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**

REPLY 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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INTRODUCTION

Mr. Parker submits this Reply to the State's Answer Brief. Mr. Parker will not reply to every argument raised by the State. However, Mr. Parker neither abandons nor concedes any issues and/or claims not specifically addressed in this Reply. Mr. Parker expressly relies on the arguments made in his Initial Brief for any claims and/or issues that are only partially addressed or not addressed at all in this Reply.

A. ARGUMENT IN REPLY TO ISSUE I: TRIAL COUNSEL AFFORDED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL TO MR. PARKER DURING HIS PENALTY PHASE

At the evidentiary hearing, the lower court was presented with the detailed account as to how the performance of Mr. Parker's trial counsel fell well below constitutionally mandated standards with respect to the penalty phase. As argued in the Initial Brief, the lower court denied Mr. Parker's ineffective assistance of counsel claim and found that trial counsel was not deficient and that Mr. Parker's presentation of evidence was cumulative (PC-R2. 350-352). In the Answer Brief, the State continued its pattern of misrepresenting the record, misconstruing the case law relevant to the standards for effective penalty phase counsel, and offering arguments that amounted to opinion and mere speculation. It is also important to note that while the State refutes the evidence presented during the evidentiary hearing, the State failed to present any witnesses to disprove Mr. Parker's social

history and family background, nor did it present any mental health experts to rebut the findings of the mental health experts presented by Mr. Parker.

In a capital case, counsel has a duty to conduct a "requisite, diligent investigation" into his client's background for potential mitigation evidence. Williams v. Taylor, 120 S. Ct. 1495, 1524 (2000). See also Id. at 1515 ("trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background"); State v. Riechmann, 777 So. 2d 342 (Fla. 2000) ("an attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence"). While an attorney is not required to investigate every conceivable avenue of potential mitigation, the Supreme Court has emphasized that:

> In assessing the reasonableness of an attorney's investigation, however, **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.***

Wiggins v. Smith, 123 S. Ct. 2527, 2538 (2003) (emphasis added). Furthermore:

> Strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgment supports the limitations on investigation.

Id. at 2539, citing Strickland, 466 U.S. at 690-691.

Despite the clear and unequivocal mandate for counsel to conduct a comprehensive investigation, it is the State's position that the standard for deficient performance is that trial counsel "do nothing." Answer Brief at 63. There is

simply no legal basis for the State's "do nothing" standard for deficient performance and it has been patently rejected by the Supreme Court. As a result, the State entirely misunderstands the Strickland line of cases, particularly the more recent decision in Wiggins. In fact, Mr. Parker's case is particularly similar to the circumstances in Mr. Wiggin's case in that Mr. Parker's trial attorneys likewise chose "to abandon their investigation of [Mr. Parker's] background after having acquired only rudimentary knowledge of his history from a narrow set of sources." Wiggins at 2537. Mr. Wiggins counsel did not, in fact "do nothing," rather, counsel retained a psychologist to do some testing, including IQ testing. The Court further described counsel's investigative efforts:

> With respect to [Mr. Wiggin's personal] history, counsel had available to them the written PSI, which included a one-page account of Wiggins' "personal history" noting his "misery as a youth," quoting his description of his own background as "'disgusting,'" and observing that he spent most of his life in foster care. Counsel also "tracked down" records kept by the Baltimore City Department of Social Services (DSS) documenting petitioner's various placements in the State's foster care system.

Id. at 2536. (citations omitted). The Supreme Court found that counsel's ineffectiveness was in the fact that they ***failed to expand their investigation beyond the records obtained and the findings of the psychologist.*** The Court found that:

> The scope of their investigation was also unreasonable in light of what counsel actually discovered in the DSS records. The records revealed several facts: Petitioner's mother was a chronic alcoholic; Wiggins

> was shuttled from foster home to foster home and displayed some emotional difficulties while there; he had frequent, lengthy absences from school; and, on at least one occasion, his mother left him and his siblings alone for days without food.

Id. at 2537. Similarly, trial counsel for Mr. Parker was unreasonable for failing to continue the investigation started by the public defender's office. Although trial counsel may have been aware of several aspects of Mr. Parker's childhood, they failed to interview one witness who could provide details and corroborate the preliminary information known by counsel or obtain one single record from Mr. Parker's background.

The State concedes that trial counsel relied entirely on the mitigation investigation conducted by Mr. Finkelstein and Mr. Moore for the Public Defender's Office. Answer Brief at 44. However, in an effort to minimize trial counsel's ineffectiveness, the state misrepresents the investigators' roles in aiding trial counsel in preparation for the penalty phase and overstates the extent of their investigation. Moreover, the fact remains that neither of these investigators were investigating Mr. Parker's case for Mr. Hitchcock or Mr. Booras. Instead, as they themselves admitted, they worked on the case for a few short months while handled by the public defender's office and testified that they performed what was merely a "preliminary investigation" (PC-T. 191-192). This is an important distinction that is entirely ignored by the State.

Moreover, both Mr. Finkelstein and Mr. Moore indicated that their contact with both trial counsels was extremely limited. In fact, Mr. Moore's only specific recollection related to his direct involvement prior to Mr. Hitchcock taking over the case and his meeting in preparation for his testimony to discuss "the type of questions that would be asked and the kind of information that I would respond to" (PC-T. 203). Mr. Moore had no specific recollection of meeting with either trial counsels between the time the public defender's office conflicted off the case and preparing to testify and admitted that he was never requested to offer any assistance or provide information to trial counsel in effort to contact the witnesses he had previously interviewed (Id.).

Further, Mr. Finkelstein specifically stated that the initial psychosocial history he compiled was simply "**to lay the groundwork for the penalty phase**" **(**PC-T. 192**)** (emphasis added). When asked if the psychosocial history is 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.). In fact, the psychosocial history was merely a list of information.[1] Mr. Finkelstein recalled that it was going to require significantly more work than had

[1] See EXH. 13.

been put into the case by both himself and Mr. Moore at the time Mr. Hitchcock was assigned to the case. This was particularly so with regards to acquiring various records including school records (Id.). Mr. Finkelstein's recollection was that his discussion with Mr. Hitchcock related to what needed to be explored further and his impressions from his initial witness contact and the psychosocial history (Id.).[2]

Essentially, trial counsel had preliminary information that would have caused a reasonable attorney to investigate further. Yet, the State argues that trial counsel was effective when it ignored the numerous red flags about Mr. Parker's traumatic childhood and possible brain deficits that required further investigative development. Meanwhile, the record shows that Mr. Booras could not provide any strategic decision for limiting his investigation especially with regards to the significant social history witnesses such as Mr. Parker's sister, friends, neighbors, and case workers. Contrary to the State's opinion that Mr. Parker's penalty phase "escaped the oft-times disjointed and piecemeal accounts of a parade of family and

[2] Mr. Finkelstein has been an attorney or investigator for thirty (30) years and has participated in investigating for capital penalty phases in at least ten (10) or twelve (12) cases and provided counsel or advice to numerous others (PC-T. 191). In those cases in which he has 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.).

friends,"[3] neither trial counsel offered this as a strategy. Neither trial counsel offered any reasonable strategy for failing to obtain or request school records, medical records, police reports relating to a prior conviction used as an aggravator, or corrections records.[4] Mr. Booras, in particular could not point to any aspect that this type of evidence would contradict or jeopardize his theory of humanizing Mr. Parker.[5] As stated in Wiggins, "[a]ny reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses…" Wiggins at 2537.

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[3] See Answer at 28, fn. 9.

[4] The State's assertion that background records were turned over to trial counsel and Mr. Parker's complaint is merely that HRS records were "unavailable" is untrue and contradicted by the record. See Answer Brief at 42. Any records that Mr. Moore collected while investigating Mr. Parker's case were lost in the theft of his vehicle (PC-T. 202). Further, Mr. Finkelstein testified that they had only begun to search for records (PC-T. 177). Admittedly, neither trial counsel attempted to regain any of the information or records that were lost to the theft nor did they pursue obtaining any medical, school, or any other agency independently at any time. (PC-T. 77-78; 285-287). There was absolutely no testimony that records could not be found after a diligent search had been completed.

[5] Despite the State's assertions that individual fact witnesses would have been subject to their own credibility issues, Mr. Booras could not indicate any witnesses other that Mr. Parker's wife who would present such a problem. Mr. Booras could not indicate any similar issues for any of the witnesses Mr. Parker presented in post-conviction. In fact, he failed to ever speak with any of them. Likewise, he could not indicate how calling any of the witnesses from Jacksonville would have implicated the negative behavior that prompted him to exclude Mr. Parker's wife (PC-T. 273-274; 292-293).

The State advises this Court that the "focus is **what** efforts were undertaken and **why** a strategy was chosen." Answer Brief at 21 (emphasis included). Trial counsels' testimony at the evidentiary hearing was clear: trial counsel made **no efforts to conduct their own mitigation investigation, failed to follow-up on any of the leads provided to them by the prior investigation and, Mr. Booras could not provide any strategic decision for failing to search for records, or limiting his investigation and excluding fact witnesses**. The State's argument that counsel argued to the jury that Mr. Parker suffered a "troubled childhood" or "never had a chance"[6] does not release counsel from his constitutional duty to investigate Mr. Parker's background and gather the evidence necessary to actually substantiate the theory that Mr. Parker deserved a sentence less than death. See Wiggins v. Smith, 123 S. Ct. 2527 (2003); see also ABA Guidelines, Guidelines 11.4.1(c) and 11.8.3(a).

While the Strickland line of cases indicates that further investigation is excusable where evidence suggests it would be fruitless, there was no evidence in Mr. Parker's case indicating a thorough investigation would be pointless. Just the opposite exists here. There were numerous red flags in the preliminary information obtained by the investigators for the public defender's office in addition to the wealth of evidence that was available in the many records never

[6] Answer Brief at 27.

obtained by counsel. Mr. Parker's school records contain early psychological testing reporting an IQ score of 78. Dr. Caddy, having reviewed this information now, stated he would have recommended further neuropsychological testing had he been aware of such a low score.[7] Also, 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 suffered from schizophrenia, yet never attempted to obtain medical records of her hospitalizations. Had they done so, they would have seen the severity of her illness. Dr. Caddy admitted he was not aware of how severe her illness was. Counsel was on notice of Mr. Parker's traumatic childhood, yet did nothing to investigate or present corroborating details of his background. Finally, had counsel obtained records of his 1979 conviction, including court documents and police reports, counsel would have been able to

[7] While the State points out that Dr. Caddy would not have ultimately changed his opinion based on the social history and background materials that were provided to him during the evidentiary hearing, Answer Brief at 46, this ignores that Dr. Caddy was still unaware of any additional testing. The fact is that Dr. Caddy admitted that he would have conducted further neuropsychological testing and without having performed this further evaluation, Dr. Caddy was in no position to change his opinion with respect to any statutory mitigators. Indeed, as the lower court specifically noted during the evidentiary hearing, Dr. Caddy had no authority on whether Mr. Parker met the standards for statutory mitigation because he did not have the proper materials nor had he performed enough investigation. The State conveniently omits the fact that upon asking Dr. Caddy whether his opinion had changed the lower 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).

challenge the factual basis of that victim's testimony at the penalty phase. See Rompilla v. Beard, 125 S. Ct. 2456 (2005).

Furthermore, the State's reliance on this Court's decision in Miller v. State, 926 So. 2d 1243 (Fla. 2006), is misplaced and can be distinguished from Mr. Parker's case. In Miller, the public defender's office had done extensive groundwork making the case "almost ready to try." Id. at 1249. In contrast, Mr. Finkelstein testified that the work done by the public defender's office in Mr. Parker's case was only the starting point (PC-T. 191-192**).** In Miller, the psychological expert conducted neuropsychological testing and interviewed the defendant's family. Whereas, Dr. Caddy only spoke to Mr. Parker's mother, a very inaccurate source as is evidenced by her testimony and mental illness, and never conducted any neuropsychological testing (PC-T. 417; R. 2260). Additionally, counsel for Mr. Miller had access to extensive materials including school records, military records, mental health records, medical records and corrections records, all of which were provided by Mr. Miller's trial counsel to the psychological expert (PC-T. 77, 290, 419). Counsel for Mr. Parker had no records and provided nothing to Dr. Caddy. In fact, Mr. Booras testified he had no duty to provide his expert with any background information or records rather; the onus was on Dr. Caddy to request specific records from trial counsel**.** The differences

between Mr. Miller's and Mr. Parker's cases are quite striking and ultimately *emphasize* Mr. Parker's trial counsels' considerable failures.

Also, the State cannot find support for its position in reliance on this Court's opinions to which the State cites. See Answer Brief at 64. For example, Mr. Parker's case is not one where trial counsel simply failed to "call everyone who may have information about an event" as in Jennings v. State, 583 So. 2d 316, 321 (Fla. 1991). Here, trial counsel ***failed to call a single witness to establish any evidence*** of the numerous traumatic events Mr. Parker suffered throughout his life. Likewise, in Breedlove v. State, 692 So. 2d 874, 877-78 (Fla. 1997), the denial of relief turned on the fact that trial counsel made the strategic decision not to subject lay witnesses to cross-examination. Mr. Parker's trial counsel's decision to exclude numerous fact witnesses was made without any reasonable investigation to support that decision. Specifically, trial counsel failed to so much as contact any of the numerous fact witnesses available. While this Court ruled in Davis v. State, 928 So. 2d 1089 (Fla. 2006), that it was not deficient performance for trial counsel to utilize previous counsel's file, trial counsel in this case actually interviewed the witnesses contacted by previous counsel and expanded upon the initial investigation performed by prior counsel. In Parker's case, the complete opposite occurred, as the State concedes, trial counsel ***relied solely*** upon the Public

Defender's preliminary investigation ***without any additional follow-up.*** See Answer Brief at 44.

The state's assertion that Mr. Parker's penalty phase witnesses were able to present credible and unimpeachable versions of Mr. Parker's life is clearly refuted by both trial and post-conviction records. Answer Brief at 28-29. 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 a result, the testimony was discredited by the state attorney. 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 the bulk of his testimony relied on Mr. Parker's self-report (R. 2210). 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.

Additionally, the State's analysis of the expert testimony at the evidentiary hearing is very concrete and its recitation of the testimony is very narrowly focused, often times incorrect. For example, the State assertion that Dr. Pickar had "little knowledge whatsoever of the case facts"[8] is unsupported by the record. Dr.

[8] Answer Brief at 53, fn. 26.

Pickar in fact, endured the State's repetitive questioning, spanning eleven pages of the transcript, and detailed the facts of the case with great accuracy (PC-T. 517-528). The State did not point to any facts which were entirely unknown by Dr. Pickar. Additionally, Dr. Pickar acknowledged that he read all of the witness statements (Id). The State argues that Mr. Parker's actions of first wearing no mask, but later donning a mask after several people had already seen him, shooting at the floor of the restaurant, shooting into a car, but missing the passenger, unsuccessfully commandeering a means of escape and running from the police demonstrate planning and control. Answer Brief at 53, fn. 26. The State's opinion as to what these actions demonstrate is irrelevant as it offered no authority, evidence or expert opinion to support these propositions. As the experts were able to convey, Mr. Parker's actions were quite desperate and erratic.

In fact, Dr. Pickar explained Mr. Parker's actions quite clearly. As a result of his 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[9], and ongoing

[9] The State's assertion that Mr. Parker has abandoned his claims with respect to alcohol intoxication is entirely without merit. Answer Brief at 68, fn. 40. To the contrary, Dr. Pickar testified at length about the effects of alcohol on Mr. Parker's brain deficits and confirmed that his alcohol consumption "certainly played a part" at the time of the crime:" (PC-T. 490-1).

neuropsychological dysfunction (PC-T. 478-479). Throughout his testimony, Dr. Pickar indicated he relied on Mr. Parker's history of impulsive acts documented in the background materials provided to him, documentation of low intellectual functioning as evidenced by the IQ score of 78 documented in Mr. Parker's school records, background information provided by Mr. Parker, his mother's schizophrenia, and his poor abstraction ability (PC-T. 480-488). Dr. Pickar emphasized that his opinion that Mr. Parker's neuropsychological functioning was not based exclusively on Dr. Crown's findings (Id.). Dr. Crown's findings confirmed his instincts and evaluation.

Mr. Parker's deficits along 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. 488-489). In an effort to explain Mr. Parker's inability to change circumstances from the events in the Pizza Hut to fleeing the Pizza Hut, Dr. Pickar testified:

> When I say 'change,' I mean literally the change of being in a familiar place, those are very familiar places for Mr. Parker, he worked in many fast-food restaurants, I believe there had been a prior episode of a robbery, or something to that effect, in another fast-food restaurant, very similar. The nature of Mr. Parker's disorder is often characterized by what's called perseveration, or a repeating, of the same thing over and over, that was familiar territory to him. Once the situation changed where he was in a pursuit, out of that particular setting, and that tragic outcome, I think every bit of Mr. Parker's liabilities came to play, and that's when I think, one, the change of set was stressful for him, two the nature of what that change was in terms of his apprehension. So, when I referred to the stress issue, I was

> referring mostly to the chase and whatever happened that resulted in the murder of an unfortunate victim.

(PC-T. 528-529). When asked if Mr. Parker felt comfortable in Pizza Hut, Dr. Pickar clarified:

> I'm not sure 'comfortable' is the right word, but he will repeat the same behavior, not necessarily out of comfort, but out of difficulty changing. So there's familiarity there, and then once there's a procedure going forward in a certain fashion it's that forced change out of that that's going to be extremely difficult for an individual such as Mr. Parker.

(Id.).

Despite the State's continued speculation as to what Mr. Parker should or should not have done upon confrontation by the police, this is exactly what each expert has testified he is incapable of doing as a result of his mental impairments. 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. 498). Additionally, Dr. Crown confirmed that Mr. Parker, as a result of his brain damage, has difficulty with his executive functioning: concentrating, attention, understanding the long-term consequences of his immediate behavior, and controlling his impulsivity (PC-T. 650).

The State argues that Dr. Crown's opinion should be discounted in its entirety because he inaccurately scored "three areas" of the tests he performed. The State makes much of Dr. Crown's scoring on Mr. Parker's WAIS-III test.

Answer Brief at 59. As Dr. Crown testified, on three vocabulary test items, Mr. Parker's responses were, arguably, not scored accurately. However, the State's reliance on these minor errors to the extent that his testimony should be rejected, reflects a misunderstanding of simple statistics and what an IQ score indicates. As Dr. Crown explained, results on the WAIS-III are subject to a statistical margin of error that includes an error ratio (PC-T. 651-652). Thus, even if Dr. Crown had scored the three queried items as the state suggests he should have, Mr. Parker's overall IQ score would not be appreciably different.

Similarly, the state's quibbling about whether Mr. Parker's IQ is 87 or 90 and whether the difference of three points "would have put him into a higher grid on the bell curve" belies a misunderstanding of statistics. Given that the error ratio must be taken into account when scoring the WAIS-III; a difference of three points is insignificant and in actuality indicates a range of scores (Id.). The State is simply wrong to suggest that there is a contradiction or conflict between these two scores or between the two experts for that matter. Answer Brief at 58-59. As stated, Mr. Parker's scores of 78, 87, and 90 overlap within the error ratio and indicate no statistical difference (Id.). In any event, as Dr. Crown acknowledged, Mr. Parker's intelligence is average under any circumstances (PC-T. 670).

The State ignores Dr. Crown's testimony that the significant difference between Mr. Parker's verbal and performance IQ was much more troubling to Dr.

Crown (PC-T. 646-647). 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 or inconsistency between Mr. Parker's verbal and performance scores are precursors or indicators of possible mental disorders and brain damage (Id.). The State has offered no evidence to refute Dr. Crown's opinion that Mr. Parker suffers from organic brain damage.

Whether or not Dr. Crown had a detailed recollection of the specific facts of the crime, he testified that he did read the direct appeal opinion as well as witness statements from the crime. Based on his reading of these background materials, Dr. Crown concluded that the circumstances of the crime would have been a very stressful situation. As a result of his review of the materials and more specifically his neuropsychological testing, Dr. Crown opined that

> the pattern and profile of [Mr. Parker's] underlying brain function would preclude any sort of stressful circumstance, his being able to deal with that sort of circumstance, and so he would have been under extreme mental or emotional disturbance as a result.

(PC-T. 653). Mr. Parker's inability to conform his conduct to the requirements of the law was likewise the result of his brain capacity and the overall circumstances of the crime.

With regards to Dr. Toomer, the State argues that he was "less than knowledgable about his practice." Answer Brief at 57. The State bases this on his

response that he has testified in hundreds of capital cases, but could not say how often he testified for the State (PC-T. 582-583). Dr. Toomer acknowledged that he has conducted evaluations and provided testimony for Capital Collateral Regional Counsel and the defense bar, but wouldn't even know where to begin guesstimating how many times (Id.). Dr. Toomer explained that he was not trying to be evasive, but that he simply did not keep that kind of information, primarily because he engages in the same type of process based on his profession as a psychologist regardless of who calls him (Id.).

The State's citation to Rose v. State, 787 So. 2d 786 (Fla. 2001) is misleading. In Rose, Dr. Toomer's bias was not at issue as the State asserts. Instead, the issue was whether the State's cross-examination of Dr. Toomer was proper. Essentially, Rose v. State, in the context cited by the State, is irrelevant here because Mr. Parker has made no objection to the admissibility or properness of the State's cross-examination regarding Dr. Toomer's practice and experience. While in Rose, the Court concluded that Dr. Toomer's findings were contradicted by the State, the State has made no such showing here.

The only challenge made by the State of Dr. Toomer's testimony is the computer-generated results of the MMPI-II test which he administered to Mr. Parker. While that report was never admitted into evidence, the State questioned Dr. Toomer as to the specifics reported therein during cross-examination. Dr.

Toomer acknowledged that the report indeed stated what the State indicated. However, Dr. Toomer explained that the ***MMPI-II is only valid to the extent that it is corroborated***; it is only one tool in the diagnostic process (PC-T. 599) (emphasis added). For this reason, Dr. Toomer did not diagnose Mr. Parker with anti-social personality disorder (PC-T. 599-601). Further, Dr. Toomer explained that there was no previous diagnosis of conduct disorder which is a precursor for an antisocial personality diagnosis (Id.). While he recognized that the DSM-IV required evidence of conduct disorder, Dr. Toomer stated that historically in the field of psychology a professional would prefer to see a diagnosis rather than just evidence (PC-T. 590-591). Dr. Toomer explained that the anecdotal reports within Mr. Parker's school records which detail some instances of disobedience and fighting were best explained as Mr. Parker's "maladaptive attempt" at coping in a particular environment and not as conduct disorder (Id.). This is particularly so given instances in which Mr. Parker was a victim very early on in his life (Id.). Dr. Toomer explained:

> All of the people in these particular agencies, and what have you, where you have drawn inferences in terms of the persons functioning, nobody ever diagnosed him as suffering from conduct disorder. And if you look at that behavior, you can talk about and choose that section which focused on his aggressive behavior, and my response to you was what I indicated earlier, and that is that that behavior is his maladaptive attempt at coping, that's what you get.

(PC-T. 593).

The State argues that it is most incredible that Dr. Toomer did not diagnose Mr. Parker with antisocial personality disorder, yet again the State has not provided any expert or authority to refute Dr. Toomer's opinions. Answer Brief at 57, fn. 32. Not one expert, historically, at trial or presently, has ever diagnosed Mr. Parker with conduct disorder or antisocial personality disorder. Additionally, the State continues to substitute its own hypothetical strategic decisions and suggests that Dr. Toomer's MMPI-II results would be a valid reason for not presenting such testimony and yet, Mr. Booras never answered any questions regarding these results or any aspect of Dr. Toomer's findings. While this Court has found that a jury may look unfavorably upon a diagnosis of antisocial personality disorder, there has been no such diagnosis here.[10] Nor, did Mr. Booras assert this as a strategy for precluding any of the information offered by Mr. Parker's postconviction experts. Specifically, Mr. Booras was unaware of any of this information because he never requested that his mental expert perform the

[10] Additionally, the States reliance on Carrol v. State, 815 So. 2d 601 (Fla. 2002) is misplaced. First, it is another attempt by the State to substitute its own strategy for not hiring a competent mental health expert. Answer Brief at 59, fn. 33. Secondly, Mr. Parker's MMPI-II score does not present "double-edge sword" evidence as the State asserts. As Dr. Toomer clarified, Mr. Parker's life history of violence, instability, and victimization explains the context for his behavior. The MMPI-II scores are another piece of corroboration that informed Dr. Toomer of the level of dysfunction that Mr. Parker suffers from. Testimony such as Dr. Toomer's would have given the jury the necessary framework to consider Mr. Parker's aggressive behavior in the context of the impact of his traumatic childhood on his mental state.

necessary tests and evaluations. As Mr. Finkelstein stated, it is not simply a matter of deciding to keep out the negative information, rather he confirmed:

> 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. 194). Mr. Booras made no weighing of the available evidence in mitigation.

The prejudice here is clear. 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.[11] A reasonable probability exists that Dwayne Parker would have received a life sentence. As such, Mr. Parker was prejudiced by counsel's failure to

[11] 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).

reasonably investigate and present mitigation.

B. ARGUMENT IN REPLY TO CLAIM II: TRIAL COUNSEL AFFORDED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL TO MR. PARKER BY FAILING TO PRESENT EXPERT TESTIMONY DURING MR. PARKER'S GUILT PHASE

It is clear that the State fails to understand the significance of the photographs depicting the fatal bullet. The State would have this Court believe that identifying the bullet that killed the victim in this case was not based on photographic documentation. Instead, the State argues that the manipulation of photographs depicting the fatal bullet lodged in the victim's body is irrelevant. The theory of defense was this was the case of the "missing silver bullet" and that the bullet was switched **after** the bullet was removed from the body. Therefore, it was incumbent on defense counsel to challenge the State's evidence to show that the photographs depicting the bullet lodged in the victim's sacrum were the only pieces of evidence that, without question, showed the bullet that killed Mr. Nicholson. Therefore, unless the bullet in evidence matched the bullet depicted in these photographs, Mr. Parker could not be responsible for shooting the victim. The issue critical to Mr. Parker's defense was not merely the "actual bullet" in evidence as the State contends, but rather, whether the bullet in evidence matched the bullet in the victim's body.

In support of its argument, the State repeatedly misrepresenting defense counsel's testimony by citing to only limited portions. Mr. Hitchcock did not

testify that the color of the bullet depicted in the photographs was irrelevant, but in fact, testified that refuting the accuracy of the State's photographs was essential to his theory of the case (PC-T. 33, 149). Mr. Hitchcock confirmed that it was critical for the defense to refute the accuracy and the validity of the State's photographic evidence in order to convince the jury to agree with Dr. Bell's original observation that the fatal bullet was silver and therefore the bullet in evidence was not the bullet that killed the victim (Id.). The color of the bullet was highly relevant.

The State asserts that Mr. Parker failed to meet his burden under Strickland because he did not refute the testimonies of Dr. Bell and Detective Cerat from trial. Yet, the State dismisses the fact that Mr. Parker's photography expert refuted the evidence that the bullet in evidence was taken from the victim during the autopsy and conveniently omits the fact that Mr. Parker was prohibited from calling either Dr. Bell or Detective Cerat both of whom were ***responsible for collecting and photographing the bullet***. It is the State that has set up the situation where Mr. Parker has been precluded from fully substantiating his claim by calling these exact witnesses to testify and then uses this fact to undermine his claim for relief. Mr. Parker's right to due process of law was violated when he was barred from calling relevant witnesses to his claim.[12] See Johnson v. Singletary, 647 So. 2d

[12] The State conveniently argues that Mr. Parker has not met his burden by refuting the testimonies of Dr. Bell and Detective Cerat. Yet in its Answer to Claim III, argues that Mr. Parker was not entitled to call these witnesses because these

witnesses were "irrelevant" to Mr. Parker's claim for relief. Answer at 97. As Mr. Parker argued during the State's Motion for Discovery prior to the evidentiary hearing:

> 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**.
>
> *****
>
> . . . 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).

The State's contention that counsel for Mr. Parker did not properly preserve this issue for appellate review is without merit. The record clearly demonstrates that counsel both objected and strenuously argued against both the lower court's requirement that Mr. Parker proffer the relevancy of his own witnesses prior to their testimony ruling to exclude these witnesses (See PCR2. 382, 384). Pursuant to Florida Statute § 924.951(1)(b) (2000), "preserved" means an issue or legal argument timely raised and ruled on by the trial court, that is "sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor."

Further, this Court has consistently stated that proper preservation entails three components. First, a litigant must make a timely, contemporaneous objection. Second, the party must state a legal ground for that objection. Third, "[i]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." Steinhorst v. State, 412 So. 2d 332, 338 (Fla. 1982). Nothing more is required.

106, 111-112 (Fla. 1994). Mr. Parker maintains that he is entitled to a full and fair evidentiary hearing at which he can fully substantiate his claims.

Nevertheless, it must be noted that Dr. Bell's initial documentation that the fatal bullet was silver was based on his first hand observation of the bullet with his eyes, while his stunning change of testimony that the bullet was copper colored was based on what he admitted to be an overexposed photographic slide (R. at 1635-43, 1645-46). Mr. Parker's photographic expert, Mr. Wyman, discussed at length, how exposure and lighting conditions either mask or alter the color of objects in a photograph and without color verification within the photo; these photographs of evidence could not be relied upon for color accuracy (PC-T. 610-628). Defense counsel's failure to challenge the State's photographic evidence prevented counsel from effectively challenging Dr. Bell or Detective Cerat's testimony regarding the color and condition of the bullet.

Additionally, while the State takes issue with the fact that Mr. Parker did not present an expert in tool marking[13], Mr. Parker's claim was that defense counsel

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The state's argument that Mr. Parker be required to proffer the entire substance of a witness testimony prior to the witness testifying is ludicrous. As was argued in Mr. Parker's Initial Brief, the proper time for a relevancy objection by the State would have been during the substance of the witness' testimony. Counsel proffered to the lower court how each witness was relevant to Mr. Parker's claim for relief.

[13] Likewise, the State either misrepresents or misinterprets a string of case law that is misplaced in Mr. Parker's case and misses the point of Mr. Parker's claim. In

was ineffective when he did not effectively challenge the viability of tool mark identification (Amended Motion to Vacate Judgment and Sentence at 29). At the evidentiary hearing, Mr. Parker proffered into the record two articles from the forensic science community that challenged the reliability of tool marking identification that were readily available to Mr. Hitchcock at the time of Mr. Parker's trial. (PC-T. 69-70). Further, Mr. Hitchcock admitted during the evidentiary hearing that he did not conduct any of his own research nor did he

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Gore v. State, 846 So. 2d 461 (Fla. 2003), the defendant was alleging ineffective assistance of counsel for the failure of trial counsel to seek a change of venue. Gore v. State, 846 So. 2d at 469-70. In Gore, the Court stated that prejudice under Strickland could not be established because the defendant "presented no evidence to indicate that the trial court would have granted the motion for the change of venue." Mr. Parker's case is distinguishable. Mr. Parker has presented both proffered evidence and expert testimony that tool mark comparisons are not valid and that the photographic evidence used by the state provided no credible basis for making tool mark comparisons using the State's photographic evidence. Mr. Parker's claim has nothing to do with the trial court granting a motion but that trial counsel's ineffectiveness caused the State case to go unchallenged leaving the jury no choice but to believe the misrepresentations of the State's evidence.

Additionally, neither Rivera v. State, 717 So. 2d 477 (Fla. 2005) nor Cherry v. State, 781 So. 2d 1040 (Fla. 2000) support the State's position. In both cases, mitigation witnesses testified, but this Court found that the witnesses offered no testimony that supported the defendant's claim. In Parker's case, Mr. Wyman testimony explicitly supports Mr. Parker's claim that the State's evidence was misleading and the testimony is clear that the State's evidence was so poor that no valid comparisons could be made between the bullet and the State's photographic evidence.

consider challenging the validity of the tool marking comparisons made by the State's experts (Id.).

Furthermore, Mr. Wyman, as a photography expert, unequivocally testified that State's photographic evidence was so poor in quality and degraded that it would be impossible to make any comparisons based on the information illustrated by the exhibit (PC-T. 101-127). Simply put, it was impossible based on the evidence available to the State's experts for them to make any valid comparisons of the bullet in evidence with the bullet in the photographs. Had Mr. Hitchcock utilized a photography expert, such as the expert that Mr. Parker presented at his evidentiary hearing, coupled with the information that tool marking comparison as a forensic science is unreliable at best for identifying bullets, he would have been able to effectively challenge the State's case and expert testimony.

In regards to Mr. Whittaker's services in the area of ballistics, the State again misrepresents the record. First, Mr. Hitchcock's testimony was clear that he was not responsible for hiring Mr. Whittaker who was retained by previous counsel (PC-T. 145-146). The State goes on to substitute its own opinion that Mr. Hitchcock excluded Mr. Whittaker in order to keep the "sandwich" in closing argument. Answer Brief at 76, fn. 44. In fact the record reflects that Mr. Hitchcock actually listed Mr. Whittaker as a defense witness two weeks before trial only to withdraw his name the following day (PC-T. 62). Moreover, Mr. Hitchcock did

not have any specific recollection as to why he failed to present Mr. Whittaker for testimony and repeatedly admits during his testimony that an expert would have provided the testimony necessary to refute the State's case. (Id.).

Furthermore, the State's contention that Mr. Hitchcock utilized Mr. Whittaker as a tool mark expert is also contradicted by the record. Instead, the record reflects that Mr. Whittaker consulted on unrelated ballistic or firearm issues, such as whether the bullet in evidence was shot from Mr. Parker's gun and the distance between the shooter and the victim (PC-T. 58). These issues are irrelevant to whether the bullet in evidence was the same bullet that killed the victim. As the State repeatedly points out, the defense theory was that the bullet was switched. However, Mr. Whittaker never in fact, examined any of the evidence surrounding whether the bullet in evidence matched the bullet that was shown in the victim's body. Mr. Whittaker never compared any of the State's photographic evidence or made any comparisons to the bullet (PC-T. 58-59). In addition, Mr. Hitchcock failed to ever have the State's evidence independently examined or tested by Mr. Whittaker or any other expert (PC-T. 65-69).

To the extent that trial counsel failed to utilize a qualified expert to rebut the State's evidence, the State's case went unchallenged and accordingly no

adversarial testing occurred.[14] Mr. Parker was able to show at the evidentiary hearing that defense counsel made no attempt to contradict the State's evidence by challenging the validity of tool mark identification, nor did he utilize a photography expert to show that the photographs depicting the fatal bullet had no evidentiary value and therefore could not serve as any basis for tool mark comparison. The prejudice to Mr. Parker is clear.

Mr. Parker was able to show both that Mr. Hitchcock failed to ever retain or consult with an expert in the field of photography and that the photographs were subject to manipulation and did not reflect the true color of the fatal bullet through Mr. Parker's own photographic expert, Mr. Wyman. Mr. Hitchcock fully admitted that no juror or lay person could have understood his cross examination of either Detective Cerat or Detective Garland due to the highly technical issues that were being discussed regarding topics such as flash, power, exposures, and color

[14] The State's dependence on Mr. Parker's direct appeal opinion continues illustrates how the State continued to miss the point of Mr. Parker's claim. Answer at 84, fn. 53. In Parker v. State, 641 So. 2d 369 (Fla. 1994), this Court addressed Mr. Parker's claim that the court erred in allowing photographs of the bullet that were different coloring than the original prints into evidence. Id. at 376. This ruling does not address in the slightest way whether or not defense counsel was ineffective for failing to utilize a photography expert or challenging the State's photographic and tool marking evidence. The Florida Supreme Court merely addresses whether the court erred in allowing the State's photographs to be entered as evidence and concludes that an adequate Richardson hearing was conducted regarding the admission of the exhibits. Id.

temperatures (PC-T. 43-45, 50, 148-150).[15] Because Mr. Hitchcock was in effect attempting to testify himself, he was admonished by the Court in front the jury, further damaging his own credibility, and his cross-examination degenerated into nothing more than argument between himself and the witnesses. (PC-T. 43-46; R. at 1595). Mr. Hitchcock frankly admitted that the jury needed to have these issues explained to them in a manner they could comprehend by an expert in the field.

Defense counsel was well aware of his error and how critical it was for the defense to utilize a photography expert to refute the State's case to the jury. Unfortunately, Mr. Hitchcock realized his error too late because he did not even attempt to locate a photography expert until after both the guilt and penalty phases had already ended (PC-T. 36-39, 41). More importantly, Mr. Hitchcock was unable to offer any strategic reason for not presenting witnesses or experts to explain how these photographs could have been manipulated and were unreliable (PC-T. 43-45, 50, 148-150).

The State's contention that Mr. Hitchcock's failed cross-examination included the information explained by Mr. Wyman is unsupported by the record.[16]

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[15] The State's attempt to minimize trial counsel's failures by pointing to Mr. Hitchcock's personal background in photography makes no sense in light of the fact that trial counsel cannot be a witness.

[16] Here, the State's reliance on State v. Bolender, 503 So. 2d 1247 (Fla. 1987) is misplaced. In, Bolender, this Court did not find ineffective assistance of counsel because trial counsel made a strategic decision after taking into account a variety

Both the trial record and Mr. Hitchcock's own admission show that no juror would have been able to comprehend the technical aspects of Mr. Hitchcock's questioning without the information being put in the proper context. The substance of Mr. Hitchcock's questioning required at least some basic knowledge of photography and processing and without some explanation the jury was lost trying to follow complicated questions on issues that included obscure topics such as F-stops and color temperatures. More importantly, unless the jury was able to understand this critical information concerning these issues such as Detective Cerat's errors and the discrepancies in photo processing, the State's case could not be challenged. In contrast, Mr. Wyman was able to systematically and methodically refute the State's evidence and at the same time convey the information in a manner that a lay person would be able to digest.

Mr. Parker was denied a reliable adversarial testing. The jury never heard the considerable and compelling evidence that was exculpatory to Mr. Parker. Defense counsel failed to investigate and present this evidence, and it cannot be disputed that the jury did not hear the evidence in question. Defense counsel failed

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of circumstances and reasons for not calling mitigation witnesses to testify. State v. Bolender, 503 at 1250. In Mr. Parker's case, defense counsel could offer no strategic reason for failing to call a photography expert. In fact, defense counsel testified that he did believe he needed to utilize a photography expert to challenge the state's evidence but failed to even begin to locate an expert until after both the guilt and penalty phases ended. Fatally, the defense had no qualified expert assistance in challenging and rebutting the State's case.

to adequately investigate and challenge the State's evidence when he did not hire the services of independent forensic experts to assist him in Mr. Parker's defense. Defense counsel's failure to consult with these experts and have them independently examine the forensic evidence in this case was ineffective and highly prejudicial to Mr. Parker.

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 _____ day of December, 2007.

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