

**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC04-2066**

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**DAVID COOK,**  
Appellant,  
v.  
**STATE OF FLORIDA,**  
Appellee.

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**ON APPEAL FROM THE CIRCUIT COURT  
OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND  
FOR MIAMI-DADE COUNTY, STATE OF FLORIDA**

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**REPLY BRIEF OF APPELLANT**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

ARGUMENT IN REPLY ..... 1

ARGUMENT I..... 1

TRIAL COUNSEL AFFORDED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE TO MR. COOK DURING HIS PENALTY PHASE THROUGH HIS FAILURE TO INVESTIGATE AND PRESENT AVAILABLE MITIGATION AND THE STATE’S ARGUMENTS IN THIS REGARD ARE WITHOUT MERIT ..... 1

    A. Deficient performance ..... 1

    B. Mental Health ..... 13

    C. Prejudice ..... 18

CONCLUSIONS AND RELIEF SOUGHT ..... 31

CERTIFICATE OF SERVICE..... 32

CERTIFICATE OF COMPLIANCE..... 32

## TABLE OF AUTHORITIES

### Cases

Blanco v. State, 943 F. 3d 1477 (11th Cir.1991).....	10
Boyde v. California, 494 U.S. 370 (1990).....	32
Breedlove v. State, 692 So. 2d 874 (Fla. 1997) .....	23
Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990).....	22
Cook v. State, 542 So. 2d 964, 970 (Fla. 1989).....	25
Davis v. State, 30 Fla. L Weekly S 709 .....	11, 12
Deaton v. Dugger, 653 So. 2d 4 (1993) .....	10
Eddings v. Oklahoma, 495 U.S. 104 (1982) .....	32
Hamblin v. Mitchell, 354 F. 3d 482 (2003).....	7
Kyles v. Whitley, 514 U.S. 419 (1995).....	33
Lockett v. Ohio, 438 U.S. 586 (1978) .....	16, 22, 32
Payne v. Tennessee, 501 U.S. 808 (1991) .....	32
Penry v. Lynaugh, 492 U.S. 302 at 319-322 (1989).....	32
Rompilla v. Beard, 125 S. Ct. 2456 (2005) .....	6, 7, 8
State v. Lara, 581 So. 2d 1288 (Fla. 1991).....	30, 31
Strickland v. Washington, 466 U.S. 668.....	2, 3, 7, 13, 26
Tennard v. Dretke, 124 S. Ct 2552 (2004).....	32
Wiggins v. Smith, 123 S. Ct. 2527 (2003).....	2, 3, 4, 5, 7, 13, 14, 17, 29, 30
Williams v. Taylor, 529 U.S. 362, 396 (2000).....	24, 26, 33
Woodson v. North Carolina, 428 U.S. 280 (1976) .....	22

### Other Authorities

ABA Guideline 10.11 (2003).....	14
ABA Guideline 11.4.1 D 2 (1989) .....	7
ABA Guideline 11.4.1 D 4.....	7
ABA Guideline 11.4.1(A) (1989).....	3
ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989).....	4, 6, 8, 10
ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (2003).....	6, 7, 8, 10
ABA Standard 4-4.1.....	4
ABA Standards for Criminal Justice.....	6, 10

## **ARGUMENT IN REPLY**

### **ARGUMENT I**

#### **TRIAL COUNSEL AFFORDED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE TO MR. COOK DURING HIS PENALTY PHASE THROUGH HIS FAILURE TO INVESTIGATE AND PRESENT AVAILABLE MITIGATION AND THE STATE’S ARGUMENTS IN THIS REGARD ARE WITHOUT MERIT**

##### **A. DEFICIENT PERFORMANCE**

In its answer brief, the State makes an attempt to refute Mr. Cook’s argument that he was rendered ineffective assistance of counsel at his capital penalty phase. This argument is futile. As will be demonstrated below, the State in so arguing relies on misstatements and misapplications of both the law and the facts of this case. The State’s arguments are without merit, and relief must be granted.

First of all, the State trumpets trial counsel’s stated strategy “to show Defendant as a good person” (Answer Brief at 62). The State paraphrases the trial testimony of the few witnesses that actually testified at the penalty phase and asserts, with no precedent attached, that reasonable counsel could not be expected to delve further into Mr. Cook’s upbringing. This argument is so far-fetched as to be ludicrous. The State’s argument ignores the factual predicate of the very grant of an evidentiary hearing by this Court: the fact that this Court found the mitigation presented at trial to

be scarce.<sup>1</sup> As such, trial counsel’s purported “strategy” was not a reasonable basis for failing to conduct any investigation into Mr. Cook’s social history. Here trial counsel, for example, did not even know that Mr. Cook was born and raised in Newark, New Jersey, much less the circumstances of his early years there. As Wiggins v. Smith, 123 S. Ct. 2527 (2003) makes clear:

Strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgment supports the limitations on investigation.

Wiggins at 2539, citing Strickland v. Washington, 466 U.S. 668, at 690-691. The State baldly asserts that counsel’s failure to investigate Mr. Cook’s social history is justified because “[n]one of the new family history mitigation evidence presented at the evidentiary hearing would have been consistent” with counsel’s purported strategy (Answer Brief at 65). Once again the State misstates the facts and misapplies the law. The State is blithely indifferent to the clear fact that counsel’s strategy was based on ignorance. As the testimony at the evidentiary hearing makes clear, trial counsel Arthur Carter did not investigate Mr. Cook’s social history and then make a reasoned decision to discard it in favor of showing Mr. Cook as a “human being.” Rather he

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<sup>1</sup>Given the **scarce mitigating evidence presented at the penalty phase**, Cook is entitled to an evidentiary hearing on the issue of counsel’s effectiveness at that stage of the proceeding. Cook, 792 So. 2d at 1203 (emphasis added).

did not investigate it at all -- a crucial distinction apparently lost on the State.<sup>2,3</sup> The testimony of Diane Simons described how she met Arthur Carter during Mr. Cook's trial. When they arrived at the court Carter asked if they were Mr. Cook's family and then told them they had to testify (T. 222). She testified without any prior preparation by Carter (T. 222). This was not the reasonable investigation mandated by Strickland and Wiggins but rather a belated, haphazard and random struggle to put on any testimony he could coax out of unprepared and un-investigated witnesses. Here the

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<sup>2</sup>At Mr. Cook's evidentiary hearing, trial counsel testified candidly that this was the first case which he had tried to penalty phase that he conducted the investigation himself, that he started preparing for the penalty phase at the end of the guilt phase or after the guilt phase of the trial, that he did not find it necessary to prepare a social history of Mr. Cook, that he did not know that Mr. Cook had been raised in Newark, New Jersey and thus had not felt the need to travel to Newark), and that he relied solely on Mr. Cook's self-reporting for educational history Mr. Carter also testified that he did not seek out medical or school records of Mr. Cook or any family members, including Mr. Cook's mother. Mr. Carter did not investigate Mr. Cook's drug history because he didn't see how it would relate to the penalty phase.

<sup>3</sup>Furthermore, the State ignores the admonition of ABA Guideline 11.4.1(A) (1989) which states that Counsel should conduct independent investigations relating to the guilt/innocence phase and the penalty phase of a capital trial. **Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously** (Emphasis added). By counsel's own admission this was not the case here. The clear purpose of this Guideline is to avoid the precise consequences demonstrated in Mr. Cook's penalty phase the presentation of scarce mitigation which did not paint a true and accurate portrait of the individual under consideration by the jury.

purported strategy was not reasonable because it was based on ignorance. The State's argument is absurd.

The State next attempts to show that Mr. Cook's assertion that counsel's performance did not measure up to the reasonable professional norms described by the ABA Guidelines<sup>4</sup> as set forth in Wiggins and its progeny . Once again, the State's argument is fanciful and refuted by the record. The State appears to make the leap of logic that just because ABA Standard 4-4.1 states that a family and social history is "among the topics that counsel should consider presenting" that trial counsel in Mr. Cook's case was somehow excused from investigating his upbringing at all. The State is apparently unaware of the difference in definition between investigation of mitigation evidence and its presentation. The record is clear that Carter did not consider presenting this evidence because he was unaware that it existed. Counsel simply could not consider presenting evidence the very existence of which he was completely unaware.<sup>5</sup> Once again, the State appears to ignore the fundamental rationale behind the ABA Standards and Guidelines as well as misquoting its content.

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<sup>4</sup>The ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty cases (1989)(henceforth ABA Guidelines).

<sup>5</sup>For example, counsel testified that he did not even know that Mr. Cook came from Newark (See T. 81).

The State next attempts to distinguish Wiggins from the instant case on the facts. The State is in error here for two reasons. First of all, as Wiggins makes plain, the ABA Guidelines are reasonable professional norms for the investigation of capital cases. They are not only applicable to cases with fact patterns identical to that in Wiggins, however much the State would wish otherwise. Second the State appears to ignore the fact, clearly established by the record below, that the omissions by trial counsel in Mr. Cook's case are even more egregious than those of Mr. Wiggins counsel which afforded him relief in the United States Supreme Court.<sup>6</sup> The State attempts to assert that Wiggins is somehow inapplicable because in Wiggins there was no dispute that the failure to prepare a social history fell below 1989 Maryland standards. While even the State does not go so far as to imply that bad practice as applied in Florida in 1985 somehow trumps the standards and guidelines approved in federal constitutional law by requiring laxer standards for the performance of counsel in capital cases, it does imply that there is a dispute to that effect. Once again this is not borne out by the record below. In fact, Mr. Cook presented the testimony of Eugene Zenobi, who was clear that Carter's performance did not reach the standard of practice of 1985 in Florida. The State did not present any testimony to suggest

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<sup>6</sup>For example, in Wiggins, the psychologist conducted interviews with some of Mr. Wiggins' family members, whereas in Mr. Cook's case, the retained psychologist did not.

otherwise (See T. 561-2). The State's argument is yet again misplaced, misleading and without merit.

The State complains that Mr. Cook's reference to Rompilla v, Beard, 125 S. Ct. 2456 (2005) is a misreading of the case because the Court in Rompilla specifically cites the American Bar Association Standards in place in 1982 in support of [its] conclusion (Answer Brief at 67). In fact it is the State who has misread Rompilla. While Rompilla does refer to the more general American Bar Association Standards for Criminal Justice in circulation at the time of Mr. Rompilla's trial, it also relies repeatedly to the specific Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases in both the 1989 and 2003 versions. See Rompilla at 2455 n. 7. These are separate and distinct documents, a fact to which the State appears oblivious.

The State asserts that the application of the 2003 Guidelines in Rompilla was only relevant because the State had cited to it in its brief (Answer Brief at 67). In fact it is clear from the discussion in Rompilla that the State cited Guideline 11.4.1 D 2 (1989). The Supreme Court, in rejecting the State's analysis, stated that the correct Guideline for the Rompilla circumstance was ABA Guideline 11.4.1 D 4. The Court then went on to note that [l]ater and current Guidelines are even more explicit See Rompilla 125 S. Ct 2456, 2455, n.7 (2005). The Court then goes on to state that:

Our decision in made precisely the same point by citing the earlier 1989 Guidelines. 539 U.S. at 524, 156 L. Ed. 2d 471, 123 S. Ct. 2527 (The ABA Guidelines provide that investigations into mitigating evidence should comprise efforts to discover all reasonably available mitigating evidence . . . (emphasis in original).

Rompilla, 125 S. Ct. 2456, 2466, n7 (2005). Taken as a whole, therefore, Note 7 of Rompilla shows that the Court’s analysis is predicated in large part on the 2003 Guidelines, however much the State may dislike the fact.<sup>7</sup>

The State attempts to use the evidentiary hearing testimony of Eugene Zenobi to prove that Carter’s representation was not deficient. In a tortured reading of the testimony, the State says that it was perfectly acceptable for trial counsel to focus solely on Mr. Cook’s asserted alibi defense as an alternative to doing a penalty phase investigation. While it is true that Mr. Zenobi testified that the standard of practice in the early 1980s in Dade County would be to gauge the possibility of a case getting to penalty phase, and if it looked likely that the case would get as far as a penalty phase, to start investigating immediately. The sort of factors that would make it likely would include the existence of a detailed confession, and multiple homicides (T. 547 -548). This community standard was even more important in the 1980s than in the present

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<sup>7</sup>The State also ignores the decision in Hamblin v. Mitchell, 354 F. 3d 482 (2003): “New ABA Guidelines adopted in 2003 simply explain in greater detail than the 1989 guidelines the obligations of counsel . . . The 2003 ABA guidelines do not depart in principle or concept from Strickland [or] Wiggins.”

because at that time trial judges did not generally allow a break between the guilt phase and the penalty phase (T.548). In Mr. Cook's case, in which there was both a confession and two homicides, this would clearly require thorough and early preparation for the penalty phase. To focus on the guilt phase to the exclusion of a constitutionally adequate penalty phase, which strategy the State regards as reasonable, was not what Mr. Zenobi stated to be the Dade County community standard in 1985. Moreover, the State ignores the very clear mandate of both the 1989 and the 2003 Guidelines, which are unequivocal that both phases should be investigated in all circumstances.

The State asserts that Rompilla did not find deficient performance for counsel's failure to obtain records (Answer Brief at 69). However since that was not the question presented to the Court in that case, the State's assertion is merely irrelevant. Furthermore, the State ignores the clear testimony of Mr. Zenobi regarding the community standard in Dade County for investigating records and family history. Mr. Zenobi testified as to the importance of obtaining records. He testified that it was standard practice in the 1980s to obtain whatever records were available, even if it meant going outside the country, for example to Cuba (T. 550). This is important not only in order to develop a social history, but also because the development of

mitigation early on in the case can be used as a bargaining tool to deflect the possibility of a penalty phase altogether (T.551).

In addition to obtaining records, Mr. Zenobi testified that in the 1980s it was standard practice to talk to as many family members as possible in preparation for the penalty phase. His explanation was that:

. . . the family is so integrated in what is going on with the person on trial, the accused, that sometimes they can be a wonderful source of where this person is mentally, or you can get medical records, or you can get people who know more about the situation perhaps to testify, because, no matter what you might say about doctors, families are so integral to second phase testimony.

**You want to talk to everybody.**

(T. 551)(emphasis added).

Mr. Zenobi testified that it was not standard in 1985 to put a penalty phase witness on the stand without preparing them for direct and cross examination beforehand (T. 552), which the record established had been done in Mr. Cook's case.

In each of these respects, Carter's performance fell below the community standard as described by Mr. Zenobi, the ABA Standards for Criminal Justice in circulation at the time of Mr. Cook's trial, and the specific Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases in both the 1989 and 2003 versions.

The State attempts to get round the admonition in Blanco v. State, 943 F. 3d 1477 (11<sup>th</sup> Cir.1991), and Deaton v. Dugger, 653 So. 2d 4 (1993), that it is inappropriate to delay the commencement of penalty phase investigation until after the guilt phase is over. The State attempts to do this by stating that witnesses here were available (Answer Brief at 71). However the State ignores the fact that the witnesses were not investigated or prepared and that counsel had very little idea of what relevant mitigation they knew. See, e.g., testimony of Diane Simmons (T. 222), John Cook (T. 260), and Dawn Major (T. 271). While a set of live people were available purely as a result of being spectators in the courtroom, this does not constitute the requisite reasonable investigation when counsel has neither an idea of their testimony nor has prepared them for direct and cross examination.<sup>8</sup>

The State makes much of this Court's opinion in Davis v. State, 30 Fla. L Weekly S 709, in an attempt to justify the minimal investigation performed by trial counsel for Mr. Cook. Again the analogy is false. It is true that as this Court noted, that the finding as to whether counsel was adequately prepared does not rely solely around the amount of time counsel spends on the case or the number of days which

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<sup>8</sup>This testimony is clear that the Cook family members found their own way to court without any help from Carter. Diane was explicit that the first time she ever met Carter was in the courtroom, when he asked if you all are David Cook's family and then told them "You got to testify" (See T. 221-2).

he or she spends preparing for mitigation. Davis, 2005 LEXIS 2052 at 11. Mr. Cook never argued that the fact that his trial counsel spent twelve (12) hours on preparing for the penalty phase was the sole indicator that he was ineffective. Rather it is one of many considerations that should be factored into the analysis. Furthermore the factual basis for Mr. Cook's claim is radically different from that of Mr. Davis. In Davis this Court found it:

significant that Davis's trial counsel had the full benefit of information obtained by the public defenders office which included matters pertaining to Davis's background and upbringing. Specifically trial counsel testified at the evidentiary hearing that the files he received from the public defenders office in Davis's case already contained records regarding his medical history, educational background and other general background information . . . Based on the information in the public defenders file that was reviewed and considered by trial counsel coupled with the additional information generated by trial counsel through interviews of Davis's mother and Davis, we conclude that the investigation into Davis's background for mitigating evidence that was conducted here was neither inadequate nor unreasonable.

Davis, 915 So. 2d 95; 2005 Fla. LEXIS 2052; 30 Fla. L. Weekly S 709.

In Mr. Cook's case, there was no public defenders file for trial counsel to fall back on. There was no prior investigation regarding Mr. Cook's medical history, educational background or general background. In sum there was nothing. Thus the duty on Mr. Carter was to commence the reasonable investigation from the beginning,

without benefit of any prior record gathering or interviews conducted by any prior counsel. On a case-by-case analysis, the time spent by Carter was simply not adequate to achieve this.

The State also attempts to portray the evidentiary hearing testimony as incredible (Answer Brief at 72). In fact the lower court did not make any credibility findings as to the majority of lay witnesses but simply stated as a matter of law that “Defendant claims that not investigating the defendants family and social history are simply wrong” (PCR2. 2134). The State makes much of Mr. Cook’s self reported account of his background during clemency proceedings as a reason to discount the evidentiary hearing testimony. This is preposterous, since the clemency hearing occurred only after Mr. Cook was sentenced to death. The State refers to the inconsistent statements that already existed at the time of Mr. Cook’s trial as a reason not to present evidence of Mr. Cook’s deprived and traumatic family life. Again, this is mere wishful thinking on the State’s part. The State is once again confusing the difference between investigation and presentation of mitigating evidence. Had counsel spent adequate time to delve into Mr. Cook’s background, spoken to family members other than the ones who were physically present at the guilt phase, obtained records and obtained proper mental health evaluations, he would not have made the strategic choice merely to portray Mr. Cook as a good person. He would not have been forced

by his own negligence to scramble to put on the mitigation that this Court described as “scarce.” Here, reasonable professional judgment does not support the extreme limitations on investigation. See Wiggins at 2539, citing Strickland, 466 U.S. at 690-691. Contrary to the State’s attempts to show otherwise, Mr. Cook has established deficient performance.

## **B. MENTAL HEALTH**

The State asserts in essence that trial counsel had no obligation to investigate Mr. Cook’s mental health mitigation because according to Mr. Carter, Mr. Cook never exhibited any strange behavior and because there was nothing in the record that would indicate Defendant would have any mental health issues The State offers nearly a page of string cites to support its claim; however notably absent is any discussion of Wiggins and the ABA Guidelines in this regard. Guideline 10.11 (2003) states that counsel should consider including:

Experts and lay witnesses along with supporting documentation (e.g. school records, military records) to provide medical, psychological sociological, cultural or other insight into the clients mental and/or emotional state and life history that may explain or lessen the clients culpability for the underlying offense(s); to give a favorable opinion as to the clients capacity for rehabilitation, or adaptation to prison; to explain possible treatment programs; or otherwise support a sentence less than death and/or to rebut or explain evidence presented by the prosecutor.

ABA Guideline 10.11 F. 2 (2003).

No matter how the State tries to gloss over Carter's omissions, the fact remains that his performance did not come close to this exhortation. The State claims that nothing in the record supports an investigation into mental health mitigation. This statement begs the question. Had Carter conducted a constitutionally adequate social history investigation including the gathering of records and proper investigation into Mr. Cook's childhood and youth, the record would have put him on notice of the need to do an in-depth mental health evaluation.<sup>9</sup> Second, the State appears to forget the salient fact that the trial record in fact does support the need for investigation into Mr. Cook's mental health background. In the hearing on the motion to suppress Mr. Cook's statement, Mr. Cook testified that he had consumed about a half of a fifth of gin the night before his arrest as well as some marijuana (See R. 284-99). Had Mr. Carter pursued this indicator by use of a qualified mental health expert he would have discovered the probability of neurological, neuropsychological and psychiatric conditions and been able to fully investigate and present such testimony.

The State trumpets Mr. Carter's use of Dr. Merry Haber and Dr. Anthony Nealy as proof that Carter's performance in this regard was not deficient (See Answer

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<sup>9</sup>The State also ignores the unrebutted testimony of Eugene Zenobi that the community standard in Dade County at that time would require a mental health mitigation evaluation in almost every capital case, and that he could not think of a circumstance where standard practice would preclude one (See T. 549).

Brief at 76). However, the State omits to note the apparent deficiencies relating to both evaluations. First of all, the appointment of the experts required a competency and insanity evaluation, not a mental health evaluation for the purposes of determining mental health mitigation. As both Dr. Merry Haber and Eugene Zenobi testified at the evidentiary hearing, this type of evaluation is not adequate for the purposes of investigating and developing mental health mitigation. Mr. Zenobi emphasized that in evaluating mitigation, the evaluation must be much broader based than for mere competency or sanity because of the wide ranging definition of mitigation as established by Lockett<sup>10</sup> and its progeny, as compared with the five or six criteria assessed in a competency or sanity evaluation (See T. 559). Dr. Merry Haber testifies that a mitigation evaluation entails

interviewing and obtaining from family members a complete family history from friends and associates; a social history from employers and coworkers; an employment history from records; an academic and school history from school records; a medical history; jail records . . . Military records . . .

(T. 125).<sup>11</sup>

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<sup>10</sup>Lockett v. Ohio, 438 U.S. 586 (1978)

<sup>11</sup>Dr. Haber's testimony squarely refutes the State's contention that it was not standard practice to provide expert witnesses with records or to afford them access to family members as part of their evaluation (Answer Brief at 82). The State relies on the testimony of Mr. Zenobi who stated that some experts like to see records and some do

Prior to testifying, Dr. Haber's only contact with Mr. Carter was likely something like a brief conversation with him outside of the courtroom or in the Pickle Barrel downstairs (T. 126). She also testified that Carter had not discussed possible avenues of mitigation investigation with her, asked if any additional testing was necessary, asked if she required any background materials (See T. 126). Dr. Merry Haber testified that both her evaluation and Arthur Carter's preparation of her to testify fell below the standard (See T. 141). Dr. Merry Haber's candid assessment of her own shortcomings in this case is entirely consistent with this Court's analysis in sending the case back for evidentiary hearing on the ineffectiveness issue. This Court took care to note that Defense counsel's direct examination of Dr. Haber consists of five pages in the appellate record, the State's cross-examination covers eight pages and there is no redirect examination. The testimony at the penalty phase covers 92 pages including the testimony of Cook, which takes up 29 pages. Cook at 1203, n.3. Had

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not. Dr. Haber's testimony shows that she would have reviewed and considered such collateral information if only it had been made available to her. As the record clearly indicates, Dr. Haber was interested in the family members by virtue of the fact that she sat through their testimony before testifying herself (See R. 1075). The State's reliance on Carter's testimony that he answered whatever questions Dr. Haber had is thus false, since without a proper investigation he was in no position so to do. The State acknowledges that Wiggins is clear that mere retention of a mental health expert is not sufficient, but shies away from the obvious application of Wiggins to Mr. Cook's case. As Mr. Cook has argued supra, his case is even more deserving of relief than Mr. Wiggins's in this regard because Mr. Wiggins's psychologist had the benefit of interviewing family members whereas Dr. Merry Haber did not.

trial counsel conducted a timely and reasonable investigation into Mr. Cook's mental health issues, there would have been a wealth of mitigation to present rather than the mere five pages at the penalty phase.

The State also attempts to justify the fact that the evaluations were held at the very last minute, after the guilt phase was over. Even if the experts had conducted an adequate evaluation, there would have been no time in which to do so before commencement of the penalty phase. The State claims that the testimony of Eugene Zenobi shows that the main reason for not waiting until after the guilt phase was that a judge might flip immediately into the penalty phase so it was necessary to be prepared beforehand (Answer Brief at 78). Here the State is ignoring the very testimony of Mr. Zenobi that it attempts to rely on elsewhere in its brief: Mr. Zenobi's assessment that in cases with more than one victim and with a confession there was a strong likelihood that the case might go to a penalty phase and therefore the need for advance preparation for the penalty phase is paramount (T. 547-548). The fact remains that Mr. Carter's late preparation affected the quality of the mitigation presented and that the minimal evaluation, lack of collateral material and the experts sole reliance on Mr. Cook's self reporting made Dr. Merry Haber a sitting duck for the cross-examination of the State. Carter's performance did not reach the constitutional minimum regarding his mental health investigation.

### C. PREJUDICE

The State contends that Mr. Cook has not shown prejudice from the additional mitigation evidence presented at Mr. Cook's evidentiary hearing. The State is in error for a number of reasons as demonstrated below.

The State complains that the testimony of sociologist Dr. Herman would not have been available at the time of Mr. Cook's penalty phase and therefore Mr. Cook was not prejudiced by failure of trial counsel to develop Mr. Cook's social history in Newark (Answer Brief at 86). The State mischaracterizes Mr. Cook's argument. First of all, notwithstanding the availability of any expertise in the area, there was a plethora of unrebutted testimony as to the Cook family's life in Newark, including accounts of the poverty, violence and devastation caused by the riots, as well as the uniquely personal traumas suffered by the Cook family.<sup>12</sup> Had trial counsel conducted a proper social history he would have been able to elicit such testimony for the jury's consideration. The State also misunderstands the testimony of sociologist and urban unrest specialist Dr. Max Herman. The State asserts that such testimony would not have been available at the time of Mr. Cook's penalty phase in 1985. This assertion is

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<sup>12</sup>The State attempts to cast doubt on the family's testimony about the circumstances surrounding the riots. There was absolutely nothing in the record to suggest that the Cook family testimony as to Mr. Cook's early life would have been anything other than what was elicited at the evidentiary hearing, contrary to the State's speculative and bad faith argument.

wrong because it is flatly contradicted by the record. While Dr. Herman personally would not have been available, the techniques he used in reviewing Mr. Cook's case, including use of oral history and mapping, are long established (See T. 389). As a result of the mapping technique he employed, Dr. Herman was able to provide objective social science evidence that corroborated the Cook family accounts of the events in Newark during Mr. Cook's childhood. He was able to show that the neighborhood was amongst the poorest in the city, and the one most affected by riots through these long established techniques. Furthermore, much of Dr. Herman's data came from the report resulting from the official enquiry ordered by then Governor Hughes of New Jersey into the race riots and published in 1968 (See T. 407-408; Defense Exhibit F). As Dr. Herman testified, this report was published widely and was available in most libraries including libraries outside the State of New Jersey (T. 411). Had trial counsel conducted a proper social history investigation and s discovered the Cook family's experiences in Newark, he would have been prompted to dig further into the events surrounding the Newark riots and would easily have found the Governors Commission report. He would thus have been able to put the testimony of the Cook family members into the historical and sociological context for the better understanding of the jury. Dr. Herman's testimony shows that this information was reasonably available, however much the State might wish otherwise.

The State's contention that such sociological investigation would not be considered reasonable is also erroneous. ABA Guideline 10.11 F. 2 (2003) reiterates the long standing principle that counsel consider expert and lay witnesses to provide medical, psychological, sociological cultural or other insights into the clients mental and/or emotional state and life history. Clearly this area is something that should have been considered by trial counsel.

The State contends that Mr. Cook has not shown prejudice from the failure of trial counsel to investigate his social history because Mr. Cook's history is inconsistent with the vast majority of riot survivors who did not go on to become criminals (Answer brief at 87). However the fact that some survivors of these traumatic experiences were not later convicted of crime is not the accepted constitutional test for what constitutes mitigation. The fact is that any events which might have affected the individual are worthy of investigation and consideration as both the United States Supreme Court and this Court have repeatedly recognized:

In capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

Lockett v. Ohio, 438 U.S. 536 at 604 (1978)(citing Woodson v. North Carolina, 428 U.S. 280 at 304 (1976))(emphasis added). Contrary to the lower court's assertion:

Events that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court.

Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990) (citing Lockett v. Ohio, 438 U.S. 586 (1978)). It thus follows that such mitigation should be investigated, notwithstanding the fact that some individuals with similar life experiences were not convicted of similar crimes.

The State attempts to attribute credibility findings by the lower court in support of its contention that Mr. Cook was not prejudiced by trial counsel's failure to investigate Mr. Cook's social history (Answer Brief at 88). However, the State does not cite to the lower court's order. This is clearly because the lower court never actually reached the issue of prejudice regarding this issue.<sup>13</sup> The State's contention that the criminal records of Mr. Cook's family members shows that counsel's investigation of their recollections did not prejudice the jury is also wishful thinking. The State cites Breedlove v. State, 692 So. 2d 874 (Fla. 1997), for the contention that "failure to present additional family testimony that would have informed the jury of negative information is not ineffective" (Answer Brief at 90). This analogy is flawed

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<sup>13</sup>The lower court's only reference to the lack of a social history investigation was the statement that Defendant claims that not investigating the defendants family and social history are simply wrong (PCR2. 2134).

for several reasons. First of all, the State ignores the fact that much of the family and other lay testimony was elicited from family members with no criminal history.<sup>14</sup> Second, the negative information referred to by the State is not about Mr. Cook himself, but the individuals testifying. Third, even given the existence of such negative information would not have precluded the investigation and presentation of such evidence. “Even if trial counsel had made a tactical decision to forego presentation of this evidence because of the negative information such a failure to introduce the comparatively voluminous amount that did speak in [Mr. Cook’s] favor, was not justified by a tactical decision to focus on [Mr. Cook as a human being].” Williams v. Taylor, 529 U.S. 362, 396 (2000).

The State argues that the jury rejected powerful mitigation that Mr. Cook had found religion could be of help to others and had strong chances of rehabilitation, and argued that Carter put on a strong mitigation case to humanize Mr. Cook. The State then asserts that there is no reasonable probability that the jury would have been more receptive to the arguments that Mr. Cook’s family history and deprived childhood mad him less morally culpable and deserving of a life sentence (Answer Brief at 90). It goes on to contend that, “There is no reasonable probability that the additional

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<sup>14</sup>Luzianne Cook, Diane Simmons, John Cook, Dawn Major and Sherry Major did not have criminal records.

mitigation would have outweighed the aggravators in the case and led to a life sentence.” The State is wrong in both its factual predicate and its legal analysis. First of all, the State completely ignores the fact that this Court has previously rejected the State’s argument that trial counsel presented powerful mitigation and a strong mitigation case at the penalty phase. This Court’s very remand of Mr. Cook’s case for an evidentiary hearing on the penalty phase ineffectiveness claim was predicated on the scarce mitigation presented at the penalty phase as compared with the additional mitigation Mr. Cook pleaded in his Rule 3.850 motion. See Cook, 792 So. 2d at 1203. Second, the State omits to mention the very significant fact that the jury recommendation was a mere eight to four, notwithstanding the scarce mitigation that was offered at the penalty phase (R. 1156), and the fact that the jury was instructed in two aggravating factors later vacated by this Court.<sup>15</sup> Given this thin margin, if only two of the jurors who voted for death had been persuaded to change their votes the recommendation would have been for life. The State has absolutely no basis in fact for its parroted assertion that there is no reasonable probability of a different outcome. The State’s legal analysis in this regard is also seriously flawed. On the one hand the State claims that the new mitigation is cumulative (Answer Brief at 90), on the other

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<sup>15</sup>This Court vacated the aggravating circumstances of heinous atrocious and cruel and avoiding arrest in which the jury was erroneously instructed. See Cook v. State, 542 So. 2d 964, 970 (Fla. 1989).

hand it seems to regard it as a totally alternative theory to that adduced at trial (Id.). The record clearly supports the fact that the mitigation about Mr. Cook's background and upbringing is new, since it was never investigated at trial. However, the State is oblivious to the United States Supreme Court's admonition in Williams that "[i]f the entire post conviction record, viewed as a whole and cumulative of [e]vidence presented originally, raise[s] 'a reasonable probability that the result of the [proceeding would have been different' if competent counsel" had represented the defendant, then prejudice is demonstrated under Strickland. Williams v. Taylor, 120 S. Ct. 1495, 1516 (2000). This Court should look at the totality of the mitigation presented at both trial and the post conviction proceedings to determine prejudice.

The State next claims that no prejudice arises from counsel's failure to investigate Mr. Cook's mental health mitigation. The State oversimplifies Mr. Cook's position as being that his severe intoxication combined with possible frontal lobe damage met the statutory mental mitigators (Answer Brief at 91). While it is true that Mr. Cook presented ample evidence of the statutory mitigators, there is also an abundance of un rebutted testimony relating to nonstatutory mental health mitigation, a fact apparently lost on the State. The State faults neuropharmacologist Dr, Mash for her calculation of Mr. Cook's level of intoxication on the night of the crime, yet itself offered no alternative except for psychologist Leonard Haber who based his

unscientific opinion on the fact that Mr. Cook was able to drive that night without hitting anyone or having an accident. The State omits to note Dr. Mash's testimony as to the effects of the habitual use of alcohol:

. . . you become tolerant to the effects of alcohol, you can start to consume more and more and its only to the point where you start to have organ damage to where you start to see the level of impairment and disability where we know people cant hold down employment.

\* \* \*

He was clearly tolerant to alcohol but the thing that I think to point out is that he wanted to drink to the point of complete impairment.

(T. 606-7).

The State also ignores the testimony relating to the combined effect of cocaine and alcohol. As Dr. Mash testified:

The combination of cocaine and alcohol is significant here, because when you use cocaine, you actually offset some of the sedating effect so you can then drink more.

(T. 608). The State also asserts that Dr. Mash's testimony concerning the synthesis of cocaine and alcohol to form the highly toxic compound cocaethylene was not available because the compound was not discovered until 1990. However the State omits to mention that the effects of the combination of cocaine and alcohol were well known for a long time prior to that discovery. As Dr. Mash testified on redirect:

[t]here was a considerable body of information prior to our discovery of cocaethylene, which shows when you drink and use cocaine in combination that you have much more severe levels of cognitive impairment psychiatric disability, levels of drug dependency that the drug dependency syndrome was markedly worsened by that particular combination of drugs.

(T. 641). The State's assumption that the amount of alcohol ingestion calculated by Dr. Mash oversimplifies Dr. Mash's testimony since it does not take either of these two factors into account. For the same reason its reliance on Dr. Leonard Haber's assertion that because Mr. Cook could drive and work, he could not have been impaired is both flawed and fanciful. Haber's analysis was based not on science, as was Dr. Mash's, but on his own unscientific prejudices as he tacitly admitted on cross-examination.<sup>16</sup>

The State next contends that the opinions of all Mr. Cook's other mental health experts were flawed because they were premised on Mr. Cook being intoxicated at the time of the crime. This is not true. Dr. Hyde's and Dr. Dudley's finding of depression, and Dr. Harvey's finding of frontal lobe dysfunction are predicated on the doctors own objective testing and not predicated on intoxication. However the State completely ignores these completely unrebutted diagnoses. The State attempts to

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<sup>16</sup>Haber admitted that his technique was self-developed and was not normed, statistically validated, published nor peer reviewed (See T. 838-9).

counter the neuropsychological testing results obtained by Dr. Harvey through the testimony of the State psychologist Suarez. However Suarez did not do any neuropsychological testing of his own, despite the fact that neurologist Dr. Hyde had indicated the need for it.<sup>17</sup> Suarez's opinion regarding Dr. Harvey's neuropsychological battery is thus without merit since his own testimony does not rebut it.

The State has a general complaint about the fact that certain of Mr. Cook's evidentiary hearing experts would not have been available personally in 1985. As each of them testified however, their particular disciplines were recognized at that time. As Wiggins makes plain, Mr. Cook need not present in postconviction the exact evidence that competent counsel would have presented at trial. Instead the Court held that in postconviction the defendant must establish "a reasonable probability that a competent attorney . . . would have introduced [the evidence] in an admissible form." Wiggins, 539 U.S. 535 (2003). Thus the State's argument about the availability of Mr. Cook's experts must fail.

The State complains that the expertise put on by Mr. Cook was cumulative to that put on from Dr. Merry Haber at the penalty phase. The State ignores the fact

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<sup>17</sup>Suarez testified that he did not do any testing for frontal lobe damage or executive functioning (T. 792), despite the fact that he testified that determining the presence of brain damage is one of the most important goals of neuropsychological testing.

that Dr. Merry Haber did not perform any testing on Mr. Cook (T. 121). Dr. Merry Haber was not provided with any records regarding Mr. Cook for the evaluation (T. 122). She did not interview any family members (T. 122). Dr. Merry Haber was never asked to look into possibility of brain damage. Neither Dr. Merry Haber nor anyone else performed a complete neuropsychological battery of tests at the time of trial (T. 123), and Mr. Carter never asked her whether additional testing was necessary (T. 126). Dr. Merry Haber described her evaluation of Mr. Cook as cursory (T. 124). The record reflects that Merry Haber's evaluation was conducted solely to determine Mr. Cook's competency, and not for the purpose of developing mitigation (T. 121). For this reason the evidence elicited from Mr. Cook's mental health experts at his evidentiary hearing is qualitatively and quantitatively superior to that produced at trial, a factor long recognized by this Court. For example, in State v. Lara, 581 So. 2d 1288 (Fla. 1991), this Court affirmed a Dade circuit court's grant of penalty phase relief to a capital defendant where the defendant presented at an evidentiary hearing evidence that, as the State conceded in that case, was "quantitatively and qualitatively superior to that presented by defense counsel at the penalty phase." Id. at 1290.

The State lauds the testimony of the State psychologists Enrique Suarez and Leonard Haber as supporting the lower court's credibility findings as to statutory

mitigation (Answer Brief at 96). However, the State ignores the obvious flaws in both Haber's and Suarez's testimony. As noted supra, Suarez, though a self-proclaimed "neuropsychologist,"<sup>18</sup> did not perform any tests for frontal lobe damage or executive functioning. And as far as Dr. Leonard Haber is concerned, as noted above, his opinion is based on a mere interview which is not normed, statistically validated, published or peer reviewed. It is utterly unscientific and thus unreliable. Moreover, Haber asserted that there is no mitigation because the mere fact that someone has something in and of itself is not sufficient for mitigation and that mitigation has to have some reasonable connection to the events. The State proudly attaches its banner to these contentions (Answer Brief at 97) but Haber's legal conclusions are, in fact, contrary to recent United States Supreme Court decisions. The State wants to impose a nexus between all mental health mitigation and the facts of the crime in contravention of well-settled Eighth Amendment jurisprudence. In Lockett v. Ohio, 438 U.S. 586 (1978), the Supreme Court set forth the rule that the Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering as a mitigating factor any aspect of record or character of the defendant . . . Lockett, 438 U.S. at 604. See also Penry v. Lynaugh, 492 U.S. 302 at 319-322 (1989); Payne

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<sup>18</sup>Suarez's testimony and curriculum vita both reflect the fact that he is not board certified in neuropsychology, nor has he published more than a perfunctory amount in that, or indeed in any, field, unlike Dr. Harvey.

v. Tennessee, 501 U.S. 808 at 822 (1991); Boyde v. California, 494 U.S. 370 at 377-378 (1990); Eddings v. Oklahoma, 495 U.S. 104 at 114 (1982). The United States Supreme Court has recently reiterated its explicit rejection of such a requirement of a nexus between the mitigation and the crime in Tennard v. Dretke, 124 S. Ct 2552 at 2571 (2004). Specifically, no nexus between the handicap and the crime is required.

The State concludes by asserting that in light of the fact that all of the expert testimony presented at the evidentiary hearing was predicated on a theory of acute intoxication and that such a defense was introduced at the guilt phase and clearly rejected by the jury, there is no reasonable probability that the result of the penalty phase proceeding would have been different (Answer Brief at 97). This conclusion is based on faulty logic and incorrect facts. As explained above, Mr. Cook's intoxication was one of a number of mental health mitigators presented at the hearing. No mental health testimony was presented at the guilt phase. Such testimony could not, therefore, have been rejected by the jury because the jury never heard it. The only expert testimony presented as to intoxication was that of Dr. Merry Haber, testimony based on Mr. Cook's self reporting, no testing, and no collateral information. The State's conclusion is erroneous.

The State suggests that the jury would have heard the conflicting evidence of the State and defense experts. That assertion is speculative and is not borne out by

the record, since no State expert was called at the penalty phase. The State trumpets the lower court's finding that the State experts were more credible regarding the statutory mental health mitigation. The State also ignores the fact that in post conviction proceedings, the lower court's capacity to determine witness credibility, and this Court's deference to the lower court's findings, is much more proscribed when the issue under review is whether particular testimony would have had an effect on a jury. See Kyles v. Whitley, 514 U.S. 419, 441-43 (1995).

Moreover, the State does not conduct an analysis of the totality of the mitigation presented at the evidentiary hearing as required by Williams, *supra*. Given the totality of the circumstances, the qualitatively and quantitatively superior mitigation presented at the evidentiary hearing, the existence of only two aggravating factors, and the original jury recommendation of eight to four, this Court cannot say that there is no reasonable probability of a different outcome. Prejudice has been shown and relief must be granted.

### **CONCLUSIONS AND RELIEF SOUGHT**

Based upon the foregoing and the record, Mr. Cook respectfully urges this Court to reverse the lower court order, grant a new penalty phase and grant such other relief as the Court deems just and proper.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on January \_\_\_\_\_, 2006.

**CERTIFICATE OF COMPLIANCE**

The undersigned counsel hereby certifies that this Reply Brief complies with the font requirements of rule 9.210(a)(2), Fla. R. App. P.

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