUTIONALLY ADEQUATE HARMLESS ERROR ANALYSIS ON DIRECT APPEAL AFTER STRIKING AN AGGRAVATING FACTOR.

CLAIM XII

[DEFENDANT]'S DEATH SENTENCE IS PREDICATED UPON AN AUTOMATIC AGGRAVATING CIRCUMSTANCE, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS. TO THE EXTENT TRIAL COUNSEL FAILED TO KNOW THE LAW, FAILED TO ARGUE EFFECTIVELY, AND/OR FAILED TO OBJECT, TRIAL COUNSEL WAS INEFFECTIVE.

CLAIM XIV

TRIAL COUNSEL WAS BURDENED BY AN ACTUAL CONFLICT OF INTEREST ADVERSELY AFFECTING COUNSEL'S REPRESENTATION, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

CLAIM XV

[DEFENDANT] IS INSANE TO BE EXECUTED.

CLAIM XVI

[DEFENDANT]'S SENTENCING JURY WAS MISLED BY THE COMMENTS, QUESTIONS, AND INSTRUCTIONS THAT UNCONSTITUTIONALLY AND INACCURATELY DILUTED THE JURY'S SENSE OF RESPONSIBILITY TOWARDS SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT PROPERLY OBJECTING.

CLAIM XVII

[DEFENDANT]'S TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE, SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

CLAIM XVIII

[DEFENDANT] IS BEING DENIED HIS RIGHT TO EFFECTIVE REPRESENTATION BY THE LACK OF FUNDING AVAILABLE TO FULLY INVESTIGATE AND PREPARE HIS POST-CONVICTION PLEADINGS, UNDERSTAFFING, AND THE UNPRECEDENTED WORKLOAD ON PRESENT COUNSEL AND STAFF, IN VIOLATION OF HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AND IN VIOLATION OF *SPALDING V. DUGGER.*

CLAIM XIX

[DEFENDANT]'S DEATH SENTENCE IS FUNDAMENTALLY UNFAIR AND UNRELIABLE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS DUE TO THE STATE'S INTRODUCTION OF NON-STATUTORY AGGRAVATING FACTORS AND THE STATE'S ARGUMENTS UPON NON-STATUTORY AGGRAVATING FACTORS. DEFENSE COUNSEL'S FAILURE TO OBJECT OR ARGUE EFFECTIVELY CONSTITUTED INEFFECTIVE ASSISTANCE.

CLAIM XX

[DEFENDANT] WAS DENIED A FAIR AND IMPARTIAL TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE ANALOGOUS PROTECTIONS WITHIN THE FLORIDA CONSTITUTION, BECAUSE THE TRIAL COURT PERMITTED THE STATE TO INTRODUCE GRUESOME AND SHOCKING PHOTOGRAPHS.

CLAIM XXI

> [DEFENDANT]'S GUILTY VERDICT AND JURY RECOMMENDED DEATH SENTENCE ARE CONSTITUTIONALLY UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, BECAUSE THE TRIAL COURT ERRONEOUSLY INSTRUCTED [DEFENDANT]'S JURY ON THE STANDARD BY WHICH THEY MUST JUDGE EXPERT TESTIMONY. THE JURY MADE DECISIONS OF LAW THAT SHOULD HAVE BEEN WITH THE PROVINCE OF THE COURT.

CLAIM XXII

> [DEFENDANT] WAS DENIED HIS RIGHT TO A FAIR TRIAL AND SENTENCING BEFORE AN IMPARTIAL JUDGE IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS. THE IMPROPER CONDUCT OF JUDGE SMITH CREATED A BIAS IN FAVOR OF THE STATE AND RENDERED RULINGS CONTRARY TO THE LAW.

(R. 21-155) The lower court conducted a hearing pursuant to *Huff v. State*, 762 So. 2d 476 (Fla. 2000). (D.A.R. 372-73) After hearing argument, the lower court granted an evidentiary hearing on claims IV and V, and, to the extent it bore on the issues raised in claims IV and V, the conflict of interest claim in claim XIV. The lower court conducted a three day evidentiary hearing on December 13-15, 2000. (D.A.R. 580-693, 694-826, 827-933, 934-1060, 1061-1271)

At the evidentiary hearing, Defendant's trial counsel, Manuel Casabielle, testified that he was employed at the Dade County State Attorney's Office for three years prior to working in a private firm that specialized in criminal

defense. (R. 450-01, 586) Mr. Casabielle further testified he had practiced as a criminal defense lawyer for fourteen years, formed his own criminal defense firm with a partner and later opened a solo practice. (R. 451, 587) Mr. Casabielle had tried between 150 and 200 criminal trials in his career, including approximately four capital cases. (R. 587) Prior to Defendant's case, Mr. Casabielle had tried a capital case to the penalty phase, as well as a second degree murder case.[2] (R. 451-54, 587)

With regard to Defendant's case, Mr. Casabielle stated he interviewed approximately 61 witnesses to investigate Defendant's case. (R. 585) Mr. Casabielle also stated that at the time of trial, he was very familiar with issues relating to his clients' competency and mental health and that he remained watchful for any signs of mental infirmity or incompetency and took all appropriate action whenever he noted such signs. (R. 481) He further stated that he never observed any signs of mental incompetency or infirmity in Defendant during the course of his case. (R. 481) Nonetheless, Mr.

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[2] Although in its order the lower court states that Mr. Casabielle acknowledged that Defendant's case was his first capital case, Mr. Casabielle's testimony at the evidentiary hearing was that it was "possible that [Defendant]'s case was [his] first capital case tried through to the penalty phase." (R. 452, 1328)

Casabielle testified that prior to trial, he obtained a court order for a psychological evaluation of Defendant and contacted Dr. Castiello, a clinical psychologist, to examine Defendant toward that end. (R 592) Although he had no recollection whether Dr. Castiello actually examined Defendant, Mr. Casabielle's attorney file reflected a letter to Dr. Castiello requesting an evaluation and enclosing the court order. (R. 593) Mr. Casabielle also stated that it is common practice for him to retain a mental health expert for an "exploratory examination" to see whether further examination will develop positive mitigating evidence for his client. (R. 594-95) Mr. Casabielle explained that he prefers to keep such exploratory examinations his work product and would often instruct the retained expert to refrain from generating a report. (R. 595, 541) Mr. Casabielle's attorney file in the instant case did not contain a report by Dr. Castiello. (R. 595)

Additionally, Mr. Casabielle enlisted the services of two other mental health experts, Drs. Mutter and David, to examine Defendant for mental health mitigation prior to the penalty phase, as well as contacted Defendant's friends and family, for mitigation evidence. (R. 612-13) Mr. Casabielle also testified that he made a strategic decision to omit

Defendant's prison records from the documents given to Drs. Mutter and David because the prison records contained damaging reports of Defendant malingering and manipulating the prison medical facilities, sexually assaulting other inmates and other anti-social behavior. (R. 598) Both Dr. Mutter and Dr. Hyde were unable to provide any mitigating evidence of psychiatric or neurological impairment. (R. 603-11) Hence, Mr. Casabielle made another strategic decision to seal such records to prevent the State from gaining access to the damaging reports finding Defendant had no mental impairment. (R. 606-10) Mr. Casabielle testified that he explained to Defendant's family that he needed any mitigating evidence concerning Defendant's life to save Defendant from the death penalty and presented such evidence at trial. (R. 613)

Dr. Noble David testified at the evidentiary hearing regarding his examination of Defendant prior to Defendant's penalty phase. (R. 632-51) Dr. David, a clinical neurologist, testified that Mr. Casabielle retained him to examine Defendant for the purpose of evaluating Defendant's neurological functioning and the diagnosis of any neurological disease or impairment that could provide mitigation for Defendant's crime. (R. 635, 645) However, Dr. David found no evidence of neurologic disease or history that suggested

significant neurologic impairment. (R. 636) Similarly, Dr. Mutter, testified Mr. Casabielle retained him to perform a psychiatric evaluation of Defendant for the purpose of determining whether any mitigating evidence existed that Defendant suffered from any mental disturbance or impairment. (R. 653) Dr. Mutter performed an hour and fifteen minute examination of Defendant and conducted an extensive interview of Defendant but found no evidence of brain damage or major mental disorder. (R. 652, 667-70) Defendant inquired of neither Dr. David or Dr. Mutter whether or how their findings would have changed if presented with Defendant's records from prison or prior court proceedings.

Defendant also presented the testimony of Dr. Thomas Hyde, who performed a neurologic evaluation and interview of Defendant. (R. 705-06) Dr. Hyde reviewed Defendant's prison records that Defendant complains on post-conviction were improperly withheld from his mental health experts at trial. (R. 706, 724, 731, 742-45). Dr. Hyde opined that Defendant had neurologic abnormalities and major psychiatric illness which amounted to mental mitigation evidence. (R. 706) However, Dr. Hyde conceded that he found no indicia of brain damage from the tests that he administered to Defendant but rather based his opinion that Defendant had brain damage

exclusively upon Dr. Eisenstein's findings. (R. 758) Dr. Hyde further testified that nearly all the people in prison who have committed serious crimes necessarily suffer from impulse control problems and therefore by definition are brain damaged. (R. 755-56) He also acknowledged that Defendant's prison records reveal a pattern of manipulative behavior. Specifically, Dr. Hyde conceded that the records reflected Defendant: faked a suicide attempt by alleging he swallowed razor blades and routinely malingered or exaggerated symptoms of illness to gain access to the hospital ward; blew up his toilet in order to leave his jail cell; and was frequently accused of sexually assaulting other inmates. (R. 724, 731, 742-45)

Next, Defendant presented the testimony of Dr. Hyman Eisentstein. Dr. Eisenstein testified he administered a neuropsychological examination to Defendant and reviewed the contested background material, which included Defendant's prison records. (R. 846) Based on his examination and review of Defendant's prison and prior court proceeding records, Dr. Eisenstein opined that Defendant "was suffering from extreme mental and/or emotional impairment. . .at the time of the commission of the crime." (R. 874) Despite Defendant's denial of having committed the crime, Dr. Eisenstein testified

that he believed Defendant was under extreme mental or emotional disturbance at the time of the murder because of Defendant's "mental capacity, his emotional capacity, his background, [and] his current brain behavior function." (R. 852)

In rebuttal, the State presented the testimony of Dr. Jane Ansley, a psychologist specializing in neuropsychology. (R. 1161) Dr. Ansley testified her evaluation of Defendant demonstrated that Defendant suffered from no neurological impairment or brain damage. (R. 1170-75) She also testified that Defendant's prison records are consistent with normal neurological functioning and do not suggest any impairment. (R. 1229). Further, Dr. Ansley explained that Defendant's slow methodical nature most likely leads others to mistakenly assess Defendant as mentally challenged. (R. 1174) Dr. Ansley also testified that nothing in the records available to Mr. Casabielle at the time of Defendant's trial suggested a need for a neuropsychological evaluation. (R. 1228).

Neither Defendant nor the State presented the testimony of Dr. Castiello, who was contacted by Mr. Casabielle to perform an evaluation of Defendant prior to his trial. (R. 928) Rather, the parties agreed to stipulate that Dr. Castiello would have testified that "he has no independent

recollection of meeting [Defendant] or talking to Mr. Casabielle, and that. . .after a search of his files, he can find no record of the case." (R. 928)

Defendant and the State submitted written post-evidentiary hearing memoranda to the lower court. (R. 1273-98, 1301-24) After review of the parties respective memoranda, the lower court granted relief on claims IV and V of Defendant's 3.850 motion. (R 1328-35) Specifically, the lower court found that Mr. Casabielle was deficient for: (1) failed to discuss the death penalty with Defendant; (2) failed to talk to Defendant's prior counsel or review court records from Defendant's prior cases to determine if any information existed that bore on Defendant's mental status; (3) hastily obtained only fragmented testimony from Defendant's family and friends regarding Defendant's upbringing and childhood; (4) failed to have Defendant examined by a mental health expert prior to trial; (5) failed to attend Defendant's mental health evaluations or "explain to the doctors the meaning of statutory mitigating factors under the law"; and (6) failed to provide Defendant's mental health experts with Defendant's records from prison and prior court proceedings. The lower court acknowledged that the findings of Drs. Hyde and Eisenstein, both of whom were retained only on post-conviction

and did not evaluate Defendant at the time of trial, were forcefully challenged on cross-examination. (R. 1335) Additionally, the lower court found that the State "was able to point out evidence of the witness' bias and information about the defendant which may not have come to light had these witnesses not been called to testify." (R. 1335) However, the lower court refused to judge the dueling credibility of the expert witnesses who testified or weigh the impact of putative testimony had it actually been presented at trial. Instead, the court simply found that the Drs. Hyde and Esienstein's testimony demonstrated that Defendant was prejudiced for defense counsel's failure to investigate and present the mitigating mental health evidence furnished by their opinions.(R. 1335)

The lower court denied Defendant's other twenty-two claims. This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court erroneously determined that a new penalty phase proceeding before a new jury was required. Although the lower court enumerated various alleged deficiencies of trial counsel, it failed to provide any record support for such deficiencies or link any of the deficiencies to specific prejudice, as required by *Strickland*. Furthermore, the lower court eschewed its proper post-conviction judicial function of evaluating the credibility of the mental health experts and weighing the evidence presented at the evidentiary hearing.

Hence, the lower court's analysis of Defendant's claims was fundamentally flawed and a new penalty phase proceeding is unwarranted. Moreover, given the especially aggravated murder of the victim, the presentation of Defendant's heavily rebutted post-conviction expert testimony that he suffered from neurologic impairment would not have yielded a reasonable probability that Defendant's sentence would have been different.

ARGUMENT

THE LOWER COURT ERRED IN DETERMINING THAT A NEW PENALTY PHASE PROCEEDING IS WARRANTED.

As noted above, the lower court determined that a new penalty phase proceeding before a new jury was required based on its conclusion that counsel was ineffective in the penalty phase for failing to adequately investigate and present mitigation evidence. (R. 1327) In its order, the lower court ruled that counsel was deficient for failing to have Defendant evaluated by a mental health expert prior to trial and provide such expert with Defendant's prison records and records from Defendant's prior cases. (R. 1328-30) Based upon the testimony of Defendant's post-conviction experts that Defendant suffered from mental impairment, the lower court then simply found prejudice without analyzing the *impact* of any of the alleged deficiencies or connecting the alleged deficiencies to specific harm. Indeed, the lower court's order never ties any of its findings of deficiency to specific prejudice, as required by *Strickland*. Furthermore, the lower court eschewed evaluating the credibility of the experts and the evidence presented at the evidentiary hearing, erroneously positing instead that "it is peculiarly within the province of the jury to sift through the evidence, assess the credibility

of the witnesses, and determine which evidence is most persuasive." (R. 1335)

Hence, the lower court's analysis of Defendant's claims was fundamentally flawed and a new penalty phase proceeding is unwarranted.[3] Mr. Casabielle did investigate and explore possible mental health mitigation and had Defendant examined by 2-3 mental health professionals.[4] Mr. Casabielle unequivocally testified he made a strategic decision to withhold Defendant's records, which reflected a damaging history of Defendant's manipulative and sexually violent behavior, from the experts' review to prevent damaging cross-examination by the State regarding such history. (R. 598-99) Thus, there is no record evidence to support the lower court's finding that defense counsel was deficient. Moreover, neither Drs. Mutter or David testified that the documents Defendant

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[3] The standard of review of the lower court's findings of both the performance and prejudice prongs under *Strickland* at evidentiary hearings on post-conviction are mixed questions of law and fact and deference on appeal is given to the lower court's factual findings. *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999).

[4] At trial Mr. Casabielle advised the trial court Defendant had been examined by a psychologist prior to trial and his files reflected numerous consultation with Dr. Castiello toward that end; however, Dr. Castiello nor Mr. Casabielle had specific recollection that Defendant was examined by Dr. Castiello. (R. 411, 928) Nonetheless, the record is clear that both Drs. Mutter and David examined Defendant prior to the penalty phase.

claims on post-conviction were improperly withheld would have changed their opinion that Defendant suffered from no neurological impairment or significant mental disorder. (R. 632-73) Furthermore, given the especially gruesome and slow death of the victim, resulting in the HAC aggravator, as well as the other aggravators (that the murder was committed by a person under sentence of imprisonment, that Defendant had previously been convicted of a violent felony, and that the murder was committed during the course of an arson) the presentation of heavily rebutted expert testimony that Defendant suffered from neurologic impairment would not have yielded a reasonable probability that Defendant's sentence would have been different.

A. THE LOWER COURT ERRED IN FINDING DEFENSE COUNSEL DEFICIENT.

The lower court set forth a number of findings in its order pertaining to Mr. Casabielle's alleged deficiency. Specifically, the lower court's order found that Mr. Casabielle: (1) failed to discuss the death penalty with Defendant; (2) failed to talk to Defendant's prior counsel or review court records from Defendant's prior cases to determine if any information existed which bore on Defendant's mental status; (3) hastily obtained only fragmented testimony from

Defendant's family and friends regarding Defendant's upbringing and childhood; (4) failed to have Defendant examined by a mental health expert prior to trial; (5) failed to attend Defendant's mental health evaluations or "explain to the doctors the meaning of statutory mitigating factors under the law"; and (6) failed to provide Defendant's mental health experts with Defendant's records from prison and prior court proceedings. (R. 1327-33) However, a review of the record and the transcripts from the evidentiary hearing reveals that the lower court's findings of deficiency were not only illusory but never connected to any prejudice accruing to Defendant.

(1) Alleged Deficiency for Failing to Discuss the Death Penalty with Defendant

The lower court criticizes Mr. Casabielle for failing to discuss the death penalty with Defendant prior to the verdict of guilty. (R. 1328) Nonetheless, the court acknowledged that this was due to Defendant's own refusal to do so. *Id.* At the hearing, Mr. Casabielle explained that he forced discussion concerning the potential of the death penalty as far as the boundaries of a functional relationship with his client would permit. (R. 589) In fact, he did "encourage [Defendant] to realize that that's a potential. That that's a possibility" and attempted to talk about the ramifications of such a

possibility with Defendant. (R. 589) However, Mr. Casabielle further explained that compelling Defendant to discuss the death penalty had to be weighed against jeopardizing his relationship with Defendant, which was crucial for preparation of both the penalty and guilt phases:

> But there comes a point in the discussions with your client where one gets a feeling that if you push a certain issue you will lose the ability to communicate with him on other issues. And more particularly, what I'm referring to is somebody doesn't want to talk about the death penalty, you don't push it.
>
> You bring it up, you talk to them about it, but you don't push it. Because that will hurt you in terms of your relationship with him during your presentation – preparation of presentation of phase one.

(R. 589) Hence, Mr. Casabielle did properly advise Defendant of the possibility of receiving the death penalty and can not be deemed deficient for Defendant's adamant refusal to engage in further dialogue with counsel regarding same. *Porter v. State*, 26 Fla. L. Weekly S321 (Fla. May 3, 2001)(holding counsel could not be deemed deficient for failing to investigate and present mitigation evidence in the penalty phase when defendant himself limited the available mitigating evidence by refusing to cooperate with counsel); *Waterhouse v. State*, 26 Fla. L. Weekly S325 (Fla. May 31, 2001)(where trial counsel's failure to present death penalty mitigating evidence

and to retain a mental health expert to evaluate defendant was not ineffective when only reason mitigating evidence was not presented was defendant's own refusal to meet with mental health expert and cooperate with counsel).

Thus, the lower court erred in finding Mr. Casabielle deficient for Defendant’s refusal to fully discuss the possibility of the death penalty with his attorney.

(2) Counsel’s Alleged Deficiency for Failing to Review Prior Court Records.

The lower court also found Mr. Casabielle deficient for failing to review court records and documents from Defendant’s prior cases to look for any information that related to Defendant’s mental status. (R. 1328) However, Mr. Casabielle testified at the evidentiary hearing that while he did not have a clear recollection of “what exactly [he] did to prepare” for Defendant’s case, his normal procedure included investigation of his clients’ prior convictions. (R. 464) Mr. Casabielle acknowledged that he had not reviewed a hand-written 3.850 motion Defendant filed pro se alleging ineffective assistance of counsel in his 1976 conviction of rape; however, Defendant’s motion chiefly involved allegations

of police misconduct and did not pertain to any issue related to Defendant's mental health. (R. 468-70) Mr. Casabielle also acknowledged that he did not recall reviewing the court opinions from his prior convictions, one of which contained a footnote concerning Defendant's mental state of "euphoria." (R. 477) Nonetheless, Mr. Casabielle also testified that he is vigilantly attentive to his clients' mental status and moves for mental health evaluations whenever he observes any signs of mental infirmity and that he did not observe any such signs in Defendant. (R. 478) He further testified that he did consider Defendant's mental status in preparation for his trial and whether Defendant had been incompetent or competent in a prior proceeding would not have obviated his consideration of Defendant's competency during the instant crime or court proceedings. (R. 478) As counsel properly considered Defendant's mental state, as well as mental status for purposes of mitigation and evaluation by mental health experts, he cannot be deemed deficient. To the extent that counsel was deficient for failing to examine certain court documents from Defendant's prior cases, Defendant did not establish nor did the lower court find any prejudice flowing from such deficiency, as discussed in subsection B, *supra*.

(3) Alleged Deficiency for "Hastily" Obtained Testimony Concerning Defendant's background and childhood

Next, the lower court cryptically found counsel deficient for only hastily obtaining "fragmented testimony" of Defendant's family and friends concerning Defendant's background and childhood. (R. 1332) However, Mr. Casabielle testified at the hearing that he spoke with Defendant's family members at length regarding any potential mitigation evidence for Defendant's penalty phase. Further, Mr. Casabielle stated he emphatically impressed upon Defendant's family members the importance of any information relevant to mitigation. Mr. Casabielle recalled explaining the various mitigating factors that could be considered, as well as advising the family that their input was a matter of Defendant's life or death:

> What you do is you talk to them in general terms, and you try to communicate to them not as a lawyers, but as human beings. You ask them what can you tell me that Jimmie has done good, and what you can me that has happened to him that has been bad. That's how you initiate conversations with human beings. That's basically what I did.
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> * * *
>
> Absolutely it was important. I made every effort that I could to make them realize that it was important for me to have this information so I could try an save Jimmie's life.

(R. 613-14) Members of Defendant's family sat down with Mr. Casabielle at counsel's request and responded to extensive

inquiry into various aspects of Defendant's childhood. (R. 567-70) Mr. Casabielle testified that he discussed with Defendant's family Defendant's poverty, contraction of polio, incidents in which Defendant was subjected to corporal punishment by his grandparents, and abused by his step-father. (R. 570-72) Merely, because his family members' alleged account of Defendant's childhood has grown in severity on post-conviction since their discussion with Mr. Casabielle in preparation for the penalty phase does not establish Mr. Casabielle was somehow deficient. *See Correll v. Dugger*, 558 So. 2d 422, 425 (Fla. 1990)(where defendant asserted that counsel was ineffective for failing to introduce available evidence of a heavy drug use, this Court held counsel was not deficient when Defendant and his mental health experts and had portrayed at the time of trial that defendant only experimented with drugs and was not a heavy user). As defense counsel did interview Defendant's family extensively regarding potential mitigation of Defendant's traumatic childhood, "good deeds," and other aspects of Defendant's life, he cannot be deemed deficient for the inadequately pursuing potential mitigating evidence. *Strickland.*

Furthermore, Defendant presented absolutely no evidence pertaining to his childhood at the evidentiary hearing that

defense counsel allegedly failed to present at trial. In fact, though Defendant's mother, aunt, sister, girlfriend, and another family member were sitting in the courtroom during the hearing, Defendant did not call any of them to testify.[5] Rather than producing a single witness at the hearing to attest to Defendant's alleged difficult childhood and subject such witnesses to cross-examination, Defendant attempted to backdoor the testimony of such witnesses through affidavits presented to Drs. Eisenstein and Hyde. (R. 807-10). Nonetheless, as the State did not stipulate to the admission of these affidavits, the their contents were inadmissible hearsay and could not be treated as substantive evidence. *See Routly v. State,* 590 So. 2d 397, 401 (Fla. 1991)(holding that absent stipulation, affidavits of defendant's family members and former teacher submitted at 3.850 hearing cannot be considered as substantive evidence).

Despite Defendant's failure to produce any additional evidence of his difficult background that counsel allegedly failed to present at trial, the lower court found counsel deficient for inadequately investigating and presenting

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[5] Indeed, collateral counsel disingenuously denied having "any idea who any of the people" in the courtroom were and objected to the court inquiring. (R. 959)

Defendant's family history. The lower court's order conspicuously lacks any finding of alleged evidence not presented at trial and only posits the unsubstantiated conclusion that the history that defense counsel actually presented was "fragmented" and "hastily obtained." (R. 1332) However, [w]hen ineffective assistance of counsel is asserted, the *burden is on the appellant to specifically allege and establish* grounds for relief and to establish whether such grounds resulted in prejudice to him. *Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983)(*citing Meeks v. State*, 382 So. 2d 673, 675 (Fla. 1980))(emphasis added) Thus, the lower court erred in failing to hold Defendant to his burden to prove that counsel was deficient for failing to present mitigating evidence of his difficult family history.

(4) Alleged Deficiency for Failing to Have Defendant Evaluated Prior to Trial

The court's order focused primarily on Mr. Casabielle's alleged failure to have Defendant evaluated by a mental health expert prior to trial. It is important to note at the outset that, in fact, Mr. Casabielle unequivocally advised the court

at the time of Defendant's trial that Defendant had been evaluated prior to trial. (D.A.R. 409-11) Mr. Casabielle's attorney files reflect several telephone conversations and correspondence with Dr. Castiello a year prior to date of Defendant's trial toward that end. (R. 592-55, 930) Further, Mr. Casabielle testified that he frequently utilizes "exploratory examinations" of experts whereby an expert privately gives a client an initial exploratory examination to determine whether mental health issues exist worth further investigating and developing. (R. 595) For the purposes of such exploratory examinations, the expert is specifically directed not to generate a report. (R. 595) Defendant's file included a letter to Dr. Castiello indicating Mr. Casabielle's desire that Defendant's examination remain private and not memorialized but rather remain Mr. Casabielle's "work product."[6] (R. 595) Hence, Mr. Casabielle testified that his attorney file may not reflect a report by Dr. Castiello simply because none was generated at his request. (R. 595) Nonetheless, Mr. Casabielle had no direct recollection of

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[6] Mr. Casabielle's file also contained a notation dated one day after the guilt phase verdict indicating that Dr. Castiello would not perform an evaluation because the court order provided insufficient funds for his services. (R. 498) However, it is unknown whether this referred to an initial examination or a follow-up examination to an initial "exploratory examination."

whether Dr. Castiello actually performed an evaluation and had no report from Dr. Castiello in his files.[7] In the light most favorable to Defendant, the record supports conflicting indicia as to whether Dr. Castiello actually evaluated Defendant. As previously stated, Defendant has the burden to establish the facts that he alleges form the basis for a claim of ineffective assistance of counsel. *Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983). Thus, with only conflicting circumstantial evidence that he may not have been evaluated by Dr. Castiello prior to trial, Defendant failed to meet his burden that counsel was deficient in such regard.

Moreover, as the lower court found the issue of Defendant's evaluation by a mental health expert relevant only to the penalty phase, it is irrelevant whether Defendant was evaluated prior to the guilt phase or not. Indeed, the record is clear that Mr. Casabielle had Defendant evaluated by Drs. Mutter and David prior to, and in preparation for, the penalty phase to investigate possible mental mitigation. Furthermore, Both Dr. Mutter and Dr. David testified that they had ample

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[7] Additionally, while Defendant did not present any testimony from Dr. Castiello at the evidentiary hearing, the parties stipulated that Dr. Castiello would testify that he had no independent recollection of meeting Defendant or speaking with Mr. Casabielle and found no record of Defendant's case in his files. (R. 928)

time in which to administer a an appropriate and full evaluation of Defendant. (R. 660-62, 652, 645) And Mr. Casabielle testified that his decision to omit Defendant's records from the experts' reviews was based upon his strategy to prevent damaging cross-examination and not due to any time constraint or lack of preparation. (R. 598) Defendant did not adduce any testimony or evidence at the evidentiary hearing that Drs. Mutter and David's evaluations of Defendant were impeded or constrained in any manner by Mr. Casabielle's timing of same. As counsel explored possible mental health mitigation and secured at least two separate experts to evaluate Defendant toward that end, counsel cannot be deemed deficient for failing to do what he, in fact, did. *Strickland*.

(5) Alleged Deficiency for Failing to Attend Defendant's Evaluation and Explain the Meaning of Statutory Mitigation to his Mental Health Experts

Next, the lower court held that counsel was deficient for failing to attend Defendant's mental health evaluations or "explain to the doctors the meaning of statutory mitigating factors under the law." (R. 1329-31) Dr. Noble David, the neurologist that examined Defendant at the time of trial, testified at the hearing that he has been performing clinical neurological exams for the past 38 years. (R.633) Prior to

evaluating Defendant, Dr. David had previously examined and testified in capital cases regarding defendants' mental status as it pertained to both guilt and mitigation issues. (R. 644) Dr. David further testified that at the time of Defendant's evaluation, he understood it was after Defendant's conviction and he was examining Defendant for any signs or symptoms of brain damage that could be a mitigating factor:

> Well, I think it was to determine whether or not [Defendant] harbored neurological disease that might impair his appreciation of his circumstances or his recollection of events in such a way to mitigate the gravity of his act that he was convicted of.

(R. 645) He also testified that because of his extensive experience performing such evaluations, he does not need an attorney to advise him of what tests he should administer to a patient or what to look for. (R. 643) Dr. David stated he had ample time in which to give Defendant a full and competent evaluation and was satisfied within a reasonable degree of medical certainty that Defendant suffered no neurologic impairment. (R. 645-50) Defendant adduced no testimony from either Dr. David or Dr. Mutter that Mr. Casabielle's presence or advice would have altered their opinions. Similarly, Dr. Charles Mutter testified that he had performed more than 15,000 evaluations of jail inmates and performed 10-12 evaluations of defendants in death penalty cases involving

mitigation issues. (R. 657, 660) Dr. Mutter also understood that his evaluation was after Defendant's guilty verdict at trial and his evaluation of Defendant was for the purpose of finding mitigating circumstances. (R. 653) Mr. Cassabielle's election to not attend the evaluations and reliance upon Drs. David and Mutter, two extremely experienced experts, to understand their professional function are simply not actions "outside the wide range of professionally competent assistance." *Occhicone v. State,* 768 SO. 2d 1037, 1049 (Fla. 2000)*; Rose v. State*, 675 So.2d 567, 571 (Fla.1996) (quoting *Bolender v. Singletary*, 16 F.3d 1547, 1556-57 (11th Cir.1994)); *see also Hildwin v. Dugger*, 654 So.2d 107, 109 (Fla.1995). Thus, the lower court erred in finding counsel deficient.

(6) Alleged Deficiency for Failing to Provide Defendant's Prison Records to his Mental Health Experts

Finally, the lower court found counsel deficient for failing to provide Defendant's mental health experts with his prison records and documents from prior court proceedings. At the evidentiary hearing, Mr. Casabielle explained that he made a strategic decision to omit such records, which contained very damaging evidence of Defendant's continued history of manipulation and violent sexual assault, from the experts'

review. (R. 597-99). Mr. Casabielle further explained that the most damaging impact of Defendant's penalty phase was the testimony of his previous rape victim and that additional testimony of Defendant's continued violent sexual behavior detailed in his prison records would have been "devastating." (R. 598). Clearly if Drs. Mutter or David reviewed Defendant's prison records and then testified during the penalty phase, the jury would hear about Defendant's continued sexual aggression in prison. (R. 596-98) Thus, Mr. Casabielle made a strategic decision to omit such records from the documents reviewed by Drs. Mutter and David in order to avoid exposing the jury to Defendant's sexually predatory behavior and pattern of manipulation in prison. Hence, Mr. Casabielle's strategic decision to omit Defendant's damaging prison records from review by mental health experts cannot be deemed deficient. *See Van Poyck v. State*, 694 So. 2d (Fla. 1997)(where defendant's prison records contained damaging information, including disciplinary reports for escape, defense counsel was not deficient for strategic decision to omit such records from the mental health professional's review of defendant's case). Thus, the lower court erred in finding Mr. Casabielle deficient for failing to turn over Defendant's prison records and prior court proceeding documents to his

mental health experts when the decision was based on strategically preventing the State from eliciting damaging evidence on cross-examination of such experts.

Not only were its findings of deficiency hollow and without record support, but the lower court failed to analyze whether the alleged deficiencies evinced actual prejudice to Defendant, as dictated by *Strickland.*

B. THE LOWER COURT ERRED IN MAKING A BLANKET FINDING OF PREJUDICE.

The lower court's order conspicuously lacks any analysis of whether its enumerated findings of deficiency actually yielded prejudice to Defendant such that a reasonable probability exists that the outcome of Defendant's sentencing proceeding would have been different but for the alleged deficiencies, as required by *Strickland.* Indeed, there is a veritable disconnect between the court's finding of the deficiencies discussed in section A, *infra,* and its discussion of the alleged prejudice accruing to Defendant from defense counsel's alleged failure to investigate and present the mental mitigation evidence about which Drs. Eisenstein and Hyde testified. Further, assuming arguendo that counsel was deficient for the six actions listed in section A, Defendant

failed to establish and the lower court failed to find any nexus between such deficiencies and consequential prejudice.

(1) No Prejudice Was Established From Counsel's Alleged Deficiency for Failing to Discuss the Death Penalty with Defendant

Indeed, there exists no record support for the lower court's finding of prejudice flowing from the six deficiencies enumerated in its order. Although the lower court speciously found Mr. Casabielle deficient for failing to discuss the death penalty with Defendant, collateral counsel failed to demonstrate how Defendant was prejudiced for such alleged deficiency. Further, although the lower court found Mr. Casabielle deficient for failing to discuss the death penalty with Defendant, no findings were made and no evidence supported that further discussion would have revealed any more mitigating information that Mr. Casabielle could have presented. Defendant denied guilt to the mental health experts who examined him and rejected many of Mr. Casabielle's attempts to discuss the death penalty in greater detail. (R. 663, 589) Nonetheless, Mr. Casabielle still had Defendant examined by at least two mental health experts for mitigation and inquired of Defendant's family and friends concerning Defendant's childhood and background to investigate possible mitigation. (R. 555) Mr. Casabielle searched for positive

aspects of Defendant's character, as well as circumstances and evidence of difficult childhood and upbringing, that could be presented as potential mitigation. (R. 554-56) As Mr. Casabielle competently prepared for the penalty phase and Defendant failed to demonstrate how further discussions with an uncooperative Defendant would have yielded a different result, no prejudice was established. *Strickland*.

(2) No Prejudice was Established from Counsel's Alleged Deficiency for Failing to Review Prior Court Records

Similarly, collateral counsel failed to demonstrate how prejudice accrued to Defendant from Mr. Casabielle's alleged failure to talk to Defendant's prior counsel or review court records from Defendant's prior cases to determine if any information existed which bore on Defendant's mental status. Mr. Casabielle explained that he was vigilantly watchful of any signs of mental incompetence or infirmity in Defendant and would have remained so regardless of what prior counsel advised:

> I've had clients that have been found incompetent and go away for six months and they come back competent. I've had clients that you couldn't talk to who go away and because of the drugs that they are given you can talk to. I look at my client at the moment that I am dealing with him. If I see any

> signs that concern me I will take the appropriate action, such as file the necessary motions. I did not see that in this case.

(R. 480-81) Counsel retained mental health experts to investigate potential mental health mitigators and explored possible signs of Defendant's mental health issues with Defendant and his family, including the sexually violent nature of his criminal history. (R. 555-56) Defendant failed to adduce what Mr. Casabielle should have done and failed to do as a result of not discussing Defendant's previous cases with prior defense counsel. Indeed, the information contained in the disputed records do not concern any issue of Defendant's mental health. Collateral counsel cross-examined Mr. Casabielle on a 3.850 motion, which Defendant filed in his 1976 case, that dealt with Defendant's accusations that he was beaten and verbally abused with racial epithets by the police officers who investigated his 1976 rape case. (R. 471-73) While the gravamen of the accusations contained in Defendant's motion certainly suggested that Defendant was coerced into confessing to the 1976, Defendant admitted that he was guilty of such rape to Dr. Mutter in his mental health examination for the instant case. (R. 663) However, no connection was made between Defendant's claim of a coerced confession and any issue bearing on Defendant's mental health. Moreover, any

minimal impact such evidence may have hadsurely would have been deminimus in the context of the violent and horrific context of the 1976 rape in which Defendant raped, strangled and left for dead a 12 year old girl and for which Defendant was convicted, as well as the other aggravators proven in Defendant's case. (D.A.R. 2709-18) Hence, Defendant failed to adduce any prejudice as a result from Mr. Casabiell's failure to review his prior cases or discuss same with previous defense counsel. *See Breedlove v. State*, 692 So. 2d 874 (Fla. 1997)(holding that even if the trial court had found mitigating circumstances in additional testimony from lay witnesses, the three aggravating factors previously affirmed eclipsed whatever mitigation testimony of defendant's friends and family could provide.); *Tompkins v. Dugger*, 549 So. 2d 1370, 1373 (Fla. 1989).

(3) No Prejudice Accrued to Defendant from Counsel's Alleged Deficiency for "Hastily" Obtained Testimony Concerning Defendant's background and childhood

Likewise, Defendant failed to demonstrate what prejudice he suffered from Mr. Casabiell's allegedly hasty and fragmented investigation of Defendant's upbringing and childhood via family and friends. Specifically, Defendant failed to establish and the lower court failed to find precisely how the testimony presented at trial concerning

Defendant's childhood was, in fact, "fragmented" or "hastily obtained."

On the contrary, through extensive testimony of several witnesses, Mr. Casabielle chronicled Defendant's background with both depth and breadth. Mr. Casabielle presented the testimony of Peal May Sanford, Defendant's mother, who testified at length about: the very poor household in which Defendant grew up; the small, two-bedroom house in which Defendant and eight others lived; how she left Defendant with her parents in Georgia when she moved to Miami but brought her other children with her; how Defendant suffered from a severe case of polio as a child that left him with a permanent limp; how his step-father accepted the other children but rejected Defendant, verbally abused Defendant and one time physically struck him; how after Defendant eventually moved in with his family in Miami he helped around the house and cared for the other children; how he got his sister off drugs and saved his step-father from drowning despite the mistreatment he suffered at the hands of his stepfather; and how Defendant found religion. (D.A.R. 2736-55) Mr. Casabielle also presented the testimony of Jessie Coney, Defendant's uncle. (D.A.R. 2780) Jessie Coney also testified concerning the poor, stark conditions of Defendant's childhood, which included picking

cotton and difficulty with polio and subsequent handicap. (D.A.R. 2782) Jessie Coney also testified that Defendant assisted his brothers and sisters and elderly relations, running various errands and doing chores for them and had a kind-hearted and generous nature. (D.A.R. 2783-87) Mr. Casabielle next presented the testimony of Defendant's sister, Elaine Sanford Harrell. (D.A.R. 2791) She testified how Defendant helped her overcome a serious drug problem. (D.A.R. 2792) Mr. Casabielle also presented the testimony of Fred Lee Thomas, Defendant's uncle who testified that Defendant was always respectful. (D.A.R. 2794-2813) Mr. Casabielle also presented the testimony of Barbara Fontenot, Defendant's friend who corresponded with Defendant while in prison. Ms. Fontenot corroborated the inauspicious conditions of Defendant's poor upbringing, including his abandonment by his mother and the succession of men in his mother's life who fathered more children forced to compete for the limited resources available to the family. (D.A.R. 2801) Ms. Fontenot also testified about Defendant's stepfather who often neglected Defendant's mother and would chase people around the house with guns. (D.A.R. 2806-07) In addition to corroborating the harsh treatment Defendant suffered from his father, she also reiterated how Defendant helped his sister

with her drug problem. (D.A.R. 2806-08) Finally, Mr. Casabielle presented Reverend Wellington Ferguson to the jury, who testified that Defendant underwent a sincere religious transformation and had genuinely accepted Jesus as his personal savior. (D.A.R. 2850-51)

In sum, Mr. Casabielle offered a cohesive and detailed portrait of Defendant's background. It is important to note that though Defendant was granted an evidentiary hearing at which various members of his family were present, he failed to present any witnesses to testify to any additional information concerning Defendant's difficult childhood that Mr. Casabielle allegedly failed to present at trial. Thus, Defendant failed to meet his burden of establishing prejudice and grounds for post-conviction relief. *Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983); *Meeks v. State*, 382 So. 2d 673 (Fla. 1982); and *Adams v. State*, 380 So. 2d 423 (Fla. 1980). Moreover, even had further evidence related Defendant's difficulties during childhood been properly admitted, such evidence, where, as here, Defendant was 42 at the time of the murder, is of little relevance. (R. 4) Indeed, any claim that Defendant committed this crime because his step-father had been cruel or because his mother had abandoned him would wholly have contradicted his steadfast maintenance of innocence. *Francis v. Dugger*,

908 F.2d 696 (11th Cir. 1992). Thus, the lower court erred in finding that Defendant was prejudiced, as Mr. Casabielle presented a thorough and complete history of Defendant's childhood.

(4) No Prejudice Resulted from Counsel's Alleged Deficiency for Failing to Have Defendant Evaluated Prior to Trial

The lower court also failed to make any analysis how Mr. Casabielle's alleged omission to have Defendant examined by a mental health expert prior to trial resulted in prejudice. In fact, the lower court affirmed Defendant's guilt phase conviction. Hence, the only issue with regard to Defendant's mental health evaluation would necessarily only relate to the penalty phase. As Defendant was examined prior to the penalty phase by both Dr. Mutter and Dr. David, it is irrelevant that such examinations were after the guilt phase.[8] Both Dr. David and Dr. Mutter testified at the evidentiary hearing that they understood prior to their exam that Defendant had been convicted and faced the death penalty and the purpose of such exam was to find whether Defendant suffered any signs or symptoms of brain damage that could be a mitigating factor in

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[8] Furthermore, as previously discussed, Defendant failed to prove that he was not examined prior to the guilt phase of the trial by Dr. Castiello, as supported by the circumstantial evidence that Mr. Casabielle corresponded with Dr. Castiello toward that end. (R. 411, 928)

for the penalty phse of his case. (R. 634, 635, 645, 653, 660-61) Additionally, both doctors testified that they had ample time to examine Defendant; Mr. Casabielle's election to omit the records from the doctors review was based upon his strategic decision and not on lack of time or preparation. As Defendant was examined by mental health experts in preparation to the penalty phase, the fact that he has secured what he feels would be more favorable expert opinions is in insufficient basis for relief. *See Turner v. Dugger*, 614 So. 2d 1075, 1079 (Fla. 1992); and *Provenzano v. Dugger*, 561 So. 2d 541, 546 (Fla. 1990). As the Eleventh Circuit has stated "'counsel is not required to 'shop' for a psychiatrist who will testify in a particular way.'" Card v. Dugger, 911 F.2d 1494, 1513 (11th Cir. 1990). Hence, as Mr. Casabielle made a reasonable tactical decision to utilize the services of Drs. Mutter and David, both infinitely qualified experts, he cannot be deemed deficient for failing to continue to utilize other experts further. *Haliburton v. State*, 691 So. 2d 466, 471 (Ala. 1997)(quoting *Palmes v. Wainwright*, 725 F.2d 1511, 1521 (11th Cir. 1984).

(5) No Prejudice Resulted From Counsel's Alleged Deficiency for Failing to Attend Defendant's Evaluation and Explain the Meaning of Statutory Mitigation to his Mental Health Experts

Next, the lower court failed to evaluate whether any prejudice resulted from the deficiency of counsel's failure to advise the doctors of the meaning of statutory mitigating factors. The record patently refutes any finding of prejudice in this regard. Dr. David emphatically testified that he did not require a lawyer to advise him of what questions he needed to ask, what tests he ought to administer, or what his obligation and function in finding potential mitigating evidence of neurological impairment was. (R. 643-44) Likewise, Dr. Mutter testified that he had conducted more than 15,000 mental health evaluations of jail inmates and 10-12 evaluations of death row inmates involving issues of potential mitigation. (R. 661) Further, Dr. Mutter testified that he addressed the standard battery of questions and issues in his examination of Defendant to determine whether Defendant had any psychiatric or neurologic impairment within a reasonable degree of medical certainty. (R. 664-68, 662, 670) It is obvious from the testimony at the evidentiary hearing that both experts understood the nature of mitigating evidence they were retained to look for, had vast experience in performing such evaluations, and required no guidance from defense counsel in this regard. Moreover, Defendant failed to inquire or establish from either expert at the hearing what guidance

Mr. Casabielle should have given them but omitted and how such guidance would have changed either expert's opinion that Defendant suffered from no neurological impairment or significant mental defect. Thus, Defendant failed to meet his burden of establishing prejudice. *Smith v. State*, 445 So. 2d 323, 325 (Fla. 1983).

(6) No Prejudice Resulted from Counsel's Alleged Deficiency for Failing to Provide Defendant's Prison Records to his Mental Health Experts

Finally, the lower court failed to properly analyze whether prejudice followed from Mr. Casabielle's allegedly deficient omission of Defendant's prison and prior court proceeding records from the experts' review. Mr. Casabielle testified unequivocally that he made a strategic decision to not provide Defendant's Department of Corrections and other records, which contained very damaging evidence of Defendant's continued history of manipulation and violent sexual assault. (R. 596-99) Clearly, if Drs. Mutter and David reviewed Defendant's prison records and then testified during the penalty phase, the jury would have heard about Defendant's continued sexual aggression while incarcerated. (R. 596-99) Dr. Hyman Eisenstein, Defendant's post-conviction expert in neuropsychology, acknowledged that the reports detailed several occasions in which Defendant was suspected in various

attacks on other inmates. (R. 893). Likewise, Dr. Thomas Hyde, Defendant's post-conviction behavioral neurologist, who had reviewed the records that Defendant now complains were improperly withheld, testified at the evidentiary hearing that the records reveal a pattern of manipulative behavior. Dr. Hyde conceded that Defendant: faked a suicide attempt by alleging he swallowed razor blades and routinely malingered or exaggerated symptoms of illness to gain access to the hospital ward; blew up his toilet in order to leave his jail cell; and was frequently accused of sexually assaulting other inmates. (R.314-20). Clearly, the harmful impact of Defendant's history of manipulative and sexually violent behavior documented by the prison records is manifest and Defendant cannot establish he was prejudiced by Mr. Casabielle's strategic decision to prevent the jury from being exposed to such information.

Specifically, Defendant complained that defense counsel was ineffective for failing to disclose to Drs. Mutter and David that Defendant's school records revealed Defendant had an I.Q. of 70 and that Defendant had attempted suicide. However, Defendant's prison records actually reveal that Defendant's "suicide" referred only to Defendant's self-report that he had swallowed razor blades and that follow-up

examination was wholly inconsistent with Defendant having actually swallowed the razor blades. (R. 737-38). Similarly, Dr. Eisenstein admitted his evaluation of Defendant's intelligence tests indicated scores within the low-average range. (R.1120-21). Defendant also alleged that Dr. David was provided an incomplete history. However, at the evidentiary hearing, Defendant failed to adduce what information normally required for a neurological examination that Dr. David was not provided or how such information would have changed Dr. David's opinion. As Defendant cannot show how any of the allegedly withheld information would have changed the outcome of Drs. Mutter or David's opinions or the result of Defendant's sentencing phase, the lower court erred in finding Defendant was prejudiced by the omission of Defendant's prison and prior court proceedings records from the experts' review.

A review of the lower court's order reveals that rather than analyzing its enumerated deficiencies in terms of corresponding prejudice, as dictated by *Strickland*, it essentially found Defendant was prejudiced by Mr. Casabielle's failure to call Drs. Hyde and Eisenstein:

> If only one of the seven jurors voting for death had been persuaded to change her or his vote, the recommendation would have

> been for a life sentence and, in view of the law requiring the presence of compelling evidence to override a jury's recommendation of life, the court would likely have followed the jury recommendation and sentenced the defendant to life in prison.
>
> Considering the evidence offered by the defendant at the post-conviction hearing, particularly the testimony of Dr. Thomas Hyde, a highly qualified behavioral neurologist, and Dr. Hyman Eisenstein, a clinical psychologist, who administered a battery of neurological tests to Mr. Coney, each of whom concluded that the defendant suffers from brain dysfunction and psychiatric illness, it is likely that a jury would have been persuaded to recommend a penalty other than death.

(R. 1333-34) However, this misses the point of *Strickland v. Washington,* 466 U.S. 668 (1984), entirely. The lower court recast *Strickland*'s prejudice inquiry in terms of whether there is a reasonable probability that at least one juror would have held out for a different verdict. Neither this Court or the U.S. Supreme Court, however, has ever held or even suggested that the *Strickland* prejudice prong may be measured by speculation about the hypthetical propensities of individual jurors. On the contrary, *Strickland* itself expressly held that the "reasonable probability" test focuses upon the likelihood that, but for counsel's alleged errors, the outcome of a defendant's trial or sentencing proceeding

would have been different. *Id*. Thus, the lower court's "one of the seven jurors" standard simply cannot be reconciled with the objective inquiry mandated by *Strickland*. Accordingly, this Court should reverse the circumvention of *Strickland*'s purposely stringent standard via the lower court's re-framing of prejudice in terms of whether one juror might have "been persuaded to change her or his vote." (R. 1333)

Moreover, the lower court's finding that Defendant was prejudiced by counsel's failure to present the alleged mitigating evidence proffered by Drs. Hyde and Eisenstein is fraught with error. Contrary to the transparent logic of the lower court's order, a new expert with a more favorable opinion after the penalty phase does not equal ineffective assistance of counsel. *Breedlove v. State*, 692 So. 2d 874 (Fla. 1997). Initially, the lower court suggests Defendant was prejudiced by Mr. Casabielle's alleged failure to secure sufficient time to prepare for the penalty phase:

> [Dr. David and Dr. Mutter]'s testimony reflects the inadequacy of their cursory and misguided evaluations, an inadequacy caused in large part by the inadequacy of trial counsel's hurried preparation for these evaluations.

(R. 1330-31) However, in fact, both Drs. David and Mutter specifically testified that they had adequate time to administer a thorough and competent examination of Defendant.

(R. 660-62, 652, 645) Dr. David succinctly answered questions related to this issue:

> Q: And you were careful when you did you examination to make sure you didn't miss anything, correct?
>
> A: Yes.
>
> Q: Okay. Do you believe that you had sufficient time to do your examination properly?
>
> A: Did I think I had enough time?
>
> Q: Yes.
>
> A: Yes.
>
> Q: Do you believe that you gave the defendant the tests necessary to come to a consideration, to a reasonable degree of medical certainty?
>
> A: To make my own mind up.

(R. 645-46) Hence, even assuming Mr. Casabielle was somehow deficient in failing to secure his experts in a timely fashion, he can demonstrate no prejudice because both experts, in fact, had adequate and sufficient time to perform appropriate and comprehensive evaluations of him.

Next, the lower court indicated that Drs. Hyde and Eisenstein's opinions demonstrated that Defendant was prejudiced by Mr. Casabielle's failure to turn over Defendant's prison records to the mental health experts who examined him. (R. 1333-35) However, as previously discussed

Mr. Casabielle made a sound strategic decision to omit such records to prevent the State from damaging cross-examination of the experts on Defendant's continued history of sexual assault in prison. (R. 597-99) Even Defendant's own experts, Dr. Eisenstein and Dr. Hyde conceded that the records contained damaging information concerning Defendant's propensity toward sexually aggressive and manipulative behavior. (R. 893, 743-44) Dr. Eisenstein acknowledged Defendant's prison records detailed several complaints and incident reports in which Defendant was suspected in various attacks on other inmates. (R. 893) Likewise, Dr. Hyde conceded that Defendant: faked a suicide attempt by alleging he swallowed razor blades and routinely malingered or exaggerated symptoms of illness to gain access to the hospital ward; blew up his toilet in order to leave his jail cell; and was frequently accused of sexually assaulting other inmates. (R. 743-44). Moreover, Dr. Ansley testified that Defendant's records were consistent with normal neurological functioning and did not suggest any impairment. (R. 1229) Clearly, the harmful impact of Defendant's history of manipulative and sexually violent behavior documented by the prison records is manifest. As such, Defendant cannot establish he was prejudiced by Mr. Casabielle's strategic decision to prevent

the jury from being exposed to such information and it cannot be reasonably concluded that anything Mr. Casabielle purportedly should have done would have probably altered the outcome of the proceedings. *Patten v. State*, 596 So. 2d 60, 63 (Fla. 1992)(rejection of mental health mitigation supported by testimony that "defendant is simply anti-social"); *Turner v. Dugger*, 614 So. 2d 1075 (Fla. 1992).

C. THE LOWER COURT FAILED TO PROPERLY WEIGH AND CONSIDER THE TESTIMONY AND EVIDENCE PRESENTED AT THE EVIDENTIARY HEARING.

In addition to the lower court's profoundly erroneous application of the deficiency and prejudice prongs of *Strickland*, it also failed to properly make findings of credibility, resolve conflicts in the evidence presented at the evidentiary hearing, and decide what weight should be afforded to the opposing experts' opinions. In its order, the lower court plainly acknowledged the discordant contrast of opinions between Defendant's post-conviction mental health experts and the State's expert, Dr. Ansley:

> Dr. Eisenstein determined it was likely that [Defendant] had impairment to the frontal lobe of his brain, an impairment which would affect his ability to make cognitive changes, and a deficit in his right brain functioning, resulting in impulsive behavior.
>
> Admittedly, these opinions of Dr. Hyde and Eisenstein were vigorously challenged by the state.

> Through cross-examination, the state was able to point out evidence of the witness' bias and information about the defendant which may not have come to light had these witnesses not been called to testify. For example, since both experts relied on prison records in their evaluations of [Defendant], those records, including information which would likely be harmful to [Defendant] would be available for the jury. FN9 Further, the state's expert neuropsychologist, Dr. Jane Ansley, who interviewed the defendant and administered many of the same tests as did Dr. Eisenstein, concluded that the defendant did not suffer from any significant psychological disorder or organic brain damage. However it is peculiarly within the province of the jury to sift through the evidence, assess the credibility of the witnesses, and determine which evidence is most persuasive.
>
> FN9 For example, the records include assessments by prison psychologists that the defendant suffers from an anti-social personality disorder, and include several disciplinary reports for sexual assaults upon other inmates.

(R. 1335) Nonetheless, the lower court clearly eschewed its judicial post-conviction function to sift through such evidence and decide which of the experts was more credible. Instead, the court posited that "it is peculiarly within the province of the jury to sift through the evidence, assess the credibility of the witnesses, and determine which evidence is most persuasive." This premise is patently rebutted by Florida case law pertaining to post-conviction claims. As this Court explained in *Porter v. State*, 26 Fla. L. Weekly S321 (Fla. May 3, 2001):

> The reason we have required postconviction evidentiary hearings on capital postconviction motions claiming ineffective assistance of counsel is to provide a defendant an opportunity to present factual and expert evidence which was not presented at the trial of the case and ***to have the trial court evaluate and weigh that additional evidence.***
>
> * * *
>
> So long as its decisions are supported by competent, substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence by the trial court. We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses and in making findings of fact.
>
> At the conclusion of the postconviction evidentiary hearing in this case, the trial court had before it two conflicting expert opinions over the existence of mitigation. Based upon our case law, ***it was then for the trial court to resolve the conflict by the weight the trial court afforded one expert's opinion as compared to the other.***

Id. (emphasis added). Thus, the lower court failed to properly assess the credibility of the dueling experts that testified at the evidentiary hearing and weigh the evidence.

Had the lower court engaged in a proper analysis of the credibility of the experts' opinions, it would have found Dr. Hyde and Dr. Eisenstein's testimony failed to illustrate a reasonable probability that had the jury or judge been

presented with their opinions at trial, the outcome of Defendant's sentencing proceeding would have been different. At the hearing, Defendant first presented the testimony of Dr. Hyde, an admitted death penalty opponent, to opine that Defendant suffers from frontal lobe damage. However, Dr. Hyde conceded that the only test he performed on Defendant that suggested frontal lobe dysfunction was the glabella reflex, which admittedly yields falsely positive results. (R. 753). Additionally, Dr. Hyde acknowledged that nothing in Defendant's prison records supported a finding that Defendant suffered any post head injuries, significant physical or sexual abuse, or history of substance abuse. (R. 722, 731, 735). Dr. Hyde even testified that he believed Defendant's self-report of childhood abuse was exaggerated. (R. 731). Furthermore, the primary bases of Dr. Hyde's opinion that Defendant was neurologically impaired were the findings of Dr. Eisenstein, who was later impeached on the stand and exposed as biased and unreliable. The value of Dr. Hyde's testimony that Defendant suffered from brain damage was further undermined by his conclusion that by definition virtually everyone in prison suffers from brain damage. (R. 756, 763). Certainly, Mr. Casabielle cannot be deemed deficient, nor can

Defendant have been prejudiced, by the failure to alienate a jury with such a fatuous basis for mitigation.

Conversely, Dr. David testified Defendant exhibited no signs of brain damage when he examined him and refuted Dr. Hyde's finding that Defendant's glabella reflex indicated frontal lobe damage:

> I'd have to say that I found no such problems with
> retentive memory when I examined him eight years previous. He also cites the presence of a glabella reflex which is blinking of the eyes when the forehead is tapped. A response that is seen in a variety neurological conditions such as Parkinson's Disease and in frontal lobe disease to some extent, but there's a notoriously misleading test in some respects because some
> people simply can't resist blinking when the forehead is tapped or the eyes are threatened.
> So without other signs which I did not find, or signs of organic frontal lobe disease or any of the degenerative diseases I would not agree at the time of my examination that he had significant glabella reflex or sign of organic frontal lobe damage.

(R. 641).

Next, Defendant offered the testimony of Dr. Eisenstein to support his claim of mental health mitigation. Although Dr. Eisenstein neatly offered the opinion that Defendant suffered from "extreme mental and/or emotional impairment at the time of his offense," his findings were patently biased and riddled with inconsistencies with the record. (R. 841). Dr. Eisenstein acknowledged his bias against the death penalty and

that 98% of his practice derives from performing mental health evaluations of death row inmates on behalf of defense attorneys, who obviously use his findings in an attempt to avoid death penalty sentences. (R. 966, 968). Specifically, Dr. Eisenstein admitted that he bills the State, whom he bills portal to portal and for his copying services, differently than he bills CCRC, whom he bills less stringently. (R. 969-74). In many instances at the Hearing, Dr. Eisenstein appeared less than candid in his responses to the State's cross-examination. Even the lower court noted the lengthy pauses between the State's questions and Dr. Eisenstein's responses.[9] (R. 1043)

Dr. Eisenstein's bias infused his findings, which were supported by little in the record beside CCRC's bald assertions. For example, Dr. Eisenstein testified that Defendant had a history of physical, emotional and sexual abuse, which Dr. Eisenstein further opined constituted valid mitigation. (R. 926). However, on cross-examination, Dr. Eisenstein admitted that he had previously assessed the Defendant's family as having a "warm and loving element" (R.

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9 In the face of the State's allegation that Mr. Hennis was coaching Dr. Eisenstein's testimony in court, the lower court stated it was not looking and did not see the conduct of counsel and Dr. Eisenstein, but noted it did observe the lengthy pauses in Dr. Eisenstein's responses and cautioned that a witness' response from the stand should not be guided by his or her attorney. (R. 1043)

1008). Further, Dr. Eisenstein admitted to previously testifying at his deposition that Defendant was raised by his grandparents who were described as “strong and religious people,” treated Defendant like a son, and provided him food and shelter (R. 1010). Indeed, during his deposition, Dr. Eisenstein testified that he had no knowledge that Defendant’s grandparents had actually abused Defendant. (R. 1011) After rigorous cross-examination, Dr. Eisenstein conceded that other than the three affidavits Defendant submitted at that last minute at the instant hearing, his sole basis for concluding that Defendant was sexually abused as a child, subjected to neglect and emotional abuse, and abused by his step father, was the allegations in Defendant’s 3.850 motion. (R. 980). Reluctantly, Dr. Eisenstein admitted that Defendant had never advised he was sexually abused. (R. 1016). While Dr. Eisenstein testified that this was merely due to his failure to inquire whether Defendant had ever been sexually abused, such explanation is highly suspect in light of Dr. Eisenstein’s vast experience in performing mental health evaluations for the express purpose of finding mitigation, like history of sexual abuse. (R. 1018). Furthermore, Dr. Eisenstein acknowledged that his review of Defendant’s record illuminated Defendant’s prior rapes and sexual assaults in prison and that such

findings would normally trigger inquiries into a patient's sexual background and history. (R. 1018). Finally, after failing to substantiate his conclusions with any documents in Defendant's record, Dr. Eisenstein was forced to acknowledge that, in fact, Defendant's prison records reveal that Defendant had denied ever having been abused. (R. 1025). As there was no credible evidence that Defendant actually suffered sexual abuse or neglect, Defendant cannot show he suffered any prejudice from Mr. Casabielle's failure to present such alleged mitigation evidence. *See Rutherford v. State*, 727 So. 2d 216, 225 (Fla. 1998).

In addition to an alleged history of abuse, Dr. Eisenstein testified that Defendant suffered from brain damage. Dr. Eisenstein primarily based his finding on the 25 point discrepancy between Defendant's verbal I.Q. score, 100, and Defendant's performance I.Q. score, 75. (R. 580. 854). Dr. Eisenstein further opined that the discrepancy "created a mind-set of lack of ability to plan out, lack of availability to control, lack of ability to demonstrate his control of his impulsivity, a lack of demonstrate executive function (sic)" (R. 853). However, later Dr. Eisenstein conceded that Defendant's full scale IQ was 88 in the top end of the low average range and that Defendant's I.Q. scores indicate that

Defendant is capable of “planning something out over hours or days.” (R. R. 1121, 1147).

Dr. Eisenstein further acknowledged that Defendant’s prison records diagnosed Defendant with anti-social personality disorder, meaning that Defendant will “behave in socially inappropriate ways and without care for property or invasiveness.” (R. 1030). Dr. Eisenstein conceded that such information would be very detrimental for a jury to hear. *Id.*

In stark contrast, Dr. Jane Ansley, also an admitted opponent of the death penalty, testified that there is no indication that Defendant suffers from organic brain damage. (R. 1179). Further, Dr. Ansley, an expert neuropsychologist, testified that Defendant’s prison records are consistent with normal neurological functioning and do not suggest any impairment. (R. 1229). Indeed, Dr. Ansley explained that Defendant’s slow methodical nature most likely leads others to mistakenly assess Defendant as mentally challenged:

> He thinks about what he's going to say before he says it; and he has very a deliberate way of speaking. He speaks slowly. And what he has to say is to the point, but definitely I would described his manner as slow, cautious, and deliberate.
>
> * * *
>
> I don't mean to suggest that he is mentally challenged. ...And it occurred me that that may have been somewhat of what occurring when he was younger

> and was identified as mentally challenged or deficient in intelligence, but anyone who spent the time talking to him would certainly not come away with that impression and I didn't.

(R. 1174) Dr. Ansley further explained Defendant's slowness in actually performing tests, rather than a visual spatial debility, was a contributing factor to his lower performance score. (R. 1183). While Dr. Ansley agreed with Dr. Eisenstein's findings that Defendant's tests showed a significant difference between his dominant right hand and his left hand, she disagreed that the difference indicated contralateral right brain impairment, as suggested by Dr. Eisenstein. (R. 1194). Rather, Dr. Ansley concluded that Defendant's childhood injury, involving a concrete brick falling on his left wrist, probably accounts for the disparity in performance on such motor tests. *Id*. Dr. Ansley further supported her findings with the results of Defendant's Rey Osterreith test administered by Dr. Eisenstein. Defendant's near perfect score on this preeminent neurological test indicated that Defendant has an "accurate preparation of spacial relationships; [is] able to plan and execute a drawing, which also includes, of course, executive functioning." (R. 1189, 1191). As Dr. Ansley merely reviewed and interpreted the results of Defendant's performance on the Rey Osterreith test,

which was administered and scored by Defendant's own expert, little argument can be adduced to attack the reliability or validity of Defendant's scores.[10]

Additionally, Dr. Ansley testified that neither Dr. David's report, Dr. Hyde's report or the neurological report contained in Defendant's prison records indicated Defendant suffered any right hemisphere damage (R. 1197). Dr. Ansley further testified that nothing in the records available to Mr. Casabielle at the time of Defendant's trial suggested a need for a neuropsychological evaluation. (R. 1228).

As Drs. Hyde and Eisenstein's opinions were contradicted by Drs. Mutter, David and Ansley, were based on unreliable information and were contradicted and impeached by other evidence, they should be rejected. As the Florida Supreme Court stated in ***Walls v. State***, 641 So. 2d 381 (Fla. 1994):

> "[A] distinction exists between factual evidence, and opinion testimony. As a general rule, uncontroverted factual evidence cannot simply be rejected unless it is contrary to law, improbable, untrustworthy, unreasonable or contradictory....Opinion testimony, on the other hand, is not subject to the same rule... Certain kinds of opinion testimony clearly are admissible -- and especially

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[10] Interestingly enough, although Dr. Eisenstein billed for the Rey Osterreith test, he failed to even mention the test or the results in his report.

> qualified expert opinion testimony -- but they are not necessarily binding even if uncontroverted. Opinion testimony gains its greatest force to the degree it is supported by the facts at hand, and its weight diminishes to the degree such support is lacking."Since the new opinions were unreliable, it cannot be said that there is a reasonable probability that this evidence would have resulted in Defendant being sentenced to life. Thus, counsel was not ineffective. *Strickland*.

As previously mentioned, the fact that Defendant has secured what he feels would be more favorable expert opinions on post-conviction is in insufficient basis for relief. *See Turner v. Dugger*, 614 So. 2d 1075, 1079 (Fla. 1992); and *Provenzano v. Dugger*, 561 So. 2d 541, 546 (Fla. 1990). As the Eleventh Circuit has stated "'counsel is not required to 'shop' for a psychiatrist who will testify in a particular way.'" Card v. Dugger, 911 F.2d 1494, 1513 (11th Cir. 1990).

Moreover, assuming arguendo the reliability of Drs. Eisenstein and Hyde's opinions, Defendant cannot establish a reasonable probability the outcome of his penalty phase would have been different had such opinions been presented in light of the overwhelming aggravating circumstances of his case.[11]

[11] As affirmed by the Florida Supreme Court, the following four aggravating circumstances were found in Defendant's case: (1) the capital felony was committed by a person under sentence of imprisonment; (2) Defendant was previously convicted of another capital felony or of a felony involving the use or threat of

Where the urged mitigating factors, such as circumstances of childhood and a psychiatric report alleging mental mitigation, are minimal compared to the aggravating circumstances, 3.850 relief should have been denied. *See Middleton v. State*, 465 So. 2d 1218, 1224 (Fla. 1985)(affirming denial of 3.850 motion where Defendant offered on post-conviction a psychiatric report and evidence of abusive childhood as mitigation because mitigators were minimal in comparison to aggravating factors); *see also Jones v. State*, 732 So. 2d 313, 318 (Fla. 1999)(where post-conviction counsel did discover additional evidence of mitigation, defendant still failed to show that "it would have made a difference in the outcome of the penalty phase proceeding" and, thus, defendant not denied effective assistance of counsel"). Hence, Defendant failed to meet his burden, and the lower court erred in finding that he was prejudiced.

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violence to the person; (3) the murder was committed while Defendant was engaged in the commission of an arson; and (4) the murder was especially heinous, atrocious, or cruel. *See Coney v. State*, 653 So. 2d 1009 (Fla. 1995).

CONCLUSION

For the foregoing reasons, that portion of the trial court's Rule 3.850 order granting a new sentencing proceeding should be reversed, and Defendant's sentence reinstated.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **INITIAL BRIEF OF APPELLANT** was furnished by U.S. mail to William M. Hennis, CCRC-South, 101 NE 3rd Avenue, Suite 400, Ft. Lauderdale, FL 33301, this _____ day of November, 2001.

_____

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is in compliance with Fla. R. App. P. 9.210(a)(2).

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