IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 06-2091

ALVIN MORTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PASCO COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

MARIE-LOUISE SAMUELS PARMER
Assistant CCRC
Florida Bar No. 0005584
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park, Suite 210
Tampa, Florida 33619
(813) 740-3544

PRELIMINARY STATEMENT

This is the appeal of the circuit court=s denial of Mr. Morton=s motion for post conviction relief brought pursuant to Florida Rule of Criminal Procedure 3.851.

Citations shall be as follows: The record on appeal concerning the 1994 trial proceedings shall be referred to as "1994 TR ___" followed by the appropriate page numbers. The record on appeal concerning the 1999 trial proceedings shall be referred to as "1999 TR ___" followed by the appropriate page numbers. The postconviction record on appeal will be referred to by the appropriate volume and page numbers. (ROA V. - P.-) Alvin Morton will be referred to as Alvin, Alvin Morton or Mr. Morton. Other family members will be referred to in the same manner, e.g. Virgil Morton or Virgil. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Alvin Morton has been sentenced to death. The resolution of issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims at issue and the stakes involved. Alvin Morton, through counsel,

respectfully requests this Court grant oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

STATEMENT OF THE CASE

Procedural History

On January 28, 1992 Alvin Morton was arrested and subsequently charged with two counts of first degree murder in the deaths of Madeleine Weisser and John Bowers which occurred on late January 26th or early January 27th of 1992. John Swisher and Gary Urso were appointed to represent Mr. Morton in January, 1992 and October, 1992, respectively.

Mr. Morton=s first trial was held in February of 1994. He was convicted on both counts. The sentencing phase began February 8th and concluded February 9th. The jury recommended death by an 11 to 1 vote on both counts. The trial court found the following aggravators for each of the murders: (1)CCP; (2)the murder was committed during the course of a robbery or burglary; (3)the murder was committed for the dominant purpose of avoiding or preventing a lawful arrest. As to Ms. Weisser, the trial court also found HAC and contemporaneous previous capital felony (the murder of Mr. Bowers). The trial court found the following mitigation: Alvin=s age and lack of significant prior criminal history (very little weight); Alvin=s family background, mental problems, physical and mental abuse and his voluntary confession (little weight). This Court remanded for a new sentencing based on improper impeachment of

witnesses. Morton v. State, 689 So. 2d 259 (Fla. 1997).

In March of 1997, the trial court reappointed Mr. Swisher and Mr. Urso. The retrial began approximately two years later, on February 8, 1999. Jury selection took less than one day. The State=s case was presented over the course of three days, February 8th through 10th, with rebuttal testimony presented on February 11th. The defense case lasted a mere five hours, with less than two hours of testimony February 10th and three hours of testimony February 11th.1999TR, V. I, p. 107-114

The jury again recommended death 11 to 1. The trial court found the same aggravators to both murders, each of which it assigned great weight: (1) CCP, (2) murder occurred during the commission of a robbery or burglary or both, (3) avoiding arrest. As to Ms. Weisser, the trial court found the same additional aggravators, (1)HAC and (2)prior contemporaneous violent felony. The trial court found the following mitigators: (1) Alvin=s age of 19; (2) lack of significant prior history; (3)dysfunctional family; (4) little contact with his mother during the first four weeks of his life; (5) physical and mental abuse by his father until age eight, and (5) confession and cooperation with police. All were given little weight except prior history was given some weight.

This Court affirmed, finding that the trial court did not

abuse its discretion in failing to find mental health mitigation. Morton v. State,789 So. 2d 324 (Fla. 2001).

Mr. Morton timely filed a Motion For Post-Conviction Relief. On February 13, 2003 the lower court entered an Order granting in part an evidentiary hearing and denying in part Mr. Morton=s Motion.[1] The lower court heard evidence in October, 2003 and January, 2004. The lower court also took judicial notice of the entire case file and the record on appeal for the 1994 and 1999 trials upon agreement by the parties. On May 9, 2005, Mr. Morton filed an amended motion, raising two claims based on newly discovered evidence and retroactive change in the law. On April 4, 2006, the lower court denied all claims. Mr. Morton filed a Motion for Rehearing on April 19, 2006. The lower court denied the motion on September 12, 2006. This appeal follows.

STATEMENT OF FACTS

Testimony and evidence admitted at the post conviction hearing established the following facts.

Trial Attorney Mitigation Investigation

Mr. Swisher had primary responsibility for the guilt phase

1. The lower court granted an evidentiary hearing on Claims I and II with the exception of claim I(G). Claim III was abandoned at the *Huff* hearing. The remaining claims were denied without hearing with the caveat that the lower court would reconsider Claim VII on its own motion if sufficient evidence was presented at the evidentiary hearing.

and Mr. Urso had primary responsibility for the penalty phase. ROA V. XIV, p. 12. Alvin's case was the first and only death penalty case Mr. Urso ever tried. ROA V. XIV, p. 19.

Billing records reflect he met with Alvin only three times prior to trial in 1994 and that he spoke with Barbara Stacy, Alvin's mother, only once by telephone a few weeks prior to trial. ROA V. XIV, p. 21-23;V. XI, p. 2109-11. He never went to the family home. ROA V. XIV, p. 122-23. Although counsel claimed he spoke to aunts and some teachers, he was unable to provide any details concerning such interviews. ROA V. XIV, p. 12; 34-38. Mr. Urso never asked anyone to prepare a comprehensive history of Alvin. ROA V. XIV, p. 54. The only records he remembered reviewing were school records but was unsure when, how or from whom he obtained them. ROA V. XIV, p. 27-28, 33 and 180, 182. He recalled seeing Department of Corrections records but could not describe any details about them. ROA V. XIV, p. 31-33. He acknowledged that he never sought releases to obtain records. ROA V. XIV, p. 28, 39.

The entire investigation by Mr. Krisanda, Mr. Urso's investigator, consisted of interviewing Alvin, his mother and his sister and obtaining newspaper clippings of the case. ROA V. XV, p. 254. Mr. Urso retained a social worker, Mimi Pisters, about six weeks prior to trial; his billing records reveal he

first spoke to her three weeks prior to trial. ROA V. XV, p. 224, 238. She had no death penalty experience. ROA V. XV, p. 236. The only background information Mr. Urso gave her were newspaper articles about the crime. 1999TR - 550. After the case was remanded, Mr. Urso gave her a transcript of Alvin=s confession. 1999TR - 565. The only witnesses she spoke to were Alvin=s mother and sister. 1999TR- 531. She would have liked to review school records and talk to teachers but did not attempt to do so, even though one of the schools was Ajust up the road.@ 1999TR - 566.

Approximately eight weeks before trial, Mr. Urso asked the court to appoint a psychologist, Dr. DelBeato, to determine competency and evaluate Alvin. Dr. DelBeato met with Alvin only once, approximately three weeks prior to trial. HRNG - 891. Mr. Urso did not provide Dr. DelBeato any records or background information. ROA V. XIV, p. 54, 160-61. Dr. DelBeato=s trial testimony in 1994 and 1999 corroborates the fact that he was not given any records or information to review. At the hearing, however, Dr. DelBeato claimed he received some documents and background information but could not provide specifics.

Investigation After Remand

After the 1997 remand, Mr. Urso reviewed the Sentencing Order. Def. Ex. 4; ROA Vol. XI, p. 1792-1802 He admitted that he

did not do any further investigation to attempt to counter Judge Villanti=s findings giving little weight to mitigation. ROA V. XIV, p. 108-09. Mr. Urso=s billing records reflect he met with Alvin only three times in the two years prior to his retrial. Def. Ex. 5; ROA, Vol. XI, p. 1803-1816. Mr. Swisher=s billing records reflect his only contact with Alvin in the two years prior to retrial was a single collect telephone call in 1998, although he claimed he must have met with him but could not provide a date or time. ROA V. XV, P.277. Mr. Swisher admitted that he could not testify that anything was done differently in 1999. Id at 284. He testified that Mr. Urso spoke to Alvin about a PET scan or MRI, which Alvin said he did not want. ROA Vol. XXI, p. 1141. Both Mr. Swisher and Dr. DelBeato sent letters to Mr. Urso urging Mr. Urso to not use Dr. DelBeato at trial. Def. Ex. 2; ROA Vol. XI, p. 1790;Def. Ex. 3; ROA Vol. XI, p. 1791 Although Mr. Urso testified the court would have provided another expert had he asked, he never made the request. ROA V. XV, p. 244. Mr. Swisher confirmed funding was available to obtain another expert and he Anever had a motion for costs denied.@ Id. at 311.

When asked about his strategy and investigation after the mandate, Mr. Urso admitted he Agot that uncomfortable feeling ... when [the state] cross-examined [Mimi Pisters about newspaper

clippings] and Dr. DelBeato about documents,@ but never did anything about it. ROA V. XIV, p. 107 -109. He presented antisocial because that was Aall we had.@ ROA V. XIV, p. 56, 102-05.

Testimony of Prevailing Norms of Capital Defense in the 1990s

Capital defense attorney Robert Norgard stated that the prevailing norms in the 1990s established that defense counsel should investigate all aspects of mitigation. ROA V. XXI, p. 1170-75. A capital case Anecessitates a very thorough investigation that can involve a couple hundred , several hundred hours of investigation.@ Id. at 1176.

Counsel, or their investigator or mitigation specialist, should attempt to obtain a comprehensive history on the client and his family members. Id. at 1170. Counsel should attempt to obtain information on generations of relatives and the relationships of various family members. Id. Obtaining information relevant to physical and sexual abuse is also important. HRNG - 1097. The standard practice is to obtain signed releases to get confidential records on clients, siblings and parents. Id. 1171. Obtaining records on birth trauma is standard, Id. 1172-75, because it is an important identifier of possible brain damage. 1177-79. Divorce decrees, bankruptcy records and police reports documenting facts of a crime are all

basic records reasonably competent counsel would look for. Id. 1172-75.

Mitigation investigation is an ongoing process, which must continue after remand. The standard is for counsel to review the sentencing order and then reinvestigate the case, especially where the court found the mitigation lacking. Id. at 1183-85.

Post Conviction Mitigation Investigation

Post conviction counsel retained Claudia Baker to conduct a social history/mitigation investigation. Ms. Baker has a masters in social work, is certified in forensic social work and was accepted as an expert in forensic social work without objection. ROA V. XV, p. 319; 323. During the course of her investigation she spoke to 21 people and reviewed and obtained extensive documentary evidence, ROA V. XV, p.323 -28,including: (1) Alvin=s medical records evidencing an anoxic, premature birth by forceps and a hole in his lung diagnosed at age eight months, St. Ex. 1, ROA, Vol. XI, p. 1761-64, (2) Les Stacy=s military records documenting his misconduct discharge for assault, ROA Vol. XI, p. 1876-1877, (3) military records documenting Virgil=s misconduct discharge for manslaughter, ROA, Vol. XI, p. 1900-1909 (4)prison records finding Virgil to be a sociopath with Asexual deviation,@ROA Vol. XI, p. 1924, 1927(5)police reports detailing where Virgil did Abeat and stomp to death@ a 21 year

old AFilipino@ man, ROA Vol. XII, p. 1960 (6) the Stacy=s bankruptcy records, ROA Vol. XI, p. 1917 (7) Barbara Stacy and Virgil Morton=s divorce decree,ROA Vol. XI, p 1829, (8) Virgil=s arrest report for assaulting Barbara ROA Vol. XI, p. 1853-1855, and (9) records detailing Virgil=s mental illness, alcoholism and history of arson. ROA Vol. XII, p. 1933.

It is standard for a forensic social worker/mitigation specialist in a capital case to obtain a comprehensive history on the client. ROA V. XV, p.330-31. The work of a mitigation specialist involves speaking to the client, then the relatives, then obtaining records, talking to more people and screening for experts on psychological issues. Id. Counsel proffered the testimony of Ms. Baker that she had reviewed Ms. Pisters testimony and report and stated that Ms. Pisters did not conduct the equivalent of a comprehensive social history/mitigation investigation. Id. at 329; 398-99. [2] Ms. Baker also confirmed it would be impossible to do an adequate mitigation investigation in six weeks. Id. at 376.

---

2 The lower court=s refusal, upon objection by the State, to allow Ms. Baker to render an opinion as to whether what Ms. Pisters did was the equivalent of a comprehensive social history investigation is raised as error in Argument IV.

Biological factors Ms. Baker found which should have prompted further investigation into brain damage in Alvin=s case included: severe birth trauma, pneumothorax as an infant; inability to remember his address, phone or school locker number as a teenager; inadequate nutrition in childhood; head trauma from abuse, and a lack of coordination up to age eight. ROA V. XV p. 333-36. Sociological factors which should have prompted further investigation included: family dysfunction going back more than one generation; continued contact with Virgil after the age of eight; physical and sexual abuse; neglect; poverty and witnessing violence. Id. at 335-38. Psychological factors which should have prompted further investigation included: Alvin=s inability to understand mood or feelings; Alvin=s habit of sticking needles in his arms; indicators that Alvin=s emotional age was significantly less than his chronological age such as not meeting developmental milestones, playing video games, riding bicycles and failing to blend with his age group; the descriptions in police and expert reports of Alvin as Arobot-like@; his inability to connect with other children; his failure to have close friends or a girlfriend; and his mother=s description of how he did not like to be touched and his fixation with clocks. Id. at 335-56. Based on her findings, Ms. Baker recommended Alvin be tested for autism. Id. at 370.

Mitigation Testimony Presented at Hearing

Robin Johnson testified that she is Alvin=s aunt, but is only seven years older than Alvin, and saw the family approximately once a week when Virgil and Barbara Stacey were still married. ROA V. XIX P. 904. Ms. Johnson said no one contacted her prior to 2000 about testifying and would have testified if asked. Id. at 911. She described horrific violence, poverty, and sexual abuse of Alvin by his father. Id. at 904-21.

Jerry Baker said he saw Virgil tease Alvin about alligators and then throw him in a river leaving him to drown and backhanding him across the mouth for asking for a glass of water. ROA V. XIX, p. 925-27. He also said Alvin Azoned out,@ while the other kids were playing and was always covered in bruises. Id. at 927-29.

Paula Henricks, an aunt of Virgil=s, testified to the extensive abuse she witnessed. She had never been contacted by Alvin=s attorneys but would have testified. ROA v. XVI, p. 519. She saw Virgil slap Alvin and break his glasses.@ Id. Claudia Baker confirmed that Virgil did this so often the family just taped them and put them back on. ROA V. XV, p.353.

Angela Morton confirmed that she and Alvin continued to have frequent contact with Virgil after their parents divorced. ROA

V. XVIII, p. 850, 860. On one of these visits, Virgil strangled a puppy because it jumped on Angela and then made Alvin bury it. Id. at 850-51; V. XV, p. 350-51. Claudia Baker also spoke to several of Alvin=s relatives who confirmed that both Alvin and Angela saw Virgil weekly at Topper=s and had their own beds there, even though Virgil had been caught sexually abusing Angela. Id. Virgil also kicked a tethered dog so often its intestines started to Ahang out.@ Id. at 365.

Evidence of neglect included Leroy Joslin describing the children to Ms. Baker as always Adirty, hungry kids.@ Id. at 361. Mr. Joslin would give them a bath and the water would turn brown because they were so dirty. Id. Jeannette Baker, Alvin=s aunt, told Claudia Baker, that when she visited the family the only items in the refrigerator were a stick of butter and a six-pack of beer. Id at 338-39. Alvin had 19 aunts and uncles who witnessed Virgil=s abuse of Alvin, none of whom reported it. Id. at 362-63. Ms. Baker also explained that the failure of Barbara Stacy to obtain counseling for Alvin was a form of neglect. Almost all of the relatives knew there was something wrong with Alvin and repeatedly told Barbara Stacy to get him help but Ms. Stacy denied this. Id. Ms. Baker explained that as the mother of a capital defendant Barbara Stacy had a perception of wanting to believe she and Les had done everything they could, but this was

inconsistent with the facts Ms. Baker heard from other people. ROA V. XVI, p. 506-07.

Ms. Baker also discovered inter-generational dysfunction in Alvin=s background including alcoholism, mental illness and physical and sexual abuse. ROA V. XV, p. 345-48 These facts are relevant because it affects the parents= ability (Barbara and Virgil) to parent their children. Id.

Ms. Baker also discovered that in the four years prior to the offense, the Stacys had lived in four or five residences due to evictions and a personal bankruptcy. ROA V. XV, p. 358-59. Mr. Urso conceded that he never knew of the bankruptcy, HRNG - 32, 105, and did not know the number of times the family moved. Id. Ms. Baker was told that the luxury items described in cross examination, e.g. Alvin=s tv and stereo, were second hand, often broken, and bought at garage sales. ROA V. XV, p. 360-61.

Robin Johnson described the family=s living conditions when ABarb and Les got together@ as a two-bedroom house with Alots of cockroaches.@ ROA V. XIX, p. 910. Ms. Johnson also said the family lived paycheck to paycheck and wore hand-me-downs. Id.

Les Stacy, Alvin=s stepfather, was not contacted by defense counsel but would have testified. ROA V. XVI, P. 519 He stated he spent essentially no time interacting with Alvin. Id. at 532,546-48, 551. When he came home from work, Mr. Stacy sat in

the dining room and read books. Id. at 551. Angela corroborated Les=s failure to interact with Alvin. ROA V. XVIII, p. 853, 855. Mr. Stacy was a self-described Astand-offish@ person who did not like to get close to people because he was afraid he would Ablow-up.@ ROA Vol. XV, p. 364-65. This was in part based on Mr. Stacy=s bad conduct discharge from the military after being convicted of two counts of assault with intent to kill. Id.; Def. Ex. ROA Vol. XI, p. 1856-81)

Mental Health Investigation and Mitigation

Prior to the 1994 trial, Barbara Stacy gave Mr. Urso a hand written letter detailing Alvin=s birth.(Def. Ex. 1, ROA Vol. XI, p. 1783) Mr. Urso recognized the letter. ROA V. XIV, p. 46. Mr. Urso conceded he knew Alvin was premature and breach at birth but this was an inaccurate or incomplete understanding of the birth. ROA V. XIV, p. 43. In spite of this information, he never saw or obtained the birth records. ROA V. XIV, p. 27-28; 49, 52-53.

Mr. Urso failed to tell Dr. DelBeato what little he did know about Alvin=s birth, i.e. that he was premature and breach. He admitted he knew Virgil kicked Alvin in the head with a steel-toe boot but never told Dr. DelBeato about it. ROA V. XIV, p. 75. Mr. Urso stated he would have given Alvin=s medical records to Dr. DelBeato if he had had them. Id. Mr. Urso never asked Dr.

DelBeato to evaluate Alvin for brain damage, even though he claimed he suspected brain damage enough to try to consult a neurologist. ROA V. XIV, p. 72; 74. He confirmed that he did not give any documents, reports or background information to Dr. DelBeato either before **or after** Dr. DelBeato=s evaluation of Alvin as that was not his policy. ROA V. XIV, p. 54, 76 -77 ; V. XXI, p. 1187.

Dr. Berland testified that it is essential for a forensic expert to seek collateral data on a defendant=s background to be sure that you are getting accurate information. Id. at 1293 Dr. Silva testified that corroboration in forensic mental health examinations is Acrucial.@ Id. at 1234.

Dr. Berland opined that Alvin has a chronic psychotic disturbance with Aa history of significant brain trauma.@ ROA V. XVI, p. 566. It is important to look for brain injury Abecause it is an important mitigator..., an important cause of changes in behavior, [and] it can be a cause of biologically determined mental illness.@ Id. at 565. His routine practice if he is told of birth trauma, and he always asks questions to get information about birth trauma, is to ask the attorneys to get the birth records. Id. at 568.

Dr. Silva conducted objective testing, reviewed documents, including the birth records, in diagnosing Alvin with Asperger=s

Disorder and Cognitive Disorder - NOS, also referred to as brain damage. ROA XVII,p. 661 He also found that Alvin had a personality disorder not otherwise specified with signs of schizoid personality disorder and antisocial traits. Id. He did not find psychosis in Alvin and in that regard he differed from Dr. Berland.

He stated that just based on a face to face interview with Alvin he suspected brain damage and would not have failed to consider it regardless of his knowledge of Alvin=s anoxia at birth. Id. at 750-51. The anoxia, however, is relevant to his diagnosis of brain damage. Failing to recognize brain damage in Alvin or discover the anoxia at birth would be something a medical student should not miss. Id.

Dr. DelBeato=s Testimony

Dr. DelBeato claimed that in 1994 he was aware of Alvin=s anoxia at birth but did not consider it important so did not mention it in his report. He offered his opinion that Alvin does not have Asperger=s Disorder or brain damage and is confident his initial diagnosis was accurate.

Dr. DelBeato=s test scores, notes and raw data no longer exist. No one has ever seen his records or test scores. Even Dr. Gonzalez, who was retained in 1994, never saw Dr. DelBeato=s test results. The only existing document of Dr. DelBeato=s work

is his 1994 report. St. Ex. 3, ROA Vol. XI, p. 1776-82.

Dr. DelBeato met with Alvin only once for a total of 90 minutes. ROA V. XIX, p. 956, 964, 1014. He administered Athe standard battery that we had given for the forensic court-appointed evals for years.@ Id. at 942. He claimed to have administered the Rorshach, WAIS, Proverbs and the MMPI. Id. at 968-69. This was consistent with his report and testimony in 1994 and 1999. 1994TR - 1022 -1023 and 1999TR - 610. At the hearing, he claimed he performed a neuropsych screening, which included administering Koh=s Blocks and memory testing, to rule out brain damage due to anoxia. Id. at 943, 949. On cross-examination, he admitted he didn=t administer those tests. Id. at 969, 1023. He also conceded he administered incomplete versions of tests and did not apply standardized scoring methods. Id. at 1014-16, 1038, 1042-46.

Dr. DelBeato claimed that he administered the tests, evaluated for competency to proceed, obtained background information and did a clinical interview in 90 minutes. Id. at 956. Without exception, all the other experts, *including the state expert*, said this would be impossible. ROA V. X, 1711-1712, V. XXI 1218, 1299-1301.

Dr. DelBeato rejected Dr. Silva=s diagnosis of Asperger=s Disorder even though he had not reviewed Dr. Silva=s test

results, in part, because he admitted he lacked the knowledge to do so. ROA V. XX, p. 1084-85; 1100-01; 1104.

Dr. Gonzalez=s Testimony

Dr. Gonzalez was retained by the State one week prior to trial. ROA V. X, p. 1697 Dr. Gonzalez developed and offered his opinion, that Alvin was a psychopath, without ever meeting Alvin. ROA V. X, p.1709- 11. Dr. Gonzalez never saw Dr. DelBeato=s test results and only asked if Alvin=s MMPI scale four was elevated. ROA Vol. X, p. 1688-91. After the remand, Dr. Gonzalez met with Alvin for an hour, conducted a clinical interview, life history and attempted to give the Rorshach. ROA V. X,p. 1716-18, 1720. Alvin had no memory of his childhood and was emotionless. Id.

Dr. Gonzalez did not test for brain damage and was not aware of the birth trauma. ROA v. X, p. 1727,1723-25. The birth records Araised a red flag,@ which would have prompted him to recommend further testing. Id. at 1723-24. He did not believe Alvin had brain damage and was unaware that Dr. Silva had conducted testing that established brain damage. ROA V. X, p. 1688. At no time was he asked to address Dr. Silva=s test results or diagnosis.

While Dr. Gonzalez still believed Alvin was antisocial, he agreed he would not diagnose antisocial personality disorder

based on Dr. Berland=s MMPI. ROA V. X, p. 1690, 1694. He opined that Alvin did not meet the statutory mental mitigators but confused them with the legal test for sanity. ROA. V. X, p. 1707-08.

SUMMARY OF ARGUMENT

1. The lower court erred in denying Alvin Morton=s claim of ineffective assistance of penalty phase counsel. Trial counsel failed to conduct a reasonably competent mitigation investigation. Trial counsel=s inexperience and lack of knowledge, coupled with his failure to conduct a rudimentary investigation resulted in a presentation at trial that was a mere hollow shell of the abuse and neglect that Alvin Morton suffered. Alvin Morton was further prejudiced when the State argued in closing that Alvin had not truly presented mitigation. Counsel=s deficient performance unconstitutionally deprived Alvin of his Sixth Amendment right to effective assistance of counsel and his Eighth Amendment right to an individualized sentencing. The lower court=s rulings are an erroneous application of this Court=s and United States Supreme Court precedent and its findings are not supported by competent, substantial evidence.

2. The lower court erred in denying Alvin Morton=s claim of

ineffective assistance of penalty phase counsel due to failure to investigate and present mitigation evidence of brain damage and mental illness. Counsel failed to provide background information and documents to his experts, and failed to critically assess the basis of his expert=s opinion. Counsel=s inexperience and lack of investigation resulted in the failure to ensure a competent mental health examination and was a denial of Due Process. Further, counsel=s strategic decision to present anti social personality disorder was based on an unreasonable and inadequate investigation. Counsel=s mental health presentation at trial prejudiced Mr. Morton to such a degree that his Fifth Amendment right to due process, his Sixth Amendment right to effective assistance of counsel, and, his Eighth Amendment right to an individualized sentencing was violated. The court=s finding that Mr. Morton has not proven that counsel was ineffective is an erroneous application of the law and is not supported by competent, substantial evidence.

3. The lower court erred in denying Alvin Morton=s claim that penalty phase counsel was ineffective for failing to present evidence of the co-defendant=s life sentence as mitigation.

4. The lower court=s evidentiary rulings in refusing to take judicial notice of the ABA Guidelines; refusing to allow a

defense expert to render an opinion in her area of expertise and allowing a state expert to render an opinion in an area where he admitted he was not an expert was error. The lower court=s rulings deprived Mr. Morton of Due Process under the Florida and Federal constitutions because it deprived him of the opportunity to present relevant evidence and allowed testimony against him.

5. The lower court erred in summarily denying Alvin Morton=s

claim of newly discovered evidence based on a landmark study establishing that the brain does not fully develop until age 25. The study supports a finding of additional mitigation for Alvin who was 19 years old at the time of the offense and who has presented testimony demonstrating traumatic birth likely to cause brain damage, evidence of brain damage and emotional maturity below his chronological age. The lower court also erred in summarily denying Alvin Morton=s claim that Roper v. Simmons, 543 U.S. 551 (2005), which bars the execution of persons under the age of 18, coupled with Urbin v. State, 714 So. 2d 411 (Fla. 1998) (the closer a defendant=s age to where the death penalty is constitutionally barred, the weightier the age statutory mitigator becomes), warrants a reweighing of his age of 19 as a mitigating factor.

STANDARD OF REVIEW

The standard of review is *de novo*. Stephens v.State, 748 So. 2d 1028, 1032 (Fla. 2000). Under *Strickland*, ineffective assistance of counsel claims are a mixed question of law and fact; with the lower court=s legal rulings reviewed *de novo* and deference given to factual findings supported by competent and substantial evidence. Sochor v.State, 883 So. 2d 766, 772 (Fla. 2004).

ARGUMENT I

THE LOWER COURT ERRED IN DENYING ALVIN MORTON=S CLAIM THAT HIS ATTORNEYS RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE BY FAILING TO INVESTIGATE AND PRESENT MITIGATION EVIDENCE ABOUT HIS BACKGROUND.

Alvin=s trial attorney rendered deficient performance by failing to conduct a meaningful investigation into his history, background and family life. Trial counsel=s rudimentary investigation was based on conversations with a narrow set of sources. Counsel failed to look for corroborating records; failed to obtain a social history; failed to ask his investigator to look for mitigation evidence; and, failed to provide any background information to his experts. His investigation fell below the standard of reasonably competent capital defense counsel.

In Strickland v. Washington, 466 U.S. 668 (1984), the United

States Supreme Court held that counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversary testing process. Id., at 688. Specifically, counsel has a duty to investigate in order to make the adversarial testing process work in the particular case. Id. at 690. AAn ineffective assistance of counsel claim has two components: A petitioner must show that counsel=s performance was deficient and that the deficiency prejudiced the defense. To establish deficient performance, a petitioner must demonstrate that counsel=s representation >fell below an objective standard of reasonableness.=@ Strickland v. Washington, 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (internal citations omitted).

This Court has said:

> Trial counsel=s obligation to zealously advocate for their clients is just as important in the penalty phase of a capital proceeding as it is in the guilt phase. There is no more serious consideration in the sentencing arena than the decision concerning whether a person will live or die. When an attorney takes on the task of defending a person charged with a capital offense, the attorney must be committed to dedicate both time and resources to thoroughly investigate the background and history, including family, school, health and criminal history of the defendant for the kind of information that could justify a sentence less than death. I believe that the constitution and the case law from this court and the United States Supreme Court requires no less.

Coday v. State, 946 So. 2d 988, 1015-1016 (Fla. 2006) (*Quince,*

J., concurring).

In Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 80 L.Ed. 2d 674 (2003), the Supreme Court held AStrickland does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather a reviewing court must consider the reasonableness of the investigation said to support that strategy. @ Id. at 2538.

> [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgements support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness.

Wiggins at 2535.

In making this assessment, the Court Amust consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. @ Id. at 2538. In finding that counsel's investigation and presentation "fell short of the standards for capital defense work articulated by the American Bar Association . . . standards to which we have long referred as 'guides to determining what is reasonable,'@the Court held the ABA Guidelines set the standards for counsel in investigating mitigating evidence. Id. at 2537.

The Eleventh Circuit has held that A[t]he primary purpose of the penalty phase is to insure that the sentence is individualized by focusing [on] the particularized characteristics of the defendant. By failing to provide such evidence to the jury, though readily available, trial counsel's deficient performance prejudices [a petitioner's] ability to receive an individualized sentence.@ Cunningham v. Zant, 928 F.2d 1006, 1019 (11th Cir.1991) Effective representation, consistent with the Sixth Amendment, also Ainvolves the independent duty to investigate and prepare.@ House v. Balkcom, 725 F.2d 608, 618 (11th Cir.1984).

> A[C]ounsel's duty of inquiry in the death penalty sentencing phase is somewhat unique. First, the preparation and investigation for the penalty phase are different from the guilt phase. The penalty phase focuses not on absolving the defendant from guilt, but rather on *the production of evidence to make a case for life*. The purpose of investigation is to find witnesses to help humanize the defendant, given that a jury has found him guilty of a capital offense.@

Hardwick v. Crosby, 320 F.3d 1127, at 1162-1163 (11th Cir. 2003)(emphasis added).

This Court has held trial counsel renders deficient performance when his investigation involves limited contact with a few family members and he fails to provide his experts with background information. Sochor v. Florida, 883 So. 2d 766, 772 (Fla. 2004). *See also* State v. Lewis, 838 So. 2d 1102, 1113

(Fla. 2002)(A[T]he obligation to investigate and prepare for the penalty phase portion of a capital case cannot be overstated-this is an integral part of a capital case.@); Ragsdale v. State, 798 So. 2d 713, 718-19 (Fla. 2001) (Inexperienced counsel rendered deficient performance when his entire investigation consisted of a few calls made to family members); (Rose v. State, 675 So. 2d 567, 571 (Fla. 1996) (AAn attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant=s background, for possible mitigating evidence.@ (*quoting* Porter v. Singletary, 14 F.3d 554, 557 (11th Cir. 1994)); State v. Lara, 581 So. 2d 1288, 1289 (Fla. 1991) (prejudice found where counsel failed to present evidence of abusive childhood).

Further, the post conviction court=s Order is often unclear as to whether it is denying the claims on the prejudice or performance prongs and to the extent that the court=s Order rejects claims, it often Afails to point to any evidence from the trial or [postconviction proceedings] that actually controverts [Alvin=s claims.] @ Coday v. State, 946 So. 2d 988, 1020 (Fla. 2006) (Bell, J., *concurring*). As such, this Court should substitute its own findings of fact and weigh the credibility of the witnesses. Sochor v. Florida, 883 So. 2d 766 (Fla. 2004).

A. Trial Counsel rendered deficient performance below

prevailing norms in investigating Alvin=s background

Prior to the 1994 trial, counsel conducted a rudimentary investigation relying on a narrow set of sources. After remand, counsel failed to reinvestigate or continue any mitigation investigation in spite of the fact that the trial judge gave little weight to the mitigation presented. Trial counsel=s investigation fell below prevailing norms.

Attorney Gary Urso lacked capital trial experience and had never attended a seminar of at least 10 hours duration which was devoted to the defense of a capital case.[3] ROA V. XIV, p.19-21. He failed to meet with Alvin until almost a year after Alvin was arrested. (ROA Vol. XIII, p. 2109-11)[4]

Mr. Urso=s contact with Alvin=s family was also minimal. His records show he spoke with Alvin=s mother only once before trial

---

3. The 1989 ABA Guidelines require that co-counsel in a capital case Ahave completed within one year of their appointment at least one training or educational program on criminal advocacy which focused on the trial of cases in which the death penalty is sought.@ ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases Guideline 5.1 (1)(B)(1989).

4. The 1989 ABA Guidelines recommend that counsel should conduct an independent investigation to the penalty phase and it should Abegin immediately upon counsel=s entry into the case@ and the client interview should be within 24 hours of entry into the case. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(A)and

by telephone, he met with Alvin only three times, and never went to the family home. ROA V. XIV, p. 21-23. Mr. Urso never prepared a comprehensive history of Alvin. ROA V. XIV, p. 54. [5] The only tasks his investigator completed was to speak to Alvin, his mother and sister and get newspaper clippings. ROA V. XV, p. 254

While Mr. Urso did retain a social worker, Ms. Pisters, to testify on behalf of Alvin, he first met with her three weeks prior to trial and wholly failed to provide her reasonably adequate background information. Ms. Pisters had no forensic experience and had never worked on a murder case before. 1999TR-730. Ms. Pisters testified the only background materials she had were newspaper clippings.[6] 1999TR - 550. She also admitted she

---

(D)(2)(1989).

5. The ABA Guidelines recommend counsel=s penalty phase investigation consist of collecting information relevant to the penalty phase Aincluding but not limited to: medical history,(mental and physical illness and injury, alcohol and drug use, birth trauma and developmental delays); educational history ... military history ... family and social history (including physical, sexual or emotional abuse); ... prior adult and juvenile record.@ ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(2)(C)(1989).

6. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(2)(E) (1989) recommends counsel should Aobtain the names of collateral persons **or sources** to **verify, corroborate and expand** upon information obtained in [the mitigation investigation/social history]. (emphasis added).

would have liked to review school records and talk to Alvin=s teachers but had not attempted to do so, even though one of the schools was Ajust up the road.@ 1999TR - 566. Neither she nor Mr Urso attempted to get Alvin=s school records. 1999TR - 568. This prompted the State to ask, ASo you=re coming in here and telling us about Alvin Morton=s background without any records to substantiate any of what you said?@ 1999TR - 568.

Eight weeks prior to trial, Mr. Urso also asked the court to appoint a mental health expert, Dr. DelBeato, but failed to give

any background records or information to him. ROA V. XIV, p. 54, 160-61 Dr. DelBeato=s testimony was very damaging at both trials.

Both Ms. Baker and Mr. Norgard opined that obtaining records was a basic part of mitigation investigation. The records are important because of the Afailures of human memory@ and issues of bias and credibility. ROA V. XXI, p. 1170-71. Records serve as Aobjective information as to what really happened. [The records are] important above and beyond...the subjective representation by the individual who committed the crime.@ Further, the ABA guidelines stress the importance of obtaining documentary evidence in the form of public records. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(3)(D) and 11.4.1(7)(1989).

Mr. Urso appeared to fail to understand the fundamental importance of records. He said: AYou know, you keep saying medical records. I don=t know why you think those are the most important things in a case. I don=t believe records are. I believe it=s the testimony that=s more convincing.@ ROA V. XV, p. 241. Regardless of whether records or testimony are more convincing, Mr. Urso=s statement reveals he misses the point. Records and testimony are not mutually exclusive. Records support an expert=s theory and a witness= credibility because they serve as objective proof of a fact that arose before an alleged motivation to fabricate may occur during litigation. Records can also reveal information witnesses may be hesitant to provide or may not understand. The records obtained by CCRC were basic types of record that reasonably competent counsel would attempt to obtain.

Mr. Urso=s misunderstanding of basic mitigation practice and his resulting failure to even attempt to obtain any records on Alvin or his family is deficient performance. Counsel renders deficient performance when only speaking to a few family members. Ragsdale v. State, 798 So. 2d 713 (Fla. 2001). Inexperienced counsel renders deficient performance, though no prejudice found, where counsel failed to investigate and give expert background information including school and medical

records. Ponticelli v. State, 941 So. 2d 1073 (Fla. 2006) The quantum of knowledge that Mr. Urso had would have prompted reasonably competent defense counsel to investigate further.

Trial counsel=s failure to conduct any further mitigation investigation after the 1997 remand was also deficient performance. Had counsel continued to investigate the case, they would have found additional mitigation and would have been able to rebut the state=s arguments minimizing the mitigation previously presented. Mr. Urso conceded that, while he did review the 1994 Sentencing Order, he did not do any further investigation to attempt to counter Judge Villanti=s findings or find additional mitigation. Both trial attorneys= billing records demonstrate they had minimal contact with Alvin in the two years leading to his retrial and did essentially no further investigation.

The defense case at the second penalty phase was so similar, in presentation and result, that appellate counsel argued the Are-sentencing judge improperly relied upon the original sentencing judge=s sentencing order and essentially adopted verbatim the findings to support the aggravating and mitigating circumstances in this case.@ Morton v. State, 789 So. 2d 324, 332 (Fla. 2001).

Reasonably competent counsel, after having reviewed the 1994

Sentencing Order, would have conducted further investigation to see if they could improve the mitigation presentation and counter the court=s findings. Mr. Norgard=s unrebutted testimony established that mitigation investigation is an ongoing process, which must continue after a remand. The prevailing standard on a retrial is for defense counsel to look at the sentencing order to review the judge=s findings and continue to investigate the case, especially where the mitigation was lacking. ROA V. XXI, P. 1183-85.

> ASince the Campbell[v. State, 571 So. 2d 415 (Fla. 1990), receded from in part by Trease v. State, 768 So. 2d 1050 (Fla. 2000)] decision, judges were required to consider and weigh any mitigating factors. Because of that fact, . . . you=re actually getting feedback from the person you are trying to persuade as to . . . your goal of proving mitigation, what they thought of your mitigation . . . [T]he fact that they found it as mitigation is important, but also their thought processes that went into how they weighed it is very important. And certainly in cases where you=re working in the abstract, where you don=t know how a trial judge is going to evaluate and weigh your mitigation, if you see in the sentencing order that there are things that you could have done to be more effective in persuading the judge of your position and that in fact the things you=re presenting should be entitled to more weight, that=s certainly a golden opportunity to do that, now that you=ve seen in essence inside the judge=s head and his thinking regarding your issues.@

Id.

Counsel renders deficient performance when he fails to conduct additional investigation after reversal on appeal when the original trial judge found the mitigation insufficient to

warrant a life recommendation. Smith v. Stewart, 189 F.3d 1004 (9th Cir. 1999), cert. denied, 531 U.S. 952 (2000). Trial counsel=s investigation fell below prevailing norms.

B. The post conviction court erred when it denied Mr. Morton=s claim of ineffective assistance of counsel in failing to investigate and present evidence of neglect, severe physical abuse as a young child, and continued contact with sadistic father after age eight. The court=s prejudice determination was an unreasonable application of state and federal law

Mr. Urso explained the state=s theory in 1994 as one where Alvin=s early years were Aabsolutely horrible@ but then everything was fine after his early years. ROA V. XIV, p. 108-09. He admitted that in the 1994 Sentencing Order, the Court, adopted the state=s theory and gave Alvin=s abuse little weight because the later years, after Alvin reached the age of 8, were corrective. Id. He admitted that he did not do any further investigation after the remand to counter the Court=s findings. Id. The post conviction court denied this claim finding a lack of prejudice:

> Defendant claims that counsel did not present sufficient testimony as to the physical abuse Defendant was subjected to by Virgil Morton. Defendant alleges that the testimony showed only that the abuse was sporadic or occasional. However, Defendant=s mother, Barbara Stacy testified at the penalty phase that the abuse she and her children suffered was a daily occurrence. See PPT, pp. 455-457, 462-468. The jury having heard the testimony about Virgil Morton=s constant physical abuse of the Defendant, counsel=s failure to present cumulative testimony does not satisfy the requirements to be considered ineffective assistance.

ROA V. IX,P. 1439. The post conviction court=s ruling is an erroneous application of the law and its factual findings are not supported by substantial, competent evidence.

Because the right to effective assistance of counsel is so fundamental, the standard for proving prejudice is low:

> An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, *even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.*
>
> * * * *
>
> The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel=s errors. . . . When a defendant challenges a death sentence . . . the question is whether there is *a reasonable probability* that, absent the errors, the sentencer -including an appellate court to the extent it independently reweighs the evidence- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. In making this determination, a court hearing an ineffectiveness claim, must consider the totality of the evidence before the judge and jury.

Strickland v. Washington, at 694 -696 (emphasis added). Prejudice is proved if Athere is a reasonable probability that, but for counsel=s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.@ Id. at 694.

> Citing to Strickland, the Fourth Circuit Court of Appeals . . . explained the [prejudice] standard: . . . petitioner Amust show that there is a reasonable probability that, but for counsel=s unprofessional errors, the result of the proceeding would have been different.= The level of certainty is something less than a preponderance; it need not be proved that counsel=s performance more likely than not affected the outcome. Instead, the petitioner need only demonstrate >a probability sufficient to undermine confidence in the outcome.=@ Young v. Catoe, 205 F.3d 750, 759 (4th Cir. 2000)

Cherry v. State, 781 So. 2d 1040, 1057-1058 (Fla. 2001) (Anstead, J. dissenting).

The postconviction court, in its analysis of this claim, also failed to follow clearly established precedent of the United States Supreme Court when, Ait failed to evaluate the totality of the available mitigation evidence **C** both that adduced at trial, and the evidence adduced in the [postconviction] proceeding in reweighing it against the evidence in aggravation. See Clemons v. Mississippi, 494 U.S. 738, 751-752 . . . (1990).@ *(Terry)* Williams v. Taylor, 529 U.S. 362, 397 (2000).

The lower court failed to acknowledge that the description of Virgil=s abuse of Alvin presented at trial was a mere hollow shell of the horrific abuse described at the hearing. The court also failed to address the evidence of Virgil=s continued contact with Alvin after age eight, the divorce records and Virgil=s DOC

records, and the fact that Virgil=s manslaughter conviction was falsely minimized before the jury due to counsel=s failure to obtain the police report establishing the underlying facts of the crime.

1. <u>The abuse testimony presented at trial</u>

At trial in 1999, Barbara Stacy said when Virgil was drunk, he would Astart off with [a] verbal assault,@ telling the two children they were bad and then sending them to bed without supper. TR1999 p.457. After Virgil passed out, Barbara would wake the children and feed them. Id. When asked to describe actual violence, Barbara Stacy said Alvin would try to protect his sister. TR1999, p.463. Trial counsel then asked the following:

> Q: Okay, can you give the jury some idea how often this violence would go on in the household?
> A: There was a little bit of violence in almost every single day.
> Q: Was Alvin involved with it almost every single day?
> A: Not every single day, but I would say every other day he came close to it.
> Q: What would happen if Alvin tried to intervene or tried to step in for his sister?
> A: He would be hit harder.
> Q: Did that happen very often?
> A: Yes.

(TR1999, p. 462-63)

When asked to give examples of physical cruelty by Virgil towards Alvin, Ms. Stacy said Virgil Athrew Alvin on the bed one time and he smacked his butt [with his hand] so hard his back

bowed.@ TR1999, p.466. She also said Virgil liked to Ahit [the children] on the head with his spoon at the table if they didn=t sit properly,@ and this resulted in Alumps on their head.@ Id. Virgil also used a dish towel and would Amake it tight and flip the kids with it.@ TR1999, p. 467. This left bruises but A*never broke the skin*.@ Id. (emphasis added)

Trial counsel also asked, ADid Mr. Morton ever do anything with Alvin or *teach him how to swim* or do anything around the water?@ 1999TR- 468. (emphasis added). Ms. Stacy then told the jury Virgil pushed one-year-old Alvin into a lake while Alvin was on an inner tube and Virgil wouldn=t let Barbara go get him, although she eventually did. Id.

When asked why she had trouble remembering details she said it was hard and, Ayou can=t say alright, on such and such a day he did this *to me*, on such and such a day he did that *to me.* There at the end when I=d walk through the house he=d throw knives *at me*.@ 1999 Trial, p.468. (emphasis added) Her answer didn=t involve Alvin or describe Virgil=s abuse of Alvin.

Cathy Dufoe said Virgil *Abackhanded*@ Alvin *Aone time*@ and called him a *Abrat.*@ 1999TR - 643 -646. (emphasis added) Another aunt, Polla Treep described Virgil as a *Astrict disciplinarian*@ whom she saw hit Alvin *Aone time in the face.*@ 1999TR - 650. (emphasis added) The third aunt, Paula Boutwell, whose entire

testimony barely comprised two pages said *Aone time*@ Virgil *Apushed Barbara*@ while she was holding Alvin. 1999TR - 655. (emphasis added) Ms. Pisters testified that she was *unable to determine the frequency of the abuse.* 1999TR- 585. (emphasis added) Dr. DelBeato testified that Alvin denied being abused. 1999TR - 613

The 1999 trial testimony painted a picture of mild abuse by a Adisciplinarian father@ that had no lasting effect on Alvin. Counsel failed to present an accurate description of Virgil=s cold, ruthless, sadistic nature and acts.[7] The trial judge found that while Alvin had a Aturbulent childhood,@ the abuse stopped at age eight and accordingly he gave Alittle weight to his childhood experience.@ 1999TR, p.160.

Because defense counsel presented such a skeletal version of the abuse, the State argued in closing that the abuse Alvin suffered was not even mitigation. The state summarized the testimony of the aunts AThen you heard from a couple of other relatives and what did they tell you? ... Alvin Morton had problems with Virgil when he was an infant. Virgil was cruel to

---

7. Ironically, the testimony of abuse presented in 1999 was less than that presented in 1994 when an aunt, Jeannette Baker, provided a more detailed and accurate description of Virgil=s treatment of Alvin.

Alvin Morton when he was an infant, and each one told you about a different incident that they had witnessed. Smacking him, hitting him when he was three or four or five, I don=t even recall the age.@ 1999TR - 737. He summed up the testimony of Angela and Ms. Stacy: AIs that mitigation? The fact that a child was abused when he was a little child? Well, see now, counsel knows that=s not mitigation, the fact that when he was five or six or seven he was hit with a fork on the top of the head, that he was thrown into a lake.@ 1999TR - 727. [8]

By contrast, the evidence presented at the evidentiary hearing, none of which was identified by the post conviction court in its Order, established horrific physical and emotional abuse by a sadistic father who singled out his son as the target for his rage and violence.

2. <u>The abuse testimony at the Evidentiary Hearing</u>

Jerry Baker described an incident where Virgil teased Alvin about alligators in the river and how they were Agoing to get him.@ ROA V. XIX, p. 925-27. The river was eight feet deep and Alvin was about three feet tall at the time. <u>Id</u>. Virgil threw Alvin in. <u>Id</u>. Alvin didn=t know how to swim and was Avery

8. On direct appeal this Court held the state=s closing argument was proper. <u>Morton v. State</u>, 789 So. 2d 324 (Fla. 2001).

frightened.@ Id. Mr. Baker swam out and brought Alvin to shore. Id. When he pulled Alvin out of the river he was crying and choking and Virgil Ahad already started walking off, walking back up to the riverbank.@ Id. at 927.

Mr. Baker=s testimony is in marked contrast to Ms. Stacy=s testimony about Virgil Ateach[ing] his son how to swim.@ Mr. Baker described a cruel and sadistic father who demonstrated indifference, at best, to drowning his son.

Paula Henricks, an aunt of Virgil=s, described Virgil as Aalways drunk, always drunk, always.@ ROA V. XVI, p. 516, 519. She also said that she saw Virgil slap Alvin Aacross the face and break . . . he used to wear little black rim glasses and break his glasses off.@ Id. Claudia Baker confirmed her investigation revealed this was a constant event for Alvin, A[Virgil] would whack him so often and break the glasses, that it wasn=t worth fixing them anymore. So they would tape them and put them back on [Alvin=s] face, because then . . . the father would proceed to do the same thing.@ ROA V. Xv, p. 353. Ms. Henricks also said Virgil never called Alvin by his name; he called him Abastard,@ Astupid,@ and Aall kinds of things.@ ROA V. XVI, p. 518.

Robin Johnson, who is Alvin=s aunt but only seven years older, spent a lot of time with the family when Virgil was still married to Barbara Stacy and saw many incidents of abuse. ROA V.

XIX, p. 904. Ms. Johnson said Virgil Adrank all the time@ and was a Amean drunk.@ Id. at 905. She said Virgil never called Alvin by his name; one of the nicknames he used was Amotherf-----r.@ Id. at 905. She said Virgil would smack Alvin, Anot like a normal spanking, he would backhand him, smack him across his back and stuff like that.@ Id. at 906.

Once, she and Angela and Alvin were all coloring in coloring books. Id. Alvin colored on the table which angered Virgil, so Virgil Apicked [Alvin] up and put him in a deep freezer and shut it.@ Id. Another time, Alvin had a loose tooth and Virgil wanted to pull the tooth but Alvin wouldn=t let him. Id. Virgil Agot mad and he hit [Alvin] with the back of his hand, and Alvin went sliding across the kitchen floor. *There was blood everywhere*, but the tooth was still hanging in [Alvin=s] mouth.@ Id. (Emphasis added)Another time she saw Virgil beat Alvin because Barbara served a meal that wasn=t warm. Id. at 906-07. She described a beating in the car:

> AVirgil turned around and he had one hand on the steering wheel, and he=s smacking Alvie just everywhere, in the head, the back. And Barb was trying to get a hold of the steering wheel because we was all over the road and off the road and [Virgil] wasn=t watching the road at all, he was just completely turned around.@

Id. at 907. She saw bruises on Alvin=s Aface, his arms, back and legs.@ id. At 908-09. An aunt who bathed Alvin also said Alvin

was always covered in bumps and bruises. ROA V. XV, p. 353.

Angela Morton testified that she and Alvin continued to have contact with Virgil after their parents divorced. ROA V. XVIII, p. 850. This contact happened Aquite a bit@ while Virgil lived with Lee and Topper. Id. Angela described an incident at Topper=s when Alvin was ten, where Virgil strangled a puppy and then made Alvin bury it. Id. at 850-51. Ms. Baker had also been told about this incident by other relatives. ROA V. XV, p. 351. Angela said Virgil would Aclinch his fist and just flair his nostrils and sit and just have an attitude towards everyone when we were there.@ ROA V. XVIII, P. 859. Ms. Baker spoke to several other relatives, including Topper, who said Alvin and Angela had weekly contact with Virgil when Virgil lived at Topper=s. ROA V. XV, p. 350-51.

Ms. Baker testified that relatives told her that Alvin was constantly covered with bruises and bumps and that one aunt witnessed Virgil kicking Alvin in the head with a metal-toe boot. ROA V, XV, p. 339-40. Mr. Urso admitted he was aware that Virgil kicked Alvin in the head with a metal-toe boot, but failed to tell his experts about it or present it. ROA V. XIV, p. 75-78.

Alvin=s uncle, Leroy Joslin, told Ms. Baker that growing up the children were always Adirty, hungry kids.@ ROA V. Xv, p. 361.

Mr. Joslin described giving the children a bath and the water would turn brown because they were so dirty. Id. He also stated that they didn=t have enough to eat and that when Alvin came to Mr. Joslin=s house, Alvin was afraid to go to the refrigerator because Virgil abused him if he ate food without asking. Id. Jeannette Baker, Alvin=s aunt, told Ms. Baker that that the only items in the refrigerator were a stick of butter and a six-pack of beer and that Barbara often spoke about not having enough money for food because Virgil used all the money on beer. ROA Vol. XV, p. 338-39. Ms. Stacy had $20 a week to feed a family of four. Id. Claudia Baker noted that Alvin suffered neglect in that 19 aunts and uncles witnessed Virgil=s abuse of Alvin, yet none reported it.

At trial, Ms. Stacy testified that she was afraid of Virgil because he had killed a man. Ms. Pisters told the jury that there was a genetic link to violence and that Barbara Stacy had told her Virgil Morton had a prior manslaughter conviction.[9] The state elicited from Ms. Pisters the following description of Virgil=s manslaughter conviction:

> Q: AYou found Ms. Stacy to be accurate?@
> A: I felt Ms. Stacy was quite honest and realistic about the situation . . .

---

9 In closing argument the State called this Ahocus-pocus,@ because Ms. Pisters was not qualified in genetics.TR1999 - 730

* * * *

> Q: She told you first of all that she married a man in 1965 by the name Virgil Morton; correct?
> A: Yes, sir.
> Q: She said that while he was in the Navy he got in a fight in a bar, hit some guy, the guy knocked his head on the ground and died, and Mr. Morton was placed on probation for manslaughter?
> A: That=s correct.

1999TR - 570.[10] The state then established during cross of Ms. Pisters that the Amother of a murder defendant could be biased@ and that it was important to get records, seek corroboration and talk to many different people in a case such as this. 1999TR - 549-550, 566 -569 and 575. The state then argued in closing that Ms. Pisters= was not credible because she:

> Anever got any police reports, never got any depos . . . she never got any sworn testimony . . . she=s given some newspaper clippings. [She claims] that=s just as good as sworn testimony, newspaper clippings. Who are you trying to kid? Didn=t in jury selection all of us talk about newspaper clippings and said you can=t rely on them. Why? Because they=re not accurate . . . [I]f they were accurate, hey, we could pass out a newspaper to all you folks and it will take 10, 15 minutes to resolve this case. But yet, she=s telling you folks that those newspaper clippings suffice for her.@

1999TR - 728. Had defense counsel provided Ms. Pisters with a reliable form of background information, the State would not

---

10 Barbara Stacy provided essentially the same version of the crime on cross. 1999TR - 474.

have been able to attack her credibility in this regard.

The state then minimized Virgil=s crime to the jury arguing that Ms. Pisters Atells you@ the father committed murder, AWhat did we find out? What Virgil did was not a murder. He hit some guy in a bar fight, the guy went down, hit his head on the sidewalk and died . . . You get drunk, you had a little too much and you whack some guy and he falls and hits his head.@ 1999TR - 729-730.

Because the defense failed to obtain the records on Virgil Morton=s conviction they were unable to rebut this inaccurate description of the crime. Police reports obtained by CCRC demonstrated Virgil Morton was charged with Amurder@ because he Adid beat and stomp to death@ a 21-year-old AFilipino@ man who died the same morning of Asevere head injuries.@ (Def. Ex. 16: ROA Vol. XII, pp. 1961-2044)

Had defense counsel conducted a reasonably competent investigation they would have known of and been able to present additional testimony of Virgil=s sadistic nature. At the very least, the state would have been prevented from misleading the jury by characterizing the killing as one punch and someone A**falls and hits his head**.@ Counsel=s failure to obtain these records prejudiced Alvin by denying him the right to an accurate, individualized sentencing determination. "Accurate

sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision.@ Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion).

Further, had defense counsel obtained Virgil=s South Carolina Department of Corrections= (SCDOC) records, the judge and jury would have known that the SCDOC determined Virgil was a Acold, ruthless individual capable of any action that will further his own personal gain.@ Def. Ex.14; ROA V. XI, pp.1918-29 Other records documented Virgil=s alcoholism, history of violence and arson, Def. Ex. 15 & 17, ROA V. XII, pp. 1930-58; 1961-2044, including the Tennessee divorce decree where the court found Virgil=s treatment of his family so Acruel and inhuman that cohabitation is unsafe and improper.@ Def. Ex. 7; ROA V. XI, pp. 1821-1851.

As demonstrated above, the post conviction court=s factual findings are not supported by competent, substantial evidence and its conclusion that prejudice was not established is an erroneous application of *Strickland* and its progeny. In finding prejudice due to a failure to investigate and present physical abuse, the Fifth Circuit Court of Appeals held that the grandmother=s Askeletal@ and Aconclusional@ testimony of abuse

failed to provide details which could have been beneficial. Lewis v. Dretke, 355 F. 3d 364 (5th Cir. 2003). The skeletal and conclusory testimony of abuse at Alvin=s trial failed to provide details which would have portrayed an accurate image of the abuse Alvin suffered.

C. The post conviction court erred when it denied Alvin Morton=s claim of ineffective assistance of counsel in failing to investigate and present evidence of sexual abuse.

At least two witnesses told trial counsel prior to 1994 that family members suspected Virgil sexually abused Alvin. Reasonably competent defense counsel would have thoroughly investigated this issue. Defense counsel failed to investigate this issue beyond speaking to Alvin=s mother and sister, and, therefore, any decision to not present evidence of Virgil=s sexual abuse of Alvin cannot be an informed judgement. The decision prejudiced Alvin because the jury did not hear this testimony and, Alvin=s lack of being sexually abused was argued by the State to reduce the weight in mitigation given to the physical abuse.

It is unclear whether the post conviction court denied this portion of the claim on the prejudice or performance prong of *Strickland*. The court found that counsel Apresented only the testimony of one aunt@ to support this claim and she testified that Ashe did not think the inappropriate touching was a sexual

act; based on such limited and unclear evidence, counsel=s failure to present such argument cannot be said to fall below the level of reasonably competent representation.@ ROA V. IX, p. 1439. The lower court=s finding is not supported by competent substantial evidence and is an erroneous application of the law in that the lower court=s order fails to address the totality of evidence presented. (Terry) Williams v. Taylor, 529 U.S. 362, 397 (2000).

1. Records and State=s argument establish prejudice

The lower court=s finding that Alvin failed to establish sexual abuse is erroneous. While there was some quibbling over the term Asexual act,@ the aunt, who herself was a victim of sexual abuse, said she saw inappropriate sexual contact that she considered to be a sexual type of act. ROA V. XV p. 356; V. XIX, p. 917-21.

In addition, the lower court=s finding that her testimony was the *only evidence* establishing Virgil=s sexual abuse of Alvin, ignores other testimony and evidence: the SCDOC records diagnosing Virgil with A*sexual deviation*,@ Def. Ex.14; ROA Vol. XI, p. 1918-29; Ms. Baker=s testimony about numerous aunts who told her about Virgil being Asexually inappropriate,@ and one aunt describing Virgil rubbing the leg of a 12-year-old boy. ROA V, XV, p. 355-56. Mr. Urso admitted he had been told prior to

1994 that there was an aunt who saw an inappropriate touching. ROA V. XV, p.79-80. Chris Walker, a co-defendant, had said prior to trial that Virgil sexually abused Alvin. ROA V. X, p.1707.

Defense counsel reasonably established by the greater weight of the evidence inappropriate sexual contact by Virgil.[11] AThe court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence: ›A mitigating circumstance need not be proved beyond a reasonable doubt....: Fla. Std Jury Instr. (Crim.) At 81. @ Brown v . Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981). A sentencing court may not give a mitigating factor no weight by excluding it from consideration. Campbell v. State, 571 So. 2d 415 , 418-420 (Fla. 1990), *receded from in part by* Trease v. State,(Fla. 2000). AWhenever a reasonable quantum of uncontroverted evidence of mitigation has been presented, the trial court must find that mitigating circumstance has been proved.@ Morton v. State, 789 So. 2d 324, 330 (Fla. 2004) (*quoting* Mahn v. State, 714 So.2d 391, 400-

11. The testimony of Virgil=s abuse of Angela also came from only one witness, Barbara Stacy, and provided less detail than Robin Johnson=s statement. Yet, it was enough to establish sexual abuse of Angela at trial. 1999TR - 474

01(Fla. 1998)). The lower court=s finding was erroneous.

The lower court also failed to address the State=s closing argument and the trial court=s Sentencing Order in assessing prejudice. The State argued in closing:

> AYeah sure [Alvin] had a tough life. From zero to eight he had a tough life. Angela had a tougher life. ... She had an even tougher life. Why? She was sexually abused by this monster. So she had a tough life. ... This girl had the same upbringing, the same difficult life ... All of that [but] she makes the right choice [not to commit murder].@

1999TR - 726-727. The trial court gave the physical abuse Alvin suffered little weight because, AAngela Morton . . . sustained sexual abuse in the presence of the Defendant by the same alcoholic father. However, this sibling has never been arrested for any crime and has led a normal productive life.@ 1999TR V. I, p. 159-60.[12] The unique facts of this case warrant a finding of prejudice to this subclaim.

2. <u>Post conviction court erred when finding trial counsel=s decision based on informed judgement</u>

To the extent that the lower court found counsel rendered reasonable performance in deciding not to present sexual abuse, the lower court=s finding is not supported by substantial and competent evidence and is an erroneous

12. The 1994 trial court made the same finding. (Def. Ex. 4, ROA Vol. XI, pp. 1800-01)

application of ***Strickland***, ***Wiggins*** and this Court=s precedent. Ponticelli v. State, 941 So. 2d

1043 (Fla. 2006)[13] Any strategy decision made by Mr. Urso was not based on a reasonable investigation. A tactical decision made in a vacuum is not due the usual deference. Mr. Urso admitted he knew an

aunt had seen inappropriate touching of Virgil by Alvin. ROA V. XV, p. 79. When asked if he ever spoke to Robin Johnson, he said, AI

don=t know who that is.@ HRNG - 1126. Mr. Urso didn=t remember asking Mr. Krisanda to investigate the claim of sexual abuse but claimed Mr. Krisanda told him they might have discussed it. ROA

---

13 See also Hooper v. Mullins, 314 F. 3d 1162, 1170-71 (10th Cir. 2002) (failure to pursue reasonable avenues of investigation without any idea of what the investigation might reveal was not an informed strategic decision and required relief from sentence of death); Pavel v. Hollins, 261 F. 3d 210, 218 n.11 (2d Cir 2001) (collecting cases and discussing how decisions made in ignorance of relevant facts and law cannot be characterized as strategic under ***Strickland)***; Bouchillon v. Collins, 907 F. 2d 589, 597 (5th Cir. 1990) (ATactical decisions must be made in the context of a reasonable amount of investigation, not in a vacuum.@); Profitt v. Walderon, 831 F.2d 1245, 1249 (5th Cir. 1987) (noting that the Ausual deference to tactical decisions is not relevant@ when the decisions are based on Ainformation that was faulty because of ineffective investigatory steps@).

V. XV, p. 79-80. Mr. Krisanda, however, never said anything about being asked to investigate sexual abuse. ROA Vol. XV, p. 254- 55. Mr. Urso also admitted he never sought records and had never seen the SCDOC records identifying Virgil as a sexual deviant. Id. at 232.

Alvin=s poor memory does not excuse counsel=s failure to investigate. Douglas v. Woodard, 316 F.3d 1079 (9th Cir. 2003). Counsel rendered deficient performance in failing to conduct a reasonable investigation even though the client was Aless than helpful@ in providing background information because his past was a Ablank;@ the client=s conduct did not excuse counsel=s obligation to obtain mitigating evidence from other sources. Id. at 1087-1088 Counsel had enough information to put him Aon notice@ about the client=s difficult childhood but failed to attempt to contact people who could provide details of the petitioner=s life. Id. at 1089. The quantum of knowledge that Mr. Urso had about sexual abuse put him on notice and reasonably competent defense counsel would have investigated further.

D. The lower court erred in denying the claim that counsel rendered deficient performance which prejudiced Alvin by failing to investigate and present poverty, neglect and continued family dysfunction.

Defense counsel was aware that the 1994 trial court gave little weight to abuse reasoning that, Athis abuse stopped at about age eight when the mother took refuge at a shelter,

divorced, and later remarried, thereby providing a substitute, stable father figure for the Defendant.@ ROA, Vol. XI, pp. 1800-1801. In light of this finding, reasonably competent counsel would have investigated Alvin=s family life after Barbara married Les Stacy to attempt to rebut this finding. Counsel failed to conduct any additional investigation or adduce at trial any additional evidence in mitigation after remand.

It is unclear whether the post conviction court denied this claim on the performance or prejudice prong of *Strickland*, ruling, AIt is . . . inconceivable that counsel could be considered deficient or ineffective for failing to [present testimony that Alvin=s luxury items were second hand],@ ROA. V. IX, p. 1441. The failure to present the family=s bankruptcy and poverty Adoes not establish ineffective assistance of counsel,@ because the Afamily=s work and financial situation@ was presented and the failure to present Mr. Stacy=s bad conduct discharge, was not Adeficient performance below that of a reasonable attorney.@ Id. The court also found that in spite of post conviction counsel=s presentation of evidence to Aunderscore that Defendant=s home environment was not ideal, there has not been a sufficient showing that counsel=s failure to do so constituted deficient performance below that of a reasonable attorney.@ Id. These findings are not supported by substantial, competent evidence

and are an erroneous application of the law.

As noted repeatedly throughout this claim, Mr. Urso=s investigation fell below that of a reasonable attorney. He never spoke to Mr. Stacy, never looked for records, never visited the family home and conducted no additional investigation after the mandate. This was deficient performance. AIt should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase . . . deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness.@ Blake v. Kemp, 785 F. 2d 523, 532 (11th Cir. 1985) Prejudice is established by testimony and evidence presented at the hearing. Had Mr. Urso spoken to Mr. Stacy he would have discovered that he was a high school dropout and Vietnam veteran; a self-described Astand-offish@ person who did not like to get close to people because he was afraid he would Ablow-up,@ based in part on his record of aggravated assault with intent to kill while in the military. ROA V. XI, pp. 1856-81;V. XV, p. 364-65; V, XVI, p. 542. Les Stacy had virtually no interaction with Alvin. ROA V. XVI, p. 532, 551-54. When Mr. Stacy got home from work, he sat in the dining room and read books. Id. at 551. Angela said, ALes and Alvin@ did not have a close relationship and she never saw them have Aan in-depth conversation@ or Ado sports or anything like that.@ ROA V. XVIII,

p. 855.

Information about the family=s financial problems was also available had defense counsel bothered to look. The 1994 PSI indicated Ms. Stacy knew Alvin Aneeded help but I didn=t have the money to get it for him.@ ROA V. XV, p. 358. Ms. Baker also determined, simply by speaking to Mr. and Ms. Stacy, that in the four years prior to the offense, the Stacys had lived in five residences due to evictions, and had filed Chapter 7 bankruptcy in 1989. Id. at 358-59;Def. Ex.13; ROA Vol. XI, pp. 1916-17. Mr. Urso admitted he did not know of the bankruptcy and did not know the number of times the family moved. ROA V. XV, p. 41, 113-14.

Alvin=s sister, Angela, said the family still Alived paycheck to paycheck . . . . And there was actually a time that [Les and Barbara] had filed bankruptcy . . . there was times at Christmas that . . . two Christmases we didn=t get a Christmas.@ROA XVIII, p. 852. The family moved to the Rainbow Lane house after the bankruptcy in 1989. Id. at 851. Prior to that they had lived in four different places, including two trailers. Id. The car that Alvin was given Awas bad. It was a hard ten years.@ Id. at 854. AThe engine was messed up. It had no air conditioning. The radio sometimes wouldn=t work on right hand turns ... It seemed to have a lot of mechanical problems.@ Id. Their clothes came from Goodwill and they Anever went on

spending sprees for clothes.@ Id. at 864-65. Alvin=s tv was used. Id. at 862-63. Alvin=s stereo Awas an old-timey radio . . . You lifted up the top to it ... it had a turntable and stuff, but it didn=t work, . . . it was broken.@ Id.

Robin Johnson described the house the family lived in when ABarb and Les got together@ as a two-bedroom house with Alots of cockroaches.@ ROA V. XIX, p. 910. It was a house Ms. Johnson felt uneasy about visiting. Id. Ms. Johnson also said the family lived paycheck to paycheck and wore Ahand-me-downs, Salvation Army [clothes], stuff like that.@ Id.

Ms. Baker explained that Ms. Stacy=s failure to obtain counseling for Alvin was a form of neglect. Almost all of the relatives she spoke to noted that Ait was pretty hard to miss something was wrong with Alvin,@ and the kids were always telling the adults about things Alvin did. ROA V. XV, p.362-63. Ms. Stacy told Ms. Baker she was unaware of Alvin=s problems but Avirtually everybody said she was made aware of it but didn=t want to deal with it.@ Id. Ms. Baker explained that, as a mother of a capital defendant, Ms. Stacy=s testimony may be skewed because she Ahas something invested, having a perception of herself and a perception of Les of having done everything they could.@ ROA Vol. XVI - 506.

Ms. Baker also testified that both sides of the family had a

history of alcoholism, abuse and mental illness and Barbara and Virgil were themselves abused. ROA V. XV, p. 345-47. Barbara=s mother was sexually abused by her father and considered extremely abusive herself; Virgil was hung upside down and left in a closet by his parents. Id.

Contrary to the post conviction court=s finding, there was *no testimony* about the Stacy family=s extended financial difficulties, bankruptcy, evictions and dysfunction. At trial in 1999, on cross examination, Ms. Stacy=s testimony was made to appear that Les Stacy had a meaningful relationship with Alvin and that life in the Stacy household was one of indulgence and stability. At trial, the state elicited from Ms. Stacy that Mr. Stacy was a Ahard-working man,@ who treated Alvin Alike his own son,@ who Ahad talks with him and stuff,@ and that Alvin Alived in a nice home@ provided by Mr. Stacy, with his Aown room,@ Atv set, AAstereo,@ ANintendo,@ and a Arunnable car.@ 1999TR. P. 476-477, 488. While Ms. Stacy tried to minimize the portrayal of material abundance at one point noting the Aincome tax money went to the new clothes for school,@ the bulk of this testimony was never contested. Id.

In closing the state argued, AMr. Stacy was a gem,@ Aa great stepdad,@ who gave Alvin a stereo and Nintendo. 1999TR - 724-25, 737. He also said, Alvin wasn=t Asome poor kid that lived in the

ghetto all his life,@ but was Agiven pretty much everything,@ and lived on Aeasy street.@ Id. at 725, 727.

Counsel=s performance prejudiced Alvin because he was denied his right to a reasoned and accurate sentencing determination. Gregg v. Georgia,428 U.S. 153, 190(1976)(plurality opinion). Instead, the judge and jury made their death determination on information now shown to be inaccurate. The post conviction court=s finding that testimony of the family=s continued poverty was cumulative is not based on any evidence in the record.

Post conviction counsel also linked Mr. Stacy=s violent past to his relationship with Alvin. Ms. Baker, Angela and Mr. Stacy all testified, as noted above, that Mr. Stacy had virtually no interaction with Alvin due to a fear of losing his temper. The court also wholly fails to acknowledge the State=s closing argument describing Mr. Stacy as a Agem,@ who treated Alvin Alike his own son.@ The trial court=s ruling is erroneous.

CONCLUSION

Counsel=s inexperience, coupled with his failure to investigate, give background information to his experts and obtain school and medical records, resulted in an abdication of his responsibility to defend his client; Alvin=s poor memory does not excuse counsel=s failure to conduct a reasonable investigation. Ponticelli v. State, 941 So. 2d 1073, 1095-96

(Fla. 2006)(citing Arbelaez v. State, 898 So. 2d 25, 34-35 (Fla. 2005). The lower court=s finding that counsel=s performance was that of a reasonably competent attorney is erroneous.

The lower court=s prejudice determination is also flawed because it is not supported by competent, substantial evidence and fails to give weight to the additional mitigation presented. Sochor v. Florida, 883 So. 2d 766, 772 (Fla. 2004); State v. Lara, 581 So. 2d 1288, 1289 (Fla. 1991). It=s reasoning is also erroneous under, *Strickland, Wiggins, Williams* and its progeny.

ARGUMENT II

THE LOWER COURT ERRED IN DENYING ALVIN MORTON=S CLAIM THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND A DENIAL OF DUE PROCESS DURING THE PENALTY PHASE. COUNSEL FAILED TO INVESTIGATE AND PRESENT EVIDENCE OF MENTAL ILLNESS, BRAIN DAMAGE AND ASPERGER=S DISORDER AND PREJUDICED ALVIN MORTON BY PRESENTING DAMAGING EXPERT TESTIMONY. ALVIN MORTON WAS ALSO DENIED A COMPETENT MENTAL HEALTH EXAMINATION. THE LOWER COURT=S RULINGS VIOLATE ALVIN MORTON=S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Trial counsel rendered deficient performance by failing to conduct a reasonable investigation into Alvin Morton=s background and mental health. Trial counsel was aware of facts which would have prompted reasonably competent counsel to investigate

further. Instead, trial counsel conducted a rudimentary investigation which consisted entirely of speaking to a narrow set of sources. Had he conducted a reasonable investigation and ensured a competent mental health examination, he would have been able to present evidence of birth trauma, organic brain damage, mental illness and Asperger=s Disorder. Instead, counsel=s theory at sentencing, that Alvin had antisocial personality disorder and Atraits of a serial killer,@ prejudiced Alvin to such a degree that confidence in the outcome is undermined. Trial counsel=s decision to present antisocial personality disorder in mitigation was based on an unreasonable investigation and is not entitled to a presumption of correctness. The postconviction court=s ruling as to this claim is not supported by competent, substantial evidence and is an erroneous application of precedent of this Court and the Supreme Court of the United States.[14] This Court=s finding of a procedural bar to the Due Process claim is arbitrarily applied.

---

14 This claim was raised below as both Ineffective Assistance and Due Process. The lower court denied the Ineffective Assistance claim on the merits and found the Due Process claim procedurally barred. It is raised herein as both types of claims.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversary testing process. Id., at 688. AAn ineffective assistance of counsel claim has two components: A petitioner must show that counsel=s performance was deficient and that the deficiency prejudiced the defense. To establish deficient performance, a petitioner must demonstrate that counsel=s representation >fell below an objective standard of reasonableness.=@ Strickland v. Washington, 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (internal citations omitted).

In Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 80 L.Ed. 2d 674 (2003), the Supreme Court held AStrickland does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather a reviewing court must consider the reasonableness of the investigation said to support that strategy. @ Id. at 2538.

This Court has held counsel renders deficient performance when he fails to ensure an adequate and meaningful mental health examination. Ponticelli v. State, 941 So. 2d 1073, 1095 (Fla. 2006); Sochor v. Florida, 883 So. 2d 766, 772 (Fla. 2004). Counsel=s failure to pursue mental health mitigation despite Ared

flags@ amounts to deficient performance; Aa competency and sanity evaluation as superficial as the one [Dr. DelBeato] performed for [Alvin] obviously cannot substitute for a thorough mitigation evaluation.@ Arbelaez v. State, 898 So. 2d 25, 34 (Fla. 2005) Prejudice is established when counsel fails to investigate and present evidence of brain damage and mental illness. Ragsdale v. State, 798 So. 2d 713, 718-19 (Fla. 2001); Rose v. State, 675 So. 2d 567, 571 (Fla. 1996) (*citing* Porter v. Singletary, 14 F.3d 554, 557 (11th Cir. 1994)). Due Process is violated under *Ake* where a mental health exam is so Agrossly insufficient@ that clear indicators of brain damage are ignored. Sireci v. State, 502 So. 2d 1221, 1224 (Fla. 1987)

The post conviction court=s Order as to this claim is unclear at times as to whether it is denying the claim on the prejudice or performance prongs, fails to rely on competent, substantial evidence, and, to the extent that the postconviction court=s Order rejects claims, it often Afails to point to any evidence from the trial or [postconviction proceedings] that actually controverts [Alvin=s claims.] @ Coday v. State, 946 So. 2d 988, 1020 (Fla. 2006) (Bell, J., *concurring*). This Court should substitute its own findings of fact and weigh the credibility of the witnesses. Sochor v. Florida, 883 So. 2d 766, 781 (Fla. 2004).

A. Trial counsel rendered ineffective assistance of counsel by failing to investigate and present evidence of mental illness and brain damage and failed to ensure that he received a competent mental health evaluation.

Trial counsel=s mitigation investigation consisted of speaking to Alvin=s mother, sister and a few aunts. He failed to obtain Alvin=s birth records, in spite of being told by Alvin=s mother that Alvin was breech, premature and black and blue at birth. He failed to obtain a comprehensive history of Alvin, failed to direct his investigator to obtain background information, failed to retain a mitigation specialist and failed to give his experts background information. He did no additional investigation in 1997 after the mandate, never attempting to obtain the names of objective people or sources who could verify or explain Alvin=s medical history, particularly his birth, his memory problems, and robotic demeanor.

All of these failures to investigate serve as the backdrop to Alvin Morton=s mental health evaluations, mental health mitigation testimony and defense counsel=s ill-informed strategy. AThe lack of a serious and sustained effort by counsel to pursue mental health mitigation despite various red flags . . . amount[s] to deficient performance.@ *Arbelaez* at 34.

1. Counsel rendered deficient performance in failing to obtain documents and convey background information

Mr. Urso retained two experts, Dr. DelBeato, a psychologist,

and Ms. Pisters, a social worker. He failed to provide background information or documents to either expert. Both experts were retained only a few weeks prior to trial. Dr. DelBeato met with Alvin once and spent a mere 90 minutes with him. His report and testimony was based entirely on the 90-minute meeting. In Ponticelli v. State, 941 So. 2d 1073 (Fla. 2006), this Court found that when inexperienced trial counsel failed to obtain school or medical records and relied on a 15 minute mental health exam, counsel functioned below prevailing norms. Such is the case here.

The most significant breakdown in Alvin=s case was defense counsel=s failure to obtain Alvin=s birth records or tell the experts about Alvin=s birth. Mr. Urso was aware that there were some problems during Alvin=s birth. When asked if he had ever seen Alvin=s birth records he stated,AYou know, I don=t think I ever obtained those, but I had a knowledge of his birth, and I don=t know where that came from.@ ROA V. XIV, p. 42-46. Mr. Urso described his knowledge of Alvin=s birth: AI thought it was a breached birth. You told me there was a wrapping around of the umbilical cord, and my review of the transcript revealed a premature birth, so I didn=t have it right at all.@ Id at 46.

Mr. Urso=s knowledge of Alvin=s birth had to have come from a handwritten letter given to him by Ms. Stacy prior to 1994. Id.

at 42. In the letter, she described Alvin=s birth as Abutt first,@ (sic) and the AE. Cord@ (sic) was wrapped around his neck three times which Ashut the oxygen off to him, so when he came out he was black & blue from the head (sic) to his feet,@ and weighed A4 pd 2 oz.@ (sic) at birth. (Def. Ex. 1, ROA, Vol. XI, p. 1783) Mr. Urso conceded that, in spite of this letter, he never attempted to get Alvin=s birth records. Id. at 49. He repeatedly stated he was unaware of and had not seen the birth records prior to the evidentiary hearing. Id. at 41, 49, 165, 180, 248.

The birth records describe a Ahighly cyanotic white viable male infant@ delivered by forceps. (ROA Vol. XI, p. 1763) AThe umbilical cord was around the neck twice and very tight and was a very short cord. The infant suffered a great deal of anoxia as the face was black when it was delivered. Immediate resuscitation therapy was initiated . . ., [Alvin] had an Apgar rating of 3 at birth and 4 in one minute, was taken to the nursery, intubated and placed in an incubator. ... Prognosis on the baby is poor. @ Id. He was resuscitated 8 hours after birth and A[c]onvulsions, tremors, rigidity and cyanosis were also recorded as being present.@ ROA Vol. XI, p. 1766. Three days later, he weighed 3 pounds, 10 ounces; two weeks later he Aspiked a fever and was treated with anti-biotics.@ Id. The records also

describe a hole in the lung or pneumothorax at eight months. ROA Vol. XI, p. 1767 - 74.

Mr. Urso admitted he never told Dr. DelBeato about Alvin=s birth. ROA V. XIV, p. 54; v. XV, p. 248. He also knew Alvin was kicked in the head with a steel-toe boot and had developmental delays but never told Dr. DelBeato. Id. at 75, 118-19. Mr. Urso also never asked him to look at brain damage. Id. When asked how Alvin was benefitted by his failure to tell Dr. DelBeato about these facts, Mr. Urso said: AI don=t know that he was. I don=t know that he benefitted by it.@ Id. at 77-78.

Ms. Pisters testified about Alvin=s birth but in a manner that ignored the anoxia and trauma. Mr. Urso described the theory of the relevance of Alvin=s birth:

> A: AHe was born premature and because of the circumstances of the household at the time, Alvin=s mother was unable to go to the hospital more than I think a couple of times a week so there was never the maternal bonding that typically would have occurred at that stage. So, yes, it was very, very relevant to our presentation.@ Q: Was there any other aspect of [Alvin=s birth that was] relevant other than lack of bonding?
> A: No. I think that was our consideration.

ROA V. XIV, p. 43.

Mr. Urso confirmed that even after the mandate he did not attempt to obtain any medical records or do any additional investigation. Mr. Urso considered obtaining an MRI or PET Scan and claimed he contacted a neurologist but was not sure when this occurred. When asked specifically what he did to investigate using an MRI or PET Scan, Mr. Urso said: AContact was made with the University of South Florida.@ ROA V. XIV p. 48-53.

When pressed further, he could not name a neurologist and admitted that there was no entry on his billing records. Id. at 50:

> Q: When you spoke to the neurologist, whoever it was, how long did you speak to the neurologist, or did you just speak to a research assistant or a secretary?
> A: I can=t tell you that I actually spoke to a neurologist. I called over to the medical school to try to get information on how we could get Alvin Morton over there, and if they could perform a brain scan or a PET scan, or whatever it is they call it when they look at someone=s brain, to see if there is some abnormality in the brain, that was what we did initially.@

Id. at 52-53.

Counsel and his experts failed to function within the realm of reasonably competent counsel and their performance fell below prevailing professional norms in failing to look for and obtain medical records. This is particularly so since counsel knew Alvin=s memory was impaired and his birth was traumatic. Counsel renders deficient performance which prejudices his client in failing to investigate and present brain damage. Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991). The mitigation evidence counsel failed to discover included the fact that the defendant=s Abirth was attended with serious medical difficulties including an initial lack of oxygen.@ Id. at 1501. AA lawyer who should have known but does not inform his expert witnesses about essential information going to the heart of a defendant=s case for mitigation does not function as >counsel= under the sixth

amendment.@ Smith v. Stewart, 189 F.3d 1004 (9th Cir. 1999), cert. denied 531 U.S. 952 (2002). The failure to present mitigation evidence of brain damage is prejudicial despite the horrific nature of the crimes. Id. Meaningful assistance of counsel in capital cases includes counsel pursuing and investigating all reasonably available mitigating evidence, including brain damage and mental illness. Frazier v. Huffman, 343 F.3d 780 (6th Cir. 2003).

Mr. Norgard gave uncontradicted testimony that it was standard practice to obtain birth records and competent counsel would have been aware of the importance of obtaining birth records. ROA V. XXI, 1166, 1172. Ms. Baker also testified that it is Acrucial@ for a mitigation investigator to obtain birth records because they provide an Aobjective verification of issues, handicaps, [and] who the person was when they came into the world.@ ROA V. XV, p. 332-34. Ms. Baker also said it would not be reasonable to rely on what the mother tells you about the birth; you get the records regardless of whether they contain significant information or not. Id. Also, the birth and medical records in this case were extremely significant. ROA V. XV, p. 333-34. The ABA Guidelines also establish that prevailing norms require counsel to collect information on Abirth trauma.@ ABA Guidelines 11.4.1(2)(C)(1989)

Dr. Berland testified that according to authoritative treatise Psychological Evaluations in the Courtroom, it is essential for a forensic expert to seek collateral data to be sure that he or she is getting the right information. ROA V. XXI, p. 1293. Dr. Silva, a psychiatrist board certified in neurology, psychiatry and forensic psychiatry with a subspecialty in lifespan psychiatry, testified that while it may be an acceptable practice for an expert to Ago in blind@ or without background information, there is an important caveat, which existed in Alvin=s case due to his poor memory:

> A: If the individual is a difficult person to interview and may actually be withholding information for a whole number of reasons, then you may have to evaluate and see that in retrospect you should have had all those records available and so the way to resolve that problem is you look at the records, you come back and you interview.
> Q: So, in other words, if you had someone who was a vague historian, the prevailing standard would be to look at the records and then go back and evaluate.
> A: That would be what most reasonable people would say in this area.

Id. at 1234. Dr. Silva confirmed that corroboration in forensic mental health examinations is Acrucial.@ Id. Dr. Gonzalez also said the prevailing practice is to get all background information. ROA V. X, p. 1721-22.

2. Testimony established Alvin Morton has brain damage, mental illness and Asperger=s. The lower court=s findings are not supported by competent, substantial evidence.

It is not clear whether the lower court denied this claim on

the performance or prejudice prongs. However, it is clear that in denying this claim, the lower court relied on the testimony of Dr. DelBeato, finding that the defense failed to establish that ADr. DelBeato=s evaluation and diagnosis is not accurate. . . .Defendant has only established that he has found experts who disagree with Dr. DelBeato=s diagnosis, and, it should be noted, with each other. . . . Defendants arguments in this claim are all based upon the assumption that Defendant does have brain damage or another mental disorder, but could not have antisocial personality disorder. Such assumption has not been proven.@ ROA Vol. IX, p. 1434-35.

The court found that Aneither of Defendant=s expert witnesses could establish conclusively that Defendant did suffer from organic brain damage,@ because Dr. Gonzalez and Dr. DelBeato Atestified that they saw no evidence of organic brain damage, and therefore, no reason to investigate further.@ Id. at 1437. The court also inaccurately frames Alvin=s claim as failure to conduct neuro-imaging and denies the claim because counsel has not had ADefendant tested to provide *objective evidence* that such organic brain damage actually exists. . . . Aside from Dr. Berland=s and Dr. Silva=s unsubstantiated opinions *contradicting those of Dr. DelBeato* and Dr. Gonzalez, *Defendant has not provided any objective evidence* that he has organic brain

damage.@ (Emphasis added) Id. The lower court also found that the defense Afailed to offer any evidence to show that Dr. DelBeato is not competent and qualified to conduct a proper mental health examination.@ Id.

The lower court=s findings are not supported by competent, substantial evidence. The court=s finding that the defense failed to provide Aany objective evidence@ of brain damage, fails to address the birth records, symptoms of brain damage such as Alvin=s undisputed memory problems, or Dr. Silva=s unchallenged, objective testing. In finding that Dr. DelBeato rendered a competent mental health evaluation and that his opinion ruling out brain damage is reliable, the post conviction court must rely on Dr. DelBeato=s rambling, defensive, and contradictory testimony that cannot be reconciled with his own testimony in 1994 and 1999 or with other evidence and testimony in the record. Dr. DelBeato is neither credible nor qualified to test for brain damage. Further, Dr. Gonzalez didn=t test for brain damage but considered the birth records a red flag and would have recommended further testing had he seen them before trial. Accordingly, this Court should substitute its own judgement on questions of fact, credibility of witnesses and the weight given to the evidence. Sochor v. Florida, 883 So. 2d 766, 781 (Fla. 2004)

3. Defense Established through Objective Substantial Evidence that Alvin has Brain Damage and Asperger=s Disorder

Dr. Silva, a Stanford educated psychiatrist board certified in neurology and psychiatry and specializing in autism, reviewed a substantial amount of documents, including trial testimony, police reports, other experts= reports, the birth records, and summaries of interviews conducted by Ms. Baker. ROA V. XVII p. 660-61 Dr. Silva also conducted a five hour clinical interview of Alvin and administered objective testing including, but not limited to, the Cambridge University Obsessions Questionnaire, the SANS, the Barron Emotional Quotient Inventory, the Benton Facial Recognition Test, the TAT-20, and the Wharton Memory Recognition Test. Id. at p. 734-736, 743. Dr. Silva diagnosed Alvin with Asperger=s Disorder and Cognitive Disorder - NOS, also referred to as brain lesions or damage. ROA V. XVII, p. 661 - 662. He also found Personality Disorder - NOS with signs of antisocial and schizoid traits but ruled out Antisocial Personality Disorder. Id. Dr. Silva opined that the records and testimony, along with his own evaluation, established Alvin met substantial diagnostic criteria for Asperger=s Disorder: dimunition of facial expression or aprosody; memory loss as documented in Dr. Gonzalez=s and Dr. DelBeato=s reports and Ms. Pisters= testimony; non kinetic use of hands; failure to develop appropriate peer relationships, lack of friends and girlfriends

as documented by Dr. DelBeato and Ms. Baker; arrested emotional development; noise hypersensitivity; lack of emotional and social reciprocity; obsessive and repetitive interests in Dungeons and Dragons; Apursuit of sameness@; persistent preoccupation as a child with clocks,Arobot-like thoughts@; engagement in rituals of withstanding pain by inserting needles in his arms; and, rearranging and reorganizing his room monthly. ROA V. XVII, p. 664 - 691, 718.

Dr. Silva explained that Alvin has feelings or emotions but has substantial difficulty experiencing feelings or emotions ROA V. XVII, p. 679 Support for this finding exists not only in his interview with Alvin but in the audiotape of Alvin=s monotone confession, the detective=s report describing Alvin as Arobot-like,@ Dr. DelBeato and Dr. Gonzalez=s description of Alvin=s Aflat affect,@ and the State=s closing argument describing Alvin=s Alack of remorse.@ ROA V. XVII, p. 679-82, 695.

Alvin=s Asperger=s is significant because it became pathological. By way of example, he would play Dungeons and Dragons for days at a time without sleeping and continued this pattern for two years. ROA V. XVII, p. 683. He was unable to form meaningful relationships with others in part because of an inability to develop social reciprocity, difficulty in feeling joy and also, Abecom[ing] so fixated in certain areas,@ he could

not Alead a balanced life.@ ROA V. XVII, p. 685, 692. A[T]he emotional processing abilities and regulations are so disabled in his case, not absent completely but seriously disabled, so that he cannot relate to people at that level. So he=s looking really truly at people as if they are robot-like, with thoughts and cognitions and memories and everything,@ and has serious difficulty processing emotion. ROA V. XVII, p. 693. He lives in Aanother realm of experience.@ Id. He would find it difficult to Aunderstand what it would mean for a person to feel a lot of different types of emotions, joy, . . . sadness, pain, emotional pain, all those things.@ Id.

Alvin=s memory problems also provided support for a diagnosis of Asperger=s and brain damage. ROA V. XVII, p. 701. It is undisputed that Alvin had significant long term memory problems about his childhood. Alvin also had short term memory problems; he often got lost when only a few blocks from home. Id. People with Asperger=s often have memory problems due to dysfunction in the amygdala and frontal lobe which regulates emotion. Id.

Alvin=s scores on the Wharton Memory Test, the SANS, the Benton Facial Recognition Test, the TAT-20, and the Barron Emotional Quotient Inventory also were consistent with Asperger=s. ROA V. XVII, p. 734-737, 743, 744. The difference

between Alvin=s E.Q. of 86 compared to his I.Q. of 119, is statistically significant. Id. at 739, 741. These tests all provided *objective scientific* support that Alvin=s ability to process and understand emotion and assess feelings in himself and others was impaired. Id.

Alvin=s Atheory of mind, @ or the ability to assess other people=s mental constructs, share emotions or feel empathy, is impaired. ROA V. XVII, p. 745. This is an important paradigm in autism research which has established that people with Asperger=s have problems in the frontal lobe, the prefrontal lobe and maybe also the amygdala. ROA V. XVII, p. 746 It is this brain impairment that substantially impairs Alvin=s ability to have empathy or remorse. ROA V. XVII, p. 746-748.

Dr. Silva suspected, just based on a face to face interview, that Alvin had brain damage and would not have failed to consider it regardless of his knowledge of the anoxia at birth. ROA V. XVII, p. 750. The anoxia, however, is relevant to his diagnosis of brain damage and Asperger=s because people with Asperger=s have been found to have frontal lobe injury and to a lesser extent, injury to the amygdala. Id. AIt is possible that some of his autistic problem may be in part associated with a birth injury such as anoxia, okay, and so that has to be clearly considered, and I would find that I would not want to avoid that

or miss that. That would be one of the last things I would do in persons such as him, given everything that I know ... If I had a medical student working with me I would say you better not miss that one.@ ROA V. XVII, p. 750-751. Information about Alvin being kicked in the head as a toddler would also be important for the same reason. Id.

Dr. Silva opined that Alvin=s brain damage and Asperger=s Disorder combined affected Alvin to such a degree that his ability to conform his conduct to the requirements of the law was substantially impaired. ROA V. XVII, p. 755. He explained that while Alvin was able to cognitively plan the crime, his judgement was impaired due to his inability to understand and control emotion, which is a very significant problem for people with Asperger=s . ROA V. XVII, p. 756-760.

The lower court in its Order does not address any of this testimony, even though the state=s own expert did not dispute Dr. Silva=s findings. The lower court=s ruling, that *no objective evidence* was presented because post conviction counsel failed to present neuro-imaging is erroneous. Appellate counsel is unaware of any opinion by this Court requiring neuro-imaging to support a finding of brain damage. In fact, such a requirement would be inconsistent with established science.

Dr. Berland also evaluated Alvin, reviewed records,

including the birth records, and administered the MMPI in concluding that Alvin has a chronic psychotic disturbance with Aa history of significant brain trauma.@ ROA V. XVI, p. 564, 568. Dr. Berland explained brain injury Ais an important mitigator..., an important cause of changes in behavior, [and] it can be a cause of biologically determined mental illness.@ ROA V. XVI, p. 565. Dr. Berland stated that Alvin=s birth records were significant because infants= brains have not formed the myelin sheath around the nerves and are therefore very vulnerable to oxygen deprivation at birth. ROA V. XVI, p. 570-71. Damage at birth Atypically can create a pattern of long-lasting mental illness.@ Id. The records demonstrated very severe anoxia because Alvin=s face was black when he was delivered, as opposed to records which may describe an infant as blue or gray. Id. Dr. Berland also explained that, in spite of the records indicating that Alvin did not demonstrate any abnormal neurological findings when he was discharged, this did not rule out brain damage because there was no assessment of cortical neurological functioning. ROA V. XVI, p. 576-577; ROA V. XVII, p. 581 Dr. Berland also stated that Alvin=s mental illness would impair his ability to make choices at the time of the offense. ROA V. XVII, p. 623. While Dr. Berland found psychosis, Dr. Silva did not, and, in that regard, the defense experts disagreed.

The lower court found Dr. Berland=s rule out of antisocial disorder to possibly be less credible because he said as a defense expert he was not looking for things that may be harmful such as antisocial personality disorder. The lower court also found that since Dr. Berland found psychosis and Dr. Silva did not that he discredited their testimony. However, this court has still found prejudice when experts disagree as to psychosis. Ragsdale v. State, 798 So. 2d 713, 718 (Fla. 2001). In addition, in light of the record in this case and the lower court=s reliance on Dr. DelBeato to exclude a finding of brain damage, this finding is not based on competent, substantial evidence.

The lower court=s refusal to find that the defense established Asperger=s Disorder, in spite of objective evidence, is also not founded on a rational basis. AThe objective testimony from [Dr. Silva] could be rejected only if it did not square with the other evidence in the case. While we have given trial judges broad discretion in considering unrebutted expert testimony, we have always required that rejection to have a rational basis. For example, the expert testimony could be rejected because of conflict with other evidence, credibility or impeachment of the witnesses, or other reasons. However, none of these reasons are present here.@ Coday v. State, 946 So. 2d 988, 1005 (Fla. 2007) While the State may argue that there was

conflict among the experts, the *only expert* who disagreed with or disputed Dr. Silva=s findings of Asperger=s was Dr. DelBeato. As will be demonstrated below, he is simply not credible. Alvin presented a Areasonable quantum@ of competent evidence to establish brain damage in the form of Asperger=s. Id.

4. Dr. DelBeato is not credible and to the extent that the lower court=s ruling is based on his testimony, the court=s findings are not supported by competent, substantial evidence

Dr. DelBeato=s test scores, notes and data no longer exist. No one else ever saw his data or test scores. Dr. DelBeato claimed at the evidentiary hearing in 2004 that he Aaccidentally@ allowed Acarpenter ants@ to eat his entire file and that the Abug man@ told him his file was destroyed. ROA V. XIX, p. 981. He further explained that when he went to court in 1999 he was faced with the disadvantage that he had no notes, nothing, other than a copy of his report which Mr. Urso had given him. ROA V. XIX, p. 953. He further reiterated that this destruction of his files was Aaccidental,@ that he would never intentionally Ashred@ or Adestroy@ case files and that it would be Aunethical@ to do so, particularly in a capital case. Id. at 981-83. He also repeated twice that it was Aimpossible@ that he shredded or destroyed his file because he has Anever shredded anything,@ and, in fact, if he had said that he shredded or destroyed his file it would have been untrue. Id. In 1999, however, Dr. DelBeato

testified, under oath, that Aafter about a year and a half we=re allowed to clear a file, so a year and a half after I appeared in court the first time, [my file] was shredded and destroyed ...@ 1999TR - 623.

Dr. DelBeato met with Alvin only once and spent a total of 90 minutes with him. He described the testing he gave as Athe standard battery that we had given for the forensic court-appointed evals for years, and the idea was if you needed more after that, then you go back and do more.@ Id. 942. At trial he said the testing he did was for Acompetencies.@ 1999TR- 615

Dr. DelBeato conceded he administered incomplete testing and that on two of the tests he did not follow standardized administration or scoring. He gave only the verbal portion of the

WAIS. Id. at 1014. He admitted Ait=s best to give the whole test.@ Id. Regarding the proverbs test, he didn=t know if he gave 2, 4 or 6 proverbs or which proverbs he used. Id. 1038. He also admitted that he did not know or follow standardized methods on the Rorschach. Id. at 1042. He administered only a partial MMPI and was unsure if it was the abbreviated or the mini MMPI. Id at 1015-16.

Dr. DelBeato=s claim that he administered the above four tests, tested for competency to proceed, and obtained background

information from Alvin in 90 minutes, was considered an impossible feat by all the other experts. Dr. Berland stated: A[I]t would seem physically impossible, looking at the most minimal approach to doing an evaluation to do all those things in 90 minutes.@ ROA V. xxI, P. 1209-1301. Dr. Berland estimated it would take at the very least, three and a half hours to do what Dr. DelBeato claimed he did in 90 minutes. Id. The state=s expert said it would take 45 minutes to one and a half hours to administer the WAIS and anywhere from one to seven hours to administer the MMPI. ROA V. X, 1711-12. Dr. Silva stated that it would take dozens of hours to do a complete and competent mental health exam in a capital case, including review of materials and research. ROA V. XXI, p. 1218. The prevailing standard is that it will take Amany, many hours to be able to do a competent evaluation.@ Id. Mr. Norgard said that, Aif you=re talking about a clinical interview and a psychological test being done in 90 minutes, you know, *I don=t know of any expert I=ve ever dealt with who could do that within that time frame.*@ Id. at 1181. (emphasis added).

The tests Dr. DelBeato purportedly used to screen for organicity/brain damage were inadequate. Dr. DelBeato said the proverbs were of Ahigh order@ in his rule out of brain damage. ROA V. IX, p. 1038. The proverbs test consists of asking the

subject to explain the meaning of common proverbs, such as a bird in the hand is worth two in the bush, in order to evaluate abstract thinking. The test, however, is regarded as a crude and minimally effective tool for detecting defects in abstract thinking according to Kaplan and Sadock, whose treatise is recognized as authoritative in the field of forensic mental health. Id. at 1040, V. XXI, p. 1207. The proverbs test does not give the tester information about brain injury or organic impairment except in a tangential and irrelevant manner. Id. 1289. Dr. Silva confirmed you cannot rule out brain damage based on giving six proverbs. Id at 1208-09. Dr. DelBeato was not sure if he gave the mini MMPI or the abbreviated MMPI, but, if he gave the mini MMPI, it is considered invalid and its use has been discontinued. Dr. DelBeato administered only the verbal portion of the WAIS which would not provide information on right hemisphere brain function.

At the hearing, Dr. DelBeato claimed he spent 15 to 20 hours in 1994 reviewing materials on Alvin=s case. His claim is not supported by the record. Dr. DelBeato=s 1994 billing records show he spent two hours direct time with Alvin, one hour to dictate his report and one and a half hours interpreting, researching and scoring. (Def. Ex. 20; ROA Vol. XII, p. 2082-83). When confronted with this, Dr. DelBeato claimed that he

never worked less than 20 hours on a case but only billed for one and a half hours because he wasn=t Agoing to get paid for anything over the one-and-a-half.@ ROA V. Ix, p. 975.[15] Dr. DelBeato also claimed that it was his personal decision to *never* bill more than $400 whether he puts in A20 hours,[or] 400 hours.@ Id. Dr. DelBeato then claimed he worked ***15 extra hours for free*** on Alvin=s case because that is his ***standard practice.*** Id. Dr. DelBeato=s claims fall outside the realm of believability. Mayfield v. Woodford, 270 F.3d 915, 928 fn. 12 (9th Cir. 2001) (a witness=s claim that he spent 200 hours in preparation but only

---

15 Mr. Swisher testified that in Pasco County, after a $400 initial cap, experts bill per hour at the going rate. HRNG - 1068. Dr. Gonzalez, the state expert, submitted a bill for $2,525 in 1994 based on the number of hours spent, and also billed for 21 hours of document review in 1999, both of which were paid. ROA V. X, p. 1745-47.

billed for 40 is Ainherently implausible.@)

Further, Dr. DelBeato could not have spent 20 hours in 1994 reviewing documents because he never got any documents to review. All the evidence in the case shows that Dr. DelBeato was not given any documents to review prior to writing his report, formulating an opinion on Alvin *and* testifying. At the hearing, Dr. DelBeato agreed he went into his evaluation with Alvin without any background information or records. However, he claimed that later, Mr. Urso gave him medical records and a family history on Alvin. ROA, V. XIX p. 947-949, 950, 957, 989-94. He said he looked at some records and remembered Alooking at paperwork@ but could not recall exactly what he saw. Id at 993. Dr. DelBeato claimed that he reviewed the background records prior to writing his report and prior to testifying on February 8, 1994. Id. at 962-63, 989-95.

However, on February 8, 1994, during cross-examination, he said he was *never given any document, records or background information going in, nor did he receive any after his evaluation*:

> Q: Prior to going down and speaking to Mr. Morton, you did not review any background information on him, you did not have any police reports about this case, any depositions, any other witnesses who might have looked at him, any of the doctors= reports, you didn=t speak to family members, did not look at school records, did not review anything at all, is that correct?

A: No, sir. I did it blind.

* * * * *

Q: And I would assume you would want to do a very thorough job and review everything that you could review to make sure when you came in here you could tell this jury that you have researched this issue and exhausted all the resources that you have to substantiate any opinion that you might have?
A: Yes, sir.
Q: But in this case you were just asked to go and do this thing, quote, blind?
A: Yes.
Q: And after you reviewed or spoke to Mr. Morton again, you did not corroborate anything he might have said by looking at the reports, speaking to other witnesses, nor reviewing any other doctors= opinions or reports that might have seen him as well?
A: I didn=t get any, no.
Q: Again, you would have liked to have all that material, again, to make sure that you have exhausted all the resources and that you did all you could to substantiate your opinion?
A: I always ask for it.
Q: But in this case, you did not receive that, as well?
A: No.

1994TR - 1030 -1032. On redirect by Mr. Urso, Dr. DelBeato reaffirmed he didn=t get any background information or reports and did not confer with Ms. Pisters. 1994TR - 1055 -1058. The State=s closing argument in 1999 also confirms this fact, A[Dr. DelBeato] didn=t get anything from the defense. They make sure they don=t send him any police reports, depos. He gets them from me ... after [he] last testified in the courthouse.@ 1999TR - 733.

Dr. DelBeato=s claim of document review is also refuted by his report, which references only Alvin as a source of

information. Vol. XI,p. 1776-1782.[16] In reversing a death sentence based on counsel=s failure to adequately investigate and ensure an effective mental health evaluation, this Court held, in part, that the experts= failure to list background documents in their reports raised an unacceptable risk that the experts were unaware of significant history indicative of brain damage:

> ASince no documents are cited in the . . . reports, too great a risk exists that these determinations of competency were flawed as neglecting a history indicative of brain damage. Commentators have pointed out the problems in basing psychiatric evaluations exclusively, or almost exclusively, on clinical interviews with the subject involved. One of the earlier interviewing psychiatrists noted in his report that [the defendant] ›. . . generally gave an extremely poor history in regards to dates, symptoms ... etc.= In light of the patient=s inability to convey accurate information about his history, and a general tendency to mask rather than reveal symptoms an

16 Dr. DelBeato=s report described Alvin as a Avague historian,@ who denied Aany history of significant head injury, brain trauma or seizure disorder.@ Other than testing, the only source of information listed in the report is Alvin himself, e.g. AAlvin was interviewed,@ AMr. Morton tells me that he was born on July 11, 1972, in Indian Rocks Beach ... He denies any history of ... brain trauma.@ A Mr. Morton tells me that he does love his mother..., @ AMr. Morton states ...,@ etc. Id.

> interview should be complemented by a review of independent data. *See* Bonnie, R. And Slobogin, C., *The Role of Mental Health Professionals in the Criminal Process; The Case for informed Speculation,* 66 Va. L. Rev. 427, 508-510 (1980)@

Mason v. State, 489 So.2d 734 at 736-37 (Fla. 1986).

Dr. DelBeato also claimed Mr. Urso told him about Alvin=s anoxia at birth.A[Mr. Urso] mentioned to me ... he asked me if I thought the oxygen deprivation at birth was significant and I felt no. I still do.@ ROA V. XIX, p. 949. Dr. DelBeato also said that when the state gave him a copy of the birth records in 2004 it prompted his memory about talking to Mr. Urso about the records. The lower court relied on this testimony in determining that the defense had failed to establish brain damage and that counsel had rendered reasonably competent performance. ROA V. IX, p. 1437. In order to accept Dr. DelBeato=s claim that he considered anoxia and ruled out brain damage, one must find that he knew Alvin suffered anoxia at birth. This fact, however, is not supported anywhere in the record other than in Dr. DelBeato=s self-serving testimony at the hearing.

As previously noted, Mr. Urso repeatedly and confidently admitted he never had the birth records, was not aware of the anoxia and never spoke to Dr. DelBeato about it. Not a single witness at either the 1994 or 1999 trial ever mentioned Alvin=s

anoxia at birth.

Dr. DelBeato=s 1994 testimony also demonstrates that he did not know or consider Alvin=s birth trauma: AI asked him about his birth and where he was born, et cetera, basic material to establish he was within the limits of reality. He responded adequately. @ 1994TR -1012. Later he said: AHe didn=t appear to have any brain dysfunction. *He denied a history, let=s put it that way,* of having any significant head trauma or epilepsy, *or anything you might suspect organically caused*, so there was no significant organic or thought impairment.@ 1994TR -1023.(emphasis added).

When asked why, if he had considered anoxia and ruled out brain damage, he failed to annotate that finding in his report, Dr. DelBeato claimed he didn=t mention it because it wasn=t Arelevant.@ ROA V. XIX, p. 1026-28. Both Drs. Berland and Silva testified that the prevailing standard in the forensic mental health field mandates that an expert must list and include in his report all information that contributed to the formation of a conclusion, including any review of medical records and ruling out of brain damage. ROA V XXI, p. 1225, 1291-92. Dr. Silva said it is Anot a good idea or something that would be reasonable to do, but it really is a must@ to list all non-published sources contacted, including people spoken to, letters reviewed,

transcripts and police reports, and, if you ruled out anoxia at birth, you Amust@ include it. ROA V XXI, p. 1225.

Dr. DelBeato=s testimony as to his review of the medical records should also be disregarded because he failed to demonstrate that he is competent to testify as to their meaning. First, he stated that although he was not a medical doctor his understanding was that an Apgar score of seven *after five minutes* Awouldn=t have been a problem@ and that there were no significant problems with Alvin=s Apgar score after five minutes. ROA v. XIX, p. 949.

However, when asked detailed questions about the significance of an infant=s color at birth (one of the symptoms scored on the Apgar) Dr. DelBeato admitted he didn=t know:

> Q: If Alvin Morton was described as blue at birth, would blueness suggest oxygen deprivation?
> A: Yes. But in and of itself it doesn=t mean anything.
> Q; How about if he was gray at birth, would that be ...
> A: In and of itself it doesn=t mean anything.
> Q: Excuse me. Let me finish the question, okay? How about if he was gray at birth, would that indicate a more significant oxygen deprivation than blue?
> A: I don=t know.
> Q: How about if he was black at birth?
> A: I don=t know.

Id. at 1028 -29.

Dr. DelBeato also minimized the significance of the records because the report showed that at discharge no Aabnormal neurological findings [were] noted,@ and he claimed it would only

be months before the full implications of the anoxia would be apparent. Id. at 1031, 1034. However, when confronted with the fact that the full implications of a neurological insult in a child may not be apparent for years according to Kaplan and Sadock=s Comprehensive Textbook of Psychiatry, Dr. DelBeato said he didn=t have to follow that authoritative treatise and cited himself as an authority:

> Q: And so according to this texbook, Kaplan=s Textbook, it could be years before the full implications of a neurological insult [in a child] might be apparent?
> A: According to him.
> Q: And can you point to any authorities that say it might be months.
> A: DelBeato.
> Q: And by DelBeato you mean?
> A: Myself.

Id. at 1036.

Dr. DelBeato=s minimization of the records was disputed by all the other mental health experts, including the state expert, Dr. Gonzalez, a medical doctor, who called the birth records a Ared flag,@ which warranted further testing. ROA Vol. X, p. 1686, 1723-24. Dr. Gonzalez also confirmed that he had no knowledge that Alvin was anoxic at birth and did not know of the birth records until 2003. ROA V. X, p. 1725.

Dr. Silva, board certified in neurology and psychiatry, noted that an expert must be able to understand the meaning of the Apgar scores before he or she gives an opinion to their significance. ROA V. XXI, p. 1238-40. When looking at an Apgar

score, one must also consider the clinical situation, looking not only at the Apgar score time but also the time peripheral to the five minute Apgar context. Id 1240-42. The birth records reveal Alvin=s zero time Apgar score was three, meaning Alvin may have been cyanotic, not breathing well and having trouble motorically. Id. More importantly though, Dr. Silva explained that the records described Alvin suffering from symptoms of convulsions, apnea, tremors, rigidity, cyanosis and bilaterally hypoinflated lungs. Id at 1244-45. Those problems were Aominous@ because they were present at not only one or two minutes of life but also at seven hours of life. Id. A symptom such as rigidity, where the muscles are not able to move appropriately, is a neurological indicator of special concern raising a flag of later brain damage. Id. at 1247. Dr. Silva also noted that, at 13 hours after his birth Alvin was observed to have breathing difficulties and, at 17 hours, he went into respiratory arrest and had to be resuscitated. Id. All of this suggests a high probability of sustained or permanent brain damage. Id. at 1248.

Dr. DelBeato=s exclusion of organicity in Alvin is also unreliable because he failed to recognize symptoms of brain damage. He admitted, as did every witness asked, that Alvin had memory problems. Alvin didn=t remember his childhood; frequently got lost; as a teenager he had to keep a slip of paper with his address and phone number on it and could not remember the

location or number of his locker at school. Dr DelBeato agreed, as did the state expert, that memory problems are a symptom of brain damage. ROA V. X, pp 1719, 1729, V. XIX 1025. He also conceded that anoxia can cause brain damage and can be classified as brain trauma. Id.

Dr. DelBeato falsely implied that he had conducted a neuropsych screening of Alvin in 1994. The evidence establishes he did not. Counsel renders deficient performance and prejudice is established when an expert reports no brain damage at trial although no testing was done and a neuropsychological examination post conviction establishes brain damage. Glenn V. Tate, 71 F.3d 1204, 1211 (6th Cir. 1995) Dr. DelBeato wrote in his report and testified in 1994 and 1999, that the only tests he gave were the Rorschach, Proverbs, the WAIS and the MMPI. 1994TR - 1022 -1023 and 1999TR - 610. However, at the hearing, Dr. DelBeato claimed he performed additional testing as part of a neuropsych screening:

> Q: ...[Did] you, in fact, administer a neuropsych screening to Mr. Morton?
> A: Yes.
> Q: And tell the Court your experience in administering or screening individuals for brain damage?
> A: I do approximately one a week neuropsych screenings for referral for the State of Florida Department of Health, been doing that since 1976.
> Q: So you have done hundreds of those neuropsych screenings?
> A: Yes. And basically that is a simple way for the State to **C** for example, I see the person, ***I may do a***

> *memory screening, I might do a Koh=s* blocks, I might do various types of things, and then recommend to the State that they have a neuropsychological battery which is more extensive, and/or see a neurologist.

ROA V. XIX, p - 943. A few questions later Dr. DelBeato, when asked to explain why he believed *in 1994* that Alvin=s anoxia at birth was not significant, falsely implied he administered the Koh=s blocks test as part of a neuropsych screen:

> Q: Can you tell us why you felt that *at the time*?
> A: ... In my recollection, after five minutes, there appeared to be no significant problems with the Apgar. And the patient, *his Koh=s blocks* is as high as you can get, which is *a neuropsych screen indicating for brain damage*. And basically there didn=t appear to be any brain damage that I would have considered significant as a mitigator.@

Id. at 949. Later, during cross examination, he admitted the following:

> Q: I think you were asked, *did you do a neuropsych screening*; do you remember being asked that on direct examination?
> A: Uh-huh. I think so, yes.
> Q: Okay. And by that, all you did ...[were] ... the tests that you told us about, the WAIS, the Rorschach, the proverbs and the MMPI, correct?
> A: Yes, ma=am.
> Q: *But you didn=t do any other tests*?
> A: *No.* And the proverbs, and all those tests together can give you some evidence of neuropsych screenings.
> Q: But *you didn=t do a Koh=s blocks*, correct?
> A: *No. I didn=t do that*.
> Q: And *you didn=t do any memory testing*, correct?
> A: *Correct*.

Id. at 1023.

Dr. DelBeato rejected Dr. Silva=s diagnosis of Asperger=s and

Cognitive Disorder N.O.S., although he conceded he had not reviewed Dr. Silva=s data, in part because he was not qualified to do so. ROA V. XX, p. 1084-85; 1103-04. Dr. DelBeato=s opinion as to Asperger=s is not credible because he is not qualified to test for the disorder and his testimony evidences a lack of understanding of the symptoms. ROA Vol. XX, p. 1085; 1099-1100. [17] Dr. DelBeato also conceded that he did not know what area of the brain was damaged in an individual with Asperger=s. Id. at 1104.

Dr. DelBeato also erroneously opined that Alvin could not have Asperger=s because of Alvin=s violent acts, ROA V. XX, p. 1084. When asked, however, if puberty can trigger violence and aggression in people with Asperger=s, Dr. DelBeato said: AThat may or may not ... you know, I can=t respond to that question as

17 Dr. DelBeato unwittingly described symptoms of Asperger=s in Alvin: lack of remorse, lack of feelings, conscience, and facial response, restricted and strange affect, and cold distant eyes and conceded anoxia was a predisposing factor for Asperger=s. All of these descriptions go into the Awhole central, nonperipheral central question of affective psychopathology that is classic for Asperger=s.@ ROA V. XXI, p. 1228 -1229.

an expert.@ Id. Dr. Silva explained that many scientifically respected studies have confirmed the significant link between Asperger=s and violence. People with Asperger=s have problems in metabolism in the prefrontal areas of the brain, which control emotion and anger. ROA V. XVII P. 660,746 & 753.

Dr. DelBeato=s failure to recognize symptoms of Asperger=s and brain damage and their impact on the statutory mental mitigator of conforming conduct to the law deprived Alvin of a competent mental health evaluation and thereby violated his right to effective assistance of counsel and due process. Had a competent expert considered brain damage, particularly since Alvin exhibited many symptoms of brain damage, counsel would have been able to present statutory and non-statutory mitigation. The post conviction court=s reliance on Dr. DelBeato=s testimony to rule out Asperger=s is not based on competent, substantial evidence.

Counsel renders deficient performance in failing to prepare and present evidence of brain damage caused by a history of exposure to toxic chemicals, severe head injuries, and significant abuse as a child. Caro v. Woodford, 280 F.3d 1247 (9th Cir. 2002) Counsel=s conduct was deficient because counsel knew of the history but did not inform the experts that examined the defendant and did not seek out an expert qualified to assess

the damage done to the defendant=s brain. Id. at 1255. The defendant was prejudiced because rather than premeditation this evidence revealed the effects of "*physiological defects* . . . on his behavior, such as causing him to have impulse discontrol and irrational aggressiveness. By explaining that his behavior was physically compelled, not premeditated, or even due to a lack of emotional control, his moral culpability would have been reduced." Id. at 1258. The prejudice was heightened where, "[m]ore than any other singular factor, mental defects have been respected as a reason for leniency in our criminal justice system." The court rejected the state=s arguments that high grades, a reasonably high IQ, rationality of actions following the murders, and normal psychiatric and neurological evaluations was inconsistent with the finding of brain damage. Id. As one expert explained, damage to a person=s frontal lobes may not affect other brain functions controlled by other parts of the brain. Id.

In Alvin Morton=s case, the failure of Dr. DelBeato to detect brain damage based in part on counsel=s deficient investigation and failure to advise him of Alvin=s traumatic birth and history of head trauma was deficient performance which deprived Alvin of his right to effective representation of counsel and a competent mental health exam and this failure

undermines confidence in the outcome.

5. Counsel=s decision to present antisocial personality disorder as mitigation prejudiced Alvin and was not based on a reasonable investigation.

Trial counsel=s decision to present a mental health expert who found no organicity or mental illness and diagnosed antisocial personality disorder was in itself objectively unreasonable; reasonably competent counsel would have recognized Dr. DelBeato=s testimony was damaging and decided to seek a second opinion or not present that testimony. On retrial, counsel makes a reasonable decision not to pursue a previously failed penalty phase strategy. *Henry v. State*, 862 So. 2d 679, 685 -86(Fla. 2003)(*citing Haliburton v. Singletary*, 691 So. 2d 466, 471 (Fla. 1997); *Bryan v. Dugger*, 641 So.2d 61, 64 (Fla. 1994)) Counsel=s decision to not present mental health testimony was reasonable because the testimony at trial Awas more devastating than helpful, especially [Dr. DelBeato=s] testimony that [Alvin] was a dangerous man.@ *Henry at 868.* Further, this Court has repeatedly held trial counsel makes a reasonable strategic decision to not present mental health mitigation after obtaining an unfavorable mental health evaluation where the *expert received information on the defendant=s background, ruled out a cognitive disorder and diagnosed antisocial personality*

disorder. Asay v. State, 769 So. 2d 974, 988 (Fla. 2000); Jones v. State, 732 So. 2d 313, 320, fn. 5 (Fla. 1999) (reasonable decision to not present mental health mitigation after unfavorable diagnosis); Rose v. State, 617 So. 2d 291, 295 (Fla. 1993) (counsel made a reasonable tactical decision not to present mental health mitigation after receiving a diagnosis of antisocial disorder and no organic brain damage).

In denying this claim, the lower court found trial counsel made a reasonable Astrategic decision@ to present testimony of psychopathy. ROA Vol. IX, p. 1445. AThe fact that the State was able to highlight those behaviors and brought out the nomenclature of sociopath or psychopath . . . is a matter of effective cross examination.@ Id. This finding is not supported by substantial, competent evidence and is an erroneous application of *Strickland* and its progeny. Counsel=s decision cannot be a reasonable strategy decision because it was made against the backdrop of a complete failure to investigate, obtain background records and provide that information to a competent expert as outlined throughout this claim. Further, the decision itself was objectively unreasonable.

Dr. DelBeato opined at trial in 1994 that Alvin had antisocial personality disorder. This diagnosis was erroneous, not based on adequate testing or background review, and given

after only cursory contact with Alvin. As noted repeatedly supra, Dr. DelBeato made his diagnosis based entirely on what Alvin was able to tell him. In light of the fact that Alvin was a Avague historian@ who did Anot like to talk much,@ Dr. DelBeato could not possibly have had sufficient background information to make a diagnosis of antisocial personality disorder. Dr. DelBeato=s reason for not administering the social scale on the MMPI reveals his predisposition to an antisocial diagnosis:

> A: [I didn=t give the socialization scale because] it wouldn=t tell me anything other than what I already knew, that he was a loner, you know, not socially oriented and things of this sort. You know, why dig into things that you already know?
> Q: Well, how did you know that considering that ...
> A: Because I have experience and because I was told that.
> Q: Excuse me, if you could, please let me finish the question, okay? How did you know that, since you went in blind and you had just met Alvin Morton for the first time?
> A: Okay. Given the object of my interview and given the kinds of things, I made the decision to give that. And basically it showed the same score as this ... so prepose (sic) I=m correct. Perhaps in the beginning I may have been somewhat less effective, but prepose (sic) it shows that it was effective.

ROA V. XIX, p. 1016-17.

Dr. Gonzalez diagnosed Alvin as a psychopath based on Dr. DelBeato=s MMPI which purportedly showed an elevated Scale 4. However, as discussed supra, the data no longer exists and no one, other than Dr. DelBeato, ever saw the data.

Both Dr. DelBeato and Mr. Swisher urged Mr. Urso to not call

Dr. DelBeato as a witness. Def. Ex. 2: ROA Vol. XI, p. 1790;Def. Ex. 3: ROA Vol. XI, p.1791. Mr. Urso explained that Dr. DelBeato Amust have been concerned that he was going to negatively impact on the case by virtue of what he was testifying, *because what he was testifying, in fact, was rather negative*. The problem is, for better or worse, whether we made the right decision or the wrong decision, *that was the theory of our case* and that was the risk, *but that=s all we had*.@ ROA V. XIV, p. 102. (emphasis added). Mr. Urso could not recall what he did, if anything, in response to the letters. His billing records show that after the letters and prior to trial he had one eight minute call with Mr. Swisher and no contact with Dr. DelBeato. Id. at 132.

Prejudice is established by Dr. DelBeato=s damaging testimony and the State=s closing argument. Dr. DelBeato said Alvin Afit the profile of a serial killer.@ 1999TR- 612. He found no mental mitigators. 1999TR - 623. He said Alvin had no brain damage or major mental illness and was a sociopath. 1999TR - 628 - 630. He also said Alvin had Ano remorse,@ A no conscience,@ and reiterated that he had the traits of a Aserial killer.@ 1999TR - 632-633. The State argued in closing that Dr. DelBeato said Alvin was a social deviant Aon the top of that chart@ and noted wryly that Dr. DelBeato was a so-called Amitigating witness.@ 1999TR - 737.

A defendant=s Sixth and Fifth Amendment rights are violated when, in a capital sentencing, counsel fails to prepare and present mitigation evidence of brain damage and presents harmful testimony of antisocial personality disorder, when the court-appointed expert is not qualified to test for brain damage and does not speak to family members. Powell v. Collins, 332 F.3d 376 (6th Cir. 2003). Relying on the ABA Guidelines, the court found counsel=s conduct deficient because counsel did not investigate mitigation and, in recalling the court-appointed expert, presented harmful information that the defendant was not mentally ill and is dangerous. Id. at 399. The court rejected the argument that counsel made a strategic decision in not presenting brain damage because counsel had failed to conduct a reasonable investigation. Counsel=s failure to present brain damage was an Aabdication of advocacy.@ Id. at 400. Prejudice was established when the prosecutor cited the Amitigation testimony@ in closing argument. Id. at 399.

In Anderson v. Sirmons, 476 F. 3d 1131 (6th Cir. 2007), the court found trial counsel rendered deficient performance by failing to investigate and obtain life history information, school or medical records, and retained a mental health expert who was not qualified to ascertain whether the defendant suffered from neurological deficits. Prejudice was established

by brain damage to the frontal lobe and no criminal history of violence prior to the murders. The court found that trial counsel failed to adduce at trial substantial amounts of mitigation and failed to adequately rebut the case in aggravation. A[Alvin Morton=s] brain deficits can be perceived as >meanness= or antisocial behavior, but with expert evaluation and explanation are properly explained as deriving from disruption and impairments to the nervous system.@ Anderson v. Sirmons, 476 F. 3d 1131, 1144 (6th Cir. 2007) The defendant was found to have committed two brutal murders with many aggravators, AAgainst this backdrop, trial counsel mounted an extraordinarily limited case in mitigation. . . Unfortunately, the case in mitigation presented by trial counsel played into the prosecution=s theory that the only explanation for the murders was that [Alvin] was an evil man.@ Id. at 1146-47. AAlthough the case against [Alvin Morton] was strong and the murders in this case were horrific, courts have not hesitated to grant relief in similar circumstances where the absence of available mitigation evidence left the jury with a pitifully incomplete picture of the defendant.@ Id. at 1148

CONCLUSION

Under the specific facts of this case, Dr. DelBeato=s unqualified and deficient mental health investigation and

resulting damaging testimony, based on counsel=s failure to investigate and provide background information and ensure a competent mental health evaluation, denied Alvin of his right to effective assistance of counsel and due process. Further, counsel=s decision to present Dr. DelBeato was objectively unreasonable. Prejudice is established by Dr. DelBeato=s damaging testimony and the State=s closing argument.

ARGUMENT III
THE LOWER COURT ERRED IN DENYING THE CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO PRESENT EVIDENCE OF THE CO-DEFENDANT=S LIFE SENTENCE

The United States Supreme Court has held that the Eighth and Fourteenth Amendments require that the sentencer be allowed to consider Aas a mitigating factor, any aspect of a defendant=s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.@ Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2965-2964, 57 L.Ed.2d 973 (1978). The Sixth Circuit Court of Appeals explained:

> [W]e are not alone among our sister circuits in recognizing that the holding in *Skipper* that a defendant be Apermitted to present any and all relevant mitigating evidence that is available,@ *Skipper,* 476 U.S. at 8, 106 S.Ct. 1669, requires that, at resentencing, a trial court must consider any new evidence that the defendant has developed since the initial sentencing hearing. *See, e.g.,* Robinson v. Moore*,* 300 F.3d 1320, 1345-48 (11th Cir.2002) (counsel

> is obliged to present newly available evidence at resentencing, although failure to do so in that case was not prejudicial); Smith v. Stewart, 189 F.3d 1004, 1008-14 (9th Cir.1999) (failure to investigate and present additional evidence at resentencing constitutes ineffective assistance of counsel); Spaziano v. Singletary, 36 F.3d 1028, 1032-35 (11th Cir.1994) (*Lockett* requires trial court to consider any new evidence that the parties may present at a resentencing hearing); Alderman v. Zant, 22 F.3d 1541, 1556-57 (11th Cir.1994) (at resentencing hearing, trial court must consider reliable evidence of relevant developments occurring after defendant's initial death sentence).

Davis v. Coyle, 475 F. 3d 761, 774 (6th Cir. 2007).

After Alvin was sentenced to death, his co-defendant, Bobby Garner went to trial and received a life sentence from the jury. Reasonably competent counsel would have been aware of this information and presented it at the 1999 retrial. Trial counsel=s failure to present this evidence was deficient performance and prejudiced Alvin Morton. The lower court, citing Jennings v. State, 718 So. 2d 144 (Fla. 1998) and Farina v. State, 801 So.2d 44 (Fla. 2001), ruled that the evidence of a co defendant=s life sentence is only admissible if the Aco-defendants were equally culpable and had similar backgrounds.@ ROA, Vol. IX, P. 1446 . Because Alvin was older and the so-called Aringleader,@ the lower court held the evidence was not relevant. However, Bobby Garner killed Madeleine Weisser and likely cut off her finger as a souvenir.

Further, Mr. Morton respectfully argues that this Court=s

holding fails to follow clearly established precedent:

> The United States Supreme Court has ruled that a defendant has a virtually unrestricted right to present any circumstance to a jury or judge for consideration as a reason to spare his life. *See* Smith v. Texas, 543 U.S. 37, 44, 125 S.Ct. 400, 160 L.Ed.2d 303 (2004) (A[T]he jury must be given an effective vehicle with which to weigh mitigating evidence so long as the defendant has met a ›low threshold for relevance,: which is satisfied by ›evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.: @) (quoting Tennard v. Dretke, 542 U.S. 274, 284-85, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004)

Farina v. State, 937 So.2d 612, 636 -637 (Fla.2006) (*Anstead, J. dissenting*) Mr. Morton respectfully requests this Court reverse its prior holdings and the lower court:s ruling.

ARGUMENT IV

THE LOWER COURT ERRED IN REFUSING TO TAKE JUDICIAL NOTICE OF THE ABA GUIDELINES; IN REFUSING TO ALLOW MS. BAKER TO RENDER AN OPINION AS TO WHETHER MS. PISTERS CONDUCTED A COMPREHENSIVE SOCIAL HISTORY INVESTIGATION; AND IN ALLOWING DR. DELBEATO TO RENDER AN OPINION IN AN AREA WHERE HE WAS NOT QUALIFIED AS AN EXPERT.

Florida Statute 90.203 states that a judge Ashall@ take judicial notice of any matter set out in Fla. Stat. 90.202, provided counsel gives Atimely, written notice@ and furnishes the court with Asufficient information to take judicial notice of the matter.@ Fla. Stat. Section 90.202(12) lists as such a matter, Afacts that are not subject to dispute because they are capable

of accurate and ready determination by resort to sources whose accuracy cannot be questioned.@

Post conviction counsel submitted a timely, written request for the lower court to take judicial notice of the ABA Guidelines and filed a copy of the Guidelines with the court. ROA, V. IV, p. 539-674; ROA V. V, p.804-07; ROA V. XIV, P. 5-10. Upon objection by the State, the court declined to take judicial notice. ROA V. XV, p. 286. This was an abuse of discretion which violated Alvin Morton=s Due Process rights because he was deprived of the right to present relevant evidence. The ABA Guidelines establish prevailing, professional norms in defending capital cases. Wiggins v. Smith, 539 U.S. 510 (2003) The lower court=s exclusion of this evidence harmed Alvin Morton=s ability to demonstrate trial counsel=s deficient performance. The lower court=s finding that trial counsel=s performance was that of reasonably competent counsel in areas where they did not meet the ABA Guidelines establishes that the lower court=s exclusion of this evidence prejudiced Mr. Morton.

The lower court erred when it found that Frye v. United States, 293 F 1013 (D.C. Cir. 1923) applied to defense counsel=s attempt to introduce expert evidence as to forensic social work, or, to the extent that *Frye* may apply, the court improperly applied *Frye*. Ms. Pisters was accepted without objection as an

expert in forensic social work. ROA. V. XV, p. 322-323. However, when counsel attempted to question her as to the prevailing standards among forensic social workers in investigating a capital case, the State raised a *Frye* challenge. ROA V. XVI, p 384 - 396. The court sustained the verbal *Frye* challenge and excluded the testimony. The court also, upon objection by the State that the witness was being called to comment on the credibility of another witness, prohibited Ms. Baker from testifying that she had reviewed the work of Ms. Pisters and her work was not the equivalent of a comprehensive social history. Id. 396-400. The testimony was offered in response to Mr. Urso=s testimony that Ms. Pisters role was equivalent to that of a mitigation specialist. The court=s ruling was erroneous, denied Alvin a fair and constitutional proceeding under both the Florida and federal constitutions and under *Frye*. The court=s ruling prejudiced Alvin Morton as demonstrated by the lower court=s finding that trial counsel met the level of a reasonably competent counsel in investigating Alvin=s background.

The lower court also erred in allowing Dr. DelBeato to offer an opinion in an area in which he was not qualified. An expert is not allowed to testify to matters that fall outside his area of expertise. Jordan v. State, 694 So. 2d 708, 715 (Fla. 1997) (citing Hall v. State, 568 So.2d 882, 884 (Fla. 1990)). Dr.

DelBeato was qualified as an expert in forensic psychology. ROA V. XIX, p. 935-938. During cross examination, Dr. DelBeato admitted he was not qualified to test for Asperger=s Disorder and was not an expert in Asperger=s. ROA V. XX, p.1083-85; 1100, 1104. Defense counsel objected and moved to strike his testimony as to Asperger=s. Id. The court deferred ruling; counsel then renewed the motion which the court denied. Id. at 1107. This error deprived Mr. Morton of a fundamentally fair proceeding because the lower court relied on Dr. DelBeato=s opinion that Alvin did not have Asperger=s in denying Alvin=s claim that counsel failed to establish brain damage.

The State cannot demonstrate that the above described errors were harmless beyond a reasonable doubt. Chapman v. California, 368 U.S. 18 (1967); Chambers v. Mississippi, 410 U.S. 284 (1973).

ARGUMENT V

THE LOWER COURT ERRED IN SUMMARILY DENYING ALVIN MORTON=S CLAIM IN HIS AMENDED 3.851 MOTION ARGUING NEWLY DISCOVERED EVIDENCE COUPLED WITH ROPER V. SIMMONS WARRANTED A REWEIGHING OF HIS AGE AS A FACTOR IN MITIGATION.

Roper v. Simmons, 543 U.S. 551 (2005), coupled with this Court=s decision in Urbin v. State, 714 So. 2d 411 (Fla. 1998) (the closer a defendant=s age to where the death penalty is constitutionally barred, the weightier the age statutory

mitigator becomes), warrants a reweighing of Alvin Morton=s age of 19 as a mitigating factor. *See also* Henyard v. McDonough, 459 F.3d 1217, 1247-54(11th Cir. 2006)(Barkett, J. Concurring). At the time of trial 16 was the cut off age where the death penalty was constitutionally barred. The cut off age is now 18 as held in *Roper*. Alvin=s age at the time of the offense would now be only one year over the cut off age and he has presented testimony that his level of maturity was below his chronological age. Alvin also argued that newly discovered evidence in a landmark study establishes the decision making areas of the human brain are not fully developed until age 25; this warrants a reweighing of his age as a factor in mitigation and non-statutory mitigation. The lower court summarily denied these claims stating, Athere has been no evidence presented in this case that would show that Defendant=s brain was less than fully developed.@ ROA V. P. . This was error.

AFor all . . . motions filed after October 1, 2001, Florida Rule of Criminal Procedure 3.851(f)(5)(A)(I) requires an evidentiary hearing >on all claims listed by the defendant as requiring a factual determination@, 802 So. 2d 298, 301 (Fla. 2001).@ Mungin v. State, 932 So. 2d 986, 996 fn. 8 (Fla. 2006). The language is mandatory; the trial court *shall* conduct an evidentiary hearing on claims identified as requiring a factual

determination.

Mr. Morton requested an evidentiary hearing so he could present testimony of the brain study *and how it relates to his brain development, in light of his traumatic birth, and emotional maturity.* To summarily deny these claims without an evidentiary hearing, and to base that denial on a failure to present evidence is a denial of Due Process under the Florida and Federal constitutions.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Mr. Morton relief on his 3.851 motion. This Court should order that his sentences be vacated and remand the case for a new trial, or for such relief as the Court deems proper.

_____
Marie-Louise Samuels Parmer
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
813-740-3544
Attorney For Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by U.S. Mail to all counsel of record on this _____ day of June, 2007.

_____

Marie-Louise Samuels Parmer
Florida Bar No.0005584
Assistant CCRC

CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Dr., Suite 210
Tampa, Florida 33619
813-740-3544
813-740-3554 (Facsimile)
Counsel for Petitioner

Copies furnished to:

The Honorable William R. Webb
Circuit Court Judge
7530 Little Road
New Port Richey, FL 34654

Michael Halkites
Assistant State Attorney
Office of the State Attorney
P. O. Box 5028
Clearwater, FL 33758

Scott Browne
Assistant Attorney General
Office of the Attorney General
3507 E. Frontage Rd, Suite 200
Tampa, FL 33607-7013

Alvin Morton
DOC #309066
Union Correctional Institution
7819 NW 228th Street
Raiford, FL 32026

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant, was generated in Courier New 12 point font, pursuant to Fla. R. App. P. 9.100 and 9.210.

_____
Marie-Louise Samuels Parmer
Florida Bar No.0005584
Assistant CCRC
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Dr., Suite 210
Tampa, Florida 33619
813-740-3544

813-740-3554 (Facsimile)
Counsel for Petitioner