**IN THE SUPREME COURT OF FLORIDA**
**Case No. SC09-1089**
**Lower Court Case No. F96-13558**

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**LABRANT DENNIS,**
**Appellant,**

**v.**

**STATE OF FLORIDA,**
**Appellee.**

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**ON APPEAL FROM THE CIRCUIT COURT**
**OF THE ELEVENTH JUDICIAL CIRCUIT,**
**IN AND FOR MIAMI-DADE COUNTY, STATE OF FLORIDA**

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# REPLY BRIEF OF APPELLANT

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## INTRODUCTION

Mr. Dennis submits this Reply to the State's Answer Brief. Mr. Dennis will not reply to every argument raised by the State. However, Mr. Dennis neither abandons nor concedes any issues and/or claims not specifically addressed in this Reply. Mr. Dennis 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.

## ARGUMENT IN REPLY

### ARGUMENT I

### MR. DENNIS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE

#### Failure to Investigate Other Suspects

Mr. Dennis maintains that he has pled and demonstrated both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668 (1984). Because these claims were more than sufficiently pled, and because the files and records do not conclusively demonstrate that Mr. Dennis is not entitled to relief, Mr. Dennis is entitled to an evidentiary hearing.

As Mr. Dennis argued in his initial brief, according to the defense, this was a case of negligent investigation, wholly lacking in any physical evidence linking Mr. Dennis to the crime (T. 3043, 3048). Specifically counsel told the jury that the police zeroed in on Mr. Dennis and forgot everything else (T. 3043). The record

reveals that trial counsel argued that other boyfriends had a similar jealous motive, but counsel provided no evidence to support this argument to the jury. The notations in the victim's diary provided the specific evidence and the diary was a significant source of information. Yet, trial counsel failed to question Detective Romagni about the diary. Instead, trial counsel simply asked Detective Romagni if he knew of other men Ms. Lumpkins was involved with and whether he checked their whereabouts. Romagni answered that he knew of others but did not check alibis (T. 4137). On re-direct, the State asked Detective Romagni if there was any evidence that "suggested" that anyone other than Mr. Dennis did this (T. 4219-20). Romagni answered "no." At no point in the cross examination regarding other boyfriends did trial counsel question Romagni about his investigation of the diary.

Trial counsel was unable to provide the jury with any other suspects due to his inadequate cross-examination of Detective Romagni and his lack of investigation. The jury was left to believe that his questions regarding other boyfriends were mere speculation. Counsel was ineffective and Mr. Dennis is entitled to an evidentiary hearing.

**Improper Comments on Silence**

The responses of Det. Romagni during direct examination at trial indicate attempted to contact Mr. Dennis at some point prior to his arrest, but Mr. Dennis refused to speak with the detective (T 4223-24). However, the record is unclear as

to when and under what circumstances Det. Romagni attempted to reinitiate his questioning of Mr. Dennis. The fact is that Romagni testified that Mr. Dennis refused to speak to him subsequent to the first interview, yet Romagni actually made no attempt to speak to Mr. Dennis again. Contrary to the State's representation that Det. Romagni attempted to speak to Mr. Dennis "a couple days" after the initial interview on April 13, 1996, the record does not reflect this. Rather, at best, the record is unclear whether Det. Romagni actually requested to speak to Mr. Dennis again:

> Q: Now, you said another time, after that first supposed statement of my client, Mr. Labrant Dennis, you asked him to come down for another statement?
>
> A: I wanted to, yes.
>
> Q: When was that? Let's use April 13th as a point of reference, 1996.
>
> A: I told him, after we concluded our talking for that day, that I wanted to continue to talk to him in a couple of days.
>
> Q: Did you make the request?
>
> A: Yes, I told him.

(T. 4237-38). This can only be interpreted to mean that on April 13, 1996, the date that Mr. Dennis initially gave a statement to Det. Romagni, Det. Romagni indicated he **would want to** speak to Mr. Dennis in a couple of days. It does not indicate that Det. Romagni actually followed through with a subsequent request to

talk to Mr. Dennis. Nothing in the record suggests he ever tried to talk to Mr. Dennis again.

Not only were Det. Romagni's comments an improper comment on silence, but based on the lack of clarity in the record, his comments appear to be inaccurate. These comments leave the impression with the jury that not only did Mr. Dennis not fully cooperate with the police, he was continuing to do so by his failure to testify at trial. The testimony from Det. Romagni also leaves the impression that Mr. Dennis is obstructing justice as opposed to exercising his constitutional right to remain silent. Trial counsel failed to object at any point in time to this information being presented to the jury. As such, the resulting prejudice is that the jury was permitted to improperly consider Mr. Dennis's silence during its deliberations.

## ARGUMENT II

### MR. DENNIS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING HIS PENALTY PHASE PROCEEDINGS

The State maintains that the record reflects that trial counsel did investigate and present evidence of Mr. Dennis's family history and life. While trial counsel did present the testimony of three witnesses during the penalty phase: Mr. Dennis's mother and two grandmothers (T. 5259-84), their testimony amounted to Mr. Dennis is a nice guy, a good student, a hard worker and loved and cared for his children. No mental health testimony was presented. Although Mr. Dennis intends

to present his mother and two grandmothers in support of his postconviction claim, after thorough investigation the picture of Mr. Dennis's life history is quite different. There is no evidence that trial counsel conducted any investigation on his own or with the assistance of an investigator. Trial counsel failed to independently obtain any of Mr. Dennis's records. The State repeatedly states that trial counsel obtained and was in possession of Mr. Dennis's school and employment records. This ignores that it was the State that gave the records to counsel in discovery, and ignores that significantly this is further evidence of trial counsel's failure to conduct any investigation. Also, it is significant that the information in the school records contradicted the testimony of Mr. Dennis's mother and grandmothers.

Like the lower court, the State emphasizes the trial court's finding that Mr. Dennis was under extreme mental or emotional disturbance at the time of the crime, however, the State fails to acknowledge that this mitigator was given "**little or no weight**" by the judge (R. 3262, emphasis added). The trial court also termed Mr. Dennis's mental state as "emotional distress," (Id.) which seems to indicate something less than what is required by the statutory mitigator. The State concludes that based on an expert report disclosed by Mr. Dennis in the previous proceedings which concluded that statutory mitigators did not apply to Mr. Dennis **because he maintains his innocence and denies involvement in the crime,** "presentation of an expert would have weakened the mitigation presented" (State's

Answer Brief at 45). This too ignores that essentially no mitigation was presented and again that the trial court did not give weight to the mitigation.

The report relied on by the State is not part of the record before this Court. On December 17, 2008, this Court issued an order holding that a **new postconviction proceeding** was warranted in this case and remanded to the trial court for a new proceeding on Mr. Dennis's postconviction motion filed under Fla. R. Crim. P. 3.851. Because the lower court, upon remand for a new proceeding, summarily denied Mr. Dennis's Rule 3.851 motion, there was no discovery disclosure pursuant to Fla. R. Crim. P. 3.851 (f)(5)(1). However, because the State has chosen to rely on the previous proceedings and evidence which is not before this Court at this time, then Mr. Dennis must point out the abundance of evidence the State was aware could be presented to support his claims based on the previous evidentiary hearing.

At the previous evidentiary hearing Mr. Dennis was able to present abundant testimony and evidence to support his claim of ineffective assistance of counsel at the penalty phase of his proceedings, including the testimony of two mental health experts. Mr. Dennis presented the testimony of Dr. Marvin Dunn[1] to explain the significance of Mr. Dennis's family life and the community in which he grew up.

[1] Marvin Dunn, Ph.D., is the Chairman of the Psychology Department at Florida International University (PC-R. 1082).

Based on his experience, Dr. Dunn described Mr. Dennis's childhood neighborhood (PC-R. 1092-3), indicating that Mr. Dennis was exposed to domestic violence, murder, theft, petit crimes, prostitution, drug use and drug trafficking (PC-R. 1093-4). Dr. Dunn explained that all children in the community would potentially be exposed to these kinds of circumstances, depending on protective factors such as a strong family unit, peer group or church (PC -R.1093). Exposure depends upon what he has around him to protect him from those influences, and supervise his behavior and responses to those influences (Id.). Mr. Dennis did not have the benefit of these protective factors, especially family (PC-R. 1095-6).

Dr. Dunn concluded that Mr. Dennis grew up in a very violent neighborhood that "exposed him to negative influences in his life," as a result, "the neighborhood did not help in his growth and evolution" (PC-R. 1095). Mr. Dennis came from a dysfunctional family that likely subjected him to emotional stress (Id.). As part of this dysfunction, Mr. Dennis never bonded with his mother (Id.). Overall, Mr. Dennis became an isolated person, who "hid from people emotionally but also carried with him a lot of hurt and anger" (PC-R. 1095-96).

Dr. Sherry Borg Carter evaluated Mr. Dennis to determine if he suffered from Post-Traumatic Stress Disorder, had been victimized as a child, adolescent or adult, that would constitute statutory or non-statutory mitigation (PC-R. 1060). In addition to a clinical interview, mental status examination, and psychological

testing, Dr. Carter interviewed Mr. Dennis's paternal and maternal grandmothers who had raised him (PC-R. 1060). Dr. Carter also reviewed background materials including school records, employment records and medical records to corroborate information provided by Mr. Dennis (PC-R. 1060-1). Dr. Carter found several mitigating circumstances: firstly, the significantly traumatic incident of watching a man getting shot in the head and die; secondly, Mr. Dennis grew up in a very impoverished setting, and an environment where he was exposed to violence and conflict in the community; thirdly, Mr. Dennis has no adjustment problems to prison; and fourthly, there is no evidence that Mr. Dennis is a psychopath (1076). Additionally, Dr. Carter opined that Mr. Dennis's exposure to violence in his community caused him to experience symptoms that were consistent with post traumatic stress disorder (PC-R. 1062).

The State asserts that any "prediction about [Mr. Dennis's] behavior would be highly speculative" because he had never been incarcerated before these crimes (State's Answer Brief at 46). This statement ignores the circumstances considered by mental health experts in determining a defendant's adaptability to prison. Experts not only look at corrections records in formulating this sort of opinion, but also look at an individual's personality and any evidence of mental illness that might cause them to have adjustment problems in prison (PC-R. 1079). Additionally, someone "facing the death penalty [] usually have a pretty good

chunk of time in jail," and jail records are available (PC-R. 1080). Evaluation of a person's ability to adapt to prison does not rely only on corrections records, but also the individual's functioning outside of prison (PC-R. 1081).

The opinions regarding Mr. Dennis's family, upbringing, community and mental state certainly would have supported trial counsel's theory that Mr. Dennis was under extreme emotional disturbance at the time of the crime. Trial counsel's failure to pursue any investigation, and the subsequent failure to present mitigation evidence was unreasonable in light of all the circumstances. Counsel's decision was not strategic but rather based on inattention and a lack of preparation. The penalty phase record itself demonstrates counsel's failure to investigate and prepare for the penalty phase. The omission of any significant mitigating factors, statutory or otherwise, undermines confidence in the outcome of the penalty phase. Because the claim was more than sufficiently pled and the files and records do not conclusively refute the claim, Mr. Dennis is entitled to an evidentiary hearing.

## ARGUMENT III

### THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE

The memorandum which was undisclosed by the State went well beyond mere witness preparation. Here, the memo went so far as providing Dr. Rao with necessary "terms of art" for the judge and jury to understand (PC-R. 535). It is

important to note that Dr. Rao's testimony at the penalty phase was almost identical to the memorandum. While the State asserts that Dr. Rao did not specifically use the terms "languished and died" as suggested in the memorandum, she testified that time would seem to slow down and seem like an eternity to the victims (T. 5244). The State ignores the similarities between the memo and her testimony as well as the significant differences between her opinion and Dr. Gulino's opinion.

The State argues that any differences in Dr. Gulino's testimony and the testimony of Dr. Rao are attributable to the different nature of guilt versus penalty phase proceedings. This argument ignores that the function of the medical examiner is that of an independent expert medical witness. Their opinions must be based on a reasonable degree of medical certainty. Therefore, any medical findings should be the same. Here Dr. Rao's testimony did not parallel the testimony of Dr. Gulino, but rather used subjective terms, varying in degree of conclusiveness, speculation and gross exaggerations.

In an effort to downplay the differences between the two doctors' testimony, the State oversimplifies and ignores the most crucial testimony. Dr. Gulino was asked if Ms. Lumpkins would know she was being beaten to death and responded that he could not say Ms. Lumpkins would know she was being beaten death, but she would know she was being beaten (T. 4433). When asked the same question,

Dr. Rao stated “She probably had a good idea that she was going to die, yes” (T. 5238). Dr. Rao also affirmatively testified that victim Barnes would be able to hear cries of pain or anguish of the other victim (T. 5241), while Dr. Gulino merely indicated it may have been possible. Additionally, Dr. Gulino testified that Ms. Lumpkins head injuries were similar to injuries seen in a high speed car crash (T. 4422), but Dr. Rao compares her injuries to having her head run over by a car (T. 5232). Dr. Rao also extrapolated that the blood smears indicated that the victim attempted to get help (T. 5255). These gross overstatements occur throughout Dr. Rao’s testimony. (Dr. Rao, T. 5222-5257; Dr. Gulino, T. 4380-4466). In many instances while Dr. Gulino tempered his testimony by stating possibilities, Dr. Rao was affirmative in all her responses. The difference in the testimony of the two doctors is directly the result of the State’s instructions and coaching. It is clear that Dr. Rao’s testimony was much more inflammatory and speculative.

Significantly, neither the State, nor the lower court, properly analyzes Mr. Dennis’s Brady[2] claim with respect to materiality. Instead, the State recites to several opinions by this Court which uphold the finding of HAC. This is irrelevant. The United States Supreme Court has explained in the related context of materiality attendant to a *Brady v. Maryland* claim, that the issue is whether the jury "would reasonably have been troubled" by the withheld information, and

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

whether "disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable." *Kyles v. Whitley*, 514 U.S. 419, 441-43 (1995). In *Kyles*, the lower court, which presided over a postconviction evidentiary proceeding, found the *Brady* material unworthy of belief. *See Kyles*, 514 U.S. at 471 (Scalia, J., dissenting). The *Kyles* majority, however, determined that the lower court's credibility finding was not fatal to the *Brady* analysis because the court's post-trial credibility determination "could [not] possibly have effected the jury's appraisal of [the witness'] credibility at the time of Kyles's trials." *Kyles* at 450 n.19 (emphasis added). The materiality test for a *Brady* claim is identical to the prejudice test for a *Strickland* claim. *See Strickler v. Greene*, 527 U.S. 263 (1999). Thus, the lower court's capacity to determine witness credibility, and this Court's deference to the lower court's findings, is much more proscribed when the issue under review is whether particular testimony would have had an effect on a jury.

The State does not even mention that trial counsel objected to Dr. Rao being permitted to testify at the penalty phase because she had not conducted the autopsies and had not testified at the guilt phase (T. 5226). Rather, trial counsel argued that her testimony was based on hearsay from the medical examiner who was no longer available (T. 5226-27). The information contained within the undisclosed memo would have supported counsel's objection, further impeached

her reliance on the hearsay reports and testimony of Dr. Gulino and called into question her exaggerated testimony. Had Dr. Rao's prejudicial and inflammatory testimony been impeached as having been coached by the State, coupled with the mitigation now presented, the result of the penalty phase would have been different.

## CONCLUSION

Based on the foregoing, as well as the argument set forth in his initial brief, Labrant Dennis respectfully requests that this court vacate his convictions and sentences, including his sentence of death and order a new trial and/or sentencing. In the alternative, because Mr. Dennis's claims were more than sufficiently pled, and because the files and records do not conclusively demonstrate that he is not entitled to relief, Mr. Dennis requests that this court remand for a full and fair evidentiary hearing.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first-class postage prepaid to Sandra Jaggard, Office of the Attorney General, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, Florida 33131 on March 8, 2010.


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## CERTIFICATE OF FONT

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