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 REPLY BRIEF OF APPELLANT

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INTRODUCTION

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

ARGUMENT IN REPLY

ARGUMENT I

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

Contrary to the State's argument, Mr. Dennis has now presented abundant testimony and evidence to support his claim of ineffective assistance of counsel at the penalty phase of his proceedings, including the testimony of two mental health experts. The opinions regarding Mr. Dennis's family, upbringing, community and mental state certainly would have supported trial counsel's theory that Mr. Dennis was under extreme emotional disturbance at the time of the crime. Trial counsel's

failure to pursue any reasonable investigation,[1] and the subsequent failure to present available mitigation evidence was unreasonable in light of all the circumstances.

The State's overly simplistic approach to the evidence that has been presented flies in the face of the analysis required under *Porter v. McCollum,* 130 S. Ct. 447 (2009). The State, like the lower court, ignores the entirety of the testimony and the impact that the testimony as a whole would have had on a jury that, due to trial counsel's failings, heard nothing other than that Mr. Dennis was a good boy, a good student, and a hard worker who loved and cared for his children.

The State asserts that trial counsel did not seek out the evidence presented at the postconviction evidentiary hearing because of the potential harm growing up in

[1] A few cursory interviews with a small number of family members do not constitute a reasonable investigation, many of which were not focused on pursuing mitigation issues and much of which was inaccurate. Trial counsel sought no corroborating information. Additionally, the State's reliance on trial counsel's testimony ignores the fact that his recollection with respect to the penalty phase was lacking. For example, in support of the misconception that trial counsel conducted a reasonable investigation, the State asserts that trial counsel reviewed Mr. Dennis's school records. However, his evidentiary hearing testimony reflects that trial counsel merely assumed he had reviewed the records and, until shown the State's discovery disclosure, did not know if he had also received college records (PC-R3. V. 4, p. 136). Trial counsel, in fact, did not have Mr. Dennis's college records and thus could not have known if he did well in college or not. A reasonable investigation would have included 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.

the projects, exposure to violence and parental abandonment would have had. Speculation as to how evidence that is mitigating *could potentially have cut the other way* so as to be harmful 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*. Here the State, like the lower court, fails 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, the crime for which Mr. Dennis was convicted.[2]

[2] The State claims that trial counsel used Mr. Dennis's lack of a violent history to support the mental health mitigator of extreme emotional disturbance. These assertions ignore the entirety of the record and the evidence that the State presented to the jury. In fact, at the penalty phase the State presented evidence and testimony of Mr. Dennis's "violent tendencies." (T. 5298-99, 5311-12, 5314). Contrary to the State's assertions now, there was no lack of a violent history, only a lack of any explanation of Mr. Dennis's background and family history which would have mitigated any indication that Mr. Dennis simply had violent tendencies. The State's belief that Dr. Dunn's testimony merely created the impression that Mr. Dennis had a propensity towards violence reflects its limited understanding of the

Contrary to the State's assertions, the lower court's analysis of Mr. Dennis's claim should be afforded no deference. To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickalnd v. Washington,* 466 U.S. 668, 694 (1984). The search for that reasonable probability must be conducted in a particular manner. Courts must "engage with [mitigating evidence]," *Porter*, 130 S. Ct. at 454, in considering whether that evidence might have added up to something that would have mattered to the jury. Courts have a "'[] duty to search for constitutional error with painstaking care [which] is never more exacting than it is in a capital case.'" *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (citing *Burger v. Kemp*, 483 U.S. 776, 785 (1987)). In performing the duty to search with painstaking care for a constitutional violation by engaging with mitigating evidence, courts must "'speculate' as to the effect" of non-presented evidence. *Sears v. Upton*, 130 S. Ct. 3266, 3266-67 (2010). It is clear that the focus of a court's prejudice inquiry must be to **try to find a constitutional violation.**

The duty to search for a constitutional violation with painstaking care is a function of the fact that a constitutional violation in a capital case is a matter of

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testimony and ignores any alternate perception the jury would have had. Dr. Dunn's testimony, not only provides an explanation of the crime, but also provides the explanation for the violent incidents the State presented during the penalty phase.

such profound repugnance that it must be sought out with vigilance. Courts must **search** for it carefully, not dismiss the possibility of it based on information that suggests it isn't there. And looking for a reasonable possibility that a violation did not occur reverses the standard of the inquiry, because if a court simply focuses on all the ways the non-presented evidence might reasonably have not mattered, it is not answering the question of whether it reasonably may have. If a court simply speculates as to how a constitutional violation might not have occurred, it is not performing its duty to engage with mitigating evidence to painstakingly speculate as to how a violation might have occurred. That sort of speculation is precisely what the State is advocating for in these proceedings and precisely what it now asks of this Court.

The State argues that the lower court's credibility findings against defense experts, not its discounting of mitigation found based on the testimony of those experts, resulted in the denial of relief by the state courts. The State then asserts that neither *Porter* nor *Smith* preclude such credibility findings. However, that is precisely what *Porter* and *Smith* preclude.

In *Porter v. State*, this Court relied on its decision in *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999) to reach its holding. In *Stephens*, this Court ruled as follows:

> [w]e recognize and honor the trial court's superior

> vantage point in assessing the credibility of witnesses and in making findings of fact. The deference that appellate courts afford findings of fact based on competent, substantial evidence is in an important principle of appellate review.

Stephens v. State, 748 So. 2d at 1034. Indeed in *Porter v. State*, this Court relied upon that very language in *Stephens v. State* as requiring it to discount and discard the testimony of Dr. Dee which had been presented by Mr. Porter at the postconviction evidentiary hearing. *Porter v. State*, 788 So. 2d at 923.

The State asks this Court to make the same error here. The State fails to understand that unreasonable discounting of evidence can come in the form of a lower court's credibility findings that should have been left to the jury. That is what happened in *Porter*. The State separates those concepts into two distinct analytical findings, but they are the same error. This Court should not discount the expert testimony in this case without considering how a jury might take that testimony simply by deferring to the credibility findings of the lower court.

Smith v. Cain makes this particular *Porter* problem clearer. In *Smith*, the United States Supreme Court ruled that

> the State and the dissent advance various reasons why the jury might have discounted Boatner's undisclosed statements . . . . 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.

132 S. Ct. 627, 630 (2012) (emphasis in original). Here we see quite clearly that making the presumption that the jury would view the credibility of a witness exactly as the lone trial court postconviction judge did is a manner of unreasonably discounting evidence. It is reminiscent of admonition from *Kyles v. Whitley* that courts cannot "'gauge" [witness] credibility by observing that the state judge presiding over [the] postconviction proceeding did not find [the] testimony in that proceeding to be convincing" because that observation could not "possibly have affected the jury's appraisal of [the witness] credibility at the time of [the] trial[]." 514 U.S. 419, 449 n.19 (1995). Almost two decades after *Kyles*, and in the more recent light of *Porter* and *Smith*, the State asks this Court to again make the mistakes of the past.[3]

[3] Further leading the Court astray the State asserts that the United States Supreme Court in *Porter* "accepted the findings of the state courts that Dr. Dees' [*stet*] testimony did not establish statutory mitigation," citing a three-page portion of the *Porter* opinion, nowhere in which does the Court even remotely make such a finding. *See Porter*, 130 S. Ct. at 454-56. Rather, the *Porter* Court mentions that "[u]nder Florida law, mental health evidence that does not rise to the level of establishing a statutory mitigating circumstance may nonetheless be considered by the sentencing judge and jury as mitigating" and then expounds extensively on the unreasonableness of this Court's failure to consider Dr. Dee's testimony in *Porter*. *Id*. Regardless, the State's assertion has no bearing on the issue, as whether the mitigation is statutory or non-statutory has nothing to do with whether it may be

This Court should not discount the defense expert testimony in this case based on a credibility finding not made by a jury under the presumption that that finding means that the testimony would not matter to a jury. To do so would be contrary to *Porter*, *Smith* and *Kyles* and would deny Mr. Dennis the right to have his claim reviewed under the proper constitutional analysis.

ARGUMENT II

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

Based on the arguments of the State, Mr. Dennis's *Brady* claim turns on two points: whether the memo went beyond mere witness preparation and whether it is material impeachment evidence. Mr. Dennis has proven both.

The memorandum which was undisclosed by the State went well beyond

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discounted based on a credibility finding that was not made by a jury. The State's assertion on this point is merely indicative of its lack of understanding of the issue and of the *Porter* Court's treatment of the issue.

Similarly, the State demonstrates an utter lack of understanding by misguidedly citing *Strickland* to this Court for the proposition that deference must be given to fact findings. That, of course, refers to deference in the context of federal habeas corpus, whereby *federal habeas courts* defer to fact findings of *state courts*. *See Strickland*, 466 U.S. at 698. It has absolutely nothing to do with whether this state appellate court should defer to a lower state court. The State either fails to understand the structure of the state and federal court system, or is attempting to convince this Court to adopt a standard of federal review in reviewing the decisions of lower state courts. Under both scenarios, this Court should disregard that assertion as false.

mere witness preparation. 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. 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. Even during cross examination, at the evidentiary hearing trial counsel distinguished between asking a witness questions to determine what the witness will say versus telling the witness what to say. (PC-R3. V. 4, p. 121) Trial counsel would have used the memo to attack the witness's testimony as having been coached.

The State places much reliance on Dr. Rao's testimony that she would not have been influenced by the memorandum. The State, however fails to address the fact that 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, the State ignores that 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.

Critical to the analysis of Mr. Dennis's *Brady* claim is consideration of the jury's appraisal of the memorandum and the extent it impacted Dr. Rao's testimony. Contrary to the State's assertion, this is precisely what is required under *Kyles*, *Porter*, *Sears*, and most recently *Smith*. Because 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), the arguments made above with respect to *Porter* and *Smith* apply with equal force to this Court's analysis of Mr. Dennis's *Brady* claim.

With respect to Mr. Dennis's ineffective assistance of counsel claim, the State argued that it was credibility findings against the defense experts, not the discounting of mitigation found based on the testimony of those experts, that resulted in the denial of relief by the state courts. With respect to the *Brady* claim, the State argues that *Kyles* does not apply because the Court was commenting on the credibility of a witness at trial, not factual findings regarding evidence presented at a postconvcition hearing. Whether evidence is discounted without consideration as to the effect it may have on a jury because of a postconviction

court's credibility determination or a factual finding is a distinction without a difference. The underlying factual findings that Dr. Rao was not influenced by the memorandum and that her testimony was consistent with the testimony of Dr. Gulino leads to the conclusion that the lower court found Dr. Rao credible. It remains that the jury could have found Dr. Rao's testimony inconsistent with that of Dr. Gulino and the Dr. Rao was influenced by the State's memorandum, thereby finding her not credible. It is precisely Dr. Rao's credibility that was at issue at the penalty phase of Mr. Dennis's trial. Therefore, *Kyles* explanation that the credibility findings of the judge who presided at a postconviction evidentiary hearing were not dispositive of whether the withheld information could have lead the jury to a different result is directly on point. *See also*, *Smith v. Cain*.

The State recites to several opinions by this Court which uphold the finding of HAC. This is irrelevant. The United States Supreme Court has explained in the related context of materiality attendant to a *Brady v. Maryland* *****claim, that the issue is whether the jury "would reasonably have been troubled" by the withheld information, and 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)*****. The question is not whether the lower court believed that Dr. Rao's testimony was unaffected by the memorandum, but whether the jury's appraisal of Dr. Rao's testimony, in light of the previously

undisclosed memorandum, would have been different. As argued above, Mr. Dennis was entitled to have the jury hear her questioned regarding the memorandum, only then could the jury have properly evaluated her testimony and credibility.

The State argues that trial counsel knew the differences between Dr. Rao's testimony and Dr. Gulino's testimony as each was presented in open court and could have and could have addressed those differences in any manner he chose. What the State ignores is that the memorandum provides the evidence of coaching Dr. Rao and demonstrates the State's influence in formulating the differences in the testimony. The memorandum is particularly significant to the differences in testimony when it is considered 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. Therefore, contrary to the cases cited by the State, the information that Dr. Rao was coached to testify in an exaggerated manner was not in trial counsel's possession.

The State argues that any differences in Dr. Gulino's testimony and the testimony of Dr. Rao are attributable to the different nature of guilt versus penalty phase proceedings. The State's reliance on *Cummings-El v. State*, 863 So. 2d 246 (Fla. 2003) as support for the differences in the nature of the two doctors's testimony is misplaced. In *Cummings-El* this Court addressed a claim that the

testimony of two lay witnesses in the penalty phase, after having already testified in the guilt phase, was cumulative and prejudicial. The Court found that the witnesses testimony at the different stages was "wholly unrelated." *Cummings-El* at 254. The court acknowledged that "[d]uring the guilt phase, these witnesses testified with respect to the incidents surrounding the victim's death and the victim's identification of Cummings-El as the perpetrator", but "[d]uring the penalty phase, these witnesses testified regarding the victim's consciousness and awareness of her impending death." *Id.*

In Mr. Dennis's case it cannot be said that the testimony of Dr. Gulino in the guilt phase and Dr. Rao in the penalty phase were wholly unrelated. As detailed in Mr. Dennis's initial brief, their testimony overlapped, in many instances being asked the same questions. The function of the medical examiner is that of an independent expert medical witness. Their opinions must be based on a reasonable degree of medical certainty. Therefore, any medical findings should be the same. Yet, 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. It cannot be said that these gross exaggerations were merely attributable to the different purpose of the penalty phase. Rather, Dr. Rao's prejudicial testimony was the result of the State's suggestive memorandum.

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.

Respectfully submitted,

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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 _____ day of February, 2012.

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