IN THE SUPREME COURT OF FLORIDA

No. SC06-2091

ALVIN MORTON,
Appellant

versus,

STATE OF FLORIDA,
Appellee.

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Any claims not argued are not waived and Appellant relies on the merits of his initial brief.

STATEMENT OF THE CASE AND FACTS

Appellant objects to the following facts presented in Appellee=s Answer Brief. The specific objections are as follows:

(1) Appellee states Mr. Urso Aworked on@ two capital cases as a prosecutor. (Answer Brief at 5) However, when asked what he did on those cases, Mr. Urso explained that, Aoftentimes in the [state attorney=s] office you would handle a lot of the depositions. It=s unlikely that I would have investigated the case. I think Michael did most of these investigations.@ (V. XIV, p.18) AMichael@ is the Assistant State Attorney who prosecuted Alvin=s case. Id.

(2) Appellee states that AUrso met with [Alvin=s] mother and sister and talked with [Alvin=s] mother on the telephone.@ (Answer Brief at 5) Mr. Urso=s 1994 billing records reflected only one contact with the family **B** a single telephone call with Alvin=s mother, on January 10, 1994, about a week before the trial. (V. XIV, p. 24) While he did have meet with Angela and Barbara Stacey in 1997, his 1999 billing records show that in the year prior to trial he had no contact with Angela and only

two phone calls with Barbara Stacey, one lasting seven minutes and one lasting 20 minutes. V. XI, pp. 1804-06.

(3) Appellee states that Mr. Urso used his investigator to find witnesses. (Answer Brief at 5) What Mr. Urso said was he didn=t remember asking Mr. Krisanda to talk to witnesses and had told postconviction counsel a few days earlier that he only used his investigator to serve subpeonas. (V. XIV, p. 24-25) However, Mr. Urso said that prior to the evidentiary hearing, his investigator told him that Urso had asked him to speak to Angela and Barbara Stacey about sexual abuse of Alvin. Id. Urso was unsure if this happened. Id. Urso also admitted his 1994 billing records reflect only one meeting with his investigator. Id. at p.22 & 24[1] Mr. Urso=s 1999 billing records do not indicate any contact with Mr. Krisanda. V. XI, pp. 1803-16.

(4) Appellee states that Mr. Urso saw Mimi Pisters frequently and discussed the facts of the case, and that she met with the family members and Alvin on several occasions. (Answer Brief at 7) However, trial counsel didn=t retain Mimi Pisters until 6 weeks prior to the 1994 trial. (V. XV, p.224-25) His 1994 billing records show he first spoke with Ms. Pisters a mere

[1] Counsel misspoke when asking Mr. Urso if it was the January 6, 1992 meeting. It is really the Nov. 6, 1992 meeting when Urso and his investigator first spoke to Alvin. The crime had not even occurred on January 6, 1992.

three weeks before the trial. (V. XV, p. 237-38) In the year prior to the 1999 trial, his billing records show a single phone call to Ms. Pisters and a single meeting with Ms. Pisters and the client. V. XI, pp. 1803-16.

(5) Appellee states that Mr. Urso said Alvin Adenied@ sexual abuse. (Answer Brief at 8, 12) Mr. Urso, on cross examination, conceded Alvin said he did not remember any abuse by Virgil: Mr. Urso=s own notes, made at the time of his interview with Alvin in late 1992 state, Alvin did not Aremember his childhood at all.@ V. XI, p. 83. Dr. DelBeato said Alvin denied both physical and sexual abuse but at both trials Ms. Pisters said Alvin had *no memory* of his childhood.

(6) Appellee states Mr. Urso talked to Alvin=s teachers to see if they would say he was a Agood boy.@ (Answer Brief at 9). However, Mr. Urso=s billing records do not reflect this and, when asked, Mr. Urso could provide no details of any interviews with any teachers. V. XIV, p.12; 34-38. At trial in 1999, Ms. Pisters didn=t even know what elementary or middle schools Alvin attended and said neither she, *nor Mr. Urso,* attempted to get any school records. 1999TR, V. VI, pp.566 -68.

(7) Appellee states Mr. Urso spoke to a neurologist because

counsel thought there might be something wrong with Alvin=s

brain. (Answer brief at 16) However, when asked to provide details of his consultation with this unnamed neurologist, Mr. Urso said, AI can=t tell you that I actually spoke to a neurologist. I called over to the medical school to try to get some information.@ V. XIV, 52-53. His 1999 billing records do not reflect that even this occurred. V. XI, pp. 1803-16.

(8) Appellee states that Mr. Urso, A[f]earing that he might have missed something, conducted some research on Asperger=s and satisfied himself that it would not be a viable penalty phase defense.@ (Answer Brief at 16) Appellee fails to mention Mr. Urso did his research at 2 a.m., the morning he testified at the postconviction hearing. His research lasted ten minutes and consisted of an internet search culminating in a visit to an autism web site. V. XIV, p. 61-66.

(9) Appellee states that Mr. Urso didn=t present sexual abuse because, A>I don=t think from what I learned of *that woman*, that she was able to testify that she observed sexual abuse.=@ (Answer Brief at 19) Appellee fails to acknowledge that Mr. Urso never spoke to the aunt who saw the sexual abuse, Robin Johnson, and when asked, didn=t even know who she was. V. XV, p. 79; XXI, p. 1198.

(10) Appellee states the State expert Dr. Gonzalez found that

the statutory mental mitigators did not apply. (Answer Brief at 21). Appellee fails to acknowledge, that Dr. Gonzalez, confused the mitigators with the legal test for insanity:

> A: (Dr. Gonzalez) Yes. That=s exactly what I wanted to clarify for the record, that the main thrust of my being in court was to make clear that he was sane or insane at the time of the offense, yes, that=s my clarification.
>
> Q: (Post conviction counsel)You were never asked to consider whether or not he might be under some mental disturbance that was less than the legal definition of insanity, correct?
>
> A: At that time, no.
>
> Q: So when you were asked whether he knew right from wrong, you were saying that in the context of whether or not he was legally insane at the time, correct?
>
> A: That is what I was charged with. I was charged with determining whether he was sane or insane according to the Florida Statutes.
>
> ...
>
> Q: And, again when you were asked whether he could conform his conduct to the requirements of the law and indicated yes because he was not psychotic and had no major mental illness, you were giving an opinion as to his sanity or insanity at the time of the crime?
>
> A: Yes. That is correct.
>
> ...
>
> Q: And when you say differentiate or know right from wrong, you=re talking about the legal definition of insanity?
>
> A: McNaughton,(sic) yes.

V. X, p. 1707-09.

ARGUMENT I

THE LOWER COURT ERRED IN DENYING ALVIN MORTON=S CLAIM THAT HIS ATTORNEYS RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE PENALTY PHASE

Appellee, in his AStandard of Review,@ correctly summarizes

the principle that an appellate court should give deference to a trial court=s factual findings in assessing the credibility of the evidence and cites this Court=s decision in *Porter v. State*, 788 So.2d 917, 923 (Fla. 2001).(Answer Brief at 25) However, *Porter* has been overruled by *Porter v. Crosby*, 2007 WL 1747316 (M.D. Fla. 2007) (Slip Copy). In assessing whether the record below supported the trial court=s factual findings, the Federal District Court granted habeas relief and stated:

> This Court can find no factual support for the trial court=s conclusion that Dr. Dee=s [the defense expert] testimony was directly challenged or not worthy of consideration. ... Therefore, this Court finds that the state court=s determination that Dr. Dee=s testimony should be rejected is not entitled to a presumption of correctness ...
>
> This Court agrees with Justice Anstead's assessment: A[A]lthough we ordinarily give deference to the trial court's factual findings, after reviewing both of the experts' testimonies, we would be hard-pressed to approve the trial court's finding that the State's expert on mental mitigation was more credible, when the record reflects no factual basis for this conclusion, the State's expert neither personally met nor interviewed Porter before rendering his opinion, and the trial court cites no other basis for this factual conclusion. If anything, an objective evaluation would ordinarily render the examining expert's opinion more credible. *Porter,* 788 So.2d at 934 n. 17 (Anstead, J., dissenting).@
>
> With respect to the non-statutory mitigating evidence, the state court made no credibility findings; rather it simply discounted its significance. Yet, there is no support in the record, for example, that the effects of child abuse diminish over time so as to become insignificant by age 54. Similarly, the fact that Petitioner went AWOL while in the military does not necessarily diminish his honorable and

> distinguished service. Indeed, the jury might well have been influenced by his military record as summarized by Justice Anstead in his dissenting opinion. *Porter,* 788 So.2d at 933 (Anstead, J., dissenting).

Porter v. Crosby, 2007 WL 1747316, Slip Copy at 29-30 (footnotes and some internal citations removed).

As this Court has explained, deference does not mean an appellate court need not consider whether the lower court=s factual findings are supported by competent and substantial evidence. *Coday v. State*, 946 So.2d 988 (Fla. 2006); *Sochor v. Florida*, 883 So.2d 766 (Fla. 2004). Any meaningful review of the record in this case reveals the lower court=s findings are not supported by competent and substantial evidence. With all due respect, there is a sharp disconnect between the testimony and exhibits presented at the postconviction hearing and the lower court=s factual findings. And, at times, Appellee=s version of the testimony and exhibits further distorts the evidence. This Court should review the evidence in this case and substitute its own findings of fact and weigh the credibility of the witnesses.

In his APreliminary Statement on Applicable Legal Standards,@ Appellee minimizes the prejudice prong of *Strickland* when he states, AThe prejudice prong is not established merely by showing that the outcome of the proceeding would have been different had counsel=s performance been better. Rather,

prejudice is established only with a showing that the result of the proceeding was unfair or unreliable. *Lockhart v. Fretwell*, 506 U.S. 364 (1993).@ (Answer brief at 27) However, as Justice O=Connor pointed out in her concurrence, the court=s decision in *Lockhart* has no effect on the prejudice inquiry set out in A[*Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)]. The determinative question-whether there is a >reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,= *id.,* at 694, 104 S.Ct., at 2068-remains unchanged.@ *Lockhart v. Fretwell*, 506 U.S. at 374 (O=Connor, J. Concurring).

Reply To Appellee=s Argument as to Deficient Performance

First and foremost, Appellee fails to identify any additional mitigation investigation conducted by trial counsel after the case was remanded in 1997. This, in and of itself, supports a finding of deficient performance.

In searching for support for a finding that trial counsel conducted a reasonably competent investigation, Appellee describes trial counsel as Aexperienced@ and prepared. (Answer brief at 27, 29) Appellee offers no record cites to support a finding that Mr. Urso, who was responsible for the penalty phase, was qualified to defend a capital case. Appellee concedes Mr. Urso had no capital experience but tries to argue his

Adealing[s] with abused and neglected children,@ made him Aunique[ly] experience[d].@(Answer Brief at 29) Appellee does not explain the nature of Mr. Urso=s dealings with children nor how this experience could make him qualified to represent someone charged with a capital offense.

Mr. Urso was not qualified and should not have been appointed nor should he have accepted appointment to this case. Or, upon accepting appointment, he should have sought training and education in defending capital cases, something he did not do.

Mr. Urso did not meet the minimum qualifications for capital counsel set out in the ABA Guidelines.[2] The Guidelines require co-counsel in a capital case to 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,@ and experience in at least one murder trial, tried to completion. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 5.1 (1)(B)(ii)(b) and (d)(1989). Mr. Urso also did not

[2] Ironically, Mr. Urso presumably was aware of the ABA Guidelines because in their Motion asking the court to appoint Mr. Urso, and signed by both Mr. Urso and Mr. Swisher, the attorneys state Ain appointing co-counsel for the defendant, this Court has a duty to ensure that these attorneys meet minimum standards under the ABA [Guidelines].@ V. XI, p.1817.

meet minimum standards for capital co-counsel under Fla. R. Crim. Pro. 3.112(g)(2)(B) and (E). [3]

Mr. Urso has never attended any seminars on death penalty defense. Further, Mr. Urso never tried a murder trial other than Alvin Morton=s case. Mr. Urso was not qualified under either the Rule or the ABA Guidelines. He was, sadly, the type of inexperienced counsel critics have long noted undermine confidence in our system of justice with respect to the death penalty.[4]

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[3] Appellant concedes this Rule was not in effect at the time Mr. Urso was appointed. Nonetheless, the rule was promulgated out of a concern that attorneys who share Mr. Urso=s level of inexperience not be appointed to capital cases.

> AThe purpose of these rules is to set minimum standards for attorneys in capital cases to ensure that competent representation will be provided to capital defendants in all cases. . . Counsel in death penalty cases should be required to perform at the level of an attorney *reasonably skilled in the specialized practice of capital representation, zealously committed to the capital case, who has adequate time and resources for preparation*.@

Fla. R. Crim. Pro. 3.112(a)(emphasis added). In addition, the Comments state that the Astandards are based on the general premise that the defense of a capital case requires specialized skill and expertise.@ Fla. R. Crim. Pro. 3.112 (Committee Comments) Therefore, the rule as promulgated can act as a guide for this Court in assessing whether Mr. Urso was qualified either through virtue of experience or training or both.

[4] Of course, if Mr. Urso had provided competent representation, his failure, in and of itself, to meet these minimum requirements would not mean Mr. Urso rendered ineffective

Appellee also states that postconviction counsel Awith the benefit of unlimited time and the ability to focus on a made record,@ has simply found more evidence. (Answer Brief at 32, 43) Appellee implies postconviction counsel=s results are somehow unfairly compared with trial counsel=s results in light of trial counsel=s limited time to prepare without Athe benefit of a made record.@ Id. Appellee has forgotten that Alvin Morton=s case was a *resentencing*. This is a crucial point in the analysis of counsel=s performance in this case. Ironically, trial counsel had a Amade record,@ of their own making, and a total of four years to prepare Alvin=s mitigation defense, not including the time the case was on appeal. Yet, trial counsel=s 1999 presentation, as argued in Apellant=s Initial Brief, was so similar that appellate counsel argued the resentencing judge essentially adopted verbatim the findings of the original judge. By contrast, post conviction counsel, who was limited to one year to investigate Alvin=s case prior to filing his 3.851 motion, found a wealth of mitigation evidence previously lacking.

Mitigation investigation is an ongoing process, which must continue after remand. Unrebutted expert testimony established

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assistance. However, counsel=s lack of experience and training led to deficient performance and prejudice in this case as shown in Appellant=s Initial Brief and addressed herein.

that the prevailing standard on 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 trial court found the mitigation lacking. ROA V. XXI, P. 1183-85. In this case, trial counsel failed to critically assess the prior judge=s findings and did essentially no additional investigation.

In *Smith v. Stewart*, 189 F.3d 1004 (9th Cir. 1999), cert. denied, 531 U.S. 952 (2000), trial counsel, who had never tried a capital case, was held to be ineffective on resentencing. The court reasoned that counsel=s failure to investigate and present any additional mitigation after a reversal on appeal amounted to deficient performance, in spite of the horrific nature of the crimes. Id. at 1013. Trial counsel in *Smith* presented mental health mitigation at the original trial in 1977 and the court had found the experts= testimony had Asevere credibility problems.@ Id. at 1009. Yet in 1979, at the time of the resentencing, trial counsel Ahad no qualms about resting on the testimony of these two experts,@ and failed to present any additional testimony even though he had four months to prepare. Id. at 1009-10. Reasonable counsel would have at least attempted to re-present and bolster the experts= testimony at resentencing. Id. at 1011. Rather than present the same evidence that the trial judge had rejected, ASmith=s counsel should have presented

new mitigating evidence that was available.@ Id. at 1012, fn. 3.

Trial counsel=s performance resembled that of counsel in *Smith*. His expert, Ms. Pisters, was discredited for basing her opinion on newspaper clippings, yet he failed to attempt to obtain records to bolster her credibility. His other expert, Dr. DelBeato, opined that Alvin was a psychopath and had the traits of a serial killer. Counsel actually presented less mitigation in 1999 than in the original trial in 1994 as set out in Alvin=s Initial Brief. Counsel=s performance fell below prevailing norms.

Appellee also, in support of a finding that trial counsel conducted a reasonable investigation, argues that trial counsel was prepared and obtained school records, DOC records, had their investigator do Alegwork@ and speak to witnesses. (Answer brief at 30, 34, and 43) If this even happened, and Appellant does not concede that it did, all of these things were allegedly done in preparation for the 1994 trial. No additional investigation occurred prior to the resentencing.

As to Appellee=s argument that trial counsel obtained school records, his argument is inconsistent with the State=s position at trial. For the State to now argue, in postconviction when it benefits their case, that trial counsel obtained school records is a violation of Due Process. First, as stated in Alvin=s

Initial Brief, evidence elicited during cross examination of Mimi Pisters *by the State* at trial in 1999 establishes unequivocally that neither Ms. Pisters nor Mr. Urso obtained or attempted to obtain Alvin=s school records but merely reviewed some report cards received from Alvin=s mother:

> Q:[by the State] And another way of determining what a person=s background is, is to check with school records and school officials, correct?
>
> A: [Ms. Pisters] Yes.
>
> Q: You could actually get records from a school which would indicate whether the kid=s been good or the kid=s been bad; correct?
>
> A: Yes.
>
> Q: You could look at records and see how many times he=s been truant?
>
> A: I saw his report cards.
>
> ...
>
> Q: In this particular case, how many times did you go to Ridgewood High School and talk with anybody there about Mr. Morton=s record at Ridgewood High School?
>
> A: I didn=t.
>
> Q: Did you find out even where he went to elementary school and middle school.
>
> A: No.
>
> Q: Did he tell you or did anybody tell you that he went to Bayonet Middle School just up the road, did you know that?
>
> A: No. I didn=t.
>
> Q: Did you make any efforts at all to go to Bayonet Middle School and try and get school records?
>
> A: No. I didn=t.
>
> Q: Did you call the school and ask them if they would send you records?
>
> A: No. I didn=t.
>
> Q: Did you ask Mr. Urso to procure any records to substantiate any of what you said?
>
> A: I talked to the mother and she showed me report cards, not all of the report cards but report cards.

1999TR, V. VI, p. 565-68. In addition, postconviction counsel introduced into evidence Alvin=s partial school records through the Records Custodian of the Pasco County School district, demonstrating that the full records had been destroyed in 1997. ROA V. XIX, p. 891-903. There was some testimony at the evidentiary hearing referencing school records but this term was used loosely by trial counsel to refer to the report cards. However, Appellant does concede that trial counsel was given copies of some report cards by Alvin=s mother.

As to the claim trial counsel reviewed DOC records (Answer Brief at 30), trial counsel was unable to identify what those records were, what they said or even where they were from. And there is no reference to DOC records in either trial. Appellant is unaware of any such records in trial counsel=s file and the State did not introduce any into evidence at the hearing.

Appellee concedes that Mr. Urso did not have the birth records. Id. This is in conflict with Dr. DelBeato=s insistence that he saw medical records prior to trial and ruled out anoxia as a cause of brain damage and is further proof of Dr. DelBeato=s lack of credibility. Appellee also appears to concede that Mr. Urso did not have the bankruptcy records, divorce records and other records introduced into evidence by CCRC.

Appellee argues that just because the attorneys= billing

records don=t reflect a particular event or investigation, that doesn=t mean the attorney didn=t do or attempt a certain task. (Answer Brief at 29) However, court appointed counsel by Rule are expected to maintain accurate billing records. Fla. Stat. Ch. 27. Further, Mr. Urso=s 1999 billing records are very precise and down to the minute. Vol. XI, p. 1803-16. By way of example, Mr. Urso=s records reflect at least two phone calls that lasted .12 hours (or approximately seven minutes) and were billable for $4.80 each. Id. at 1807, 1810. Mr. Urso=s 1999 records noticeably do not reflect any contact with a neurologist or medical school, his investigator Mr. Krisanda, nor do they reflect any independent investigation on his part. The records show the only defense witnesses he spoke to in preparation for trial were Ms. Pisters, Barbara Stacy, Angela Morton and AKathy Defeaux.@[5] (sic) The records also show he didn=t depose the State expert, Dr. Gonzalez, until approximately one week before trial in 1999. Id. at 1811. Mr. Urso failed to conduct a reasonable investigation of his client=s case after the remand. He essentially did no additional investigation. And, as set out in Alvin=s Initial

[5] His records do show one brief (less than 15 minutes) phone conversation with Dr. DelBeato, but that was more than a year prior to trial. ROA V. XI, p. 1804.

Brief, his investigation prior to the 1994 trial was inadequate.

Appellee also challenges Claudia Baker=s credentials and compares her to Mimi Pisters in an attempt to claim that Mimi Pisters fulfilled the role of a mitigation specialist as asserted by Mr. Urso. (Answer Brief at 31) Ms. Baker is highly qualified. She has a bachelor=s degree in psychology and a master=s degree in social work from the University of California at Berkeley, a master=s degree in public health from the University of North Carolina in Chapel Hill, and a certificate in forensic mental health, with an emphasis in capital social history investigation, from New York University. V. XV, p. 319. She received all of her degrees with high honors. Id. She had five years of experience conducting social history investigations in capital cases and had worked on approximately 15 capital case. Id. She was accepted as an expert in forensic social work without objection. V. XV, p. 322.

Mr. Urso=s statement, that he didn=t Aknow what else a forensic social worker would have done other than what [Ms. Pisters] did,@ (Answer Brief at 31) proves two things. One, Mr. Urso doesn=t understand the role of a mitigation specialist and two, Mr. Urso failed to ensure that Alvin=s background was thoroughly investigated. Ms. Pisters and Ms. Baker=s roles in

this case were completely different.

The role of a mitigation specialist, as explained by Claudia Baker, is to conduct a thorough biopsychosocial history, obtain relevant documents on the client and his family such as school records, birth records, bankruptcy records, military records and police reports. A mitigation specialist also conducts interviews with people who knew the client, such as friends, immediate and extended family, and others if available. They rely on specialized training and experience in interviewing techniques to help people open up about embarrassing or painful facts. This is consistent with the ABA Guidelines. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(2)(C)(1989).

A mitigation specialist then consults with the attorney, reviewing findings and identifying areas where expert assistance may establish mental health issues. Ms. Baker did all of those things in this case, speaking to more than 20 witnesses, and either obtaining records herself, such as the school records and military records (V. XV, p. 325), or directing others to obtain them, such as the birth records and police reports on Virgil's manslaughter. Based on her findings she ruled out post traumatic stress disorder and recommended counsel have Alvin evaluated for autism.

Mimi Pisters on the other hand, who had no capital experience, spoke to Alvin and his mother and sister and reviewed newspaper clippings and report cards. She did no independent investigation, did not attempt to obtain records, even the school records, and testified at trial rendering an opinion on the unbonded child.[6] Mimi Pisters did not fulfill the role of a mitigation specialist.

Appellee also criticizes Ms. Baker for spending over A100 hours@ investigating this case. (Answer Brief at 31) With all due respect, this argument is absurd. Unrebutted evidence at the hearing established it takes hundreds of hours to do a competent mitigation investigation in a capital case. V. XXI, p. 1176.

Reply to Appellee=s Argument Regarding Prejudice

Appellee makes the sweeping assertion that extensive abuse was presented (Answer Brief at 28) and argues Acollateral counsel presented largely cumulative testimony about the abusive family environment Morton was exposed to as a young child.@ (Answer Brief at 33) However, like the lower court, Appellee fails to point to specific facts in the 1999 trial record in support of this finding. Appellee merely states that relatives testified to

[6] Mitigation specialists rarely testify at trial. More often they work behind the scenes as part of the legal team.

abuse.

Appellant set out, in detail, in his Initial Brief, the limited abuse testimony presented at trial in 1999. The entire defense portion of the 1999 penalty phase lasted less than five hours. The Assistant State Attorney trying the case mocked the physical abuse presented, stating in closing argument that Abeing hit on the head with a spoon@ and being slapped once or twice didn=t rise to the level of mitigation. For the State to now argue that abuse was extensively presented is inconsistent with its argument at trial and therefore a violation of Due Process. *Cf. Donnelly v. DeChristoforo*, 416 U.S. 637 (1974).

Unlike the presentation at the 1999 trial, Mr. Morton presented detailed testimony of horrific abuse by his father. Specific instances of abuse about which the jury never heard included Virgil locking Alvin into a disconnected freezer, Virgil beating Alvin into a bloody pulp over a loose tooth, and Virgil kicking Alvin in the head with a steel-toe boot. Appellant also presented evidence of emotional abuse after Virgil and Barbara were divorced which included Virgil kicking a dog so often it=s intestines started hanging out, and Virgil strangling a puppy because it jumped on Angela and then forcing Alvin to bury it. Appellee and the lower court fail to squarely address these facts or point to any testimony in the 1999 trial

record which would show this evidence to be cumulative.

Appellee argues that there was no deficiency in trial counsel=s failure to present documentation of Virgil=s manslaughter conviction because the jury heard about it. (Answer Brief at 33) However, Appellant=s argument is that what the jury heard was inaccurate, falsely minimizing the brutal nature of Virgil=s crime. Appellee fails to address this issue and therefore concedes this point. Appellee also argues that there was no deficiency in presenting the SCDOC records where Virgil is diagnosed as a sexual deviant because the jury knew Virgil molested Angela. (Answer Brief at 34) Appellee fails to squarely address Alvin=s argument that counsel=s abysmal failure to even attempt to obtain any records, because Mr. Urso thought they were less meaningful than live testimony, was deficient performance. The prejudice in failing to obtain the SCDOC records was the fact they supported a finding that Virgil was capable of and most likely did sexually molest Alvin, or, at the very least, provided objective corroboration as to how sadistic he really was.

Appellee argues Alvin failed to present sufficient evidence to establish sexual abuse. (Answer Brief at 34) In support of this, Appellee states Alvin Adenied@ sexual abuse and Mr. Urso couldn=t put on evidence of something Alvin denied as true.

However Dr. Gonzalez and Ms. Pisters said Alvin had Ano memory@ of his childhood. Also, as stated above, Mr. Urso=s 1992 notes of his interview with Alvin state Alvin didn=t remember his childhood. And, Dr. DelBeato said Alvin denied physical abuse also, yet, Mr. Urso presented testimony on physical abuse. Despite Mr. Urso=s *post hoc* claim to the contrary, the greater weight of the evidence shows Alvin couldn=t remember his childhood.

Appellee also claims defense counsel investigated abuse. As set out in his Initial Brief, Mr. Urso didn=t even remember investigating sexual abuse and didn=t even know who Robin Johnson was. Mr. Urso=s investigator, Mr. Krisanda, said he was asked to investigate sexual abuse but it never got that far. There is no competent substantial evidence to support this finding.

Appellee claims Robin Johnson=s testimony was equivocal. Robin Johnson, Alvin=s aunt who was only seven years older than Alvin, was herself a victim of sexual abuse, a fact of which she confided about to Claudia Baker. She was cross examined by a male attorney, in front of a male judge, in an open courtroom about a very sensitive topic. While she was not the calmest and bravest witness on the stand, she did say that she saw Virgil touch Alvin in a sexually improper manner. She explained her answer in deposition saying she hadn=t seen sexual abuse was

because she mistakenly thought that when counsel was asking her if she saw a Asexual act@ that meant actual sex, such as anal sex. Her testimony was sufficient to establish sexual abuse of Alvin.

In addition, other evidence also supported this finding, including the SCDOC records, Chris Walker=s testimony (Appellee claims it was double hearsay but Dr. Gonzalez, the State expert, thought it was important enough to mention in his testimony) and another aunt who told Ms. Baker about watching Virgil inappropriately rub the knee of a 12-year-old boy. In addition, Mr. Urso admitted he had been told that an aunt had seen Virgil touching Alvin in a sexual manner yet he never spoke to that aunt, Robin Johnson, as argued above.

This case is distinguishable from ***Gorby v. State***, 819 So.2d 664 (Fla. 2002). First, Alvin had no memory of his childhood. Mr. Urso=s claim that Alvin denied sexual abuse but admitted physical abuse is not borne out by a thorough review of the record, and is inconsistent with his decision to present physical abuse. Second, Robin Johnson=s testimony established sexual contact by Virgil, and, other evidence also tended to show Virgil was capable of and did in fact sexually abuse Alvin. Finally, trial counsel=s investigation into this claim was deficient so any strategic decision he made was not based on a reasonable investigation.

As to the failure to present poverty, Appellee quotes the lower court=s Order and then states, AThe State can add little to the trial court=s detailed Order.@ (Answer brief at 41) The lower court found evidence of poverty was presented. Appellee fails to address Appellant=s argument that the lower court=s Order is not supported by competent and substantial evidence. Appellee also ignores the State=s own closing argument at trial, that Alvin was not Asome poor kid from the ghetto,@ but lived a life of luxury on Aeasy street.@ The State=s decision to now argue a different version of facts than argued by the State at trial violates Due Process. *Cf. Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)

Appellee also argues that evidence that Les Stacey had attempted to kill two people in the past and was a Vietnam era vet who had received a dishonorable discharge is not mitigating because he was not violent in the home and trial witnesses considered him a good parent. (Answer Brief at 41) First, trial counsel never spoke to Mr. Stacey, never knew about his past, and never went to the family home. Second, Appellee ignores Mr. Stacey=s own testimony that he had virtually no interaction with Alvin. And Appellee relies on the same woefully unprepared witnesses at trial, who described Virgil as a Adisciplinarian,@ as support for a finding that trial counsel did an adequate job. In addition, Appellee argues that trial counsel Acannot be faulted for failing to uncover any negative information about

Stacey when the family members didn=t reveal it.@ (Answer Brief at 42) However, Appellee ignores Dr. DelBeato=s testimony that Alvin had no male role models and told him he didn=t get along with Les Stacey. Trial counsel knew, or should have known, there was a difference of opinion about Les Stacey as stated by his client, and he should have investigated further. Instead, trial counsel presented inconsistent testimony that reflected negatively on his client, based on an inadequate investigation. Finally, Appellee fails to address the State=s own closing argument minimizing the abuse mitigation because Mr. Stacey, was Aa gem.@

Appellee also argues that, AIn sum, Morton failed to establish any abuse or deprivation after Virgil was out of the family home.@ (Answer Brief at 42) However, Appellee, much like the lower court, fails to acknowledge the bankruptcy, the evictions, the hand-me-down clothes from Salvation Army, the description of cock-roach infested housing, the continued contact with Virgil (including frequent overnight visits even though he had sexually abused both children) and exposure to sadistic cruelty and violence, including Virgil=s documented deliberate cruelty to animals in Alvin=s presence. A review of the record does not support the lower court=s findings or Appellee=s argument.

Appellee cites ***Hodges v. State***, 885 So.2d 338 (Fla. 2003) in

support of a finding that Alvin has failed to establish prejudice. (Answer Brief at 43) However, *Hodges* is distinguishable. The majority found, AThe scope and nature of counsel's investigative effort and family contact distinguish this case from those in which this Court has made a determination of ineffective assistance of counsel.@ Id. at 348. The majority based its decision on a finding that, while much favorable mitigation had not been presented at trial, *experienced* trial counsel had conducted a *reasonable investigation,* had obtained records and made a reasonable decision to *not present unfavorable mental health* testimony. Id. at 348-349. Further, *Hodges* does not involve a resentencing.

By contrast, inexperienced trial counsel in this case failed to obtain records, including birth records, failed to understand the importance of records, failed to go to the family home, failed to speak to the client=s stepfather, failed to find the aunt who had seen improper sexual contact, failed to conduct any investigation after the remand, and made an unreasonable decision to present a defense expert who said his client was a psychopath with the traits of a serial killer and wasn=t worth the time to even attempt to rehabilitate.

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.

Appellee fails to squarely address, or address with any specificity, Appellant=s argument that counsel rendered deficient performance in failing to investigate mental illness and brain damage. Specifically, Appellant argued that trial counsel=s 1994 investigation fell below prevailing norms in that counsel spoke to only a few sources, failed to obtain any background records or provide his experts with background information, including medical records documenting Alvin=s traumatic birth, and failed to ensure a competent mental health evaluation that took into account Alvin=s birth and severe memory problems. This error was compounded when, after remand in 1997, trial counsel failed to conduct any additional mitigation investigation.

The only portion of this argument which Appellee appears to squarely address (Appellee=s Answer Brief does not track the Initial Brief) is the fact that counsel conducted no investigation after remand. Appellee appears to concede, on page 52 of his Answer Brief, that all counsel did after the remand was think about having neuro-imaging done of Alvin=s brain. This is not a reasonably competent investigation after a remand.[7]

[7] Appellee states that counsel did not pursue this because Alvin would not consent to neuro-imaging. If in fact counsel actually made reasonable efforts to address neuro-imaging and actually discussed this with Alvin in a meaningful manner, which is disputable, it proves that trial counsel suspected brain damage. Further, there are other ways to test for and

Appellee fails to address most of the case law cited in the Initial Brief in support of a finding of deficient performance and prejudice.[8] Appellee also fails to address the ABA Guidelines and the unrebutted expert testimony establishing prevailing norms require counsel to investigate a client=s birth, obtain medical records and other records and provide corroborating data to experts. Appellee, therefore, must concede deficient performance.

Appellee Failed To Squarely Address Appellant=s Arguments of Prejudice

Appellee also fails to squarely address Appellant=s argument that he presented extensive, uncontested evidence of brain damage as set out in his Initial Brief. Specifically, Alvin stated the lower court=s factual finding that postconviction counsel presented no Aobjective@ evidence of brain damage was a clearly erroneous factual finding. The lower court ignored and failed to address 1) Dr. Silva=s objective neuropsychiatric test data establishing objective proof of brain damage, including the

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prove brain damage (in spite of the lower court=s finding that neuroimaging is the only objective way to prove brain damage) including neuropsychiatric testing as was done by Dr. Silva.

[8] Appellee notes Appellant=s summary of *Anderson v. Sirmons*, 476 F. 3d 1131 (10th Cir. 2007) is mistaken in that defense counsel did not hire a mental health expert. (Answer brief at 55) Appellant concedes that Appellee is correct as to that point.

SANS, the Barron Emotional Quotient Inventory, the Benton Facial Recognition Test and the Wharton Memory Recognition Test, 2) the birth records and 3) Alvin's undisputed memory problems. Alvin also argued that none of the other experts reviewed his data, so could not comment on it. The only expert who disputed Dr. Silva's diagnosis was Dr. DelBeato, who was unqualified to do so. Alvin also argued that the lower court's requirement that neuro-imaging be presented in order to establish brain damage was not supported by case law or established science. Appellee fails to squarely address these claims.

Appellant argued that Dr. DelBeato was not credible and that the lower court's reliance on his testimony is not based on substantial, competent evidence.[9] As set out in his Initial Brief, Dr. DelBeato's testimony was inconsistent with his testimony at trial and even inconsistent with his own testimony at the hearing.

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[9] Appellee did argue Dr. Silva and Dr. Berland were less credible. (Answer Brief at 62) The lower court did make a finding that Dr. Berland's opinion may be skewed because as a defense expert he wasn't looking for things that would hurt the client's case. However, the lower court did not address Dr. Silva's credibility per se, but rejected his testimony because it was not based on objective evidence (a clearly erroneous finding as argued herein and in the Initial Brief) and because Dr. Silva disagreed with Dr. Berland's diagnosis of psychosis. There was nothing in Dr. Silva's testimony that cast doubt on his credibility. And, in light of Dr. DelBeato's testimony, as set out extensively in Appellant's Initial Brief, it is hard to imagine how Dr. Silva's testimony could be less credible. Any such finding would not be based on competent substantial

His records no longer exist. The answer he gave at the hearing, under oath, as to how they were destroyed was a lie, or, the answer he gave at trial in 1999, also under oath, was a lie. Or, perhaps they were both lies. But they cannot both be true.

Dr. DelBeato=s claim that he spent 90 minutes with Alvin and was able to administer all those tests, including the MMPI and the WAIS, was considered impossible by all the other experts, including Dr. Gonzalez. (Appellee only addresses Dr. Berland=s testimony in this regard and does not address the comments of Dr. Gonzalez, Dr. Silva or Mr. Norgard.) Dr. DelBeato admitted he didn=t follow standardized scoring or administration of the tests.[10] Appellee fails to address these aspects of Dr. DelBeato=s testimony. Therefore, he must concede these points.

Dr. DelBeato=s claim that he saw medical records and was given background information and therefore was aware of the anoxia prior to trial was not credible. Appellant set out in detail in his initial Brief how Dr. DelBeato=s own trial testimony established his evidentiary hearing testimony was false. (Initial Brief at 75-77) Alvin further alleged that the

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evidence.

[10] At trial, when being bolstered on cross by the State, he claimed his tests were standardized. At the hearing, of course, he admitted he didn=t administer them in a standardized manner.

lower court=s finding of fact that Dr. DelBeato ruled out anoxia was based on this testimony and therefore was not supported by competent, substantial evidence. Id. Appellee does not address this argument. He simply states that, AWhile Dr. DelBeato did not have the birth records at the time of his initial evaluation, he recalled talking to Mr. Urso about potential anoxia at birth.@ (Answer Brief at 59)

A careful review of the record establishes that Appellee=s assertion is not supported by competent, substantial evidence. In addition to the detailed record evidence cited at pages 75-77 of the Initial Brief, other evidence shows Dr. DelBeato=s claim is inaccurate or outright false. For example, Mr. Urso confidently and repeatedly stated he did not have the medical records and, therefore, could not have known about the anoxia. According to Mr. Urso, the only thing relevant about Alvin=s birth was the lack of bonding due to his premature birth. Further, Dr. DelBeato=s own report contradicts his testimony and Appellee=s claim. (Initial Brief at 77) Appellee fails to acknowledge or attempt to dispute these inconsistencies.

Appellant also argued that Dr. DelBeato was not qualified to rule out Asperger=s because he admitted he was not an expert in that area, did not even review Dr. Silva=s objective test data, and, when asked simple questions such as what area of the brain is damaged in Asperger=s, he admitted he didn=t know. (Initial

Brief at 84-85) Appellee fails to squarely address this issue also.

ISSUES ADDRESSED BY APPELLEE

Appellant raised the claim that counsel was deficient, and made an objectively unreasonable decision to present Dr. DelBeato at the resentencing. (Initial Brief at 88-92) In addressing this claim, Appellee states, AOn balance, Dr. DelBeato=s testimony was favorable, showing how Morton=s early life affected his later decisions and that his conduct must be viewed and evaluated on the basis of his early childhood experience and his personality dysfunction.@ (Answer Brief at 50). Appellee also cites *Adams v. Wainwright*, 709 F.2d 1443 (11th Cir. 1983) for the principle that an attorney=s bad decision Awill be held ineffective only if it was so patently unreasonable that no competent attorney would have chosen it.@ (Answer Brief at 51 quoting *Adams*). Appellant points out that *Adams* is a pre-S*trickland* case and Appellant has established counsel=s decision was based on an unreasonable investigation. But, even so, trial counsel=s decision to present Dr. DelBeato at the resentencing, in light of the facts of this case, was patently unreasonable and no competent capital defense attorney would have presented his testimony.

First, a review of Dr. DelBeato=s trial testimony proves Appellee=s argument that Dr. DelBeato=s testimony was favorable is

without merit. In addition to the portions of Dr. DelBeato=s trial testimony quoted in Appellant=s Initial Brief at page 90, Dr. DelBeato said Alvin was an antisocial loner and testing showed him to have a lot of Asuppressed anger,@ Asuspicion,@ and sensitivity in the sense he was likely to be easily angered. 1999TR V. VI, p. 610, 616-17. Dr. DelBeato did say Alvin=s personality was the result of heredity and environment, Id. at 611, but also offered the helpful tidbit that A100% of serial killers@ lack a male role model. Id. at 612. Dr. DelBeato also said Alvin told him he didn=t like his stepfather and denied physical abuse. Id. at 613.[11]

On cross, Dr. DelBeato was even less helpful. The State established that the Defense failed to give him any background documents. (199TR, V, VI, 623, 631-32) He offered that Alvin was Athe leader@ based on the documents the State Attorney gave him and that Alvin made a Achoice@ to kill. Id at 631-32. He also said Alvin=s likelihood of rehabilitation was so low he wouldn=t Awaste the time@ trying to treat him. Id. at 642. He said Alvin was truant and a discipline problem at school. Id. at 632.[12]

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[11] Appellee states at page 55 of his Answer Brief addressing Dr. DelBeato=s testimony that Athe defense brought out that [Alvin] had been abused as a child.@ Appellee does not cite the source for that information but clearly it was not Dr. DelBeato.

[12] This is somewhat inconsistent with his Report, ROA v. XI, p. 1777, and it is unclear what Dr. DelBeato based this on.

And, as argued above, Dr. DelBeato=s testimony about Alvin=s stepfather, when considered with the lay witness testimony, served merely to undermine Alvin=s credibility. Appellee=s argument, and the lower court=s finding that counsel made a reasonable decision to present Dr. DelBeato=s testimony is not supported by competent, substantial evidence.

In support of trial counsel=s decision to present Dr. DelBeato, Appellee argues that trial counsel could not go out and hire a Apsychiatrist from San Francisco who charged $250 an hour.@ (Answer Brief at 52) This is a thinly veiled swipe at Dr. Silva. Appellee must make this argument because Dr. Silva=s credibility and the basis of his opinion was not undermined in any other way.

As to the substance of Appellee=s argument, the issue isn=t whether Dr. Silva personally was available for trial but whether the evidence Dr. Silva presented was available. The evidence of Asperger=s and brain damage was reasonably available; there is nothing in the record to suggest Dr. Silva was the only competent neuropsychiatrist who could identify and present testimony of brain damage and Asperger=s in 1999.

In addition, Mr. Swisher conceded they could have asked for

Neither Alvin=s report cards, as given to defense counsel by Barbara Stacy, nor the school records obtained by CCRC, support a finding that he was a Adiscipline problem.@ They do, however, show he received an in school suspension for truancy.

another expert and most likely would have been given the funds to obtain one. Appellee=s argument suggests that court-appointed attorneys in Pasco County can=t ask the court for expert assistance that is reasonably required to defend their client=s life. This on its face raises Equal Protection and Due Process concerns. Further, it is routine throughout Florida for counsel to retain qualified out of state experts, at rates of $250 an hour or higher. Appellee=s argument is a red herring.

Appellee states that ADr. DelBeato=s professional qualifications have not been challenged and Morton has failed to establish that Dr. DelBeato=s opinions are unsound. A (Answer Brief at 52) However, Appellee fails to squarely address the inconsistencies in Dr. DelBeato=s testimony, his false claim of conducting a neuropsych screening in 1994, his unorthodox testing methods, the questionable nature of his claim he administered all his testing in 90 minutes and his admitted lack of knowledge of Asperger=s. Appellant stands on his Initial Brief.

Appellee argues that prejudice is not established because neither Dr. Gonzalez, the State trial expert, nor Dr. DelBeato changed their opinions based on the background material. (Answer Brief at 56) However, Dr. Gonzalez admitted he would have suspected brain damage based on the birth records and Dr. DelBeato was neither credible nor qualified as argued

extensively above.

A review of Dr. Gonzalez=s testimony shows he thought the birth records were a Ared flag@ which would have prompted him to recommend further testing. ROA V. X, p. 1686, 1723-24. Also, Dr. Gonzalez never addressed and was apparently never informed by the State that Dr. Silva had conducted objective neuropsychiatric testing and diagnosed brain damage. Id. at 1688. Third, Dr. Gonzalez admitted that Alvin had no memory of his childhood and memory problems are consistent with brain damage. Id. at 1717-18. Fourth, Dr. Gonzalez thought Dr. Berland=s MMPI did not show brain damage but admitted that Dr. Berland Acan tell you better than me about [the MMPI}.@ Id. at 1690. Appellee=s argument is not supported by substantial, competent evidence.

Appellee also states, in support of this argument, that Dr. DelBeato did a neuropsych screening. Appellee fails to address the detailed record cites in Appellant=s brief that show he did not conduct a neuropsych screening. Appellee also refers to Dr. DelBeato=s testimony where he dismisses the birth records to argue the birth records don=t suggest a problem because Alvin was released with no neurological deficits noted. Appellee fails to address that Dr. DelBeato=s opinion is refuted by the highly respected treatise, Kaplan and Sadock=s Comprehensive Textbook of Psychiatry(7th Ed.),and, when confronted with this, Dr. DelBeato

cited himself as the authority for his opinion.

Appellee=s remaining arguments as to this claim merit little discussion. However, Appellee states that Dr. Silva=s linking of Asperger=s to violence was based on Anon specific anecdotal evidence.@ (Answer Brief at 69) This is inaccurate. Dr. Silva based his opinion on peer-reviewed articles and highly respected studies. Further, Appellee=s reference to the DSM-IV-TR, stating it does not show a link to violence in its definition of Asperger=s, is grasping at straws. The DSM-IV-TR does not link any mental illness to violence, including brain damage, for obvious reasons. Nonetheless, it is uniformly accepted that frontal lobe deficits and Asperger=s are linked to violence.

Finally, Appellee states that because of the aggravators in this case, Alvin cannot demonstrate prejudice. However, Alvin=s co-defendant, Bobby Garner was tried based on the same aggravators and received a life sentence.[13] Certainly this is not a case where competent attorneys could not have saved the life of a mentally ill 19Byear-old boy who came from an impoverished

[13] Garner=s case involved facts even worse than Alvin=s. By way of example, the State argued that it was Garner=s idea to get a body part as a trophy and that he suggested cutting out a heart and bringing it back. Garner TT, p. 748. Garner also knew the victims, had been their neighbor and was the one who got the knife. Id. at 745-49. The State also argued Garner tried to cut the victim=s head off because he wanted a souvenir better than a pinkie finger. Id at 753-754. And, Garner was the one laughing about the victim=s bones Asnapping and popping.@ Id.

and abusive background.

ARGUMENT IV

Appellee argues that Appellant=s Request for Judicial Notice was not timely. (Answer Brief at 79). It was timely. First, the hearing was bifurcated. Appellant filed the Request in October at the beginning of the hearing. The hearing did not resume until three months later in January. After the lower court denied the Request in October, Appellant submitted an Amended request in early January that was heard and denied on the merits on January 16th. ROA v. XX, p. 1106; V. XIX, p.879; V. IV, p. 539; V. X, p. 1757-58.

Appellee cites *Gilliam v. State*, 514 So.2d 1098 (Fla. 1987) in support of the lower court=s refusal to allow Ms. Baker to offer her opinion as whether Ms. Pisters did the work of a mitgation specialist based on failure to establish or meet *Frye*. However, in *Flanagan v. State*, 625 So.2d 827, 828 (Fla. 1993), this Court held that when an expert expresses a Apure opinion,@ the testimony is based on the expert=s personal experience and training, and does not have to meet *Frye*.

ARGUMENT V

Appellee cites to *Grossman v. State*, 932 So.2d 192 (Fla. 2006) in support of a summary denial of Alvin=s claims of newly discovered evidence supporting a reweighing of his age mitigator

in light of *Roper*. However, *Grossman* involved a successive 3.851. Alvin=s claim was raised as an amendment to his original 3.851.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this _____ day of December, 2007.

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

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