IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-1967

LANCELOT URILEY ARMSTRONG,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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INTRODUCTION

LANCELOT URILEY ARMSTRONG ("Armstrong") submits this reply brief in response to the State's answer brief in SC14-1967. Armstrong will not reply to every factual assertion, issue or argument raised by the State and does not abandon or concede any issues and/or claims not specifically addressed in the reply brief. Armstrong expressly relies on the arguments made in the initial brief for any claims and/or issues that are only partially addressed or not addressed at all in this reply.

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REPLY TO ARGUMENT I

ARMSTRONG RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT HIS RESENTENCING IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

When David Rowe conducted Armstrong's resentencing, he had never done a capital penalty phase. He had no training or education about how to conduct one, and his inexperience and lack of knowledge was painfully obvious. The State extolled Rowe's experience of "handl[ing] four capital cases and attending a death penalty seminar put on by the Broward County Bar Association[1]" (Answer p. 77) but failed to acknowledge the salient fact that none of Rowe's previous four capital cases had proceeded to a penalty phase. In Rowe's motion to the circuit court requesting appointment in Armstrong's case, he inexplicably listed his expertise in the "Jamaica-US Extradition Treaty" and "Caribbean Law issues" as qualifications for conducting a capital resentencing proceeding as lead counsel. (PCR-2. 1878.) Rowe's co-counsel, Donovan Parker, was even more inexperienced and filed

[1] Rowe admitted at the postconviction hearing that the only capital defense seminar he had attended was a "lunch session," not the twelve hours of continuing education recommended by Florida Rule of Criminal Procedure 3.112. (PCR-2. 1781-82.)

a motion requesting appointment under Florida Rule of Criminal Procedure 3.112 allowing appointment of otherwise unqualified capital counsel under exceptional circumstances. (PCR-2. 1940-42.)

Florida Rule of Criminal Procedure 3.112 was promulgated specifically to prevent such unqualified attorneys from representing capital defendants. The rule provides that "[t]he purpose of these rules is to set minimum standards for attorneys in capital cases to help ensure that competent representation will be provided to capital defendants in all cases." Fla. R. Crim. P. 3.112 (a). The abysmal performance of David Rowe, who did not meet a single one of the minimum requirements of Rule 3.112,[2] illustrates the danger inherent in allowing unqualified attorneys to handle capital cases.

Rowe did not understand mitigation and could not counsel his cognitively challenged client about it, and the trial court improperly failed to consider available mitigation because there was no nexus between it and the crime.

Rowe's comments on the record demonstrate that he had no idea what mitigation was. His statements to the court that he did not intend to present mental health mitigation because Armstrong was not "mad" or "crazy" indicate that to him, mental health mitigation and insanity were one and the

[2] Rowe was evasive in his testimony regarding his (lack of) experience, and rather than answering "no" to the question of whether he had ever conducted a penalty phase, he stated "it's not my fault that the State dropped the death penalty after the case starts." (PCR-2. 1773.)

same. (R. 1026, 1379.) Given Rowe's own misunderstanding of mitigation, it stands to reason that his discussions with Armstrong were littered with the same ignorance. Since Rowe did not understand or condone the use of mental health mitigation evidence himself, there is no way he could have properly counseled his cognitively impaired client about whether to present it or not.

It was well established at the 2001 evidentiary hearing that Armstrong suffers from cognitive impairments including frontal lobe dysfunction and deficits in basic information processing, organic brain dysfunction, and neuropsychiatric difficulties. Four mental health experts,[3] whom the State characterized as "esteemed doctors from the National Institute of Health" (R. 1024), testified regarding Armstrong's cognitive dysfunction, and their testimony was voluminous and unrefuted. The State did not present a single witness at the 2001 postconviction hearing.

Dr. Richard Dudley, a clinical psychiatrist, testified that Armstrong suffered from long-standing cognitive deficits caused by extensive frontal lobe damage, and that those impairments caused Armstrong to be impulsive and hypervigilant. (PCR-1. 1272-77.) Dr. Terry Goldberg, a neuropsychologist, testified that his findings were consistent with Dr.

[3] Counsel mistakenly asserted in the initial brief that six experts testified at Armstrong's 2001 evidentiary hearing, when in fact there were five, four of whom were mental health experts. (Initial Brief p. 4.)

Dudley's, and opined that Armstrong suffers from moderate to severe impairment of his working memory, which correlates to one's ability to adapt and function in the world, as well as one's decision-making. He also testified that someone with these impairments would have difficulty inhibiting impulses in stressful situations. (PCR-1. 152-54.) Dr. Thomas Hyde, a behavioral neurologist, also reached findings consistent with those of the other experts. He found that Armstrong suffers from significant organic brain dysfunction including frontal lobe, parietal lobe, and temporal lobe damage, and that damage to these areas impedes reasoning and increases impulsivity. (PCR-1. 188.) In addition to the expert witnesses, postconviction counsel presented several lay witnesses who testified about Armstrong's horrific childhood in Jamaica, which Justice Anstead characterized as "substantial important mitigation" in his concurrence to the opinion remanding the case to the lower court for a new penalty phase. *Armstrong v. State*, 862 So. 2d 705, 724 (Fla. 2003).

The State argued that this was not a case where resentencing counsel failed to investigate potential mitigation, but rather one where counsel did investigate and then made an informed decision not to present it. (Answer p. 36.) In support of this argument, the State averred that "resentencing counsel moved for the disclosure of Dr. Griesemer's raw data collected during a

neurological exam, for travel funds for State mental health experts Drs. Martell and Griesemer, and for additional funds for defense mental health expert, Dr. Harvey," implying that Rowe had conducted some discovery and investigation into potential mental health issues and discarded it after proper investigation. (Answer p. 36.) However, the resentencing counsel who requested that information was not Rowe, but rather Armstrong's prior counsel, Hilliard Moldof. Moldof testified at the postconviction evidentiary hearing that although he gave his files to Rowe, Rowe never contacted him and they never spoke to each other about the case. (PCR-2 1677.) There is no evidence that Rowe followed up on any of the investigation Moldof had begun, presumably because he was a "qualified attorney" and was "not required to use any previous attorney's defense." (PCR-2. 1026.) He was, however, under an ethical obligation to fully investigate all potential avenues of mitigation.

Counsel has a "strict duty to conduct a reasonable investigation of a defendant's background for possible mitigating evidence," and "[t]he failure to investigate and present available mitigating evidence is of critical concern along with the reasons for not doing so." *State v. Riechmann*, 777 So. 2d 342, 350 (Fla. 2000). Rowe failed to speak to any of Armstrong's prior attorneys or consult with any of the expert witnesses who had previously testified before

counseling his client about whether such evidence should be presented, therefore his performance was per se inadequate. *See Rompilla v. Beard*, 545 U.S. 374, 383-93 (2005) (defense counsel's failure to obtain file of prior violent felony was deficient performance which resulted in prejudice); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) ("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''); *Williams v. Taylor*, 529 U.S. 362 (2000) ("It is undisputed that [the defendant] had a right—indeed, a constitutionally protected right—to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer.").

The initial postconviction court improperly rejected the available mental health mitigation evidence because there was no nexus between it and the crime, and the resentencing court adopted that flawed reasoning when failing to consider it. The lower court discounted the testimony of the mental health experts, finding that "even if Defendant had presented during the resentencing proceedings all the evidence presented during his 2001 postconviction proceedings there is no reasonable probability that he would have received a different sentence." (PCR-2. 1381.) In so holding, the lower

court essentially adopted the findings of the initial postconviction court, which found the experts' testimony incredible and dismissed it because "none of the three experts called had an accurate understanding or grasp of the salient facts of the crimes for which the Defendant was convicted." (PCR-2. 1380.) However, it is well-settled that there does not need to be a nexus between mitigation evidence and the crime, and a trial court cannot require one when considering mitigation evidence. *Tennard v. Dretke*, 542 U.S. 274, 276 (2004). Although the court can consider the circumstances of the offense when assigning weight to mitigation evidence, the court cannot discount mitigation because there is no nexus between it and the crime.

The State attempted to justify Rowe's failure to investigate and present available mitigation by arguing that "each suggested mental health expert brought with him testimony damaging to Armstrong." (Answer p. 42.) With respect to Dr. Hyde, the "damaging" testimony the State referred to was the testimony discussed above, which the State mischaracterized. (Answer p. 43, fn. 17.) The supposedly "damaging" testimony Dr. Dudley would have offered was that Armstrong "was able to teach himself basic carpentry skills, he started a business which generated enough money to support himself, his immediate and extended family, as well as his friends." (Answer p. 42, fn. 15.) Contrary to the State's assertion, a person with cognitive deficits often

has the ability to function in certain areas while failing spectacularly at others. Regarding Dr. Appel's trial testimony, the State emphasized the doctor's statement that "'I am not telling you the head injury was responsible for any of this.'" (Answer p. 42, fn. 14.) Dr. Appel's inability to provide a nexus between Armstrong's head injury and the crime does not negate the viability of such evidence as mitigation.

Regarding Dr. Goldberg, the State argued that his report and testimony "indicate that Armstrong suffers from moderate impairment to cognitive control resulting in impulsivity, inability to plan or develop a reasonable strategy in non-routine situations." (Answer p. 42, fn. 16.) The State failed to indicate why that particular evidence would be damaging to Armstrong. Then the State argued that because Dr. Goldberg was not intimately familiar with the facts of the crime that his opinion was invalid, once again attempting to impose an unconstitutional burden on Armstrong of establishing a nexus. The State further argued that Dr. Goldberg had testified that "his opinion was based primarily on the neuropsychological testing and the facts/background were of minimal significance." (Answer p. 42, fn. 16.) It is perplexing how this testimony would have been damaging to Armstrong since neuropsychologists' opinions regarding mental health issues or cognitive deficits are necessarily based upon their testing, among other things. Whether

or not Armstrong suffers from cognitive deficits is not proven or disproven by the facts of the crime, it is proven by empirical testing data, which the State did not challenge.

Despite the State's attempts to inflate Armstrong's cognitive abilities through false statements and misdirection, the fact is that Rowe never had Armstrong evaluated for competency, even though Armstrong was determined to sink his own ship. *See Boyd v. State*, 910 So. 2d 167 (Fla. 2005) (Defendant was "exercising his right to be 'captain of the ship' in determining what would be presented during the penalty phase.[4]"). It stands to reason that a person with such pervasive cognitive deficits—which directly impacted his ability to make decisions and function effectively—would lack the ability to act in his own best interest. Given Rowe's dismissive attitude toward mental health issues, it is not surprising that he failed to investigate whether his client was currently suffering from any, or whether he was competent to execute a knowing, voluntary, and intelligent waiver of what Justice Anstead considered to be "substantial important" mitigation. *See Armstrong*, 862 So. 2d at 724. Mental health issues are so ubiquitous among capital defendants that the ABA

[4] It is important to note that this Court's holding in *Boyd* presupposes that a defendant who waives mitigation is competent. *See Boyd*, 910 So. 2d at 189 ("[W]e have long recognized that a **competent** defendant may waive the right to present all mitigating evidence.") (emphasis added).

Guidelines mandate that "at least one member of the defense team be a person qualified by experience and training to screen for mental or psychological disorders or defects." *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Revised Ed. 2003). Not only did the defense team not include anyone with such qualifications, but Rowe failed to have his client evaluated by a mental health professional despite his long and well-documented history of mental health problems.

The State made several misleading assertions regarding findings of Armstrong's competency. The State emphasized that "the original direct appeal and 2001 collateral proceedings show that Armstrong ha[d] been found competent to stand trial." (Answer p. 46, fn. 19). However, Armstrong was never evaluated for competency after 1991. The initial postconviction court's 2001 order merely noted that Armstrong had been found competent to stand trial **in 1991**. But the State's argument that Armstrong had been found competent in 1991 and in 2001 was simply wrong. The State also argued that Dr. Hyde, a defense expert at the 2001 postconviction hearing, testified that "**Armstrong was competent to stand trial**." (Answer p. 43, fn. 17) (emphasis in original). The State was so emphatic about this falsehood that it bolded and underlined it. The problem is that Dr. Hyde never said that, and the State's citation to the portions of the first postconviction record which

supposedly supported this fallacy (PCR-1. 175-79, 183, 212) was either a mistake or a deliberate attempt to mislead this Court. What Dr. Hyde did, in fact, testify was that he "believed [Armstrong] was competent," only in response to this question by the prosecutor: "The evaluations you saw, competency evaluations you saw of Mr. Armstrong, how would you assess their thoroughness?" (PCR-1. 215.) Dr. Hyde then qualified his answer by saying, "I agree with the conclusions he was competent." (PCR-1. 215.) Again, however, this testimony referred to the competency evaluations that were done **in 1991**. Dr. Hyde never evaluated Armstrong for competency himself. Furthermore, apparently the State considers itself a forensic mental health expert capable of assessing competency, as it argued that "Armstrong's testimony, colloquy with this Court, and pro se filings regarding his desire to discharge counsel prove his competency." (Answer p. 46.)

As if to imply that Armstrong was competent to waive mitigation at his resentencing, the State and the lower court made much of the fact that Armstrong "testified before the jury for approximately eight (8) hours" and "he was coherent in his answers and able to withstand the rigors of cross-examination." (PCR-2. 1377; *see also* Answer p. 46.) However, a review of Armstrong's testimony shows that his responses were rambling, confusing,

and often nonresponsive. To be fair, Rowe's lines of questioning were fairly nonsensical, such as this exchange:

> ROWE: During the time you were an auxiliary police officer, did you come under fire?
>
> ARMSTRONG: Yes, I came under fire a lot of times when I was a member of that club. There was a lot of people. Because violence was so bad, I had a lot of friends. And the police were forced to put things to my head. So I had close friends all over the place within a year or two.
>
> ROWE: What was it about the violence that eventually led you to leave the auxiliary police force and come to the United States?
>
> ARMSTRONG: At that time a lot of things were going on all at once. Some people didn't like the fact I was working for the police. At that time someone wanted to take revenge. I was still working part time.
>
> ROWE: Was there any ruling after as to an auxiliary police officer working at rafting?
>
> ARMSTRONG: Some of them were working at rafting also. While we were working there, I did assist some of them there to stop one of the guys who wanted to steal from

the tourists. At times we wanted to make those tourists a good visit in Jamaica. They come with a good recommendation to make more, so at that time the one coming there try to steal, we'll always try to stop him from doing that. At that time some people were authorized to be at certain locations or just our selling souvenirs or selling any type of stuff to the tourists.

ROWE: Who won the 1980 election, Castro or U.S. Forces?

ARMSTRONG: I would say U.S. Forces, because JP Watts was supported by the United States. That's why there was such a reaction of the people of the national party. Most of the people at that time, as I remember, most of the people who came up and were farm workers, it caused a reaction, because some of those people didn't even get paid and it was easier for someone else to get paid. I can't remember when Castro was in custody. I remember he was out on PBS talking about the amount every month, what those people with farms were supposed to take back to their farms. So there was a little bad feeling about the people who supported Castro. There was always a retaliation.

> Just for example, while I was working, as soon as the party was once in power, those people lost their jobs because the party in power wants to put their own people there, even though some of them were experienced in that area. Those other senior people lost their jobs just because the change in party.

(RS. 1106-07.) This is merely one excerpt from Armstrong's eight-hour testimony, which the lower court characterized as "coherent" but which was obviously anything but. Further, despite the State's attempts to bolster Armstrong's competency, the fact remains that he was never evaluated for competency after 1991.

There was a wealth of mitigation evidence that was available to David Rowe, and he failed to investigate or present any of it, purportedly following instructions from his cognitively impaired client who suffers from a panoply of mental health issues. He also failed to ascertain whether his client was competent to waive valuable mitigation, in part because he did not recognize its value and chose instead to re-litigate the guilt phase, which was objectively unreasonable given the voluminous evidence against Armstrong. Rowe's performance was constitutionally ineffective. If a jury had heard this important, substantial mitigation evidence, it is likely that the result would

have been different, especially since the jury recommendation was 9-3 in favor of death. Relief should issue.

Rowe failed to challenge the State's case and failed to mount a viable defense.

At the resentencing, the State presented almost the exact same case as it had presented at trial. The State argued in its answer brief that at Armstrong's resentencing, the State "presented evidence and witnesses which comported with the facts presented in the initial trial in order to educate the jury about the crime and establish aggravating factors." (Answer p. 10.) But the State had done much more than that. In fact, the State presented almost the identical case at the resentencing that it had at Armstrong's original guilt/innocence phase, calling twenty-nine of the thirty-three witnesses from the trial.

Although the State "may introduce evidence concerning the facts and circumstances of the crime in order to prove the aggravating circumstances beyond a reasonable doubt," it may not relitigate guilt during resentencing proceedings. *Way v. State*, 760 So. 2d 903, 917 (Fla. 2000). It is clear from this Court's holding in *Way* that evidence regarding the facts of the crime is necessary **for the purpose of proving the aggravators**—not to prove guilt. Armstrong had already been found guilty of first degree murder, which the

jury was told the moment they sat down for voir dire. The court instructed the potential jurors as follows:

> Ladies and Gentlemen, the defendant has been found guilty of Murder in the First Degree. The Appellate Court has reviewed and affirmed the defendant's conviction. However, the Appellate Court sent this case back to this Court with instructions that the defendant is to have a new trial **to determine what sentence should be imposed**. You will not concern yourselves with the question of his guilt.

(R. 29-30.) (emphasis added). Thus, the jury was aware from the very beginning that the purpose of the resentencing was for them to make a recommendation regarding punishment—not to determine guilt or innocence.

However, the State argued that "[t]he circumstances of the instant crimes were necessary to show Armstrong was the person who shot and killed Deputy Greeney, shot at and attempted to kill Deputy Sallustio, and robbed Church's Chicken, which necessitated presenting eye-witnesses, forensic, ballistic, and DNA experts/evidence that Armstrong committed those crimes to establish aggravation." (Answer p. 52.) In other words, according to the State's argument, all twenty-nine witnesses were necessary for the State *to establish Armstrong's guilt*. But that was not the purpose for the resentencing, as the court's instruction to the jury made clear. The purpose was for the jury to make a sentencing recommendation. The State sought three aggravators:

(1) prior violent felony; (2) felony murder; and (3) victim was a law enforcement officer. All three aggravators could have been established through the testimony of a few witnesses. It was unnecessary, cumulative, and prejudicial to call twenty-nine guilt/innocence phase witnesses to establish those aggravators.

Although jurors cannot be expected to make a "wise and reasonable decision in a vacuum," there is a vast difference between simply educating the jury about the facts of the crime to enable them to make an informed decision and presenting essentially the same case as was presented at trial. *Teffeteller v. State*, 495 So. 2d 744, 745 (Fla. 1986). In *Teffeteller*, the trial court had allowed the State to introduce "testimony of several witnesses concerning the murder of [the victim] and also allowed the state to introduce one photograph of the victim into evidence." *Id*. This Court held that it was within the judge's discretion to "allow the jury to hear or see probative evidence which will aid it in understanding the facts of the case in order that it may render an appropriate sentence." *Id*.

The facts in *Teffeteller* are distinguishable from those in the instant case. Here, the trial judge allowed the State to present twenty-nine of the thirty-three trial witnesses, and introduce evidence including photographs of Deputy Sallustio's chest and heel wounds, the emergency room, the vest and

shirt Deputy Sallustio was wearing the night he was shot, his guns, flashlight, and "numb-chucks" [sic], bullets that were removed from Deputy Sallustio, fragments of the bullet that was removed from Armstrong's arm, multiple other bullet fragments and casings, fingerprints, multiple photographs showing Deputy Greeney's wounds, a vial of Deputy Greeney's blood, and Deputy Greeney's uniform shirt showing a bullet hole and a burn mark. This volume of evidence far exceeded what was necessary for the State to establish the aggravators, and was prejudicial to Armstrong given that his guilt had already been determined. Such a barrage of evidence could only serve to inflame the jury's emotions and ensure a death sentence.

Rowe's job was to present mitigation sufficient to outweigh the vast amount of evidence the State presented in aggravation, and he utterly failed to do so. Rowe's purported strategy seemed to be "to try to establish the mitigating factors, arguing along the lines of there was, in fact, a shootout. The minor participant in a shoot out be [sic] subjected to the death penalty." (R. 1379.) However, Rowe was aware that Deputy Sallustio would testify at the resentencing, and that his testimony would be the same as it had been at trial—that Armstrong had shot him and chased him across the parking lot to "finish the job" so there wouldn't be any witnesses. (R. 468-72.) In light of that evidence alone, it was objectively unreasonable for Rowe to attempt to

convince the jury that Armstrong was a minor participant in the shootout, particularly since he had already been found guilty of first degree murder. This is not a mere "disagreement with counsel's strategy." (Answer p. 53.) Rowe's decision to present a minor participant defense under these circumstances was so constitutionally ineffective as to deprive Armstrong of a fair trial. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Armstrong is entitled to relief.

Rowe's actual conflict of interest prevented him from calling Dr. Laurie Gunst as a witness, depriving Armstrong of the effective assistance of counsel.

An actual conflict of interest existed between David Rowe and defense expert witness Dr. Laurie Gunst. Throughout Rowe's representation of Armstrong, he was actively representing conflicting interests, and this conflict adversely affected his performance. *See Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980) ("[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief.").

Dr. Gunst testified that she had been sued in Jamaica by Edward Seaga, the former Prime Minister of Jamaica, for libel based on comments she had made on a Jamaican radio show. (PCR-2. 1849.) Rowe testified that he did not represent Edward Seaga in the libel lawsuit in Jamaica. (PCR-2. 1798.)

However, Dr. Gunst testified that Rowe sent Dr. Gunst a letter on behalf of Seaga requesting an apology for her comments on the radio show and also asking her to come to Jamaica to litigate the allegations Seaga had made against her. (PCR-2. 1847.) Dr. Gunst sued Seaga in federal court in New York, and Rowe represented Seaga in that lawsuit. (PCR-2. 1846, 1879-1905.) Both lawsuits were pending in 2006, when Rowe represented Armstrong. The State argued that the New York lawsuit could not have affected Rowe's preparation because it was dismissed on March 30, 2007, eleven days prior to the start of Armstrong's resentencing. (Answer p. 65.) However, Rowe apparently thought it was enough of a conflict to discuss it with Armstrong and obtain a verbal waiver, even though this alleged waiver was never memorialized on the record or in writing. (PCR-2. 1804-05.) Also, it cannot be said that the fact that the New York case against Dr. Gunst was pending throughout Rowe's preparation did not affect his decision regarding whether he would call her as a witness in Armstrong's case.

Rowe's bias against Dr. Gunst was obvious from his testimony. He repeatedly refused to refer to her as "Dr. Gunst" and instead called her as "Ms. Gunst" or just "Gunst." (PCR-2. 1803, 1804, 1806.) Rowe ostensibly objected to calling Dr. Gunst in part because she "has no academic background in Caribbean studies" and none of her degrees were obtained from a Caribbean

university. (PCR-2. 1819.) It is true that she did not attend a Caribbean university; she merely *taught* at the University of the West Indies and she obtained her Master's and doctoral degrees in Latin American and Caribbean History from Harvard (PCR-2. 1839), credentials which the lower court agreed were "great." (PCR-2. 1392.) Rowe claimed that she was an "inappropriate country conditions expert for Caribbean [sic]" in part because in his opinion, she did not have an "afro-centric view of the socio-economic problems that affect Jamaica and other Caribbean countries." (PCR-2. 1819-20.) Rowe's attitude appeared to be based on nothing more than his personal distaste for the fact that a white American woman dared to call herself an expert on Jamaican history, as his disdain certainly was not based upon her credentials, her education, or her experience.

The State argued that Rowe discredited Dr. Gunst's expertise in part because in his opinion, her book *Born Fi' Dead* "did not mention rural Jamaica where Armstrong grew up." (Answer p. 67, fn. 27.) However, the subject of her book, which was published in 1995, had nothing to do with whether she had the ability to testify effectively on Armstrong's behalf in 2007. In sharp contrast to Dr. Rhodd's testimony at the resentencing, Dr. Gunst testified at the evidentiary hearing about Armstrong's life in Jamaica, the conditions under which he was raised, the poverty he experienced, and

many other details about his personal life, which is precisely the type of information which a sentencing jury should hear. Dr. Rhodd, on the other hand, testified generally about the Jamaican economy, and failed to make a connection for the jury between it and Armstrong's life. There is no question that Dr. Gunst's evidentiary hearing testimony was more specific to Armstrong, more descriptive and informative about his life and circumstances, and would have been far more important for the jury to hear than Dr. Rhodd's dry, general testimony which was not related to Armstrong's life or background.

Rowe labored under an actual conflict of interest during Armstrong's resentencing, and he never obtained a waiver of the conflict from Armstrong. Armstrong is entitled to a new penalty phase.

Rowe was ineffective for failing to question and challenge jurors during voir dire.

Even though this was a resentencing, the purpose of which was to determine punishment, Rowe never asked a single juror about whether he or she could consider and give effect to mitigation—in fact, he never even said the word "mitigation" throughout voir dire. Unfortunately, neither did the court. In fact, the court mistakenly instructed the potential jurors that both the State and defense would be presenting aggravators. At the beginning of voir dire, the court instructed the jury as follows:

> During this trial, the penalty phase, *aggravating circumstances will be presented by the State and the Defense for you to consider*. When both the State and the Defendant will have an opportunity to present argument for and against the death penalty. Following, I will give you written instructions on the law that you are to apply in weighing those circumstances and in making your recommendations.

(R. 30-31) (emphasis added). Rowe did not object to this dangerous mischaracterization of the purpose of the entire proceeding, so the jury was left with the impression that the only evidence they would hear was that of "aggravating circumstances" from both the State and the defense. It was Rowe's job to educate the jurors about the concept of mitigation, and to ascertain that they had the ability to consider and give effect to it, and he failed to do so.

Regarding Juror Bacchus, the State's argument was filled with speculation and conjecture about her background, her potential biases, her feelings towards fellow immigrants who commit crimes, and her (supposed) "familiar[ity] with Black-Jamaican businessmen." (Answer p. 78.) However, State ignored the fact that Rowe never asked her any questions, and simply adopted Rowe's speculative justifications for why he did not speak to her before choosing her to serve on Armstrong's jury. (PCR-2. 1361-63.) Rowe guessed that her heritage was "probably" Caribbean given her surname (even

though her surname could have been her husband's, which would indicate nothing about her own heritage), speculated without speaking to her that she would be sympathetic to Armstrong's plight because she was black, of Caribbean descent (he assumed), and free of bias against immigrants who commit crimes. Unfortunately, the fictional juror that Rowe created in his mind does not necessarily comport with reality, and he never bothered to find out. Because he never questioned her, he never found out what her feelings or motivations were, which falls far outside prevailing professional norms. Rowe admitted at the evidentiary hearing that he did not ask her what she meant by her comment that she could vote for the death penalty because Armstrong was "in a situation," nor did he ask her what her feelings were toward the death penalty, or whether she could vote for life. (PCR-2. 1791-92.)

The lower court denied evidentiary hearing on the remainder of Armstrong's claim regarding Rowe's ineffective performance at voir dire, which violated his right to due process, as argued in the initial brief. The details of the claim are incorporated herein and will not be repeated, but it is important to note that several jurors indicated a potential bias against Armstrong and/or in favor of the State, and one lied about her criminal history. The makeup of the jury is particularly important here, given that Armstrong's jury recommendation was 9-3, and he would have needed only three more

votes to secure a life sentence. Armstrong is entitled to a new penalty phase with an unbiased jury.

CONCLUSION AND RELIEF SOUGHT

For the claims not addressed in this reply, Armstrong relies on the arguments set forth in his initial brief. Based upon the foregoing briefs and the record, Armstrong respectfully urges this Court to reverse the lower court and grant a new penalty phase based upon the ineffective assistance of counsel, and such other relief as the Court deems just and proper.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND FONT

I HEREBY CERTIFY that a true copy of the foregoing has been provided to opposing counsel, Leslie T. Campbell, Assistant Attorney General, Office of the Attorney General, 1515 N. Flagler Drive, Suite 900, West Palm Beach, FL via electronic service at capapp@myfloridalegal.com this 17th day of August 2015.

Counsel further certifies that this brief is typed in Times New Roman 14-point font pursuant to Florida Rule of Appellate Procedure 9.100(1).

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