IN THE SUPREME COURT OF FLORIDA

CASE NO. 09-2289

LABRANT DENNIS,

Petitioner,

v.

WALTER A. MCNEIL,
Secretary, Florida Department of Corrections

Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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ARGUMENT IN REPLY

REPLY TO CLAIM I

MR. DENNIS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL TO THE FLORIDA SUPREME COURT IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ART. I §§ 9, 16(a) AND 17 OF THE FLORIDA CONSTITUTION.

A. Introduction

At the outset, Mr. Dennis would point out that the State's assertions regarding the applicability of the American Bar Association Guidelines to Mr. Dennis's case (Response, p. p. p. 12) are incorrect. The State's reliance on *Bobby v. Van Hook*, 130 S. Ct. 13 (2009), is misplaced. *Van Hook* addressed the applicability of the 2003 ABA Guidelines to a case tried in 1985. The Supreme Court determined that the Sixth Circuit erred in applying on the 2003 Guidelines' standards to a case tried eighteen years before those standards were articulated in the Guidelines. In stead, the Court applied the prevailing professional standards in place in 1985, as described by ABA Standards for Criminal Justice then in effect. *Van Hook*, 130 S. Ct., at 17 (citing 1 ABA Standards for Criminal Justice 4-4.1, p. 4-53 (2d ed. 1980)). Thus, under the reasoning of *Van Hook*, the prevailing professional standards applicable to Mr. Dennis's ineffective assistance claims would be the those outlined by ABA Guidelines, which had been in effect since at

least 1989.

Furthermore, notwithstanding the fact that Mr. Dennis's case was tried in 1998, there is no doubt as to the applicability of the 2003 Guidelines to his case. The 2003 version of the guidelines spells out in more detail the reasonable professional norms, but the prevailing norms and obligations of counsel are essentially the same as those announced in the 1989 Guidelines. In *Rompilla v. Beard*, 1125 S. Ct. 2456 (2005), the United States Supreme Court reaffirmed the applicability of the Guidelines to those cases tried before the Guidelines were promulgated. Rompilla's trial took place in 1989, prior to the promulgation of either the 1989 or the 2003 Guidelines. The Supreme Court still applied not only the 1989 Guidelines, but also the 2003 Guidelines, in finding that trial counsel was ineffective. *See also, Hamblin v. Mitchell*, 354 F.3d 482 (2003) (the 2003 Guidelines apply to cases tried before 2003 because the new Guidelines "simply explain in greater detail than the 1989 guidelines the obligations of counsel").

Any assertion that the ABA Guidelines do not apply to Mr. Dennis's direct appeal claims is without merit.

B. Mr. Dennis Was Denied Due Process Due to Improper and Inflammatory Testimony Offered by the State

The State claims that Det. Hudak's testimony regarding the emotionality of the football players was relevant because it showed that they "were isolated from

the community and crime scene, not provided with information about the murders, interviewed and in no emotional state to be communicating with the community at large." (Response, p. p. 13). Thus, any purported knowledge the defendant had of the crime could not have come from these witnesses. This was clearly not the purpose of the testimony as it was presented.

Det. Hudak did not merely offer facts to establish that the players were isolated and did not have knowledge of the circumstances of the crime. Rather, he offered emotionally charged and inflammatory testimony more akin to victim impact evidence than evidence establishing Mr. Dennis's guilt. There is no relevance to Det. Hudak's testimony that Earl Little "broke down," was "muttering," or "incoherent, but extremely upset." (R. 3402). To the contrary, this type of testimony only serves to inflame the passions of the jury.

Furthermore, contrary to the State's assertion otherwise, trial counsel objected to this testimony, thus preserving the issue for appeal. In fact, trial counsel moved to strike "this entire line" of questioning, which was overruled. (R. 3408). The trial court's admission of this testimony was error, and appellate counsel's failure to raise this issue on direct appeal constituted ineffective assistance.

The State also argues that Mr. Dennis "invited any error" in the admission of Dr. Gulino's testimony regarding blood smears because counsel vigorously

cross-examined another witness, Ofc. Oppert, relying on his knowledge of blood smear evidence. (Response, p. p. 14-15). Thus, the according to the State, Dr. Gulino was properly permitted to testify outside his expertise.

The State's argument ignores the fact that Dr. Gulino was presented to the jury as an expert medical doctor, with the heightened degree of credibility due to his education and experience. While, arguably, it might be proper for a non-expert police officer to testify regarding his impressions at a crime scene, it is certainly improper to offer a medical examiner as an expert and then allow the expert to testify outside the area of his expertise. Mr. Dennis's jury was instructed that expert testimony was like any other, except that experts may offer opinions, and that they jury may consider the experts' training, education and experience in weighing their testimony. While the jury likely respected Ofc. Oppert's experience as a seasoned police officer, it is equally likely that the opinions offered by a medical doctor with advanced degrees, training and experience would have been afforded even more credibility. The State's argument that Dr. Gulino and Ofc. Oppert should be held to the same standard of expertise is without merit.

The State also fails to consider that this is not merely a case where the medical examiner testified to the location of the victim's body. As such, the State's reliance on *Terry v. State*, 668 So. 2d 954 (Fla. 1996), is misplaced. Dr. Gulino testified at Mr. Dennis's trial that the blood smears on the door were consistent

with Mr. Barnes being blinded before he died, and that the location of the blood on the floor indicated that Mr. Barnes was reaching for the door, the implication of which is that Mr. Barnes was struggling for help. The State's reliance on *Terry* is misplaced.

The trial court erred in admitting inflammatory and improper testimony over Mr. Dennis's objection. Mr. Dennis was prejudiced as a result. Appellate counsel's failure to raise this meritorious issue in Mr. Dennis's direct appeal resulted in ineffective assistance of counsel.

C. Mr. Dennis was Denied Due Process Due to Improper and Inflammatory Testimony Offered by the State Which Constituted Fundamental Error

Here again, the State assigns blame for the admission of improper and inflammatory testimony to Mr. Dennis. The State asserts that Paramedic Sibley's dramatic description of the crime scene was offered after Mr. Dennis "elicited a graphic description of the bloodiness of the crime scene during his cross-examination of Off. Oppert." (Response, p. p. 16). Again, the State ignores the highly inflammatory nature of the testimony. Paramedic Sibley testified not only to "the bloodiness of the area" (Response, p. p. 16). Rather, he described the carpet being "saturated with blood and other types of tissue" and added that "it was probably the worst thing I've seen in a long time." (R. 3244-5). Similarly, State fails to mention the inflammatory testimony offered by Det. Melgarejo that the

back of one of the victims' skull was "very mushy." (R. 3343). Such editorializing bears no relevance to any issue of guilt. It only serves to inflame the passions of the jury, to Mr. Dennis's prejudice.

Similarly, Coach Shannon's testimony, was not relevant to prove any element of the crime. The State's claim of relevancy is spurious at best. The prosecution did not need to call Coach Shannon to establish that Mr. Lewis had no connection to, or knowledge of, the crime. This evidence could have been presented through numerous other witnesses.

In any event, there was no reason, other than to inflame the passions of the jury, to elicit testimony describing Mr. Lewis's emotional reaction to learning of the murders, or the fact that Coach Shannon had to talk with him for twenty minutes "just to calm him down." (R. 3413). This testimony did nothing but inflame the passions of the jury.

Likewise, the State avers that the medical examiner's testimony describing the victims' injuries was relevant because it described the "amount of force necessary to cause the victims' injuries." (Response, p. p. 18). However, the medical examiners' testimony did not describe the force necessary to cause the injuries. Rather, they compared the appearance of the victims' injuries to other traumatic events – including "a head being run over by a car" – which had no relevance to the circumstances of this case. Such testimony only served to inflame

the passions of the jury.

The State also argues that Det. Charles was qualified to give an expert opinion regarding blood smears at the crime scene. However, the State made no effort to qualify him as such at the trial. To the contrary, the State objected to Det. Charles's opinion testimony because they believed him not qualified to render an opinion.

Nevertheless, even if he were qualified to interpret blood spatter, the testimony he offered regarding blood smears went beyond that area of "expertise." Det. Charles's divinations of the events at the crime scene, presented as scientific "blood spatter" evidence, were as unreliable as they were prejudicial.

The same can be said of Det. Charles's testimony regarding the toolmark evidence. Contrary to the State's assertions, Det. Charles's testimony did more than simply "describe things he had seen." (Response, p. p. 20). Rather, Det. Charles offered expert opinion based on his interpretation of the toolmark evidence. He not only described the shape and size of the tire puncture marks, he extrapolated that "[i]t was the type that I would associate with a knife puncture." (R. 3262). Like Det. Charles's opinions regarding blood smears, this conclusion, which left the impression with the jury that the knife in evidence caused the puncture, was not based on any scientific principle or process.

Appellate counsel's failure to raise these meritorious issues denied

Mr. Dennis effective assistance of counsel for his direct appeal.

REPLY TO CLAIM II

MR. DENNIS WAS DENIED A FAIR TRIAL AND SENTENCING DUE TO MISCONDUCT AND BIAS BY THE TRIAL JUDGE AND THE PROSECUTOR IN THIS CASE WHICH IRREPARABLY TAINTED THE JURY AGAINST MR. DENNIS, ALL OF WHICH RISE TO THE LEVEL OF FUNDAMENTAL ERROR.

Regarding the arrest of Mr. Dennis's mother during his trial, the State argues that the jury never heard the alleged threat and "the jury had no way of knowing directly that Defendant's mother had been arrested." (Response, p. p. 30). The State points out that the court admonished the jury to avoid media reports about the case, and the next morning, the court inquired of the jury and no one admitted to exposure (R. 5355). However, the State offers no explanation, other than coincidence, for why the jurors requested the following day that they each be escorted to their cars individually.

Clearly, such a request would have been made only if the jurors felt they were threatened in some manner. The fact that they had not previously made such a request indicates that they did not feel threatened until the incident giving rise to Mr. Dennis's mother's arrest. There is no other reasonable explanation than that the jury had been tainted by knowledge of the alleged threats and the Defendant's

mother's arrest.

Trial counsel recognized that the request for police escort, made the day after the arrest, was more than mere coincidence, and requested that the court inquire again as to the jury's exposure to outside information. The court's refusal to conduct the additional inquiry was fundamental error which denied Mr. Dennis due process and a fair trial.

Lastly, in addressing the relationship between the court and Dr. Rao, the State argues that the claim is based on extra-record evidence and, therefore, appellate counsel could not have raised it. This argument ignores the fact that Mr. Dennis has alleged fundamental error, not merely an ineffective assistance of appellate counsel claim. While it is true that appellate counsel could not have raised the claim based on what he knew from the record, it is equally true that the court had a duty to disclose the friendship he had with Dr. Rao at the time of trial, like he did during postconviction proceedings.

The court's failure to disclose his friendship with Dr. Rao is exacerbated by the nature of the friendship, and the extent to which the court relied on Dr. Rao's testimony in sentencing Mr. Dennis to death. The court failed to disclose at trial the fact that they had been friends since before Judge Crespo took the bench, and that they had worked on cases together. This long-standing friendship was evident in the court's sentencing order, which relied heavily on Dr. Rao's testimony to

establish the HAC aggravator. The Court's failure to disclose their friendship created fundamental error, denying Mr. Dennis due process and a fair trial and sentencing.

CONCLUSION

As to the remaining arguments in Mr. Dennis's habeas petition, he relies on the arguments and authority cited therein. For all of the arguments discussed above and those argued in his habeas petition, Mr. Dennis respectfully urges this Court to grant habeas corpus relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Sandra Jaggard, Office of the Attorney General, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, Florida 33131, by United States Mail this 23rd day of March, 2010.

_____
SUZANNE MYERS KEFFER
Chief Assistant CCRC-South

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing has been reproduced in 14pt Times New Roman type, pursuant to Rule 9.1, Fla. R. App. P.

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