IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-2176

DWAYNE IRWIN PARKER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the circuit court's denial of Rule 3.850 relief following an evidentiary hearing. The following symbols will be used to designate references to the record in this appeal:

"R. ____" -- record on direct appeal to this Court of Mr. Parker's guilt and penalty phase proceeding, Case No. SC60-76172;

"PC-R1. ____" – record on appeal from the lower court's summary denial of Mr. Parker's Motion to Vacate Judgment and Sentence pursuant to Rule. 3.850, Case No. SC02-1471.

"PC-R2_____" -- record on instant appeal to this Court;

"PC-T._____" -- transcripts of Mr. Parker's post conviction proceedings;

"EXH. _____" -- exhibits admitted during Mr. Parker's 3.850 proceedings.

"Supp. PC-R2." -- supplemental record on appeal to this Court;

References to other documents and pleadings will be self-explanatory.

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REQUEST FOR ORAL ARGUMENT

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

STANDARD OF REVIEW

The claims presented in this appeal are constitutional issues involving mixed questions of law and fact, which are reviewed *de novo*, giving deference only to the trial court's findings of fact. Stephens v. State, 748 So. 2d 1057, 1034 (Fla. 1999); State v. Glatzamayer, 789 So. 2d 297, 301 n.7 (Fla. 2001).

STATEMENT OF THE CASE AND FACTS

A Broward County grand jury indicted Mr. Parker on one count of first-degree murder, two counts of attempted first-degree murder and nine counts of armed robbery. See Parker v. State, 641 So. 2d 369, 372 (Fla. 1994). After the Broward County Public Defender's office conflicted off Mr. Parker's case, Mr. Bo Hitchcock and Mr. Theodore Booras were appointed as special public defenders. Trial Counsel represented Mr. Parker in his criminal trial before the Honorable

Leroy Moe in the Circuit Court of the Seventeenth Judicial Circuit in Florida from April 30 to May 9, 1990 (R. 2026). The facts alleged at trial were as follows:

On April 22, 1989, after spending the day together consuming large quantities of alcohol, Mr. Parker and Ladson Marvin Preston robbed the manager and the patrons of a Pizza Hut in Pompano Beach (R. 2220-2221). After the police arrived and entered the restaurant, Mr. Parker fled the scene and ran into the street, where Keith Mallow was driving his car with his family. Mr. Parker fired one shot trying to stop the car, which swerved into some parked cars. Mr. Parker continued to flee, while Deputy Killen pursued him on foot and at least two deputies gave chase in patrol cars. At this point, Mr. Nicholson was shot. He died of a single shot to the abdomen.

Tammy Duncan, the only eyewitness to Mr. Nicholson's shooting, heard a gunshot while watching television at home (R. 1183). While outside, Ms. Duncan saw Mr. Parker running with a gun in his hand (R. 1184-85). Ms. Duncan saw officers arrive a minute or two after Mr. Nicholson was shot; one of them got out of the car, picked Mr. Nicholson up and patted him down (R. 1188-89). Tammy Duncan saw Mr. Parker 60-70 feet away from Mr. Nicholson at the time he was shot (R. 1231). Deputy Kevin McNesby and his dog pursued and aided in arresting Mr. Parker (R. 1250-54). Deputy McNesby came upon Mr. Nicholson staggering in the intersection (R. 1246-47). He stopped his car, and Mr. Nicholson collapsed

on the trunk (R. 1247). He saw no officers around (R. 1247-48). Deputy Killen rounded a corner and saw Mr. Nicholson sitting and bleeding in the road. Mr. Nicholson pointed in the direction in which Mr. Parker had fled, and the deputy continued the chase (R. 1498-99). He and other officers found Mr. Parker lying near a house (R. 1498).

Sargent Edward Baker, in a squad car, saw two men running (R. 1526). Turning a corner, he saw Mr. Nicholson on the ground and Mr. Parker running to the southwest (R. 1527). Sargent Baker saw Mr. Parker 10-15 feet from Mr. Nicholson and did not see anything in Mr. Parker's hand (R. 1529). Nor did he see any cars (R. 1532). Mr. Parker was arrested and taken to the Broward County Sheriff's office where he was charged on April 23, 1989.

Mr. Hitchcock conceded that Mr. Parker was guilty of the armed robbery but did not shoot Mr. Nicholson (R. 1921). Trial counsel argued that Mr. Parker's case was the case of the "missing silver bullet" (R. 935). There was a dispute of fact as to whether the fatal bullet was silver-colored—the color of the bullets used by the Broward deputies. Mr. Parker's bullets were allegedly yellow toned. Dr. Michael Bell, the medical examiner, indicated in his autopsy report that "[a] large caliber silver-colored bullet is recovered with very little deformation" was taken from the body (R. 1643). At trial, Dr. Bell testified that his contemporaneous report was wrong because he "didn't look at the bullet properly" (R. 1643-44). At Dr. Bell's

first deposition, he swore that the bullet was a "silver colored bullet with no deformation," and he did not think he cut the bullet with a saw (R. 1644, 1664-65). A handwritten report made before the deposition notes that the bullet was silver with very little deformation (R. 1661-62).

The State presented the testimony of Detective Cerat who received the fatal bullet from Dr. Bell, photographed it, and put it in envelope sealed with a single piece of tape (R. 1560, 1566). Additionally, he photographed the bullet while still in the sacrum, which was presented at trial as State's Exhibit 115 (R. 1561). State's Exhibit 116 was a photograph of a yellow bullet, which Detective Cerat identified as the bullet put in the sealed envelope (R. 1561-63). Dr. Cerat explained the fact that Exhibit 115 showed a white bullet as the result of lighting in the autopsy room and the strobe light used to take the picture (R. 1565). Detective Cerat did not note any stippling around the wound (R. 1591). Dr. Bell, on the other hand, noted stippling, which indicated that the shot was fired from between two inches and two feet (R. 1632).

The State also presented the testimony of firearms expert Patrick Garland who testified that the bullet the State's claimed was found in the victim's body was the fired from Mr. Parker's gun (R. 1776). Well into the trial, the State gave notice of a newly retained expert in forensic pathology, Dr. Besant-Matthews (R. 1426-28). After argument and proffer, the court ruled that it would not allow Dr. Besant-

Matthews testify in the state's case-in-chief, but would allow him testify "on rebuttal if there's any defense." (R. 1152-53, 1610-12[1], 1754). The trial court did allow into evidence three photographic prints that the state had not provided in discovery (R. 1750-52, 1793-98). Trial counsel presented no expert or other defense witnesses during the guilt phase. Trial counsel attempted to get a continuance to Mr. Parker's sentencing hearing in order to call a photography expert (R. 2334). On May 10, 1990, the jury returned a verdict finding him guilty on the murder and armed robbery charges and of the lesser offense of aggravated battery with a firearm on the two counts of attempted murder. See Parker at 373; (R. 2026).

On May 25, 1990, approximately two weeks after the verdict was issued, the Court conducted a brief (one-day) penalty phase (R. 2091-2317). During the penalty phase, trial counsel presented the testimony of six witnesses, including: (1) Howard Finkelstein and (2) Carlton Moore, investigators for previous counsel; (3) trial counsel's investigator, Cary Kultau; (4) Mr. Parker's mother, Marion Sanders; (5) Dr. Glenn Caddy, trial counsel's mental health expert; and (6) Ladson Marvin

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[1] There was argument regarding the admission of a photographic print that were "a whole different color rendition" from prints provided in discovery (unlike the discovery prints, the objected-to prints cast the fatal bullet significantly more yellow-toned.) The prints were to be used in Dr. Besant-Matthews testimony. The trial court allowed them into evidence subject to further defense argument that they were not provided in discovery.

Preston, Mr. Parker's co-defendant. The judge instructed the jury to weigh the aggravating and the mitigating factors and to render an advisory sentence. By a vote of 8 to 4, the jury recommended that Mr. Parker receive the death sentence (R. 2326). On June 14, 1990, the trial court sentenced Mr. Parker to death (R. 2332). The trial court found four aggravating circumstances: 1) prior violent felony; 2) felony-murder; 3) great risk; and 4) avoid arrest (R. 2026-29, 2325, 2383-92, 2862, 2887-95). The trial court found no mitigating factors because trial counsel failed to establish the facts alleged during penalty phase (R. 2384, 2387, 2390-91).

On direct appeal, the Florida Supreme Court affirmed Mr. Parker's convictions and sentences. See Parker, 641 So. 2d 369 (Fla. 1994), cert. denied, 115 S. Ct. 944 (1995).

Mr. Parker filed an initial motion for post-conviction relief pursuant to rule 3.850 and 3.851 of the Florida Rules of Criminal Procedure on March 24, 1997 (PC-R1. 1-112). On June 5, 2000, Mr. Parker filed his final Amended Motion to Vacate Judgment of Conviction and Sentence with Special request for Evidentiary Hearing (PC-R1. 299-426). The State filed its Response on November 6, 2000 (PC-R1. 469-616). With leave of the court, Mr. Parker filed a Reply on December 15, 2000 (PC-R1. 1150-1172). On April 18 2001, Judge Moe held a hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1983). On February 12, 2002, relief was summarily denied (PC-R1. 1484-1532, 1537-58, 1559-80). Mr. Parker timely

appealed. (PC-R1. 1581-82).

On June 11, 2003, Mr. Parker filed his initial brief and a petition for writ of habeas corpus. On March 24, 2005, this Court reversed, in part, the circuit court's summary denial of Mr. Parker's Rule 3.851 claims. This Court remanded Mr. Parker's case for an evidentiary hearing in circuit court on two claims: 1) ineffective of assistance of counsel for failure to either retain or present testimony of a forensic expert to rebut the State's evidence and testimony on the alleged fatal bullet and 2) ineffective assistance of counsel at penalty phase.

On February 16-17, 21-22, 2006 and March 6, 2006, Judge Moe held an evidentiary hearing on the two claims that were the subject of this Court's remand. Mr. Parker presented the testimony of thirteen witnesses[2] that included:

1. **Mr. Bo Hitchcock**: Mr. Hitchcock was Mr. Parker's lead counsel and testified that he was responsible for Mr. Parker's guilt phase issues (PC-18-20). Mr. Hitchcock testified that he did not consult with or retain any photography experts prior to guilt phase (PC-T. 36-39, 41). Additionally, Mr. Hitchcock did not direct any mitigation investigation to prepare for the penalty phase nor did he

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[2] On January 10, 2006, the lower court granted the State's motion to strike four witnesses and precluded Mr. Parker from calling Detective Cerat, Dr. Michael Bell, Dr. Ronald Wright, and State Attorney Michael Satz. PC-R2. 371. Mr. Parker intended to call these witnesses in order to substantiate his claim of ineffective assistance of counsel at guilt phase. PC-R2.

retain any of Mr. Parker's background records (PC.T 23-24, 73, 77, 389-90).

2. **Mr. Theodore Booras**: Mr. Parker's penalty phase counsel. Mr. Booras could not recall nor were there any records that he interviewed any mitigation witnesses other than Mr. Parker's mother and wife (PC-T. 273-277, 286-287, 411). Mr. Booras did not attempt to obtain any of Mr. Parker's background records for either purposes of pursuing mitigation investigation or providing materials to his mental health expert, Dr. Caddy (Id.) Mr. Booras did not request that Dr. Caddy perform any psychological or neuropsychological testing (PC-T. 410). Mr. Booras presented six witnesses at Mr. Parker's penalty phase (PC-T. 335; R. 2174-2286).

3. **Mr. Howard Finkelstein**: Broward County Public Defender investigator who began an initial mitigation investigation on Mr. Parker's case for previous counsel (PC-T. 191-192).

4. **Mr. Carlton Moore**: Broward County Public Defender investigator who worked with Howard Finkelstein and made initial contact with witnesses from Mr. Parker's background in Jacksonville, Florida (PC-T. 206-207).

5. **Mr. Cary Kultau**: Investigator hired by trial counsel to investigate guilt-phase issues (PC-T. 21).

6. **Dr. Glenn Caddy**: Mental health expert hired by trial counsel to conduct competency and sanity evaluation and conducted a psychological screener on Mr. Parker (PC-T. 84, 288, 410). Dr. Caddy did not find that Mr. Parker met any

statutory mitigators at trial (R. 2299).

7. **Ms. Princess Ferrette**: Mr. Parker's closest sibling who grew up with him in Jacksonville, Florida. Ms. Ferrette and lived with Mr. Parker during the periods of time they were able to live with their mother, Marion Sanders, who suffered from paranoid schizophrenia. She testified to the abuse that both she and Mr. Parker suffered at home and while living in foster care including bizarre episodes where their mother withheld food from them because she believed it was poisoned and being beaten by multiple men that would stay in the home with them (PC-T. 233-234, 238-240).

8. **Ms. Virginia Holcombe**: A family friend who was involved in committing Mr. Parker's mother to mental institutions on multiple occasions. Ms. Holcomb knew Mr. Parker as he grew up in Jacksonville, Florida during the period of time he lived in and out of foster care and recalled that he would runaway from the homes due to the physical abuse he endured (PC-T. 217-219, 222-224).

9. **Mr. Gregory Pender**: Mr. Parker's childhood friend who witnessed Mr. Parker being sexually assaulted by other boys multiple times (PC-T. 257-258). Mr. Pender recalled that one occasion that Mr. Parker was sexually assaulted, he suffered from a ruptured rectum (Id.).

10. **Dr. Larry Richardson**: Mr. Parker's child protective services worker while Mr. Parker was in the State foster care system. Dr. Richardson had to remove Mr.

Parker from his mother's home on numerous occasions. Dr. Richardson testified that he initially began to work with Mr. Parker when he was eleven years old at the Diagnostic and Assessment Unit that was operated by an organization called the Child Guidance Center (PC-T. 350, 353-54). Dr. Richardson testified that at the time he was suffering from "selective mutism" caused by a severe trauma and he did not speak for sixty days (PC-T. 356-57).

11. **Dr. David Pickar**: Mr. Parker's psychiatric expert who specialized in schizophrenia. Dr. Pickar found that Mr. Parker suffered from frontal lobe brain damage and low intellectual functioning and that Mr. Parker inherited the effects of schizophrenia genetically from his mother (PC-T. 480-88)

12. **Dr. Jethro Toomer**: Mr. Parker's psychological expert who concluded that Mr. Parker suffered from a major mental personality disorder and that the effects of Mr. Parker's psychological deficits were of long-standing duration from being exposed to a psychologically dangerous environment for a significant period of time (PC-T. 570-572).

13. **Dr. Barry Crown**: Mr. Parker's neuropsychological expert who conducted intelligence testing and neuropsychological testing and found that Mr. Parker suffered from right hemisphere/frontal lobe brain damage (PC-T. 645-650).

Following the evidentiary hearing, the lower court denied Mr. Parker's Rule 3.850 motion on September 13, 2006 and issued its order on September 27, 2006

(PC-R2. 348-354). Mr. Parker timely filed his notice of appeal on October 23, 2006 (PC-R2. 355).

SUMMARY OF THE ARGUMENT

ARGUMENT I: Trial counsel afforded constitutionally ineffective assistance of counsel to Mr. Parker at his penalty phase. Due to trial counsel's constitutionally inadequate and perfunctory investigation of mitigation, trial counsel failed to adequately investigate Mr. Parker's family history or present or retain adequate mental health expert testimony. As a result, crucial mitigation evidence of Mr. Parker's impoverished, brutal, and chaotic background was not presented at Mr. Parker's penalty phase.

ARGUMENT II: Trial counsel afforded constitutionally ineffective assistance of counsel to Mr. Parker by failing to present expert testimony during Mr. Parker's guilt phase. Due to trial counsel's inadequate preparation for trial, trial counsel failed to present testimony or retain necessary experts to challenge the State's experts and evidence alleging that Mr. Parker shot the fatal bullet. As a result, crucial evidence that Mr. Parker was not responsible for shooting the fatal bullet and that the State's experts' testimony and evidence presented was invalid was not presented at Mr. Parker's guilt phase.

ARGUMENT III: Mr. Parker was denied a full and fair hearing before a fair and impartial judge in violation of the due process clause of the Federal

Constitution. The lower court erred in denying Mr. Parker's motion to disqualify when it became apparent that the court was exhibiting a specifically racially charged bias against Mr. Parker during the evidentiary hearing. Additionally, the lower court erred when it denied Mr. Parker the opportunity to call four relevant witnesses to his claim that trial counsel was ineffective at guilt phase.

ARGUMENT

ARGUMENT I

THE LOWER COURT ERRED IN DENYING MR. PARKER'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE DURING PENALTY PHASE

The performance of Mr. Parker's trial counsel fell well below constitutionally mandated standards with respect to the penalty phase. Mr. Parker's trial counsel, Mr. Bo Hitchcock (lead counsel) and Mr. Theodore Booras (penalty phase counsel), were appointed to his case as special public defenders after Warner Olds of the Broward County Public Defenders Office withdrew due to a conflict. Both Mr. Hitchcock and Mr. Booras were ineffective in their representation due to the fact that they all but ignored the preparation necessary to prepare for Mr. Parker's sentencing. Their ineffectiveness lied in the fact that rather than engage in the required and necessary investigation to prepare a comprehensive presentation of Mr. Parker's background they chose to merely rely on the preliminary investigation conducted by previous counsel. Neither Mr. Hitchcock

nor Mr. Booras engaged in even the most rudimentary investigation that would have developed evidence crucial for Mr. Parker's penalty phase. Counsel failed to develop any significant evidence for sentencing despite being explicitly aware of the possible mitigation that existed.

As explained by the United States Supreme Court, an ineffective assistance of counsel claim is comprised of two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Williams v. Taylor, 120 S. Ct. 1495, 1511 (2000), quoting Strickland v. Washington, 466 U.S. 668, 687 (1984).

In Williams, the Supreme Court found deficient performance where counsel failed to prepare for the penalty phase of a capital case until shortly before trial, "failed to conduct an investigation that would have uncovered extensive records," "failed to seek prison records," and "failed to return phone calls of a certified public accountant." Williams, 120 S. Ct. at 1514.

The United States Supreme Court further explained the obligations of trial counsel in a capital case in Wiggins v. Smith, 123 S. Ct. 2527 (2003). In Wiggins, the Supreme Court addressed counsel's decision to limit the scope of the

investigation into potential mitigating evidence and the reasonableness of that decision. The Court stated:

> [A] court must 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.** Even assuming [trial counsel] limited the scope of their investigation for strategic reasons, *Strickland* 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.**

Wiggins, 123 S. Ct. at 2538 (emphasis added).

The obligations of trial counsel in investigating and preparing for a capital penalty phase were again addressed in Rompilla v. Beard, 125 S. Ct. 2456 (2005). In Rompilla, the Supreme Court held,

> "when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial."

Id. at 2460 (emphasis added). At issue was trial counsel's neglect in obtaining the file regarding a prior violent felony conviction, which was to be used as an aggravating circumstance against Mr. Rompilla.

Mr. Rompilla's counsel had spoken to their client and family members on several occasions but had not received any helpful mitigation evidence. Mr. Rompilla was evaluated by mental health experts prior to trial in an effort to find mitigation evidence. See Rompilla, 125 S. Ct. at 2461. However, the Supreme

Court found that trial counsel's efforts fell below an objective standard of reasonableness for failing to obtain records which would have provided significant "mitigation leads." Id. at 2468.

> Reasonable efforts certainly included obtaining the Commonwealth's own readily available file on the prior conviction to learn what the Commonwealth knew about the crime, to discover any mitigating evidence the Commonwealth would downplay and to anticipate the details of the aggravating evidence the Commonwealth would emphasize. Without making reasonable efforts to review the file, defense counsel could have had no hope of knowing whether the prosecution was quoting selectively from the transcript, or whether there were circumstances extenuating the behavior described by the victim.

Id. at 2465 (emphasis added). Re-emphasizing the importance of the ABA Standards for Criminal Justice as a model for reasonable conduct, the Supreme Court found that when trial counsel fails to "conduct a prompt investigation of the circumstances of the case[,]" that attorney has failed to provide effective assistance.[3] Id. at 2466.

Additionally, "[c]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary." Strickland v. Washington, 466 U.S. 668, 691 (1984); see also Ragsdale v. State,

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[3] In Rompilla, the Supreme Court looks to the 1982 ABA Standards for Criminal Justice as the guiding principle for effective assistance of counsel. These standards would be applicable to Mr. Parker's counsel because his trial commenced in 1990.

798 So. 2d 713, 716 (Fla. 2001) ("[A]n attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence." (quoting State v. Riechmann, 777 So. 2d 342, 350 (Fla. 2000)). A reasonable investigation is a crucial prerequisite to the presentation of mitigating evidence. See State v. Lewis, 838 So. 2d 1102, 1113 (Fla. 2002) (stating that "the obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated—this is an integral part of a capital case."); accord Orme v. State, 896 So. 2d 725, 731 (Fla. 2005); Sochor v. State, 883 So. 2d 766, 772 (Fla. 2004). An attorney's failure to investigate and present available mitigating evidence is a matter of "critical concern" in determining whether counsel's performance was ineffective at the penalty phase. Reichmann, 777 So. 2d at 350 n. 3.

While the Strickland line of cases indicates that trial counsel's failure to investigate further is excusable where evidence suggests further investigation would be fruitless, in Mr. Parker's case there were numerous red flags in the preliminary information obtained by the investigators for the public defender's office that required trial counsel to investigate further.

At the conclusion of the 3.850 hearing, the circuit court denied Mr. Parker's ineffective assistance of counsel claim. It found that trial counsel was not deficient

and found most of the evidence cumulative (PC-R2. 350-352).[4] The court erred in both respects. Both the record of Mr. Parker's penalty phase and the evidence presented at his evidentiary hearing reveal trial counsel Mr. Hitchcock and Mr. Booras made a less than complete investigation and that counsel's omissions were the result of either no strategic decision at all, or by a strategic decision that was itself unreasonable, being based on inadequate investigation. The extensive evidence trial counsel did not discover and that Mr. Parker presented at his evidentiary hearing was qualitatively and substantively different than anything presented at trial.

A. Trial Counsel's Perfunctory Investigation of Mitigation Evidence.

Initially, Mr. Parker was represented by Assistant Public Defender Warner Olds, with the assistance of investigators Howard Finkelstein and Carlton Moore.

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[4] It must be noted that the lower court did not cite to any portions of the record in support of its findings. As the Court explained:

> In conclusion, it must be noted that although the body of this opinion does not contain many separate and distinct references to pages in the transcript of the trial or other post trial pleadings or proceedings, both the State and the Defendants written closing arguments do contain references to the record which supports this courts finding of fact and conclusions of law.

PC-R2. 353. It is impossible to discern which facts from either the State's or the Defendant's post hearing memorandum the lower court was choosing to rely upon. Mr. Parker submits that none of the facts Mr. Parker cited in his closing argument would support the lower court's findings.

The Public Defender's Office was forced to withdraw as the result of a conflict. The court appointed Mr. Hitchcock as a Special Public Defender on September 7, 1989 (Id.) (EXH. 2). Subsequently, Mr. Booras was appointed as co-counsel to handle Mr. Parker's penalty phase (PC-T. 270).

The difference in the preliminary preparation and development of Mr. Parker's penalty phase investigation by the Public Defender's legal team versus the investigation that followed once Mr. Hitchcock and Mr. Booras took over is striking. Essentially, all mitigation investigation came to a complete halt with no follow up, nor any pursuit of the leads developed through the initial investigation by the Public Defender's Office. There was no further investigation into Mr. Parker's substantial history of mental illness and childhood trauma. Simply put, Mr. Booras, and ultimately Mr. Hitchcock as lead counsel, ineffectively relied upon what was a wholly and admittedly incomplete and superficial mitigation investigation that cannot be attributed to any justifiable or reasonable strategic decision.

Neither Mr. Hitchcock nor Mr. Booras had ever handled a capital case through to a penalty phase at the time of Mr. Parker's trial (PC-T. 18, 270). In fact, Mr. Parker's trial is Mr. Hitchcock's one and only capital case (PC-T. 18). Admittedly, Mr. Hitchcock's understanding of a penalty phase and the law regarding statutory mitigators was limited exclusively to what Mr. Booras

explained to him (PC-T. 71). While Mr. Hitchcock engaged an investigator, Mr. Cary Kultau, he too had very little experience developing mitigation and had never worked on a capital case prior to Mr. Parker's trial (PC-T. 21). The trial court failed to consider trial counsel's collective lack of experience.

Overall, Mr. Hitchcock's participation in preparing for the penalty phase was limited to hiring psychologist Dr. Glenn Caddy, speaking with Mr. Parker's wife and mother, and reviewing Mr. Booras' opening statement (PC-T. 23-24, 73). Trial counsel hired only a single psychologist, Dr. Glenn Caddy, who was initially contacted to determine Mr. Parker's competency to stand trial and was provided with no background materials and interviewed no collateral witnesses (PC-T. 77, 83-84, 228, 290, 343) (EXH. 11). Dr. Caddy conducted no psychological testing and relied almost entirely upon Mr. Parker's self-report (PC-T. 459). Additionally, Mr. Hitchcock did not direct Mr. Kultau to pursue any of the leads provided by the previous investigators. Mr. Kultau spent no time whatsoever interviewing potential lay witnesses or conducting mitigation investigation for Mr. Parker's penalty phase (PC-T. 387-391) (EXH. 19). As a result, he uncovered none of the evidence that Mr. Parker was able to present during his 2006 evidentiary hearing (Id.).

While Mr. Hitchcock admitted that he was ultimately responsible for both the guilt and penalty phases of Mr. Parker's trial (PC-T. 24), both Mr. Hitchcock and Mr. Booras testified that it was Mr. Booras who took control of the penalty phase (PC-

T. 24, 272). Mr. Booras was responsible for the development and presentation of Mr. Parker's penalty phase (PC-T. 72, 273). However, the majority of Mr. Booras' preparation time was spent doing research and drafting legal motions for *both* penalty and guilt phase (PC-T. 336-337) (EXH 17, 18). It was evident that there was very limited preparation for the penalty phase prior to Mr. Parker's conviction[5] (PC-T. 23-24, 335).

As a result, trial counsel approached Mr. Parker's May 1990 penalty phase date unprepared, having interviewed not a single penalty phase witness, failing to direct his investigator to pursue any mitigation, and failing to ensure a competent mental health evaluation by the only mental health expert he hired. Counsel presented only six witnesses at the penalty phase: Dr. Caddy, three investigators, Mr. Parker's mother, and the co-defendant, who testified that Mr. Parker was drinking on the day of the crime (PC-T. 23-24, 335; see also R. 2174-2286). Mr. Kultau testified solely to the criminal record of the victim, while Mr. Finkelstein

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[5] Mr. Hitchcock's billing does not indicate any penalty phase preparation, with the exception of brief telephone conversations with Dr. Caddy, prior to May 16, 1990. While it does indicate meetings with Mr. Booras prior to this date, penalty phase preparation is not indicated and both Mr. Hitchcock and Mr. Booras testified that in addition to his duties and penalty phase attorney, Mr. Booras assisted in the preparation for guilt phase and legal issues for purposes of appeals (PC-T. 23-24, 335).

and Mr. Moore testified to the initial investigation they conducted. Their testimony amounted to nothing more than a cursory, second-hand account of Mr. Parker's childhood (PC-T. 13-14, 48-49; see also R. 2202-2216, 2276-2286).

1. Trial Counsel Did Not Adequately Investigate Family History

Trial counsel did not invest the time or effort required to conduct a reasonable investigation of readily available mitigation evidence. Upon taking over the case in September 1989, trial counsel was aware of a wealth of possible mitigation available from the initial contacts made by the previous investigators. Essentially, trial counsel had preliminary information that would have caused a reasonable attorney to investigate further.

Howard Finkelstein testified that he spoke with Mr. Parker's mother, father, sister, and half brother during the course of his investigation (PC-T. 172). In addition, Carlton Moore traveled to Jacksonville, Florida where Mr. Parker grew up (PC-T. 206-07). While in Jacksonville, Mr. Moore located and spoke to Mr. Parker's sister, his minister, at least two of his teachers, a foster parent of Mr. Parker's sister, an ex-boyfriend of Mr. Parker's mother, and Mr. Parker's mother (PC-T. 207). These witnesses, together with the psychosocial history that Mr. Finkelstein developed from Mr. Parker's self report, provided Mr. Booras and his legal team with a number of leads and avenues to investigate further (PC-T. 171-172, 206-207) (EXH. 13, 14).

However, as Mr. Finkelstein testified to at the evidentiary hearing, the investigation that he and Mr. Moore had begun was merely the preliminary investigation laying the groundwork for penalty phase preparation. Indeed, the entire social history that Mr. Finkelstein started was based exclusively on Mr. Parker's self-report and served only as a preliminary road map for further detailed background investigation (PC-T. 191-192) (EXH. 13). When asked if the psychosocial history was the end of the investigation, Mr. Finkelstein responded:

> Oh, no, no. The psychosocial history is really the beginning…it's really an outline or a road map to use to go out to fully develop either additional information or corroboration, so that when you reach a penalty phase, you don't just have the word of a defendant to rely upon…

(Id).[6]

Despite this initial background information, Mr. Booras neither contacted nor utilized a single witness from Mr. Parker's background to corroborate or develop any of the facts that were alleged to the jury at sentencing. Mr. Booras pursued none of the leads the previous investigators had gathered and obtained no additional records. Trial counsel contacted no witnesses who had knowledge of

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[6] It should be noted that Mr. Finkelstein has been an attorney or investigator for 30 years and has participated in investigating for a capital penalty phase in at least 10 or 12 cases and provided counsel or advice on numerous others (PC-T. 191). In those cases in which he participated, Mr. Finkelstein would not have stopped his investigation with only information provided by the defendant and a few family members as was done here by trial counsel (Id.).

Mr. Parker's everyday life as a child with a schizophrenic mother, and consulted no experts to investigate the effects and implications of Mr. Parker's mother's schizophrenia her son (PC-T. 77-78, 286-287). Neither Mr. Booras, nor the public defender investigators, can recall ever meeting each other to discuss the information that was developed or to weigh the negative and positive aspects of the preliminary information obtained (PC-T. 176, 275-277).[7] Mr. Finkelstein

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[7] Mr. Booras' billing records do not indicate that he spoke to either Finkelstein or Moore about these witnesses or other available evidence (PC-T. 275-277) (EXH. 17, 18). Mr. Booras did indicate in his billing when he spoke with other penalty phase witnesses including Mr. Parker's mother and the co-defendant in this case, both of which occurred only four days before Mr. Parker's penalty phase began (Id.). Mr. Hitchcock met with the attorney from the public defender's office after he took over Mr. Parker's case for approximately two hours and on another occasion to organize the case file and retrieve a deposition transcript, though Mr. Hitchcock can not recall discussing penalty phase issues (PC-T. 22). Both Mr. Hitchcock and Mr. Finkelstein recalled meeting at some point prior to Mr. Finkelstein's testimony. However, Mr. Hitchcock's billing reflected one meeting for only one hour on December 26, 1989, without Mr. Booras (See EXH. 3). Mr. Hitchcock recalled a brief meeting in the hallway of the courthouse to discuss an overview of Mr. Parker's case (PC-T. 74-75). Mr. Finkelstein could not recall ever meeting Mr. Booras, nor could he recall ever being prepped by Mr. Booras or Mr. Hitchcock in anticipation of testimony (PC-T. 175-176). See Sochor, 883 So. 2d 772 (Fla. 2004) (finding "clearly deficient" the performance of counsel who did not interview or prepare witnesses for testimony).

Mr. Moore only had a specific recollection as to his involvement prior to Mr. Hitchcock taking over the case and only as to being prepared to testify. Interestingly, he had no specific recollection of meeting with either trial counsel between the times the public defender's office conflicted off the case and preparing to testify. Mr. Moore clarified that his preparation was merely "an indication of the type of questions that would be asked and the kind of information that I would respond to" (PC-T. 203). He admitted that neither Hitchcock nor Booras ever

emphasized the importance of such an evaluation of the evidence. When asked if, based on his experience as an investigator and attorney for over 30 years, he would present a witness that had negative things to say about a defendant, he replied:

> Maybe**. It would really depend on what the positive was, what the negative was, and I would have to balance and weigh that.** If the positive was something that was beneficial, I would probably take the risk, depending on what the negative was, because by that point, the jury already has a negative opinion. They've just convicted someone of capital murder.

(PC-T. 301). In Mr. Parker's case this determination was never made because neither Mr. Booras nor Mr. Hitchcock ever met with potential mitigation witnesses.

The only family members that Mr. Booras spoke with were Mr. Parker's mother and wife (PC-T. 273-274). Despite being explicitly aware of Ms. Sander's long-term diagnosis of schizophrenia, Mr. Booras conducted no investigation into Ms. Sanders' mental illness and what affects she and her illness had on Mr. Parker's development (PC-T. 286-287). Ultimately, Mr. Booras conceded that he never

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asked for his assistance in contacting those witnesses he had interviewed. Further, Mr. Moore only remembered discussing the content of the interviews he conducted with family and social history witnesses in the context of preparation for his testimony. It is important to note, that Mr. Booras and Mr. Hitchcock also had no notes of the meetings Mr. Moore had with the witnesses in Jacksonville as his car had been broken into during his investigation and all those records were stolen (PC-T. 309). There is no evidence that trial counsel had any information from those valuable mitigation resources.

even spoke to Mr. Parker's sister, Mr. Parker's former Department of Children and Families case worker, or his schoolteachers (Id.). Counsel could not have made a reasonable strategy decision to exclude the evidence available through these witnesses without ever having spoken to them.

While Mr. Hitchcock utilized his own investigator, Cary Kultau, his primary role was to investigate guilt phase issues and he was never instructed to pursue mitigation by either Mr. Hitchcock or Mr. Booras (PC-T.389-390). In fact, Mr. Booras testified that he felt it was the investigator's responsibility to conduct the mitigation investigation (PC-T. 285). Specifically, Mr. Booras explained it was his practice to simply inform his investigator to investigate for a penalty phase without any further direction (Id.). Yet, Mr. Kultau testified that he never contacted or met with any witnesses from Jacksonville where Mr. Parker grew up (PC-T. 301) Mr. Kultau did not interview **any** witnesses pertaining to Mr. Parker's background, childhood, schooling or family (PC-T. 389). Mr. Kultau's billing confirmed that he did not spend any hours conducting mitigation investigation (EXH. 19). The only task Mr. Kultau performed in preparation for Mr. Parker's penalty phase was to investigate the background of the victim, which was the subject of his testimony at trial (PC-T. 387; see also R. 2174-2183). It is clear that Mr. Booras had no idea of defense counsel's responsibilities in a capital case.

Throughout the Wiggins Court's analysis of what constitutes effective

assistance of counsel, they turned to the American Bar Association (ABA) Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. See Wiggins at 2536-7. Under the ABA Guidelines, there are specific requirements which should be met from the initial appointment on a case through its conclusion.[8] Guideline 11.4.1(c) states the "investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." Id. at 2537. In order to comply with this standard, counsel is obliged to begin investigating **both** phases of a capital case from the beginning. Guideline 11.8.3(A). This includes requesting all necessary experts as soon as possible. See Commentary on Guideline 11.4.1(C). It was ineffective assistance for Mr. Booras to generally discharge these duties to an investigator. In this case, however, Mr. Booras did not even do that.

Further, trial counsel failed to obtain a single record related to Mr. Parker's medical, correctional, foster care, or school history[9] and never obtained any police

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[8] The ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases was updated in February 2003. However, references in this case will be to the edition that was in effect from 1989 to February 2003, during the time of Mr. Parker's trial.

[9] Post Conviction Counsel was able to obtain numerous records including, Mr. Parker's school records and his mother's medical records. The lower court precluded Mr. Parker from admitting any of these records despite his mental health

reports from a prior conviction used as an aggravator (PC-T. 77, 290). Mr. Finkelstein's recollection with regards to acquiring various records was that it was going to require a lot more work than he or Mr. Moore had put into it at the time the case was assigned to Mr. Hitchcock. By Mr. Hitchcock's and Mr. Booras' own account, they never pursued obtaining any records. Had trial counsel made a diligent search, there would have been a wealth of records of available.

Early psychological testing results, contained within Mr. Parker's school records, indicate an IQ score of 78. A reasonable attorney compiling evidence for a mitigation case would have recognized the significance of such a score. Further, counsel knew Mr. Parker's mother had been hospitalized numerous times for schizophrenia, yet never attempted to obtain medical records of her hospitalizations. Had they done so, they would have seen the severity of her illness. Finally, had counsel obtained records of his 1979 conviction, including court documents and police reports, counsel would have been able to challenge the factual basis of that victim's testimony at the penalty phase.

In Rompilla, the trial attorneys spoke to Rompilla about his own background, spoke to his family members and hired three mental health witnesses

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experts relying on the materials in forming the basis for their opinion regarding Mr. Parker's diagnosis. See Court Exhibit, Background Materials, Volume I and II. Supp. PC-R2. V.2-3.

to look into his mental state at the time of the offense, as well as competency and sanity. Despite the attorneys' difficulties in obtaining information from these sources, Rompilla's counsel failed to pursue any other historical source. However, in post-conviction, several sources were identified which could have been pursued in developing a mitigation case, particularly school records and records of Rompilla's juvenile and adult incarcerations. The Court found that Rompilla's attorneys, regardless of the investigation that was pursued, were ineffective for failing to review a file of his prior conviction, which counsel knew the prosecutor intended to use as an aggravator. In Mr. Parker's case, not only did counsel fail to obtain any school records or medical records, but also failed to obtain any documentation of Mr. Parker's prior convictions.

Trial counsel, Mr. Booras, could not provide any strategic decision for limiting his investigation especially with regard to significant social history witnesses such as Mr. Parker's sister, friends, neighbors and case workers. Neither Mr. Booras nor Mr. Hitchcock gave any reasonable strategy for not requesting school records, medical records, police reports relating to a prior conviction used as an aggravator and/or corrections records. Mr. Booras also could not point to any aspect of this type of evidence that would contradict or jeopardize his theory of

humanizing Mr. Parker.[10] "Any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses…" Wiggins at 2537.

2. Trial Counsel Did Not Present Adequate Mental Health Expert Testimony or Retain Necessary Experts.

Mr. Hitchcock sought the assistance of Dr. Glenn Caddy as a mental health professional (PC-T. 83). Mr. Hitchcock hired Dr. Caddy because he had worked with him on previous cases, though not capital cases (PC-T. 79). Despite hiring a psychologist to evaluate Mr. Parker, trial counsel rendered the psychologist incompetent by failing to provide him with any of the necessary materials to conduct a thorough and comprehensive evaluation. According to both Mr. Hitchcock and Mr. Booras no records or background materials were ever provided to Dr. Caddy, nor were they ever obtained (PC-T. 77, 290). Additionally, trial counsel did not hire any mental health experts to conduct neuropsychological testing. Significantly, Dr. Caddy was initially hired to evaluate Mr. Parker only for sanity and competency issues and the possibility of a voluntary intoxication

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[10] While Mr. Booras indicated that he did not want to present the testimony of Mr. Parker's wife as she had negative things to say about Mr. Parker, he could not say the same for any other witness which Mr. Parker presented in post-conviction because he never even spoke to them. He likewise could not indicate how calling the witnesses from Jacksonville would trigger the negative behavior known by Mr. Parker's wife.

defense (PC-T. 84, 288, 410). Only later was Dr. Caddy asked to evaluate Mr. Parker's case for the purposes of establishing mitigation. (PC-T. 410).

While Dr. Caddy was hired by Mr. Hitchcock, Mr. Booras admitted that ultimately he was responsible for directing Dr. Caddy's evaluation of Mr. Parker. (PC-T. 287). Mr. Booras did not believe it was his role to determine whether background materials were necessary for his experts, instead he simply left that decision up to the psychologist with whom he was working (Id.). Mr. Booras testified:

> **Q**: You [Mr. Booras] stated earlier, and I [undersigned counsel] just want to be clear, would you normally provide experts with any background materials on the defendant?
> [. . .]
>
> **A**: Initially, no.
>
> **Q**: Okay
>
> **A**: Unless they [psychologist] asked for it.
>
> **Q**: So you would never provide them [psychologist] with anything?
>
> **A**: Not initially.
>
> **Q**: Only if they asked for it subsequent to that?
>
> **A**: Correct

(Id.). Further, he never inquired whether any additional testing, such as a neuropsychological examination, was recommended and never made any individuals with background information regarding Mr. Parker available to speak

with Dr. Caddy (PC-T. 290, 343). Mr. Booras ignored the fact that he was ultimately responsible for the penalty phase.

At the evidentiary hearing, Dr. Caddy explained that he is a clinical and forensic psychologist (PC-T. 408). In preparation for his evaluation of Mr. Parker, Dr. Caddy testified that the materials provided to him were "quite sparse" (PC-T. 411). Dr. Caddy recalled that the only background materials he received from trial counsel included a memo, to Warner Olds from Howard Finkelstein, which contained a background summary consisting of five pages and a probable cause affidavit with Mr. Parker's charges (Id.). Essentially, this memo only contained lists of information, but was not itself the detailed account that would be found in actual records for schooling and employment. The only family member that Dr. Caddy interviewed was Mr. Parker's mother (PC-T. 417). However, he was provided with no records whatsoever pertaining to the severity of her schizophrenia, hospitalizations, or the circumstances of Mr. Parker's home life with her (PC-T. 419).

Dr. Caddy testified regarding his previous evaluations of other defendants for the purpose of establishing potential mental health mitigation (PC-T. 413-414). Typically, Dr. Caddy requested all information that would be available regarding the defendant and could not explain why he did not receive those materials in preparation for Mr. Parker's trial (Id.). In Dr. Caddy's experience, trial counsel's

investigators characteristically developed the sources and obtained the information for evaluation (PC-T. 414). In contrast, prior to Mr. Parker's evidentiary hearing, Dr. Caddy reviewed two volumes of documents that included a life history, school records, arrest history and pre-sentence investigation reports, among other records (PC-T. 416) (Court EXH. C and D, Supp. PC-R2. 39-645).

Dr. Caddy made clear at the evidentiary hearing that these types of records are very important to establish mitigation and determine what issues need to be further examined (Id.). For example, Dr. Caddy noted that just prior to the evidentiary hearing, he learned for the first time that Mr. Parker's school records indicated an IQ score of 78, which placed Mr. Parker in the borderline retardation range of intelligence (PC-T. 421). Had Dr. Caddy known this prior to trial, he would have recognized a need for further examination of Mr. Parker's functioning prior to and at the time of his trial (Id.). Because he was not made aware of this pertinent information, Dr. Caddy was unable to find that Mr. Parker met any of the statutory mitigators when he testified at Mr. Parker's penalty phase (PC-T. 449, 462-453).

Dr. Caddy also admitted that due to his lack of preparation and sparse background materials, his opinion was based on nothing but Mr. Parker's self-report (PC-T. 459). As a result, the State was able to thoroughly discredit him on cross-examination, including that his entire opinion was based on Mr. Parker's

self-report (R. 2251); that Dr. Caddy's conversation with Mr. Parker's mother was over the telephone and lasted no more than thirty (30) minutes (Id.); that Dr. Caddy did not read any police reports or witness statements (R. 2256); that Dr. Caddy had never seen Mr. Parker intoxicated (R. 2250); and, that Dr. Caddy did not conduct any psychological testing on Mr. Parker (R. 2260). Dr. Caddy admitted during trial that it would have been better to talk to those persons who came in contact with Mr. Parker on a daily basis, yet he did not interview any collateral sources (R. 2257). In fact, he conceded on cross-examination that Mr. Parker did not meet the requirements for either of the two statutory mental health mitigators in Florida, Fla. Stat. 941.121(6)(b) and (f) (R. 2262, 2271). This negatively impacted the credibility of his expert opinion and testimony. The State capitalized on this shortcoming during closing statements, arguing that the information relied on by Dr. Caddy was primarily from Mr. Parker, and as such, if erroneous, then Dr. Caddy's opinion was erroneous (R. 2300).

Moreover, the lower court highlighted Dr. Caddy's incompetent evaluation by noting during the evidentiary hearing that Dr. Caddy did not have enough materials, nor had he performed enough investigation to opine on whether Mr. Parker met the standards for statutory mitigation. When the State asked Dr. Caddy if his opinion had changed with regards to Mr. Parker's impairment, the Court cautioned that **". . .to have an opinion like that he would have to have a basis**

for it, in other words, more investigation or learned more things" (PC-T. 450).

As Wiggins, makes clear the solitary act of retaining a mental health expert is insufficient to constitute the requisite "reasonable investigation" and does not substitute for the investigation of the defendant's social history. In Wiggins, the retained psychologist "[C]onducted a number of tests on petitioner. . .conclud[ing] that petitioner had an IQ of 79, had difficulty coping with demanding situations and exhibited features of personality disorder" but "revealed nothing of his 'life history.' Wiggins at 2536.

In Mr. Parker's case, the situation is even more egregious. In Wiggins, the psychologist conducted interviews with some of Mr. Wiggins' family members and numerous psychological tests. Here, Dr. Caddy only conducted a brief interview with Mr. Parker's mother and a brief psychological screening. Trial counsel had knowledge of available family members and background witnesses and just never bothered to contact them or make them available to their expert. Trial counsel were aware of Ms. Sanders severe schizophrenia but simply did not bother or even consider providing any information relating to her illness for Dr. Caddy to review. Nor did trial counsel request that Dr. Caddy conduct any psychological or neuropsychological evaluation.

3. Trial Counsel Failed Conclusion (call this something different)

It is clear that trial counsel did not utilize a single witness from Mr. Parker's

background to corroborate or develop any information he was trying to present to the jury. Instead he relied on second hand testimony by presenting the investigators who were then thoroughly discredited by the state on cross-examination.

Wiggins specifically addresses the failure by trial counsel to investigate a capital defendant's social history for the purpose of developing mitigation. It clarifies the fact that applicable professional standards require such investigation. These principles of professional representation are not new. In Hamblin v. Mitchell, 354 F. 3d 482 (6th Cir. 2003), the court explained:

> [t]the standards merely represent codification of longstanding, common sense principles of representation understood by diligent, competent counsel in death penalty cases. The ABA standards are not aspirational in the sense that they represent norms newly discovered after Strickland. They are the same type of longstanding norms referred to in Strickland in 1984 as "prevailing professional norms" as "guided" by "American Bar Association and the like.

It is well settled from the Strickland line of cases that it is ineffective to simply not investigate possible mitigation for presentation at the penalty phase. Counsel could not have made a reasonable strategy decision to exclude certain testimony and evidence without first knowing what the evidence was. This could only be accomplished through a thorough investigation.

Counsel, or any investigator for counsel, admittedly never spoke to the abundant witnesses who were available and had information relevant to the defense theory that Mr. Parker's life should be spared due to his horrific childhood. Had

trial counsel investigated Mr. Parker's social history, obtained any records, or interviewed Mr. Parker's family members and individuals involved with his childhood, schooling and foster care placements, Mr. Hitchcock and Mr. Booras would have discovered a wealth of information that would have both been compelling in its own right and would have strengthened the testimony of Mr. Parker's mental health expert, Dr. Caddy. Any negative information that may have come out at the penalty phase could have been limited or explained, and was far outweighed by the benefit of the detail and corroboration of Mr. Parker's unstable, neglected and abusive childhood. This is evidenced by the testimony at the evidentiary hearing.

B. Crucial Mitigation Evidence was not Presented at Mr. Parker's Penalty Phase

1. Trial Counsel Did Not Present the Severe Deprivation and Abuse that Mr. Parker Suffered as a Child

Having conducted virtually no investigation, Mr. Booras elicited general evidence that was merely the tip of the iceberg of the abuse and brutalization that characterized Mr. Parker's formative years. In denying Mr. Parker relief, the lower court stated:

> . . . the defense was allowed to present the most dismal and mitigating facts of Parkers [sic] life to the jury through the use of articulate, credible, and well prepared witnesses. The Finkelstein/Moore [sic] mitigation presentation was credible, condensed, unimpeachable and heart rendering version of Parkers [sic] early life based on the information they gathered during their investigation.

(PC-R2. 350).

However, both the trial and post conviction record clearly refute this line of reasoning. All of the testimony presented to the jury about Mr. Parker's childhood was hearsay relayed through the previous investigators in a way that diminished its effectiveness as compared to live testimony. The investigators' summaries of their conversations with family members and collateral witnesses were merely overviews of the general information they gathered. Repeatedly, the investigators qualified and expressly limited their testimony as being nothing but what Mr. Parker or his family members told them (R. 2207, 2209, 2215). Incredibly, one investigator said Mr. Parker had a twin brother while the other investigator stated he did not (R. 2202, 2211, 2212, 2284). One investigator did not know who Mr. Parker's girlfriend was or recall the names of either Mr. Parker's wife or sister (R. 2284, 2285). As a result, the State was able to thoroughly discredit both of the investigators based on the fact that they were testifying to hearsay evidence and Mr. Parker's self-reporting (R. 2210-2213, 2284). Contrary to the lower court's findings, both Mr. Finkelstein and Mr. Moore were effectively impeached by the State.

Further, the record of the evidentiary hearing shows that trial counsel failed to meet and prepare with the witnesses that were presented (PC-T. 234). Mr. Booras met with Mr. Finkelstein for the first time just before he testified (Id.). Therefore,

both the jury and the judge either never learned, or at best heard only vague secondary evidence, that Mr. Parker's formative years were fraught with poverty, abuse, neglect, chaos and exposure to brutal violence. The testimony of Virginia Holcomb, Princess Ferrette,[11] Gregory Pender, and Dr. Larry Richardson presented at Mr. Parker's evidentiary hearing support several non-statutory mitigating factors that should have been presented to Mr. Parker=s penalty phase jury.

It was unrefuted at the evidentiary hearing that Mr. Parker's mother, Ms. Sanders, had a long-term diagnosis of schizophrenia. Due to her mental illness she was unable to perform the most basic maternal duties. As each and every factual witness explained during the evidentiary hearing, Mr. Parker was subjected to bizarre and often psychotic behavior whenever his mother decompensated as a result of her schizophrenia. Ms. Ferrette testified that she and her brother lived in constant fear (PC-T. 231). Ms. Ferrette recalled that her mother would have breakdowns where she would destroy everything in the house, take off her clothes and climb into the closet of Mr. Parker=s bedroom (Id.). Ms. Virginia Holcomb, a

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[11] Princess Ferrette, Mr. Parker's younger sister and closest sibling emotionally, testified that she was available to testify and willing to help with the investigation in any way possible (PC-T. 247). In fact, she was initially contacted by both investigators for the Public Defender's office and helped Mr. Moore when he traveled to Jacksonville providing information about individuals and locations (Id.). However, she was never contacted again after trial counsel took over Mr. Parker's case; not by an attorney, not by an investigator and not by any mental health expert--not even to be notified of Mr. Parker's trial date (Id.).

long term family friend, testified that she twice had to commit Mr. Parker=s mother to a state mental institution for bizarre behavior such as hording her urine, losing excessive amounts of weight, walking around her neighborhood naked or in her young daughter=s clothes and obsessively bleaching her house (PC-T. 217-219). Mr. Gregory Pender, Mr. Parker=s childhood friend, testified that he witnessed numerous times where Mr. Parker=s mother would drink excessively and walk around the house and neighborhood naked in front of Mr. Parker=s friends and neighbors (PC-T. 367). Dr. Richardson, Mr. Parker's protective services worker, testified he would arrive at Mr. Parker=s home to find his mother screaming in the front yard, naked, having just turned the home into complete disarray because she believed it was infested with germs (PC-T. 361). Mr. Parker would be hysterically crying while the police came to take his mother into custody (Id.).

As Ms. Ferrette recalled, she and her brother endured severe abuse and neglect as a result of their mother=s psychotic behavior. Ms. Ferrette testified that their mother, during periods of decompensation, would obsessively write down the serial numbers of the canned food in the house and withheld the food from her children because she believed that it was poisoned (PC-T. 233-234). Both Ms. Ferrette and Ms. Holcomb recalled Mr. Parker=s mother beating Mr. Parker, including hanging him outside of a second story window by his ankles threatening to drop him (PC-T. 221, 237). Additionally, Ms. Ferrette recalled an instance

where Mr. Parker hid under his bed from his mother during one of her episodes and she took boiling water and threw it under the bed in an attempt to get him out (PC-T. 235-237). Mr. Parker repeatedly had to observe his sister being beaten as well (PC-T. 238).

Dr. Richardson testified that during the time he worked with Mr. Parker he could not recall Ms. Sanders being stable in the home for more than six to seven months at a time (Id.). As a result, when Mr. Parker and his sister lived with their mother they were abused, neglected and subjected to frightening psychotic episodes. During the periods where Mr. Parker=s mother had to be committed to state hospitals for psychiatric care, Mr. Parker was shuffled from home to home in and out of foster care where he would suffer physical and sexual abuse at the hands of his foster parents and other children.

Ms. Holcomb testified that Ms. Sanders was unable to care for her children. She estimated that Mr. Parker lived in foster homes 90% of the time. (PC-T. 220). Even during the times where she was not committed to hospitals, Mr. Parker was unable to live with his mother because she was drinking and Apartying." She sent Mr. Parker to live with others, where he would suffer physical abuse (PC-T. 220, 234). In the event that Mr. Parker was living with his mother, she would Aparty@ and bring home men, both the children would observe their mother being beaten by the various men she brought home (PC-T. 239-240). Ms. Ferrette recalled that she

would be forced to sleep in the living room when her mother's boyfriends would spend the night and oftentimes, Mr. Parker would be beaten with switches and cords by these men while trying to defend his mother from being attacked by them (Id.).

Due to his mother's erratic behavior, Mr. Parker and his sister both lived with a woman known as "Momma Hall" for significant periods of time (PC-T. 223, 244). Ms. Holcomb could recall hearing Mr. Parker crying out from beatings at Momma Hall's house when she lived across the street from Ms. Hall (PC-T. 222). Ms. Ferrette recalled that "Momma Hall" was an especially cruel person and would beat all of the children who were staying in her home (PC-T. 245). In addition, Ms. Ferrette testified that Ms. Hall sexually molested her and she would submit to the molestation in order to avoid being beaten (Id.). Because of the abuse, Ms. Ferrette recalled that she, her brother, and many of the other children living in this home would run away (Id.). In fact, Ms. Holcomb also could recall that on a number of occasions, Mr. Parker ran away from Ms. Hall's home and would sleep on the church steps. On one occasion he was beaten by the police in front of his whole neighborhood and brought back to Ms. Hall's home (PC-T. 223-224). Ms. Holcomb recalled that Mr. Parker was a "sad" and "unhappy child" whose mother did not care for him (PC-T. 213, 224). Mr. Parker continued to suffer abuse when he entered the foster care system.

The effects of Mr. Parker=s environment on his psychological functioning were apparent early in Mr. Parker=s life. Dr. Larry Richardson testified that he initially became involved with Mr. Parker as an eleven-year-old patient at the Diagnostic and Assessment Unit that was operated by an organization called the Child Guidance Center (PC-T. 350, 353-54). This was a specialized unit to evaluate children who were having mental health or emotional problems (Id.). Mr. Parker was initially referred to the Diagnostic and Evaluation Center because he completely stopped speaking or communicating with anyone (Id.). While at the Center, Mr. Parker did not speak one word for at least sixty days (Id.). Dr. Richardson testified that the preliminary diagnostic impression of Mr. Parker was that he suffered from "childhood schizophrenia, sometimes called autism" or that he was "emotionally disturbed or had some sort of emotional disturbance" (Id.). After spending some time with Mr. Parker and spending time observing him, Dr. Richardson believed that Mr. Parker was capable of communicating but was choosing not to do so (PC-T. 355-356). Dr. Richardson believed, based on his experience as a protective services worker, that Mr. Parker was experiencing a condition known as selective mutism (PC-T. 356-357). Dr. Richardson explained that selective mutism occurs in children and is triggered by a traumatic event so great that the child chooses to "shut out their environmental circumstances that would cause them to have intrusive recollections or other experience as a result of

the trauma" (Id.).

In addition, Mr. Parker's low intellectual functioning was apparent early on. Mr. Parker's school records from ninth grade in 1975, indicate borderline mental retardation with a score of 78.[12] At one point, as Dr. Richardson noted, Mr. Parker was at least two grades behind children in his same age group (PC-T. 363).

As Dr. Richardson testified, two years after he had been assigned to Mr. Parker=s case, he recommended that Mr. Parker be placed in the foster care system officially because no family members were willing to care for him (PC-T. 364-365). Mr. Parker=s father refused to take him in because he had a wife and family and "did not want to get involved with him" (PC-T. 365). At one point, Mr. Parker was placed in a foster care home where the foster mother would only accept teenage boys. This home was later closed because of abuse allegations (PC-T. 357-68). Dr. Richardson was aware of Mr. Parker running away from many of his foster homes. On at least one occasion, Dr. Richardson took Mr. Parker into his own home for a night because Mr. Parker had no where else to go (PC-T. 368-69). Dr. Richardson had to buy Mr. Parker clothes and recalled him screaming out in the middle of the night from nightmares (PC-T. 369-370). Dr. Richardson tried to get Mr. Parker the help he needed however, adequate services such as appropriate

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[12] School Psychology Service Unit, Duval County Board of Education, 11/14/75. Defendant=s Court EXH. C.

therapeutic counseling were just not available for African-American children at the time Mr. Parker was growing up in Jacksonville (PC-T. 371).

Furthermore, not only did Mr. Parker suffer abuse at the hands of his mother and his foster parents, but also he suffered sexual abuse by his own peers (PC-T. 257-258). Gregory Pender, Mr. Parker=s childhood friend, recalled one event where he and other boys were spending the night at Mr. Parker=s home. Mr. Pender observed three boys having sex with Mr. Parker, forcing themselves on him (Id.). On yet another occasion, Mr. Pender observed a boy taking Mr. Parker inside an abandoned house and forcing Mr. Parker=s head down to perform oral sex. Id. Mr. Pender was also aware of a third incident in which a boy forced himself on Mr. Parker so brutally that Mr. Parker=s rectum was ruptured (Id.).

Contrary to the circuit court's order, the details presented at the evidentiary hearing are not merely cumulative. These witnesses gave uncontroverted first hand accounts of the extreme suffering and brutal abuse that Mr. Parker experienced, that was not presented at Mr. Parker's penalty phase. Counsel's failure to discover and present this evidence and the effect this emotional and physical neglect and abuse had on Mr. Parker constitutes ineffective assistance. See State v. Lara, 581 So. 2d 1288, 1289 (Fla. 1991) (affirming finding of ineffective assistance when witnesses would have testified on defendant's difficult child hood including eating dirt because his father would not feed him, harsh abuse by father, early alcoholism,

hearing the devil's voice, and a head injury.")[13]

The State did not present any evidence to refute the facts detailed by these witnesses. The only attempt to discredit them was to barrage each witness with the facts of Mr. Parker's prior convictions and charges pending at the time of his trial. The State's questions overlook the fact that, despite trial counsel's best efforts, Mr. Parker's prior convictions in 1979 and 1990 were admitted at the penalty phase and the jury was made aware of the facts of those convictions. As for the charges pending at the time of trial, the State was prohibited from mentioning the pending cases and any facts pertaining thereto (R. 2091-2094). Moreover, the State has not presented any evidence demonstrating that the lay witnesses in any way testified

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[13] This Court has found in a similar case that counsel's failure reasonably to investigate and present mitigation evidence constituted deficient performance. In Ragsdale v. State, 798 So. 2d 713 (Fla. 2001), counsel was deemed ineffective for failing to investigate and present mitigating evidence about Ragsdales' childhood and mental health. Id. at 719. Lay testimony at the evidentiary hearing revealed that Ragsdale had a "horrific" childhood, enduring abuse from his father and migrating with his impoverished family from trailer to trailer. Id. at 716-717. Ragsdale abused drugs and suffered head traumas from childhood accidents. Id. at 171. Counsel did present testimony of the head trauma, but only in a limited fashion. Id. Ragsdale's attorney did not present expert testimony at the penalty phase about the abuse, substance abuse, or the head traumas. Id. As with Mr. Parker's counsel, Ragsdale's counsel was appointed after a previous attorney had withdrawn and wrongly assumed that the case was trial-ready. Id. at 718. The Court held that counsel's inadequate investigation precluded strategy as justification for his failure to present evidence of Ragsdale's childhood; "since counsel did not conduct a reasonable investigation, he was not informed as to the extent of the child abuse suffered, and thus he could not have made an informed strategy decision not to present mitigation witnesses." Id. at 720.

untruthfully.

2. Trial Counsel Did Not Present Evidence of Mr. Parker's Mental Infirmities

Because of trial counsel's inadequate investigation he never discovered or presented readily available evidence that Mr. Parker suffers frontal lobe brain damage, low intellectual functioning, and major mental disorders. In Mr. Parker's case, counsel failed to provide his client with "a competent psychiatrist . . . [to] conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Ake v. Oklahoma, 105 S. Ct. at 1096 (1985). Although Mr. Parker's trial attorneys did retain the services of psychologist Dr. Glenn Caddy, it is clear that he almost exclusively relied on the information gleaned from Mr. Parker with respect to his social and medical history.

Both the expert and trial counsel have a duty to perform an adequate background investigation. However, as argued above, Dr. Caddy did not request and defense counsel simply did not give Dr. Caddy any background material. As a result, the judge and jury were deprived of the facts necessary to make a reasoned finding. Information necessary in order to render a professionally competent evaluation was not investigated. Mr. Parker's judge and jury were not able to "make a sensible and educated determination about the mental condition of the defendant at the time of the offense." Ake, 105 S. Ct. at 1095.

At Mr. Parker's evidentiary hearing, Mr. Parker offered the testimony of three

mental health experts who each reviewed voluminous background materials including an extensive life history, school records, pre-sentence investigation reports, witness statements, and court transcripts. PC-T. 474. Dr. Caddy's "sparse" evaluation is in stark contrast to the thorough evaluations that have now been conducted (PC-T. 411).

Dr. David Pickar testified at the evidentiary hearing that he is a board-certified psychiatrist with a special interest in schizophrenia (PC-T. 467-469). After conducting an evaluation, Dr. Pickar concluded that Mr. Parker suffers from borderline intellectual functioning from a very early age and has a very long standing history of behavioral disorders, first-degree family history of schizophrenia, a significant substance abuse problem, particularly with alcohol, and ongoing neuropsychological dysfunction (PC-T. 478-479).

According to Dr. Pickar, the fact that Mr. Parker's mother suffers from schizophrenia is quite significant to Mr. Parker's brain and intellectual functioning (PC-T. 481-482). Ms. Sander's schizophrenia is important not only because of the chaos that it created for Mr. Parker as child, but also from a genetic standpoint (PC-T. 481). As Dr. Pickar explained, having a schizophrenic first-degree family member not only raised the likelihood that Mr. Parker would inherit schizophrenia -- effects of schizophrenia can be inherited even without the full blown illness manifesting (PC-T. 480-81). As Dr. Pickar made clear, first-degree family

members with schizophrenia will pass along certain neuropsychological deficits to their offspring (Id.). In Mr. Parker=s case, Dr. Pickar testified that these brain deficits are evidenced in Mr. Parker=s low intellectual functioning (PC-T. 482). Mr. Parker's documented low IQ score, which falls in the borderline intellectual functioning range, indicates an abnormal brain (Id.). These deficits are inherited in the form of dysfunctioning brain regions, particularly, in Mr. Parker=s case, the frontal lobe region (PC-T. 483). The frontal lobes, or pre-frontal cortex, are the portion of the brain responsible for executive functioning or the ability to assimilate and integrate information, make decisions, and plan (PC-T. 485). More specifically, Dr. Pickar indicated that a person, like Mr. Parker with a frontal lobe that does not function well is "a recipe, under the right circumstances, for impulsivity, for poor modulation, and a fundamental inability to plan" (PC-T. 488). Further, "[i]ndividuals with frontal lobe dysfunction have a great deal of difficulty [. . .] changing circumstances" (Id.).

Mr. Parker=s psychological and brain deficits were exacerbated by his long history of alcohol abuse and consumption of large quantities of alcohol on the night of the crime (PC-T. 490-91). According to Dr. Pickar, alcohol "certainly played a part" at the time of the crime:

> [Mr. Parker's] going to be very sensitive to alcohol, and certainly large amounts. Individuals vary in terms of how they behave with alcohol, but in general, particularly when consumption is chronic and there=s an intolerance, what it does it can lessen a little bit of the acute

> picture of intoxication and you can see a pattern of severe impulsivity and related behaviors. So the alcohol, I think, is germane to the question at hand, and I would suspect, while it could [a]ffect somebody with a normal central nervous system quite adversely to somebody with a compromised central nervous system, I think it affects it more seriously.

(PC-T. 490-1). At the time of Mr. Parker=s penalty phase, the jury never heard the extent of Mr. Parker=s deficits and how this compromised his functioning (R. 2233-2272).

Ultimately, Dr. Pickar concluded that Mr. Parker met the two statutory mitigators that Mr. Parker was under extreme mental or emotional disturbance at the time of the crime and his ability to conform his behavior to the requirements of the law was substantially impaired (PC-T. 486-87). Dr. Pickar reached these conclusions based on evidence of Mr. Parker=s underlying mental status or brain impairment that he believes was passed along to Mr. Parker by his mother and further complicated by his intoxication (PC-T. 496). These deficits, combined with the circumstances on the night of the crime, resulted in Mr. Parker=s inability to change circumstances, his inability to plan and/or weigh consequences (PC-T. 488-87).

Dr. Barry Crown testified at the evidentiary hearing that he is a licensed neuropsychologist, a Diplomate of both the American Board of Professional Neuropsychology and the American Academy of Pain Management and a graduate professor of psychology at Florida International University (PC-T. 641). Dr.

Crown performed a thorough evaluation of Mr. Parker, including the review of background materials, two interviews, and a series of neuropsychological and IQ tests (PC-T. 645, 647). Dr. Crown=s interview and review of materials focused largely on factors that would be contributory to aspects of his cognitive performance, such as Mr. Parker=s alcohol and substance abuse, history of head trauma, and Mr. Parker=s mother=s diagnosis of schizophrenia (PC-T. 649-650, 653-654).

Dr. Crown conducted extensive testing to determine Mr. Parker=s intellectual functioning and neuropsychological impairment. These tests were designed to assess how Mr. Parker processed information in the areas of memory, visual, spatial, constructional concepts, language, attention, delayed memory, mental flexibility, and his ability to learn information and transfer it into new learning situations (PC-T. 647-649). Dr. Crown concluded that, based on Mr. Parker=s performance and his observations, Mr. Parker was cooperative, and there was no indication that Mr. Parker was putting forth poor effort or had a lack of motivation (PC-T. 648).

In Dr. Crown=s opinion, the results of Mr. Parker=s IQ testing pointed to problems in the non-dominant hemisphere of his brain, or the right hemisphere (PC-T. 646). Dr. Crown found that Mr. Parker=s full-scale IQ score was 87 (Id.). However, the significant difference between Mr. Parker=s verbal and performance

IQ was much more troubling (Id.). Mr. Parker scored a verbal IQ of 95 while his performance IQ was 78—what Dr. Crown identified as a statistically significant difference (Id.). As Dr. Crown explained, this discrepancy between Mr. Parker=s verbal and performance scores are precursors or indicators of possible mental disorders and brain damage (PC-T. 646-47).

Therefore, Dr. Crown administered a second evaluation to determine whether Mr. Parker did in fact suffer from brain damage (PC-T. 646). Based on Dr. Crown=s extensive testing, he concluded that Mr. Parker does have neuropsychological impairment in the frontal lobe region of his brain (PC-T. 649). As a result of Mr. Parker=s brain damage, Dr. Crown confirmed that Mr. Parker has difficulty with his executive functioning: concentrating, attention, understanding the long-term consequences of his immediate behavior, and controlling his impulsivity (PC-T. 650).

Dr. Crown further concluded that nothing in Mr. Parker=s records reflect that Mr. Parker suffered head trauma since he has been incarcerated. In all likelihood, as a result of the lineage of schizophrenia from his mother and inconsistencies during childhood, including lack of mothering, nurturing, nutrition and stimulation, the damage originated in Mr. Parker's early childhood (PC-T. 649, 651-52, 667). Dr. Crown further opined that even small amounts of drugs or alcohol will have a greater effect on someone, like Mr. Parker, with underlying brain disturbances.

Thus, Mr. Parker's reasoning and judgment skills were even further reduced on the night of the crime because of his alcohol consumption (PC-T. 653-654). For these foregoing reasons, Dr. Crown concluded that Mr. Parker's capacity to conform his conduct according to the law was substantially impaired, and Mr. Parker was under extreme mental or emotional disturbance at the time of the offense due to the circumstances and given his brain capacity (PC-T. 654). Again, the jury was never provided with this evidence.

Dr. Jethro Toomer testified that he is a psychologist who is a Diplomate for the American Board of Professional Psychology and the American Board of Forensic Examiners (PC-T. 559). As part of his evaluation, Dr. Toomer met with Mr. Parker on two occasions and administered certain protocols to assess intellectual academic functioning, academic skill functioning, intellectual functioning, and overall psychiatric functioning (PC-T. 563-581). Dr. Toomer explained that cultural sensitivity is a critical element when administering these protocols because most of the tests were developed from a white/middle-class perspective (PC-T. 566). The performance of individuals of a different orientation, such as African-American, require that different factors be taken into account and there must be corroboration "among all the sources of the data: the testing, the collateral data, individuals who have had contact with the individual, as well as the clinical impressions that are formed from the face to face contact" (Id.). To

corroborate what Mr. Parker told him, Dr. Toomer spoke with Mr. Parker=s sister, mother and former protective services worker and reviewed records pertaining to Mr. Parker=s background and the offense (PC-T. 564, 568-570).

Dr. Toomer explained that this type of corroboration is critical because the various sources not only provide a frame of reference with regard to Mr. Parker=s developmental process but also confirm the information through congruence (PC-T. 568-69). This is exactly the corroboration which was necessary for a competent mental health evaluation, but which was not provided by Dr. Caddy at the time of trial due to trial counsel's ineffectiveness.

In Dr. Toomer=s opinion, Mr. Parker suffers from ". . . effects of psychological deficits that are of long-standing duration," that adversely impacted his over all executive functioning and are the result of several factors (PC-T. 570). Dr. Toomer explained that Mr. Parker=s behavior and functioning vacillate along a continuum between personality disorder and major mental illness:

> . . .[W]hen you say major mental illness you're talking about one end of the continuum, you're talking about schizophrenia, bipolar affective disorder. . . [W]hen you're talking about personality disorder you're talking about the other end of the continuum, and what happens is that individuals vacillate along that continuum, and oftentimes[[. . .]]the personality disorder in essence becomes a major mental illness, there's kind of like a progression from personality disorder, as it becomes more severe, as more symptoms become apparent, as the symptoms last for a longer duration, and what have you, then the individual is diagnosed as having major mental illness. . .
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> *****

> I think that during most of his [Mr. Parker's] life he has probably vacillated along the continuum from personality disorder, basic personality disorder all the way down to symptomatology suggestive of a major mental illness.

(PC-T. 577-78).

Dr. Toomer explained that Mr. Parker's psychological deficits stem from formative years in an environment wrought with a severe lack of stability, predictability, saneness, and security that resulted from an impoverished environment, the trauma of living with a mother with severe schizophrenia and the effects of her erratic behavior, moving in and out of foster homes, and suffering abuse at the hands of others (PC-T. 573, 577). Dr. Toomer emphasized that it is these factors—predictability, saneness, stability, and security that are "the critical ingredients developmentally that enable individuals to be able to develop those particular skills that are required in order to function appropriately . . . and to engage in appropriate behavior in terms of judgment, choices, and what have you, in organized society . . . If you expose an individual to those kind of variables without any kind of significant intervention, [mental health professionals] can almost guarantee that you will produce an individual who will be dysfunctional." (PC-T. 572).

The duration and breadth of Mr. Parker's exposure to a psychologically dangerous environment has left Mr. Parker as a dysfunctional individual who cannot engage in higher order thought such as weighing alternatives, projecting

consequences, or understanding boundaries (PC-T. 578-79). Dr. Toomer made it clear that the development of higher order thought processes does not come automatically with age, but "has to be taught . . . [T]here's an environmental component also, and if that is not available," the result is a highly dysfunctional individual (Id.). There is no question that the nurturing environment required to develop the skills that are necessary for functioning in a predictable and stable fashion did not exist for Mr. Parker. In fact, Dr. Toomer felt Mr. Parker exemplified a textbook case of how this development fails to evolve (PC-T. 580). In order to compensate for his deficits, Dr. Toomer explained, Mr. Parker had to develop coping or survival behaviors that can often be perceived as destructive or inappropriate because of his limitations and lack of higher order thought processes (PC-T. 579-80, 595-96).

Due to the effects of Mr. Parker=s psychological deficits, Dr. Toomer opined that Mr. Parker was under extreme mental or emotional disturbance at the time of the crime in addition to substantial impairment limiting his ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law at the time of the crime (PC-T. 580-81). Further, Dr. Toomer opined that Mr. Parker is essentially under extreme mental or emotional disturbance and does not possess the ability to conform his behavior to the requirements of the law at all times simply because his deficits keep Mr. Parker from being able to engage in the

decision making necessary when he is in an unstructured environment and is required to respond to unpredictable stresses (PC-T. 596).

While the lower court finds that these experts' opinions are not credible, the court did not point to any portion of the record from the evidentiary hearing to support its finding. The court does not indicate which expert was not credible, what aspect of their opinion was not credible or why he is finding them not credible. The court further concludes that the experts opinions "in no way would undermine or change the original proceedings or result in this case," again, failing to cite to the record in this regard.

B. Trial Counsel's Ineffectiveness Prejudiced Mr. Parker

Drs. Crown, Pickar, and Toomer testified that Mr. Parker's suffers from both significant neurological deficits—in the form of frontal lobe brain damage—and major mental disorder. As explained above, Mr. Parker's mental infirmities manifest themselves in behavioral inappropriateness, difficulty handling novel situations, and the inability to plan effectively, including impulsive behavior and persisting with ineffective problem-solving solutions. As a result, each doctor found that Mr. Parker was under extreme mental or emotional disturbance at the time of the crime and his ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired at the time of the crime.

In addition to the mental health statutory mitigators, there was an abundance of non-statutory mitigation available for the jury's consideration. Mr. Parker's jury should have considered the non-statutory mitigating factors of poverty, instability, childhood trauma, physical and sexual abuse; the effects of his mother's schizophrenia on his childhood; abandonment by his father; neglect, emotional and educational deprivation; neuropsychological deficits or brain impairment; low intellectual functioning; intoxication; and a long history of alcohol abuse. These facts were never investigated by trial counsel and instead were presented through investigators without any corroboration whatsoever and therefore, totally discredited by the state in cross-examination. Contrary to the trial court's assessment that the witnesses presented at the penalty phase were unimpeachable, this is not true.

During the direct examination of Mr. Finkelstein, the prosecutor was able to point out his criticisms of Mr. Finkelstein's testimony by objecting in front of the jury:

> Mr. Finkelstein is a Public Defender. He is reciting this like he was there. Is this what somebody's telling him, or is he testifying as a psychologist or psychiatrist? That's my objection. He is going on like - - My objection is he's giving his opinions. He is not qualified to give those opinions.

(R. 2207). Although the objection was overruled, it made the point to the jury that these were unqualified opinions. The prosecutor further emphasized on cross-

examination that Mr. Finkelstein was not a psychologist or psychiatrist and that much of his information came from Mr. Parker (R. 2210). Interestingly, Mr. Finkelstein even admitted that he hadn't looked at his notes since the time of his initial investigation (R. 2214-15).

Although Mr. Finkelstein testified that Mr. Parker had a twin brother, Mr. Moore on cross-examination contradicted this and acknowledged he does not (R. 2284). Mr. Moore also could not remember the names of Mr. Parker's sister or wife (R. 2285) and the prosecutor pointed out that the sexual abuse was not documented (R. 2284). Likewise, Dr. Caddy was impeached on cross-examination in several areas. Dr. Caddy conceded that, aside from a thirty-minute telephone conversation with Mr. Parker's mother, all the information to which he testified came from Mr. Parker (R. 2256). Based on this limited source of information, he conceded that his opinion would be compromised (R. 2258). The prosecutor also emphasized that Dr. Caddy performed only an intellectual screening test on Mr. Parker (R. 2260) and no further psychological tests. Further, the prosecutor hammered the point that Dr. Caddy did not substantiate the amount of alcohol consumed by Mr. Parker (R. 2262-2270). To say that this presentation of evidence was unimpeachable, ignores the record entirely.

Further, the testimony of the investigators only scratched the surface of the mitigation that was available and did not provide the detail testified to by these

witnesses. In contrast to the vague and generalized testimony trial counsel presented of Mr. Parker's childhood and abuse, Mr. Parker, in fact endured a childhood of indescribable distress and fear. Mr. Parker was sentenced to death without the jury learning that he spent the most formative years of his life without the basic life necessities, the severe emotional and physical trauma he endured at the hands of a mother who suffered from severe schizophrenia, the physical abuse he received at the hands of foster parents, and the sexual abuse he endured as adolescent boy by his peers. It is impossible to understand Mr. Parker's conduct without understanding the history of neglect and abuse throughout his entire childhood.

During closing argument, trial counsel argued that Mr. Parker was emotionally abused or disturbed and beaten as a child, but provided no evidentiary support for this argument (R. 2315). Counsel simply failed at painting the picture of what Mr. Parker's life was really like. The evidence now presented "expounds upon both the abuse Mr. Parker suffered as a child and Mr. Parker's mental infirmities" Parker v. State, 904 So. 2d 370, 378 (Fla. 2005).

The United States Supreme Court has recognized that the presentation of mitigation evidence, including disadvantage in childhood and mental illness, is crucial to the penalty phase and that the failure to present such evidence may be prejudicial. Such evidence is relevant to the sentencing judge and jury's assessment

of the defendant's moral culpability. In Penry v. Lynaugh, 492 U.S. 302 (1989), the Supreme Court stated:

> 'If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'

Id. at 319 (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

In Wiggins v. Smith, 539 U.S. 510 (2003), the Supreme Court held that it was prejudicial for counsel not to discover and present evidence of severe deprivation and abuse in childhood and diminished mental capacities. Id. at 535. This Court has found prejudicial performance in cases where counsel failed to present evidence of severe mental disturbance. See, e.g., Rose v. State, 675 So. 2d 567 (Fla. 1996) at 573-74 (holding that counsel's failure to present mitigation evidence that defendant suffered from schizophrenia, organic brain damage, and a personality disorder prejudiced the defendant). Psychiatric evidence can dramatically change the sentencing hearing by connecting the homicidal conduct to the mental illness, thus weakening aggravating factors, and strengthening

mitigating factors.[14]

Furthermore, a capital defendant may be prejudiced by trial counsel's failings even if some mitigation is presented. In Orme v. State, 896 So. 2d 725 (Fla. 2005), this Court held that trial counsel's failures prejudicial where Orme's attorney presented two mental health experts at the penalty phase who testified that he suffered from a personality disorder and depression and was a cocaine addict. Id. at 734. Counsel also presented as mitigation evidence of intoxication. Id. at 736. However, counsel failed to investigate information that Orme suffered from bipolar disorder and did not present evidence at the penalty phase about the existence and effects of Orme's mental illness. Id. at 735.. This Court noted that bipolar disorder is "a serious and significant diagnosis" and concluded that testimony about the disorder would have undermined the State's argument that Orme's intoxication evidence was an attempt to use his addiction to excuse his

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[14] See Hannon v. State, 941 So. 2d 1109, 1165 (Fla. 2006) (Anstead, J. dissenting); Rose, 675 So. 2d at 573 ("In evaluating the harmfulness of re-sentencing counsel's performance, we have consistently recognized that severe mental disturbance is a mitigating factor of the most weighty order . . . and the failure to present it in the penalty phase may constitute prejudicial ineffectiveness." (citations omitted)); Middleton v. Dugger, 849 F. 2d 491, 495 (11th Cir. 1998) (stating that psychiatric evidence "has the potential to totally change the evidentiary picture by altering the causal relationship that can exist between mental illness and homicidal behavior" and that "psychiatric mitigating evidence not only can act in mitigation, it also could significantly weaken the aggravating factors" (quotation omitted)).

actions. Id. at 736. Here, the evidence of Mr. Parker's major mental disorders and brain damage together with the evidence about his childhood deprivation, abuse, and mental illnesses corroborated by numerous sources would have rebutted the State's argument that Dr. Caddy's opinion was invalid. (R. 2260, 2299, 2300-01).

All of the statutory and non-statutory mitigation, including substantial mental health mitigation, presented at the evidentiary hearing, was available at the time of Mr. Parker's trial had counsel chosen to investigate it. There was no strategic or tactical motive for failing to investigate this mitigation and any decision not to present this evidence was itself not based on reasonable investigation. The incomplete evidence trial counsel presented allowed the trial court to dismiss Mr. Parker's mental deficiencies and horrific childhood when it found **no statutory mitigators or nonstatutory mitigators.** The trial court stated in its sentencing order that it "finds nothing in the Defendant's character or record to be in mitigation (R. 2894). In affirming Mr. Parker's death sentence, this Court relied upon the trial court's finding and held:

> Contrary to Parker's contention, the [trial] court gave ample consideration to all of the evidence Parker submitted in mitigation. "A trial court must consider the proposed mitigators to decide if they have been established and if they are of a truly mitigating nature in each individual case."[Citations omitted] The court did this, **but found that the facts alleged in mitigation were not supported by the evidence**. . . **The record supports the trial court's conclusion that no mitigators had been established**.

Parker, 641 So. 2d at 377 (emphasis added). Had trial counsel performed

effectively, he would have presented evidence that (1) Mr. Parker's mental deficiencies and illnesses were serious conditions that continued to affect his life and decision making and (2) that the unimaginable abuse and deprivation Mr. Parker suffered as a child and the serious mental health conditions he suffered from would have shown that the State's characterization of Mr. Parker's childhood as merely "unfortunate" was a gross understatement (R. 2301).

If evidence of the statutory and nonstatutory mitigating factors had been presented to the jury, there is a reasonable probability that the jury would have recommended life and the judge would have given that recommendation great weight. This is particularly so given that the jury only recommended death by an 8 to 4 vote.[15] A reasonable probability exists that Dwayne Parker would have received a life sentence. As such, Mr. Parker was prejudiced by counsel's failure to reasonably investigate and present mitigation.

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[15] It is even more probable that the jury would have recommended life given the evidence that existed post-trial that the jury initially voted to recommend a life sentence by a vote of seven (7) to five (5), however, when the jury engaged in further discussion, certain jurors, in a blatant disregard of their oath to consider only the law and the evidence, changed their vote for life to a vote in favor of death for no other reason than to quickly end the deliberations so the jury could go on about their business (R. 2349-50).

ARGUMENT II

TRIAL COUNSEL AFFORDED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL TO MR. PARKER BY FAILING TO PRESENT EXPERT TESTIMONY DURING MR. PARKER'S GUILT PHASE

A. Trial Counsel Did Not Adequately Prepare For Trial

At his evidentiary hearing, Mr. Parker presented evidence that demonstrates that confidence was undermined in Mr. Parkers=s convictions. Trial counsel failed to present expert testimony to show that the photographs depicting the fatal bullet did not reflect the true color of the bullet and failed to refute the claim that the bullet that killed the victim was fired from Mr. Parker=s gun. In essence, trial counsel failed to mount a defense on Mr. Parker=s behalf. To support Mr. Parker=s claim of ineffective assistance of counsel regarding trial counsel=s failure to present expert testimony, Mr. Parker presented the testimony of a photography expert, his trial attorneys and introduced a number of exhibits.[16] The constitutional violation that occurred during Mr. Parker=s guilt phase entitles him to a new trial.

During trial counsel's opening statement to the jury, he characterized Mr. Parker's case as "the case of the missing silver bullet" (R. 935). Aptly named, the State's case against Mr. Parker turned largely on the identification and origin of the

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[16] Based on the State's objection, the lower court precluded Mr. Parker from calling several witnesses, denying Mr. Parker a full and fair hearing. See Argument III (b), infra.

bullet that killed William Nicholson.

The State alleged that Mr. Parker fired the shot that killed William Nicholson as Mr. Parker was fleeing from the scene of the robbery. Nicholson, a bystander, who had come out of a nearby bar, was shot while running behind Mr. Parker and as police officers closed in. From the beginning, substantial evidence existed, and was available to Mr. Parker's counsel, that exonerated Mr. Parker. This evidence revealed that Mr. Nicholson was shot by a police officer, and not by Mr. Parker. However, defense counsel unreasonably failed to investigate and present this information and the State improperly concealed evidence and presented false testimony. This resulted in a misleading, inadequate and false presentation of evidence to the jury.

When he was initially appointed, trial counsel confirmed that his theory of defense for the guilt phase was that the "state had not proven that the projectile that was fatal was discharged from Mr. Parker's weapon" or the fatal bullet was switched once it was removed from the body (PC-T. 19, 148). This theory was based on the observations, notes and depositions of Dr. Michael Bell, the medical examiner who conducted the autopsy in this case.

Dr. Michael Bell of the Broward County Medical Examiner's Office performed the autopsy of Mr. Nicholson on April 23, 1989. In his notes from the autopsy and his subsequent written autopsy report, Dr. Bell stated that he had

removed a "large caliber silver colored bullet" from the body of Mr. Nicholson (R. 1643). Dr. Bell indicated that there had been very little deformation to the bullet, with no cuts, and that he had not marked the bullet before photographing it and turning it over to Detective Cerat (R. 1677). Dr. Bell's deposition testimony was consistent with the statements contained in his April 23, 1989, notes and autopsy report.

The evidence is undisputed that, on the night of the crime, Mr. Parker's gun fired only copper colored bullets. Because silver bullets were standard issue for Broward County Sheriff's deputies, Dr. Bell's findings established, without question, that the a deputy fired the fatal bullet. The exculpatory information contained in Dr. Bell's autopsy report was available to defense counsel at the very latest on December 19, 1989, the date of Dr. Bell's deposition. No later than December 28, 1989, the date defense counsel examined the physical evidence, defense counsel learned that the bullet held in evidence that the State had alleged was removed from the victim was copper colored and had a significant cut. Thus, the bullet held in evidence that the State alleged had been removed from Mr. Nicholson's body did not match Dr. Bell's description of the bullet that was actually removed. The only possible explanation for this shocking disparity in the evidence was that the silver bullet that Dr. Bell stated he had removed from Mr. Nicholson at the autopsy had been, subsequent to its removal, switched with a

copper colored bullet. At the evidentiary hearing, Mr. Hitchcock recalled that the earlier robbery of a Pizza Express had an important role in shaping the defense theory in Mr. Parker's case. The Pizza Express robbery occurred close in time and location, to the Pizza Hut robbery (PC-T. 19). At the time the Pizza Hut robbery took place, the Pizza Express robbery suspects, two white males, were still at large (Id.). The victim in the instant case—a white male—appeared to be fleeing in the direction of Officer McNesby, one of the officers pursuing Mr. Parker (PC-T. 29-30). This Pizza Express robbery became significant to Mr. Hitchcock's theory because it provided the explanation as to why the police, and not Mr. Parker, shot the victim, as Dr. Bell's autopsy report and deposition testimony made clear. (Id.).

However, on the eve of trial, Dr. Bell made a stunning and incredible reversal. On April 18, 1997, approximately two weeks prior to Mr. Parker's trial, Dr. Bell revealed that, after receiving a telephone call from State Attorney Michael Satz, he had decided to change his testimony regarding the bullet removed from Nicholson's body. In a deposition taken on April 18, 1997, Bell stated that it "had become clear to him that [he] was wrong," and that the bullet had in fact been cut during removal (Deposition of Dr. Michael Bell 4/18/97, 4-5). Subsequent to this deposition, approximately one week prior to trial, Dr. Bell further revealed that he had also mistakenly identified the bullet removed from Nicholson's body as silver, and, after reviewing the evidence at the State's direction, he now intended to testify

at trial that the bullet was copper in color.

Mr. Hitchcock wanted to use the discrepancies involved with identifying the fatal bullet to show that Mr. Parker was not responsible for killing the victim (PC-T. 27). Mr. Hitchcock testified that the silver bullet was central to Mr. Parker=s defense and the changes in the medical examiner=s testimony created reasonable doubt (Id.). Mr. Hitchcock developed his theory in January of 1990 after reviewing the evidence and consulting with Mr. Kultau, his investigator, who recalled that the Broward Sheriff=s Officers were shooting silver bullets (PC-T. 28-29). However, the bullet that the State was alleging killed the victim was copper colored with a significant cut (Id.).

Mr. Hitchcock recalled that the change in Dr. Bell=s testimony occurred just before Mr. Parker=s trial began (PC-T. 30). At trial, the State argued that Dr. Bell simply made a mistake when he stated in his notes, autopsy report, and original deposition that the bullet he removed from Mr. Nicholson was silver with no deformation (R.1898). Through defense counsel's ineffectiveness, the State was able to convince the jury that such a mistake did indeed happen in this case. The State did so by introducing "redeveloped" photographs in which the color of the bullet shown in the photographs was changed to look more yellow and less silver. The State also used these photographs to present tool mark evidence that went completely unchallenged by the defense.

The most significant photographs presented at the trial were those showing the bullet lodged in Mr. Nicholson's sacrum. Two such photographs were admitted into evidence: a print of a photograph taken by Detective Cerat (Trial Exhibit 115), and an enlargement of the same photograph (Trial Exhibit 122). Significantly, these were the only photographs that, without question, showed the bullet that killed Mr. Nicholson. Therefore, the color of the bullet lodged in the sacrum as portrayed in these two photographs was a critical issue.

Mr. Hitchcock recalled that several photographic exhibits were identified and used to illustrate that the bullet depicted in the victim=s body was the same bullet the State was alleging was in evidence (PC-T. 42, 53-54). These trial exhibits included State=s exhibit 115, 122, and 127 (Id.). Mr. Hitchcock admitted during the evidentiary hearing that it became critical to the theory of defense to refute the accuracy and validity of the State=s photographic evidence and to convince the jury that Dr. Bell=s original statements based on his first-hand, eyewitness, observation of the silver bullet during the autopsy showed convincingly, that Mr. Parker was not responsible for shooting the victim (PC-T. 33, 149). In this capacity, trial counsel was wholly ineffective in challenging the State=s photographic and tool mark evidence to expose that the comparisons being made by the State=s witnesses were completely invalid and based on junk science. In essence, by not consulting qualified experts who could testify to the weaknesses

of the State=s evidence, the jury had no choice but to believe the State=s experts.

1. Trial Counsel Failed to Retain Necessary Forensic Experts to Adequately Challenge the State's Case.

Despite the underlying issue regarding the coloration of the photographs and the defense theory that the true color of the bullet could not be determined through these photographs, Mr. Hitchcock admitted that he never retained an expert to assist him with this issue, and did not even begin to look into hiring such an expert until May 29, 1990**B after both Mr. Parker=s guilt phase *and* penalty phase ended**[17] (PC-T. 36-39, 41). In fact, Mr. Hitchcock confirmed that during his preparation for trial, no expert ever reviewed any of the photographs for accuracy (PC-T. 49). Rather than seek expert assistance, defense counsel attempted to rely on his own knowledge of photography to challenge the State's case (R. 1576, 1594, 1811-13). As a result, the only evidence presented to challenge the State's

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[17] Mr. Hitchcock identified his handwritten notes where he documented that he contacted a photography expert on 5/30/90 and 6/12/90 (EXH 4). Additionally, Mr. Hitchcock identified undated handwritten notes that indicated that he contacted Michael Long a professor at Princeton and friend of Mr. Hitchcock=s as well as, forensic department at Rochester Institute, Glenn Miller, Professor Andy Davidhazy [sic], and local photography Roy Crogan (PC-T. 40) (EXH. 6). While his notes were undated, the same contacts were found in a billing log kept by Mr. Hitchcock. Mr. Hitchcock identified the log he kept during the trial to keep track of his hours which listed contacting "Crogan, Kodak, RIT, Glenn Miller, and Andre Davidhazy [sic]" for two hours on 5/29/90 (Id.) (EXH 7). Finally, at Mr. Parker's ***sentencing hearing*** trial counsel made a motion for continuance in order to call George Pearl as a photography expert that was denied (R. 2334).

witnesses was Mr. Hitchcock himself, who argued with the witnesses in front of the jury about highly technical photographic issues without providing any context or explanation. Id.

At trial, Detective Cerat testified regarding his photographic methods and techniques (PC-T. 42; R. 1555-1610). On cross, Mr. Hitchcock went through a litany of questions about F-stops, sources of light, strobes, power sources, processing, color renditions, exposure, film, color ranges, and enlarging photographs. Mr. Hitchcock argued with Detective Cerat so intensely that, at one point, he told Detective Cerat that his testimony was "poppycock" (R. 1576-1595). Ultimately, the court admonished Mr. Hitchcock for attempting to testify (PC-T. 43-46; R. 1595). At the evidentiary hearing, Mr. Hitchcock recalled the cross-examination of Detective Garland, where he asked very specific questions related to color temperature and gray cards (PC-T. 51; R. 1811-1812). Mr. Hitchcock admitted that he believed no layperson, including the members of Mr. Parker's jury, could have understood these highly technical aspects of photography without at least some basic explanation of the terms and techniques, and their significance (PC-T. 43-45, 50 148-150). Yet, Mr. Hitchcock offered no strategic reason for not presenting witnesses or experts to explain how these photographs could have been manipulated to show that the bullet was copper, and were therefore unreliable (Id.).

To bolster its claim that Dr. Bell simply made a mistake, the State offered

the testimony of a tool marking expert whose testimony supported the State's theory that the copper colored bullet placed into evidence at trial was the same bullet Dr. Bell removed from Mr. Nicholson. Detective Garland testified to illustrate the purported similarities between the bullet in evidence and the bullet in the photographs admitted as State's Exhibits 115, 122 and 127 (PC-T. 53-54; R. 1709-1804). State's Exhibit 122 was an enlarged image of a portion of State's Exhibit 115 by from placing the negative under a microscope (R. 1582). State's Exhibit 127 was a further enlargement accomplished by photographing State's Exhibit 122, another photograph (R. 1796).

Mr. Hitchcock agreed that Detective Garland's comparisons of the bullet in evidence with the bullet in the photographs were based on exhibits that were produced by highly questionable techniques that included enlarging or magnifying the image by taking a picture of a picture (PC-T. 47-50). Though Mr. Hitchcock explained that he objected to the introduction of these exhibits, he did so on the basis of a discovery violation (Id.). However, Mr. Hitchcock understood that the problems with these enlargements were that the images were created by taking a photograph of a photograph and with each generation of a photograph taken by this method, the reliability and accuracy of color is destroyed (PC-T. 50). Even in the case of State's Exhibit 122, the quality would be degraded (R.1583). Yet, Mr. Hitchcock failed to object to these exhibits on the basis that the quality of these

photographs was so poor; they provided no evidentiary value or basis for making tool mark comparisons (PC-T. 48-50). Likewise, Mr. Hitchcock presented no evidence or testimony to refute the validity of the comparisons made by Detective Garland.

Although, Mr. Hitchcock did not immediately recall consulting with Mr. Edward Whitaker, a forensic examiner, upon reviewing notes from Mr. Whittaker contained in his file, Mr. Hitchcock acknowledged some consultation with Whittaker. However, the record shows that he was not responsible for hiring Mr. Whitaker, rather Mr. Whitaker was already reviewing evidence in Mr. Parker=s case while the Public Defender=s office was still appointed[18] (PC-T. 55, 145-146). After reviewing Mr. Whitaker=s notes, Mr. Hitchcock recalled that Mr. Whitaker consulted on issues including gunshot stippling, distance from the shooter to the victim, projectiles and firearms (PC-T. 58).

There is no indication whatsoever, that Mr. Whitaker made any comparisons between State=s Exhibit 115, 122, or 127 with the projectile in evidence (PC-T. 58-59). Rather, Mr. Whitaker=s notes reflect his review of the police reports indicating that the projectiles collected during the investigation matched Mr. Parker=s gun. This was not central to the issue disputed at trial; the theory of defense was that the

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[18] (R. 1774) (Patrick Garland testified that he opened evidence in the presence of Warner Olds and Mr. Ed Whitaker on July, 28, 1989).

fatal bullet was switched for one of Mr. Parker=s copper bullets after it was removed from the body. Therefore, the critical issue was whether the projectile in evidence matched the projectile lodged in the victim=s body as depicted in the photographs. Whitaker=s notes reflect several suggestions and theories of what evidence may be tested, but there is no evidence that any of these suggestions were carried out (PC-T. 59-61). Nor could Mr. Hitchcock provide any reasonable strategy for not following through with the initial suggestions or for failing to request a thorough comparison of the bullet in evidence to the photographs.

The record indicates that on February 27, 1990, Mr. Hitchcock did file a Motion for Independent Scientific Examination where he requested to test all tangible evidence however; this motion did not request to perform any individual or specific scientific examinations[19] (PC-T.65-66). This motion was general despite Mr. Hitchcock being made aware through his consultation with Mr. Whitaker of a number of specific tests to perform, including a wipe-ring test (PC-T. 66). On March 19, 1990, Mr. Hitchcock filed another motion requesting all physical evidence be released for examination by an independent expert which, likewise, did not specify any particular items or request specific testing[20] (PC-T. 67). Mr.

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[19] See EXH 9.

[20] See EXH 10.

Hitchcock recalled that at the time he filed the motion on March 10, 1990 he was having difficulty getting Detective Garland, one of the forensic examiners, to appear for deposition (PC-T. 68). Mr. Hitchcock indicated that he would routinely file motions of this nature as a tactic to push getting depositions taken rather than for the purpose of actually performing the testing (Id.). Additionally, Mr. Hitchcock had no recollection of contacting anyone to conduct a tool marking comparison after he filed these motions (PC-T. 68-69).

Mr. Hitchcock did not conduct any of his own research[21] into the validity of tool marking as a science nor did he consider presenting any evidence that tool marking as a science was invalid, especially in light of the poor quality of evidence being used to make the comparisons (PC-T. 69-70). Defense counsel failed to obtain and utilize expert assistance on the viability of tool mark identification. Expert assistance in this area would have enabled counsel to effectively challenge the State's case in this regard. In short, nothing that Mr. Hitchcock did with regards to his investigation or cross-examination of the State's witnesses effectively challenged the State's misrepresentations and weaknesses to show the

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[21] Numerous articles were available discussing the issues and problems with tool marking as a scientifically valid form of forensic testing. Mr. Hitchcock could not recall having any knowledge of the research or information after being presented with two articles dated prior to Mr. Parker's trial. Mr. Parker proffered these articles. See Court EXH. A and B.

jury that Mr. Parker was not responsible for shooting the victim. As a result, no adversarial testing occurred.

2. Because of Trial Counsel's Failure to Retain Necessary Forensic Experts, Crucial Evidence was not Presented at Mr. Parker's Guilt Phase

Had Mr. Hitchcock utilized an expert to evaluate the reliability of the photographs and challenge the validity of comparing the bullet in evidence to the photographs, he would have been able to show the jury that the State=s witnesses had absolutely no credible basis for asserting that the bullet depicted in the exhibits matched the bullet the State was alleging was fired from Mr. Parker=s gun. It is irrelevant whether the bullet in evidence matched Mr. Parker=s gun. In and of itself, a bullet found at the scene of the crime matching Mr. Parker=s gun does nothing to prove that Mr. Parker shot the victim. The State had to prove that the bullet from Mr. Parker=s gun matched the fatal bullet in the victim=s body. The lower court based its denial of relief on its finding that "[t]he issue is not what color was a bullet in a photograph. But what bullet actually killed the victim" (PC-R2. 352). The court's ruling is erroneous.

The lower court failed to understand how these two issues are interrelated. In order for the State to prove that the bullet that was in evidence was the bullet that killed the victim, it had to be shown that the bullet in evidence matched the one in the photograph of the victim's sacrum. As Mr. Wyman, Mr. Parker=s photographic

expert, testified to at the evidentiary hearing, it is impossible for the State=s photographs to provide any reliable information. Further, the exposure and the enlargements of the exhibits are so poor that there was no way an accurate comparison could be made between the features of the bullet in evidence and the bullet depicted in the photographs. As demonstrated at the evidentiary hearing, An expert could have properly explained to Mr. Parker's jury, in a manner they could understand why it was impossible to identify the bullet in these photographs, and therefore, the State was unable to prove that the fatal bullet was fired by Mr. Parker.

a. Trial Counsel Did Not Present the Photo he Received During Discovery Depicting the Fatal Bullet as Silver

Mr. Hitchcock recalled that the defense received several photographs through discovery. During the trial, however, the photo the State entered into evidence depicting the bullet lodged in the victim=s sacrum[22] had a completely different coloration than the original photo the defense had received (PC-T. 35). The original photograph Mr. Hitchcock received in discovery depicted the bullet as silver.[23] In contrast, State=s Exhibit 115 had been developed or processed with an overall yellow hue which also made the bullet appear more copper (PC-T. 593-94).

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[22] State=s Exhibit 115 at trial. See EXH 13.

[23] See EXH 12.

Mr. Hitchcock recalled that he believed the photograph was a different printing altogether and that the State could not account for the adjustments in the printing (PC-T. 35-36). Despite the obvious discrepancy in coloration between the photograph the State offered at trial and the photograph provided to the defense in discovery, Mr. Hitchcock never entered or attempted to enter this photograph into evidence (Id.). Mr. Hitchcock went so far as to having it marked as Defense Exhibit A at trial, but because it was never used it was returned to him (Id.). This photograph would have shown the inaccurate and misleading nature of the State's "redeveloped" photographs.

b. Trial Counsel Failed to Present Expert Testimony that would have Challenged the State's Case that Mr. Parker Shot the Fatal Bullet

At the evidentiary hearing Mr. Parker presented Mr. Robert Wyman, a photography expert, who plainly and concisely discussed the many discrepancies and flaws in the State's evidence. Mr. Wyman has been a full time forensic photographer since 1998 and has been involved with "thousands" of assignments involving forensic photography and evidence documentation (PC-T. 604, 606). Mr. Wyman explained that in his evaluation of Mr. Parker's case he reviewed a number of background materials including trial transcripts and depositions, and reviewed the photographs admitted into evidence at Mr. Parker's trial (PC-T. 608-609).

Mr. Wyman explained that he found Detective Cerat's testimony regarding

the flash unit to be significant (Id.). After reviewing the testimony, he believed Detective Cerat photographed the bullet by detaching the flash unit from the camera, holding it some distance away and "forward and pointed down" (Id.). In his opinion, this would explain the shadowing pattern found in Exhibit 115 (PC-T. 611).

Mr. Wyman found the discussion about the camera settings, specifically the power rating and whether it was set to "manual or automatic, full power or something less than full power" significant as well (Id.). Mr. Wyman explained that power is the amount of light being given off by the flash, which relates to the brightness in a photo and where the light is traveling while the photo is being taken (PC-T. 612). Mr. Wyman found a conflict in Detective Cerat=s testimony concerning the power settings he used when taking the photograph for State=s exhibit 115. At one point Detective Cerat testified that he manually set his flash unit for between five and fifteen feet, but then later stated that he was using full power when he took the photograph (PC-T. 614). As Mr. Wyman explained, these two flash settings are incompatible. At full power, a flash unit gives off as much light as possible, and at five -fifteen feet away, full power light would be so bright that the photograph would be almost all white (Id.).

Mr. Wyman explained further that the setting of the flash unit is significant to the quality of a photo as it relates to brightness. At a too powerful a setting,

light will reflect off the surface of the subject (PC-T. 615). As this relates to Exhibit 115, Mr. Wyman testified that the powerful setting Detective Cerat used for the flash resulted in the Avery bright light@ reflecting off the surface of the bullet (Id.). In addition, the brightness created by the flash used can cause the exposure of the photograph to be too light or too dark (PC-T. 615-16). In Mr. Wyman=s opinion, Exhibit 115 is over-exposed, or too light, because the subject of the photo, the bullet, is reflecting such a quantity of light back from the flash to the camera that it has become "overly-bright" (PC-T. 617). As a result, the color of the bullet in the exhibit is obscured by the reflection of the flash. Because the photograph depicts the color of the flash rather than the coloration of the bullet itself, it is impossible to determine the true color of the bullet by looking at the photograph (Id.).

In addition to brightness, Mr. Wyman testified that color accuracy was also a significant issue in the photographs (PC-T. 618). In order for a photograph to be accurate, the color of the subject depicted needs to match the color of the subject in real life (PC-T. 618-19). In a photograph, if the color is inaccurate in one area, it will be inaccurate in all areas (Id.) However, as Mr. Wyman explained, color accuracy is very subjective and is affected by the photographer taking the photo and the technician who develops the exposure. Id. Therefore, an objective observation as to the color accuracy requires that standard color charts be placed in

the frame of the original image (Id). A color chart, or color checker, is a piece of paper depicting standard color samples, gray scales, or black and white samples, and a ruler (PC-T. 620). When a color chart is included in the photograph, an exposure can be produced that matches the colors in the photograph to the colors presented on the chart (PC-T. 620-21). Mr. Wyman testified that he routinely uses color charts when photographing evidence to insure that anyone reviewing the photograph will be able to objectively determine the color accuracy. Id. Without a color chart in State's Exhibit 115, it is impossible for any individual to make an objective determination of real life colors, or whether any particular color case influenced the photograph's accuracy (Id.).

In addition to State=s Exhibit 115, Mr. Wyman reviewed Defense Exhibit 12, the photograph of the bullet in the victim=s body that Mr. Hitchcock initially received in discovery (PC-T. 622). Mr. Wyman compared Defendant=s Exhibit 12 with State=s Exhibit 115 and concluded that State=s Exhibit 115 was noticeably different due to a "yellow/green kind of cast to it" or a yellow sheen (Id.). On the other hand, Defendant=s Exhibit 12 was brighter, without a yellow cast (Id.). Nonetheless, without a color chart, Mr. Wyman opined that it was impossible to determine if either photograph depicted the actual color of the bullet, or what color the bullet was in "real life" (PC-T. 623). The photographs were simply too unreliable (Id.).

Mr. Wyman also testified to how the other lights present, such as interior lights or "ambient lighting," at the time the photograph was taken are particularly significant because they too influence the photograph. PC-T. 624. This is known as "color temperature" (Id.). In essence, an object can be one color in "real life" and because of the lighting display a completely different color in the photograph (PC-T. 625). Mr. Wyman provided the example of red landscape lighting that will illuminate a palm tree in a landscaped yard. In "real life" the palm tree fronds are green and the eye knows that the fronds are green, but due to the lighting, the eye will see the fronds as red in a photo (Id.). According to Mr. Wyman, the conditions of the "ambient lighting," which include the intensity and quality of the light, goes directly to determining the color of the bullet in these photographs (PC-T. 626). Basically, the lights present in the room would be able to "color" the bullet in the photograph (Id.).

Mr. Wyman also reviewed Detective Garland's testimony and examined State's Exhibit 127, a "photograph of a photograph" of the bullet in the victim's sacrum (PC-T. 626-627). In his expert opinion, the image was degraded because the second-generation photograph depicts another piece of paper rather than the actual subject--in this case, the bullet (Id.). This resulted in a lower quality image (Id.). Mr. Wyman testified that Exhibit 127 is so magnified and out of focus there is no way even to discern what the actual subject of the photograph is (PC-T. 627-

28). Furthermore, when you take into account all of the factors Mr. Wyman discussed regarding, exposure, brightness, and lighting together with photographing another photograph, the resulting color in the new image is going to shift that much more (PC-T. 628).

Thus, with such a degraded photo, there simply was no way that the State=s witnesses, such as Detective Garland, had any basis for making the comparisons that were testified to at trial. The photographs simply proved nothing. Had trial counsel utilized an expert such as Mr. Wyman, and the jury heard testimony to refute and expose the State=s misrepresentations and inferior forensic techniques and conclusions, the jury could only conclude that the fatal bullet did not come from Mr. Parker=s gun.

B. Trial Counsel's Failure To Adequately Prepare For Trial Prejudiced Mr. Parker

At trial, Detective Cerat testified that he was present during the autopsy of Mr. Nicholson, at which he took possession of the fatal bullet and placed it into evidence. Detective Cerat's testimony was the basis for the State's claim that the bullet shown to the jury was the same bullet removed from the body of Mr. Nicholson, and that the bullet was copper in color and contained a cut. Defense counsel's failure to challenge the State's photographic and tool mark evidence prevented counsel from disputing Detective Cerat's testimony. Moreover, defense counsel did not have qualified experts to consult regarding areas of investigation to

help them prepare their defense strategy or their cross-examination. Fatally, the defense had no qualified expert assistance in detecting weaknesses in the State's case. The State's case went unchallenged and unrebutted. The prejudice to Mr. Parker is in the fact that the jury had no choice but to believe the State's experts and the misrepresentations to which they testified.

In attempting to minimize the prejudice resulting from Mr. Hitchcock's ineffectiveness, the State argued in post-conviction that Mr. Hitchcock was a professional photographer and had a working knowledge of photography principles and techniques that were evident during his cross-examination of the State's witnesses. Despite Mr. Hitchcock's familiarity with photography, by his own acknowledgment, the jury was left confused (PC-T. 150-154). It was critical to Mr. Hitchcock's theory of defense that he refute the accuracy and validity of the State's photographic evidence to convince the jury that Dr. Bell's original statements were correct and that the fatal bullet was silver, proving that Mr. Parker was not the shooter (PC-T. 33, 149). The State ignores the fact that expert testimony, such as Mr. Wyman's, was necessary, as Mr. Hitchcock himself admitted, in order to convey to the judge and jury the egregious errors being committed by the State's witnesses in a manner that the jury would have the capability to comprehend.

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

Supreme Court held that counsel has "a duty to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688 (citation omitted). Counsel's highest duty is the duty to investigate and prepare. See, e.g., R. Regulating Fla. Bar 4-1.1. Where, as here, counsel unreasonably fails to investigate and prepare, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. See, e.g., Kimmelman v. Morrison, 477 U.S. 365, 384-88 (1986) (failure to request discovery based on mistaken belief state obliged to hand over evidence); Henderson v. Sargent, 926 F. 2d 706 (8th Cir. 1991)(failure to conduct pretrial investigation was deficient performance); Chambers v. Armontrout, 907 F. 2d 825 (8th Cir. 1990)(en banc) (failure to interview potential self-defense witness was ineffective assistance); Nixon v. Newsome, 888 F. 2d 112 (11th Cir. 1989)(failure to have obtained transcript of witness's testimony at co-defendant's trial was ineffective assistance); Code v. Montgomery, 799 F. 2d 1481, 1483 (11th Cir. 1986) (failure to interview potential alibi witnesses).

"At the heart of effective representation is the independent duty to investigate and prepare." Goodwin v. Balkom, 684 F. 2d 794, 805 (11th Cir. 1982); accord Porter v. Wainwright, 805 F. 2d 930, 933 (11th Cir. 1986). Moreover, to be effective, counsel must present "an intelligent and knowledgeable defense." Cunningham v. Zant, 928 F. 2d at 1006, 1016 (11th Cir 1991). In order to prove

ineffective assistance of counsel, Strickland requires a defendant to demonstrate (1) unreasonable attorney performance, and (2) prejudice. Mr. Parker has shown both and a new trial should be ordered.

ARGUMENT III

MR. PARKER WAS DENIED A FULL AND FAIR HEARING BEFORE A FAIR AND IMPARTIAL JUDGE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION

1. Introduction

All parties before a court are entitled to full and fair proceedings, including the fair determination of the issues by a neutral, detached judge. In re Murchison, 349 U.S. 133 (1955); Porter v. Singletary, 49 F. 3d 1483 (11th. Cir. 1995); see also Holland v. State, 503 So. 2d 1354 (Fla. 1987). The lower court denied Mr. Parker a full and fair evidentiary hearing by 1) denying Mr. Parker's motion to disqualify, and 2) requiring Mr. Parker to proffer the relevancy of the witnesses he intended to call before the evidentiary hearing, and consequently precluding Mr. Parker from calling four of his witnesses, in violation of the due process clause of the Fourteenth Amendment.

A. The denial of the Mr. Parker's motion to disqualify was a violation of due process under the Fourteenth Amendment.

The Honorable Leroy Moe, who was also Mr. Parker's original trial judge, presided over Mr. Parker's 3.850 proceedings. During the course of Mr. Parker's

evidentiary hearing it became apparent that Judge Moe was exhibiting a particular racially charged bias against Mr. Parker. Post-conviction counsel filed a motion to disqualify alleging the following:

> The evidentiary hearing commenced on Thursday, February 16, 2006. Before the hearing began, Mr. Parker was brought into the courtroom wearing leg shackles, hand shackles and waist chains. Broward County deputies seated Mr. Parker inside the jury box of the courtroom.
>
> Undersigned counsel addressed the Court before the hearing began and requested that Mr. Parker be seated with counsel so that counsel and Mr. Parker would be able to properly communicate during the hearing. In addition, undersigned counsel requested that the Court remove Mr. Parker's hand shackles so that he may properly write notes during the hearing.
>
> The Court denied both undersigned counsel's requests for Mr. Parker to be seated at counsels' table and to remove his hand shackles. As a result, Mr. Parker remained in the jury box several feet away from his attorneys. While seated in the jury box, Mr. Parker's hands were shackled and chained to his waist cuffs. In addition, Mr. Parker was chained to his chair from his waist chain and his legs remained shackled.
>
> At the start of the hearing, the issue of Mr. Parker's location in the jury box was revisited. The Court continued to refuse Mr. Parker the right to sit at his counsel's table although, undersigned counsel was able to move the table closer to the jury box where Mr. Parker was chained to his chair. In addition, the Court ordered an armed guard to be seated within listening distance of Mr. Parker throughout the duration of the hearing.
>
> Throughout the duration of these proceedings, Mr. Parker remained in the jury box shackled at both his hands and feet and chained to his seat. As a result, Mr. Parker had difficulty getting counsel's attention when he needed to communicate during testimony and undersigned counsel had extreme difficulty hearing Mr. Parker during testimony or

to conduct discussions with any certainty of confidentiality. In order for undersigned counsel to attempt communication with Mr. Parker or hear what Mr. Parker was saying counsel had to lean over the jury box bar in order to get close enough to Mr. Parker to have a confidential conversation. Mr. Parker had no ability to lean towards counsel to facilitate a conversation due to being chained at his waist to the chair.

On Wednesday, February 22, 2006, during Dr. Pickar's cross-examination, Mr. Parker's co-counsel, Barbara Costa, leaned over the jury box bar to confer with Mr. Parker. At this point, the Court stopped Dr. Pickar's testimony and reprimanded Ms. Costa for leaning over the bar to speak with Mr. Parker. Ms. Costa responded to the Court by stating she had difficulty hearing Mr. Parker.

Undersigned counsel then raised an objection on the grounds that counsel has continued to have difficulty communicating with Mr. Parker due to his location in the jury box. The Court then directed the armed deputy to observe Mr. Parker because the Court believed that there was someone in the courtroom connected to Mr. Parker that posed a security issue. The Court specifically noted that "there's people in here that I don't know that I know are connected to [the Defendant] that, let's say, security issues jump to my mind, and I'm going to protect everybody as much as I can."

At the time the Court made this statement regarding people connected to Mr. Parker, there was only one person, Mr. Christopher Taylor, an African-American male, seated directly behind Mr. Parker's counsel table, on the same side of the courtroom as Mr. Parker. Mr. Parker is also African-American. Christopher Taylor is an investigator with the Capital Collateral Regional Counsel-South and working with undersigned counsel on behalf of Mr. Parker. In response to the Court's statement, undersigned counsel put on the record that Mr. Taylor is an investigator working with Mr. Parker on a professional basis only. In response, the Court stated that it believed Mr. Taylor was connected to Mr. Parker because of "eye contact" and a "smile" that Mr. Taylor gave Mr. Parker when he entered the courtroom. Despite the representation from undersigned counsel, Judge Moe indicated that Mr. Taylor had "enough eye contact for me to know that they're more than just - - let's say they're connected in some way, either professionally or personally." It was this "connection"

which gave rise to Judge Moe's concerns regarding security.

As a result of the heated exchange between undersigned counsel and the Court, the Court asked everyone in the courtroom to "stand up and take a deep breath" to "relieve the tension." Due to the court's restrictions undersigned counsel was unable to confer with Mr. Parker during witness testimony.

At the conclusion of Dr. Pickar's cross examination, the Court allowed undersigned counsel to confer with Mr. Parker before the redirect of Dr. Pickar. The Court would only allow undersigned counsel to stand at the side of the jury box. In response, undersigned counsel requested to step inside the jury box to sit next to Mr. Parker to preserve some degree of privacy and confidentiality. The Court refused undersigned counsel's request citing security reasons. The Court specifically noted that it was mainly concerned with the personal security of Mr. Parker's attorneys. Undersigned counsel made clear that she had no question regarding her personal security in Mr. Parker's presence. In response Judge Moe stated "he would be concerned for her."

Undersigned counsel was more concerned with being able to adequately confer with Mr. Parker and protecting the confidentiality of Mr. Parker's conversations with his attorneys. The Court responded by questioning counsel as to whether anyone would be interested in listening to Mr. Parker's conversation with his attorneys. As a result of this exchange, the State offered to leave the courtroom and the court took a ten minute recess.

During the court's recess, Judge Moe approached Mr. Taylor in the outside hallway to offer an apology. At this time, Judge Moe extended his hand to Mr. Taylor for a handshake, apologized for "hurting" Mr. Taylor's "feelings" and told Mr. Taylor "I'm not like that." See Attached Affidavit of Christopher Taylor.

Judge Moe's statements during the hearing indicate that he believes Mr. Parker to be so dangerous that his own counsel should be concerned for their safety. This, coupled with Judge Moe's reaction that an African-American man sitting in the courtroom must be connected to Mr. Parker and therefore security issues "jump to mind"

> demonstrates a clear bias against Mr. Parker, an African-American male himself. As a result Mr. Parker fears that he will not receive a fair hearing and a fair resolution of the issues before Judge Moe. Any apologies made to counsel or her investigator do not quell this fear.

(PC-R2. 153-168).

To prevail on a motion to disqualify pursuant to Fla. Stat. § 38.10 and Rule 2.330 of the Florida Rules of Judicial Administration, Mr. Parker had only to show that the motion was legally sufficient. See Barnhill v. State, 834 So. 2d 836, 842-43 (Fla. 2002). For the purposes of a motion to disqualify where no judge has previously been disqualified in the case on that motion, the facts alleged by the movant must be taken as true. See id.; see also §§ 38.02, 38.10; Fla. Stat.; Fla. R. Jud. Admin. 2.330 (f); Cave v. State, 660 So. 2d 705, 707-708 (Fla. 1995). To establish a basis for relief a movant:

> need only show "a well grounded fear that he will not receive a fair trial at the hands of the judge. It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling." State ex rel. Brown v. Dewell, 131 Fla. 566, 573, 179 So. 695, 697- 98 (1938). See also Hayslip v. Douglas, 400 So. 2d 553 (Fla. 4th DCA 1981). The question of disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his ability to act fairly and impartially.

Livingston v. State, 441 So. 2d 1086 (emphasis added). The facts alleged in Mr. Parker's motion were "sufficient to warrant fear on [Mr. Parker's] part that he would not receive a fair hearing by the assigned judge." Suarez v. Dugger, 527 So. 2d 190 (Fla. 1988).

Judge Moe's actions in court and subsequent apology to Mr. Taylor indicate bias and the appearance of bias against Mr. Parker. The purpose of the disqualification rules direct that a judge must avoid even the appearance of impropriety:

> It is the established law of this State that every litigant, including the State in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of the court to scrupulously guard this right of the litigant and to refrain from attempting to exercise jurisdiction in any manner where his qualification to do so is seriously brought into question. The exercise of any other policy tends to discredit and place the judiciary in a compromising attitude, which is bad for the administration of justice. Crosby v. State, 97 So. 2d 181 (Fla. 1957); State ex rel. Davis v. Parks, 141 Fla. 516, 194 So. 613 (1939); Dickenson v. Parks, 104 Fla. 577, 140 So. 459 (1932); State ex rel. Mickle v. Rowe, 100 Fla. 1382, 131 So. 3331 (1930).
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> The prejudice of a judge is a delicate question for a litigant to raise but when raised as a bar to the trial of a cause, if predicated on grounds with a modicum of reason, the judge in question should be prompt to recuse himself. No judge under any circumstances is warranted in sitting in the trial of a cause who neutrality is shadowed or even questioned. Dickenson v. Parks, 104 Fla. 577, 140 So. 459 (1932); State ex rel. Aguiar v. Chappell, 344 So. 2d 925 (Fla. 3d DCA 1977).

State v. Steele, 348 So. 2d 398 (Fla. 3d DCA 1977).

Canon 3E of the Florida Code of Judicial Conduct and Rule 2.160 of the Florida Rules of Judicial Administration mandate that a judge disqualify him or herself in any proceeding "in which the judge's impartiality might reasonably be questioned," including but not limited to instances where the judge has a personal

bias or prejudice concerning a party or a party's lawyer, personal knowledge of disputed evidentiary facts concerning the proceeding, or where the judge has been a material witness concerning the matter in controversy. Canon 3E(1)(a) & (b)(emphasis added), Fla. R. Jud. Admin. Rule 2.160(d)(1) & (2). Additionally, due process guarantees to every party the right to a neutral detached judiciary in order "to convey to [him] a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests." Carey v. Piphus, 435 U.S. 247, 262 (1978). The situation in this case mandated recusal.

During Mr. Parker's evidentiary hearing Judge Moe made clear that he called into question the personal security of Mr. Parker's attorneys and precluded Mr. Parker from having full access to his attorneys as a result. Because Judge Moe believes Mr. Parker is so dangerous that his attorneys should be concerned for their safety, it is reasonable to fear that Judge Moe will not fairly evaluate his claims which could result in a new trial or new sentencing, thereby releasing him from confinement on death row. In addition, the mere presence of an African-American male in the courtroom suggested to Judge Moe that a security risk was present.

Mr. Parker's motion was based on the fear that the biased assumptions behind Judge Moe's excessive security measures would prevent Mr. Parker from receiving a full and fair hearing. That Judge Moe finds Mr. Parker so dangerous that he

would not even allow him to be seated with his own attorneys during the hearing, coupled with the racially discriminatory assumptions made regarding both Mr. Parker and his investigator, demonstrated a clear bias. The prejudice to Mr. Parker is clear, a new evidentiary hearing, presided over by an impartial judge should be granted. See Fuster-Escalona v. Wisotsky, 781 So. 2d 1063 (Fla. 2003).

B. Mr. Parker's Evidentiary Hearing was not Full and Fair, the Lower Court Erred in Prohibiting Mr. Parker from Presenting Witnesses Relevant to his Claim of Ineffective Assistance of Counsel for Failing to Utilize Forensic Experts during Guilt Phase

Mr. Parker was denied a full and fair evidentiary hearing when he was denied the opportunity to present testimony to fully litigate his claim of ineffective assistance of trial counsel for failing to present expert testimony to challenge the State's photographic evidence regarding the fatal bullet. The lower court prohibited Mr. Parker from presenting testimony from (1) Detective Robert Cerat: detective who took several of the photographs of the bullet that the State used to prove that the bullet taken at the autopsy matched the bullet in evidence; (2) Dr. Michael Bell: medical examiner who initially noted that the bullet he extracted from the victim's body was "large caliber silver color bullet" and who took photographs of the bullet while conducting the autopsy which were relied upon by the State; (3) Dr. Ronald Wright; (4) State Attorney Michael Satz: the prosecuting State Attorney who presented the testimony of the State experts regarding the features of the bullet and admitted the photographs in question into evidence (PC-R2. 376-377, 380-381,

383). The court's basis for striking these witnesses was that they were irrelevant to the claims that this Court remanded for an evidentiary hearing.

First, Mr. Parker is not required to make a showing of relevancy prior to calling witnesses. The lower court erred in overruling Mr. Parker's objection to the State's Motion for Discovery requiring Mr. Parker to specify the relevancy of the witnesses (PC-R2. 371). Florida Rule of Criminal Procedure 3.850 does not provide for automatic discovery. Lewis v. State, 656 So. 2d 1248, 1250 (Fla. 1994). Under Lewis, the lower court was required to determine that the State met their burden to show good cause for why discovery should be granted. Id. at 1249. The State failed meet to any of the requirements under Lewis, which include:

> the elapsed time between the conviction and the post-conviction hearing, any burdens placed on the opposing party and witnesses, alternative means of securing the evidence, and any other relevant facts

Id. at 1250. The State's only argument before the lower court was that:

> The State initially seeks a proffer of the testimony to be given by each of the Defendant's witnesses and a determination by the court as to relevancy. The State questions the propriety and relevancy of compelling the appearance and testimony of certain witnesses for this collateral proceeding.

(PC-R2. 36; PC-T. 369-371). At the hearing, the State made no further showing and the lower court made no inquiry whatsoever into what factors under Lewis would compel Mr. Parker to proffer the relevancy of the witnesses. Nor did the State establish that they should have the opportunity to depose the witnesses (PC-

T. 371). The Court struck the witnesses solely on the basis that the State questioned their relevancy.

In any event, the proper time to make an objection as to the relevance of testimony is at the time the testimony is offered. As explained by Charles Earhardt in Florida Evidence (2006 Edition) § 104.5, pre-trial determinations of the admissibility of evidence are typically reserved for evidence that will be highly prejudicial to the moving party. Id. Additionally, pursuant to Fla. Stat. § 90.104(a) "a proper objection must state the specific reason for excluding the evidence. Id. at § 104.2.[24] Specifically, "[t]he objection that evidence is incompetent, irrelevant and immaterial is not a specific objection." Id.[25] The argument by the State that the issues relating to the bullet were already "fully litigated" at the time of trial and therefore, Mr. Parker is not entitled to call material witnesses, does not satisfy these requirements.

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[24] See also Atlantic Coast Line R. Co. v. Shouse, 91 So. 2d 90, 95 (Fla. 1922) ("The rule which obtains in this state as to objection to the admission of evidence is that the grounds to the objection must be specific, and when objection is based upon and confined to particular grounds no other grounds of objection will ordinarily be entertained.")

[25] See also Tampa Elec. Co. v Charles, 67 So. 572, 573 (Fla. 1915) (" 'Where the grounds of objection interposed to proffered evidence were the same was immaterial, irrelevant and not pertinent to any issue made in the pleading, such grounds of objection are properly overruled, unless the evidence so objected is palpably prejudicial, improper and inadmissible for any purpose'") (quoting Brown v. Bowie, 50 So. 637 (Fla. 1909)).

Moreover, assuming that Mr. Parker was properly compelled to proffer the relevancy of material witnesses, the lower court erred when it granted the State's motion and struck material witnesses to Mr. Parker's claim of ineffective assistance of counsel at guilt phase. The lower court clearly missed the key issue regarding witnesses relevant to proving a material fact when it granted the State's motion to strike and ruled that Mr. Parker's witnesses were irrelevant. The Court stated:

> Well, unless you know that any of these witnesses have knowledge about the factual basis for the purpose for which the case was remanded, such as Bo Mr. Hitchcock said to Mike Satz, "I'm not calling any experts because I don't think they're necessary." Or told Ron Wright, "I'm going to put on what I have about the color of the bullet, but I refuse to call any experts because I don't want to spend money." Unless these proposed witnesses have any knowledge along those lines, their knowledge has been fully explored. Any testimony they may have would not be relevant to the issue of why the case was remanded.

(PC-R2. 383). Mr. Parker's counsel objected to the Court's ruling arguing:

> I think here it is my burden not only to show deficient performance but I also have to show ineffective assistance of counsel standard. I can't show prejudice without showing what Mr. Hitchcock should have done to contest the color of those photographs, and **to contest the methods in which those photographs were taken**.
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> . . . Here Cerat and Bell are both ones that took the photographs that are in question that Mr. Hitchcock should have retained an expert to question those photographs. With all due respect, the statements Your Honor is making about did Mr. Hitchcock say to Satz or Wright or Bell, I'm not calling an expert, I'm going with what I've got, that goes strictly to the deficient prong of ineffective assistance of counsel. I

> can't litigate or adequately present the ineffective assistance of counsel claim if I'm prohibited from proving prejudice as well. That exactly what this is doing.

(PC-R2. 382, 384) (emphasis added); see also Strickland v. Washington, 466 U.S. 668 (1984).

As this Court noted when it remanded Mr. Parker's case, trial counsel did not get an expert to examine the evidence relating to the bullet after the medical examiner changed his initial testimony. Parker, 904 So. 2d at 377. Pursuant to this Court's remand, the material issues of fact relevant to Mr. Parker's claim included any information relating to the methods and conditions under which the photographs and how the evidence was handled in State custody. The witnesses that Mr. Parker intended to call were directly relevant to these issues. Pursuant to Fla. Stat. § 90.401 "Relevant evidence is evidence tending to prove or disprove a material fact," and evidence that is relevant is admissible. See Fla. Stat. § 90.402; see also Gentler v. State, 868 So. 2d 557 (Fla. 3d DCA 2004) citing to Stephens v. State, 787 So. 2d 749 (Fla. 2001) (Relevant evidence has a logical tendency to prove or disprove a fact of consequence to the outcome of the case.)

Additionally, in the trial court's order, Judge Moe specifically notes that:

> It must be pointed out that in the post conviction evidentiary hearing, the defense could not produce one witness who testified any differently than the testimony that was presented at the trial.
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> Again, nothing was presented at the evidentiary hearing to show that

> any photography expert could ***refute the trial testimony of Dr. Bell and Detective Cerat*** that the bullet was in fact the fatal bullet taken from the victim at his autopsy.

(PC-R2. 353). The trial set up the situation so that Mr. Parker was precluded from fully substantiating his claim and used that fact to deny Mr. Parker relief. Mr. Parker's right to due process of law was violated by precluding him from calling relevant witnesses to his claim. See Johnson v. Singletary, 647 So. 2d 106, 111-112 (Fla. 1994). Mr. Parker is entitled to a a full and fair evidentiary hearing at which he can fully substantiate his claims.

CONCLUSION

Based on the foregoing, Mr. Parker seeks a new trial and sentencing due to trial counsels' failure to afford constitutionally adequate representation during both the guilt and penalty phases of his trial. If this Court determines that Mr. Parker has not established the necessary prejudice regarding the ineffective assistance of counsel claim for failing to present expert testimony regarding the State's photographic evidence of the fatal bullet, then Mr. Parker respectfully requests that his case be remanded for a full and fair evidentiary hearing on each of his claims for relief before a new judge.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, firs-class postage prepaid to Leslie Campbell, Asst. Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, FL 33401, on the 16th day of July, 2007.

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