IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 10-1463

TERANCE VALENTINE

Appellant,

v.

STATE OF FLORIDA

Appellee,

ON APPEAL FROM THE CIRCUIT COURT OF THE 13TH JUDICIAL CIRCUIT FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities:

REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Valentine lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the fact that a life is at stake. Mr. Valentine accordingly requests that this Court permit oral argument.

CITATION KEY

The record on direct appeal of Mr. Valentine's trial shall be cited (FSC ROA Vol. # p. #). The record of Mr. Valentine's evidentiary hearing shall be cited as (PCR Vol. # p.#).

STATEMENT OF THE CASE AND FACTS

I. PROCEDURAL HISTORY

Mr. Valentine was charged by indictment on September 21, 1988 with: Count One, Burglary-Armed, F.S. 810.02, a first degree felony; Count Two, Kidnapping, F.S. 787.01 (1)(A)(3), a first degree felony; Count Three, Kidnapping, F.S. 787.01 (1)(A)(3), a first degree felony; Count Four, Grand Theft - Second

Degree, F.S. 812.014 (2)(B), a second degree felony; Count Five, First Degree Murder, F.S. 782.04, a capital felony; and Count Six, Attempted Murder-First Degree, F.S. 782.04 and F.S. 777.04, a first degree felony.

Mr. Valentine's first trial resulted in a mistrial where the jury was unable to reach a verdict. After a second trial, Mr. Valentine was convicted on all counts. The jury recommended death on the first-degree murder charge and the judge imposed a sentence of death. The Florida Supreme Court reversed the conviction and vacated the sentence due to a jury selection error under State v. Neil, 457 So.2d 481 (Fla. 1984). See Valentine v. State, 616 So.2d 971 (Fla. 1993). On retrial, Mr. Valentine was again convicted on all counts. Mr. Valentine waived the jury advisory sentence and presented mitigating evidence directly to the judge. The trial court again sentenced Mr. Valentine to death on September 30, 1994. On direct appeal, the Florida Supreme Court reversed the conviction for attempted first-degree murder and vacated the sentence. The Court affirmed the remaining convictions and sentences including the first-degree murder conviction and sentence of death. See Valentine v. State, 688 So.2d 313 (Fla. 1996), cert. denied, 522 U.S. 830, 118 S.Ct. 95, 139 L.Ed.2d 51 (1997).

On May 28, 1999, Capital Collateral Regional Counsel filed Defendant's Motion to Vacate Judgment of Conviction and Sentence with Special Request for leave to Amend. (Shell motion).

On July 16, 1999, Capital Collateral Regional Counsel filed a Motion to Extend or Toll filing time for 3.850 Motion.

On August 9, 1999, Capital Collateral Regional Counsel withdrew from the instant case and Mr. Nick Sinardi (Registry counsel) was appointed to represent Mr. Valentine.

On October 4, 1999, the Court formally entered an order appointing Mr. Nick Sinardi to represent Mr. Valentine in this case. Mr. Sinardi filed his 3.850 motion on May 25, 2001.

On August 1, 2002 a "Huff" hearing was held.

On October 28, 2002, the post conviction court entered an Order Denying, In Part, Defendant's Motion to Vacate and Set Aside the Judgment of Conviction and Sentence. (PCR Vol. V p. 906-984)

On February 23, 2006, Mr. Nick J. Sinardi withdrew from the case and a Mr. Daniel F. Daly was appointed to represent Mr. Valentine. Mr. Daly withdrew from the case on April 2, 2007.

On August 8, 2007, CCRC-M filed a Notice of Appearance. The post-conviction Court allowed CCRC-M to amend the previously filed motion regarding PENALTY PHASE CLAIMS ONLY.

An evidentiary hearing was held on October 13, 2008, October 14, 2008 and July 22, 2009. The post conviction Court entered its order denying relief on July2, 2010. A timely Notice of Appeal was filed, this appeal follows.

EVIDENTIARY HEARING FACTS

Testimony of Walter Lopez

Walter Lopez was the penalty phase attorney at Mr. Valentine's trial on July 19th, 1994. He assumed that position when William Fuente was appointed to the circuit bench. (PCR Vol. XVII p.159-160). Trial counsel did not know whether or not Dr. Gamache had spoken to any of the witnesses that were presented at the penalty phase. (PCR Vol. XVII p. 163). Dr. Gamache's opinion focused on Mr. Valentine's competency rather than the statutory mental mitigators. (PCR Vol.

XVII p. 170). Trial counsel testified that he never expected this case to go to a penalty phase. (PCR Vol. XVII p. 180). Upon conviction in first phase, trial counsel make no attempt to establish the statutory mitigation.

The presentation of mitigation at trial is detailed at (PCR Vol. XVII p. 181-187).

Mr. Lopez did supply Dr. Gamache with records of Mr. Valentine's prior incarceration in an attempt to establish non-statutory mitigation and Mr. Valentine's adaptability to prison life, but stated that Dr. Gamache did not talk to the mitigation witnesses. (PCR Vol. XVII p. 184-185). Mr. Lopez did not provide Dr. Gamache with trial transcripts or depositions or police reports. (PCR Vol. XIX p. 381-382).

Testimony of Dr. Henry Dee

Dr. Henry Dee was a neuropsychologist who was qualified to testify before the post-conviction court. (PCR Vol. XVII p. 193). Dr. Dee examined Mr. Valentine on September 27, 28, 2007 and January 10, 2008. (PCR Vol. XVII p. 194-195). Prior to examining Mr. Valentine at UCI on the dates specified; Dr. Dee had reviewed the Florida Supreme Court's opinion, recorded phone calls between Mr. Valentine and his wife, depositions of Nancy Cioll, testimony of Olivia Porche

Romero, deposition of Jorge Fernandez, excerpts from the penalty phase testimony and phone conversations between Mr. Valentine and his daughter Giovanna. (PCR Vol. XVII p. 195-196). Dr. Dee reviewed the material for two reasons. One was to give him an idea of his mental state at the time he was talking to his ex-wife which was shortly after the murder of Ferdinand Porche. Dr. Dee thought it would give him a better idea of how Valentine was operating at that time and give some description of lay witnesses and also to avoid the danger of self-reporting. (PCR Vol. XVII p. 196-197). Dr. Dee opined that Valentine had a credibility inflated estimate of his personal power and his ability to achieve things. He engaged at times in almost magical thinking. (PCR Vol. XVII p.199). Dr. Dee thought it somewhat bizarre that shortly after the crime was committed, Mr. Valentine called the surviving victim to brag about the crime and threaten suit to the victim and demand that the victim go down and drop all charges against him. (PCR Vol. XVII p. 199-200). Dr. Dee opined that Valentine's own estimate of his personal power and ability to achieve things and even make sense about what he wanted people to do was clearly impaired. (PCR Vol. XVII p. 200). The indications of grandiosity, the rather bizarre behavior, the bragging, led Dr. Dee to believe that Valentine was suffering from a disease or defect of the mind, specifically, mania.

(PCR Vol. XVII p. 200-201). Dr. Dee described mania as both a mental disturbance and an emotional disturbance. (PCR Vol. XVII p. 201).

Dr. Dee opined that Mr. Valentine was suffering from extreme mental or emotional disturbance at the time of the crime. (PCR Vol. XVII p. 203-204). From a review of the trial transcript; most notably, the testimony of Valentine's sister, Dr. Dee discovered two head injuries where Mr. Valentine was taken to the hospital for treatment. (PCR Vol. XVII p. 204-205).

Dr. Dee further opined that Mr. Valentine was not a malingerer, rather he would intentionally or unintentionally would minimize any psychopathology, Mr. Valentine does everything he can to make a positive impression on other people and to impress them with his intelligence and vocabulary. (PCR Vol.XVII p.210-211). Dr. Dee's diagnosis of mania was reinforced at (PCR Vol. XVII p. 212-214).

Dr. Dee also opined that Mr. Valentine's sense of self worth and his sense of importance was exaggerated. Dr. Dee further opined that Valentine eluded constantly that things will happen almost like magic and that because he believes something should happen, it will happen. It was Dr. Dee's opinion that even a casual reading of the trial transcripts and the depositions would prompt a mental health professional to conclude that this man may be suffering from some disease

or defect of the mind. (PCR Vol. XVII p. 215). As a result of this preliminary investigation, Dr. Dee went back to UCI to further evaluate Mr. Valentine. He concluded that Valentine was suffering from a mood disturbance, specifically bi-polar disorder. Mostly manic episodes and most recently and episode of hypomanic. Dr. Dee opined that it has been present for many years. (PCR Vol. XVII p. 216).

Dr. Dee then gave Mr. Valentine a battery of neuropsychological tests including the Wechsler Adult Intelligent Scale. Dr. Dee explained how the tests worked and ultimately opined that Mr. Valentine, although he is a very intelligent man, has suffered brain damage due to instances in childhood where he fell and/or dropped and lost consciousness and had to be hospitalized. (PCR Vol. XVII p. 216-222). Dr. Dee opined that the testing revealed that Mr. Valentine suffers from frontal lobe damage. (PCR Vol. XVII p. 225). As a result, people who have frontal lobe damage "don't plan well". (PCR Vol. XVII p. 225). Dr. Dee also opined that people with this type of brain damage are a good deal more impulsive and a good deal more irritable than the normal person. (PCR Vol. XVII p. 226).

In addition to the mania, Dr. Dee opined that the frontal lobe damage in and of itself, indicates that Mr. Valentine was operating under extreme mental or

emotional disturbance at the time of the crime. (PCR Vol. XVII p. 227). Dr. Dee also opined that the results of the tests coincide with the examples of his behavior during his childhood and the information gleaned from Mr. Valentine in the clinical interview. It was apparent to Dr. Dee that this man had these problems all of his life. (PCR Vol. XVII p. 228-229). Dr. Dee also opined that Mr. Valentine had mood disturbance for most of his life. Dr. Dee testified that mood disturbance is a presentation of abnormally intense and often inappropriate mood states. (PCR Vol. XVII p. 229-230).

Dr. Dee ultimately opined that Mr. Valentine was operating under extreme mental or emotional disturbance at the time of the offense. (PCR Vol. XVII p. 231). Regarding the evaluation done by Dr. Gamache, Dr. Dee testified that from a reading of Dr. Gamache's material; there was no indication that Gamache had read any of the trial transcripts, (unlike Dr. Dee). Nor does it indicate that Dr. Gamache interviewed any penalty phase witnesses. Nor does it indicate that Dr. Gamache had an extensive clinical interview with Mr. Valentine, (again unlike Dr. Dee). (PCR Vol. XVII p. 258-259). Based upon Dr. Gamache's billing records, Dr. Dee testified that Gamache could not have given Valentine the neuropsychological battery of tests and interviewed him because there wasn't

enough time billed for doing all that. Gamache billed for three hours, and Dr. Dee's evaluation took at least 16 hours. (PCR Vol. XVII p. 260).

Testimony of Dr. Ronald Wright

Dr. Ronald Wright testified by telephone at the evidentiary hearing. (PCR Vol. XVII p. 263). Dr. Wright is a forensic pathologist who was qualified to render an opinion in this case. (PCR Vol. XVII p. 268). Dr. Wright was retained to render an opinion regarding the autopsy report of Ferdinand Porche. (PCR Vol. XVII p. 268-269). Dr. Wright was concerned that the medical examiner did not go to the scene where the body of Ferdinand Porche was discovered. Dr. Wright testified that this failure to visit the scene was probably below the standard in medical examiner work. (PCR Vol. XVII p. 270). However, Dr. Wright had no dispute with Dr. Miller, (the medical examiner) that the cause of death for Ferdinand Porche was multiple gunshot wounds. (PCR Vol. XVII p. 271).

Testimony of Eddie Gray

Eddie Gray, a Texas resident, testified by telephone at the evidentiary hearing. (PCR Vol. XVIII p. 304). Mr. Gray testified that he knows Mr. Valentine and had met Livia Romero. (PCR Vol. XVIII p. 305). Mr. Gray testified that he knew Mr. Valentine from his activities in the drug business and there came a time

where Mr. Gray owed Mr. Valentine sixty thousand dollars as a result of the drug business. (PCR Vol. XVIII p. 306). Mr. Gray testified that the money owed by Valentine was paid back by Livia Romero Valentine on four separate occasions consisting of $15,000 payments to Gray. The exchanges were made at a Greyhound bus station. (PCR Vol. XVIII p. 306-307).

Testimony of Terence Valentine

Mr. Valentine testified that he was arrested in New Orleans and taken to the FBI building on Pointer Street. (PCR Vol. XVIII p. 313). Mr. Valentine saw a magistrate once after his arrest. His attorney Mr. Unterberger, filed a motion to suppress based on an illegal warrant. (PCR Vol. XVIII p. 314-315). Mr. Valentine testified that he was a Costa Rican national at the time of his arrest on February 26th 1989. (PCR Vol. XVIII p. 315-316). Mr. Valentine further testified that he asked to speak with the Costa Rican consul and was ignored by law enforcement. (PCR Vol. XVIII p. 316).

Mr. Valentine testified that he married Livia Romero in 1973 or 1972 and was still married to her on September 9th, 1988. (PCR Vol. XVIII p. 317). Livia Romero never became Livia Porche. At the evidentiary hearing the following exchange took place:

> Q. Do you remember hearing the name Livia Porche used throughout your trial?
>
> A. At least 150 times. In all different kinds of connotations she was Livia Porche. She was the wife of Ferdinand Porche and I was the ex-husband and that went on over and over and over. My attorney used it. The Judge used it. The prosecutor used it. Everybody used it. She was Porche in all the paperwork except when she was presented on the stand she was Romero then.
>
> Q. Did she – was she actually called Livia Porche and referred to as Livia Porche in front of the presence of the jury?
>
> A. Yes, sir, numerous times. In fact she was Livia Porche when she collected monies as the widow of Ferdinand Porche when in fact she was never married to him.
>
> Q. Is it safe to say when the Chevy Blazer was stolen from her on September 9th, 1988, you two were still married?
>
> A. Yes. (PCR Vol. XVIII p. 318).

Mr. Valentine testified about Livia's propensity for fraud. (PCR Vol. XVII p. 325-327) At the evidentiary hearing, Mr. Valentine testified that his divorce from Livia became final in 2000. (PCR Vol. XVIII p. 340).

Testimony of Karen Cox

Karen Cox was called as a witness on behalf of the State at the evidentiary hearing. (PCR Vol. XIX p. 390). On cross examination, the following exchange occurred:

Q. And you just testified you did not do the indictment, but obviously you read the indictment, right?
A. Oh, yes, I absolutely read the indictment. I don't remember what it said at this point, but, yes.
Q. And the indictment had the name Livia Porche?
A. I don't know. I don't remember what the indictment said. But I didn't – I do not, I don't believe, participate in the indictment. I know I didn't participate in the first trial. And I don't have any recollection, have no reason to believe that I would have participated in any of the investigation of this case based on my position at the State Attorney's Office when this whole case occurred.
Q.. But obviously – obviously you participated in the last trial?
A. Yes, I did in the second trial.
Q. Okay. And you do recall using the name Livia Porche throughout the course of the trial, don't you?
A. Do I – I actually don't, but I probably did.
Q. Okay.
A. I mean, I haven't reviewed the transcript of the entire trial.
Q. And of course you were aware at the time that Mr. Valentine was still married to Ms. Livia Romero Valentine?
A. I recall that that was a point in contention. It was a big issue of whether or not they had a valid divorce in Louisiana. And Louisiana records and laws were very difficult to get to the bottom of.
Q. But it would certainly serve your purpose as the State to use the name Livia Porche to inflame the passions of the jury to infer that the victim's married to Ferdinand Porche when she was not?

A. I believe and I don't recall one hundred percent, but I believe that Ms. Porche, that was the name that she held herself out as. And it – she didn't want, especially based on everything that occurred, in any way, shape or form to be addressed by the name Valentine I believe was on her instructions. I mean, I know how she felt and I think that that was her direction.

Q. But that might have been her direction how she felt, but that was actually a mischaracterization, wasn't it?

THE COURT: I'm sorry, that was a what?

MR. SHAKOOR: A mischaracterization.

BY MR. SHAKOOR:

Q. Because she actually was not Livia Porche, was she?

A. Well, she held herself out in the community as Livia Porche. And she believed herself to be married to Mr. Porche. I mean, I think she used the name all the time.

Q. She used the name, but she wasn't legally Livia Porche?

A. She believed that she was divorced from Mr. Valentine.

Q. So you decided to present to the jury what she believed as opposed to what was legally an actual fact?

A. I don't know if we know what the actual fact – I don't recall whether we ever got to the bottom of whether or not she was divorced, because she was dead certain that she had done all of the paperwork to get a divorce in Louisiana. I mean that I know. She – the accusation that she wasn't divorced took her – I mean, like pulled the rug out form under her. She was very certain that she had been divorced. And, you know, I don't remember if it turned out that she wasn't. I don't remember how that

played out. But I do remember that it was – we tried to get records from parishes in Louisiana and –
Q. So you – but you didn't – so you didn't verify before using the name Livia Porche repeatedly in court at all?
A. I don't –
THE COURT: Say it again now. What did you –
BY MR. SHAKOOR:
Q. You didn't verify the woman's name – you didn't verify whether or not you could actually legally use the name Livia Porche in a court of law prior to actually doing so? You just basically went by what she wanted?
A. By what – yeah, the name that she was – she was known by.
MR. KILEY: A moment with counsel, please, sir?
THE COURT: Okay.
MR. SHAKOOR: Almost finished, Mr. – Judge. One second, please.
BY MR. SHAKOOR:
Q. Ma'am, do you remember seeing a medical examiner report in this case?
A. I'm sure that I – I know that I did. I don't remember it, but, yes.
Q. Would you refute the record if – would you refute the report if it indicates that there was a call received from a Livia Romero on September 14, 1988?
A. No, I'd have no basis to refute that.
Q. Okay. And, ma'am, this wouldn't be the first time in a court of law that you used someone else's incorrect name as a state attorney, is it?
A. What? No. I don't understand your question. But I don't concede that Livia Porche was not a correct name for Livia Porche. That's the name she was known by.

> Q. But as you've testified, that's the name that she wished to be known by.
> THE COURT: Counsel, I got the point. I mean, you don't – she's not going to acknowledge that you're correct and you're not going to acknowledge she is. I understand your position. Any other questions?
> BY MR. MOODY:
> Q. Ms. Cox –
> MR. KILEY: Hold up. Hold up.
> THE COURT: Hold up.
> MR. MOODY: Oh I'm sorry.
> MR. KILEY: Probably, Judge.
> BY MR. SHAKOOR:
> Q. Ma'am, as a United States attorney, did you ever hold out someone's name to be correct when it actually not the correct name?
> A. Yes, not – not exactly as worded, but, yes.
> MR. SHAKOOR: Nothing further, Your Honor.
>
> (PCR Vol. XIX p.400-405).

Testimony of Jorge Fernandez

Jorge Fernandez was called as a witness on behalf and testified that he was the lead detective in the case of the State of Florida versus Terence Valentine. (PCR Vol. XIX p.406-407). Fernandez testified that upon orders from Karen Cox, he searched Mr. Valentine's jail cell. (PCR Vol. XIX p. 408).

Testimony of Dr. Michael Gamache

Dr. Michael Gamache was called by the State of Florida and testified by telephone at the evidentiary hearing. Dr. Gamache testified that he was retained as a confidential expert by William Fuente sometime in early 1994. (PCR Vol. XIX p. 417). Dr. Gamache met with Mr. Valentine once on March 15, 1994 and William Fuente was present for the three hour examination. (PCR Vol. XIX p. 420). Dr. Gamache testified that the only mitigation he had to present at sentencing would be Mr. Valentine's ability to adapt to incarceration. (PCR Vol. XIX p. 422). Dr. Gamache further testified that had he interviewed any family members he would have reflected it in his bill. (PCR Vol. XIX p. 427).

Testimony of Simson Unterberger

Simson Unterberger was called as a witness on behalf of the defense at the evidentiary hearing. (PCR Vol. XX p.436). Mr. Unterberger testified that Livia had several surnames that seemed to come up during the course of the trial. (PCR Vol. XX p. 437). Mr. Unterberger testified that he determined Livia and Mr. Valentine had never been divorced. (PCR Vol. XX p. 437-438). Mr. Unterberger doesn't recall ever filing a motion in limine to insist that Livia Romero or Valentine not be referred to as Livia Porche. (PCR Vol. XX p. 439). Mr. Unterberger concedes that the record would reflect whether the name Livia Porche,

or the phrase “ex-Mrs. Valentine”, was used over 150 times, during the course of the trial. (PCR Vol. XX p. 442). He is aware that Karen Cox had a “problem” when she became a federal assistant U.S. attorney. (PCR Vol. XX p. 446).

SUMMARY OF ARGUMENTS

ARGUMENT I

Mr. Valentine was denied the effective assistance of counsel at the guilt and sentencing phase of his capital trial, in violation of the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and the corresponding provisions of the Florida Constitution. Trial counsel failed to object or to move in liminie to prevent the prosecutor from engaging in repeated misstatement of facts at issue in the case.

ARGUMENT II

The lower court erred in summarily denying Mr. Valentine a hearing on all of Claim XI (6) which alleged that trial counsel was ineffective for failing to object to multiple examples of prosecutorial misconduct during closing argument, in violation of the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and the corresponding provisions of the Florida Constitution. Pursuant to case law, an evidentiary hearing is mandated when issues are properly raised via collateral attack.

ARGUMENT III

The lower court erred in holding that Mr. Valentine was not denied the effective assistance of counsel at the sentencing phase of his capital trial, in violation of the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and the corresponding provisions of the Florida Constitution. Trial counsel failed to adequately challenge the State's case in the mistaken belief that the case would never go to penalty phase. As a result of trial counsel's deficient performance, investigative leads were ignored, a proper mental evaluation was not done and important statutory and non-statutory mitigation was not established.

THE LOWER COURT'S ORDER

On October 28, 2002, the lower court summarily denied Claims I, II, III, IV, V, VI, VII, VIII, IX, X, XI(1), XI(2), XI(5), and XI(6) in part. The Court granted an evidentiary hearing on Claims XI(3), XI(4), XI(6) in part, XI(7), XI(8), XI(9), XI(10), XI(11), XI(12), XI(13), XI(14), and XI(15). (*See* Order dated October 28, 2002). On April 20, 2005, the Court decided to enter an order granting an evidentiary hearing on Claim XI(5). (*See* April 20, 2005, Amended Order).

The Appellant filed an Amended Motion to Vacate Judgment and Sentence on October 16, 2006 to enlarge Claim I, and a raised new claim that execution by lethal injection was cruel and unusual, as administered in Florida. On January 9, 2007, the Court summarily denied the amendments to the motion. (*See* January 9, 2007, Order). The Appellant filed an Amended Motion to Vacate and Set Aside the Judgment of Convictions and Sentence on July 31, 2008, raising three new penalty claims XII, XIII, and XIV. The Court summarily denied Claim XIV, but added claims XII and XIII for the evidentiary hearing. At the time, the Court reserved ruling on Claim XIII. (*See* October 6, 2008, Order).

All in all, the Court considered claims XI(3), XI(4), XI(5), XI(6) in part, XI(7), XI(8), XI(9), XI(10), XI(11), XI(12), XI(13), XI(14), XI(15), XII, and XIII, after presiding over the hearing on October 13, 2008, October 14, 2008, and July

22, 2009. Relief on all claims were denied. (see PCR Vol. XIII p. 2419-2471). Due to page constraints, only issues in dispute will be reproduced.

Claim XI(6). Defendant was denied a fair trial due to prosecutorial misconduct during closing argument, thereby rendering the guilty verdicts fundamentally unfair and unreliable.

"Having reviewed the record, the Court finds Cox's statement, "he calls us from prison to Costa Rica" mischaracterizes Francis Valentine's testimony as Francis merely testified that she had had telephone conversations with Defendant since 1988; she did not testify that Defendant was calling from prison." (*See* trial transcript pp. 1594-95).

"Defendant has not established that any member of the jury relied on the State's one inaccurate comment on the evidence to discredit the testimony of Defendant's alibi witness and decide his guilt in this case. Having considered the allegations; the testimony, evidence, and argument presented at the evidentiary hearing; the court file, and the record, the Court's confidence in the outcome of Defendant's trial is not undermined. Because Defendant has failed to establish deficient performance or prejudice under *Strickland*, Claim XI(6) is denied."

Claim XII. Mr. Valentine was denied the effective assistance of counsel at the sentencing phase of his capital trial, in violation of the Sixth, Eighth, and Fourteenth amendments to the Constitution of the United States and the corresponding provisions of the Florida constitution. Trial counsel failed to adequately investigate and prepare the penalty phase of the trial. Trial counsel failed to adequately challenge the state's case, counsel's performance was deficient, and as a result the death sentence is unreliable.

"Even if Lopez's failure to have Defendant's mental state evaluated further and to present additional mitigation might be considered deficient performance, Defendant has failed to establish prejudice under *Strickland*. At sentencing, the Court found four aggravating circumstances. While the aggravating circumstance that Defendant had been convicted of a prior violent felony would no longer be valid in light of the Florida Supreme Court's reversal of Defendant's conviction on the attempted murder count, three aggravating circumstances remained: the murder was committed during the course of a burglary and kidnapping; the murder was heinous, atrocious, or cruel; and the murder was committed in a cold, calculated and premeditated manner. (*See* sentencing order, attached). CCP and HAC are two of the weightiest aggravators in Florida's sentencing scheme. *Morton v. State*, 995 So. 2d 233, 243 (Fla. 2008) (citing *Larkins v. State*, 739 So.2d 90, 95 (Fla. 1999)).

"Notably, Dr. Dee did not believe Defendant's capacity to appreciate the criminality of his conduct was substantially impaired because Dr. Dee felt Defendant knew what he was doing was wrong. The only additional mitigating circumstance established by Dr. Dee's testimony is that Defendant was operating under the influence of extreme mental or emotional disturbance. Considering the substantial aggravation found by the sentencing court, Defendant has failed to establish a reasonable probability that had counsel presented this additional statutory mitigator, "the sentencer...would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. Accordingly, Defendant is unable to establish his claim of ineffective assistance of counsel for failing to investigate and otherwise prepare for the penalty phase and Claim XII is denied."

Claim XIII. Defendant's trial was fraught with procedural and substantive errors which cannot be harmless when viewed as a whole, since the combination of errors deprived him of the fundamentally fair trial guaranteed under the Sixth, Eight, and Fourteenth amendments to the Constitution of the United States and the corresponding provisions of the Florida constitution.

Having considered the allegations; testimony, evidence, and argument presented at the evidentiary hearing; the written closing arguments; applicable law,

court file; and record; the Court finds that because each of the individual errors alleged are without merit, Defendant's cumulative error claim must also fail. *See Griffin v. State*, 866 So.2d 1, 22 (Fla. 2003) (stating, "[b]ecause the alleged individual errors are without merit, the contention of cumulative error is similarly without merit, and [the defendant] is not entitled to relief on this claim"). Accordingly, Defendant's claim of cumulative error is denied."

ISSUE I

MR. VALENTINE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND SENTENCING PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. TRIAL COUNSEL FAILED TO OBJECT TO BLATANT PROSECUTORIAL CONDUCT ON THE PART OF STATE ATTORNEY KAREN COX DUE TO HER REPEATEDLY USING THE NAME LIVIA PORCHE OR OTHERWISE IMPLYING THAT MR. AND MRS. VALENTINE WERE NO LONGER MARRIED.

THE STANDARD OF REVIEW

Under principles set forth by this Court in Stephens v. State, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court.

FACTS

The defendant, Terence Valentine, testified on his own behalf at the evidentiary hearing concerning this issue. His divorce from Livia Romero wasn't completed until 2000. (PCR Vol. XVIII p. 317). The two were still a married couple on the day of the crime, September 9th, 1988, and Livia Romero never became Livia Porche. (PCR Vol. XVIII p. 317).

The State called Karen Cox in their rebuttal at the evidentiary hearing. (PCR Vol. XIX p. 390-405). Ms. Cox admitted to probably using the name "Livia Porche:" throughout the course of the trial. (PCR Vol. XIX p. 401). She admitted that she never got to the bottom of whether or not Livia Romero was actually divorced before using the name Livia Porche. (PCR Vol. XIX p. 402). Ms. Cox admits that she wouldn't refute the official record if the medical examiner's report referred to the living victim as Livia Romero. (PCR Vol. XIX p. 404). In response to the question of did she ever "hold out someone's name to be correct

when it was actually not the correct name?"she responded, "yes, not–not exactly as worded, but, yes." (PCR Vol. XIX p. 405).

Simson Unterberger was called as a witness on behalf of the defense at the evidentiary hearing. (PCR Vol. XX p. 436). Mr. Unterberger testified that Livia had several surnames that seemed to come up during the course of the trial. (PCR Vol. XX p. 437). Mr. Unterberger testified that he determined Livia and Mr. Valentine had never been divorced. (PCR Vol. XX p. 437-438). Mr. Unterberger doesn't recall ever filing a motion in limine to insist that Livia Romero or Valentine not be referred to as Livia Porche. (PCR Vol. XX p. 439). Mr. Unterberger concedes that the record would reflect whether the name Livia Porche, or the phrase "ex-Mrs. Valentine", was used over 150 times, during the course of the trial. (PCR Vol. XX p. 442). He is aware that Karen Cox had a "problem" when she became a federal assistant U.S. attorney. (PCR Vol. XX p. 446).

The attorney who handled the penalty phase, Walter Lopez, was also well aware that Mr. Valentine and Livia Valentine were still legally married. He testified at the evidentiary hearing as follows:

> Mr. Kiley: Okay. So when you learned that you had a live victim who was going to get on the stand and say that's the guy and by the way he's my ex-husband, you –

> did you begin to suspect that you might be going to a penalty phase?
> Mr. Lopez: Mr. Kiley, certainly. First of all, as a point of correction, that was not ex-husband. They were still married. That divorce had never been final. She was living an adulterous situation. But to your question – to the point of the question, one – one always felt that. And as I mentioned yesterday – and again, my – my job as counsel is not to – to judge, certainly, and it's not to diagnose, certainly. It's to defend. And the – I felt based on my reading and my familiarity with – with the people that I had spoken to that the witnesses that came on – on Mr. Valentine's behalf were very strong. They were not only family, as I recall, they were – they were government officials. I think there was a police officer.

(PCR Vol. XIX p. 384-387).

It is clear that both trial counsel were well aware that Mr. Valentine and Livia Valentine were legally married, and that Livia was involved in an "adulterous situation" with Ferdinand Porche. Yet, trial counsel was woefully deficient in failing to file a motion in limine to prevent Karen Cox from implying that Mr. and Mrs. Valentine were no longer married. Nor did they object at each instance where Ms. Cox engaged in such prosecutorial misconduct. But for trial counsel's ineffectiveness, the jury wouldn't have been mislead, and its passions wouldn't have been inflamed. Mr. Valentine would have been acquitted of First Degree Murder had trial counsel not been ineffective on this issue.

Legal Memorandum

Case law is clear that the defendant had an absolute right to attack this ineffective assistance of counsel claim in a collateral proceeding. Massaro v. U.S., 538 U.S. 500 (2003) holds in part:

> An ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal. Requiring a criminal defendant to bring ineffective-assistance claims on direct appeal does not promote the procedural default rules objectives: conserving judicial resources and respecting the law's important interest in the finality of judgements. Applying that rule to ineffective-assistance claims would create a risk that defendants would feel compelled to raise the issue before there has been opportunity fully to develop the claims factual predicate, and would raise the issue for the first time in a forum not best suited to assess those facts,... Id. At 504.

The reasoning for why an evidentiary hearing was properly allowed on this issue is further detailed in Allen v Butterworth, 756 So.2d 52 (Fla. 2000):

> In addition to the unnecessary delay and litigation concerning the disclosure of public records, we have identified another major cause of delay in post-conviction cases as the failure of the circuit courts to grant evidentiary hearings when they are required. This failure can result in years of delay. This Court has been

> compelled to reverse a significant number of cases due to this failure. When a case gets reversed for this reason, the entire system is put on hold, as the hearing on remand takes many months to be scheduled and completed, and the appeal therefrom takes many additional months in order for the record on appeal to be prepared and the briefs to be filed in this Court. In order to alleviate this problem, our proposed rules require that an evidentiary hearing be held in respect to the initial motion in every case. This single change will eliminate a substantial amount of the delay that is present in the current system.

Id. At 66,67.

Mr. Valentine was rightfully granted an evidentiary hearing on his claim that trial counsel was ineffective for failing to object to the prosecutorial misconduct at the trial level. Trial counsel failed to preserve the record concerning this issue for and attack on direct appeal. This issue was raised through the evidentiary hearing testimony of Terence Valentine, (PCR Vol. XVIII p. 317), Karen Cox (PCR Vol. XIX p. 390-405), and Simson Unterberger (PCR Vol. XX p. 435-442). This issue was properly litigated, thoroughly, throughout the evidentiary hearing, through three witnesses. The State never objected to the issue being raised, or the about the line of questioning.

The closest the State ever came to a challenge, was when they objected to a question posed to Simson Unterberger about Ms. Cox's reputation in the

community regarding her ethics or veracity. (PCR Vol. XX p. 441). The question was allowed through rephrasing. (PCR Vol. XX p. 442-443). The State, and most importantly, this Court, allowed the door to be open on this issue with evidence presented. It was the proper decision.

By using the name of Livia Porche, Karen Cox was falsely labeling the name of a victim/witness to confuse the jury. She was getting her practice in, so to speak, for her later actions as a United States Attorney in a case called United States v. Sterba, 22 F.Supp.2d 1333 (M.D. Fla. 1998). The Florida Supreme Court ordered Cox to be suspended from the practice of law for one year due to her actions in Sterba. The Florida Bar v. Karen Schmid Cox, 794 So.2d 1278, 1287 (Fla. 2001). In Sterba, Karen Cox, in her role as an assistant United States Attorney, knowingly placed a witness on the stand under an alias. Id. at 1279. The witness' actual name was Adria Jackson, but Ms. Cox had the witness testify under her fictitious confidential informant (CI) name, "Gracie Greggs". Id. These actions prevented Mr. Sterba from knowing the true identity of his accuser; including the knowledge that she had a criminal record. Id. at 1280.

The subterfuge was discovered by the defense during the middle of the trial, and they successfully moved for a mistrial-- which was charged to the state– mandating a dismissal with prejudice. Id. As the Court wrote in Cox:

> We can think of no greater "significant...adverse effect on the legal proceeding" than a dismissal with prejudice of a criminal indictment due to a prosecutor's misconduct. Equally important, Cox's misconduct involved "potentially serious injury to a party," namely the criminal defendant, Sterba, whose rights to a fair trial, confrontation, and due process would have been denied had Cox's misconduct not be revealed. Id. at 1284.

The Court went on to say of Cox:

> Cox failed to heed her duty to represent the public fairly and justly in her role as a prosecutor, and damaged the public by undermining the confidence in the very core of the judicial process in search of the truth. The public clearly deserves protection from a prosecutor who determines on her own when and how to follow the rules. Id. at 1286.

In the case before this court, it's easy to see how Karen Cox was simply getting her practice in on how to deceive a judicial proceedings which she took to another level in Sterba. Karen Cox was clearly aware that Livia Romero never became Livia Porche. She still repeatedly called her "Porche" to deceive the jury. Simson Unterberger testified that he knew the defendant was still married to Livia at the time of the offense. (PCR Vol. XX p. 437-439). Yet he was blatantly deficient in allowing the false testimony to appear before the jury.

The prejudice is clear because it appeared to the jury that Livia went through the horror of seeing her "husband" tortured and murdered before her very eyes, as

opposed to the person she was seeing while legally married to Mr. Valentine. The subtle references hammered thoughts of Livia Porche/Mrs. Porche/Wife of Ferdinand Porche home to the jury. The result was fundamentally unfair in that the jury was completely mislead by Karen Cox. They were deceived, and trial counsel allowed it to happen. The prejudicial effect made it appear as though Terence Valentine was a deranged ex-husband attacking a happily married couple. If Ms. Cox had never engaged in such tactics, Mr. Valentine never would have been convicted by the passionately inflamed jury.

The Florida Bar News of April 1 2002, page 9 DISCIPLINARY ACTIONS reported the following action:

> **Karen Schmid Cox**, P.O. Box 3913, **Tampa, suspended** from practicing law in Florida for 30 days, to run concurrent with the one year suspension entered in Case No. SC96217 (effective June 18, 2001), following a January 31 court order. (*Admitted to practice:* 1985) In two unrelated cases in which Cox was acting as a prosecutor, she made improper statements during closing arguments. In one case, Cox implied that the defendant would not have been prosecuted if he was not guilty. (Case No. SC01-2148).

Ms. Cox has a long history of judicial prosecutorial misconduct, and it was indeed demonstrated throughout the trial of Mr. Valentine. The acts of prosecutorial overreaching set forth above has compromised the judicial process and the

resulting convictions and sentences are tainted by prosecutorial misconduct. Karen Cox pulled the fraud off in open court, and counsel allowed it to happen. If the jury had known the truth, Mr. Valentine would have been acquitted on the charge of first degree murder. Relief is proper.

ISSUE II

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. VALENTINE A HEARING ON ALL OF CLAIM XI(6), WHICH ALLEGED THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO MULTIPLE EXAMPLES OF PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

THE STANDARD OF REVIEW

Under principles set forth by this Court in Stephens v. State, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court.

THE LOWER COURT'S ERROR

In it's Order rendered on October 28, 2002, the circuit court ruled as follows regarding claim 11(6):

> However, as to the substantive claims regarding prosecutorial misconduct in closing argument, they could have been or should have been raised on direct appeal and are now procedurally barred. Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987) (Defendant is procedurally barred from raising a claim that prosecutor used inflammatory closing arguments); Kelly v. State, 569 So.2d 754 (Fla. 1990); Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987) (Defendant is procedurally barred from raising a claim that his rights were violated by improper closing arguments). Consequently, ground VI is procedurally barred from being raised in a motion for post conviction relief. As such, no relief is warranted as to ground VI. *See lower court's Order dated October 28, 2002*

The trial court eventually amended its Order to summarily deny a hearing on all but for the improper comment, "...he calls us [Defendant's family] from prison to Costa Rica. What is going on here? Why did every single other family member and in-law deny any type of contact?" *See lower court's Order dated July 2, 2010.* However, on that issue, the lower court ultimately decided as follows:

> "Defendant has not established that any member of the jury relied on the State's one inaccurate comment on the evidence to discredit the testimony of Defendant's alibi witness and decide his guilt in this case. Having

> considered the allegations; the testimony, evidence, and argument presented at the evidentiary hearing; the court file, and the record, the Court's confidence in the outcome of Defendant's trial is not undermined. Because Defendant has failed to establish deficient performance or prejudice under *Strickland*, Claim XI(6) is denied." *See lower court's Order dated July 2, 2010.*

The lower court erred in denying Mr.Valentine a full hearing on his claim of ineffective assistance of counsel, for failure to object to the prosecutorial misconduct during closing argument. In addition to the examples of prosecutorial misconduct in which Mr. Valentine was granted a hearing on, detailed in Issue I, there were several more examples of misconduct on the part of Karen Cox throughout her closing argument, in which Mr. Valentine was not granted a hearing.

Legal Memorandum

As discussed in Issue I above, Massaro v. U.S., 538 U.S. 500, 504 (2003) and Allen v Butterworth, 756 So.2d 52, 66-67 (Fla. 2000) clearly addresses the importance of post-conviction counsel raising the claim via collateral attack. The trial court erred in issuing a summary denial.

During closing argument, the assistant state attorney, Karen Cox, told the jury:

"Mr. Unterberger says that the shooting didn't happen in the back seat of the Blazer, but he ignores the testimony of Dr. Miller that said that there is blood spatter on this Blazer..." (FSC ROA Vol. XV p. 1727). However, there is no evidence or testimony that Dr. Miller examined the Blazer. Dr. Miller did not testify that there was any blood spatter on the Blazer. Ms. Cox made an improper reference to matters not in evidence, intended to inflame the jury.

During closing argument, the assistant state attorney, Karen Cox told the jury:

> "Now, Mr. Unterbeger wants you to believe that she [Livia] is lying and to have you believe that she is lying, he has to provide you with a motivation for why she was lying and so her motivation is this Costa Rican divorce. He somehow wants you to believe and wants to suggest to you that it is this woman, she was laying there, bound bloodied, naked, wondering if she was going to live or die, not knowing if she would ever see her children again, she thought 'Hey, if I say Terance did it, maybe he has got some property in Costa Rica and I will get an attorney, and we will do a property search, and maybe I will get half..." (FSC ROA Vol. XV p. 1724).

Ms. Cox made improper comments expressing her personal beliefs concerning defense counsel's presentation of his case and improperly attacked opposing counsel's theory of defense. See United States v. Young**,** 105 S. Ct. 1038 (1985).

It is impermissible for a prosecutor to criticize defense counsel's closing argument or ridicule a defendant or his theory of defense. See Riley v. State, 560 So.2d 279, 280 (Fla. 3d DCA 1990); Rosso v. State, 505 So.2d 611, 612 (Fla. 3d DCA 1987).

In this case, the prosecutor continued beyond the limits of proper and ethical prosecutorial conduct. In closing, the prosecutor commented on facts not in evidence and interjected improper personal comments. This case is yet another example where the prosecutor's over zealousness in prosecuting the State's cause worked against justice rather than for it. Gore v. State, 719 So.2d 1197, 1203 (Fla.1998) (quoting Ryan v. State, 457 So.2d 1084, 1091 (Fla. 4th DCA 1984)). See Ruiz v. State, 743 So.2d 1 (Fla. 1999); Kellogg v. State, 761 So.2d 409 (Fla. 2d DCA 2000).

In Ruiz, the Defendant was convicted in the Circuit Court, Hillsborough County, of first-degree murder and sentenced to death. Mr. Ruiz appealed. The Florida Supreme Court held that the prosecutor, the same Karen Cox, engaged in misconduct in closing arguments. The court reversed the conviction and vacated the sentence because of prosecutorial misconduct.

In Ruiz, as here, the defendant presented an alibi defense, claiming that he was in Orlando on the day of the murder. Several witnesses attested to this. At the

conclusion of the evidence, Ruiz was convicted and charged. On appeal, Ruiz argued, inter alia, prosecutorial misconduct on the part of Karen Cox during closing argument. The Florida Supreme Court agreed.

> "A criminal trial provides a neutral arena for the presentation of evidence upon which alone the jury must base its determination of a defendant's innocence or guilt. Attorneys for both sides, following rules of evidence and procedure designed to protect the neutrality and fairness of the trial, must stage their versions of the truth within that arena. That which has gone before cannot be considered by the jury except to the extent it can be properly presented at the trial and those things that cannot properly be presented must not be considered at all." Ruiz**,** 743 So.2d at 4.

The role of the attorney in closing argument is "to assist the jury in analyzing, evaluating and applying the evidence. It is not for the purpose of permitting counsel to "testify" as an expert witnesses.' The assistance permitted includes counsel's right to state his contention as to the conclusions that the jury should draw from the evidence." United States v. Morris**,** 568 F.2d 396, 401 (5th Cir. 1978). "To the extent an attorney's closing argument ranges beyond these boundaries it is improper. Except to the extent he bases any opinion on the evidence in the case, he may not express his personal opinion on the merits of the case or the credibility of witnesses. Furthermore, he may not suggest that evidence which was not presented at trial provides additional grounds for finding defendant guilty." Ruiz, 743 So.2d at 4.

The witnesses for both the State and the defense were subjected to extensive cross-examination and impeachment, and the credibility of each was called into question. During closing argument, prosecutor Cox sought to bolster the credibility of the State's case with the following improper statements:

> [MS. COX:] What motive does anybody in the world have to do this to Livia Proche except the man who so hated her and who thought that she was keeping him from his child and who thought that she had his belongings and that they were rightfully his?
> What other person in the world would do this to Livia Porche and Ferdinand Porche and, before taking them out of the scene, would take the time and the trouble to subject her to the degradation having photos of her mother and photos of her husband children shredded and dropped over her body?
> Who else would do this type of commando raid into that house and really not take anything except the life of her husband? Who else was calling her and telling her to disappear? No one. No one in the world. (FSC ROA Vol. XV p. 1723).

Mr. Valentine's convictions are irreparably tainted. The record shows that this trial was permeated by egregious and inexcusable prosecutorial misconduct. Ms. Cox attempted to tilt the playing field and obtain a conviction and death sentence in a number of improper ways: by demeaning and ridiculing the

defendant and his counsel; by appealing to the jurors' raw emotions; and by introducing improper evidence.

The prosecutor crossed the line of zealous advocacy by a wide margin and compromised the integrity of the proceeding. See Garcia v. State, 622 So.2d 1325, 1332 (Fla. 1993) ("Once again, we are compelled to reiterate the need for propriety, particularly where the death penalty is involved....") Nowitzke v. State, 572 So.2d 1346, 1356 (Fla. 1990) ("[W]e are distressed over the lack of propriety and restraint exhibited in the overzealous prosecution of capital cases, and we feel compelled to reiterate [the warning expressed in Bertolotti]."); Garron v. State, 528 So.2d 353, 359 (Fla. 1988) ("Such violations of the prosecutor's misconduct in several death penalty cases...This Court considers this sort of prosecutorial misconduct, In the face of repeated admonitions against such overreaching, to be grounds for appropriate disciplinary proceedings."); Urbin v. State, 714 So.2d 411 (Fla. 1998) (reversing death sentence and condemning extensive prosecutorial misconduct).

The cumulative effect of the prosecutor's improper conduct constitute fundamental error. Here, the prosecutor made an attack on defense counsel, commented on a matters not in evidence, invaded the jury's providence , bolstered

the officers, bolstered the state witness, and shifted the burden of proof. This is the type of error which reaches down into the validity of the trial itself, to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. See McDonald v. State, 743 So.2d 501 (Fla. 1999). Here, the prosecutor's comments were so prejudicial as to vitiate the entire trial. McDonald at 505.

Fundamental error in closing occurs when the "prejudicial conduct in its collective import is so extensive that its influence pervades the trial, gravely impairing a calm and dispassionate consideration of the evidence and the merits by the jury." Silva v. Nightingale, 619 So.2d 4, 5 (Fla. 5th DCA 1993). The cumulative effect of the prosecutor's improper comments vitiated the fairness of the appellant's trial. See Caraballo v. State, 762 So.2d 542 (Fla. 5th DCA 2000).

Here, the cumulative effect of the prosecutor's improper comments deprived Mr. Valentine of a fair trial. See Brown v. State, 593 So.2d 1210 (Fla.2d DCA 1992) (holding that a combination of improper comments made by the prosecutor during closing argument required reversal and remand for a new trial). Accordingly, Mr. Valentine's judgment of conviction and sentence must be vacated and set aside. See Ruiz.

Trial counsel was ineffective under Strickland, for failing to object to these numerous examples of prosecutorial misconduct. Had he done so, Mr. Valentine would have been acquitted, as the objections would have been sustained, and Ms. Cox reprimanded. Moreover, the issues would have been properly preserved for direct appeal, and subsequently Mr. Valentine's conviction would have been reversed due to reversible error.

In Davis v. State, 648 So.2d 1249 (Fla. 4th DCA 1995) at 1249, the court held: "that trial counsel's failure to object to reversible error, while waiving the point on direct appeal, does not bar a subsequent, collateral challenge based on a claim of ineffective assistance of counsel."

In Vento v. State, 621 So.2d 493 (Fla. 4th DCA 1993), at 495, the court held: "The question then becomes one of whether trial counsel's failure to object on these three interrelated grounds was a deficiency from the professional norm which prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In our view appellant has established ineffectiveness on these three grounds."

Pursuant to the case law cited above, Mr. Valentine should have been granted an evidentiary hearing and it was error for the lower court to deny him a

hearing on this claim. Trial counsel's failure to object to the improper prosecutorial arguments of Assistant State Attorney Cox prejudiced Mr. Valentine.

Trial counsel's arguments were denigrated and the State's witnesses were bolstered. The effect of the State's arguments led the jury to believe that defense arguments were unworthy and that the State's witnesses should be believed. The overall effect of the State's arguments prejudiced Mr. Valentine by ensuring that the jury would sentence Mr. Valentine to death. Relief is proper.

ISSUE III

THE LOWER COURT ERRED IN HOLDING THAT MR. VALENTINE WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. TRIAL COUNSEL FAILED TO ADEQUATELY CHALLENGE THE STATE'S CASE, COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT THE DEATH SENTENCE IS UNRELIABLE.

THE STANDARD OF REVIEW

Under the principles set forth by this Court in Stephens v. State, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court.

THE LOWER COURT'S ERROR

The lower court held in its order:

> Lopez acknowledged that he did not present any psychological or psychiatric evidence. (*See* October 13, 2008, transcript p.32), but explained that competency was never in issue,

"Mr. Valentine's defense was one of alibi and he wasn't even here at the time. It becomes difficult to argue that at the time he was mentally incompetent or suffering under some disability when factually he was not here and the lay witnesses that we brought that I recall were very strong that he had been in Costa Rica at the time this occurred." (*See* October 13, 2008, transcript pp. 15-16).

" We had whatever mitigators there were already on the record... and we brought the witnesses up from Costa Rica to establish the other mitigating circumstances. It was difficult for me, it was difficult for me for a number of days to be part of a team that was arguing that Mr. Valentine was in Costa Rica when this occurred and then have to get up and argue, he was in Costa Rica but if he wasn't there he was here and if he was here he was incompetent. ...

Incompetent or meeting some of the statutory mitigating circumstances." (*See* October 13, 2008, transcript pp. 27-28).

Dr. Gamache testified that he had no independent recollection of meeting with Defendant, Lopez, or Judge Fuente and the only thing he retained in Defendant's file is the March 27, 1995, letter to Lopez and bill for services, which gave him some indication of the work he performed in this case and adequately summarized the activity that he engaged in. (*See* October 14, 2008, transcript pp.262, 270). He testified that he was retained as a confidential expert by Judge Fuente, and generally when so retained, he would consult with penalty phase counsel about psychological issues relevant to mitigation; examine the defendant; ask for, receive, and review records relating to the instant offense, the defendant's mental health history, prior criminal, incarcerative, family, or educational history; and communicate with counsel regarding the results of the examination and if

> and how the results might be relevant to the penalty phase. (*See* October 14, 2008, transcript pp. 260-61). He testified that he would have performed such an evaluation in his review of Defendant for mental health presentation. (*See* October 14, 2008, transcript p. 265).
>
> Having considered Defendant's allegations; the testimony, evidence, and argument presented at the evidentiary hearing; the court file; and the record, the Court finds that Defendant has failed to establish that counsel was deficient in his investigation and presentation of mitigation at trial. (PCR Vol. XIII p. 2467-2469)

This was error. At the evidentiary hearing, Walter Lopez was asked the following questions and gave the following answers:

> Q. When the jury came back guilty is it safe to assume that the jury did not believe he was where he said he was?
> A. That's correct.
> Q. So upon seeing that this man is convicted of first degree murder, did you make any attempts to establish a statutory mitigator?
> A. We had whatever mitigators there were already on the record, already on the record and we brought the witnesses up from Costa Rica to establish the other mitigation circumstances. It was difficult for me, it was difficult for me for a number of days to be part of a team that was arguing that Mr. Valentine was in Costa Rica when this occurred and then have to get up and argue, he was in Costa Rica but if he wasn't there he was here and if he was here he was incompetent.
> Q. Well, sir –

A. That is the dilemma that I had for myself. Whether the presentation of those mitigating factors was adequate the record will tell us.

Q. Yes, sir, however, you say incompetent – what do you mean by incompetent?

A. Incompetent or meeting some of the statutory mitigating circumstances.

Q. Like which one, which statutory mitigator?

A. I don't know, Mr. Kiley.

THE COURT: I am not following your question, Counsel, to be honest with you.

BY MR. KILEY:

Q. Are you aware that there are two statutory mental mitigators?

A. Yes.

Q. Do you know what the first one is?

A. Mr. Kiley –

Q. Do you know what the first one is?

A. No I do not.

Q. Are you aware that the first one is that the defendant was operating under severe mental or emotional disturbance at the time of the offense?

A. Yes.

Q. Now, does the fact of the defendant being under a severe mental or emotional disturbance have anything to do with the standard of competency?

A. No.

Q. Now, are you aware of the second mental mitigator, sir?

A. Yes.

Q. Are you aware of that?

A. Yes.

Q. But you just told me you weren't aware of that.

A. I was going to let you recite them, Mr. Kiley.

Q. You were certified in this capital stuff, weren't you?

A. Yes, I was.

Q. In mitigation?
A. Yes, I took it.
Q. Now, going back to Dr. Gamache it is safe to assume , sir, that Dr. Gamache was not going to bill you for something he didn't do, right?
A. No.
Q. Nor was he going to do anything for free?
A. That's correct.
Q. Now this psych exam at Orient Road with William Fuente you were not present there, were you?
A. I was not.
Q. And this review of records they were prison records; were they not, sir?
A. I don't know what records he reviewed.
Q. Well, did you supply Dr. Gamache as per the –
A. I supplied him with some records, yes.
Q. Of his previous incarceration?
A. That's correct.
Q. And that was your attempt to establish a non-statutory mitigator; was it not, sir?
A. Yes.
Q. Now, do you know again whether or not Dr. Gamache ever talked to the mitigation witnesses which you provided at trial?
A. He did not.
Q. And, sir, are you aware of the standard or the burden of proof required of you as a certified capital attorney to prove a statutory or a non-statutory mitigator?
A. It is my burden.
Q. What is the standard you're getting at, Mr. Kiley.
THE COURT: Do you mean clear and convincing?
BY MR. KILEY:
Q. Is it beyond a reasonable doubt?
A. No.
Q. Could it possibly be a preponderance of the evidence?
A. Yes.
MR. KILEY: One moment, sir, Your Honor.

> THE COURT: Yes.
> BY MR. KILEY:
> Q. Sir, you just testified you really had nothing to do with the guilt phase.
> A. Well, I had nothing to do in terms of presenting the evidence at the Court. I had a lot to do with the guilt phase because I did confer with Mr. Unterberger throughout the trial.
> Q. Regarding the penalty phase, have you ever in your career argued an inconsistent defense?
> A. Yes.
> Q. And attempting to prove a statutory mitigator would have been inconsistent with the defense of alibi in the guilt phase?
> A. Yes.
> Q. But this was a separate proceeding; was it not?
> A. Yes, it was.
> Q. Yet, you did not attempt to establish any statutory mitigation?
> A. Well, in order to answer that question I would really need to review what in fact I did argue and present to Judge Allen. Now, did I present psychological or psychiatric evidence, I did not. I did not.
> Q. Okay. Well, if the record reflects at the penalty phase colloquy that you did not attempt to establish a statutory mental mitigation through the testimony of Dr. Gamache or any lay witness nor did you argue statutory mental mitigation, would you have any reason to dispute the trial record?
> A. I have no reason to dispute the trial record. (PCR Vol. XVII p. 181-187).

The above cited testimony of penalty phase counsel clearly establishes several important points regarding counsel's ineffectiveness. Lopez had focused on the standard of competency rather than the statutory mitigation he could have

investigated and presented but, as his testimony above revealed; he did not know what the statutory mitigators were. It is clear that Dr. Gamache was not provided anything by Lopez except records of Mr. Valentine's previous incarceration. Walter Lopez knew that Dr. Gamache never talked to the mitigation witnesses.

Dr. Dee, on the other hand, reviewed the trial testimony and learned that Mr. Valentine had a history of a head injury. (PCR Vol. XVII p. 204). Dr. Dee went further and opined that even a casual reading of the transcripts would prompt a mental health professional to conclude that Mr. Valentine was suffering from some disease or defect of the mind. (PCR Vol. XVII p. 215). Clearly a valuable investigative lead was abandoned. The history of the head injury of Mr. Valentine should have been explored by penalty phase counsel yet it was not.

Dr. Gamache was asked the following questions and gave the following answers at the evidentiary hearing by the prosecutor:

> Q. And would you please describe what that indication is?
> A. Well, from the – from the invoice, I can determine that that – as well as from the notes, I can determine that I met with Mr. Valentine face to face and conducted an examination on March 15 of 1994. From the invoice, I would conclude that – that Bill Fuente was there and present for the examination. That on a date subsequent to

that, April of – 14 of 1994, that I reviewed a volume of records that were provided. On July 15 of 1994, I had a telephone consultation with attorney Walter Lopez. On August 16, 1994, I had another telephone consultation with attorney Walter Lopez. On that same date, I had a conference – I guess a face-to-face conference with him. I don't know whether that was in my office or his office or elsewhere. That was also on 8-16-1994. On the same date, my records reflect that there was a telephone consultation at the request of attorney Lopez with assistant state attorney – looks like the name is Chris Wilkes.

Q. Actually I think the – one of the prosecutors on the case was a Chris Watson –

A. Okay.

Q. – rather than Chris Wilkes.

A. Chris Watson then. The invoice says Wilkes, but that could be an error. The following day, August 17, 1994, there was a telephone consultation again with attorney Walter Lopez. August 17, 1994, I reviewed an additional volume of records that were provided. And then it looks – I don't – I don't have documentation of any other activity until March 27 of 1995 when I sent a letter to Mr. Lopez about the status of the case.

Q. And did you record what your opinion about Mr. Valentine was with regard to the second phase and mitigation?

A. I did not.

Q. Did you record in your letter to Mr. Lopez the substance of your testimony that you and he had discussed?

A. I believe that is reflected in there. And, again, just to be clear about your previous question, I don't have a

record of recording my opinion in this case. That doesn't mean that I didn't, but there is no longer a record of it in this file. But in the letter that I referred to, in the first paragraph of that letter, I make reference to one of the telephone consultations that I had with Mr. Lopez where he indicated that the only mitigation that he had to present at sentencing would be my testimony regarding Mr. Valentine's ability to adapt to incarceration. And while I don't independently recall that, I would presume that we had some discussions about that, and that I thought that – that that was something that could be presented in mitigation in Mr. Valentine's case. That is I didn't find anything in the examination that would suggest that he was necessarily a threat or danger in an incarcerative setting, and that he could probably adapt adequately to such a setting.

Q. Okay. And Dr. Gamache, the purpose of your being hired by Mr. Fuente as we spoke was to be a confidential expert, and you indicated you reviewed for possible mental mitigation. Would you have performed such an evaluation in review of Mr. Valentine for mental mitigation preparation – or presentation rather?
A. Yes.
Q. And would the techniques that you have previously described, are they in conformance with the guidelines and protocols set forth in the profession of psychology?
MR. KILEY: Objection, leading.
THE COURT: I'm going to overrule that.
BY MR. MOODY:
Q. In connection with forensic psychology and neuropsychology?

> A. Well, I don't know that there are specific guidelines that are put forth by any agency or organization with regard to these types of evaluations. There certainly is research literature and professional literature. And my approach is in keeping with the generally accepted approach to these evaluations.
> Q. And when you make an evaluation in this kind of case for second phase, do you basically follow the same protocol when you perform these evaluations?
> A. Most of the time the protocol is similar. There are variations on that depending on the individual case and depending of the specific questions that counsel has.
>
> (PCR Vol. XIX p. 420-423).

It is clear from Dr. Gamache's testimony that only a three hour clinical interview was conducted with Mr. Fuente being present for at least part of the interview. Furthermore, it is clear that Dr. Gamache never did a full battery of neurophychological testing. At the evidentiary hearing Dr. Dee was asked the following questions and gave the following answers:

> Q. You don't know if he was measuring this particular difference in intelligence or brain lesion stuff that you have testified at length and to the confusion of defense counsel previously.
> A. I have no idea.
> Q. You don't know if he gave him the Wechsler, the Denman, the card sorting, the line drawing, whatever you gave him, right?

> A. Well, first of all he couldn't have given him the neuropsychological battery and interview him because ther wasn't enough time billed for doing all that. Three hours is what he billed and mine took at least 16 hours.
> Q. Really?
> A. Yes. (PCR Vol. XVII p. 260)

It is also noteworthy that Judge Fuente, who was available and in the same building, was never called by the State to rebut the contentions of Mr. Valentine regarding the preparation of mitigation.

The underlying reason that Lopez failed to pursue investigative leads for a penalty phase presentation is reflected in his evidentiary hearing testimony:

> Q. Okay. Now, yesterday you said that you really didn't expect him – this case to go to a penalty phase.
>
> A. Personally didn't .
> Q. Personally didn't?
> A. I personally didn't.
> Q. Okay. When did you realize – well, wait a minute. Did you tactically evaluate the case for guilt phase?
> A. Well, one absolutely does that as one is, you know, going through –
> Q. And you usually do that with a case?
> A. – through the procedure, sure.
> Q. Okay. So when you learned that you had a live victim who was going to get on the stand and say that's the guy and by the way he's my ex-husband, you – did you begin to suspect that you might be going to a penalty phase?

A. Mr. Kiley, certainly. First of all, as a point of correction, that was not ex-husband. They were still married. That divorce had never been final. She was living an adulterous situation. But to your question – to the point of the question, one – one always felt that. And as I mentioned yesterday – and again, my – my job as counsel is not to – to judge, certainly, and it's not to diagnose, certainly. It's to defend. And the – I felt based on my reading and my familiarity with – with the people that I had spoken to that the witnesses that came on – on Mr. Valentine's behalf were very strong. They were not only family, as I recall, they were – they were government officials. I think there was a police officer.

Q. You mean – you mean – excuse me, I'm a little confused here. This is in your trial, right, in 1994?

A. Um-hmm.

Q. And – and Valentine was arrested in – well, 1989, right?

A. '88 or '89, yes.

Q. And he had a trial – first trial was when? 1992?

A. I don't know. I'd have to look at it.

Q. Okay. And – and do you remember Ms. Cox's closing argument in guilt phase when she asked why didn't these alibi witnesses immediately contact the Costa Rican embassy upon Valentine's arrest, and say, hey, in 1989 in preparation for the 1992 trial you got the wrong guy, he was with us at the day of the child.

A. I don't remember that argument specifically. She may have made it.

Q. Well, if the record disputes that she did, you don't dispute that now?

A. I would refer defer to the record.

> Q. All right. Now, so do you think at that time Mr. Valentine may have been in a little legal hot water when it came to conviction?
> A. He was in legal hot water when he was indicted.
> Q. Right. And you testified yesterday that you were aware of the Bar guidelines that you were supposed to begin a penalty phase investigation immediately, right?
> A. As soon as I was appointed, I began collecting materials and preparing for the penalty phase.
> Q. And to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. You testified yesterday you were familiar with that, right?
> A. Yes.
> Q. But, sir isn't it true yesterday when asked to recite what the two statutory mental mitigators were, you could not do that, sir?
> A. I answered no to that question – to those questions. (PCR Vol. XIX p. 384-387).

From the above cited testimony of Dr. Gamache, Dr. Dee and Walter Lopez, it is clear that evidence of Valentine's head injury and manic behavior were overlooked by penalty phase counsel. Dr. Gamache was not provided with the testimony on Mr. Valentine's sister who clearly documents the head injury and grandiosity. This would have prompted any mental health professional to give Mr. Valentine a battery of neuropsychological tests. These tests were not done by Dr. Gamache; rather a mere clinical interview with the attorney present was conducted.

Relief is proper and a new penalty phase is the remedy.

The lower court, in its order further held:

Even if Lopez's failure to have Defendant's mental state evaluated further and to present additional mitigation might be considered deficient performance, Defendant has failed to establish prejudice under *Strickland.* At sentencing, the Court found four aggravating circumstances. While the aggravating circumstance that Defendant had been convicted of a prior violent felony would no longer be valid in light of the Florida Supreme Court's reversal of Defendant's conviction on the attempted murder count, three aggravating circumstances remained: the murder was committed during the course of a burglary and kidnapping; the murder was heinous, atrocious, or cruel; and the murder was committed in a cold, calculated and premeditated manner. (*See* sentencing order, attached). "CCP and HAC are two of the weighiest aggravators in Florida's statutory sentencing scheme." *Morton v. State*, 995 So.2d 233, 243 (Fla. 2008) (citing *Larkins v. State,* 739 So.2d 90, 95 (Fla. 1999)). Notably, Dr. Dee did not believe Defendant's capacity to appreciate the criminality of his conduct was substantially impaired because Dr. Dee felt Defendant knew what he was doing was wrong. The only additional mitigating circumstance established by Dr. Dee's testimony is that Defendant was operating under the influence of extreme mental and emotional disturbance. Considering the substantial aggravation found by the sentencing court, Defendant has failed to establish a reasonable probability that had counsel presented this additional statutory mitigator, " the sentencer ... would have concluded that the balance of

> aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. (PCR Vol. XIII p. 2469-2470)

This was error. The post conviction court's application of Strickland was an unreasonable application of federal law as determined by the United States Supreme Court. The post-conviction court erroneously applied a proportionality analysis to a prejudice issue. Pursuant to Urbin v. State, 714 So.2d 411 (1998):

> Proportionality review "requires a discrete analysis of the facts." *Terry v. State*, 668 So.2d 954, 965 (Fla. 1996), entailing a *qualitative* review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis. We underscored this imperative in *Tillman v. State*, 591 So.2d 167 (Fla. 1991):
> We have described the "proportionality review" conducted by this Court as follows:
> Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review *to consider the totality of the circumstances in a case, and compare it with other capital cases*. It is not a comparison between the number of aggravating and mitigating circumstances.
>
> Id.at 416.

The confidence in the outcome was undermined because there was not a fair adversarial testing of the evidence. Leads were abandoned or not explored because trial counsel never expected the case to go to a penalty phase. Any

one of the abandoned leads could have led to non statutory mitigation which should have been considered by the post conviction court due to the holding in Porter cited in the legal argument below.

Legal argument

In Ake v. Oklahoma, 470 U.S. 68, 80-1, 105 S.Ct. 1087, 1095 (1985) The Supreme Court of the United States held:

> [T]hat when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity *Solesbee v. Balkcom,* 339 U.S. 9, 12, 70 S.Ct. 457, 458, 94 L. Ed. 604 (1950),

> and tell the jury why their observations are relevant. Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefor offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation, and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense. Id. At 80-1 **1095

In Mr. Valentine's case the "elusive and often deceptive" symptoms of insanity were neither elusive nor were they deceptive. Mr. Valentine's grandiose mood swings were obvious upon listening to the taped conversations between Mr. Valentine and the surviving victim. A mental health professional would have explained to the sentencing Court why these taped conversations were relevant to prove mania and by extension, the statutory mitigator. The testimony of Mr. Valentine's sister detailing the head injuries that Valentine suffered as a child prompted Dr. Dee to give Mr. Valentine a battery of neuro-psychological tests which revealed frontal lobe damage. These tests results further established the statutory mitigator of extreme mental or emotional distress. The trial court knew nothing about Mr. Valentine's mental state and neither did his own defense team.

In Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995), the Florida Supreme Court held that trial counsel's performance at sentencing was deficient and woefully inadequate where trial counsel failed to unearth a large amount of mitigating evidence which could have been presented at sentencing. Counsel presented limited testimony of lay witnesses. Hildwin at 110fn.7. In Hildwin, at the 3.850 hearing, experts testified that the defendant was under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Hildwin's sentence was vacated. In Mr. Valentine's trial, Mr. Lopez called two lay witnesses; first called was one Iris B. Sterling (FSC ROA Vol. XVI p. 1821-1828). Ms. Sterling was a longtime friend of the Valentine family and saw Terance grow up. (FSC ROA Vol. XVI p. 1823). She described Mr. Valentine as a normal boy, very respectful, an excellent athlete, very tender around small children and enjoyed a normal relationship with his brothers and sisters. (FSC ROA Vol. XVI p. 1823-25). Her testimony can best be described as "nice guy mitigation".

Mr. Lopez then called Frances Valentine Pineda. (FSC ROA Vol. XVI p. 1829-1841). Ms. Valentine-Pineda is the defendant's older sister. (FSC ROA Vol. XVI p.1829). She described defendant as a very mischievous child, liked to move

around a lot and was a nice brother. (FSC ROA Vol. XVI p. 1830). The "elusive and often deceptive" symptoms are detailed thusly:

> Q. You said he was very talkative. Can you tell us more about this very talkative young man?
> A. Yes. He used to like to brag a lot, brag, say things that – tell lies sometimes to feel hisself important. He used to like to fill up stories to make himself very important.
> Q. And when he built these stories, when he made up these stories, it was always to make himself more important?
> A. Yes, was to make – we look at him like something very, very, special. He liked to – he liked to be special. (FSC ROA Vol. XVI p.1830-31)

As detailed in Dr. Dee's testimony to the post-conviction court, this was an example of hypomanic or manic behavior. A qualified mental health professional doing more than a clinical examination with the defendant's lawyer present would have caught this and would have been able to explain to the trial court the ramifications of this testimony. An important statutory mitigator would have been established. Relief is both necessary and proper. Furthermore, the following testimony should have been investigated by a qualified mental health professional:

> Q. Did he have any serious childhood diseases that may have had a lasting effect on him?
> A. Well, he had ordinary children diseases, chickenpox. Measles, is that what you call it?

> Q. Measles.
> A. Something like that, and then he, *if he run around a lot, he fall. He fall twice when he was a baby. He fall and he was unconscious and had to go to the hospital when he was a baby. He fell out of my hands and afterwards, when he was a small child, a small infant more or less, he fell again, and he had to go to the hospital for a few days.(*emphasis added) (FSC ROA Vol. XVI p.1831-32).

It is clear that trial counsel was asking the correct questions to establish statutory mitigation; but the further investigation needed to establish the statutory mitigation was abandoned.

The United States Supreme Court clearly enunciated the duty of a lawyer to investigate when it cited ABA standards in Rompilla v. Beard, 125 S.Ct. 2456, 2466 (U.S., 2005) stating "[i]t is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." Instead of relying on a three hour clinical interview; an interview which consisted of self-reporting with the defendant's lawyer present and with no data from Valentine's relatives, trial counsel should have ordered a complete sixteen hour battery of neuro-psychological testing. Such testing would have confirmed that Valentine, although a very intelligent man, was suffering from frontal lobe damage

in addition to mania and would have further established the statutory mitigation of extreme mental or emotional disturbance. Trial counsel instead merely provided Gamache with records of Valentine's incarceration to establish the non-statutory mitigator of adaptability to prison life. Trial counsel did not comply with his basic duty to the detriment of Mr. Valentine. Relief is proper.

The Florida Supreme Court in Orme v. State, 896 So.2d 725, 732 (Fla. 2005) held that:

> The trial court concluded in its order denying postconviction relief that Orme's defense counsel acted reasonably by not presenting bipolar disorder as a defense during the guilt phase and as a mitigator during the penalty phase, stating that there was some disagreement on how to diagnose Orme at the time of trial and at the postconviction proceeding, even with the additional information presented. The court noted that because the experts agreed that Orme was addicted to cocaine, and the drug addiction was a factor in his murder trial, it was reasonable for trial counsel to present only this evidence. We disagree and find that counsel's performance was deficient in both the investigation of Orme's mental health and the presentation of evidence of Orme's mental illness to the jury. Id. At 732.

In Orme, some mental mitigation evidence was known to counsel before trial and the defendant was evaluated. In Mr. Valentine's case, upon learning of Valentine's

history of head injury; a proper evaluation should have been ordered. Trial counsel abandoned the mitigation investigation. Relief is proper under Orme.

In Ragsdale v. State, 798 So.2d 713 (Fla. 2001), the Florida Supreme Court held that trial counsel failed to conduct a reasonable investigation into the defendant's background for possible mitigation evidence where counsel failed to present evidence of a head injury after childhood accidents. After the accidents, Ragsdale went through behavioral changes in which he would violently "snap" over anything. Experts at the postconviction hearing testified that Ragsdale was under extreme mental and emotional disturbance and was unable to conform his conduct to the requirements of the law. Ragsdale's sentence was vacated and remanded for a new penalty phase. As in Ragsdale, Mr. Valentine suffered a childhood brain injury and was hospitalized according to Frances Pineda. Mr. Valentine was evaluated by Dr. Dee and was found to be brain damaged. "Defense counsel failed to take any steps to uncover mental health mitigation evidence that was readily available and his performance did not fall within the wide range of reasonable professional assistance." Baxter v. Thomas, 45 F.3d 1501, 1514 (11th Cir. 1995). Had trial counsel retained a proper expert to explain the childhood brain injury, the sentencer would have imposed life over death. As it was, Mr. Valentine was deprived of a fair adversarial testing of the evidence due to trial

counsel's ineffectiveness. Relief is proper under Ragsdale and Baxter and a new penalty phase is the remedy.

In Wiggins v. Smith, 123 S.Ct. 2527 (2003) the Supreme Court of the United States ultimately held that "The performance of Wiggins' attorneys at sentencing violated his Sixth Amendment right to effective assistance of counsel." Id. at 2529. Justice O'Connor, in delivering the opinion of the Court, stated:

> We established the legal principles that govern claims of ineffective assistance of counsel in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. *Id.,* at 687, 104 S.Ct. 2052. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id.*, at 688, 104 S.Ct. 2052. We have declined to articulate specific guidelines for appropriate attorney conduct and instead have emphasized that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Ibid.*

The performance of trial counsel in Mr. Valentine's case fell below prevailing professional norms. The deficiencies of counsel extended to the investigative and preparation aspect of the case. Mr. Valentine is entitled to relief

under Wiggins. In Wiggins, the investigation regarding mitigation was abandoned, leads were not pursued. In Mr. Valentine's' case, Lopez failed to do even a cursory investigation. The Supreme Court of the United states further held in Wiggins:

> Counsel did not conduct a reasonable investigation. Their decision not to expand their investigation beyond a presentence investigation (PSI) report and Baltimore City Department of Social Services (DSS) records fell short of the professional standards prevailing in Maryland in 1989. Standard practice in Maryland capital cases at that time included the preparation of a social history report. Although there were funds to retain a forensic social worker, counsel chose not to commission a report. Their conduct similarly fell short of the American Bar Association's capital defense work standards. Moreover, in light of the facts counsel discovered in the DSS records concerning Wiggins' alcoholic mother and his problems in foster care, counsel's decision to cease investigation when they did was unreasonable. Any reasonably competent attorney would have realized that pursuing such leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of aggravating factors from Wiggins' background. Indeed, counsel discovered no evidence to suggest that a mitigation case would have been counterproductive or that further investigation would have been fruitless, thus distinguishing this case from precedents in which this Court has found limited investigations into mitigating evidence to be reasonable. Id. at 2530.

Frances Pineda provided mitigation which should have been further explored and investigated by trial counsel. Due to trial counsel's ineffectiveness, he was unable to establish a statutory mitigator. The mitigating evidence which counsel failed to further investigate and which was presented at the 3.851 was powerful. The evidence of head injury suffered in childhood and infancy was never provided to Dr. Gamache. The lack of impulse control and symptoms of mania were documented by Mr. Valentine's sister Frances and by the taped conversations Valentine had with the surviving victim and his daughter before his capture. The testimony of Dr. Dee at the evidentiary hearing clearly established the statutory mitigator of extreme mental or emotional disturbance. The sentence of death is the prejudice suffered by Mr. Valentine. It is clear from the testimony of Walter Lopez that although he had asked Pineda about the mania and the head injury, he had no idea what that evidence meant in terms of statutory mitigation as he was unaware of that particular statutory mitigator. In assessing the reasonableness of an investigation and the "tactical decisions" resulting from that investigation, the Wiggins Court further held:

> In assessing the reasonableness of an attorney's investigation however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable

> attorney to investigate further. Even assuming Schiaich and Nethercott limited the scope of their investigation for strategic reasons, *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather a reviewing court mist consider the reasonableness of the investigation said to support that strategy. Id. at 2538.

In Mr. Valentine's case, the obvious facts elicited at the evidentiary hearing that Mr. Valentine was given a battery of neuro-psychological tests based on Frances Valentine Pineda testifying that Valentine fell down a lot and was dropped on his head and hospitalized. Dr. Dee further investigated this evidence. Walter Lopez did not. Relief is proper under Wiggins.

In Torres-Arboleda v. Dugger, 636 So.2d 1321 (Fla. 1994), the Florida Supreme Court stated:

> However, we do find merit to Torres-Arboleda's claim in issue three that defense counsel rendered ineffective assistance of counsel during the penalty phase. The original sentencing court found two aggravating circumstances and no mitigating circumstances. The only mitigating evidence that counsel presented during the penalty phase was the expert testimony of clinical psychologist Dr. Mussenden, who testified that Torres-Arboleda was very intelligent and an excellent candidate for rehabilitation. Id. At 1325.

Mr. Valentine contends that the testimony of Dr. Mussenden was much like the bland stipulation of Dr. Gamache that Valentine would do well in prison. The Torres-Arboleda Court went on to hold:

> During the 3.850 hearing, collateral counsel presented substantial mitigation evidence that trial counsel could have discovered if he had conducted a reasonable investigation of Torres-Arboleda's background. Documentary evidence showed that Torres-Arboleda had a history of good behavior during his incarceration in California, had no police record in Colombia, and had attended a university in Colombia. These documents should have been considered in mitigation as such factors may show potential for rehabilitation and productivity within the prison system. *See Stevens v. State*, 552 So.2d 1082, 1086 (Fla. 1989) *Holsworth v. State* 522 So.2d 348, 354 (Fla. 1988). Additionally, these documents could have provided independent corroborative data for Dr. Mussenden's opinion that the defendant had a good potential for rehabilitation. Instead, Dr. Mussenden relied upon the defendant's self-report and some psychological tests as the basis for his opinion. Testimony at the postconviction proceeding also revealed that Torres-Arboleda grew up in abject poverty in Colombia, was a good student and child, and supported his family after his father's death. Such evidence of family background and personal history may be considered in mitigation. Id. At 1325.

The bizarre, rambling testimony of penalty phase counsel at the evidentiary hearing begs further analysis. Firstly, Lopez's statement that he never expected the case to go to penalty phase (PCR Vol. XIX p. 384) is stunning in itself. There was a live witness who was shot in the head by the defendant and lived to testify about the suffering of Ferdinand Porche. The alibi witnesses' testimony was vitiated by the fact that it was years before they came forward with this alibi, they did not immediately inform the American Embassy in 1989 that Valentine was at "the day of the child celebration". Lopez's naive statement that he didn't think the case would go to penalty phase ignores one basic fact of human nature; people rarely lie about the folks who shoot them in the head. Secondly, Lopez relied on a three hour clinical interview done by William Fuente and Dr. Gamache. The testimony of Frances Valentine Pineda clearly was a lead (the history of head injury as were the taped conversations which Valentine had with the surviving victim and his daughter) which should have been provided to Dr. Gamache. Gamache could have done a complete battery of neuro-psychological tests. Mr. Lopez did not provide this information to Gamache nor did he attempt to establish any statutory mental mitigation through the testimony of Dr. Gamache or any lay witness. (PCR Vol. XVII p. 187). As in Torres-Arboleda, collateral counsel presented substantial mitigation evidence that trial counsel could have discovered if he had conducted a

reasonable investigation. Dr. Dee addressed the mental health examination that Gamache did as opposed to Dr. Dee's in the following manner:

> BY MR. KILEY:
>
> Q. Let me show you what already is in evidence as Number One. You flip it to the other side, sir, and see – let me get my copy and read along with you.
> The data Dr. Gamache had available; do you remember it?
> A. Yes, sir.
> Q. Now, this services rendered, does it indicate that Dr. Gamache read any of the trial transcripts?
> A. No.
> Q. Does it indicate anywhere that Dr. Gamache interviewed that penalty phase witnesses like Francis Valentine, the sister?
> A. No.
>
> Q. Does it indicate that Dr. Gamache had an extensive clinical interview with Mr. Valentine?
> A. I don't think so.
> Q. Does it indicate to you that Dr. Gamache knew about the intricate facets about the case?
> A. Well, given the amount of time he spent reviewing the records I would not think so.
> Q. Does it indicate to you that Dr. Gamache even read a police report concerning this?
> A. You can't tell.
> Q. All right, Doctor, let me show you something else here. This is Defense Exhibit Two what does that indicate that Dr. Gamache reviewed?

A. Prison records.
Q. Thank you.
A. That's it.
Q. Nothing else?
A. No.
Q. Now it is possible, sir, that had Dr. Gamache reviewed the same material that you reviewed and did the same tests that you took he could have a different opinion, correct, sir?
A. Yes.
Q. However, sir, would you agree or disagree that would have been up for a jury or a judge to decide which opinion was more credible?
A. Yes.
Q. And again, sir, in order for you to evaluate what Dr. Gamache tests were, first of all you need to know what they were, right?
A. Right.

Q. You don't know if he was measuring this particular difference in intelligence or brain lesion stuff that you have testified at length and to the other confusion of defense counsel previously.
A. I have no idea.
Q. You don't know if he gave him the Wechsler, the Denman, the card sorting, the line drawing, whatever you gave him, right?
A. Well, first of all he couldn't have given him the neurological battery and interview him because there wasn't enough time billed for doing all that. Three hours is what he billed for and mine took at least 16 hours.
Q. Really?
A. Yes. (PCR Vol. XVII p. 258-260).

The testimony of Dr. Michael Gamache which detailed the extent of his evaluation of Mr. Valentine was addressed in this manner:

> Q. Okay. Do you have an independent recollection of meeting with Mr. Valentine and William Fuente and Walter Lopez?
> A. No, I don't.
> Q. Okay. Do the files that you have give you an indication of the sorts of things that you would have done when you met with Mr. Fuente, Mr. Lopez and Mr. Valentine?
> A. They do give me some indication, yes.
> Q. And would you please describe what that indication is?
> A. Well, from the – from the invoice, I can determine that that – as well as from the notes, I can determine that I met with Mr. Valentine face to face and conducted an examination on March 15 of 1994. From the invoice, I would conclude that – Bill Fuente was there and present for the examination. That on a date subsequent to that, April of – 14 of 1994, that I reviewed a volume of records that were provided. On July 15 of 1994, I had a telephone consultation with attorney Walter Lopez. On August 16, 1994, I had another telephone consultation with attorney Walter Lopez. On that same date, I had a conference – I guess a face-to-face conference with him. I don't know whether that was in my office or his office or elsewhere. That was also on 8-16-1994. On the same date, my records reflect that there was a telephone consultation at the request of attorney Lopez with

assistant state attorney – looks like the name is Chris Wilkes.
Q. Actually I think the – one of the prosecutors on the case was a Chris Watson –
A. Okay.
Q. – rather than Chris Wilkes.
A. Chris Watson then. The invoice says Wilkes, but that could be an error. The following day, August 17, 1994, there was a telephone consultation again with attorney Walter Lopez. August 17, 1994, I reviewed an additional volume of records that were provided. And then it looks – I don't –I don't have documentation of any other activity until March 27 of 1995 when I sent a letter to Mr. Lopez about the status of the case.
Q. And did you record what your opinion about Mr. Valentine was with regard to the second phase and mitigation?
A. I did not.

Q. Did you record in your letter to Mr. Lopez the substance of your testimony that you and he had discussed?
A. I believe that is reflected in there. And, again, just to be clear about your previous question, I don't have a record of recording my opinion in this case. That doesn't mean that I didn't, but there is no longer a record of it in this file. But in the letter that I referred to, in the first paragraph of that letter, I make reference to one of the telephone consultations that I had with Mr. Lopez where he indicated that the only mitigation that he had to present at sentencing would be my testimony regarding Mr. Valentine's ability to adapt to incarceration. And while I don't independently recall that, I would presume

> that we had some discussions about that, and that I thought that – that that was something that could be presented in mitigation in Mr. Valentine's case. That is I didn't find anything in the examination that would suggest that he was necessarily a threat or danger in an incarcerative setting, and that he could probably adapt adequately to such a setting. (PCR Vol. XIX p. 419-422).

It is clear that penalty phase counsel's representation, investigation and preparation of the penalty phase case fell far below prevailing professional standards pursuant to Wiggins. Penalty phase counsel testified that Gamache did not talk to mitigation witnesses. (PCR Vol.XVI I p. 184-185). Mr.Lopez did not provide Dr. Gamache with trial transcripts or depositions or police reports. (PCR Vol. XIX p. 381-382). The mania which Dr. Dee discovered was easily discoverable by Dr. Gamache had he listened to the taped conversations between Valentine and the surviving victim. The frontal lobe damage discovered by Dr. Dee was also easily discoverable by Dr. Gamache had he given Valentine the 16 hour battery of neuro-psychological tests. Instead, Mr. Lopez relied only upon a clinical interview conducted by Dr. Gamache and Mr. Valentine's previous lawyer, William Fuente.

In Pearce v. State, 994 So.2d 1094 (Fla. 2008), the Florida Supreme Court reversed the post-conviction court's order granting Pearce a new guilt phase, but affirmed the post-conviction court's order granting Pearce a new penalty phase

based on the ineffectiveness of penalty phase counsel. The Florida Supreme Court held:

> Defense counsel indicated that Pearce did not want any form of mitigation presented during the penalty phase. However, an attorney's obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated because this is an integral part of a capital case. *See* *State v. Lewis*, 838 So.2d 1102, 1113 (Fla. 2002) (citing *Rose*, 675 So.2d 567 (holding that an attorney's failure to conduct a reasonable investigation for possible mitigation evidence may render counsel's assistance ineffective)). Although a defendant may waive mitigation, he should not do so blindly. Counsel must first investigate and advise the defendant so that the defendant reasonably understands what is being waived and reasonably understands the ramifications of a waiver. The defendant must be able to make an informed, intelligent decision. *See, e.g.*, *Lewis*, 838 So.2d at 1113 (citing *Koon v Dugger*, 619 So.2d 246, 249 (Fla. 1993)0; *Deaton v. Dugger*, 635 So.2d 4, 8 (Fla. 1993).
>
> We find there is competent, substantial evidence to support the trial court's finding that counsel did not spend sufficient time to prepare for mitigation prior to Pearce's waiver. In preparing for the penalty phase, counsel never investigated Pearce's background, never interviewed members of Pearce's family, and never investigated mental health issues. Therefore, counsel was unable to advise Pearce as to potential mitigation. Thus, the evidence supports the trial court's finding that Pearce's waiver of the presentation of mitigation

> evidence was not knowingly, voluntarily, and intelligently made. Pearce suffered prejudice based on this lack of a knowing waiver because there was substantial mitigating evidence which was available but undiscovered We affirm the trial court's conclusion that Pearce established a claim for ineffective assistance of counsel in the penalty phase of the trial. Id. at 1102-1103.

In Mr. Valentine's case, Dr. Gamache could not testify as to what if any neuro-psychological tests were conducted as part of the clinical examination:

> Q. No, okay. Now, Doctor, so, if you had administered any neruopsychological tests to Mr. Valentine, would you have billed the State of Florida for that?
>
> A. Yes, I would have. But that would not necessarily – I could have administered psychological or neuropsychological tests as part of the psych examination. We don't necessarily itemize that out timewise, but if I spent time doing it, it would be part of the bill. (PCR Vol. XIX p. 425).

One thing is certain, however, Gamache did not do a complete battery of neuro-psychological tests as did Dr. Dee otherwise there would be a 16 hour billing entry.

A recent case which supports the granting of a new penalty phase is Hurst v. State 18 So.2d 975 (Fla. 2009). As in Mr. Valentine's case, Defense counsel Raymond Glenn Arnold testified that he "didn't think that a shrink would find a mental problem," and that he believed he was going to win the guilt phase. Id. At

1009. As in Pearce and Lewis, Mr. Valentine's waiver of presentation of mitigation to the penalty phase jury was not freely, voluntarily, knowingly and intelligently made. As far as Mr. Valentine was concerned, the only mitigation available to him was a paltry stipulation that he would do well in prison. Had he been aware that an important statutory mitigator could have been established had penalty phase counsel bothered to do his job, whether such statutory mitigation could have been presented to a jury or a sentencing Court, the outcome would have been different. But for counsel's unprofessional errors in investigation and preparation, Mr. Valentine was deprived of a reliable adversarial testing of the evidence.

The Hurst Court held that "The evidence presented at the evidentiary hearing established that significant mental mitigation was available and could have been presented in the penalty phase of trial if Hurst had been examined by a mental health expert." Id. At 1010. At Mr. Valentine's evidentiary hearing Dr. Dee testified that a complete neuro-psychological battery of tests was performed on Mr. Valentine. Trial transcripts, police reports, taped telephone conversations and depositions were reviewed by Dr. Dee to avoid the danger of self-reporting and the mania (an extreme emotional disturbance) as well as the frontal lobe damage (an

extreme mental disturbance) was established. All of the evidence of mental or emotional disturbance at the time of the offense could have and should have been discovered and presented at penalty phase by penalty phase counsel. This was not done; to the detriment of Mr. Valentine.

Regarding the propriety of having the client thoroughly examined by a mental health professional, the Hurst Court cited Jones v. State, 998 So.2d 573 (Fla. 2008) in this manner in reaching its decision to award Hurst a new penalty phase:

> Where available information indicates that the defendant could have mental health problems, "such an evaluation is 'fundamental in defending against the death penalty.'" Arbelaez, 898 So.2d at 34 (quoting Bruno v. State, 807 So.2d 55, 74 (Fla. 2001) (Anstead, J., concurring in part and dissenting in part)). Id. At 583.

In Mr. Valentine's case, the pre-trial depositions and taped phone conversations which Dr. Dee reviewed and which were certainly available to trial counsel clearly indicated that the magical thinking and mania was information that the defendant could have mental health problems. Effective counsel would not have abandoned these leads and would have further investigated. Had he done so, a statutory mitigator would have been established.

The Hurst Court further held:

> Although trial counsel testified that he personally saw nothing that would have required a psychiatric or psychological examination, in assessing the reasonableness of counsel's investigation and decision not to obtain a mental health evaluation in this case, the Court " must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Wiggins v. Smith, 539 U.S. 510, 523 (2003).We conclude that the evidence and information available to Hurst's counsel was sufficient to place him on notice that further investigation of mental mitigation was necessary; consequently, his decision not to pursue it was not reasonable under the circumstances of this case. Id. at 1010.

The Hurst Court further held:

> Recently, in Parker v. State, 3 So.3d 974 (Fla. 2009), we reversed for a new penalty phase where counsel presented only "bare bones" mitigation at trial and where substantial mental mitigation and mitigation concerning Parker's childhood were discovered and presented at the postconviction evidentiary hearing. Id. At 984. The Court stated, "The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" Id. At 984-85 (quoting the American Bar Association, Guidelines for

> the Appointment and Performance of Counsel in Death Penalty Cases guideline 11.4.1 (C), at 93 (1989)). "Among the topics that counsel should consider presenting in mitigation are the defendant's medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." Parker, 3 So.3d at 985 (citing ABA guideline 11.8.6, at 133). In this case, counsel not only failed to investigate mental mitigation reasonably suggested by available evidence, he also failed to present the relevant features of Hurst's educational background and school records, which showed Hurst was a special education student with borderline intelligence who dropped out of school after repeating the tenth grade. Id. at 1011.

Postconviction counsel respectfully contends that the testimony of Iris Sterling cited above stating that this recently convicted murderer was really very respectful in school, the testimony of Frances Valentine Pineda which provided leads that were ignored by defense counsel, the testimony of Emigrey Zuniga Rios (FSC ROA Vol XVI p. 1842-1844) that Mr. Valentine was good with children and the paltry stipulation that was read to the trial court was indeed "bare bones mitigation." There was nothing to prevent penalty phase counsel from taking the leads supplied by Frances Valentine Pineda and doing a complete mental health investigation and presenting it at the Spencer hearing.

The Hurst Court further held:

> In Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995), we reversed for a new penalty phase because trial counsel's investigation was "woefully inadequate" and failed to discover "an abundance of mitigating evidence which his trial counsel could have presented at sentencing," in addition to the lay witnesses who testified and which would have established statutory mental mitigation. Id. at 109-10.
>
> Thus, mental mitigation that establishes statutory and nonstatutory mitigation can be considered to be a weighty mitigator, and failure to discover and present it, especially where the only other mitigation is insubstantial, can therefore be prejudicial. We do not overlook the fact that this murder was especially heinous, atrocious or cruel or that the robbery aggravator clearly exists. Id. At 1014.

Ultimately, the Hurst Court held:

> Because this mitigation was not made available for the jury or the trial judge to consider before the death sentence was imposed, our confidence in the imposition of the death penalty in this case is undermined. Accordingly, we must vacate the death sentence in this case and remand for a new penalty phase proceeding. Id. At 1015.

The United States Supreme Court also addressed lack of investigation in Williams v. Taylor, 529 U.S. 362 (U.S. Va., 2000) stating that "the graphic description of

Williams' childhood, filled with abuse and privation, or the realty that he was "borderline mentally retarded," might well have influenced the jury's appraisal of his moral culpability." In Williams, the Court recognized the influence that mitigation evidence could have on a jury. In Mr. Valentine's case, the establishment of a statutory mitigator might well have influenced the jury's appraisal of his moral culpability or assuming his waiver of the penalty phase jury hearing this important mitigation was knowingly, voluntarily and intelligently made (this assumption is purely speculative as Mr. Valentine had no knowledge that a statutory mitigator would be established due to penalty phase counsel's ineffectiveness) to the trial court. In Porter v. McCollum,558 U.S. ----, 130 S.Ct. 447, 449 (2009) 175 L.Ed.2d 398 (2009), the facts and legal reasoning of the United States Supreme Court fall squarely on point with the facts of Mr. Valentine's case. Regarding the post-conviction aspect of Porter's case; the United States Supreme Court contrasted what was presented in penalty phase and what was presented at the post-conviction evidentiary hearing thusly:

> In 1995, Porter filed a petition for postconviction relief I state court, claiming his penalty-phase counsel failed to investigate and present mitigating evidence. The court conducted a 2-day evidentiary hearing, during which Porter presented extensive mitigating evidence, all of which was apparently unknown to his penalty-phase

> counsel. Unlike the evidence presented during Porter's penalty hearing, which left the jury knowing hardly anything about him other than the facts of his crimes, the new evidence described his abusive childhood, his heroic military service and the trauma he suffered because of it, his long-term substance abuse, and his impaired mental health and mental capacity. Id. At 449.

In Mr. Valentine's case, the trial Court knew nothing about Mr. Valentine other than the facts of the crime itself. Mitigation was minimal, vague, testimony by lay witnesses and a stipulation that Mr. Valentine would adapt to prison life, was read into the record.

Regarding the psychological evaluation and its application to Mr. Valentine's case; the Porter Court held thusly:

> In addition to this testimony regarding his life history, Porter presented an expert in neuropsychology, Dr. Dee, who has examined porter and administered a number of psychological assessments. Dr. Dee concluded that Porter suffered from brain damage that could manifest in impulsive, violent behavior. At the time of the crime, Dr. Dee testified, Porter was substantially impaired in his ability to conform his conduct to the law and suffered from an extreme mental or emotional disturbance, two statutory mitigating circumstances, Fla. Stat.§ 921.141 (6). Dr. Dee also testified that Porter had substantial difficulties with reading, writing, and memory. And that these cognitive defects were present when he was

> evaluated for competency to stand trial. 2/Tr. 227-228 (Jan. 5, 1996); see also Record 904-906. Although the State's experts reached different conclusions regarding the statutory mitigators, each expert testified that he could not diagnose Porter or rule out a brain abnormality.

Id. at 451.

At Mr. Valentine's evidentiary hearing, the State called no experts to test and subsequently render a diagnosis. Therefore, Dr. Dee's diagnosis of hypo-mania and brain damage which established an important statutory mental mitigator was unrebutted.

Regarding the investigation of mitigation; the Porter Court held further:

> Because the state court did not decide whether Porter's counsel was deficient, we review this element of Porter's *Strickland* claim *de novo. Rompilla v. Beard*, 545 U.S. 374, 390, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). It is unquestioned that under the prevailing professional norms at the time of Porter's trial, counsel had an "obligation to conduct a thorough investigation of the defendant's background." *Williams v. Taylor*, 529 U.S. 392, 396, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The investigation conducted by Porter's counsel clearly did not satisfy those norms. Id. at 452-453.

In Mr. Valentine's case, the investigation at trial as opposed to the investigation and evaluation of Mr. Valentine in post-conviction clearly fell under the prevailing

professional norms. The sentencing court heard nothing that would humanize Mr. Valentine. Regarding this aspect of the case, the Porter Court further held:

> The judge and jury at Porter's original sentencing heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability. They learned about Porter's turbulent relationship with Williams, his crimes, and almost nothing else. Had Porter's counsel been effective, the judge and jury would have of the "kind of troubled history we have declared relevant to assessing a defendant's moral culpability." *Wiggins, supra,*at 535, 123 S.Ct. 2527. Id. at 454.

In Mr. Valentine's case, the facts of the crime and the paltry stipulation that Mr. Valentine would adapt to prison life did nothing to enable the sentencing court to assess Mr. Valentine's moral culpability. The evidence of brain injury, hypo-mania, magical thinking and extreme mental or emotional disturbance adduced at the evidentiary hearing would have changed the outcome of the case. Relief is proper.

Regarding the issue of prejudice; the Porter Court held:

> The Florida Supreme Court's decision that Porter was not prejudiced by his counsel's failure to conduct a thorough- or even cursory-investigation is unreasonable. The Florida Supreme Court either did not consider or unreasonably discounted the mitigation evidence adduced

> in the postconviction hearing. Under 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. See, *e.g. Hoskins v. State*, 965 So.2d 1, 17-18 (Fla. 2007) (*per curiam).* Indeed, the Constitution requires that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor." *Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Yet neither the postconviction trial court nor the Florida Supreme Court gave any consideration for the purpose of nonstatutory mitigation to Dr. Dee's testimony regarding the existence of a brain abnormality and cognitive defects. While the State's experts identified perceived problems with the tests that Dr. Dee used and the conclusions that he drew from them, it was not reasonable to discount entirely the effect that his testimony might have had on the jury or the sentencing judge. Id. at 454-455.

Because trial counsel "didn't think the case would go to penalty phase"; he completely neglected to prepare any meaningful mitigation at all. At the evidentiary hearing, it was clear that significant leads were ignored. Had Valentine's childhood history and behavior been explored, significant non statutory mitigation would have been established. For example, Valentine's interaction with family members and other children (story telling and magical thinking) would be found. That Valentine was really a wronged husband rather than a jealous ex-husband would have highlighted the cultural differences

regarding marriage in Central America versus the United States. Valentine's devotion to his daughter along with the established stipulated adaptability to prison and the established mental mitigation would have swayed the sentencer to recommend life over death. Relief is proper.

CONCLUSION AND RELIEF SOUGHT

In light of the facts and arguments presented above, Mr. Valentine never received a fair adversarial testing of the evidence. Confidence in the outcome is undermined and the judgement of guilt and subsequent sentence of death is unreliable. Mr. Valentine requests this Honorable Court to vacate the convictions, judgments and sentences including the sentence of death, and order a new trial.

CERTIFICATE OF SERVICE

HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this_____, day of March, 2011.

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I HEREBY CERTIFY that a true copy of the foregoing **Initial**

Brief, was generated in a Times New Roman 14 point font, pursuant to Fla. R. App. P.9.210.

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