IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-2379

DOLAN DARLING, A/K/A SEAN SMITH

Appellant,

v.

STATE OF FLORIDA

Appellee.

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

INITIAL BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT REGARDING RECORD REFERENCES

The record on direct appeal from the judgment and sentence comprises thirteen volumes plus three supplemental volumes. The transcript of the guilt/innocence phase of the trial was paginated separately from the rest of the record and comprises Volumes 1- 4, totaling 799 pages. This portion of the record will be cited with the letters "TT" and the appropriate volume and page number. The remainder of the record on direct appeal is cited in the form, e.g., R (or R-Supp.) Vol. I , 123. The record of the postconviction proceedings comprises 10 volumes and will be cited in the form, e.g., PC-R Vol. I, 123. Supplemental volumes in the record of the postconviction proceedings are in the form, e.g. PC-R Supp. Vol. I, 123.

REQUEST FOR ORAL ARGUMENT

Mr. Darling has been sentenced to death. The resolution of the issues involved in this action will determine whether he lives or dies. Given the seriousness of the claims at issue and the stakes involved, Dolan Darling, a death-sentenced inmate on Death Row at Union Correctional Institution, through counsel, urges this Court to permit oral argument on the issues raised in his appeal.

STATEMENT OF THE CASE AND OF THE FACTS

The Appellant, DOLAN DARLING, a/k/a Sean Smith, appeals from the denial

of his Rule 3.851 motion for postconviction relief from his conviction and sentence of death for the murder and armed sexual battery of Grace Mlynarczyk ("Grace") on October 29, 1996. This Court's affirmance on direct appeal of the judgment and sentence (with three Justices concurring in result only) is reported at *Darling v. State*, 808 So.2d 145 (Fla. 2002), *cert. den. Darling v. Florida*, 537 U.S. 848, 123 S.Ct. 190, 154 L.Ed.2d 78 (U.S. Fla. Oct 7, 2002). The presiding judge at trial and the postconviction proceedings was the Honorable John H. Adams. Sr. The prosecutor at trial was Assistant State Attorney Jeffrey Ashton. Francis Iennaco and Robert LeBlanc were appointed to represent Darling on September 16, 1997, after the public defender withdrew. R-Vol. IV 431. On direct appeal, he was represented by Assistant Public Defender Christopher S. Quarles.

Trial

The guilt/innocence phase of the trial took place from November 30 through December 3, 1998. According to the State=s case, Grace was a thirty three year old Polish female living illegally in the United States. The murder was reported to the police by the victim's boyfriend, Zdzislaw Raminski ("Jesse"). He said that he became concerned when some calls to her apartment had gone unanswered that afternoon. TT Vol. 2, 346. He let himself in with his own key, and found the victim on her back on the floor of her bedroom, naked from the waist down, with her face near the bed and her legs inside the closet. TT Vol. 2, 336. Officers responding to the scene

secured items of evidence found in the bathroom, which included a lotion bottle, a pair of panties, and a pink throw pillow. TT Vol.3, 397-401, 407. The pillow had a blackened area and a gunshot hole through the sides. There was blood spatter on the closet door, and blood in the closet area. There were no signs of forced entry or ransacking. The medical examiner testified that the fatal wound was a pillow- silenced close range gunshot to the back of the victim's head. He stated that "[c]onsciousness would probably not be more than a few seconds@. TT Vol. 3, 463. Death was instantaneous. TT Vol. 3, 479. The doctor reported vaginal and rectal injuries consistent with sexual battery. Vaginal swabs contained traces of DNA that was consistent with that of the defendant.

Darling's apartment was located about 50 feet from Grace's apartment and he was interviewed briefly during a neighborhood canvass. About a week later, on November 7, 1996, Darling was arrested for the carjacking and non-fatal shooting of a taxi cab driver earlier in the day. His fingerprints were compared to a thumbprint lifted from the lotion bottle seized in this case and found to match.

Darling=s attorney in the carjacking case did not know about the murder investigation. PC-R Vol. V 788. The indictment in this case was not presented until June 12, 1997. R Vol. V 405-07. Darling was not arrested on the indictment until August 29, 1997. In the meantime, the carjacking case had been resolved with a negotiated plea and sentence on April 3, 1997. Shortly thereafter, Darling filed a pro

se motion for postconviction relief in the carjacking case alleging ineffective assistance of counsel and requesting appointed counsel. The court denied his request for appointment of counsel but conducted an evidentiary hearing on some of Darling=s ineffective assistance claims on October 8, 1997. The court concluded that Darling=s motion for psotconviction relief was really a motion to mitigate sentence, and denied it. Darling subsequently filed an appeal to the Fifth Circuit Court of Appeals, which was eventually dismissed for lack of prosecution. The testimony of the taxi cab driver and the conviction in that case was used to support the prior violent felony aggravating circumstance in this case.

During voir dire in this case, defense counsel moved that juror Morgan Wilson be excused for cause because his brother had been murdered. TT Vol. 2, 259-260. Counsel then said he confused Wilson with another juror, and withdrew his cause challenge. *Id*. Wilson had said that the murder of his brother might make him tend to favor one side over another.

David Baer, a Crime Laboratory Analyst with FDLE, testified that the DNA in the semen sample from the victim matched the DNA from Darling's blood sample. Defense counsel objected to Mr. Baer=s qualifications to offer an opinion in the field of statistical analysis, but did not otherwise challenge the laboratory procedures or results. The prosecution relied entirely on forensic evidence to identify Darling as the perpetrator. Darling did not testify or present any other evidence. The jury found

Darling guilty of capital murder and armed sexual battery; a third charge, armed robbery, was dismissed with the agreement of the State.

The penalty phase was conducted on December 14 and 15, 1998. The State introduced Darling's conviction and sentence in the taxicab case without objection. The taxicab driver testified that Darling had robbed him at gunpoint. The State also introduced brief victim impact testimony from a friend of Grace.

The defense presented the testimony of four witnesses: **Deshane Claer**, the mother of Defendant=s daughter; **Vereneki Butler**, the Defendant=s sister; **Eleanor Bessie Smith**, the Defendant=s mother; and **Dr. Michael Herkov**, a clinical psychologist.

Ms. Claer said that she and the Defendant had a Adating relationship . . . There was a period of time that we had no contact with each other.@ R Vol. II, 69-70. That=s when she found out she was pregnant. The Defendant=s mother gave her support for prenatal care.

Ms. Butler, the Defendant=s sister, described Carlton Darling, their father, as verbally abusive to her and physically abusive to her mother and brother. She witnessed physical fights. R Vol. II, 76. She said that the father drank excessively. She has an unknown number of halfB brothers and sisters because her father Acarried on@ with other women, a situation she described as extremely embarrassing. R Vol. II,

78. She went away to school at age 16.

She was present when the father beat Darling with a pipe. She said Ahe just went over him with a PVC pipe . . . the bruising was pretty bad . . . I nursed him and then . . . put alcohol or Vaseline, or whatever to sooth it.@ R Vol. II, 84. She recalled an occasion when the defendant Agot . . . beat so bad . . . it must have been with a metal coat hanger.@ R Vol. II , 92-93.

Her home environment affects her to this day. "Today I am battling alcoholism . . . at times I'm also plagued by depression and the doctor placed me on antidepressant drugs . . .@ She said that she tends to be a bit rough on her own son. "I've taken courses in psychology [so] I can stop myself from . . . abusing him when it does happen." R Vol. II , 98-99.

On cross examination, she agreed that the father Ain all other respects is considered a good hard-working citizen and a success@. *Id.* II, 86.

The Defendant=s mother, Eleanor Smith, said that the father Awas very abusive, verbally, physically and every which way. It was like a terror living there.@ R Vol. II,102. She explained that the Defendant was present during fights between her and Carlton Aon many occasions, on many occasions.@ The Defendant tried to defend her. AMany occasions he got bruises from trying to defend me because his dad is a very big, thick, heavy man.@ R Vol. II, 104.

That concluded the testimony from the family members. The Defendant=s

father did not testify at the sentencing phase hearing. Dr. Herkov testified that he had conducted a clinical interview and administered psychological testing. Dr. Herkov reviewed Aat least some of the discovery provided by the State attorneys@, i.e. police reports, lab reports, consultation with investigators. He spoke with the prosecutor several times, and spoke with family members: mother Eleanor Smith, girlfriend Deshawn Claer, and half-sister Paula Haven. He reviewed some grade school reports. He read the statements of: father, Carlton Darling; Verneki Butler; Harlan Dean, headmaster at one of the schools that the defendant had attended; and Debra Rolle, a probation officer. R Vol. II, 119-21. Generally, Dr. Herkov agreed with the prosecutor that he could not demonstrate a cause and effect relationship between the childhood abuse and subsequent violence. R Vol. II, 165.

Dr. Herkov said: AThere was the history of sexual abuse.@ R Vol. II, 136. That is the only reference to the subject during the penalty phase.

In closing argument the State emphasized the subjectivity of the process: With regard to the abuse, the prosecutor said that sometimes the Defendant Aprobably deserved it . . .[I]t defies common sense to say this man became a rapist and murderer because his father picked on him the way he did.@ R Vol. III, 270-71. Defense counsel urged that the factors described above be considered in mitigation and asked for mercy and compassion. His argument occupies 17 pages of the transcript. *Id.* 274-91.

The jury recommended death by a vote of 11-1. The defendant was sentenced to death at a combined Spencer/Sentencing hearing on December 18, 1998. The Spencer memorandum submitted by the defense did not contain any new information , R Vol. IX, 1158-65, and none was offered at the hearing. R Vol. IV, 318-42. The sentencing court found two aggravating circumstances: (1) the defendant was previously convicted of a felony involving the use or threat of violence to the person (carjacking with a firearm, robbery, and aggravated battery), and (2) the capital felony was committed while the defendant was engaged in the commission of the crime of armed sexual battery. The court found the statutory age mitigator, but assigned it modest weight. R Vol. VIII, 1122. The court also found several nonstatutory mitigating factors, but assigned them slight or little weight. R Vol. VIII, 1121-27.

Direct Appeal

Darling raised the following issues on direct appeal: that the trial court reversibly erred in (1) denying his motion for judgment of acquittal predicated on insufficiency of the evidence; (2) admitting DNA evidence; (3) not allowing defense counsel to comment on the State's failure to exclude other suspects; (4) limiting Darling's voir dire examination during jury selection; (5) denying Darling's requested instruction regarding circumstantial evidence; (6) precluding defense counsel's rebuttal closing argument where the State had waived its closing argument; (7) refusing to allow Darling to argue residual doubt as a mitigator; and (8) denying Darling's requested

special penalty phase jury instructions. Additionally, Darling asserted that (9) the absence of a complete record on appeal deprived him of adequate appellate review; (10) his death sentence is disproportionate; and (11) his death sentence violates the Vienna Convention on Consular Relations, 596 U.N.T.S. 261 (Dec. 24, 1969). *Darling v. State*, 808 So.2d 145 (Fla. 2002) at 155 n.10. Relief was denied on the merits on all claims. Darling's petition for writ of certiorari filed in the United States Supreme Court was denied on October 7, 2002. *Darling v. Florida*, 537 U.S. 848 (2002).

Postconviction

Initial Pleadings and Summary Dispositions

Darling filed a timely Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend pursuant to Fla. R. Crim. P. 3.851 on September 24, 2003. PC-R Vol. VII, 1256-1370. The State filed an Answer which incorporated a motion to strike Ashell claims@ on October 24, 2003. PC-R Vol. VII, 1371 - Vol. VIII, 1474. The trial court conducted a case management conference on January 30, 2004 (PC-R Supp. Vol. I), and granted the State=s motion to strike Claims XI, XII, XIV through XXXIV, and XXVI. Order, PC-R Vol. VIII, 1563-64. The court eventually merged Claim XV with Claim IV, on which the court afforded an evidentiary hearing. The court summarily denied relief on Claims II (in part), V

through IX, and XXXV in its order of April 27, 2004. PC-R Vol. VIII, 1534-44. The court subsequently entered an order on April 29, 2004 clarifying its ruling. PC-R Vol. VIII , 1563-64.

The portion of Claim II which was disposed of summarily alleged that the court committed error by not excusing a biased juror *sua sponte*. The court cited *Griffin v. State*, 866 So.2d 1 (Fla. 2003) in denying the claim on the merits, and also found that it was procedurally barred. PC-R Vol. VIII, 1534-44 and 1535-36. Claim V, that the jury was misled by comments which diluted its sense of responsibility, was deemed procedurally barred as being a direct appeal issue. *Id*. 1536-37. Claim VI alleged improper prosecutorial comment and ineffective assistance for failure to object. This Claim was denied on the merits. *Id*. Claim VII alleged that improper instructions and prosecutorial comment, and counsel=s failure to challenge them, limited the mitigation that could be considered by the jury in support of a life sentence. The court summarily denied this claim as being a direct appeal issue and therefore procedurally barred . Claim VIII challenged prosecutorial argument to the effect that the law required a death recommendation under certain circumstances. The court found that the substance of this claim was a procedurally barred direct appeal issue. As to the component of this claim which alleged ineffective assistance of counsel for failing to object, the court summarily denied it on the merits on prejudice grounds only. *Id*. 1540. Claim IX, which asserted a claim under *Ake v. Oklahoma*, 470 U.S. 68 (1985),

was deemed procedurally barred as a direct appeal issue and also found to lack sufficient allegations. Claim XXXV, based on *Ring v. Arizona,* was denied on the merits based on, *inter alia, Marquard v. Moore*, 850 So.2d 417 (2002). The court further found that the claim lacked merit because of Darling=s convictions in the taxicab case and his contemporaneous convictions in this case. *Id*. 1542-43. During the evidentiary hearing, collateral counsel proffered the testimony of Christopher Smith, Darling=s attorney on the taxi cab case, in support of a claim of ineffectiveness for failure to attack the prior violent felony aggravator. The court permitted the testimonial proffer, but declined to consider the testimony ruling that the claim had not been pled with sufficient particularity.

Postconviction Evidentiary Hearing

On April 26-29, 2004, and May 3 and 7, 2004 the court conducted an evidentiary hearing on Claims I (public records disclosure), the ineffective assistance component of Claim II (jury selection), Claim III (failure to challenge the fingerprint evidence), Claims IV and XV (penalty phase ineffectiveness), Claims X and XXXVIII (cumulative error), and Claim XXXVII (failure to challenge the DNA evidence). PC-R Vol. VIII, 1543. In addition, the court agreed to consider evidence of all instances of ineffectiveness in connection with the prejudice prong of any instance of ineffective assistance of counsel. Ultimately, the court denied relief on all claims in its Order of October 29, 2004. PC-R Vol. VII, 1786.

DNA/Discovery Violations

In Claim XXXVII Darling alleged ineffective assistance due to counsel=s failure to challenge the Florida Department of Law Enforcement ("FDLE") DNA laboratory quality assurance standards. Janine Arvizu testified on Darling=s behalf. (PC-R Vol. IV 703-86; Vol. VI 1142 **B** Vol. VII **B** 1205). Ms. Arvizu was qualified as an expert in scientific laboratory quality assurance under F.S.A 90.702. PC-R Vol. IV, 714. Ms. Arvizu has been trained in the assessment of laboratory quality systems and has obtained certification as a quality assurance auditor. She has established and managed an analytical laboratory, and has been involved in a number of interagency quality assurance initiatives between the Department of Energy, the Department of Defense and the Environmental Protection Agency. In her current position as a consultant, she has been conducting data audits, data quality assessments, and laboratory audits for various organizations. She managed the United States Navy's National Laboratory Audit Program for the assessment of both commercial and government laboratories. She would have been available to testify as an expert at the time this case went to trial. PC-R Vol. VI, 1171, 1172.

Claim I of the motion for postconviction relief alleged that FDLE failed to adequately disclose public records, including *inter alia* the FDLE=s DNA laboratory Quality Assurance manual, Standard Operating Procedure manual (SOP), curricula concerning the evidence collection personnel and the contamination control practiced

in the laboratory, and the results of contamination control surveys relevant to DNA testing. PC-R Vol. VII, 1791. Prior to the evidentiary hearing, the court had granted motions to compel production of these and other documents relating to the DNA testing. *Id.*

In the middle of the evidentiary hearing, the court found that a discovery violation had occurred. PC-R Vol. V, 951. The court discussed the matter with counsel, Ms. Arvizu and the FDLE analyst regarding the appropriate remedy. PC-R Vol V, 951-58. Although Ms. Arvizu said she would need a Amatter of weeks@ to review and prepare the new material, the court directed that she, accompanied by one of Darling=s two attorneys and the FDLE analyst, go to the FDLE lab and conduct an audit on the spot, while the court continued with the evidentiary hearing. AAnd if you have this afternoon and if we resume at noon tomorrow, that would give you this afternoon and tomorrow morning. I think you should be able to make progress and at least report back.@ *Id.* While on site, Ms. Arvizu interviewed analyst Baer, and requested further documentation. PC-R Vol. VI, 1149. Ms. Arvizu=s resumed testimony was based on her preliminary review of the new material, but she said that she needed time for further review and assessment. She had received only about two thirds of the requested materials. PC-R Vol. VI, 1145. After additional information was provided to her via the internet, PC-R Vol. I 84, her report, dated May 15, was proffered on May 21, 2004. PC-R Vol. VIII 1580-85 (supplemental report); PC-R

Vol. VII 1826 (order denying relief).

In the May 15 report, Ms. Arvizu said that Mr. Baer had printed the Quality and SOP manuals off of his PC and represented that they were the manuals in effect in 1997, when the testing was done. However, that the quality manual referred to the use of radioisotopes, whereas Mr. Baer indicated that the lab had switched to non-radiological methods in 1996. This indicated that the manual may not have been in effect at the time of the work done in this case, which was around May of 1997. Moreover the laboratory was unable to provide a complete quality manual for the period from 1996-1997. As a result, Ms. Arvizu was unable to fully review the laboratory=s policies and operating requirements with regard to evidence management, contamination control, record management, and personnel training. She concluded that the laboratory=s inability to produce copies of quality system documentation then in effect was A a clear indication that the laboratory=s document control system was not operating effectively during the period in question.@

The laboratory was asked to produce copies of 13 reagent preparation logs for selected materials identified on the analyst's preparation records but was unable to produce 4 of them. The fact that the laboratory did not have preparation records for 30 percent of the requested materials indicated that the laboratory's system for ensuring the efficacy of reagents was ineffective at the time the work was performed. PCR Vol. VIII 1583.

The laboratory's quality manual required that no chemicals, probes, or standards be used beyond the manufacturer's expiration date, but the reagent preparation records revealed that at the time the subject work was performed, the laboratory did not have a means of ensuring and documenting that materials were used within their shelf life. The laboratory was unable to produce any records of quality control data provided by the supplier of the DNA standards used in this case. *Id.*

She noted that the FDLE lab failed to run the necessary controls to ensure against unreliable results and cross-contamination. Positive controls are samples known to contain a substance of interest, negative controls are samples that are known not to contain that substance. The laboratory's quality manual did not require inclusion of negative controls at any point in the analytical process. Routine inclusion of negative controls is an essential element of an analytical quality assurance. PC-R Vol. VIII 1583-84. PC-R Vol. IV 722. She further identified record keeping failures with regard to one of the instruments used to process the samples, calibration of the pipettes used by the analyst, and the qualifications of the analyst who performed the second reading in this case. PC-R Vol. VIII 1585.

She also reported that the laboratory was unable to produce the electronic records that were used to perform selection and sizing of bands during testing of the subject samples. She described this as probably the most serious of the problems that she identified. PC-R Vol. VI 1151. The selection and sizing of bands was the point in

the analysis where matches between known and suspect samples were made by comparison of their images. PC-R Vol. VI 1213. The electronic data is that which is stored in the computer or on a disk after the pictures of the autorads of known and suspect samples are scanned into the computer, and it can be deciphered using an accepted software program. Mr. Baer stated that at the time the subject testing was performed, such records were never saved by the laboratory, and could not now be re-created.

The laboratory was unable to produce validation records or operating guidelines for the software program which enabled the analyst to size and compare the images of the bands created from known and suspect samples. PC-R Vol. VIII 1583. This problem was exacerbated by the failure of the lab to retain the electronic data described above. Likewise, the lab was unable to produce records demonstrating that the internally prepared software program used to perform the statistical analysis had been validated.

The court acknowledged Ms. Arvizu=s testimony that the procedures and methods utilized in this case fell well below accepted standards. FDLE had inadequate custody control procedures in place, failed to run the necessary controls to ensure against unreliable results and cross-contamination, and, at the time of testing, did not have a quality assurance program in place. PC-R Vol. IV 721-723, 726, 742. Additionally, logbooks pertaining to instruments used in DNA testing and external

proficiency results regarding the analysts were not provided and/or available, and the analysts observations and testing notes were not maintained according to general laboratory practice. PC-R Vol. IV 734, 735, 738. Order denying relief, PC-R Vol. VIII 1826. Only the statistical analysis of the DNA testing, not the laboratory procedure, was challenged by trial counsel and considered on direct appeal. PC-R Vol VIII, 1583

Nevertheless, the court denied relief. With regard to the allegation of discovery violations, the court found that the remedial actions taken before and during the course of the evidentiary hearing allowed Darling to Afully present his case at the evidentiary hearing.@ PC-R Vol VII 1793. With regard to the claim that counsel was ineffective in failing to challenge the DNA evidence, the court agreed that Ms. Arvizu=s testimony may have been admissible. The court recited the State=s rebuttal testimony from David Baer to the effect that the Baer himself had passed a number of proficiency tests, the lab was accredited and had been audited a number of times, and that the testing in this case had been reviewed by two other laboratories. PC-R Vol. VIII, 1826-27. The court also noted that Arvizu was not qualified to challenge the testing results, only the laboratory protocol. The court found that there was no reasonable probability that Arvizu=s testimony would have resulted in the Aexclusion, or even undermining@ of the DNA evidence offered by the State. Order, PC-R Vol. VIII, 1828.

Penalty Phase Ineffectiveness/Failure to Challenge Aggravator

At the evidentiary hearing, collateral counsel offered the testimony of Christopher Smith, Darling=s attorney in the carjacking case. Darling=s contention was that he received ineffective assistance due to the failure of Christopher Smith to defend him in the carjacking case adequately and because his attorneys in this case failed to intervene in the carjacking case when they could have done so. The trial court ruled that the claim was not pled with sufficient specificity and therefore declined to accept Christopher Smith=s testimony in evidence, but allowed a testimonial proffer. PC-R Vol. V, 902.[1]

Christopher Smith testified that he would have handled this case differently if he had known about the possibility of a murder indictment. He would have contacted the attorney who was handling the murder case and he Awould not have been so amenable to recommending a plea, knowing that this could possibly be used against [Darling] in a penalty phase later on.@ PC-R Vol. V, 910-11. He had taken no depositions. Smith conceded that he Adidn't do much work@ on the case. *Id*. 921-22. He had met his client only two times prior to the entry of a plea and sentence. PC-R Vol. V, 922. He would not have resolved the case with a plea at that time, although

[1]Collateral counsel also offered a package of documents filed in the carjacking case, which were marked as Exhibit O for identification. PC-R Vol. V 907.

he did not rule out the possibility of a plea later on. *Id.* 912. He would have pursued a motion to suppress evidence. PC-R Vol. V, 910-11. He understood that Darling was under the influence of drugs at the time of the offense, but did not investigate a voluntary intoxication defense. *Id*. 914; 919.

Christopher Smith recalled a conversation with Mr. LeBlanc about Darling=s case, but he did not recall when that conversation took place. PC-R Vol. V, 917. Mr. Iennaco retained a file which contained Darling=s pro se postconviction motion in the carjacking case, the State's response, and personal notes explaining why he did not think that the conviction could be successfully attacked. PC-R Vol. VI, 1019. Mr. Iennaco said that he "looked into" getting the plea withdrawn, but could not because "Christopher Smith was an excellent lawyer." PC-R Vol. VI, 1012. Mr. Iennaco said that he thought he spoke with Christopher Smith about the carjacking case, but that he could not swear to it. PC-R Vol. VI, 1012. He was sure that he spoke with Darling but was otherwise unsure of the specifics. PC-R Vol. VI, 1017-1018 .[2] There is no court record of any activity in the taxi cab case by either Mr. LeBlanc or Mr. Iennaco.

The court addressed these issues this way:

[2]In a letter dated January 22, 1998 Mr. LeBlanc wrote Darling, "While I would like to speak with you more frequently, I know you are serving a sentence and I don't want to affect your gain time by having you brought here to Orange County."

Claims X and XXXVIII: Mr. Darling's convictions are materially unreliable because no adversarial testing occurred due to the cumulative effects of ineffective assistance of counsel, the withholding of exculpatory or impeachment material, newly discovered evidence, and/or improper rulings of the trial court, in violation of Mr. Darling's rights as guaranteed by the fifth, sixth, eighth, and fourteen amendments.

Defendant contends that this Court should consider the proffer of attorney Chris Smith [22] as evidence to support his claim of ineffective assistance of counsel at the penalty phase. He asserts this is so because in the instant case, the State gave notice that it would use his conviction in the taxi cab case [23] as an aggravating circumstance to support the death penalty, Defendant argues that counsel failed to investigate the taxi cab case or take any action to challenge the State's use of that aggravator, He further argues that if counsel had investigated and/or adequately communicated with Chris Smith or himself, counsel would have realized that Defendant filed a pro-se claim for postconviction relief in the taxi cab case, alleging a valid claim that Chris Smith was ineffective for failure to investigate a defense of involuntary intoxication. Defendant states that it is clear that counsel in the instant case was ineffective for failing to become involved in the taxi cab case, and seeks to have this Court consider that failure. However, as Defendant concedes, this claim was not specifically pled in his Rule 3.851 motion; instead it was raised for the first time in his written closing arguments following the conclusion of the evidentiary hearing. Accordingly, it is denied. [24]

> 22 As stated previously, Chris Smith represented Defendant in the "taxi cab case." At the evidentiary hearing in the instant case, collateral counsel stated he wanted to call Chris Smith to help establish the ineffective assistance of counsel claim at the penalty phase of trial; specifically, collateral counsel wanted to show that because the taxi cab case served as an aggravating factor in the instant case, counsel in the instant case had a duty to investigate the taxi cab case. [PC-R Vol. V, 896-903.] After argument from the State, the Court denied counsel's request to call Chris Smith in the case in chief, finding that the claim was outside the pleadings. [PC-R Vol. V, 902.] However, counsel was allowed to call Chris Smith as a rebuttal witness. [PC-R

Vol. V, 902.]

> 23 Defendant asserts that the plea form in the taxi cab case failed to mention that he was under investigation for first degree murder and that, should he plea out to the charges, they might be used as an aggravator to make him eligible for the death penalty on a soon-to-be filed murder charge
>
> 24 Collateral counsel conceded that this claim was not specifically pled, but stated, "claim ten . . . talks about Mr. Darling's convictions are materially unreliable because no adversarial testing occurred due to cumulative effects of ineffective assistance of counsel," and "my understanding is that the state has basically stipulated to a broad-sweeping claim of ineffective assistance of counsel at the penalty phase," to which the State replied, "Judge, not this broad."
>
> Order denying relief, PC-R VIII 1811-12.

Penalty Phase Failure to Present Mitigation

At the evidentiary hearing, collateral counsel presented the testimony of Carlton Darling, the defendant=s father; Mario Smith, the defendant's first cousin, who was employed as a prison guard at Foxhill Prison (in the Bahamas) while the defendant was incarcerated there as a juvenile; Lance McIntosh and Montico Rahmings, friends of the defendant in the Bahamas; Marjorie Hammock, a sociology professor; Dr. Mark Cunningham, a forensic psychologist; and Dr. Henry Dee, a neuropsychologist. The State presented the testimony of Dr. Frank, a psychiatrist employed by the Florida Department of Corrections, and Darling=s trial counsel.

The evidence offered through these witnesses was, by its nature, detailed and

fact-intensive. The court summarized some, but not all, of the facts presented through this testimony the following way:[3]

> During the evidentiary hearing, Carlton stated that he and Dolan's mother never married. Any time that Carlton spent with Defendant was generally restricted to picking him up from school and administering beatings, usually with his fists and/or a PVC pipe. Defendant was beaten approximately six times a week, and Carlton would typically hit Defendant wherever he (Carlton) "could get a good hit." Carlton admitted he had a drinking problem and that he was physically abusive toward Defendant's mother in front of Defendant. When Defendant was approximately 13 years old, he would sometimes spend time at the cabaret where Carlton worked and where topless and/or scantily clad women were paid to entertain men.
>
> Mario Smith ("Mario"), Defendant's first cousin, testified that he was employed as a prison guard at Foxhill Prison (in the Bahamas) while Defendant was incarcerated there. Defendant was 17 or 18 at the time, and juveniles were not separated from adult prisoners, nor were mentally ill patients separated from the general population.
>
> Mario described the prison as having a "deplorable" smell, as well as rats, roaches, and lice. Additionally, there was no running water and the small, unlit cells each housed five or six inmates. The toilet facilities consisted of shared five-gallon buckets, which were only emptied once a day. Executions by hanging were carried out at the prison, and Mario believed Defendant was there when one took place. The prison guards were generally indifferent and would beat prisoners with a rubber hose for perceived discipline violations or because they held grudges against them. Mario stated that he never saw Defendant being beaten, nor Defendant complain that he had been beaten. Mario testified that the prisoners were allowed to get toiletries on Sunday from friends and

[3]For example, the court did not mention the testimony of Dr. Frank, which, although presented by the State as rebuttal, supported a recognized mitigating circumstance, namely, potential for rehabilitation.

family, and were able to wash themselves in the cells. He further testified that Defendant's mother and sister visited Defendant and provided him with what he needed.

Defendant's friends Lance Mclntosh ("Mclntosh") and Montico Rahming ("Rahming"), were deposed on April 22, 2004. Mclntosh testified that Defendant was like a brother to him, and was a nice person. He further testified that growing up on the island was not easy and both he and Defendant joined a gang to cope with the difficulties. Drugs were a "wide thing" on the island, and easy to get. Smoking dope (marijuana) was a common occurrence and sometimes it was laced with cocaine, however, marijuana was "mostly our thing." Mclntosh characterized Defendant as a "big smoker." Mclntosh stated that the police would harass people and would hit them to force them to talk about things they knew nothing about. Mclntosh witnessed Defendant being beaten repeatedly about the head with a police radio because he was unable to provide the police officer with the information the officer wanted. Mclntosh was sent to Fox Hill prison in 1996; however, Defendant was not there at the time. Mclntosh described the prison conditions much as Mario did. Mclntosh stated that Defendant told him that he was beaten between the legs with billy clubs while showering at the prison.

Rahming, who had known Defendant for seventeen years, described him as the type of person who would give you the shoes off his feet or the shirt off his back. Rahming also had a stay at Foxhill prison and described the conditions just as Mclntosh and Mario had, Rahming was housed next to Defendant and stated that the guards went into Defendant's cell and beat him for approximately minutes with a bat or billy club.

Marjorie Hammock ("Hammock"), offered a biopsychosocial assessment of Defendant based on interviews with Defendant, his parents, and his older brother, along with her reviews of school records and the psychological and neuropsychological evaluations conducted by Drs. Henry Dee ("Dr. Dee"), and Mark Cunningham ("Dr. Cunningham"). Hammock also spoke with several of Defendant's friends and traveled to the Bahamas to "get a sense" of where Defendant grew up. Hammock stated that Defendant had a fairly extensive history of head injuries from blows, falling off bicycles, and beatings that continued throughout his early adolescence; as a result of these injuries, Defendant lost consciousness on at least two occasions. Frequent nosebleeds began early in life and reoccurred in adolescence. In addition

to the known physical abuse administered by Carlton, Defendant also suffered emotional abuse from both parents, resulting in a "lack of connection." Although he tried very hard, Defendant was not a good student. Hammock opined that there were many challenges in Defendant's early childhood that led to him becoming "someone who is quite compromised" and that Defendant had a learning problem that may have been related to his emotional and physical conditions. Hammock also noted that, while he was in the "early grades," Defendant began stuttering or stammering whenever he was under stress or distress, or after he had been physically hurt.

Defendant began to experiment with alcohol with he was around eleven or twelve years old, and marijuana followed a year later. Eventually he consumed marijuana on a daily basis, and crack cocaine every other day. Based on Dr. Dee's testing, Hammock stated that Defendant scored in the low/average intelligence range. She further stated that when he was nine years old, Defendant scored in the average or low average range in standardized intelligence tests. Hammock testified that she was told that while Defendant was in a police station in the Bahamas, he escaped due to a mix-up. Even though she was not clear about the details, she knew Defendant was able to leave the Bahamas as a stowaway on a cruise ship. Hammock agreed that Defendant's ability to get to the United States and find work and an apartment was an aspect of his adaptive skills.

Dr. Cunningham testified that he interviewed Defendant, his parents, and Mario. He reviewed Dr. Dee's testing summaries and deposition, and spoke to Dr. Dee telephonically. Dr. Cunningham also reviewed, inter alia, statements and/or testimony from Deshane Claer, Dr. Herkov, and Defendant's mother and sister, Defendant's school records, the opening and closing statements from both the guilt and penalty phases of Defendant's trial, Dr. Herkov's deposition, and research literature. Based on his investigation, Dr. Cunningham identified four primary arenas of mitigating circumstances; (1) "faulty wiring" (i.e., evidence of neuropsycho-logical cognitive dysfunction); (2) parental poisoning (i.e., generational dysfunctional family scripts); (3) sexual poisoning (i.e., dysfunctional family attachments); and (4) community poisoning (i.e., inadequate community guidance and intervention). When asked if Defendant met the criteria for a Diagnostic and Statistical Manual IV Text Revision Diagnosis for post-traumatic stress disorder, Dr. Cunningham stated that he had not attempted to diagnose Defendant's

current psychological status.

Dr. Dee testified that he interviewed Defendant and conducted a neuropsychological evaluation on him on October 17, 2003. During the evaluation, Dr. Dee used inter alia, the Wechsler Intelligence Scale, Wechsler Adult Intelligence Scale, and the Denman Neuropsychology Neuroscale. On the Wechsler Intelligence Scale, Defendant's foil scale IQ was 89, which Dr. Dee characterized as low average or dull normal. On the Denman test, Defendant had a full scale IQ of 93, which Dr. Dee characterized as pretty much the same as Defendant's IQ on the Wechsler test. Defendant was unable to perform the Wisconsin Card Sorting Test and failed the Categories test, both of which are designed to identify frontal lobe damage. Dr. Dee stated that he reviewed, inter alia, Defendant's school records, the transcript of the penalty phase of the trial, Dr. Cunningham's deposition and records from the Bahamas, the MMPI given to Defendant in December 1998 by Dr. Herkov, and Dr. Herkov's statement and testimony. Dr. Dee regarded Defendant's history of head trauma to be neuropsycho logically significant, and stated there was a great deal in Defendant's environmental circumstances and family history that could be "fertile" in relation to Defendant's psychological condition. He further stated that Defendant's frequent nosebleeds, headaches, nausea, and vomiting might point to a medical condition that was relevant to a neuropsychological evaluation; however, they might also be symptoms of stress. Dr. Dee testified that, in the absence of documented medical diagnosis and treatment, it was impossible to establish a nexus between Defendant's physical problems and the subsequent neuropsychological findings. Based on test results, Dr. Dee diagnosed frontal lobe syndrome, which he regarded as a potentially mitigating factor. Dr. Dee opined that frontal lobe damage created a substantial impairment in the ability to conform one's conduct to the requirements of the law.

Order denying relief, PC-R Vol. VII 1801-07 (citations and footnotes omitted).

Trial counsel (Mr. LeBlanc) relied on their investigator to develop background mitigation. PC-R Vol. VI, 1046. He admitted at the evidentiary hearing that Carlton Darling=s testimony would have been Aa significant part@ of the presentation of

mitigation. PC-R Vol VI, 1032. Mr. LeBlanc thought that Mr. Darling did not want to attend his son=s trial. Counsel did not try to force him to attend, but did really want him to attend. PC-R Vol. VI, 1033.

Carlton Darling=s 1998 telephone deposition was entered at the evidentiary hearing to show that he was cooperative. PC-R Vol. VI, 1140. Mr. Darling did not remember talking to his son=s attorney prior to that deposition. PC-R Vol. I, 140.

Defense counsel did not request a neuropsychological examination because Aif we didn=t have any history we wouldn=t have thought it at the time significant.@ He added: AI might be thinking differently now in a capital case than I did back in >96.@ PC-R Vol. VI, 1050. He relied on Dr. Herkov to recommend one, if needed. PC-R Vol. VI, 1050-51.

The court concluded that the mitigation testimony presented at the evidentiary hearing was cumulative to that presented at the penalty phase. The court ruled that Acounsel was not ineffective@ for failing to present Athe same information already presented at the penalty phase.@ PC-R Vol. VII, 1809. Although not explicit, the court apparently denied relief only under the second, prejudice prong of Strickland. The court specifically cited *Sweet v. State*, 810 So.2d 854 (Fla. 2002) at 863-64 (expressly declining to address the deficiency component of Strickland and denying relief under the prejudice prong); and *Gudinas v. State*, 816 So.2d 1095 (Fla. 2002) at 1106 (same).

SUMMARY OF ARGUMENT

The trial court erred in denying relief under the prejudice prong of *Strickland*, based on its finding that Acounsel was not ineffective@ for failing to present Athe same information already presented at the penalty phase.@ To the contrary, trial counsel's performance was prejudicially deficient under standards set by *Strickland*; *Williams v. Taylor*; *Wiggins v. Smith*; this Court=s jurisprudence, and the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. Trial counsel failed to adequately investigate and present mitigating evidence. The wealth of mitigating evidence that was produced at the postconviction hearing demonstrates both deficiency and prejudice, e.g. a neuropsychological examination supported both statutory mental mitigators and a complete biographical assessment showed (among many other things) that the defendant was sexually abused as a juvenile.

Moreover, the court violated *Wiggins* by comparing the mitigating information presented at the trial to that presented in the postconviction proceedings as if each were a dry catalog of unrelated facts. At trial, the prosecutor capitalized on the defense expert=s admission that he could not draw a connection between mitigating biographical information and the crime. At the evidentiary hearing, Darling presented additional mitigating evidence that vastly exceeded the trial testimony both in degree and in kind. He also presented a thorough analysis of all of the mitigation which, if

presented to the trial court, would have explained why it was mitigating.

Darling also received ineffective assistance of counsel at the penalty phase due to his lawyers' failure to challenge a prior conviction which was used as an aggravating circumstance. Following his lawyer=s advice, Darling entered a plea in an unrelated carjacking case while he was under investigation for the murder in this case. The plea was entered with virtually no adversarial testing, and without knowledge of the impending murder indictment. Darling subsequently filed a motion for postconviction relief based on ineffective assistance of counsel in the carjacking case. His request for appointment of postconviction counsel was rejected, although all the requirements for appointment of counsel had been met. The court erroneously decided to treat the motion as a motion to mitigate sentence and denied it, thereby avoiding adjudication of Darling=s claims and foreclosing his right to appellate review. Defense counsel in this case had been appointed to represent Darling by that time, but failed to attend his posctonviction hearing in the carjacking case or otherwise intervene in it. In this case, the postconviction court erred by declining to receive the proffered testimony of Darling=s attorney in the carjacking case.

At trial, counsel failed to challenge anything about the State=s DNA evidence except the statistical analysis of the FDLE laboratory results. At the postconviction hearing, Darling contended that trial counsel could and should have challenged the results as well. First, the postconviction court erred in its rulings concerning the

disclosure of public records relating to FDLE procedures. Moreover, the court acknowledged Darling=s evidence that the methods utilized by FDLE fell well below accepted standards. Nevertheless, the court found that the witness presented at the hearing was not qualified to challenge the testing results, only the laboratory protocol. In effect, the court adopted the State=s argument that this whole line of inquiry was irrelevant (and that it therefore did not matter whether there were or were not discovery violations). This approach violated this Court=s holding in *Murray v. State* as well as standards established by the NRC. It was shown that the laboratory failed to follow its own quality assurance procedures. The quality and therefore the probative effect of its results were not assured, and should have been challenged.

In this appeal Darling also argues that defense counsel was ineffective for failing to object to the entry of a photograph of a latent fingerprint obtained from a lotion bottle located at the crime scene; that he was denied his right to individualized sentencing in violation of *Lockett v. Ohio* and progeny; and that trial counsel was ineffective in failing to object when the prosecutor repeatedly told the jury that a death recommendation was required under certain circumstances. For preservation purposes, Darling has also submitted claims that the jury was misled by instructions that diluted the jury's sense of responsibility and that the sentence of death in this case must be vacated in light of *Ring v. Arizona*. Additional claims which have been raised to preserve the record have been filed in the accompanying petition for writ of habeas

corpus. These are that lethal injection is cruel and unusual punishment, and that Darling may be incompetent at the time of execution.

STANDARD OF REVIEW

Ineffective assistance of counsel claims present mixed questions of law and fact with deference to be given only to the lower court's factual findings. *Stephens v. State*, 748 So.2d 1028 (1999). To uphold the trial court's summary denial of claims raised in a motion for postconviction relief, the claims must be either facially invalid or conclusively refuted by the record. Where no evidentiary hearing is held below, the Court must accept the defendant's factual allegations to the extent they are not refuted by the record. *Peede v. State*, 748 So.2d 253, 257 (Fla. 1999) (citation omitted); *Kimbrough v. State*, 886 So.2d 965 (Fla. 2004).

ARGUMENT

CLAIM I

TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PRESENT MITIGATING EVIDENCE

Trial counsel's performance was prejudicially deficient under standards set by *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); and the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death

Penalty Cases (rev.ed.2003), reprinted at 31 Hofstra L. Rev. 913 (2003).[4] Because the sentencer in a capital case must consider in mitigation, "anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant," *Brown v. State*, 526 So.2d 903, 908 (Fla. 1988) (citing *Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987); see also *Eddings v. Oklahoma*, 455 U.S. 104, 113-15 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)); "penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history." ABA Guideline 10.7 **B** INVESTIGATION, Commentary, 31 Hofstra L. Rev. 913 (2003) at p.1022. This Eighth Amendment right to offer mitigating evidence "does nothing to fulfill its purpose unless it is understood to presuppose that the defense lawyer will unearth, develop, present, and insist on the consideration of those Acompassionate or mitigating factors stemming from the diverse frailties of humankind." ABA Guideline 1.1 **B** OBJECTIVE AND SCOPE OF GUIDELINES, Commentary, quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell, & Stevens, JJ).

This Court has consistently recognized and applied these principles. "[T]he

[4]Although the latest edition of the Guidelines were published after the defendant's trial, they are an articulation of long-established "fundamental" duties of trial counsel. The *Wiggins* Court observed that "in referring to the ABA Standards for Criminal Justice as guides, we applied the same "clearly established" precedent of Strickland we apply today."

obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated." *State v. Lewis*, 838 So.2d 1102, 1113 (Fla. 2002); *Davis v. State*, 875 So.2d 359 (Fla. 2003) at 365. "[A]n attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." *State v. Riechmann*, 777 So.2d 342, 350 (Fla. 2000); *Ragsdale v. State*, 798 So.2d 713, 716 (Fla. 2001); also see *Lambrix v. Singletary*, 72 F.3d 1500, 1504 (11th Cir. 1996); *Thompson v. Wainwright*, 787 F.2d 1447, 1451 (11th Cir. 1986).

Here, counsel relied on their investigator to develop background mitigation. PC-R Vol. VI, 1046. Mr. LeBlanc, who had primary responsibility for the penalty defense, recalled only some telephone contacts with the witnesses and met them for the first time when they appeared for court. PC-R Vol. VI, 1047. Contact with Carlton Darling was left to the investigator. PC-R Vol. VI, 1032-1033. According to Mr. LeBlanc, Carlton Darling was expected to appear but did not show up. PC-R Vol. VI, 1032. Carlton Darling was deposed prior to the trial. According to him, Athe person on the phone, on the other end, told me that it was a deposition, and all they wanted me to do is answer some questions. They told me when to begin and then when it's over. And they told me they might be contacting me, but nothing ever happened.@ PC-R Vol. I, 140. McIntosh and Rahmings reported that they were never contacted by the trial attorneys or a defense investigator. Defense counsel did not request a neuropsychological examination, instead relying on Dr. Herkov to

recommend additional testing, if needed. PC-R Vol. VI, 1050-1051. Dr. Cunningham reviewed Dr. Herkov=s billing records, which reflected two hours of record review, an interview of the defendant lasting an hour and twenty minutes, ninety minutes with the defendant=s family, and 2.4 hours spent on psychological testing. PC-R Vol. III, 532-34. Dr. Cunningham described this investment of time as Awoefully inadequate@, Aextraordinarily brief@, and Asimply inadequate to the task@. *Id., 532* By contrast, Dr. Dee=s neuropsychological testing took the balance of the day. PC-R Vol. III, 598-599. Also, in contrast to Dr. Herkov=s testimony, Dr. Dee=s ultimate interpretation from the neurological testing was that there was neurological damage, probably to the frontal lobe area. PC-R Vol. IV, 639. In his opinion, Dolan Darling=s neuropsychological condition established the existence of both mental statutory mitigating circumstances (impairment of capacity to conform and influence of extreme emotional disturbance). PC-R Vol. IV, 682.

The wealth of mitigating evidence that was produced at the postconviction hearing demonstrates both deficiency and prejudice.

Carlton Darling

The Defendant=s father, Carlton Darling, was the first witness called at the evidentiary hearing. Trial counsel=s explanation for why Carlton Darling was not called at the penalty phase was that Carlton Darling was not forthcoming with information and was uncooperative. This assertion was contradicted by Carlton Darling=s 1998

telephone deposition, showed that Mr. Darling was very cooperative and was perfectly willing to provide information regarding his son=s abusive and neglectful upbringing. Deposition entered at PC-R Vol. VI, 1140.

Carlton Darling was an authoritative man who showed little to no love for his son, and was neglectful and abusive towards him. Darling observed his father beat his mother with his fists. PC-R Vol. I, 149. On one occasion, Carlton Darling beat his son at school, and the principal had to inform him that he could not tolerate that abuse on school grounds. PC-R Vol. I, 150-151. At home the severe beating continued. Mr. Darling recalled another incident where he beat his son about the head so hard that he broke the PVC pipe. PC-R Vol. I, 152-153.

Carlton Darling explained, AWell, I'll be honest with you, me and Dolan really didn't have no relationship. I was a father who put down rules and regulations, provide, and I go. When I come home, I want what I said to be done, and that was it. That's how I was brought up. My son was no friend of mine. We no buddies. It's just do as you told. I take care of you and that's it.@ PC-R Vol. I, 154.

Mr. Darling explained an incident where Darling was beaten about the head by a neighborhood gang with bats. Darling was bleeding through his nose and knocked unconscious from the beating. PC-R Vol. I, 160. Mr. Darling decided not to take his son to the hospital, even though he was unconscious for five minutes, because Darling=s nosebleed had stopped. PC-R Vol. I, 161. Darling was about 7 or 8 years

old at the time of that beating. After the boys beat Dolan, he would bleed through his nose and stutter every time Mr. Darling beat him. PC-R Vol. I, 176. Mr. Darling stated that he beat Darling about six times per week. PC-R Vol. I, 163.

Mr. Darling explained that he would sometimes spend time with his son at the cabaret where he worked, where topless, scantily clad women were paid to entertain men. PC-R Vol. I, 156. Darling was about 13 years old at the time. When Darling was 16 years old, his father left the home to live with another woman and family.

Carlton Darling said he never received notice that he was to testify in Darling=s trial, either in person or by telephone. PC-R Vol. I, 166.

Mario Smith

The trial court=s order summarizes most of Mario Smith=s testimony at the evidentiary hearing. PC-R Vol. VII 1801-07. It did not recite his testimony that officers at Foxhill Prison, where Darling was housed as a teenager, carried out frequent practice runs of hangings in the presence of the inmates, Atesting the rope.@ PC-R Vol. II, 209. The order noted that mentally ill inmates were not housed separately. Mario Smith said that, Asome of them, they took their own feces and rub it all over their body and their hair. Urine. They eat their feces, throwing it all over the cells through the corridor.@ PC-R Vol. II , 211, *Id.*

Lance McIntosh and Montico Rahmings (via Deposition Transcripts)

Mr. McIntosh and Mr. Rahmings were deposed in Nassau on April 22, 2004.

Defense Exhibits #3 & 4, accepted in evidence at PC-R Vol. IV, 686-87.

The trial court=s order cited earlier in this brief summarizes most of McIntosh=s testimony at the evidentiary hearing. He said that boys in the Bahamas were forced to join gangs for protection, or suffer violent reprisals against them and their families. He characterized the police as being like a rival gang. McIntosh saw Darling being beat about the head repeatedly by a police officer using a police radio. This type of police misconduct and abuse was common on the island.

When Darling spoke to McIntosh about his stay in the prison, Darling=s eyes would tear up. Darling told McIntosh that he had been beaten between his legs with billy clubs while he showered.

The court=s order mentioned that McIntosh was imprisoned at Fox Hill prison but did not note that he had to spend over two years in Fox Hill for a murder charge before he was released for a lack of evidence. He described the Boys Industrial School as a little prison.

McIntosh testified that Darling liked to work for his money, as in construction work, and Arobbing wasn=t his thing.@ He recalled that Darling=s father was abusive and Darling was afraid to be home alone without his mother. McIntosh saw bruises on Darling. When Darling=s father came home, McIntosh and other children would have to retreat to escape Darling=s father=s wrath.

Montico Rahmings said that he had known Darling for about seventeen years.

Rahmings had also been an inmate at Fox Hill prison at the time that Darling was there. His description of the prison conditions was consistent with that of McIntosh. He shared a cell next door to Darling and recalled a time that the prison guards went into Darling=s cell and beat him with a bat, or a billy club. There was a legacy of brutality at the prison. He actually heard Darling being beaten. He heard horrible screaming hollering, and crying out in pain. He could recognize Darling=s voice and his screams of pain. The beating lasted about 20 minutes to his recollection. Darling was in prison with him to hear the same sounds of the Atesting of the ropes@ as executions, hangings, were carried out at Fox Hill. At the time, their cells were side by side.

Rahmings described Darling as the type of person that would give you the shoes off his feet, the shirt off his back. He was never contacted by the trial attorneys or a defense investigator.

Marjorie Hammock

Ms. Hammock is a professor at Benedict College in Columbia, South Carolina. She has previously testified as an expert in the field of forensic social work. She holds a masters in social work from Howard University, worked in numerous agencies for 42 years before joining Benedict, and was the Director of Social Work for the Department of Corrections in Columbia, South Carolina. She has been qualified to give expert testimony as a clinical social worker with expertise in conducting biopsychosocial histories and assessments in South Carolina, Florida, Indiana and

Maryland. PC-R Vol. II, 231-235.

In addition to her work in the South Carolina prison system, she has observed prisons in the Virgin Islands, Alabama, Maryland, Indiana, Florida, every facility in North Carolina, and a holding facility in Kumasi in Ghana, West Africa. PC-R Vol. II, 240-241. She also visited the Bahamas in connection with this case, and had previously toured Foxhill prison during a social work convention at which she was a guest speaker. PC-R Vol. II, 236-238. She reported a meeting with the Prime Minister of the Bahamas, who spoke of the problem of domestic violence on the island, and the effects of economic and employment problems on male residents there. PC-R Vol. II, 280-281. Ms. Hammock also related the remarks of Melanie Griffin, Minister of Social Services in Community Development on the Bahamas, regarding domestic violence in the Bahamas. PC-R Vol. II, 281.

In this case she offered a biopsychosocial assessment of the Defendant using an interview of the client, his mother and his older brother. She reviewed his medical records, school records, and she relied on psychological and neuropsychological evaluations conducted by Drs. Cunningham and Dee. She described Foxhill consistently with the testimony of Mario Smith: generally primitive, without plumbing, heat or air, improvised mats on the floor, dirty, and infested with roaches.

The Defendant was jaundiced when born. PC-R Vol. II, 242. She found a fairly extensive history of injuries, head injuries, from blows, from falls on bikes, and

from beatings from others, and that continued throughout his early adolescence. He lost consciousness on at least two occasions. PC-R Vol. II, 254. Nosebleeds began early in life and were frequent. PC-R Vol. II, 242. These would occur while he was asleep and his face would be attached to the pillow from the caked blood. PC-R Vol. II, 254. As well as the known history physical abuse from his father, she found a level of emotional abuse also, from both mother and father. PC-R Vol. II, 243. He lived in a physically comfortable home, but it was emotionally very cold. As he grew older and more independent, his neighborhood was adjacent to a very dangerous neighborhood, and he was exposed to physical challenges there on a regular basis. He was not a good student, although his records showed that he tried very hard. PC-R Vol. II, 244.

Ms. Hammock reviewed records from Queen=s College grades one through six. She noted that Darling=s first year was generally a good one. PC-R Vol. II, 248-249. Thereafter his situation deteriorated. He repeated two grades. By the time he was in fourth grade he was showing difficulty with language skills and concentration. The only area in which he showed success was in handwriting. PC-R Vol. II, 250. Ms. Hammock opined that he obviously had a learning problem that may have been connected with his emotional and physical conditions. PC-R Vol. II, 250.

At the end of sixth grade, he was expelled for fighting with another boy and placed in the boy=s industrial home, a juvenile detention facility, for about 18 months.

PC-R Vol. II, 252, 261. Corporal punishment, caning, was used extensively; beatings were routine. PC-R Vol. II, 253-256. The superintendent was Harlan Dean. According to some of the sources considered by Ms. Hammock, Mr. Dean treated the Defendant well by giving him privileges, supervisory responsibilities, spending extra time with him, and took him on trips outside of the facility. PC-R Vol. II, 257. Other information indicated that Mr. Dean was fairly aggressive and describes him as Abeing a bully.@ PC-R Vol. II, 257. According to Drs. Dee and Cunningham, Mr. Dean treated a rash that the defendant had developed on this thighs and genitals by personally applying a salve, which caused the Defendant to have an erection. PC-R Vol. II, 258.

The Defendant began to experiment with alcohol when he was around 11 years old. PC-R Vol. II, 261. Marijuana followed about a year later. Eventually he consumed marijuana on a daily basis and crack cocaine on an every other day basis. PC-R Vol. II, 261. There was a family pattern of substance abuse in that his father and paternal grandfather, as well as a maternal uncle, were alcohol abusers. PC-R Vol. II, 262. Self report included some abuse or experimentation with rufinol, quaalude, LSD and psilocybin. PC-R Vol. II, 263.

Ms. Hammock reviewed records from the Florida Department of Corrections, which reflected no significant problems with the defendant=s conduct. PC-R Vol. II, 283.

As mitigating circumstances she identified: mental health issues, significant learning disabilities, corrupting and abusive environment, lack of emotional support in early childhood, un-addressed physical problems in early childhood including head injuries, childhood abuse, Aterrorizing@ environment at the boys industrial school as an adolescent and Foxhill prison as a young adult. PC-R Vol. II, 286-288. She identified trial deficiencies in the failure to provide information about drug and alcohol abuse and to consider self medication, although that information had been available to counsel. PC-R Vol. II, 349. She also noted the lack of testimony regarding headaches and nosebleeds and the failure to administer a neuropsychological examination. PC-R Vol. II, 350.

Dr. Mark Cunningham

Dr. Cunningham is a clinical and forensic psychologist who has been in private practice since 1983. His curriculum is in evidence as Defense Exhibit 5. PC-R Vol. II, 362. Its highlights include: undergraduate degree from Abilene Christian College Magna Cum Laude, graduate school and Ph.D at Oklahoma State in clinical psychology, a one year internship in clinical psychology (completed in 1978) as an active duty naval officer at Bethesda and subsequent assignment at the Naval Submarine Medical Center in Groton, Connecticut. During that assignment he taught part time in the local community college system while pursuing his post-doctoral program at Yale, for which he received an award for outstanding achievement.

Dr. Cunningham is both board certified and is an examiner in forensic psychology. PC-R Vol. II, 366-367. He is a Fellow of the American Academy of Forensic Psychology; and conducts regular workshops regarding capital sentencing around the country as a member of the workshop teaching faculty of that association. PC-R Vol. II, 369. He is a designated reviewer for several peer review journals for Law and Human Behavior and Behavioral Sciences and the Law, which are the two most prestigious peer review journals in the field of forensic psychology. PC-R Vol. II, 370.

His curriculum vitae lists three pages of publications. PC-R Vol. II, 370-71. He has authored or co-authored numerous works on capital sentencing, including the chapter on capital sentencing evaluations in a twelve volume set titled the Handbook of Psychology. His publications have extensively focused on capital sentencing issues. PC-R Vol. II, 372.

He has been qualified to testify as an expert in over 200 cases, including capital sentencing in 28 federal capital cases around the country and approximately 55 state capital cases. PC-R Vol. II, 373. In addition, he has testified at state post-conviction and federal habeas proceedings, and also in noncapital military settings. *Id.* He has testified in approximately 25 states. *Id.*

Dr. Cunningham interviewed the Defendant for about five-and-a-half hours. Additionally, he interviewed his mother, father and Mario Smith. He also reviewed the

interview summaries that had been prepared by postconviction investigators, as well as interview summaries that were prepared at the time of trial. He reviewed extensive records in this case, including police and incarceration reports from here and the Bahamas. He consulted with Dr. Dee. Dr. Cunningham reviewed relevant portions of the trial record, and Dr. Herkov=s pre-trial deposition and billing records. He reviewed written statements of Deshan Cleare, Harlan Dean, Carlton Darling, Vernike Butler, Deborah Rolle; and the testimony of Deshan Cleare, Vernike Butler, Eleanor Smith and Dr. Herkov. Additionally, he reviewed extensive research literature, particularly noting publications that were available in 1998 at the time of trial. PC-R Vol. II, 380-381. He was also in the courtroom during most of the testimony that had been presented by that point.

Dr. Cunningham identified mitigating circumstances that he found to be present in this case. He described them as falling into four primary Aarenas@ and listed them as follows:

The first primary arena is what he characterized as **faulty wiring**, which is to say that there was evidence of neuropsychological cognitive dysfunction. This group of factors comprised learning difficulty and school failure, recurrent head injuries, recurrent trauma exposure, neuropsychological deficits, explosive temper and behavioral dis-inhibition, genetic predisposition to substance dependence, teen onset poly-drug dependence, and youthfulness at the time of the offense.

The second set of developmental injuries were characterized as **parental poisoning**. These include generational dysfunctional family scripts, disorganized family structure, that the Defendant=s mother was a teenager at the outset of child bearing, his father's alcoholism, chronic parental hostility and conflict, observed domestic violence, his father's emotional neglect, his father's physical and verbal abuse, his father's abandonment in teen years, his mother's emotional neglect, and his mother's insufficient limit setting and guidance.

Dr. Cunningham characterized the next general arena of factors as **sexual poisoning.** These factors include dysfunctional family attachments, the father's chronic infidelity, the father's sexually derogatory verbal abuse of mother, the father's sexually exploitive attitudes towards women, the mother's poor boundaries, community values of irresponsible and exploitive sexuality, community values of violence towards women, and sexually corruptive and traumatic exposures.

The fourth arena was characterized as **community poisoning**. These factors include extensive youth gang penetration and recruitment, inadequate community guidance and intervention, sanctioned police brutality, and adolescent institutionalization and mistreatment. PC-R Vol. II, 383-385.

His testimony is summarized as follows:

Learning difficulty and school failure was supported by the clinical interview, school records, and interviews with the Defendant=s mother. This is a

broad risk factor for adolescent substance abuse, lower achievement, and association with delinquent peer groups. PC-R Vol. II, 393. Dr. Herkov made a one line reference to learning disability, but beyond naming the factor, did nothing to give it any substance. PC-R Vol. II, 394. Lacking were an analysis of its nature, a description of the subject=s resulting experience, identification of the problems faced by the subject because of it, validating evidence, connection to other problems faced by the subject and particularly its relevance to the issue of Afaulty wiring.@ Dr. Cunningham said that Athe presence of those learning difficulties was one of the factors that should have prompted a complete neuropsychological assessment of Mr. Darling.@ PC-R Vol. II, 394. Dr. Cunningham described the evaluation administered at trial as Asimply inadequate.@ **Recurrent head injuries** as a factor was supported by the clinical interview and collateral family reports. At an early age Darling struck his head in a bike accident. Approximately age twelve he was hit in the head by a peer wielding a rock, and was beaten by a youth gang. At about age fifteen he was hit in the head by a peer with a shovel. In another incident he was hit in the head with a baseball bat, and was apparently unconscious for five to fifteen minutes. PC-R Vol. II, 396. The defendant=s behavior changed after that incident, becoming more irritable and reactive. PC-R Vol. II, 399. About age sixteen he was struck repeatedly in the head during a police interrogation that also ruptured his eardrum. Dr. Cunningham noted Rahming=s report that Darling had been beaten during a police interrogation

with baseball bats. PC-R Vol. II, 397. He also recalled McIntosh=s report that Darling was beaten by police on the head with a police radio. PC-R Vol. II, 398. Dr. Cunningham recited Carlton Darling=s admission of beatings which included blows to the head and which occurred five to six times a week.

Dr. Herkov did not have the history of the frequency of blows to the defendant=s head, nor was there any testimony about the nexus between head injuries, neuropsychological findings and violent outcome. PC-R Vol. III, 401. ADr. Herkov administered a Wechsler Adult Intelligence Scale, which is simply an assessment of his intellectual capability alone. Now while that is a standard part of a neuropsychological battery, it is simply inadequate to identify the presence of brain damage in many, many cases.@ PC-R Vol. II, 396.

Dr. Cunningham referenced a study in the Journal of Neurology in 1995 which examined a group of 31 individuals awaiting trial or sentencing for murder, of which of which 64 per cent had frontal lobe dysfunction, which is the nature of the dysfunction that was identified by Dr. Dee in his neuropsychological assessment. P. Blake, Neurological Abnormalities in Murderers, Journal of Neurology, pp. 1641-47, 1995. The study was only a representative sample of the literature available. The study found that 83 percent had histories of physical abuse and 29 percent had histories of sexual abuse, both of which were present in this case. According to Dr. Cunningham, research literature established a nexus between neurological insult and/or

neuropsychological deficits and criminally violent outcome, including murder. That nexus was not presented at trial. PC-R Vol. III, 402.

Recurrent trauma exposure refers to the effects of psychological or emotional trauma, the history of which was presented in other contexts during the hearing. PC-R Vol. III, 403. As Dr. Cunningham put it, AThe relevance to this wiring section is there is a growing body of research and has been since the early 90's [t]hat psychological trauma ends up affecting the metabolism and the architecture of the brain. That it's not simply a matter of you have got bad memories, malignant memories, but instead the psychological factors are changing the physical nature of the brain.@ PC-R Vol. III, 403. In support of this conclusion, he cited literature published in 1994. He explained generally that a child=s brain is still growing, so that the brain and the nervous system have greater plasticity in a child than in an adult. Referring to literature published in 1994 and 1996, Dr. Cunningham explained A that trauma ends up impacting on brain structure, metabolism and functioning.@ PC-R Vol. III, 405.

Neuropsychological deficits are ways to identify brain dysfunction by deficient performance on different tasks. Dr. Cunningham relied upon Dr. Dee=s neuropsychological evaluation to establish this factor. He testified that there was extensive literature on this subject available at trial. PC-R Vol. III, 410.

Dr. Cunningham identified **explosive temper and behavioral dis-inhibition** as a potentially mitigating factor because to the extent that such behavior is the result of

brain dysfunction it represents a status that is not chosen by the Defendant, but rather was the result of injury or some other external cause. PC-R Vol. III, 412. Dr. Cunningham considered the argument that defense counsel might choose not to disclose information about the Bahamas reports, but noted that the other factors included under the heading of Afaulty wiring@ existed independently of the reports. PC-R Vol. III, 414.

Genetic predisposition to substance dependence is supported by a significant history of alcohol dependence in the Defendant's family, including his father and both paternal and maternal grandfathers. Genetics are a particularly powerful predisposer to drug and alcohol abuse. Thus, even if the Defendant=s history of substance abuse might be regarded as aggravating rather than mitigating, the jury could have been provided with some understanding of how someone comes to be an alcoholic or drug dependent and what factors put them at risk for that. PC-R Vol. III, 413-414. The Defendant not only had a genetic predisposition to substance dependence, he also had a model of substance abuse in his father. Moreover, he had traumatic experiences which gave rise to self-medication. PC-R Vol. III, 414-415. These genetic and environmental factors were not something the defendant chose in the first place, and his behavior was not a matter of choice or moral character, but rather a question of how his system reacts to substances. PC-R Vol. III, 415-416. The research that would support the identification of this factor as a mitigating circumstance is extensive

and includes the DSM-IV, a 1979 the Journal of Studies on Alcohol, Vol. 40, pp. 89-116; Schuckit, Biological Vulnerability to Alcoholism Journal of Consulting and Clinical Psychology, Volume 55, pp. 301-30 (1987). Extension of this concept to drugs was reflected in literature dated 1993. PC-R Vol. III, 417.

Dr. Cunningham explained that the issue of addiction and substance abuse is part and parcel of the conduct in both this case as well as the armed robbery and attempted murder of the taxicab driver that occurred about a week after this offense. PC-R Vol. III, 418. At trial, neither Dr. Herkov nor anyone else provided an explanation of the genetic disposition to alcoholism or the other risk factors for substance abuse that the defendant was subjected to, or of how this issue would compromise neuropsychological functioning, involve frontal lobe deficits, or how to apply these considerations to the crime charged. PC-R Vol. III, 419.

Teen onset poly-drug dependence. In fact, the onset of the Defendant's alcohol and drug abuse was preteen. He began to sneak beer or his father would give him some when he was seven or eight years old. Around ten he began stealing beer from his father's refrigerator on a regular basis. At thirteen, he was drinking gin and orange juice on weekends and would drink until he passed out on weekend nights. He would also take alcohol from the household liquor supply, or with peers. PC-R Vol. III, 422.

The Defendant began to abuse marijuana at sixteen. Once he started, he

smoked two to three times daily until he was locked up. He consumed Ablunts@ or marijuana cigars. He first abused cocaine around age twenty. Once he began to do that he continually laced his marijuana with cocaine. He also began popping pills in between smoking the cocaine and marijuana. These included quaaludes and rohypnol. He began to take LSD and used hallucinogenic mushrooms. He reported that he was getting more paranoid, which is a common toxic reaction to heavy cocaine abuse, and reported other symptoms that are found in heavy cocaine abuse, such as being more on edge, more reactive. At the time of the offense, he was using these drugs routinely. PC-R Vol. III, 424-425.

Poly-drug dependence delays the onset of maturity, compromises achievement, and contributes to impulsive behavior and poor judgment, particularly among adolescents. It is a broad risk factor for increased likelihood of criminal and violent behavior. PC-R Vol. III, 426-427.

Dr. Cunningham described research showing a causal, rather than merely statistical, relationship between substance abuse and violent crime. A subject does not get to choose his genetic predispositions or the other childhood environmental influences that have been identified. PC-R Vol. III, 431.

Moreover, substance abuse dependency is a mitigating factor regardless of whether the defendant was actively intoxicated at the time of the offense. Individuals who are substance dependent exhibit impaired judgment whether they are actively

impaired at the time or not. PC-R Vol. III, 431.

Dr. Cunningham included **youthfulness** under the category of faulty wiring, although he said incomplete wiring would be a better description. The fact that a defendant=s nervous system is still developing has important implications for weighing his culpability. PC-R Vol. III, 437. This is especially important here, where age was given as a statutory mitigator at trial, but no reason was given as to why it w as mitigating.[5]

The next broad category was **parental poisoning**.

First, Dr. Cunningham listed **generational dysfunctional family scripts.** AFamily scripts@ he defined as stories we carry inside of us of how our lives are supposed to go. Incorporating the work of Marjorie Hammock, Dr. Cunningham related Darling=s family tree in detailed background. Darling=s genealogy showed a pervasive legacy of dysfunction going back generations that involved substance abuse and alcoholism, parental irresponsibility, parental abandonment, disrupted parent/child relationships, promiscuity, exploitation of females, and violence toward women. Dr. Cunningham opined that this information could be regarded as mitigating because the Defendant did not choose the script of his own family and community system, and yet this had a significant influence on the choices he made and the person he became.

[5]See n.8 on *Roper v. Simmons, supra*.

PC-R Vol. III, 454.

Disorganized family structure: Darling lacked a secure, stable predictable family setting. Carlton Darling estimated that ninety percent of the children in the Bahamas are born out of wedlock, and the norm for a young girl is to have three or four children and not be married. He estimated that thirty percent of the children make it to a constructive adulthood, and two-thirds of those are females. That matches with research in the United States as well, that the likelihood that a young male will engage in criminal activity doubles if he is raised without a father and triples if he lives in a neighborhood with a high concentration of single parent families. PC-R Vol. III, 456. Dr. Cunningham referred to data indicating that the homicide rate in the Bahamas is three to four times what it is in the United States. PC-R Vol. III, 457.

The Defendant=s mother was a teenager at the outset of child bearing. Eleanor was fifteen years old when Paula was born. Age of initial child bearing is a key indicator of antisocial conduct and outcome in sons, because the mother=s own emotional development may be damaged. PC-R Vol. III, 460.

The Defendant=s father was an alcoholic. Carlton said that he drank from dawn to dusk. The children of alcoholic parents are much more likely to be physically and emotionally abused. The psychological abuse is related to inconsistency and unpredictability of the home. Effectively it robs the child of his childhood and is a broad risk factor for relationship problems, self-control and behavior problems, for

feelings of defectiveness, for psychological disorders, and for criminal behaviors. PC-R Vol. III, 461-463.

The jurors in this case heard that Darling=s father was an alcoholic, but they did not hear the nature and the extent of his alcoholism, or how this risk factor damages a child not only at the time but also in terms of long-term life outcomes. PC-R Vol. III, 463-464.

Chronic parental hostility and neglect is a mitigating circumstance. Darling=s family system was chronically hostile. Carlton said he was always angry at everyone in the house. From the Darling=s perspective, there was constant fighting between his parents. PC-R Vol. III, 464-465. On one occasion Darling=s mother took him with her to the father=s girlfriend's house to pick a fight. That kind of hostility in a household is very corrosive to the emotional development of the children that are growing up there. PC-R Vol. III, 465.

The next factor was observed **domestic violence**. Carlton began to become physically and vocally abusive of Eleanor when Darling was about eight years old. The verbal abuse was often sexually derogative. PC-R Vol. III, 468.

The **father=s emotional neglect** was identified as an independent factor. Carlton was functionally absent from any sort of relationship role as a father. An emotional role as a father to be present as a stable, guiding, affirming presence is important to a child=s emotional development and outcome. PC-R Vol. III, 468.

The **father's physical and verbal abuse of the Defendant** was identified as an independent factor. The factor was presented through the testimony of Carlton Darling himself earlier in the postconviction evidentiary hearing. It was not presented to the same degree at the penalty phase of the trial. PC-R Vol. III, 468-469. In fact, Dr. Herkov inaccurately described this abuse as having been monthly, and referred only to a single incident involving the PVC pipe. PC-R Vol. III, 469.

The implications of physical abuse were not adequately brought out at trial. Some of the studies that were available at that time included a report of the Presidential Task Force on Violence in the Family published in 1996 by the American Psychological Association. PC-R Vol. III, 469-470. Dr. Cunningham referenced Thornberry, Violent Families and Youth Violence, U.S. Department of Justice, 1994, called the Rochester Youth Development Study. This study involved a thousand children who were followed from seventh and eighth grade. Dr. Cunningham contrasted this with the Cathy Spatz-Widham study that was described at trial. The Widham study had some methodological problems. Moreover, one of the findings in the early Widham study was that the maltreated children had a twenty-five percent higher rate of arrest. This was the finding presented at trial to suggest that the difference between the two groups was not all that great. However, Widham published a subsequent report in 1996 that was available at the time of trial which examined ethnic background as well as the group as a whole. This study reported that

eighty-two percent of the black males who had been maltreated subsequently had been arrested for some type of offense. Defense Exhibit #6; PC-R Vol. III, 474.[6] Neither defense counsel nor Dr. Herkov presented this information.

The Thornberry study examined self and family reports of violence, examining three types of violence within the family: spouse abuse, child abuse, and a climate of violence and hostility. All were present in Darling=s home. PC-R Vol. III, 470-475.

Father's abandonment in teen years. Carlton Darling essentially disavowed the family when Darling was a teenager, no longer providing even economic support. Instead he moved down the street and moved in with another woman and began providing for those children. This additional rejection was a significant blow. PC-R Vol. III, 478.

Mother's emotional neglect. Eleanor was unaffectionate and undemonstrative. Research demonstrates that emotional neglect is not a benign experience which puts a child at significant risk in terms of his own emotional and behavioral outcomes in adulthood. PC-R Vol. III, 478-479.

[6]The Cycle of Violence Revisited, National Institute of Justice, February, 1996,.

Dr. Cunningham identified the **mother's insufficient limit-setting and guidance** as a mitigating factor. Eleanor did not effectively discipline, control, and set limits on Darling. Lack of parental structure and discipline contributes to aggressiveness and predisposes to violence in the community. Dr. Cunningham cited numerous studies in support of this circumstance.[7] PC-R Vol. III, 480-483.

The next general arena of mitigating circumstances was characterized by Dr. Cunningham as **sexual poisoning.** PC-R Vol. III, 484. Given the circumstances of this case, the influences that specifically impacted on the development sexuality and eroticism were important to understand. PC-R Vol. III, 484-85. If it had been explained that the offense came at the end of a developmental sequence which Darling did not choose for himself, but was made with scales that were heavily loaded, then the criminal behavior can be understood as an outgrowth of damage as opposed to

[7]Cantelon, Family Strengthening for High Risk Youth, Office of Department of Justice, Fact Sheet Number Eight (1994); Friday, 1994, the Psychological Impact of Violence in Underserved Communities, Journal of Healthcare for the Poor and Underserved, Volume Six, Pages 403 to 409; Patterson, Debaryshe and Ramsey, 1989, Developmental Perspective on Antisocial Behavior, American Psychologist, Volume 44, Pages 239 to 235; Staub, 1996, Cultural Societal Roots of Violence American Psychologist, Volume 51, Pages 117 to 132.

simply a willful, evil choice made from a level playing field. PC-R Vol. III, 485.

Lack of functional family attachments.

Here, Dr. Cunningham spoke about a study conducted by the FBI's Behavioral science unit, in a work that was published in 1988 called Sexual Homicide, Patterns and Motives, by Ressler, Burgess, and Douglas. The authors found that the quality of the attachments to parents and other members of the family during childhood is central to how the child will relate to and value other members of society as an adult. They identified a number of characteristics of these families with a surprising correspondence to those present here. Dr. Cunningham said that there was a clear nexus between this dysfunctional family system and the nature of the offense that occurred here. PC-R Vol. III, 491-493.

Witnessing disturbed sex. Darling was exposed to explicit pornographic material. Carlton denied it, but both Eleanor and Darling described four or five x-rated videotapes. Carlton also said had satellite feed in the house and that there were sexually oriented materials that were available on that satellite feed.

Father's chronic infidelity. This behavior is hedonistic, exploitive of the other person and generated significant conflict within Darling's world.

Dr. Cunningham identified the **father's sexually derogatory verbal abuse** as a separate circumstance within this category. In addition to the physical violence and general verbal abuse that was directed toward the mother, Carlton would call her a

Afucking ass.@ He would say, AI fuck who I want to fuck.@ He would call her a Abitch.@ He would tell her that sex with her was no good. He would tell her that the girls that he was with were younger and sexier. In front of Darling the message was that sexuality was being used as a weapon to degrade and humiliate his mother. PC-R Vol. III, 494-495.

Mother's poor boundaries reflects that Darling=s mother did not have a good sense of when to relate and when to have some boundaries and some distance. On one hand she did not hug or kiss him say AI love you,@ but she did move into her adolescent son's bedroom rather than take another empty room in the house. This was an unhealthy boundary violation. PC-R Vol. III, 497-498.

Community values and irresponsible and exploitive sexuality is a circumstance that is reflected in the Defendant=s family tree, his father=s behavior, and the behavior of males in the community generally. PC-R Vol. III, 498. The mitigating value of these circumstances derives from the fact that the Defendant did not choose to be influenced by the kind of community he was born into. PC-R Vol. III, 503.

Dr. Cunningham also identified **sexually corruptive and traumatic exposures** as an independent factor. Darling was in the cabaret club during his middle childhood and early adolescence where he was around women in g-strings and topless shows. PC-R Vol. III, 503. His father described him being in there a half dozen times and Darling recalled being there routinely. That was an inappropriate place for a boy aged

eight to fourteen, to the point that here it would likely lead to intervention by the courts or police. PC-R Vol. III, 504.

Darling reported that when he was in the boys industrial school that the older boys would compel the younger or smaller ones to perform fellatio on them. PC-R Vol. III, 507. Whether it happened to Darling or not, the awareness of it happening was a traumatic and damaging experience for him. PC-R Vol. III, 508.

Additionally, Darling reported that the director of the boys industrial school took a particular interest in him. There was a rash that Darling had developed around his upper thigh and inner groin area and this administrator desired to inspect this and apply ointment to him himself. Darling developed an erection in the course of this and the administrator advised him that it would be okay if he wanted to masturbate. Darling said he declined. Dr. Dee in his deposition said in his interview with Darling that, in fact, Darling had acknowledged that the administrator had masturbated him in the course of these events. Darling also described the administrator taking him off campus for outings, putting his arm around him, and developing an increased degree of familiarity with him. PC-R Vol. III, 508. The Defendant was exposed to rapes occurring in the Foxhill prison as well. PC-R Vol. III, 511.

Community poison was identified as a mitigating factor. It involves the extensive youth gang recruitment in the Bahamas. If a youth did not join a gang, he was in danger. PC-R Vol. III, 510. Lance McIntosh stated that when he Darling and

Montico were growing up, there were about fifteen different gangs on the island. They were loosely organized but were very intimidating. The police were considered another gang. Gang recruitment started at an early age. PC-R Vol. III, 514-515.

Sanctioned police brutality was identified as an independent mitigating factor. Multiple people that Dr. Cunningham spoke to or whose statements he reviewed reported being beaten by the police. PC-R Vol. III, 515. Carlton described an occasion where he was beaten by the police in a darkened interrogation room; Darling recounted a similar experience. Darling said he was beaten by the police each time he was interrogated. He said he was handcuffed and punched in the stomach and head, and beaten on the soles of his feet to avoid bruising. He said that he was hit with hands, or with a bat wrapped in cloth. PC-R Vol. III, 516. On one occasion he was hit on the side of his head so that his eardrum ruptured. Lance McIntosh provided an account of the police beating Darling, including hitting him twice in the head with a radio, knocking him to the ground and then kicking him. PC-R Vol. III, 517.

Dr. Cunningham explained that if the people in authority are themselves violent and predatory, any message that violence is inappropriate, that possession of power does not mean that it should be used, is lost. PC-R Vol. III, 518. Darling=s experience was one where he was beaten repeatedly, his mother was beaten, police were violent, his peers were violent, and where violence was routine in Foxhill prison. There was little opportunity to learn that violence was not a norm. PC-R Vol. III, 518-519.

Florie Brice, Darling=s maternal aunt, was a cook and subsequent supervisor in the boys industrial school. She worked there when Darling was sent there and was there until he reached sixteen. According to her, the boys were mixed together regardless of the severity of their offenses, ranging from status crimes to murder. The boys were medicated with phenobarbital to calm them down. The officers were brutal to the boys, and caning was a common form of punishment. PC-R Vol. III, 520. Darling=s description and Florie Brice=s were consistent. The isolation cell used for punishment had no bed, a small window at the top and a bucket used as a toilet that was not emptied until the boy=s term of solitary confinement had expired. PC-R Vol. III, 521. Dr. Cunningham described this method of punishing teenagers as grossly abusive. PC-R Vol. III, 522.

Darling went to Foxhill prison when he was seventeen. Darling=s descriptions of the horrific conditions within Foxhill prison were substantiated by the testimony of Mario Smith, Lance McIntosh and Montico Rahmings. The inmates put pieces of cloth in their ears at night to keep the roaches out. They would try to stuff things up against the bottom portion of the cell grate, the bars across the front, to try to keep the rats from running in at night. The conditions were psychologically injurious, whether or not Darling was directly subjected to each of these experiences. PC-R Vol. III, 523-524.

Dr. Cunningham would have been able to address the issue of **positive prison**

adjustment. PC-R Vol. III, 526. This is an unusual case because there is a track record of Darling in prison from after date of commission of this offense, but before the trial. Dr. Cunningham=s review of prison records did not disclose any violent behavior during that time, and the disciplinary events that did occur were few and minor in nature.

Another method of violence risk assessment is based on group statistical data. Dr. Cunningham referred to studies of 533 Furman-commuted inmates. The primary finding was that 70-80 percent of these inmates never had an incident of serious violence across 15-20 years. PC-R Vol. III, 529. All of these studies were available by 1996. Dr. Cunningham=s opinion was that the overwhelming likelihood was that Darling would not exhibit serious violence across a life term in prison.

With regard to the penalty phase, Dr. Cunningham reviewed Dr. Herkov=s billing records. That included two hours for record review, which Dr. Cunningham described as very limited for a capital case. Dr. Herkov=s interview with Darling lasted an hour and twenty minutes, an Aextraordinarily brief amount of time@ for a capital defendant. PC-R Vol. III, 532. Dr. Cunningham said:

> The task of a forensic psychologist at capital sentencing is to explore all possible biopsychosocial adverse developmental events that might have affected this person's developmental trajectory or have some nexus with the offense. This is a task far beyond anybody's ability to competently do in a hour and 20 minutes. That's a woefully inadequate amount of time. The hour with the family is . . . also an extraordinarily brief period of time . . . There is another appointment of 2.4 hours for testing. That

> includes the [Wechsler] adult intelligence scale, which is going to take probably an hour-and-a-half, and the rest of the time would have been observing Mr. Darling take the MMPI. . . . [A]s a result, while Dr. Herkov identifies a few of these factors, none of them were fleshed out sufficiently to really appreciate them . . . [I]t is simply . . a very casual evaluation.

PC-R Vol. III, 533-534.

On cross examination, Dr. Cunningham was confronted with the proposition that there were others besides the Defendant who grew up in similar circumstances, but had not committed similar crimes. In fact, Darling=s older half brother, Lernice Brice, had gone to prison for killing his girlfriend. Beyond that, Dr. Cunningham cited numerous studies showing the correlation between Arisk factors@ versus protective factors and subsequent violent criminality. An analogy he used was the fact that one out of four smokers do not develop lung cancer. That obviously does not mean that smoking does not have a causal relationship to lung cancer. PC-R Vol. III, 585.

Dr. Henry Dee

Dr. Dee is a clinical psychologist and neuropsychologist. Dr. Dee received his Bachelor=s degree from the University of South Florida, and his Master=s and Doctorate from the University of Iowa. He has been in private practice since 1976. He has been on the staff of Lakeland Regional medical Center since 1972. He is a member of the American Psychological Association, American Academy of Neurology, and the Academy of Aphasia, American Association for the Advancement

of Science, Sigma Xi, and the Iowa Academy of Science. PC-R Vol. III, 593-97. He has testified as an expert in the field of neuropsychology in about 12 states, federal courts, and in Canada and Mexico, over a period of thirty years. He estimated the number of times that he has actually testified as over a thousand; capital cases numbered around a hundred. PC-R Vol. III, 597.

Dr. Dee conducted a neurological evaluation of the Defendant, which took the balance of the day. PC-R Vol. III, 598-99. He also reviewed documents which included the decision of the Florida Supreme Court, school records, the MMPI administered by Dr. Herkov in 1998, statement and testimony of Dr. Herkov, and a transcript of the penalty phase. PC-R Vol. III, 599. He said the MMPI results were invalid. PC-R Vol. IV, 602. After he was deposed in connection with this proceeding he reviewed materials from Dr. Cunningham, which included Dr. Cunningham=s deposition and records from the Bahamas. PC-R Vol. III, 599-600 and PC-R Vol. IV, 601.

Relevant data from Darling=s interview included evidence of beatings, with a belt and PVC pipe, being sexually abused by the superintendent, that he had been held back in school, and that he was Aslow@ in reading and math. PC-R Vol. IV, 603-606. Darling said he did not complain about the sexual abuse because he had never before had a man treat him in a Afatherly way,@ a choice of words which Dr. Dee thought was odd. PC-R Vol. IV, 606-607.

Between seven and nine, Darling had a bike accident where he was knocked unconscious. While in the industrial school he was hit with a shovel and knocked unconscious for about ten minutes. From then on, he had headaches in the right frontal area of his head which have persisted to this day. PC-R Vol. IV, 608. He also had reports of an occasion where Darling was hospitalized after having been struck on the head with baseball bat. PC-R Vol. IV, 609-10.

Dr. Dee inquired into substance abuse. Darling reported that he started drinking when he was a child and progressed to drinking about two pints of gin or vodka a day. He used marijuana daily, and occasionally cocaine, rohypnol, and LSD.

Dr. Dee administered the Wechsler Adult Intelligence Scale (WAIS-III), Denman Neuropsychology Neuroscale, Wisconsin Card Sorting Task, the Categories test, Judgment of Line Orientation test, Facial Recognition test, and the Visual Form Recognition test. PC-R Vol. IV, 618-619.

Darling could not perform Wisconsin Card Sorting test. The test was terminated about one fourth of the way through because he could not get any correct answers. PC-R Vol. IV, 627-28. The Wisconsin Card Sorting test is also designed to detect frontal lobe damage, and this one resulted in complete failure. He also failed the Categories test, although not quite so badly. He demonstrated frustration here, but remained cooperative throughout. The Categories test is sensitive to the presence of relatively small damage to the frontal lobes. The tests have been used for nearly fifty

years and have been standardized and validated. PC-R Vol. IV, 637-638.

Dr. Dee=s opinion was that there was neurological damage to the frontal lobe. PC-R Vol. IV, 635, 639. Individuals with frontal lobe injury show behavioral deficits that are quite striking and important. They have an inability to inhibit their behavior adequately. PC-R Vol. IV, 635. They have very intense but short lived emotional displays. They often do provocative and shocking things. PC-R Vol. IV, 636.

Dr. Dee regarded the existence of frontal lobe damage as a mitigating factor, and he regarded it as a major emotional disorder. PC-R Vol. IV, 681-682. In his opinion, Darling=s neuropsychological condition established the existence of both statutory mitigating circumstances (impairment of capacity to conform and influence of extreme mental or emotional disturbance). PC-R Vol. IV, 682.

Argument

In denying this claim, the court compared the information presented at the penalty phase and evidentiary hearings and denied relief on a finding that the latter was cumulative to the former. This was not a finding of fact in sense of a primary, historical or narrative fact, or a credibility determination.[8]

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[8]Factual issues involve >what are termed basic, primary, or historical facts: facts Ain the sense of a recital of external events and the credibility of their narrators. . .@= *Townsend v. Sain,* 372 U.S. 293, 309 n. 6, 83 S.Ct. 745, 755 n. 6, 9 L.Ed.2d 770 (1963) (quoting *Brown v. Allen*, 344 U.S. 443, 506, 73 S.Ct. 397, 446, 97 L.Ed. 469 (1953)).

The court gave short shrift to Dr. Cunningham=s testimony. Specifically the court said: ADr. Cunningham=s testimony added little or nothing new; instead it was merely a >cumulative analysis= of the testimony previously presented at the penalty phase.@ This was essentially the approach taken by the court with regard to all of the mitigating evidence offered at the evidentiary hearing. *Id.*

The court erred in a number of ways. There was significant mitigation presented at the evidentiary hearing which was not presented at trial. In particular, Dr. Dee=s testimony, backed by biographical information presented by the other witnesses, supported the presence of two statutory mental mitigating circumstances. This Court has consistently recognized that severe mental disturbance is a mitigating factor of the most weighty order, *Hildwin v. Dugger*, 654 So.2d 107 (1995) at 110; *Santos v. State*, 629 So.2d 838, 840 (Fla. 1994), and the failure to present it in the penalty phase may constitute prejudicial ineffectiveness. *Hildwin*, 654 So.2d at 110. Rose, 675 So.2d at 573; see also *Baxter v. Thomas*, 45 F.3d 1501, 1512- 13 (11th Cir. 1995) (stating that "[p]sychiatric mitigating evidence 'has the potential to totally change the evidentiary picture.' ").

The biographical information presented at trial was not only woefully incomplete, it was inaccurate. The trial testimony painted a picture of a normal childhood marred by occasional abuse, which the prosecutor argued was little more than deserved discipline. The testimony at the evidentiary hearing was much more

extensive and included violent abuse, head injuries, behavioral change, paternal abandonment, victimization and recruitment by gangs, and police and institutional abuse including sexual abuse. A[I]t is critically important to construct a persuasive narrative in support of the case for life, rather than to simply present a catalog of seemingly unrelated mitigating factors . . . Since an understanding of the client's extended, multi-generational history is often needed for an understanding of his functioning, construction of the narrative normally requires evidence that sets forth and explains the client's complete social history from before conception to the present.@ Commentary to ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev.ed.2003), 31 Hofstra L. Rev. 913 at 1061. *Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (noting that consideration of the offender's life history is a " 'part of the process of inflicting the penalty of death' "); *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (" '[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background ... may be less culpable than defendants who have no such excuse' ").

According to Dr. Cunningham, the available evidence painted a picture of Awhat it was like in Dolan's childhood that is simply not captured by any testimony that occurred at trial@. PC-R Vol. II, 400. There was essentially no explanation

offered by either trial counsel or his expert as to why anything being offered was, in fact, mitigating. Dr. Herkov admitted that he could not establish a causal nexus between anything that happened in the defendant=s childhood and the instant offense. R Vol. III, 161-65. That contention then became the core of the State=s argument in opposition to the mitigation that was offered. *Id*. 270-71.

The postconviction court erred in dismissing Dr. Cunningham=s testimony on the ground that it was Amerely an analysis@ of the mitigating information offered at the penalty phase. In doing so, the court approached the evidence offered at both the trial and the postconviction proceedings as if each were a Acatalog of seemingly unrelated mitigating factors.@[9] In determining prejudice, a court should examine whether the "entire postconviction record, viewed as a whole and cumulative of mitigation evidence presented originally, raised a 'reasonable probability that the result of the sentencing proceeding would have been different' if competent counsel had presented ***and explained*** the significance of all the available evidence." *Wiggins*, 539 U.S. at 524, 123 S.Ct. at 2543; *Williams v. Taylor*, 529 U.S. at 399, 120 S.Ct. at 1516

[9]This is one of a number of techniques, which have been used to deny relief without any real qualitative analysis of mitigating evidence, which were rejected in *Wiggins* and *Williams*. Another, implicated here, is the Atwo edged sword@ analogy. Every comprehensive examination of a capital defendant=s past (and that of everyone else) is going to turn up some information that paints him in a bad light. The new information revealed in *Williams* and *Wiggins* did so. The precise source of new mitigation in *Rompilla, infra,* was Rompilla=s criminal case court file. The Court granted relief anyway.

(emphasis added). This means that the way mitigating information was presented cannot be excluded from the prejudice analysis, which is what the court did here. The available mitigating evidence, taken as a whole, verified, adequately presented and explained, "might well have influenced the jury's appraisal" of Darling's moral culpability. *Id*., at 398, 120 S.Ct. 1495. *Wiggins*, 539 U.S. at 537. Although Ait is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test.@ *Rompilla v. Beard*, --- U.S. ----, 125 S.Ct. 2456, --- L.Ed.2d ---- (2005) at 2469. The likelihood of a different result if the available mitigating evidence had been adequately presented and explained is sufficient to undermine confidence in the outcome actually reached at sentencing. *Id*. citing *Strickland*, 466 U.S., at 694, 104 S.Ct. 2052.

CLAIM II

MR. DARLING RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE DUE TO HIS LAWYERS= FAILURE TO CHALLENGE A PRIOR CONVICTION IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

About a week after the murder, Darling was arrested for a carjacking and non-fatal shooting of a taxi cab driver. Attorney Christopher Smith was appointed to represent him after the public defender withdrew due to a conflict. Mr. Smith did not learn about the murder investigation until after he resolved the carjacking case with a negotiated plea on April 3, 1997. The carjacking conviction was used to support the

prior violent felony aggravating circumstance in this case.

Darling filed a pro-se 3.850 motion in the taxicab case claiming ineffective assistance of counsel. Darling=s request for the appointment of counsel in the postconviction proceedings was denied. PC-R Vol. I, 14.[10] On October 8, 1997, the court conducted an evidentiary hearing on three issues: ineffective assistance because defense counsel (1) failed to investigate and prepare a voluntary intoxication after promising to do so, (2) badgered Darling into accepting a plea, and (3) failed to investigate the facts of the crime. With regard to the third claim, Darling alleged that an adequate investigation would have revealed that the victim was unable to identify Darling as the perpetrator. *Id.* Darling was unrepresented at the hearing. The court asked Darling a few preliminary questions about his allegations and then turned him over to the prosecutor. Darling admitted committing the crime, although he said that he was on drugs at the time, and maintained that Adidn=t intend to do what happened@ and was unable to distinguish Aright from wrong.@ *Id*. 20-21. Christopher Smith

[10]This was error. In determining whether counsel should be appointed in a 3.850 proceeding the trial court should consider the adversarial nature of the proceedings, the complexity of the case, the need for an evidentiary hearing and the need for substantial research. *Graham v. State*, 372 So.2d 1363 (Fla. 1979). During the capital evidentiary hearing, Christopher Smith said that he didn=t think Darling was sophisticated enough to represent himself in his postconviction proceedings. [PC-R Vol. V, 916-917]. An evidentiary hearing in itself implies the presence of three of the four Graham factors. William v. State, 471 So. 2d 738(Fla. 1985). Any doubts about the necessity of counsel must be resolved in favor of the defendant. *Id.*

testified at some length and denied that his representation fell short in any way. Darling asked that the court be lenient. The court found that Darling=s motion for postconviction relief was, in reality, a motion to mitigate sentence, and denied it. PC-R Vol. I, 68-72. That denial was appealed pro-se to the 5th District Court of Appeal, but the appeal was apparently abandoned.

At the evidentiary hearing in this case, Christopher Smith testified that he would have handled this case differently if he had known about the possibility of a murder indictment. He said that he would have contacted the attorney who was handling the murder case, he would have put it on the record that he had discussed the fact this was a possible aggravating factor in his homicide case. He also Awould not have been so amenable to recommending a plea, knowing that this could possibly be used against [Darling] in a penalty phase later on.@ He had not completed discovery at the time this plea was entered. He had scheduled some depositions, but had not taken them yet.

Ineffective assistance of counsel is supported by counsel=s failure to take depositions, investigate voluntary intoxication, file a motion to suppress the confession, the entry of a plea based after less than two months, and failure to file a motion to withdraw the plea based on lack of knowledge that the plea would be used as an aggravator in support of an unrelated death penalty case.

"It is the duty of the lawyer to conduct a prompt investigation of the

circumstances of the case and to examine all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty." 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.)

CLAIM III

THE POSTCONVICTION COURT ERRED IN EXCLUDING THE PROFFERED TESTIMONY OF THE ATTORNEY WHO REPRESENTED DARLING IN THE PRIOR CONVICTION USED AS AN AGGRAVATING FACTOR

The trial court erred in refusing to accept the proffered testimony by Christopher Smith, which was offered to establish ineffective assistance of trial counsel in this case during sentencing phase for failure to challenge Darling=s prior carjacking conviction. The trial court ruled that the claim was not pled with sufficient specificity. However, in Claim IV of his postconviction motion Darling alleged, *inter alia*, that "counsel was ineffective for failing to investigate the defendant's background". PC-R Vol. VII 1283. The State=s written response to this claim was:

> 8. CLAIM IV, (Ineffective assistance/ failure to obtain and present mental status information), appears to be sufficient raise a valid post-conviction claim.

PC-R Vol. VII, 1396. In Claim XV Darling alleged, *inter alia,* failure "to adequately challenge the State's case" for aggravation. *Id.* 1313.[11] The court appeared to have mistakenly denied this claim in its order of April 27, 2004. PC-R Vol. VIII, 1534-44. However, the court subsequently entered an order on April 29, 2004 clarifying its ruling. PC-R Vol. VIII, 1563-64. That order stated:

> 2. CLAIM XV (Sentence phase ineffective assistance/ failure to provide adequate mental health assistance) is STRICKEN as a separate claim and MERGED into the allegations of Claim IV. To the extent that Claim XV presents issues distinguishable from those of Claim IV, Defendant is hereby authorized to argue the allegations and issues as set out in Claim XV as a part of Claim IV.

An evidentiary hearing was granted on these claims and the proffered testimony of the attorney should have been considered by the trial court.

CLAIM IV

THE POSTCONVICTION COURT ERRED IN ITS RULINGS CONCERNING THE DISCLOSURE OF PUBLIC RECORDS RELATING TO DNA EVIDENCE

Claim I of the motion for postconviction relief alleged that FDLE failed to adequately disclose public records, including *inter alia* the FDLE DNA laboratory Quality Assurance Manual, Standard Operating Procedure manual (SOP), curricula

[11]This claim was filed as a Ashell@ claim. It=s wording was intended to be broad-sweeping.

concerning the evidence collection personnel and the contamination control practiced in the laboratory, and the results of contamination control surveys relevant to DNA testing. PC-R Vol. VII, 1791. Prior to the evidentiary hearing, the court had granted motions to compel production of these and other documents relating to the DNA testing. *Id.*

In the middle of the evidentiary hearing, the court, on motion, found that a discovery violation had occurred. PC-R Vol. V, 951. Although Ms. Arvizu said she would need a Amatter of weeks@ to review and prepare the new material, the court directed that she, accompanied by one of Darling=s two collateral attorneys and the FDLE analyst, go to the FDLE lab and conduct an audit on the spot, while the court continued with the evidentiary hearing. Only about two thirds of the additional documentation requested on site was provided. Ms. Arvizu=s resumed testimony was based on her preliminary review of the new material, but she said that she needed time for further review and assessment. PC-R Vol VI, 1145.

She also noted that the FDLE lab personnel had never known the scope of the request. She said that Aapparently, somebody else in the organization knew it, but the actual responsible laboratory people, who would recognize@ exactly what is was that was being requested were learning of the request for the first time. PC-R Vol. VI, 1158. After additional information was provided to her via the internet, PC-R Vol. I, 84, her report, dated May 15, was proffered on May 21, 2004. PC-R Vol VIII, 1580-

85 (supplemental report).

The court found that the remedial actions taken before and during the course of the evidentiary hearing allowed Darling to Afully present his case at the evidentiary hearing.@ PC-R Vol VII, 1793. That, however, was not the appropriate remedy.

Under Florida law "all state, county, and municipal records shall at all times be open for a personal inspection by any person." ' 119.01(1), Fla. Stat. (1995); art. I, ' 24 Fla. Const. Courts must construe the Public Records Act "to frustrate all evasive devices." *Town of Palm Beach v. Gradison*, 296 So.2d 473, 477 (Fla. 1974). The State must disclose any *Brady* material even if exempt under Chapter 119. *Walton v. Dugger*, 634 So.2d 1059, 1062 (Fla. 1993). Moreover, under rule 3.852, any objection to production must made within a time specified or the objection will be deemed waived. Here, the requests were very specific; they were simply not transmitted within the agency to anyone who knew what those specifics meant.

When a capital defendant claims that a state agency is withholding pertinent public records, the trial court should hold a hearing regarding such claims. See *Reed v. State*, 640 So.2d 1094, 1098 (Fla. 1994). Here, the court did not afford collateral counsel any additional time to review the new information which was coming in before, during and after the evidentiary hearing. Mr. Darling must finally be given an opportunity to participate in a meaningful way in the public records process. He must be given the opportunity to analyze those documents and to amend his 3.850 motion

to include any additional claims, including *Brady* claims, that are revealed. *Provenzano v. Dugger*, 561 So.2d 541, 547 (Fla. 1990). This Court has permitted amendments to rule 3.850 motions for postconviction relief upon the receipt of public records to include and new or additional claims in light of information obtained from the furnished documents. *Ventura v. State*, 673 So.2d 479, 481 (Fla. 1996); *Muehleman v. Dugger*, 623 So.2d 480, 481 (Fla. 1993). A new hearing on the amended 3.850 motion must then be held if Mr. Darling finds evidence to support an amendment to his 3.850 motion or which supports his previously filed 3.850 motion.

CLAIM V

MR. DARLING RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO COUNSEL=S FAILURE TO CHALLENGE THE STATE=S DNA EVIDENCE

The court acknowledged Ms. Arvizu=s testimony that the procedures and methods utilized in this case fell well below accepted standards. FDLE had inadequate custody control procedures in place, failed to run the necessary controls to ensure against unreliable results and cross-contamination, and, at the time of testing, did not have a quality assurance program in place. Additionally, logbooks pertaining to instruments used in DNA testing and external proficiency results regarding the analysts were not provided and/or available, and the analysts observations and testing notes were not maintained according to general laboratory practice. Order denying relief, PC-R Vol. VIII, 1826. Nevertheless, the postconviction court found that Ms. Arvizu

was not qualified to challenge the testing results, only the laboratory protocol. The court therefore found that there was no reasonable probability that Arvizu=s testimony would have resulted in the Aexclusion, or even undermining@ of the DNA evidence offered by the State. Order, PC-R Vol. VIII, 1828. In effect, the court adopted the State=s argument that this whole line of inquiry was irrelevant (and that it therefore did not matter whether there were or were not discovery violations).

That analysis conflates exclusion with challenging the evidence at trial, and is erroneous on both counts:

> The validity of [the] assumption . . . that the analytical work done for a particular trial comports with proper procedureBcan be resolved only case by case and is always open to question, even if the general reliability of DNA typing is fully accepted in the scientific community. The DNA evidence should not be admissible if the proper procedures were not followed. Moreover, even if a court finds DNA evidence admissible because proper procedures were followed, the probative force of the evidence will depend on the quality of the laboratory work.

DNA Technology in Forensic Science, National Research Counsel, National Academy Press, Washington D.C., 1992, at pg. 134.

In *Murray v. State*, 838 So.2d 1073 (Fla. 2002), this Court determined that DNA testing results from the FBI should be excluded due to deficiencies in the testing procedures in the particular case before it. The Court ultimately concluded that: "Based on the unique combination of errors and problems which occurred in the tests and the lack of documentation, we find that the State did not meet its burden in

demonstrating the general acceptance of the testing procedures which were used in this case." *Id*. 1081. It is self-evident that if the laboratory failed to follow its own quality assurance procedures then the quality and therefore the probative effect of its results are not assured. The jurors question during deliberation suggests that a challenge to this evidence would have influenced the jury=s verdict. TT Vol. IV, 774

CLAIM VI

DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE ENTRY OF A PHOTOGRAPH OF A LATENT FINGERPRINT OBTAINED FROM A LOTION BOTTLE LOCATED AT THE CRIME SCENE

The state=s evidence against the Defendant included testimony that a lotion bottle found in the victim=s apartment contained one thumb print matching the Defendant. Although the photograph was *not* the best evidence of the latent fingerprint recovered (it was rather a reproduction), the defense voiced no objection to the entry of the photograph, and the photograph was admitted as State=s exhibit #14. TT Vol. III pg. 499. Had the defense objected on the grounds of best evidence rule, the photograph of the latent print would not have been admissible and the State=s case would have been seriously undermined.

In *McKeehan v. State*, 838 So.2d 1257 (Fla. 5th DCA 2003), a defendant=s conviction was overturned based on a violation of the best evidence rule. The best evidence rule, as codified by statute, requires that if the original evidence or a

statutorily authorized alternative is available, no evidence should be received which is merely Asubstitutionary in nature.@ *McKeehan* at 1260; 90.952, Florida Statutes (2002).

CLAIM VII

MR. DARLING WAS DENIED HIS RIGHT TO INDIVIDUALIZED SENTENCING IN VIOLATION OF LOCKETT V. OHIO AND ITS PROGENY.

The prosecutor improperly argued that mitigating circumstances were limited to those which were directly related to the crime for which sentence was to be imposed. Here, the jury was advised that mitigating evidence, was subject to a Abut **B** for@ causal test to be considered as such. Defense counsel was ineffective in failing to object to this argument.

The prosecutor argued what had started out as a defense**B**proposed special instruction as a main feature of his closing argument:

> The judge is going to tell you that these mitigating circumstances are these factors, including any aspect of the defendant=s background or life which may be considered as attenuating or reducing the degree of moral culpability for the offense.

R Vol. III, 267. With regard to age, the prosecutor argued: A[I]s there anything mitigating about the defendant=s age that attenuates or reduces the degree of mental or emotional culpability for the offense? No there just isn=t. That=s not a mitigating circumstance.@ *Id*. The State then pressed the same point with regard to essentially

the entire case for mitigation: ADoes the fact that his parents weren=t married reduce his moral culpability for the crime . . . I can=t see how it does . . . Mom=s always been there for him . . . but does that reduce his moral culpability?@ *Id*. 268.

With regard to Darling being the victim of childhood abuse, the prosecutor argued:

> Is there something about the fact that the defendant was physically abuse[d] by his father . . that, again, going back to the definition, reduces the degree of moral culpability for the offense?
>
> I asked Dr. Herkov can you show us that fact has some direct correlation to this murder? No. I even asked him could you tell us had that not happened this crime wouldn=t have still occurred? No, I don=t know that. No one can know that. No one can know what effect these events had on the crime in this case.
>
> I submit to you, ladies and gentlemen, it defi[]es common sense to say this man became a rapist and murderer because his father picked on him the way he did.

Id. 270-71. During cross examination, the prosecutor had asked Dr. Herkov, AIn fact, in this particular case you are not really able to tell us what, if any, role this supposed abuse had in the actual crime that was committed here?@ R Vol. III 161. It appears that Dr. Herkov opined that there was a Acorrelation,@ *id*. 162, but he agreed that there Awould not be a one-to-one correlation.@ *Id*. 165. He further agreed that he was not Agiving an opinion . . . as to why Mr. Darling committed the crime@. *Id*.

The jury was instructed that "Mitigating circumstances are those factors, including any aspect of the defendant's background and life, which may be considered as extenuating or reducing the degree of moral culpability for the offense." R Vol. III,

295. The standard catch-all instruction that followed was inadequate to offset the prosecutor's improper argument and defense counsel's failure to do anything about it.

The sentencing judge was also persuaded that the weight of a mitigating circumstance is proportional to its connection with the crime. This is shown by the sentencing order:

> [T]he unfortunate events of his childhood do not in any direct way diminish his moral culpability for this crime. The indirect effects of his desensitization are the most weighty of the non-statutory mitigating factors and the court has given this factor due consideration.

R Vol. IV, 334; R Vol. VIII, 1123-24. This analysis errs by finding Athat an aspect of the defendant's background or character need not be given weight unless the defendant can first show its relationship to the crime in question.@ *Ford v. State*, 802 So.2d 1121 (Fla. 2001) concurring opinion 1137-39. See also *Asay v. Moore*, 828 So.2d 985, 991 (Fla. 2002) (mitigation evidence is not limited to evidence that provides justification or excuse for the act).

CLAIM VIII

THE JURY WAS REPEATEDLY TOLD THAT A DEATH RECOMMENDATION WAS LEGALLY REQUIRED UNDER CERTAIN CIRCUMSTANCES. DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO OBJECT.

During voir dire, the prosecutor repeatedly instructed Mr. Darling=s venire panel that a death recommendation was required under certain circumstances. One panel

member, Ms. Adams, indicated she did not think she could recommend the death penalty. She told the prosecutor: AIt would be against anything I believe. But you=re telling me I couldn=t break the law, so I have to vote for it.@ TT Vol. I, 94. The prosecutor replied with an explanation about the bifurcated nature of the trial, and then said: ABut under some circumstances to follow the law, the death [sentence] is the appropriate vote you should make.@ *Id*. 95. Ms. Adams responded, AIt sounds like I would either vote for the death penalty or I would break the law. I don=t think I should be put in that position.@ *Id*. 95.

On objection, the court ordered the prosecutor to rephrase the question. The prosecutor said:

> Mr. Ashton: Thank you. Let me phrase the question this way. In order to be a juror in any kind of case you have to take an oath in the beginning to follow the law, wherever it leads you.
> In a case of this type, the law might lead you as you analyze it to vote death. [The q]uestion for you is, could you take an oath to follow the law, knowing that it might result in your voting to impose the death penalty?

Id. 97-98. There was no objection. Ms. Adams said she would not vote for the death penalty (and was eventually excused). Later in the voir dire, veniremember Ramos indicated that he would not vote for the death penalty under any circumstances. The prosecutor, before the entire panel, responded:

> MR ASHTON: Now, I asked the same questions of one of the jurors this way. As a juror it would be your **B** the way we start the process with the jurors, they take an oath to follow the law. Could you take an oath to

> follow the law if it meant that you might be compelled to vote to impose death, if that's what the law called for?

TT Vol. I, 115. There was no objection from the defense or response from the Court. Ramos stuck to his position and was later excused.

In *Henyard v. State*, 689 So.2d 239 (Fla. 1996), this Court held that a prosecutor's comments during voir dire that jurors must recommend death when aggravating circumstances outweigh mitigating circumstances misstated the law. See *id*. at 249-50. "[A] jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors." *Id*. at 249-50; *Brooks v. State*, 762 So.2d 879, 902 (Fla. 2000) (prosecutor misstated the law in commenting that jurors must recommend a death sentence unless the aggravating circumstances are outweighed by the mitigating circumstances); *Garron v. State*, 528 So.2d 353, 359 & n. 7 (Fla. 1988) (finding that it was a misstatement of the law to argue that "when the aggravating factors outnumber the mitigating factors, then death is an appropriate penalty"). *Franqui v. State*, 804 So.2d 1185 (Fla. 2001) (trial court's comment that the law required jurors to recommend a death sentence if the aggravating circumstances outweighed the mitigating circumstances misstated the law). A mandatory death penalty is constitutionally impermissible. *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

In this case, the prosecutor repeatedly told the jury that a death

recommendation was required under certain circumstances. In fact, the prosecutor said all of the things that have been condemned in the above cited cases. At one time or another he warned the jurors that by voting for a life recommendation they could be breaking the law, violating their oaths, and that the law could compel them to recommend death. The first time it happened, during the voir dire of Ms. Adams, defense counsel objected and requested a general curative instruction. The court then gave an instruction which did not even address the error. Instead, the Acurative@ instruction emphasized the point that a recommendation is only a recommendation and that the judge would be the one to decide the sentence. In other words, to the complaint that a juror might be required to recommend death under certain circumstances, the court responded by saying, in so many words, Athat is true, but don=t take it too seriously.@ The prosecutor immediately followed with an unequivocal statement that a death vote at times would be legally required. This statement went unchallenged. Its placement in context -- immediately after an objection, instruction, and invitation to rephrase **B** had the effect of giving it the court=s blessing. It also distinguishes it from a situation where the court effectively cures the error by giving a correct instruction. The standard instructions are consistent with the law in that their description of the role of the jury omits any reference to a required death recommendation, but, as shown by the note to the *Franqui* decision cited above, they do not specifically instruct the jury that a death requirement does not exist.

The fact that the prosecutor repeated the same misstatement during the voir dire of juror Ramos distinguishes this case from those where the misstatement of law was Aisolated.@ The error here was repeated and actually magnified by defense counsel and the court. Prejudice is shown by the fact that nothing occurred during the proceedings to cure the error.

Defense counsel did worse than nothing with his comment during voir dire. He told the jury that Awe can=t tell you . . . if you vote against the death penalty, you=re breaking the law? We can=t say that.@ That is as much as saying AWe can=t tell you that, but that=s the way it is.@ Ms. Adams= response, the final word on the subject, shows that she at least was left with the belief that under certain circumstances she would be breaking the law and violating her oath unless she recommended a death sentence. Defense counsel=s failure to counter this repeated error through objections, argument, proposed instructions or appropriate motions constituted prejudicially ineffective assistance of counsel.

Claims Submitted for Preservation

The following claims are submitted here in order to preserve them for review.

CLAIM IX

MR. DARLING'S SENTENCING JURY WAS MISLED BY 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.

When veniremember Adams balked at the prosecutor's statement that she might be violating the law if she did not vote for the death penalty, the court instructed the panel that: AThe decision would be mine ultimately@. TT Vol. I , 96-97. And, as Justice Lewis pointed out in Bottoson, *infra*,

> Under Florida's standard penalty phase jury instructions, the jury is told, even before evidence is presented in the penalty phase, that its sentence is only advisory and the judge is the final decisionmaker. *See* Fla. Std. Jury Instr. (Crim.) 7.11. The words "advise" and "advisory" are used more than ten times in the instructions, while the members of the jury are only told once that they must find the aggravating factors beyond a reasonable doubt. The jury is also instructed several times that its sentence is simply a recommendation.

Bottoson v. Moore, 833 So.2d 693, 731-34 (Fla. 2002)(Lewis, J., concurring in result only)(citations omitted).

In *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633 (1985), the Supreme Court held that it was constitutionally impermissible to rest a death sentence on a determination made by a sentencer who had been led to believe that the responsibility for the sentence rested elsewhere.[12] Were this Court to conclude now that the death sentence in this case rests on findings made by the jury after they were told, and Florida law clearly provided, that a death sentence would not rest upon their

[12]Held inapplicable in *Grossman v. State*, 525 So.2d 833 (Fla. 1988).

recommendation, it would establish that it was imposed in violation of *Caldwell***.**

CLAIM X

THE SENTENCE OF DEATH IN THIS CASE MUST BE VACATED IN LIGHT OF *RING V. ARIZONA*

CONCLUSION AND RELIEF SOUGHT

The lower court's order denying relief should be reversed with directions to afford a new trial, penalty phase before a jury, sentencing, or an evidentiary hearing on those claims which were summarily denied, or this Court should afford such other relief as it deems appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of the Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record and the Defendant on November _____, **2005.**

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of the Appellant, was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210.

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