

IN THE SUPREME COURT OF FLORIDA

**Case No. SC09-1089
Lower Court Case No. F96-13558**

**LABRANT DENNIS,
Appellant,**

v.

**STATE OF FLORIDA,
Appellee.**

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

SUPPLEMENTAL INITIAL BRIEF OF APPELLANT

**SUZANNE MYERS KEFFER
Assistant CCRC
Florida Bar No. 0150177**

**OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
101 N.E. 3rd Ave., Suite 400
Ft. Lauderdale, FL 33301
(954) 713-1284**

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

The following abbreviations will be utilized to cite to the record in this cause, with appropriate page number(s) following the abbreviation:

"R. ____" -- record on direct appeal to this Court;

"T. ____" -- trial transcripts on direct appeal to this Court;

"PC-R. ____" -- record on the first 3.851 appeal to this Court;

"Supp. PC-R. ____" -- supplemental record on the first 3.850 appeal to this Court;

"PC-R2. ____" -- record on the instant 3.851 appeal to this Court.

"PC-R3. V.____, p. ____" – the record of the proceedings after relinquishment for an evidentiary hearing.

REQUEST FOR ORAL ARGUMENT

Mr. Dennis has been sentenced to death. 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. Mr. Dennis, through counsel, urges that the Court permit oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Labrant Dennis, Appellant/Defendant, appealed the denial of his motion to vacate his convictions and sentences of death. Following oral argument, this Honorable Court remanded jurisdiction. This Court remanded for a new postconviction proceeding. *Dennis v. State*, 999 So. 2d 644 (Fla. 2008).

On remand, the circuit court summarily denied Mr. Dennis's postconviction motion. On appeal, this Court temporarily relinquished jurisdiction for the circuit court to conduct an evidentiary hearing on two claims: (a) that counsel was ineffective for failing to investigate and present mitigation evidence at the penalty phase; and (b) the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose the assistant state attorney's memo to Dr. Rao.

At the evidentiary hearing, Ronald Guralnick, Mr. Dennis's trial counsel, testified that Mr. Dennis's case required a tremendous amount of time, "produced quite a bit of discovery" and resulted in approximately 100 witnesses being listed by the State. (PC-R3. V.4, p. 24) While representing Mr. Dennis in his capital case, Mr. Guralnick also represented another capital defendant, Daniel Lugo, in a double homicide case. (PC-R3. V.4, p. 27) Mr. Guralnick had no second chair attorney assisting him. He felt that it was not mandatory and he felt he could do all of the work himself. (PC-R3. V.4, p. 30)

Mr. Guralnick's theory of the defense was innocence -- there was as much evidence against the State's key witness, Joseph Stewart, as there was against

Mr. Dennis. He did not have a second-chair attorney to assist him because he felt it was not necessary, he had done it many times before, and the courts had never objected. (PC-R3. V.4, p. 30)

Mr. Guralnick hired an investigator, Al Fuentes, to assist with the guilt phase. (PC-R3. V.4, p. 35.) He acknowledged a notation in his file reflecting his thought to have Mr. Fuentes investigate mitigation, however Mr. Guralnick testified that he does not know if he ever asked Mr. Fuentes to conduct a mitigation investigation. Rather, Mr. Guralnick recalled that he conducted penalty phase investigation himself. (PC-R3. V.4, p. 36.) He interviewed several of Mr. Dennis's family members, "anybody they told me about that was on the State's witness list. . ." (PC-R3. V.4, p. 35) Mr. Guralnick feels that they didn't give him much to work with. They didn't tell him that Mr. Dennis had a "schizophrenic episode or anything like that." (PC-R3. V.4, p. 36) They said that Mr. Dennis was a good son, good father and did not have any prior record. (PC-R3. V.4, p. 36)

Mr. Guralnick's notes reflect that he had some discussion with Mr. Dennis's mother, Elaine Williams, regarding his performance in school and his relationships with various people. Mr. Guralnick testified that Mr. Dennis had "all the advantages that one could ask for more than most people." (PC-R3. V.4, p. 37) Ms. Williams told Mr. Guralnick that Mr. Dennis was an excellent student. "She never said he had any problem at all. It was as if Labrant had a nice childhood and a good background." (PC-R3. V.4, p. 55) Mr. Guralnick made no attempt to

corroborate the information from Ms. Williams. (PC-R3. V.4, p. 58) He had no reason to disbelieve her. She seemed like a nice and truthful person and he believed that the mother was in a better position than anyone to know her son. (PC-R3. V.4, p. 60)

Guralnick received Mr. Dennis's school and employment records in discovery from the prosecution. Ms. Williams had told him that Mr. Dennis got excellent grades and he left college because he was associated with a rap star named "Snoop Doggie Dog" and wished to expand his music career. (PC-R3. V.4, p. 63) Nothing in the school records provided by the state contradicted that. (PC-R3. V.4, p. 63)

From Mr. Dennis's brother Michael, Mr. Guralnick learned that their father abused alcohol and smoked marijuana. (PC-R3. V.4, p. 67) Mr. Guralnick did not follow up on that information because he saw no reason to since the father was "never abusive to Mike or Labrant." (PC-R3. V.4, p. 67) Therefore, Mr. Guralnick believed that the father's drinking and drug abuse was not significant whatsoever. (PC-R3. V.4, p. 68)

Mr. Guralnick did not hire any mental health experts because he did not feel it was necessary based on what Mr. Dennis's family told him. (PC-R3. V.4, p. 71) Mr. Guralnick is not a mental health expert and does not believe that any of Mr. Dennis's family members have any mental health training. (PC-R3. V.4, p. 143-144) Mr. Guralnick was aware of the ABA Guidelines for the Appointment and

Performance of Counsel in Death Penalty Cases, but felt that he does not have to accept their recommendations. (PC-R3. V.4, p. 73)

At the evidentiary hearing, Mr. Guralnick identified a memorandum from Assistant State Attorney Joshua Weintraub to Assistant Medical Examiner Dr. Rao. (PC-R3. V.4, p. 82, Exhibit C) Mr. Guralnick did not see this memorandum until it was provided to him by postconviction counsel. (PC-R3. V.4, p. 82) When presented with the document, Mr. Guralnick was “shocked” and “very upset.” (PC-R3. V.4, p. 82) Mr. Guralnick believed that the memorandum told the doctor what the State Attorney needed him¹ to say in this case and sets it out with particularity. (PC-R3. V.4, p. 82) Had the memorandum been provided to him at trial pursuant to reciprocal discovery, Mr. Guralnick would have used it to impeach Dr. Rao. (PC-R3. V.4, p. 83) Mr. Guralnick feels that the memorandum constitutes coaching the witness and would have reported the matter to the Florida Bar. (PC-R3. V.4, p. 84)

By agreement of the parties, the circuit court considered the previous evidentiary hearing testimony of Alberto Fuentes in lieu of presenting him at the evidentiary hearing. Mr. Fuentes had testified that he was an experienced private investigator used frequently by Mr. Guralnick. Mr. Fuentes had been a private investigator for 22 years. (PC-R. 1198) Ninety-five percent of Mr. Fuentes’s work involved criminal defense, and he had “extensive experience” in capital cases,

¹ Mr. Guralnick repeatedly mistakenly refers to Dr. Rao as “him.” Dr. Rao is female.

including penalty phase investigation. (PC-R. 1199) Mr. Fuentes explained that a penalty phase investigation involves investigating the defendant's background extensively to find out mitigating things to attempt to save his life. (PC-R. 1199)

Trial counsel never asked Mr. Fuentes to conduct any penalty phase investigation. (PC-R. 1202) Mr. Fuentes did not interview any of Mr. Dennis's family members. (PC-R. 1210) Although Mr. Fuentes took a very basic social history of Mr. Dennis, it was not as in-depth as if he were preparing for the penalty phase. (PC-R. 1207-8) Mr. Fuentes's focus was to find out facts that might exonerate Mr. Dennis. (PC-R. 1207-8)

When Mr. Fuentes asked about the penalty phase, trial counsel responded "I've got it under control and I'm going to do it myself". (PC-R. 1207-8) Mr. Guralnick said he was not going to hire a second-chair attorney. (PC-R. 1207-8) Mr. Fuentes does not know if trial counsel hired any other investigators or mental health experts, but he did not speak to any mental health experts. (PC-R. 1203)

Sherri Bourg Carter, Ph.D., testified that she is a licensed psychologist who practiced clinical and forensic psychology. (PC-R3. V.5, p. 34) Dr. Bourg Carter has testified in thousands of cases and has specialized in evaluating post-traumatic stress disorder cases. (PC-R3. V.5, p. 44) In addition, Dr. Bourg Carter has consulted with law enforcement and attorneys regarding issues related to child witnesses and posttraumatic stress disorder. (PC-R3. V.5, p. 44) Dr. Bourg Carter evaluated Mr. Dennis in 2003 to determine if there were any statutory or non-

statutory mitigators applicable to his case. (PC-R3. V.5, p. 49) In addition to a clinical interview and mental status examination, Dr. Bourg Carter administered the Minnesota Multiphasic Personality Inventory-Second Edition (MMPI-2), the Detailed Assessment of Post-Traumatic Stress (DAPTS), and the Psychopathy Check List-Revised (PCL-R). The interviews included his life history, childhood, work history, mental health status and mental health history, and substance abuse. (PC-R3. V.5, p. 54) Dr. Bourg Carter also reviewed background materials including school records, employment records and medical records to corroborate information provided by Mr. Dennis.

Mr. Dennis reported that his parents were never married, that he was primarily raised by his grandmothers, and that his mother would come around but not often. (PC-R3. V.5, p. 57) Mr. Dennis's father exposed him to sexuality and his mother and father both had substance abuse issues. (PC-R3. V.5, p. 57) Mr. Dennis's school records reflect that he was an average B-C-D student. (PC-R3. V.5, p. 59)

The Psychopathy Checklist-Revised measures psychopathic personality traits that might imply risk or danger to other people. (PC-R3. V.5, p. 61) The test does not rely on self-reporting, rather it is scored using records or collateral sources of information regarding the person's functioning over their life span. Mr. Dennis scored low on the PCL-R, indicating no evidence of psychopathy. (PC-R3. V.5, p. 62)

On the Detailed Assessment of Posttraumatic Stress, Mr. Dennis produced a valid profile. DAPTS indicated symptoms consistent with exposure to a traumatic event. (PC-R3. V.5, p. 63) and his scores fell within the moderate range of severity for posttraumatic symptoms. (PC-R3. V.5, p. 64) The incident Mr. Dennis reported that was most stressful to him was witnessing a person getting shot in the head when he was seven or eight years old. (PC-R3. V.5, p. 55) He recalled seeing the person being shot and falling into a pool of blood. (PC-R3. V.5, p. 55) Another incident involved Mr. Dennis being held up at gunpoint. In another incident, Mr. Dennis witnessed a friend getting shot in the leg. (PC-R3. V.5, p. 55) The DAPTS's two validity scales established that Mr. Dennis was not trying to look better or worse than he really was symptomatically. (PC-R3. V.5, p. 65) Most death penalty defendants know their in a lot of trouble and usually they report a lot of things that happened to them. This was an unusual case because Mr. Dennis did not report much trouble at all. (PC-R3. V.5, p. 85)

As a result of her evaluation and testing, Dr. Bourg Carter diagnosed Mr. Dennis with mild symptoms consistent with posttraumatic stress in partial remission. (PC-R3. V.5, p. 67) Dr. Bourg Carter found several mitigating circumstances. First, his history of posttraumatic stress and his exposure to violence in the community as a child. In addition, Mr. Dennis has no adjustment problems to prison and would likely do well in the prison setting. Lastly, there is no evidence that Mr. Dennis is a psychopath. (PC-R3. V.5, p. 69-70)

Mr. Dennis also presented Annie Siplin, his grandmother. (V5 150) Ms. Siplin testified that Mr. Dennis's mother, Elaine Williams, and father Michael were about 16 or 17 when he was born. (PC-R3. V.5, p. 152) They were never married. (PC-R3. V.5, p. 152) Mr. Dennis came to live in Ms. Siplin's home with her ten children. At the time, the family lived in a housing project known as "The Graveyard." (PC-R3. V.5, p. 152)

Elaine did not have much to do with Mr. Dennis. His grandmothers took care of him. (PC-R3. V.5, p. 153) Elaine drank a lot and did not take care of her baby. She would be gone four nights of the week and on the weekend. (PC-R3. V.5, p. 156) Eventually she moved out and got her own apartment. When Mr. Dennis was 10, Elaine came and got him. (PC-R3. V.5, p. 157)

Mr. Dennis was ashamed of his father because he was always drunk and was gay. (PC-R3. V.5, p. 157) When Michael came to the house, Mr. Dennis would run and hide. The other kids in the neighborhood would laugh at Michael and teased Mr. Dennis about his father. (PC-R3. V.5, p. 158)

The Graveyard was a bad neighborhood with a lot of killing and shooting. (PC-R3. V.5, p. 158) Often, purse snatchers would run right through their apartment when the windows and doors were open because of the heat. (PC-R3. V.5, p. 158) Killings occurred on the playground. (PC-R3. V.5, p. 159) There were a lot of drugs and guns. (PC-R3. V.5, p. 162) Ms. Siplin recalled that Mr. Dennis called her right away after he was shot at in a phone booth. (PC-R3. V.5, p. 163)

Ms. Siplin recalled meeting Mr. Guralnick three times for approximately 20 minutes, with Mr. Dennis's mother and other grandmother present. (PC-R3. V.5, p. 164) Mr. Guralnick did not ask any questions about Mr. Dennis's mother or father or the neighborhood he grew up in. (PC-R3. V.5, p. 165) Mr. Guralnick only said that he would take the case and win it, or he would appeal. (PC-R3. V.5, p. 166) He never mentioned that Mr. Dennis was facing the death penalty. (PC-R3. V.5, p. 168)

On cross-examination, Ms. Siplin testified that she tried to instill values in her children, but several of them went to jail for drugs and "being in the wrong place." (PC-R3. V.5, p. 169-170)

Elaine Williams testified that she is Mr. Dennis's birth mother. She was 16 when he was born. His father was 19. (PC-R3. V.5, p. 190) Ms. Williams lived with her mother and 5 brothers and 5 sisters. Mr. Dennis would go back and forth between his grandmothers' homes. (PC-R3. V.5, p. 191) When she was about 20, Ms. Williams began "partying." (PC-R3. V.5, p. 192) When his grandmother brought Mr. Dennis by, Ms. Williams would be out partying, drinking and using cocaine. (PC-R3. V.5, p. 193) On Mr. Dennis's tenth birthday, Ms. Williams came to get him "to bring him home." (PC-R3. V.5, p. 196) They moved often, approximately six times. (PC-R3. V.5, p. 196) Eventually, they moved to the Pork and Beans projects. (PC-R3. V.5, p. 196)

Ms. Williams described the Graveyard, the neighborhood where Mr. Dennis

lived with his grandmother, as “always drugs, a lot of killing, a lot of pocketbook snatching, people running in and out of your house.” (PC-R3. V.5, p. 197) But the Pork and Beans Projects were even worse. (PC-R3. V.5, p. 198) Ms. Williams was still partying at that time. Ms. Williams acknowledged that she was not involved in Mr. Dennis’s life when he was growing up. (PC-R3. V.6, p. 205) She was always partying and wanting to have a good time. (PC-R3. V.6, p. 205)

Ms. Williams recalled meeting with Mr. Guralnick about two times. (PC-R3. V.6, p. 207) Mr. Guralnick did all the talking. He never asked about Mr. Dennis’s childhood, his family, his parent’s substance abuse or the neighborhoods where he grew up. (PC-R3. V.6, p. 207) He never spoke of the fact that Mr. Dennis was facing the death penalty. (PC-R3. V.6, p. 210) If she had known that Mr. Dennis faced a death sentence, she would have asked Mr. Guralnick more questions. (PC-R3. V.6, p. 211)

Virginia Dennis, Mr. Dennis’s paternal grandmother, testified that Mr. Dennis came to live with her when he was 2 weeks old. (PC-R3. V.6, p. 225) Mr. Dennis’s father would visit and would be drinking. (PC-R3. V.6, p. 230) Elaine would come by with her boyfriends to pick up Mr. Dennis some weekends. She would drink and at times she seemed like she “had something in her.” (PC-R3. V.6, p. 228)

Ms. Dennis recalled meeting with Mr. Guralnick. He told the family that he would win the case. He did not ask any questions. (PC-R3. V.6, p. 233) He never

mentioned that Mr. Dennis was facing the death penalty. (PC-R3. V.6, p. 234) She did not know until he was sentenced to death. (PC-R3. V.6, p. 235)

Marvin Dunn, Ph.D., testified at the evidentiary hearing that he is a psychologist with experience and expertise in Community Psychology. Dr. Dunn explained that Community Psychology involves the study of the interrelationships of individuals and the community. (PC-R3. V.6, p. 252)

Dr. Dunn evaluated Mr. Dennis in 2004. He interviewed Mr. Dennis on two occasions and interviewed his mother, father and grandmothers. (PC-R3. V.6, p. 257) Dr. Dunn also reviewed several volumes of school, employment, corrections and medical records. (PC-R3. V.6, p. 259) Dr. Dunn initially found Mr. Dennis to be suspicious and confrontational. At his second meeting, Mr. Dennis was less suspicious and cooperative. (PC-R3. V.6, p. 260)

In interviewing Mr. Dennis's grandmothers, Dr. Dunn found Virginia Dennis to be defensive and in denial about the problems with raising Mr. Dennis. (PC-R3. V.6, p. 263) Ms. Dennis struggled to raise Mr. Dennis and the other children living in her home. She had a very rough time with him. (PC-R3. V.6, p. 263) While Ms. Dennis did the best she could, she was not an effective guardian. (PC-R3. V.6, p. 263) Dr. Dunn found Ms. Siplin to be similarly defensive and in denial. (PC-R3. V.6, p. 264) With both grandmothers, the denial was extreme. (PC-R3. V.6, p. 265)

Dr. Dunn also interviewed Mr. Dennis's natural parents. He testified that

Elaine Williams was more forthcoming about her inadequacies as a mother. (PC-R3. V.6, p. 265) She acknowledged the abandonment of her son and was honest about her drug problems at the time. (PC-R3. V.6, p. 265) However, she remained detached and not in touch with Mr. Dennis in a close way. (PC-R3. V. 265) Michael Dennis was very difficult to talk to. He has problems with his sexual behaviors and drinking, and was never a father to his son. (PC-R3. V.6, p. 266-267) If anything, his sporadic and superficial interactions with Mr. Dennis were negative and unhelpful. (PC-R3. V.6, p. 267) In a more recent interview with Mr. Dennis's mother, Dr. Dunn found she had a more stable home, work and had been clean for 10 years or so. She seemed to gain perspective on how she had hurt her son by her abuse and neglect. (PC-R3. V.6, p. 270) Ms. Siplin, however, remained in denial and defensive. (PC-R3. V.6, p. 271)

Overall, Dr. Dunn found the family to be "terrible historians." Ms. Williams appears to function at below-average intelligence and her thoughts are disconnected and hard to follow. (PC-R3. V.6, p. 269) Her lifestyle was extremely abusive in its neglect for him, even after she took him back. (PC-R3. V.6, p. 268) There was no continuing, stable relationship between Mr. Dennis and his mother. (PC-R3. V.6, p. 268) She abandoned Mr. Dennis because of drugs. (PC-R3. V.6, p. 272) Mr. Dennis had a terrible relationship with his mother, whom he resented. (PC-R3. V.6, p. 268) Neither she nor the grandmothers knew what Mr. Dennis was doing; he effectively raised himself. (PC-R3. V.6, p. 269)

Dr. Dunn testified that this kind of abandonment is emotionally damaging. (PC-R3. V.7, p. 5) Males who have been abandoned experience temperamental problems, attachment problems and possessiveness. (PC-R3. V.7, p. 5) They have difficulty establishing relationships, and sometimes irrational behavior, suspiciousness, poor performance in school, and rebellious behavior. (PC-R3. V.7, p. 5) The emotional damage occurs very early on, between ages 1 and 4. (PC-R3. V.7, p. 6) When abandoned as infants, they hardly ever get over the emotional damage. (PC-R3. V.7, p. 6) Mr. Dennis's emotional issues are very consistent with what psychologists have found in other abandoned children. (PC-R3. V. 7 7)

Dr. Dunn explained that, while Mr. Dennis was raised by his grandmothers, "grandma ain't mama." (PC-R3. V.7, p. 7) Even with an attentive grandparent, the emotional hurt is still there. However, if that grandparent has additional pressures such as other children, employment, etc., it becomes extremely difficult for the child to receive the kind of attention and affection or support that he needs. (PC-R3. V.7, p. 8) Mr. Dennis felt that he was the lowest in the room and the other children got more attention than he did. (PC-R3. V.7, p. 12) His grandmothers had difficulty providing the emotional support that he need to overcome the deficits he undoubtedly suffered due to his mother's abandonment. (PC-R3. V.7, p. 64)

As a result of the emotional injury he suffered, Mr. Dennis is emotionally flawed. (PC-R3. V.7, p. 13) He dealt with this by isolating himself from others. (PC-R3. V.7, p. 13) Most of what he has tried to do in life has failed. He is

essentially a very unsuccessful person. (PC-R3. V.8, p. 14) He did not perform well in college and his rap career was a failure.² From Mr. Dennis's school records, Dr. Dunn learned that Mr. Dennis did not have smooth elementary school experience and performed marginally. (PC-R3. V.6, p. 267-268) An elementary teacher commented that Mr. Dennis needed strict supervision and behavior guidelines. (PC-R3. V.7, p. 53) Employment records indicated difficulties relating to others and explosive behavior at work. (PC-R3. V.6, p. 267)

Dr. Dunn testified that Mr. Dennis grew up in the most problematic area of Miami-Dade County in terms of violence and crime. (PC-R3. V.6, p. 16) Mr. Dennis was exposed to this violence and crime, including witnessing another person shot. (PC-R3. V.7, p. 21) Violence was a part of what he experienced in those neighborhoods. (PC-R3. V.7, p. 22), including his exposure to the McDuffy riots which took place there. (PC-R3. V.7, p. 24) Not everyone who grows up in these conditions is predisposed to violence. However, when a child grows up in these conditions without a parent, it is reasonable to expect there will be such problems. (PC-R3. V.7, p. 41.) Children with certain protective factors, specifically parents or others who can offer a level of protection, can do well even under such conditions. (PC-R3. V.7, p. 45) However, Mr. Dennis was never able to develop such relationships and those protective factors did not exist for him. Dr. Dunn felt

² Dr. Dunn explained that Mr. Dennis was in a rap group called "The Dawgs" but was not associated with the rap celebrity Snoop Dog. (V7. 15)

that the growing up in the conditions of these neighborhoods, coupled with the abandonment of both parents, specifically the mother, were mitigating. (PC-R3. V.7, p. 36)

Dr. Dunn testified that he would have been available to testify at Mr. Dennis's penalty phase, though not necessarily willing. (PC-R3. V.7, p. 43) When first contacted about this case by postconviction counsel, he did not want to get involved. (PC-R3. V.7, p. 43) However, once he learned more about the abandonment Mr. Dennis experienced, he felt that this information was mitigating. (PC-R3. V.7, p. 43) Had trial counsel provided such information to him, he would have felt "compelled" to get involved. (PC-R3. V.7, p. 43)

In lieu of live testimony, the parties agreed to the court considering the previous evidentiary hearing testimony of Valerie Rao for the purposes of this hearing. (PC-R3. V.7, p. 100) Dr. Rao previously testified that she was the medical examiner in Boone and Callaway Counties, Missouri, and an associate professor in the Department of Pathology and Anatomical Sciences at the University of Missouri School of Medicine. (PC-R. 1122) In 1998, Dr. Rao was an associate medical examiner at the Miami-Dade County Medical Examiner's Office. (PC-R. 1123) Dr. Rao was present during the autopsies of the two victims in this case by Dr. Gulino, but was working on her own cases. (PC-R. 1124) However, according to Dr. Rao, she did some of the matching of the shotgun to the victims' injuries along with Dr. Gulino. (PC-R. 1124)

Dr. Rao testified that she reviewed some documents in preparation for her evidentiary hearing testimony. (PC-R. 1127) Included was a faxed memorandum, addressed to Dr. Rao from the State Attorney, indicating that she would be testifying at the upcoming penalty phase because Dr. Gulino was unavailable. (PC-R. 1129) In preparation for her trial testimony, Dr. Rao reviewed the case files in detail and based her opinions on Dr. Gulino's observations. (PC-R. 1130)

Dr. Rao explained that her opinions, like medical examiners across the country, are based on a reasonable degree of scientific certainty. (PC-R. 1132) As such, if Dr. Gulino were asked the same questions as Dr. Rao, the gist of the testimony would be the same. (PC-R. 1132) Dr. Gulino was asked at trial if Timwanika would have been able to know that she was being beaten to death as it was occurring, and indicated that he could not say if she knew or not. (PC-R. 1133) Dr. Rao was asked if Timwanika would be able to know and be aware of her impending death, and answered that she probably had a good idea she was going to die. (PC-R. 1133-4)

Mr. Dennis also presented Assistant State Attorney Joshua Weintraub. Mr. Weintraub testified that he was the second-chair attorney who prosecuted the case. (PC-R3. V.7, p. 89) He was responsible for presenting Dr. Rao at the penalty phase. (PC-R3. V.7, p. 89) Mr. Weintraub identified Defense Exhibit C as the memorandum he wrote to Dr. Rao. He also identified an e-mail from Assistant State Attorney Flora Seff, indicating that Dr. Rao had received and read the

memorandum. (PC-R3. V.7, p. 91) Mr. Weintraub stated that the memo was created using terms of art not to get her to use those terms but so that Dr. Rao “would know in what direction we were headed.” (PC-R3. V. 98)

The State presented one witness, psychologist Enrique Suarez, Ph.D. Dr. Suarez testified that he evaluated Mr. Dennis prior to the evidentiary hearing, which was videotaped, with counsel for the State and defense present. Dr. Suarez conducted an interview and administered the MMPI-2. Mr. Dennis reported that he did not recall being evaluated by Dr. Bourg Carter or any female psychologist. (PC-R3. V.7, p. 164) He only recalled being interviewed by a male psychologist.

During the interview, defense counsel witnessed the prosecutor write a note and place it on the chair next to Dr. Suarez. Counsel objected to the prosecutor attempting to communicate with the doctor while he was evaluating Mr. Dennis. Dr. Suarez objected to defense counsel interrupting the evaluation and denied that he had seen the note. However, during a brief break while the videographer was changing tape, Dr. Suarez did read the note and, at the direction of the prosecutor, refused to disclose its contents to defense counsel. (PC-R3. V.7, p. 165) Dr. Suarez then administered the MMPI, after which he resumed his interview, asking Mr. Dennis who the male psychologist was who had come to see him. (PC-R3. V.7, p. 165) At the evidentiary hearing, Dr. Suarez testified that the note from the prosecutor requested that he ask that question. (PC-R3. V.7, p. 165) Mr. Dennis moved to strike Dr. Suarez’s testimony based on improper conduct by the State.

(PC-R3. V.7, p. 169)

Dr. Suarez disagreed that Mr. Dennis suffers from posttraumatic stress disorder. (PC-R3. V.7, p. 157) Approximately 2 to 3 percent of Dr. Suarez's practice is dedicated to PTSD cases. (PC-R3. V.8, p. 212) He has not conducted any research on PTSD since his pre-doctoral training in 1974-75, when the area of posttraumatic stress was "being developed." (PC-R3. V.7, p. 102-103) He has not written on the topic since contributing to a book in 1987 or 1988. (PC-R3. V.8, p. 213-214) Dr. Suarez did not and has never performed the Detailed Assessment of Posttraumatic Stress. (PC-R3. V.8, p. 215) Dr. Suarez identified several standardized, statistically normed and validated tests for PTSD, he did not perform any of them. (PC-R3. V.8, p. 217)

After the parties submitted post-hearing memoranda, the circuit court denied Mr. Dennis's motion for postconviction relief. (PC-R3. V.3, p., p. 533) This appeal follows.

SUMMARY OF THE ARGUMENTS

Argument I: Mr. Dennis was denied the effective assistance of counsel during his penalty phase proceedings. Trial counsel failed to investigate, prepare and present a mitigation case. Counsel's investigation was cursory and would have lead a reasonable attorney to investigate further. As a result of trial counsel's failings, a wealth of compelling mitigation information never reached the sentencing judge or jury. Had trial counsel adequately prepared and presented a mitigation case, the

result of the penalty phase would have been different.

Argument II: The state withheld evidence which was material and exculpatory in nature and/or presented misleading evidence to Mr. Dennis’s sentencing judge and jury. In preparation for the penalty phase, the State coached the testimony of the medical examiner, providing “terms of art” and specific circumstances that the judge and jury needed to understand in order to find the aggravators. Had trial counsel been presented with this memorandum in reciprocal discovery, he would have effectively used the memorandum to impeach the medical examiner’s credibility. Confidence in the outcome of the penalty phase is undermined.

ARGUMENT I: MR. DENNIS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING HIS PENALTY PHASE PROCEEDINGS

Analysis of an ineffective assistance of counsel claim proceeds under *Strickland v. Washington*, 466 U.S. 668 (1984), which requires a showing of deficient attorney performance and prejudice. Counsel's highest duty is the duty to investigate, prepare and present the available mitigation. *Wiggins v. Smith*, 123 S. Ct. 2527 (2003); *see also Williams v. Taylor*, 120 S. Ct. 1495 (2000); *Rompilla v. Beard*, 125 S. Ct. 2456 (2005). The conclusions in *Wiggins* are based on the principle that “strategic choices made after less than complete investigation are reasonable” only to the extent that “reasonable professional judgments support the limitations on investigation.” The *Wiggins* Court clarified that “in assessing the reasonableness of an attorney’s investigation, 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* at 2538.

Throughout the *Wiggins* Court’s analysis of what constitutes effective assistance of counsel, the Court turned to the American Bar Association (ABA) Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. *See id.* at 2536-7. *See also, Dwayne Parker v. State*, 3 So. 3d 974 (Fla. 2009). Under the ABA guidelines, trial counsel in a capital case “should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(c), p. 93 (1989) (emphasis added).” *Id.* at 2537.

While trial counsel said he was familiar with the American Bar Association guidelines on how to conduct a death penalty case, he argued that he was trial counsel and the people who compiled the guidelines probably never tried a double homicide. Trial counsel’s testimony demonstrates that he not only ignores the guidelines, he has contempt for them, and the Florida rules for appointment of capital defense attorneys:

MS KEFFER: Are you aware that the ABA Guidelines recommend hiring an expert at the onset of a capital case.

MR. GURALNICK: You said recommend. That’s different than mandatory. I don’t have to accept their recommendation. And I wonder how many of those lawyers decided that should be a

recommendation ever even tried a first degree homicide case or a double homicide case.

* * *

I'm referring to rule 3.122 Minimum Standards for Attorneys in Capital Cases, the Florida Statute. It says the American Bar Association Standard and many other states standards require the appointment of two lawyers at the trial level in every prosecution that could result in an imposition of a death penalty. They're referring to appointed lawyers. I was not appointed.

(PC-R3. V.4, p. 73-74) Trial counsel's complete disregard for these standards was evident in his deficient performance.

Here, trial counsel's failure to pursue any meaningful investigation, and the subsequent failure to present available mitigation evidence, was unreasonable in light of all the circumstances. The evidence presented at the evidentiary hearing establishes that counsel did not conduct a reasonable investigation pursuant to *Wiggins*, *Williams* and *Rompilla*. Counsel's decision was not strategic but rather based on inattention and a lack of preparation.

Despite his testimony that he conducted the penalty phase investigation himself, Mr. Guralnick devoted his entire efforts to the guilt phase investigation and barely scratched the surface of the possible mitigation that was available. While he learned through an interview with Michael Dennis, Mr. Dennis's brother, that their father was an alcoholic, counsel did absolutely nothing to follow-up on this information. Rather, he concluded that the father's alcoholism was not relevant. Mr. Guralnick believed that if there was no report of physical abuse, then

there was no possible mitigation. Counsel completely ignored the effect an alcoholic, neglectful father could have on Mr. Dennis's development.

Additionally, although Mr. Guralnick's notes reflected some discussion with Mr. Dennis's mother, Elaine Williams, regarding his performance in school and his relationships with various people, the discussion was cursory at best. Not only was the interview cursory, the information trial counsel received from Ms. Williams was inaccurate and Mr. Guralnick sought no corroborating information. For example, Ms. Williams reported that Mr. Dennis was an excellent student. The school records contradicted this notion and reflected that Mr. Dennis was average at best. Trial counsel failed to make any attempt to corroborate the information from Ms. Williams. Instead, he believed that the mother was in a better position than anyone to know her son. This was completely wrong by all other accounts, including Ms. Williams herself. Ms. Williams had very little, if any, knowledge of her son during his formative years.

Because trial counsel failed to adequately investigate and corroborate the minimal information he had, trial counsel believed that Mr. Dennis's mother was an accurate historian who knew her son better than anyone else. If trial counsel had investigated, including seeking out the necessary mental health experts to assist him, he would have learned that Mr. Dennis's mother was a terrible historian, with a history of drug and alcohol abuse, who lived in denial of Mr. Dennis's problems. In fact, contrary to trial counsel's and the lower court's belief, Ms. Williams knew

almost nothing of Mr. Dennis’s history. Trial counsel’s decision to rely on a drug addicted and alcoholic mother who gave demonstrably false information about her son cannot be deemed reasonable under the circumstances.

The lower court’s conclusion that Mr. Guralnick reasonably relied on the mother’s information because he interviewed her with the two grandmothers present ignores the testimony of Dr. Dunn and the family members themselves. Dr. Dunn emphasized that all three were “terrible historians,” as the lower court also recognized. (PC-R3. V.3, p., p. 557) Indeed, the court notes that they could not even agree on when Mr. Dennis was abandoned by his mother; the only consistency in their stories was that Mr. Dennis went back to live with his mother at age ten. (PC-R3. V.3, p., p. 557) These inconsistencies and inability to recall pivotal events demonstrates just how poor historians they were, and why it was patently unreasonable for Mr. Guralnick to have relied on their representations.³

Mr. Fuentes corroborated the complete lack of investigation on trial counsel’s part. Mr. Fuentes had a very specific recollection with regards to his role for the penalty phase. As of his testimony in 2004, Mr. Fuentes had been a private investigator for 22 years. (PC-R. 1198) Ninety-five percent of Mr. Fuentes’s work

³ Indeed, the lower court recognized that “the grandmothers, mother and Defendant all report different ages at which he was raised by which person.” (PC-R3. V.3, p. 567) Yet, in the very next paragraph, the court determines that “trial counsel cannot be deemed ineffective for relying on the mother for background information.” (PC-R3. V.3, p. 567)

involved criminal defense, and he had “extensive experience” in capital cases, including penalty phase investigation. (PC-R. 1199) Mr. Fuentes explained that a penalty phase investigation involves investigating the defendant’s background extensively to find out mitigating things to attempt to save his life. (PC-R. 1199)

Mitigation may include:

Anywhere from neglect, child abuse, mental illness in the family, trauma to the head that may have happened to the individual at a young age or at any time before the crime was committed, anything that may have or would have affected the defendant and may paint a different picture to the jury of judge when time comes for sentencing.

(PC-R. 1199) Trial counsel did not conduct any investigation like that described by Mr. Fuentes.

Nor did trial counsel ever ask Mr. Fuentes to conduct any penalty phase investigation. (PC-R. 1202) Mr. Fuentes did not interview any of Mr. Dennis’s family members. (PC-R. 1210) Although Mr. Fuentes took a very basic social history of Mr. Dennis, he explained that it was not as in depth as if he were preparing for the penalty phase:

It’s basic information. It would be much more in depth if I did it for a penalty phase situation. And usually I do the penalty phase first before I prepare the case in chief. But in this particular case, I was not instructed to do that [...] I thought that maybe at a later date that either myself or someone else would do a penalty phase interview which is more in depth and goes more into like mental illness, things like that, not just your criminal history, where did you live, who is your mother, father, brother. It’s a little bit more intense and actually a lot longer.

(PC-R. 1207-8) Rather, Mr. Fuentes’ focus was to find out facts that might

exonerate Mr. Dennis. (PC-R. 1207-8)

When Mr. Fuentes asked about the penalty phase, trial counsel responded “I’ve got it under control and I’m going to do it myself”. (PC-R. 1207-8) According to Mr. Fuentes, trial counsel said he was not going to hire a second-chair attorney. (PC-R. 1207-8) Mr. Fuentes does not know if trial counsel hired any other investigators or mental health experts, but he did not speak to any mental health experts. (PC-R. 1203) This surprised Mr. Fuentes:

I didn’t understand what he was going to do. I didn’t understand what he meant by he had it under control. I figured he knew what he was doing. It wasn’t my job or obligation to question him. I asked him if he wanted me to do it, and he wanted me to participate in this, and he didn’t, and to me that was the end of it as far as I was concerned.

(PC-R. 1203)

Trial counsel offered no strategic reason for limiting his investigation for the penalty phase. He simply indicated that no one provided him with any more information than what he presented. Trial counsel relied on Mr. Dennis’s mother’s inaccurate accounts of Mr. Dennis’s life and representation that Mr. Dennis had no mental health problems, despite his acknowledgement that the family members had no mental health background, training or expertise.

In addition to finding that trial counsel reasonably relied on the mother’s information, the trial court denied this claim because 1) the court did not accept that Mr. Dennis suffers from posttraumatic stress disorder, and 2) because trial counsel made a valid tactical decision not to call Dr. Dunn or his testimony would

merely have been cumulative. The trial court's findings are erroneous in several respects.

First, trial counsel did not make any decision to call or not call Dr. Dunn. In fact, trial counsel never consulted with Dr. Dunn – or any other mental health expert -- in preparation for the penalty phase. Having done no investigation at all, trial counsel's decision to not call a mental health expert cannot be deemed reasonable. Moreover, while the court is quick to point out Dr. Dunn's reluctance to involve himself in the case, the fact remains that Dr. Dunn, once presented with the facts of the case and potential mitigation, felt "compelled" to get involved.

The court's conclusion that Dr. Dunn's testimony would merely be cumulative to that presented at trial is clearly erroneous given the testimony presented at the evidentiary hearing. While it is true that trial counsel presented some testimony about Mr. Dennis's background, the paucity of what was presented at the penalty phase pales in comparison to the detailed and compelling testimony Dr. Dunn offered at the evidentiary hearing. Indeed, Mr. Dennis's sentencing judge and jury knew nothing of the impact of abandonment, coupled with the conditions under which Mr. Dennis grew up, had on his character and development.

None of this was presented at trial because trial counsel was unaware of it. There was no strategy involved. Trial counsel believed that Mr. Dennis was an excellent student who enjoyed "all the advantages" of anyone raised in the projects. As Dr. Dunn explained, nothing could be further from the truth. While the

majority of people raised in conditions similar to those Mr. Dennis experienced, the likelihood that someone could emerge from such deprivation is greatly decreased when that person does not have the necessary protective factors, such as capable responsible parenting, to overcome those challenges. In Mr. Dennis's case, he was not only raised in this environment of crime, poverty, drugs and violence, he was also abandoned by both of his parents, raised by grandmothers who could offer him little time or attention. None of this was known to Mr. Dennis's jury.

The record at trial and at the evidentiary hearing reveal that trial counsel simply did not reasonably prepare for the penalty phase. The penalty phase record itself demonstrates counsel's failure to investigate and prepare for the penalty phase. Contrary to the lower court's findings (PC-R3. V.3, p. 567), there was no testimony that Mr. Dennis grew up in the projects. There was no testimony that his mother had a drug problem and was absent. There was no testimony that his father was an alcoholic. The lower court's factual findings are erroneous.

Trial counsel presented the testimony of three witnesses during the penalty phase: Mr. Dennis's mother and two grandmothers. (T. 5259-84) Their testimony amounted to nothing more than Mr. Dennis being a nice guy, a good student, and a hard worker who loved and cared for his children. No mental health testimony was presented. The only records obtained by trial counsel pertaining to Mr. Dennis's background, specifically his school records and employment history, were given to him by the State in discovery. Significantly these records were received by

Mr. Guralnick only two weeks prior to the start of the penalty phase. Trial counsel failed to independently obtain any of Mr. Dennis's records.

Had trial counsel obtained and reviewed the school records in a timely manner, he would have seen that Elaine Williams's account of her son as an excellent student was inaccurate. This information should have raised a red flag as to the accuracy of all the information provided by Ms. Williams and should have prompted counsel to further investigate, including following-up on the sparse information provide by Mr. Dennis's brother about his father, and talking in depth, with a focus on mitigation, to the women who actually raised him, Virginia Dennis and Annie Siplin.

While trial counsel argued two statutory mitigators. (The crime was committed under the influence of extreme emotional disturbance and the capacity of the defendant to conform his conduct to the requirements of the law was substantially diminished), he offered absolutely no evidence to support them. Instead, he argued that evidence of these statutory mitigators should be derived from the State's theory at the guilt phase that this was a crime of passion and rage. As such, the State was able to emphasize to the jury that there was no evidence offered with respect to these mitigators. (T. 5379) The State further downplayed the non-statutory mitigation offered and argued that it should be given little weight. (T. 5329-30) As a result of the State's argument and trial counsel's ineffectiveness, the trial court afforded the 'under extreme emotional disturbance' mitigator "little

or no weight". (R. 3262), and gave the 'diminished capacity to conform his conduct to the requirements of the law' mitigator no weight, finding that it did not exist. (R. 3262)

Mr. Guralnick failed to understand that the extreme emotional disturbance mitigator constitutes mental health mitigation, which at the very least should have been explored by a psychologist. Ultimately, Mr. Guralnick acknowledged that this mitigator necessarily implicates Mr. Dennis's state of mind, but he still failed to see the necessity of hiring a mental health expert to assist his investigation. It was unreasonable to discount this avenue of investigation based on the untrained and uninformed opinion of Mr. Dennis's mother that Mr. Dennis had no mental health issues. Here, trial counsel's failure to pursue any investigation, and the subsequent failure to present mitigation evidence, was unreasonable.

Strickland's prejudice standard requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. A petitioner is not required to show that counsel's deficient performance "[m]ore likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693. The Supreme Court specifically rejected that standard in favor of a showing of a reasonable probability: "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he

received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Strickland*, 466 U.S. at 693. The correct standard is whether unpresented, available evidence "might well have influenced the jury's appraisal of [the defendant's] moral culpability" or "may alter the jury's selection of penalty." *Williams v. Taylor*, 120 S. Ct. at 1515-16. Further, under *Strickland*, prejudice is established when the omitted evidence likely would have affected the "factual findings." *Strickland*, 466 U.S. at 695-96.

The lower court failed to find prejudice due to a flawed legal and factual analysis in which it unreasonably discounted mitigation evidence not presented at trial but which was presented at the postconviction evidentiary hearing. Here, the lower court found that trial counsel's failure to investigate prepare and present the fact that Mr. Dennis suffers from posttraumatic stress disorder did not prejudice Mr. Dennis because "at best this alleged mitigator would be given slight weight by this court." (PC-R3. V.3, p., p. 566) The court similarly found no prejudice in failing to present evidence of Mr. Dennis's abandonment and childhood of deprivation and specifically dismissed Dr. Dunn's testimony because "[g]iven the nature of this crime in which the defendant was convicted of the brutal murder of the mother of his oldest daughter and he[r] current boyfriend, this testimony was unlikely to be helpful and more likely to be harmful if presented to the jury." (PC-R3. V.3, p., p. 567)

Porter v. McCollum, 130 S. Ct. 447 (2009), instructs that the lower court's

wholesale discounting of Dr. Bourg Carter and Dr. Dunn’s testimony and expertise is error. In *Porter v. McCollum*, the United States Supreme Court found this Court’s *Strickland* analysis which appeared in *Porter v. State*, 788 So. 2d 917 (Fla. 2001), to be “an unreasonable application of our clearly established law.” *Porter v. McCollum*, 130 S. Ct. at 455. This Court’s *Strickland* analysis in *Porter v. State* was as follows:

At the conclusion of the postconviction evidentiary hearing in this case, the trial court had before it two conflicting expert opinions over the existence of mitigation. **Based upon our case law**, it was then for the trial court to resolve the conflict by the weight the trial court afforded one expert’s opinion as compared to the other. The trial court did this and resolved the conflict by determining that the greatest weight was to be afforded the State’s expert. We accept this finding by the trial court because it was based upon competent, substantial evidence.

Porter v. State, 788 So. 2d at 923 (emphasis added). The United States Supreme Court rejected this analysis (and implicitly this Court’s case law on which it was premised) as an unreasonable application of *Strickland*:

The Florida Supreme Court’s decision that Porter was not prejudiced by his counsel’s failure to conduct a thorough - or even cursory - investigation is unreasonable. The Florida Supreme Court did not consider or unreasonably discounted mitigation adduced in the postconviction hearing. * * * Yet neither the postconviction trial court nor the Florida Supreme Court gave any consideration for the purpose of nonstatutory mitigation to Dr. Dee’s testimony regarding the existence of a brain abnormality and cognitive defects. While the State’s experts identified perceived problems with the tests that Dr. Dee used and the conclusions that he drew from them, **it was not reasonable to discount entirely the effect his testimony might have had on the jury or the sentencing judge.**

Porter v. McCollum, 130 S. Ct. at 454-55. (emphasis added). In *Porter v. State*, this Court failed to find prejudice due to a truncated analysis, which summarily discounted mitigation evidence not presented at trial, but introduced at a postconviction hearing, *see id.* at 451, and “either did not consider or unreasonably discounted” that evidence. *Id.* at 454. The circuit court in Mr. Dennis’s case has followed the same flawed analysis. The lower court failed to consider the impact that both Dr. Dunn and Dr. Bourg Carter’s testimony may have had on the jury. Instead, the court merely dismissed the doctors’ testimony given “the nature of this crime.” (PC-R3. V.3, p. 567)

Here, in discounting the testimony of Dr. Dunn, the court makes precisely the same error that required a reversal in *Porter*. The court determined that Dr. Dunn’s postconviction testimony, explaining that Mr. Dennis having been abandoned by his mother at a young age caused him to be angry, to be prone to violence and to have problems with relationships with women, “was unlikely to be helpful and more likely to be harmful if presented to the jury.” (PC-R3. 567). That sort of speculation as to how evidence that is powerfully mitigating—nothing less than a child being abandoned by his own mother and sent into the world without that critical source of emotional stability that shapes us all into the adults we later become—*could potentially have cut the other way* is constitutionally impermissible. In *Porter*, the United States Supreme Court found that “[i]t is [] unreasonable to conclude that Porter’s military service[, presented in

postconviction as mitigating evidence,] would be reduced to ‘inconsequential proportions,’ . . . simply because the jury would also have learned that Porter went AWOL on more than one occasion” 130 S. Ct. at 455 (footnotes omitted). The underlying problem in *Porter* was that this Court discounted mitigation based on a rationalization of how that mitigation might have been more damaging than helpful, representing a “failure to engage with what Porter actually went through in Korea.” *Id.* The United States Supreme Court explained that “the relevance of Porter’s extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter. The evidence that he was AWOL is consistent with this theory of mitigation and does not impeach or diminish the evidence of his service.” *Id.* That failure to conceive of the nature of mitigating evidence is at play here. The court failed to understand that evidence of a traumatic childhood experience that led to violent behavior is the very quintessence of mitigation. It helps explain, quite directly as a matter of fact, the crime for which Mr. Dennis was convicted. However, the court took the lay approach of asking whether mitigation would make the defendant more despicable or look more guilty. That failure to engage with mitigating evidence because a lay person might take it the wrong way is not permitted.

In *Smith v. Cain*, the United States Supreme Court resoundingly reaffirmed

that analysis, finding that

the State and the dissent advance various reasons why the jury might have discounted Boatner's undisclosed statements. They stress, for example, that Boatner made other remarks on the night of the murder indicating that he could identify the first gunman to enter the house, but not the others. That merely leaves us to speculate about which of Boatner's contradictory declarations the jury would have believed. The State also contends that Boatner's statements made five days after the crime can be explained by fear of retaliation. Smith responds that the record contains no evidence of any such fear. Again, the State's argument offers a reason that the jury *could* have disbelieved Boatner's undisclosed statements, but gives us no confidence that it *would* have done so.

565 U.S. ___, slip op. at 3 (January 10, 2012) (emphasis in original). The same reasoning applies to the court's dismissal of Dr. Bourg Carter's diagnosis of PTSD. Here, the court rationalized to itself a way that the jury might not have seen anything mitigating about Mr. Dennis's childhood, family history or mental health. But, as in *Porter* and *Smith*, that was not for the court to decide. That is for the jury to decide.

Dr. Dunn testified that he found several factors in Mr. Dennis's background to be mitigating. Mr. Dennis's neighborhood subjected him to an unusual amount of crime and violence. While children with adequate emotional support are often able to overcome such obstacles, Mr. Dennis suffered abandonment by family, his mother particularly, which rose to the level of abuse. Mr. Dennis's family was highly dysfunctional. His parents never married and would fight over who would take responsibility for him. His mother was a drug addict with no parenting skills;

his father an alcoholic. Eventually Mr. Dennis was left to be raised by his grandmother among nine children.

Dr. Dunn explained that Mr. Dennis's grew up in a "problem" neighborhood where poverty, crime and violence were rampant. Dr. Dunn explained that Mr. Dennis reported that he was exposed to the crime in the community, theft, prostitution, drug dealing and abuse, and violence. This self-report was corroborated by Mr. Dennis's family, and by Dr. Dunn's own research and knowledge of Mr. Dennis's community.

Dr. Dunn also explained that Mr. Dennis was effectively abandoned by his mother to the care of his grandmother, and that this abandonment rose to the level of abuse. From his interviews with Ms. Williams, Dr. Dunn found that she was a teenage mother who did not want Mr. Dennis, but preferred to be in the streets. Other than knowing her son's birthday, Ms. Williams did not know her son at all and was a bad historian. Ms. Williams would have had no knowledge of whether Mr. Dennis suffered any mental or emotional problems. In addition to being limited cognitively, Ms. Williams was in extreme denial about her difficulties, and those of her son.

Mr. Dennis's father, Michael Dennis, also abandoned his son. While he did visit from time-to-time, Mr. Dennis would run and hide when his father came. Mr. Dennis was ashamed and frightened of his father, in part because the neighborhood children teased him because his father was gay. On one occasion,

when learning of this, Michael Dennis took Mr. Dennis and confronted the neighborhood children by lowering his pants and yelling profanity. Dr. Dunn found this incident to be particularly disturbing and significant.

Dr. Dunn explained that, because he was abandoned by his mother, Mr. Dennis lived with his grandmother, Virginia Dennis, who struggled to raise him along with other children she raised while also working full time. As a result, Mr. Dennis did not receive the attention he required. Like the other members of Mr. Dennis's family, Virginia was in denial about Mr. Dennis's emotional problems, and the problems in their community.

According to Dr. Dunn, as a result of the abandonment by his parents, Mr. Dennis was an emotionally damaged person, and this damage occurred likely when Mr. Dennis was a very young child. Facts and events in early life parallel those of children who suffer abandonment. Mr. Dennis's experiences parallel those of other abandoned children, but are complicated by Mr. Dennis's unique circumstances.

Dr. Dunn testified to the significance of parental abandonment on children like Mr. Dennis. In short, children, especially male children, do not get over being abandoned by their mother. Such abandonment causes a lifelong, inescapable pain. As a result of his abandonment, Mr. Dennis has a great deal of anger toward his mother which has resulted in his inability to form healthy bonding relationships with anyone, especially women. He is isolated, depressed and suspicious.

As a result of the emotional injuries he has suffered, Mr. Dennis is emotionally flawed. He dealt with this by isolating himself from others. Far from trial counsel and the circuit court's belief, Mr. Dennis is essentially a very unsuccessful person. He did not perform well in college, having dropped out after only a semester. His decision to do so had nothing to do with his association with Snoop Dog or any other "rap star," as trial counsel believed (PC-R3. V.4, p. 62-630. In fact, his rap career with "The Dawgs,"⁴ a local Miami group, was an abject failure.

From Mr. Dennis's school records, Dr. Dunn learned that Mr. Dennis did not have a smooth elementary school experience and performed marginally. (PC-R3. V.6, p. 267-268) An elementary teacher commented that Mr. Dennis needed strict supervision and behavior guidelines. (PC-R3. V.7, p. 53) Employment records indicated difficulties relating to others and explosive behavior at work. (PC-R3. V.6, p. 267) Moreover, the fact that he was employed as a caterer at a country club refutes any notion that his entertainment career was anything more than an abject failure.

Psychologist Dr. Sherri Bourg 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. In

⁴ Dr. Dunn explained that Mr. Dennis was in a rap group called "The Dawgs" but was not associated with the rap celebrity Snoop Dog. (V7. 15)

addition to a clinical interview, mental status examination, and psychological testing,⁵ Dr. Bourg Carter interviewed Mr. Dennis's paternal and maternal grandmothers who had raised him. Dr. Bourg Carter also reviewed background materials including school records, employment records and medical records to corroborate information provided by Mr. Dennis.

Dr. Bourg Carter administered the Psychopathy Checklist–Revised, which measures psychopathic personality traits. Psychopathy is a personality style where the person is grandiose, manipulating, egocentric and experiences no remorse or regret. Psychopaths do not understand emotions, are shallow in relationships, promiscuous and violate social norms. The test does not rely on self-reporting, rather it is scored using records or collateral sources of information regarding the person's functioning over their life span. Mr. Dennis scored quite low indicating no psychopathic personality.

Dr. Bourg 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 would have no adjustment problems to prison; and fourthly, there is no

⁵ Dr. Bourg Carter administered the Minnesota Multiphasic Personality Inventory - Second Edition (MMPI-2), the Detailed Assessment of Post-Traumatic Stress (DAPTS), and the Psychopathy Check List - Revised (PCLR).

evidence that Mr. Dennis is a psychopath. Additionally, Dr. Bourg 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.

The State attempted to suggest that since Mr. Dennis did not report the shooting he could not be classified as having PTSD. The State also attempted to suggest that since Mr. Dennis did not seek counseling for PTSD after the shooting he cannot be classified as having the disorder. However, as Dr. Bourg Carter explained, there is nothing in the DSM-IV that requires reporting or treatment as a diagnostic criterion for PTSD. Thus, the State's suggestion is without scientific basis.

Not being content with misstating the diagnostic criterion for PTSD, the State sought to discredit Mr. Dennis's traumatic childhood experience of witnessing a man being shot in the head by suggesting that it did not happen since they could find no record of it. However, Dr. Bourg Carter clearly testified that child witnesses commonly get certain facts wrong such as date and location. This is especially the case when they witness a traumatic event such as a shooting. Nonetheless, child witnesses do accurately report the main part of the traumatic event which, in Mr. Dennis's case, was the shooting itself. Just because the State could not find records of a crime occurring at the time and the location Mr. Dennis remembers does not mean it never happened, or that he was not traumatized by witnessing the event. Thus, once again, the State's attempt to discredit

Mr. Dennis's PTSD is baseless.

The testimony of Dr. Bourg Carter and, certainly, Dr. Dunn would have provided the support for trial counsel's theory that this was a crime of passion and rage. Even if their testimony had not risen to the level of the statutory mitigator, the testimony lends support to non-statutory mitigation that Mr. Dennis was under emotional disturbance and/or distress and that this was a crime of passion.

As demonstrated at the evidentiary hearing, Mr. Dennis was prejudiced by trial counsel's numerous failings. Mr. Dennis presented the testimony of his mother, two grandmothers and two mental health experts. While Mr. Dennis's mother and grandmothers are the same witnesses presented by trial counsel, after thorough investigation, the picture of Mr. Dennis's life history is quite different from the simplistic good guy theory asserted by trial counsel.

The testimony of Mr. Dennis's mother and grandmothers at the evidentiary hearing detailed the community in which he grew up and his family life. Mr. Dennis grew up in the projects of Miami and was shuffled off to live with his paternal grandmother at a very early age until it was convenient for his mother to get him. When he was finally with his mother, they changed residences frequently or he often stayed with others. His mother admitted that she had very little involvement in Mr. Dennis's life.

Mr. Dennis's grandmother received no financial assistance from either of his parents, she had very little income. Mr. Dennis's parents were more concerned

with drinking and doing drugs than raising their son. Mr. Dennis's father only had an occasional relationship with Labrant. However, Michael Dennis's sexuality was frequently an issue for Mr. Dennis, as he was often teased by neighbors and friends about his father being a homosexual. The expert testimony presented at the evidentiary hearing explained the effects of Mr. Dennis's community and unstable family life on his adult life and relationships.

As a result of trial counsel's inattention, Mr. Dennis's jury heard none of the mitigation now presented. Here, under the applicable standard of proof, Mr. Dennis established mitigating factors which were not established or found at trial. The omission of the mitigating factors undermines confidence in the outcome of the penalty phase, warranting relief.

ARGUMENT II: THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE

In order to prove a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), a claimant must establish that the government possessed evidence that was suppressed, that the evidence was "exculpatory" or "impeachment" and that the evidence was "material." *United States v. Bagley*, 473 U.S. 667 (1985); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Strickler v. Greene*, 527 U.S. 263 (1999). Evidence is "material" and a new trial or sentencing is warranted "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. *Kyles*, 514 U.S. at 433-434; *Hoffman v.*

State, 800 So. 2d 174 (Fla. 2001); *Rogers v. State*, 782 So. 2d 373 (Fla. 2001); *Young v. State*, 739 So. 2d 553 (Fla. 1999).

Prior to the penalty phase of Mr. Dennis's trial, the State was in possession of a memorandum sent to Dr. Valerie Rao from Assistant State Attorney, Josh Weintraub detailing the medical testimony required from her at the penalty phase. It is undisputed that Mr. Guralnick was never provided with the State Attorney's memo to Dr. Rao. Further, the State stipulated that Dr. Rao received the memorandum. Assistant State Attorney Joshua Weintraub testified, based on an email he wrote in November 1998, that it appeared Dr. Rao did actually review the memo. (PC-R3. V.7, p. 91) Had the defense done their investigation, and the State been forthcoming, the defense would have questioned Dr. Rao regarding her preparation for the penalty phase and the memorandum would have been used to impeach Dr. Rao and challenge her opinions.

The circuit court denied this claim based on Dr. Rao's testimony that "what the State says and what they want me to tell them is not what they're going to get." (PC-R3. V.3, p. 571) However, the circuit court ignores the fact that Dr. Rao's testimony did not only give the state what they wanted, it echoed the state's language provided in the memorandum. Similarly, the circuit court's reliance on Dr. Rao's statement that she would not change one word if the State asked her to (PC-R3. V.3, p. 571) ignores the fact that there would be no need for her to do so because she already said what they State asked her to.

The function of the medical examiner is that of an independent expert medical witness. As Dr. Rao testified at the evidentiary hearing, medical examiners' opinions are based on a reasonable degree of medical certainty. Therefore, by Dr. Rao's own admission, any medical findings would be the same. In fact, Dr. Rao testified that "if you ask the same question, you probably would get the same gist". (PC-R. 1132) 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.

Contrary to Mr. Weintraub's assertions at the evidentiary hearing, it is apparent that the memorandum which was undisclosed by the State went well beyond mere witness preparation. Indeed, the memo provided Dr. Rao with "terms of art" and specific circumstances that the judge and jury needed to understand in order to find the aggravators. When Dr. Rao's testimony is considered under all the circumstances and compared in detail to Dr. Gulino's testimony, it is apparent that the memo is tantamount to witness coaching. In addition to comparing her testimony with that of Dr. Gulino's testimony, it is important that Dr. Rao did not conduct the autopsies or visit the crime scene, nor did she testify at the guilt phase of Mr. Dennis's trial. It is also telling that the State could have relied on the testimony of Dr. Gulino in the penalty phase, but chose not to, in favor of presenting the inflammatory testimony of Dr. Rao, and then relying on Dr. Rao's testimony during closing argument. Clearly, the State believed Dr. Gulino's

testimony was not strong enough to rely on in the penalty phase. Mr. Dennis was entitled to the information which would have shown that Dr. Rao's testimony was coached.

The lower court's conclusion that "the testimony of Dr. Gulino at the guilt phase was consistent with the testimony of Dr. Rao at the penalty phase". (PC-R3. V.3, p. 572) is refuted by the record. While Dr. Rao did not specifically state the victims "languished and died," she testified that time would seem to slow down and seem like an eternity to the victims. (T. 5244) The State's memorandum references a "'covering up' stage" that the State wanted Dr. Rao to emphasize, and stresses that Ms. Lumpkins was aware she was being beaten. Dr. Rao dutifully testified to Ms. Lumpkins awareness (T. 5233) and emphasized there was "quite a bit of an attempt to shield herself." (T. 5234) This testimony echoes the State's request to discuss Ms. Lumpkins' "covering up." With respect to Ms. Lumpkins' awareness, Dr. Rao exaggerated the testimony of Dr. Gulino. 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, consistent with the State's memorandum, testified that Ms. Lumpkins would be able to hear "what was occurring in her surroundings,"

would be able “to hear threats of death” and would “be able to hear through the front door what was going on.” (T. 5235-36) These answers were not phrased in possibilities and this testimony amounted to pure speculation. 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. Dr. Rao’s testimony mimics the State’s instruction that it wanted the jury to know that “Marlon Barnes was capable of ‘consciousness or awarenesses’ ” and “he could still hear the cries of anguish from Timwanika down the hallway.”

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 blood smears indicated that the victim attempted to get help. (T. 5255), again directly following the State’s instruction that it wants the jury to know that the victim had the “ability to try and seek help.” Gross overstatements and pure speculation 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 than Dr. Gulino’s. However, because the State failed

to disclose this memorandum, the defense was unable to impeach Dr. Rao with the information that the State influenced her testimony. The totality of the circumstances – the inconsistencies between Dr. Rao’s testimony and Dr. Gulino’s, and the relative consistencies between her testimony and the State’s memorandum, and that the State chose to present Dr. Rao at the penalty phase in lieu of Dr. Gulino – lead to no other conclusion but that Dr. Rao’s testimony was affected by the State’s memorandum.

Exculpatory and material evidence is evidence of a favorable character for the defense, **including impeachment evidence**, which creates a reasonable probability that the outcome of the guilt and/or penalty phase of trial would have been different. This standard is met and reversal is required once the reviewing court concludes that there exists a "reasonable probability that had the [unpresented] evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 680 (1985).

The United States Supreme Court has explained that, in the context of materiality attendant to a *Brady v. Maryland* claim, the issue is whether **the jury** "would reasonably have been troubled" by the withheld information, and 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).

At 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) 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.

At the evidentiary hearing, trial counsel testified that he was shocked he never received the memorandum because he believes it was discoverable. Trial counsel characterized the memo as Assistant State Attorney Weintraub telling Dr. Rao what he needed her to say, and when he compared the testimony of Dr. Rao at the penalty phase with the memo, he felt they matched. Trial counsel would have used the memo to attack the witness's testimony as having been coached and would have reported the discovery violation to the bar. Trial counsel considered

Dr. Rao to be a material witness, particularly with respect to her testimony regarding defensive wounds and, as such, had he received the memorandum, he would have deposed her. Regardless of what her answers may have been during deposition, trial counsel would have impeached her testimony with the fact that the State prepared her through the instructive memorandum. Trial counsel was adamant that he would have used the memo to impeach Dr. Rao. Mr. Guralnick further indicated at the evidentiary hearing that he believed the memo rose to the level of prosecutorial misconduct. Had he been aware of the memo, Mr. Guralnick would have reported Mr. Weintraub to the Bar Association for unethical conduct and tampering with witnesses.

The State's position that it is unknown whether Dr. Rao reviewed the memo is undermined by Mr. Weintraub's testimony agreeing that she did review the memo. Further, any testimony by Mr. Weintraub that nobody told Dr. Rao what to say, is self-serving. Upon cross-examination by the State, Dr. Rao denied that the memo had any effect on her testimony. However, Dr. Rao's testimony that she did not script her answers based on the memo is not credible. If Dr. Rao does not recall receiving the memorandum or placing it in the medical examiner's file, she cannot possibly recall whether or not she placed any reliance on the memo. More importantly, whether Dr. Rao relied on the memo or not is irrelevant to the *Brady* analysis. Mr. Dennis was entitled to have the jury hear her questioned regarding the memorandum; i.e. its very existence, how it was similar to her testimony, and

how her testimony differed from Dr. Gulino's testimony. Only then could the jury have properly evaluated her testimony and credibility. There need not have been an admission on Dr. Rao's part that she was influenced by the memo for the jury to have drawn that conclusion.

Furthermore, a proper materiality analysis under *Brady* must contemplate the cumulative effect of all suppressed information. The materiality inquiry is not a "sufficiency of the evidence" test. *Kyles*, 514 U.S. at 434. The burden of proof for establishing materiality is less than a preponderance. *Kyles*, 514 U.S. at 434. Or in other words: "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Id.* Rather, the suppressed information must be evaluated in light of the effect on the prosecution's case as a whole and the "importance and specificity" of the witnesses' testimony. *United States v. Scheer*, 168 F.3d 445, 452-453 (11th Cir. 1999).

Dr. Rao's testimony went directly to the heinous, atrocious and cruel aggravator. The State urged the jury to find the aggravating factor of heinous, atrocious and cruel in its closing argument based on the testimony of Dr. Rao:

This defendant as you heard Dr. Rao say and Dr. Gulino during the trial, this defendant beat Timwanika. **The injury was so severe it was as if her head was run over by a car**, and this is after he has beaten Marlin Barnes 20-25 times in his face and head area.

(T. 5362) (emphasis added). But Dr. Gulino did not testify that the injury was

equivalent to being run over by a car, this only came from Dr. Rao.

Mr. Guralnick was never provided with the State Attorney's memo to Dr. Rao. Because the State failed to disclose this information, the defense was unable to impeach Dr. Rao with this information. 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

For the reasons argued in Mr. Dennis's Motion to Vacate Judgments of Conviction and Sentence, the arguments and evidence presented at the evidentiary hearing, and the arguments herein, Mr. Dennis is entitled to relief in the form of a life sentence, or in the alternative, a new penalty phase proceeding.

Respectfully submitted,

SUZANNE MYERS KEFFER
Chief Assistant CCRC-South
Florida Bar No. 0150177

PAUL KALIL
Assistant CCRC-South
Florida Bar No. 0173113

Capital Collateral Regional Counsel-South
101 NE 3rd Avenue, Suite 400
Fort Lauderdale, Florida 33301
(954) 713-1284

COUNSEL FOR MR. DENNIS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by United States Mail to Sandra Jaggard, Assistant Attorney General, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, Florida 33131, this 11th day of January, 2011.

SUZANNE MYERS KEFFER
Chief Assistant CCRC-South

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the foregoing Initial Brief has been reproduced in 14 Times New Roman type, pursuant to Rule 9.100 (1), Florida Rules of Appellate Procedure.

SUZANNE MYERS KEFFER
Chief Assistant CCRC-South