

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-1089

LABRANT DENNIS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY,
CRIMINAL DIVISION

SUPPLEMENTAL BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

The State relies on the statement of case and facts from its initial brief with the following additions. On June 16, 2010, this Court entered an order, reversing the trial court's summary denial of the claim of ineffective assistance of counsel at the penalty phase and the claim that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose a trial preparation memo from one of the prosecutors to Dr. Valerie Rao, and relinquishing jurisdiction to the lower court to hold an evidentiary hearing on those two claims. (PCR2-SR. 97-98)¹

At the evidentiary hearing, Ronald Guralnick, Defendant's trial counsel, testified that he had practiced law for 43 years, that between 60% and 70% of his practice was devoted to criminal defense and that he had tried at least 15 to 20 capital trials. (PCR2-SR-4. 16-18) He had met and represented Defendant in a civil matter before these crimes occurred and believed that he was retained in this matter through Defendant's family. (PCR2-SR-4. 18) He received a fee from Defendant and his family that did not fully compensate him for the work he did in the case. (PCR2-SR-4. 19-20) He also admitted that he applied for, and received, \$10,000 to cover the costs of litigation from the

¹ The symbol "PCR2-SR." will refer to the supplemental record after the relinquishment proceedings. Because volumes 4-8 of the supplemental record are not consecutively paginated, they will be referred to as "PCR2-SR-[Vol. no]."

Court. (PCR2-SR-4. 20-23)

Mr. Guralnick stated that this was a big case because one of the victims was Marlon Barnes, a football player at the University of Miami. (PCR2-SR-4. 23-26) At the time this matter was pending, Mr. Guralnick was also representing Daniel Lugo in another capital case. (PCR2-SR-4. 26-27) He did not seek the services of a second attorney to assist with this matter because he did not believe that he needed the assistance of another attorney and because he had previously had negative experiences with using a second chair attorney. (PCR2-SR-4. 30, 75-76) He believed that he had time to prepare this matter despite his work load and would not requested a continuance if he felt the need. (PCR2-SR-4. 115)

In the penalty phase, Mr. Guralnick sought to establish that Defendant had no prior criminal history, that the crime was committed while Defendant was under extreme mental or emotional disturbance and that Defendant had family and friends and was a good son and father. (PCR2-SR-4. 31-33) He based the claim of a mental or emotional disturbance on the fact that crime was one of rage and out of character for Defendant. (PCR2-SR-4. 32)

Mr. Guralnick hired Alberto Fuentes as his investigator in this matter. (PCR2-SR-4. 33) He recalled using Mr. Fuentes to assist him in interviewing Defendant. (PCR2-SR-4. 34) However,

Mr. Guralnick investigated mitigation himself by interviewing Defendant, his mother, his grandmothers, his half-brother, his cousin and other family members about Defendant's background. (PCR2-SR-4. 36, 43-44, 47) A review of the notes from his file regarding some conversations with Defendant's mother and half brother confirmed that Defendant's background had been discussed. (PCR2-SR-4. 55-60, 63-67) The notes Defendant provided regarding a conversation with Annie Siplin did not indicate that they had discussed Defendant's background but Mr. Guralnick believed that there may have been other conversations not recorded in the notes. (PCR2-SR-4. 47-52) He also received Defendant's school and employment records from the State and had no reason to seek them again. (PCR2-SR-4. 61-62)

Mr. Guralnick stated that the information he gleaned from his investigation showed that Defendant was a good and loving family member, that he attended church regularly, that he had received a scholarship to attend college, that Defendant did not abuse drugs or alcohol and that he had voluntarily left college to pursue a career in rap music, which was successful in that he toured both nationally and internationally and became acquainted with Snoop Doggy Dog. (PCR2-SR-4. 36-37, 62-63) Defendant also had been successful in other employment. (PCR2-SR-4. 109-10) He indicated that he had no reason to believe that Defendant had

any mental health issues from either his interviews or his interactions with Defendant, including his prior representation of Defendant. (PCR2-SR-4. 36-38, 56, 65, 89, 104-06, 110) Mr. Guralnick had no reason to question the reliability of the information he received as the witnesses seemed forthright and provided consistent information. (PCR2-SR-4. 60, 69-70)

Mr. Guralnick did learn that Defendant's father drank a lot and used marijuana at times. (PCR2-SR-4. 66-67) He probably followed up on this information but did not consider it important because it concerned the father's life and did not appear to have affected Defendant. (PCR2-SR-4. 68-69) However, he was never informed that Defendant witnessed a shooting as a child, was a victim of a robbery or was with a friend during a shooting. (PCR2-SR. 102-03)

Based on this information, Mr. Guralnick settled on a mitigation strategy of arguing that the crimes were committed in a rage and out of character for Defendant. (PCR2-SR-4. 96-97) He made strategic decisions regarding which witnesses to call to present this mitigation. (PCR2-SR-4. 64, 70-71) He did not request a mental health evaluation because there was no indication of any mental health issues. (PCR2-SR-4. 71) He did not want to present mitigation that would suggest that Defendant had a propensity for violence. (PCR2-SR-4. 97-98) He also would

not have presented evidence that people who grew up in the Scott Projects had to become criminals because it could alienate the jury. (PCR2-SR-4. 111-12) He also would not have called an expert who indicated that he was unwilling to testify and angry at Defendant about the crime. (PCR2-SR-4. 112-14)

Mr. Guralnick knew that there were two medical examiners involved in this case and that Dr. Rao was one of them. (PCR2-SR-4. 77-78, 116) He knew that Dr. Rao testified at some point at trial but did not recall when she testified. (PCR2-SR-4. 78) Mr. Guralnick had not seen the memo from Mr. Weintraub to Dr. Rao prior to trial. (PCR2-SR-4. 81-83) He found the memo shocking because he believed that it showed that the State was directing her how to testify. (PCR2-SR-4. 83-84) Had he seen the memo before the penalty phase, he would have filed a complaint against Mr. Weintraub with the Florida Bar. (PCR2-SR-4. 84) He would have attempted to use the memo to impeach Dr. Rao on the basis that she had been coached. (PCR2-SR-4. 84)

However, Mr. Guralnick admitted that it was entirely proper for the State to discuss a witness's testimony with the witness. (PCR2-SR-4. 112) He acknowledged that a good trial attorney knows the answer to his questions before he asks. (PCR2-SR-4. 122-23) He did not recall if Dr. Rao had actually used the terms Mr. Weintraub had suggested in the memo during her testimony.

(PCR2-SR-4. 126-27) He admitted that he would not have wanted to go through the actual content of the memo regarding the "terms of art" suggested in that memo because they would simply emphasize the heinousness of these murders. (PCR2-SR-4. 127-29) He acknowledged that he believed that suggesting the victims were unconscious was an effective manner of challenging HAC. (PCR2-SR-4. 118-19) He admitted that he would have deposed Dr. Rao about the memo before attempting to use it and would not have attempted to use the memo at all if Dr. Rao had informed him in deposition that the memo did not affect her testimony. (PCR2-SR-4. 128-32)

Sherrie Bourg Carter testified that she was now an author of books related to psychological topics but had previously practiced psychology. (PCR2-SR-5. 33) When she practiced psychology, she was conducted evaluations for competency, sanity and mitigation in criminal cases, mainly for the defense. (PCR2-SR-5. 35-36, 40) She had developed an interest in domestic violence and child witnesses and had conducted evaluations for post traumatic stress disorder (PTSD) related to this interest. (PCR2-SR-5. 44) However, Dr. Bourg Carter admitted that most of PTSD evaluations concerned battered women and children. *Id.* She was unable to recall a single PTSD evaluation conducted on an adult male. (PCR2-SR-5. 44-45) She insisted that this was

unimportant because men and women were the same. (PCR2-SR-5. 46) After considering this evidence, this Court stated that it did not find Dr. Bourg Carter to be an expert in PTSD in adult males. (PCR2-SR-5. 47-48)

Dr. Bourg Carter was retained in September 2003, to evaluate Defendant for mitigation. (PCR2-SR-5. 49) As part of her evaluation, she interviewed Defendant and reviewed his school, employment and Department of Corrections (DOC) records. (PCR2-SR-5. 49-50) The interview lasted 2½ hours and consisted of conducting a mental status exam and obtaining a life history. (PCR2-SR-5. 54-55) Dr. Bourg Carter believed that the significant information she gleaned from the interview was Defendant's statement that he had witnessed someone being shot in the head when he was 7 or 8. (PCR2-SR-5. 55) She was also told that Defendant had been involved in two other incidents involving guns: being robbed and being with a friend who was shot. (PCR2-SR-5. 55)

Regarding his life, Defendant informed Dr. Bourg Carter that he had lived in the projects with one of his grandmothers from birth to age 10, and with his other grandmother between ages 11 and 18. (PCR2-SR-5. 57-58, 72-73) He stated that his parents never married, that he did not see either of his parents much and that they both had substance abuse problems. (PCR2-SR-

5. 57) He claimed that his father lived with numerous women and that his father exposed him to sexual activity through these women, which Defendant did not find abusive. (PCR2-SR-5. 57, 72, 88) In fact, Defendant denied that he was abused in any manner while acknowledging that he was disciplined through the use of belts and switches. (PCR2-SR-5. 88-89) Defendant admitted that he had no problems with substance abuse and did not drink. (PCR2-SR-5. 89-90) Defendant acknowledged that he was an average student, played football and received a college scholarship to do so. (PCR2-SR-5. 59) However, Defendant claimed that he was forced to work to help support his family. (PCR2-SR-5. 129) He related no information of any mental health issues regarding himself or his family. (PCR2-SR-5. 73-74)

Dr. Bourg Carter admitted that the DOC records she reviewed would not have existed at the time of trial as Defendant had not been incarcerated prior to these crimes. (PCR2-SR-5. 87) She stated that the school records showed that Defendant was an average student. (PCR2-SR-5. 59) She admitted that Defendant did well in employment and that she saw no red flags of any problems with Defendant. (PCR2-SR-5. 86-87) In speaking to Defendant's family, she noted that they did corroborate Defendant's parents' substance abuse issues and the fact that Defendant was raised primarily by his grandmothers but were inconsistent in the

details of Defendant's living arrangements. (PCR2-SR-5. 55-58, 73) Defendant's family also did not corroborate the alleged incident where Defendant saw the shooting as a child, although Defendant had told his grandmother of the robbery and the shooting of the friend. (PCR2-SR-5. 71-72)

Dr. Bourg Carter administered the Minnesota Multiphasic Personality Inventory (MMPI), the Detailed Assessment of Posttraumatic Stress (DAPS) and the Psychopathy Checklist to Defendant. (PCR2-SR-5. 60) Defendant's performance on the MMPI resulted in an invalid profile because Defendant responded inconsistently. (PCR2-SR-5. 60-61) The Psychopathy Checklist indicated that Defendant was not a psychopath. (PCR2-SR-5. 61-62)

Dr. Bourg Carter stated that the DAPS relied exclusively on Defendant's self report of symptoms. (PCR2-SR-5. 64) She stated that Defendant claim about seeing the shooting as a child was the traumatic event he experienced. (PCR2-SR-5. 63) She stated that Defendant averred that he experienced symptoms of dissociation at the time of the event, problems sleeping, a heightened startle response, nightmares, tension, re-experiencing the event and intrusive thoughts about it. (PCR2-SR-5. 63-64, 74-76) Dr. Bourg Carter stated that the criteria for PTSD were (1) exposure to a frightening, life-threatening

trauma, (2) avoidance symptoms, (3) hyperarousal symptoms, (4) reliving symptoms and (5) effect on functioning. (PCR2-SR-5. 74) However, she insisted that PTSD might not affect a person's ability to play football, be a performer, socialize or work and that any effect on functioning would diminish over time. (PCR2-SR-5. 68-69) She also stated that child witnesses may get the facts wrong because of the nature of memory, the time lapse between the incident and the recollection and the nature of brain development in children. (PCR2-SR-5. 55-56)

Based on this information, Dr. Bourg Carter opined that Defendant was suffering from mild PTSD in partial remission in 2003. (PCR2-SR-5. 67) She acknowledged that this diagnosis was based entirely on Defendant's self report, which was not the best source of information for a diagnosis. (PCR2-SR-5. 65-66) She also found Defendant's exposure to violence in his community, his potential to adjust to prison and his lack of psychopathy mitigating. (PCR2-SR-5. 69-70) However, she did not find any statutory mitigation. (PCR2-SR-5. 69)

On cross, Dr. Bourg Carter insisted that having corroboration that an alleged traumatic event occurred was not necessary to diagnose PTSD. (PCR2-SR-5. 79-80) She admitted that PTSD could be malingered. (PCR2-SR-5. 91) She acknowledged that Defendant never informed his family of the shooting, that they

did not report seeing changes in his behavior in connection with a traumatic event and that she did not see any signs of an exaggerated startle response in her interview with Defendant. (PCR2-SR-5. 98, 103-04, 109, 110-11) She admitted that the score Defendant received on the DAPS indicated that he did not have PTSD and that her diagnosis was not based on Defendant's condition at the time of the crime or trial. (PCR2-SR-5. 117-18, 119-20)

Annie Siplin, Defendant's maternal grandmother, testified that Defendant's mother was 15 or 16 and in school when Defendant was born. (PCR2-SR-5. 150-52) She believed that Defendant's father was 17 or 18 and not really in school at that time. (PCR2-SR-5. 151-52) Defendant's parents never married or lived together. (PCR2-SR-5. 152) From birth to age 3, Defendant lived with her and her own 10 children. (PCR2-SR-5. 152-53) Defendant moved to Virginia Dennis' home when he became ill and returned when he was 10. (PCR2-SR-5. 153, 157) Defendant's mother was not around much because she was drinking and said she was using drugs. (PCR2-SR-5. 153-56) Ms. Siplin believed that Defendant was ashamed of his father because he was drunk and gay. (PCR2-SR-5. 157-58)

Ms. Siplin insisted that she lived in a neighborhood known as the graveyard in which crime was rampant. (PCR2-SR-5. 152,

158) She claimed that shots were routine in the neighborhood and that individuals would run through her home to evade the police. (PCR2-SR-5. 158-63) She stated that she spent her holidays lying on the floor by the couch to avoid being struck by random gunfire. (PCR2-SR-5. 163) She averred that Defendant was once shot. (PCR2-SR-5. 163)

Ms. Siplin stated that she met with Mr. Guralnick on 3 occasions prior to trial for about 20 minutes each time in the company of Elaine Williams and Ms. Dennis. (PCR2-SR-5. 153-65) She insisted that Mr. Guralnick simply informed the family that he was representing Defendant and assured them that he would win without asking any questions about Defendant's upbringing. (PCR2-SR-5. 165) In fact, she claimed to have been unaware that Defendant faced the death penalty. (PCR2-SR-5. 167-68) She stated that during one of these meetings, Mr. Guralnick asked for money and that she paid him \$300. (PCR2-SR-5. 166)

On cross, Ms. Siplin first claimed that her children had never been in trouble and then claimed that some of her children had been incarcerated. (PCR2-SR-5. 169-70) She admitted that Defendant had actually only live with her for the first couple weeks of his life. (PCR2-SR-5. 171) She also claimed that Defendant never lived with her after he moved to Ms. Dennis' home. (PCR2-SR-5. 179) She stated that her husband was a good

person but a drunk and insisted that her prior testimony that he husband was a good husband was based merely on his willingness to live with her and her children. (PCR2-SR-5. 173-74) She insisted that she did not provide for Defendant but acknowledged he had food, shelter and clothing. (PCR2-SR-5. 174-75) She stated that she did not allow violence in her home but could not stop it and that her children were violent and bad. (PCR2-SR-5. 176-77) Ms. Siplin admitted that she loved Defendant and that Defendant was not abused by his father. (PCR2-SR-5. 177-78)

Elaine Williams, Defendant's mother, testified that she was 16 years old and in high school when Defendant was born, and Defendant's father was 19 years old and finished school at that time. (PCR2-SR-5. 189-190) They never married or lived together. (PCR2-SR-5. 190) She stated that Defendant lived at her mother's home until he was four and that she did not care for Defendant during this period. (PCR2-SR-5. 190-91) She stated that she began to drink and use drugs on the weekends when she was 20. (PCR2-SR-5. 191-92) During this time, she did not see much of Defendant as she was not home when Ms. Dennis brought Defendant to Ms. Siplin's home. (PCR2-SR-5. 192-93) She averred that Defendant remained at Ms. Dennis' home throughout his childhood but, on prompting by counsel, claimed that he lived with her after his 10th birthday. (PCR2-SR-5. 194-96) She averred that

they lived in a variety of bad neighborhoods, that she continued to abuse drugs and that Defendant lived with her mother. (PCR2-SR-5. 196-99) She stated that she would have people at her home using drugs but that Defendant was never present. (PCR2-SR-6. 203-04) She also claimed Defendant's father was an alcoholic but had no idea if he drank when he was with Defendant. (PCR2-SR-6. 207-08)

Ms. Williams stated that she met with Mr. Guralnick 2 times at his office in the presence of Ms. Dennis and Ms. Siplin prior to trial. (PCR2-SR-6. 206) She stated that the meetings each lasted 2 hours but claimed that nothing was really discussed during these meetings and that she did not even know that Defendant was facing the death penalty. (PCR2-SR-6. 206, 209-11)

On cross, Ms. Williams acknowledged that she had cared for Defendant with the help of her family for the first 4 years of his life. (PCR2-SR-6. 213-14) She claimed not to remember whether she got along with Ms. Dennis, why she would have previously testified that she and Defendant's father were the same age or whether Defendant lived with her family after the age of 10. (PCR2-SR-6. 212-13, 214-15) She admitted that Defendant never saw her use drugs or alcohol, never did so himself, never had any behavioral issues, graduated from high school, played sports and attended college. (PCR2-SR-6. 218-20)

Virginia Dennis, Defendant's other grandmother, testified that Defendant's father was a teenager in school when Defendant was born and that Defendant's parents never married or lived together. (PCR2-SR-6. 223-25) Defendant came to live with her when he became ill at 2 weeks old and remained with her until a week before his 10th birthday. (PCR2-SR-6. 225-26, 231) At that time, Defendant's mother picked him up to take him for a birthday party and refused to return him to Ms. Dennis. *Id.* When Defendant was living with Ms. Dennis, Ms. Dennis had 3 of her children and 3 of her other grandchildren living with her in the Scott Projects. (PCR2-SR-6. 226) Ms. Dennis stated that shootings were rare in her neighborhood and that she did not know of any problems in the neighborhood related to drugs. (PCR2-SR-6. 226-28) Defendant's mother and her boyfriend would pick Defendant up most weekends for visits. (PCR2-SR-6. 228) Defendant's father did not live with Ms. Dennis but would visit Defendant at her home. (PCR2-SR-6. 229) While her son had a drinking problem, he did not drink around Defendant and was not drunk in Defendant's presence. (PCR2-SR-6. 229-30)

Ms. Dennis met with Mr. Guralnick on 2 occasions at his office prior to trial in the company of Ms. Williams and Ms. Siplin. (PCR2-SR-6. 232-33) She claimed that Mr. Guralnick merely stated that he was representing Defendant and would win

at these meetings without even mentioning the death penalty.
(PCR2-SR-6. 233-35)

On cross, Ms. Dennis acknowledged that she loved Defendant, that he was never involved in crime, that he stayed in school and that he went to church regularly. (PCR2-SR-6. 236-37, 241-43) She could not explain why she had previously testified that Defendant's father lived with her or that his father did not drink daily. (PCR2-SR-6. 239-40) She admitted that she, Ms. Siplin and Ms. Williams attended pretrial hearings in the case and knew the charges Defendant faced. (PCR2-SR-6. 243-44)

Marvin Dunn, a retired professor of psychology who had never practice psychology and was not a forensic psychologist, testified that his main work was in the areas of race relations and juvenile justice. (PCR2-SR-6. 249-56, 48) In this matter, he was hired by the defense around 2004 and conducted an evaluation by interviewing Defendant and his mother, father and grandmothers, as well as reviewing Defendant's school and employment records. (PCR2-SR-6. 256-59) Dr. Dunn stated that Defendant was hostile and uncooperative during his first interview but more cooperative during the second interview. (PCR2-SR-6. 260-61)

Dr. Dunn found Defendant's grandmothers defensive and in denial over problems with Defendant. (PCR2-SR-6. 262-65) He

believed Ms. Williams was more forthcoming but found her detached and distant. (PCR2-SR-6. 265) He opined that Defendant's father had issues with his sexuality and drinking and that he was never an effective parent. (PCR2-SR-6. 265-66) He averred the records showed that Defendant's performance in school was marginal and Defendant had difficulty relating to people. (PCR2-SR-6. 266-67) He believed that Defendant had a poor relationship with his mother, that he resented her and that she had neglected him as a child. (PCR2-SR-6. 267-68)

Based on this information, Dr. Dunn opined that Defendant was emotionally abandoned by his mother and that such abandonment causes lifelong difficulty in forming relationships, possessiveness, suspiciousness, resistance to authority, poor performance in school and rebellious and irrational behavior. (PCR2-SR-7. 4-5, 12) He insisted that the abandonment occurred even though Defendant was placed in the care of a loving grandmother simply because she was not his mother. (PCR2-SR-7. 7-8) He averred that Defendant displayed symptoms of abandonment by being a failure in everything he did and claiming that he was unloved. (PCR2-SR-7. 13-14, 15)

Dr. Dunn averred that Defendant had witnessed a person being shot in the head, a friend being shot and other incidents of violence in his neighborhood, including the McDuffie riots.

(PCR2-SR-7. 21-27) He opined that this exposure predisposed Defendant to being violent. (PCR2-SR-7. 27-28, 35-36, 40-41)

Dr. Dunn acknowledged that he would not have been willing to be a defense witness at the time of trial. (PCR2-SR-7. 42) He stated that he only became willing to be involved after Defendant's attorneys told him that Defendant had been abandoned as a child. (PCR2-SR-7. 43)

On cross, Dr. Dunn admitted that he did not know what was done to convince Defendant to speak to him. (PCR2-SR-7. 51-52) He acknowledged that his assertion about Defendant having problems in school was based entirely on a single remark about Defendant needing strict supervision. (PCR2-SR-7. 53-56) He insisted that achieving SAT scores in the 49 percentile in verbal and the 74 percentile in math was insufficient to be admissible to college. (PCR2-SR-7. 56-59) He admitted that he was unaware that Defendant's rap group had songs on the music charts. (PCR2-SR-7. 59) His opinion that Defendant failed in his other employment was based on reports about 2 isolated incidents and not his good performance reviews. (PCR2-SR-7. 61-63) He admitted that Defendant was loved by his extended family. (PCR2-SR-7. 63) When asked about people with whom Defendant had long term relationships, Dr. Dunn insisted that the relationships were all unhealthy. (PCR2-SR-7. 66-68) He admitted that

Defendant had not engaged in violent behavior before the crime and had no mental injuries. (PCR2-SR-7. 68-69) He acknowledged that he had made no attempt to verify that the murder Defendant claimed to have witnessed. (PCR2-SR-7. 71-72)

Joshua Weintraub testified that he was an Assistant State Attorney, had been one for 15 years and served as second chair during this trial. (PCR2-SR-7. 88-89) Among his duties were presenting the testimony of Dr. Rao. (PCR2-SR-7. 89) He stated that he prepared a memo to Dr. Rao about his theory of the case because he was too busy to prepare her to testify in person. (PCR2-SR-7. 89-90) He did not know if she had read the memo but stated that an email he had written suggested that she had. (PCR2-SR-7. 90-91)

On cross, Mr. Weintraub stated that it was routine practice to prepare witnesses to testify and to discuss legal terms of art with expert witnesses in doing so. (PCR2-SR-7. 92) The memo reflected his strategy, Dr. Rao was not involved in its drafting and Mr. Weintraub did not even recall discussing it with her. (PCR2-SR-7. 93) He averred that he never told Dr. Rao what her testimony should be and that Dr. Rao was not the type of person who would accept such direction. (PCR2-SR-7. 97-98)

The parties then stipulated to the lower court considering the transcript of Dr. Rao's testimony from the first evidentiary

hearing in lieu of her live testimony. (PCR2-SR-7. 99) In that testimony, Dr. Rao stated that she had supervised Dr. Galino in conducting the autopsies in this matter and had personally conducted the pattern match between the injuries and the shotgun. (PCR. 1122-24) She did not recognize Mr. Weintraub's memo but would have received and read it if it were in the medical examiner's file. (PCR. 1125-27) She considered the memo to be an outline of the State's strategy. (PCR. 1129) She would not have allowed the memo to influence her testimony. (PCR. 1129, 1141-42) Instead, her testimony would have been based on the medical examiner's file. (PCR. 1129-31, 1141-42) She stated that her answers and Dr. Galino's answers to the same question would be similar but noted that she had more experience, including experience in dealing with live victims at the rape treatment center, so that she had a better understanding of what victims experienced. (PCR. 1132-34) On cross, Dr. Rao stated that she considered herself an unbiased witness who was available to speak to either the State or defense. (PCR. 1141)

The parties also stipulated to the consideration of Al Fuentes' prior testimony. (PCR2-SR-8. 239) In that testimony, Mr. Fuentes, a private investigator, testified that he had conducted investigations in 30 to 50 capital cases and was hired by Mr. Guralnick to work on this case. (PCR. 1198-1200) Mr.

Fuentes took a social history from Defendant and conducted an extensive investigation regarding the guilt phase. (PCR. 1200-01) Mr. Guralnick did not ask Mr. Fuentes to conduct any further investigation regarding the penalty phase and informed Mr. Fuentes that he had the penalty phase under control when Mr. Fuentes asked about it. (PCR. 1202) On cross, Mr. Fuentes admitted that Mr. Guralnick was present when he took the social history from Defendant. (PCR. 1208)

Enrique Suarez, a psychologist, testified that he had extensive experience in adults with PTSD because he had worked for the Veterans' Administration beginning in 1974. (PCR2-SR-7. 101-06) He had since practiced clinical and forensic psychology. (PCR2-SR-7. 108-110)

Dr. Suarez defined malingering as feigning symptoms to achieve a goal. (PCR2-SR-7. 112) He stated that malingering had to be actively considered in cases referred by an attorney, cases where the symptoms reported did not match the symptoms observed and cases involving people with antisocial personality disorder. (PCR2-SR-7. 113-15)

Dr. Suarez noted that self report was a frequent source of information about PTSD symptoms. (PCR2-SR-7. 117) However, relying exclusively on self report to diagnose PTSD was insufficient. (PCR2-SR-7. 116) Instead, a clinician needed to

corroborate the self report with observations and information from collateral sources such as records and family members. (PCR2-SR-7. 116-19) He noted that an effect on the ability to live normally was required for PTSD to exist. (PCR2-SR-7. 127-28) Dr. Suarez stated that experiencing nightmares did not necessarily indicate that a person had PTSD. (PCR2-SR-7. 119) Instead, nightmares associated with PTSD are thematically and temporally related to the trauma experienced. (PCR2-SR-7. 120-25)

In this case, Dr. Suarez was retained by the State to evaluate Defendant and reviewed Defendant's school and employment records, Dr. Bourg Carter's report and raw data and prior testimony from Dr. Bourg Carter and Dr. Dunn as part of the evaluation. (PCR2-SR-7. 129-30) He also interviewed Defendant. (PCR2-SR-7. 130-36) During the interview, Defendant stated that he lived with Ms. Dennis until he was 13 and then lived with his mother. (PCR2-SR-7. 139-40) Defendant claimed to have little contact with his father and denied ever being abused. (PCR2-SR-7. 139, 140-41) Both Defendant and his school records indicated that he was an average student who was not a discipline problem and was not socially promoted. (PCR2-SR-7. 143-46)

Defendant indicated that he voluntarily left college to

pursue a career as a rap singer, dancer and song writer, and Dr. Suarez confirmed that the group had been successful through internet research. (PCR2-SR-7. 146-49) Defendant also worked in catering and advanced in that career. (PCR2-SR-7. 154-55) Defendant never received any mental health treatment before the crime and did not abuse alcohol or drugs. (PCR2-SR-7. 155-56)

Dr. Suarez opined that Defendant did not have PTSD. (PCR2-SR-7. 156-57) He noted that he had attempted to verify that the murder Defendant claimed to have witnessed had occurred through Det. Romangi but was unable to do so. (PCR2-SR-7. 157-58) Moreover, Defendant admitted that he never told anyone about allegedly witnessing the murder until after he was convicted, claimed that he only experienced nightmares after reporting the incident and provided inconsistent information about the number of times he had nightmares. (PCR2-SR-7. 160-61) Defendant also acknowledged that the alleged incident had never affected his functioning. (PCR2-SR-7. 161-63) Further, Defendant did not exhibit any physical symptoms even when discussing the incident and never exhibited any stress response to the alleged incident or the other 2 violent encounters that he had reported. (PCR2-SR-7. 164-78)

Dr. Suarez noted that Defendant had responded inconsistently during the MMPI when Dr. Bourg Carter

administered it and achieved similar results when he did so. (PCR2-SR-7. 189-92) He also noted that the results of the DAPS that Dr. Bourg Carter administered were inconsistent with a diagnosis of PTSD. (PCR2-SR-7. 192-93)

After considering this evidence, the lower court denied the claims, finding that Defendant had failed to prove his claims. (PCR2-SR. 533-73) This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly denied the claim of ineffective assistance of counsel at the penalty phase because Defendant failed to prove either deficiency or prejudice. The lower court also properly denied the *Brady* claim because Defendant failed to prove the memo was favorable or material.

ARGUMENT

I. THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE WAS PROPERLY DENIED.

Defendant first asserts that the lower court erred in denying his claim that his counsel was ineffective for failing to investigate and present mitigation. However, the lower court properly denied this claim.

In reviewing the denial of a claim of ineffective assistance of counsel after an evidentiary hearing, this Court is required to give deference to the lower court's findings of fact to the extent that they are supported by competent,

substantial evidence. *Stephens v. State*, 748 So. 2d 1028, 1033-34 (Fla. 1999). Among the factual findings to which this Court must defer are the credibility of witnesses and the determination that counsel made a strategic decision. *Wood v. Allen*, 130 S. Ct. 841, 848-49 (2010); *Stephens*, 748 So. 2d at 1034. However, this Court may independently review the lower court's determination of whether those facts support findings of deficiency and prejudice to support a holding that counsel was ineffective. *Stephens*, 748 So. 2d at 1033-34.

Here, the lower court denied the claim:

[Defendant] alleges that there was abundant mitigation available to present to the jury, but trial counsel failed to investigate and present this evidence. He contends there was mitigation about his childhood and family life that was not presented, but does not state what was not presented at the penalty phase, that should have been presented, in his post-conviction motion or the hearing on remand. At the hearing, [Defendant] presented the testimony of Ronald Guralnick, Dr. Sherrie Bourg-Carter, Annie Siplin, Elaine Williams, Virginia Dennis, and Dr. Marvin Dunn, and the previously given testimony of Al Fuentes on this issue.

Dr. Suarez' testimony that [Defendant] does not suffer from PTSD is extremely persuasive. He went through each criteria from the DSM-IV-TR that is used to diagnose PTSD. [Defendant] did not meet the criteria required to suffer from PTSD. Counsel cannot be ineffective for failing to present evidence that [Defendant] had PTSD, when the evidence shows that [Defendant] in fact does not have PTSD.

On the DVD's audio and video of Dr. Suarez' evaluation of [Defendant], [Defendant] clearly states that the viewing of one man shooting another in the head had no effect on him. He further states that he went on to graduate from high school, go to college on

a football scholarship and voluntarily left school, to pursue a Rap music career, had the three (3) CD's that were published, and maintained employment all the while being promoted from position to position and job to job, resulting in a managerial position at an exclusive Miami hotel/condominium club.

Counsel for defendant requested that the testimony of Dr. Suarez be stricken. If this court had struck the testimony of Dr. Suarez, the end result would be the same.

The State's cross-examination of Dr. Bourg-Carter showed that [Defendant] does not meet the criteria for a diagnosis of PTSD under the DSM-IV-TR. Dr. Bourg-Carter's score sheet indicates he is lacking in some of the criteria. Therefore, he cannot be properly diagnosed as suffering from PTSD, particularly in 1996-1998.

Even if this court assumes that the testimony of Dr. Sherrie Bourg-Carter is accurate when she states that [Defendant] suffers from mild PTSD that is in remission, and assumes that counsel was ineffective by failing to present this as mitigation, [Defendant] has only shown the first prong of the test. [Defendant] must also show prejudice. Dr. Bourg-Carter diagnosed **mild** PTSD that is in **remission**. The court would have to weigh this mitigator, along with other mitigators against the aggravators. Mild PTSD that is in remission did not preclude [Defendant] from graduating from high school, attending college for a semester on a scholarship, pursuing a music career, traveling to Europe and holding a job and receiving promotions and positive evaluations. At best this alleged mitigator would have been given slight weight by this Court. The trial court in this case gave HAC and CCP great weight. Even if this evidence was presented, the HAC and CCP clearly outweighed the mild PTSD that is in remission. Thus [Defendant] cannot show prejudice.

[Defendant] also presented the testimony of Dr. Dunn. Dr. Dunn testified that he did not want to be involved in this case at the time of trial. Mr. Guralnick testified that he would not have hired Dr. Dunn after Dr. Dunn expressed antipathy for this case. Dr. Dunn stated he had a child in college at the University of Miami at the time of this incident and wanted nothing whatsoever to do with this case. Clearly Mr. Guralnick's decision not to call Dr. Dunn

was a valid tactical decision.

Likewise, even if Dr. Dunn had testified, most of what he testified to was cumulative. [Defendant's] relatives testified as to his upbringing, the fact he grew up in the projects, and was raised by his grandmothers. There was testimony that his mother had a drug problem and was absent; there was testimony that his father was an alcoholic. Any further testimony about these issues would have been cumulative and counsel cannot be deemed ineffective for presenting cumulative evidence.

Dr. Dunn also testified that [Defendant] was abandoned by his mother and as a result, he was angry, prone to violence, possessive, and had problems with relationships with women. Given the nature of this crime in which [Defendant] was convicted of the brutal murder of the mother of his oldest daughter and he[r] current boyfriends, this testimony was unlikely to be helpful and more likely to be harmful if presented to the jury. As testified to by both the medical examiners the incredibly severe trauma to the victims' heads was equivalent to being in a car accident and or each of their heads being run over by a car, such as a the tire of the car crushing their skulls.

The grandmothers, mother, and [Defendant] all reported different ages at which he was raised by which person. The only consistency is that [Defendant] went to live with his mother at the age of 10. The mother reported that she cared for [Defendant] for the first four (4) years of his life. If that was the case, Dr. Dunn's theory is invalid in this case as he stated all the damage is done in the first few years of an individual's life.

Also, counsel cannot be deemed ineffective for relying on the mother for background information. Both grandmothers and the mother reported that [Defendant] lived with the mother from right before he turned 10 until he left for college. In his interview with Dr. Suarez, [Defendant] stated that he lived with his mother from age 13 until he graduated from high school. Ms. Dennis testified that [Defendant] spent weekends with his mother during the years she raised him. Given the amount of time [Defendant] lived with his mother, it was not unreasonable for Mr. Guralnick to rely on her for background. Also, the mother and grandmothers all testified that they met with Mr.

Guralnick together, so he had all the caregivers there at one time to provide him the background information.

Dr. Dunn testified that [Defendant] was a failure in everything he attempted. That conclusion is contradicted by all the records. [Defendant] graduated from high school. He went to college for a semester on a football scholarship. He left voluntarily for a music career and had some success at it. He worked his way up in his employment at the Doral Country Club and was hired for a better job in a managerial position at Grove Isle.

[Defendant] does not meet the DSM-IV-TR criteria for PTSD. Even if he did, there would have been no prejudice for not presenting this mitigation. The background of [Defendant] was presented as mitigation. Dr. Dunn did not want to participate in this case at the time of trial. Even if he had, the evidence would have been cumulative, unlikely to be helpful, or contrary to the records and other testimony.

[Defendant] further claims that Mr. Guralnick should have hired a second chair. Al Fuentes testified previously that he asked Mr. Guralnick if he was going to hire a second chair and if Mr. Guralnick wanted him to conduct a mitigation investigation. Mr. Guralnick told him he had it under control. According to Mr. Fuentes, Mr. Guralnick stated that he had all the information he needed and that he did not always find a second chair helpful in every death case he handled. This was a tactical decision. Additionally, Mr. Guralnick presented all the mitigation that was supported by the facts. He presented evidence of [Defendant's] upbringing, his father's alcohol usage, the mother's drug problem, the violence of life in the projects. He tactically chose not to present evidence that being raised in the community in which [Defendant] lived leads to violence, as that infers to the jury that [Defendant] is prone to violence and would have hurt [Defendant's] case in the penalty phase.

Mr. Guralnick was not ineffective. Even if he was, [Defendant] cannot and did not show prejudice.

(PCR2-SR. 564-69)

Here, the lower court's findings of fact are supported by

competent, substantial evidence. Dr. Suarez did testify that Defendant did not ever have PTSD and did review each of the DSM criteria for PTSD and explain why Defendant did not satisfy them during his testimony. (PCR2-SR-7. 156-78) Moreover, the evidence did show that Defendant did graduate from high school, did attend college on a football scholarship, did leave college voluntarily to pursue a music career, had some success in the music business and did advance in other employment. (PCR2-SR-4. 36-37, 62-63, 109-10, PCR2-SR-5. 59) Dr. Bourg Carter did acknowledge that her opinion that Defendant suffered from PTSD was based on her administration of the DAPS and that the score Defendant received on that test indicated that he did not have PTSD. (PCR2-SR-5. 117-20) Dr. Dunn did testify that he would not have been willing to be hired in this case at the time it was pending trial. (PCR2-SR-7. 42-43) The gravamen of Dr. Dunn's testimony was that Defendant was prone to violence against women and criminal behavior in general because of the circumstances of his childhood. (PCR2-SR-7. 4-5, 7-8, 12, 27-28, 35-36, 40-41) Further, Dr. Dunn based this opinion on his belief that Defendant had been a failure in everything he ever did. (PCR2-SR-7. 13-14, 15) However, all of the other evidence showed that Defendant had been successful in graduating high school, going to college, pursuing a music career and pursuing other

employment. In fact, Dr. Dunn admitted that his opinion was based on isolated remarks in the records he reviewed without considering the positive information in these records. (PCR2-SR-7, 53-63)

Mr. Guralnick did testify that he did not want to investigate or present evidence showing that Defendant was prone to violence or grew up in the projects. (PCR2-SR-4. 97-98, 111-12) He also stated that he would not have attempted to hire an expert who did not wish to be involved in the case. (PCR2-SR-4. 112-14) He also testified that he personally investigated Defendant's background by interviewing Defendant's family and friends and reviewing his school and employment records. (PCR2-SR-4. 36, 43-44, 47, 61-62) Further, Defendant showed Mr. Guralnick some notes from interviews that confirmed the interviews had taken place. (PCR2-SR-4. 55-60, 63-67) Given this evidence, the lower court's findings of fact are supported by competent, substantial evidence and must be accepted by this Court. *Stephens*, 748 So. 2d at 1034.

Moreover, given these findings of fact, the lower court properly denied the claim. The United States Supreme Court has held that counsel cannot be deemed ineffective for failing to conduct more investigation into a defendant's background, where the evidence showed that counsel did interview those family

members who could be reasonably expected to know about a defendant's background and obtained records about the defendant and the information provided did not indicate that there was additional, favorable information. *Bobby v. Van Hook*, 130 S. Ct. 13, 18-19 (2009); *Burger v. Kemp*, 483 U.S. 776, 794 (1987); *Strickland v. Washington*, 466 U.S. 668, 672-73, 698-99 (1984). Moreover, this Court has recognized that counsel cannot be deemed ineffective for failing to seek out evidence that he believed would be harmful, such as evidence showing a defendant had violent tendencies. *Cummings-el v. State*, 863 So. 2d 246, 250-53 (Fla. 2003). Further, counsel is not ineffective for failing to call a witness who would not have been willing to testify on his client's behalf at trial. *Taylor v. State*, 3 So. 3d 986, 999 (Fla. 2009). Moreover, the Court has made it clear that a defendant has the burden of affirmatively proving that there is a reasonable probability of a different result and that he has not done so when the evidence he presented was largely cumulative to the evidence that was presented, the evidence strongly supported a death sentence and the additional information that would have been presented would have been harmful to the defendant. *Wong v. Belmontes*, 130 S. Ct. 383, 387-91 (2009). Given this body of law, the lower court properly determined that Defendant has not proven his claims and denied

them as such. It should be affirmed.

While Defendant faults counsel for not hiring a mental health expert, as courts have recognized counsel cannot be deemed deficient for failing to hire a mental health expert when counsel has no basis to believe that the defendant has any mental health problems. *Melendez v. State*, 612 So. 2d 1366, 1368 (Fla. 1992); *Mills v. State*, 603 So. 2d 482, 485-86 (Fla. 1992); see also *Williams v. Head*, 185 F.3d 1223, 1239 (11th Cir. 1999); *Baldwin v. Johnson*, 152 F.3d 1304, 1314-15 (11th Cir. 1998). Here, as Mr. Guralnick testified he had no basis to believe that Defendant had any mental health problems. Defendant presented no evidence that there were any records available that Mr. Guralnick did not have. Moreover, Dr. Bourg Carter, Defendant's own expert, testified that she saw nothing indicating a red flag that Defendant had any mental problems. (PCR2-SR-5. 86-87) Given these circumstances, the lower court properly rejected this claim. It should be affirmed.

Despite the evidence that showing that counsel did investigate his background, Defendant insists that the lower court should have found counsel's investigation was unreasonable. In support of this assertion, Defendant contends that counsel should not have relied on his close family members because they provided inconsistent testimony at the post

conviction hearing and should have followed up on information that Defendant's father drank. However, in making this argument, counsel ignored Mr. Guralnick's testimony that the information he received from these family members was consistent and that he would have followed up on the information about Defendant's father. (PCR2-SR-4. 60, 69-70, 68-69) The fact that they provided consistent information is confirmed by the fact that they provided consistent testimony at trial. (T. 5259-84) While Defendant insists that Mr. Guralnick must not have followed up on information about his father because it was not presented at trial, Defendant ignores that he presented no evidence that his father's drinking affected him. In fact, the evidence presented was that Defendant never drank or used drugs and that neither of his parents did so when he was around them. Given these circumstance, the lower court's determination that counsel was not deficient was correct. Its denial of the claim should be affirmed.

Additionally, the lower court was correct in finding that there was no reasonable probability of a different result. As the United States Supreme Court has recognized, a determination of whether a defendant proved prejudice requires a consideration of all of the evidence presented in aggravating and mitigation, both at trial and during the post conviction hearing. *See Porter*

v. McCollum, 130 S. Ct. 447, 453-54 (2009). Here, the evidence presented at trial showed that Defendant beat two people to death after a week of preparing to do so and an evening of stalking them. He did so in Mr. Barnes' apartment after gaining entry by smashing Mr. Barnes in the face with a shotgun. As a result of this evidence, 4 aggravators were found: (1) prior violent felony; (2) during the course of a burglary, (3) HAC and (4) CCP.

Through the mitigation presented at trial, the jury learned that Defendant was born out of wedlock to teenaged parents, had a father who never acknowledged him, achieved A's, B's and C's in school, graduated from high school, attended college on a football scholarship, left to pursue a music career in which he had some success, did not abuse substances and was successful in other employment. (T. 5259-84) Moreover, contrary to Defendant's assertion, Ms. Siplin did testify that family lived in the projects. (T. 5274) Additionally, evidence was presented that Defendant had loving relationships with his family and was never in trouble. (T. 5259-84) Counsel used the evidence regarding Defendant's lack of a violent history to argue that Defendant must have snap and committed this murder under the influence of an extreme mental or emotional disturbance and succeeded in convincing the trial court to find this mitigator. (R. 3262)

Through the evidence presented during the post conviction hearing, Defendant eliminated this mitigator, as his own expert testified it did not apply. (PCR2-SR-5. 69) Despite eliminating the mental mitigation that was found, the new evidence did not establish any new mental mitigation, as Dr. Bourg Carter rendered her opinion in contradiction to the results of the test she herself administered and Dr. Dunn based his opinion on Defendant being a failure even though all of the evidence showed that he was a success. The presentation of this testimony also introduced the negative impression that Defendant had a propensity for violent. Moreover, the testimony the family provided during the post conviction proceedings did not reveal any evidence of abuse, use of substances by Defendant or mental health problems. Instead, it continued to show that Defendant was raised by people who loved him and rose above his circumstances to attend college and be successful both as a musician and a worker. Yet, through the fact that the witnesses constantly contradicted themselves and each other, the new testimony provided reason for the jury to question the witnesses' credibility. Further, while Dr. Bourg Carter testified that Defendant would adapt well to incarceration, she admitted that she reached this conclusion based on prison records that did not exist at the time of the penalty phase. As

such, this evidence would not have been available at the time of trial. See *Evans v. State*, 995 So. 2d 933, 943 (Fla. 2008); *State v. Riechmann*, 777 So. 2d 342, 354 (Fla. 2000). Since the evidence presented did not affect the strong aggravation found, weakened the mitigation that was presented and added only negative information regarding Defendant's propensity for violence, the lower court properly determined that Defendant did not prove prejudice. *Belmontes*, 130 S. Ct. at 387-91.

In an attempt to avoid this result, Defendant relies heavily on the ABA guidelines and Mr. Guralnick's testimony regarding his opinion about them to suggest that Mr. Guralnick was deficient. However, in making this argument, Defendant ignores that both the United States Supreme Court and this Court have recognized that the ABA guidelines are not rules governing an attorney's performance. *Van Hook*, 130 S. Ct. at 16-17; *Mendoza v. State*, 36 Fla. L. Weekly S427, S429 (Fla. Jul. 8, 2011). Given these circumstances, Defendant's suggestion that his counsel should be deemed ineffective simply because he rejected the recommendations in the ABA guideline should be rejected.

In another attempt to avoid this result, Defendant suggests that counsel could not have made a strategic decision not to call Dr. Dunn because he never spoke to Dr. Dunn. However, in

making this argument, Defendant ignores that the Court has held that counsel can make a valid strategic decision not to investigate particular areas of mitigation. *Wiggins v. Smith*, 539 U.S. 510, 521-22, 533 (2003); *Strickland*, 466 U.S. at 690-91. Moreover, counsel ignores that the determination of whether counsel made a reasonable strategic decision is an objective analysis that does not depend on "counsel's subjective state of mind." *Harrington v. Richter*, 131 S. Ct. 770, 790 (2011). Here, as Mr. Guralnick explained, he decided not to pursue evidence regarding the effect of being raised in the projects such as that presented by Dr. Dunn. (PCR2-SR-4. 71, 97-99) As such, the lower court was correct to find that counsel made a strategic decision. It should be affirmed.

In a further attempted to avoid this result, Defendant suggests that *Porter and Smith v. Cain*, 132 S. Ct. 627 (2012), required the lower court to accept the testimony of Dr. Dunn and Dr. Bourg Carter and find prejudice. However, this is not true. The lower court did not find that this testimony established mitigation that it discounted; it found that the testimony was incredible. In neither *Porter* nor *Smith* did the Court suggest that it was improper for a court to make credibility findings regarding the evidence presented in support of a claim of ineffective assistance of counsel. In fact, in *Porter*, the Court

accepted the findings of the state courts that Dr. Dees' testimony did not establish statutory mitigation. *Porter*, 130 S. Ct. at 454-56. Moreover, in *Strickland*, the Court directly required that deference be given to findings of fact. *Strickland*, 466 U.S. at 698. Given these circumstances, Defendant's reliance on *Porter* and *Smith* is misplaced. The lower court should be affirmed.

II. THE LOWER COURT PROPERLY DENIED THE BRADY CLAIM.

Defendant next asserts that the lower court erred in denying his claim that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to discuss a trial preparation memo from one of the prosecutors to Dr. Rao. However, Defendant is entitled to no relief because the lower court properly denied this claim.

In order to prove a *Brady* claim, a defendant must show:

[1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued.

Way v. State, 760 So. 2d 903, 910 (Fla. 2000) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). To show prejudice, the defendant must show that but for the State's failure to disclose the evidence, there is a reasonable probability that the results of the proceeding would have been different. *Guzman v. State*,

868 So. 2d 498, 506 (Fla. 2003). The question of whether the evidence is exculpatory or impeaching is a question of fact, as is the question of whether the State suppressed the evidence. *Allen v. State*, 854 So. 2d 1255, 1259 (Fla. 2003). Questions of fact are reviewed to determine if they are supported by competent, substantial evidence. *Way*, 760 So. 2d at 911. The question of whether the undisclosed information is material is a mixed question of fact and law, reviewed de novo, after giving deference to the lower court's factual findings. *Rogers v. State*, 782 So. 2d 373, 377 (Fla. 2000); *Stephens*, 748 So. 2d at 1032-33.

Here, the lower court denied the claim:

[Defendant] contends that a memorandum sent to the Miami Dade County Medical Examiner Office via fax and addressed to Dr. Valerie Rao from Assistant State Attorney Joshua Weintraub instructed Dr. Rao what to say and constituted a *Brady* violation.

During the guilt phase of trial, Dr. Gulino testified about the vast multitude of injuries on both victims, the beatings they took, the defensive wounds present on the bodies of both victims, how parts of the shot gun used in the beatings matched injuries on the bodies. He testified that the victims knew that they were being beaten while they were being beaten, that they were aware they were in pain, and could hear the other victim being beaten. When the first witness on the scene arrived, called 911 and law enforcement responded, Mr. Barnes was still alive.

In the penalty phase, Dr. Rao testified as to injuries, the defensive wounds, the amount of pain, and the awareness of the victims. She opined that they probably knew they were going to die before they lost consciousness.

During the previous post-conviction proceedings

in 2004, Dr. Rao was questioned about how she could testify that the victims probably knew they were going to die when Dr. Gulino did not give that opinion. Dr. Rao responded that she was asked a different question from Dr. Gulino and that semantics were important. She stated that if she was asked the same question as Dr. Gulino, her answer would not be exactly the same but the gist would be the same. (PCT. 1132.) She also stated that one must look at the entire picture. At the very end of the beatings and maybe throughout the process, Ms. Lumpkins knew she was going to die. Dr. Rao noted that she had 17 years of experience at that time and Dr. Gullino was her resident at that time. Further, Dr. Rao worked at the Rape Treatment Center. She incorporated her decades of a wide range of experiences and many of the victims there with whom she spoke were severely beaten and at death's door. They told her that they thought they were going to die. (PCT. 1134.) Therefore, this supports her testimony.

Regarding the memo at issue, Joshua Weintraub testified that Dr. Rao always said what Dr. Rao wanted to say. Dr. Rao testified at the post-conviction hearing in 2004 that the memo did not impact her testimony. She stated:

They can give me all the terms they want. But I'm going to be looking at both finals and testifying the way I think I could testify. So what the State says and wants me to tell them is not what they're going to get. It's something that I have to analyze based on the injuries and what I think I'm able to testify on.

(PCT. 1129.)

Dr. Rao stated that she was not a State or Defense witness. Medical examiners "...are totally unbiased scientific experts trying to give you both sides of the expertise." (PCR. 1141) When asked if she would have testified in the penalty phase based on something Mr. Weintraub wanted her to say, versus something that she said based on the review of the files, which included photographs, police reports, crime scene descriptions she stated, "No. I wouldn't change one word." (PCT. 1141-1142.)

Given the testimony of Dr. Rao at the previous hearing in 2004 that the memo did not have any impact

on her testimony, it is unclear why this issue needed to be revisited reading the trial testimony. As an aside, the parties herein stipulated to this court to both medical examiners and Dr. Rao's stenographed testimony from 2004. Thus while this was remanded pursuant to [Defendant's] request for a hearing in this matter, this Court relied upon the transcripts herein, just as the undersigned previously referred to in its previous order Denying post-conviction relief in 2009. The testimony of Dr. Gulino at the guilt phase was consistent with the testimony of Dr. Rao during the penalty phase. Dr. Rao reached the conclusion Ms. Lumpkins properly knew she was going to die based upon decades of experience as a medical examiner and her work at the Rape Treatment Center. She also specifically used the word "probably". She stated that Mr. Barnes also probably knew he was going to die due to the extreme beating and blood loss, he would have felt himself getting weaker and light headed. Additionally, he was still alive and attempted to stand up when law enforcement was present, moments before collapsing and dying.

Mr. Guralnick testified that if the memo did not impact Dr. Rao's testimony, he would not have been able to use it to discredit her testimony.

(PCR2-SR. 570-72)

Here, the lower court's findings of fact are supported by the evidence. Dr. Rao did testify that Mr. Weintraub's memo would not have affected her testimony and that any difference between her testimony and Dr. Gulino's testimony was based on differences in the questions asked and their relative levels of experience. (PCR. 1129-34, 1141-42) Mr. Guralnick did testify that he would have deposed Dr. Rao about the memo before attempting to use it before the jury and would not have asked about it at all during trial if Dr. Rao had informed him during

that deposition that the memo did not affect her testimony. (PCR2-SR-4. 128-32) In fact, the trial record itself supports the finding that the memo did not influence Dr. Rao's testimony. In the memo, Mr. Weintraub suggested that the term "languished and died" was a term of art that needed to be provided to the judge and jury. (PCR2-SR. 233) However, Dr. Rao never used this term in her testimony. (T. 5222-57) Since the lower court's findings of fact are supported by the record, this Court must accept them. *Way*, 760 So. 2d at 911. As such, Defendant's assertions that the testimony underlying these finding is incredible should be rejected. *Stephens*, 748 So. 2d at 1034.

Moreover, given these findings of fact, the lower court properly denied this claim. Defendant had the burden of proving that the evidence was favorable to him because it was impeaching to prove his *Brady* claim. *Way*, 760 So. 2d at 910. By finding that the memo did not influence Dr. Rao's testimony and that Mr. Guralnick would not have attempted to use the memo at trial unless it did, the lower court found that the memo was not actual impeachment evidence that would have been introduced at trial. As this Court has held, such a finding is a factual finding. *Allen*, 854 So. 2d at 1259; *see also United States v. Ruiz*, 536 U.S. 622, 630 (2002) (noting that the determination of the favorable nature of impeachment material is fact specific).

Having determined that the evidence was not impeachment that would have been introduced, the lower court properly denied this claim. *Wood v. Bartholomew*, 516 U.S. 1, 5-8 (2005); *Wright v. State*, 857 So. 2d 861, 869-70 (Fla. 2003). It should be affirmed.

Moreover, the lower court also properly denied the claim because any attempt to impeach Dr. Rao with the memo would not be material. This Court has consistently upheld HAC where the victims died as the result of a brutal beating. *Guardado v. State*, 965 So. 2d 108, 115-16 (Fla. 2007); *Coday v. State*, 946 So. 2d 988, 1006 (Fla. 2006); *England v. State*, 940 So. 2d 389, 402 (Fla. 2006); *Buzia v. State*, 926 So. 2d 1203, 1212 (Fla. 2006); *Douglas v. State*, 878 So. 2d 1246, 1260-61 (Fla. 2004); *Beasley v. State*, 774 So. 2d 649, 669-71 (Fla. 2000); *Lawrence v. State*, 698 So. 2d 1219, 1221-22 (Fla. 1997); *Willacy v. State*, 696 So. 2d 693, 696 (Fla. 1997); *Bogle v. State*, 655 So. 2d 1103, 1109 (Fla. 1995); *Whitton v. State*, 649 So. 2d 861, 866-67 (Fla. 1994); *Colina v. State*, 634 So. 2d 1077, 1081 (Fla. 1994); *Owen v. State*, 596 So. 2d 985, 990 (Fla. 1992); *Penn v. State*, 574 So. 2d 1079, 1083 & n.7 (Fla. 1991); *Bruno v. State*, 574 So. 2d 76, 82 (Fla. 1991); *Cherry v. State*, 544 So. 2d 184, 187-88 (Fla. 1989); *Lamb v. State*, 532 So. 2d 1051, 1053 (Fla. 1988); *Scott v. State*, 494 So. 2d 1134, 1137 (Fla. 1986); *Wilson*

v. State, 493 So. 2d 1019, 1023 (Fla. 1986); *Heiney v. State*, 447 So. 2d 210, 216 (Fla. 1984). The only times that it has found that HAC was not applicable in a beating death involve situations where the victim was rendered immediately unconscious by a blow and did not regain consciousness. *Zakrzewski v. State*, 717 So. 2d 488, 493 (Fla. 1998); *Elam v. State*, 636 So. 2d 1312, 1314 (Fla. 1994).

Here, it is undisputed that both victims were beaten to death by multiple blows and that both sustained defensive wounds. Both Dr. Gulino and Dr. Rao testified to these facts, and Defendant presented absolute no evidence that this is not true. (T. 4413-34, 4435-46, 5228-32, 5238-40) Not only did both Dr. Gulino and Dr. Rao testify that the victims were conscious during the beatings and capable of hearing the attack on the other victim (T. 4433-34, 4437, 4446, 4450, 4452-53, 5233, 5241-42), but also the fact the victims remained conscious and did not die immediately was confirmed by other evidence. Earl Little testified that Mr. Barnes was alive and responded to his name when Mr. Little arrived at the apartment. (T. 3176-78) Off. Oppert testified that Ms. Lumpkins was alive and attempted to get up when he arrived at the apartment after 7:30 a.m. (T. 3205, 3213-15) One of Ms. Lumpkins' earrings was found under the bed and she was found next to the bed, which was consistent with

having attempted to hide under the bed before she was attacked. (T. 3275-76, 3279) Moreover, the walls of the living room and furniture were covered in smeared blood, consistent with Mr. Barnes have groped his way around the room in an attempt to find a way out of the apartment. (T. 3292, 3319, 4544, 4557-63, 4602)

In fact, the trial court's finding of HAC was based largely on this other evidence, and this Court relied on Dr. Gulino's testimony in affirming HAC. (R. 3256-59); *Dennis v. State*, 817 So. 2d 741, 766 (Fla. 2002). Further, it should be remembered that had Defendant attempted to impeach Dr. Rao based on the fact that she had discussed her testimony with the State, the State would have been entitled to have the jury instructed that the fact that Dr. Rao had discussed her testimony with the State was not a basis to discredit her testimony. Fla. Std. Jury Instr. 3.10(7) ("It is entirely proper for a lawyer to talk to a witness about what testimony the witness would give if called to the courtroom. The witness should not be discredited by talking to a lawyer about [his] [her] testimony."). Given all of these circumstances, the lower court also properly denied this claim because the memo was not material. *Strickler*, 527 U.S. at 289-96; *United States v. Agurs*, 427 U.S. 97, 112-13 (1976). It should be affirmed.

In an attempt to avoid this result, Petitioner suggests

that *Kyles v. Whitley*, 514 U.S. 419 (1995), requires that this Court not defer to the lower court's factual findings. However, this is not true. In the portion of *Kyles* on which Petitioner relies, the Court was responding to assertion made by a dissent. *Id.* at 449. A review of the portion of the dissent to which this comment was direct shows that the dissent was not directed to a factual finding regarding evidence presented at a post conviction hearing. *Id.* at 471-72 & n.6. Instead, it was commenting on the credibility of a witness at trial, an issue about which the dissent acknowledged there had not been a factual finding by the jury, the fact finder at trial. *Id.* As such, the dicta in *Kyles* does not show that this Court is entitled to ignore the lower court's factual finding. The denial of the claim should be affirmed.

Defendant also seems to suggest that the lower court should have found the memo favorable and material because a jury might have been affected by an attempt to impeach Dr. Rao and this might have lead the jury to believe that HAC was not proven. However, the United States Supreme Court has directly rejected the assertion that evidence is material simply because it might have affected the jury's appraisal of the evidence. *Strickler*, 527 U.S. at 289-96. Instead, as this Court has recognized, the determination of materiality must be made on an objective basis.

Mungin v. State, 2011 WL 5082454, *7 n.5 (Fla. Oct. 27, 2011). Moreover, Defendant acknowledges the test for materiality is identical to the test for *Strickland* prejudice. Supplemental Initial Brief at 47. In *Strickland*, the Court directly stated that prejudice had to be determined based on the assumption that the decision maker would act in accordance with the law. *Strickland*, 466 U.S. at 694-95. Here, given the undisputed fact that the victims were beaten to death, Dr. Gulino's testimony regarding the presence of defensive wounds and the physical evidence and eyewitness testimony showing that the victims were not rendered immediately unconscious by a single blow, an objective analysis of the evidence shows that the attempt to impeach Dr. Rao was not material. The denial of the claim should be affirmed.

In another attempt to avoid affirmance, Defendant suggests that the memo should have been viewed as material because Mr. Guralnick stated that he would have reported Mr. Weintraub to the Bar. However, Defendant offers no explanation of how reporting Mr. Weintraub to the Bar would create a reasonable probability of a different result. In fact, he offers no explanation of how such action would even be admissible. However, as the United States Supreme Court has recognized, inadmissible information does not constitute material *Brady*

information.² *Wood*, 516 U.S. at 5-8. The denial of the claim would be affirmed.

Defendant also suggests that claiming that the memo amount to witness coaching would have supported a motion to preclude Dr. Rao's testimony. However, he offers no explanation of how this is legally true. Moreover, the law would not have supported such a motion. First, the mere fact that the State discussed a witness's testimony with the witness prior to trial is not improper. See Fla. Std. Jury Instr. 3.10(7). Second, even where misconduct has occurred, exclusion of evidence is only considered a proper remedy when there is no other available remedy. *Duest v. State*, 12 So. 3d 734, 743 (Fla. 2009); *McDuffie v. State*, 970 So. 2d 312, 321 (Fla. 2007). Since other remedies such as allowing Defendant to depose Dr. Rao about the memo and its effect on her testimony and to attempt to impeach her based on the memo were available, any attempt to exclude Dr. Rao as a witness would have been meritless. The denial of the claim should be affirmed.

Defendant finally suggests that the memo should have been considered material because there were minor differences between Dr. Rao's testimony and Dr. Gulino's testimony. However, in

² In fact, Mr. Guralnick reported other prosecutors to the Bar in connection with this case prior to trial and it had no effect on his convictions or sentences.

making this argument, Defendant ignores that he knew of the alleged difference between their testimony at the time of trial as their testimony was presented in open court. Since Defendant already knew of this difference, it cannot be said that the lack of the memo prevented Defendant from using that difference in any manner he wanted at the penalty phase. See *Maharaj v. State*, 778 So. 2d 944, 954 (Fla. 2000)(*Brady* claim fails where defendant possessed information); see also *State v. Knight*, 866 So. 2d 1195, 1202-03 (Fla. 2003)(*Brady* claim fails where alleged undisclosed information was cumulative to information in defendant's possession). He also ignores that Dr. Rao's testimony was presented at the penalty phase and was focused on the fact that the victims were conscious while they were attacked and the suffering they endured. (T. 5222-57) Dr. Galino's testimony was presented at the guilt phase and focused on the manner of death and the link between the victims' wounds and the shotgun. (T. 4380-4466) This Court has recognized that such a difference in the purpose of testimony accounts for a difference in the nature of the testimony. *Cummings-el*, 863 So. 2d at 254. As such, the lower court properly rejected this argument and should be affirmed.

CONCLUSION

For the foregoing reasons, the order denying the motion for post conviction relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to **Suzanne Keffer**, 101 NE 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301, this ____ day of February 2012.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in Courier New 12-point font.

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