

IN THE SUPREME COURT OF FLORIDA

Case No. SC09-1089

Lower Court Case No. F96-13558

**LABRANT DENNIS,
Appellant,**

v.

**STATE OF FLORIDA,
Appellee.**

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's summary denial of Mr. Dennis's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.851. The following symbols will be used to designate references to the record in this appeal:

"R" -- record on direct appeal to this Court;

"T." -- trial transcripts on direct appeal to this Court;

"PC-R" -- record on the first 3.851 appeal to this Court;

"Supp. PC-R." -- supplemental record on the first 3.850 appeal to this Court;

"PC-R2." -- record on the instant 3.851 appeal to this Court.

REQUEST FOR ORAL ARGUMENT

Mr. Dennis has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Dennis, through counsel, accordingly urges that the Court permit oral argument.

TABLE OF CONTENTS

PRELIMINARY STATEMENT	ii
REQUEST FOR ORAL ARGUMENT.....	ii
TABLE OF CONTENTS	iii
STATEMENT OF THE CASE.....	1
SUMMARY OF THE ARGUMENT	4
STANDARD OF REVIEW	6
ARGUMENT	7
ARGUMENT I: THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. DENNIS’S CLAIMS THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE	7
1. Mr. Dennis’s Right to a Speedy Trial was Violated	8
2. Failure to Adequately Prepare for Trial	10
3. Failure to Object to Improper Bolstering by State Witnesses	11
4. Irrelevant and Highly Prejudicial Evidence Admitted Without Objection	18
5. Improper Comment on the Defendant’s Right to Remain Silent	21
6. Failure to Investigate Other Suspects.....	24
8. Failure to hire a crime scene expert.....	30
ARGUMENT II: MR. DENNIS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING HIS PENALTY PHASE PROCEEDINGS	34
ARGUMENT III: THE LOWER COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON MR. DENNIS’S CLAIM THAT THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND	

EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE.....	42
ARGUMENT IV: MR. DENNIS’S SIXTH AMENDMENT RIGHTS WERE VIOLATED DUE TO TRIAL COUNSEL’S CONFLICT OF INTEREST.	46
ARGUMENT V: TRIAL COUNSEL FAILED TO OBJECT TO THE PROSECUTOR'S IMPROPER EXAMINATION AND COMMENTS THROUGHOUT TRIAL.	48
ARGUMENT VI: MR. DENNIS IS BEING DENIED HIS CONSTITUTIONAL RIGHTS AND THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE OF THE RULES PROHIBITING MR. DENNIS’S LAWYERS FROM INTERVIEWING JURORS.....	52
ARGUMENT VII: THE CIRCUIT COURT ABUSED ITS DESCRETION IN DENYING ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. DENNIS’S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES IN VIOLATION OF FLA. R. CRIM. P. 3.852.....	54
ARGUMENT VIII: MR. DENNIS IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT THE FORENSIC SCIENCE USED TO CONVICT AND SENTENCE HIM WAS NEITHER RELIABLE NOR VALID, THUS DEPRIVING HIM OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.....	63
ARGUMENT IX: THE CIRCUIT COURT ERRED IN DENYING MR. DENNIS AN EVIDENTIARY HEARING ON HIS CLAIM THAT FLORIDA’S LETHAL INJECTION STATUTE AND THE EXISTING LETHAL INJECTION PROCEDURES VIOLATE THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 AND ARTICLE II, SECTION 3 OF THE FLORIDA CONSTITUTION; THE STATUTE AND PROCEDURES CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.....	72
ARGUMENT X: MR. DENNIS IS INNOCENT OF FIRST DEGREE MURDER.....	74
CONCLUSION AND RELIEF SOUGHT.....	75

CERTIFICATE OF SERVICE	76
CERTIFICATE OF FONT	76

TABLE OF AUTHORITIES

Cases

<i>Ake v. Oklahoma</i> , 470 U.S. 68 (1985)	41
<i>Allen v. Butterworth</i> , 756 So. 2d 52 (2000)	8
<i>Amendments to Fla. R. Crim. Pro. 3.851</i> , 772 So. 2d 488 (Fla. 2000)	8
<i>Arbelaez v. State</i> , 775 So. 2d 909 (Fla. 2000)	46
<i>Baze v. Rees</i> , 128 S. Ct. 1520 (2008).....	87, 88
<i>Bertolotti v. State</i> , 476 So. 2d 130 (Fla. 1985)	57, 58
<i>Booker v. State</i> , 969 So. 2d 186 (Fla. 2007)	8
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	3, 46, 48, 50
<i>Brown v. State</i> , 596 So. 2d 1025 (Fla.1992).....	59
<i>Capehart v. State</i> , 583 So. 2d 1009 (Fla. 1991).....	14
<i>Connor v. State</i> , 979 So. 2d 852 (Fla. 2007)	8
<i>Craig v. State</i> , 510 So. 2d 857 (Fla. 1987)	56
<i>Cunningham v. Zant</i> , 928 F. 2d 1006 (11th Cir. 1991)	58
<i>Cuyler v. Sullivan</i> , 446 U.S. 335 (1980).....	51, 53
<i>Davis v. Florida</i> , 742 So. 2d 233 (Fla. 1999).....	89
<i>Dennis v. State</i> , 537 U.S. 1051 (2002).....	1
<i>Dennis v. State</i> , 817 So. 2d 741 (2001)	1
<i>Donnelly v. DeChristoforo</i> , 416 U.S. 647 (1974).....	58
<i>Easter v. Endell</i> , 37 F. 3d 1343 (8th Cir. 1994).....	71
<i>Frye v. United States</i> , 293 F. 1013 (D.C. Cir. 1923)	84, 85
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972).....	85

<i>Garcia v. State</i> , 622 So. 2d 1325 (Fla. 1993)	54
<i>Garron v. State</i> , 528 So. 2d 353 (Fla. 1998).....	57
<i>Gaskin v. State</i> , 737 So. 2d 509 (Fla. 1999)	46
<i>Gideon v. Wainwright</i> , 375 U.S. 335 (1963)	52
<i>Gonzales v. State</i> , 990 So. 2d 1017 (Fla. 2008).....	8
<i>Heath v. State</i> , 648 So. 2d 660 (Fla. 1994).....	25
<i>Hill v. State</i> , 921 So. 2d 579 (Fla. 2006)	62
<i>Hoffman v. State</i> , 800 So. 2d 174 (Fla. 2001).....	47
<i>Holland v. State</i> , 503 So. 2d 1250 (Fla. 1987).....	71
<i>Holloway v. Arkansas</i> , 435 U.S. 475 (1978)	52, 53
<i>In Re Winship</i> , 397 U.S. 358 (1970)	89
<i>Jackson v. Virginia</i> , 443 U.S. 307 (1979).....	90
<i>King v. State</i> , 623 So. 2d 483 (Fla. 1993).....	57
<i>Kyles v. Whitley</i> , 514 U.S. 419 (1995).....	47, 50
<i>Lightbourne v. McCollum</i> , 969 So. 2d 326 (Fla. 2007).....	87
<i>Lightbourne v. State</i> , 549 So. 2d 1364 (Fla. 1989).....	9, 46
<i>Maharaj v. State</i> , 684 So. 2d 726 (Fla. 1996).....	9
<i>Marek v. State</i> , 2009 WL 259356 (May 2009)	67
<i>Marek v. State</i> , 8 So. 3d 1123 (Fla. 2009)	68
<i>Martinez v. State</i> , 761 So. 2d 1074 (Fla. 2000)	20
<i>Mendoza v. State</i> , 964 So. 2d 121 (Fla. 2007)	37
<i>Morales v. Tilton</i> , 465 F. Supp. 2d 972 (N.D. Cal. 2006)	70
<i>Muehleman v. Dugger</i> , 623 So. 2d 480 (Fla. 1993)	61

<i>Norris v. State</i> , 525 So. 2d 998 (Fla. 5th DCA 1988).....	14
<i>Nowitzke v. State</i> , 572 So. 2d 1346 (Fla. 1990).....	54
<i>Osborn v. Shillinger</i> , 861 F. 2d 612 (10th Cir. 1988).....	52
<i>Pardo v. State</i> , 563 So. 2d 77 (Fla. 1990).....	53
<i>Patton v. State</i> , 784 So. 2d 380 (Fla. 2000).....	46
<i>Porter v. State</i> , 653 So. 2d 375 (Fla. 1995)	61
<i>Proffitt v. Florida</i> , 428 U.S. 242 (1976)	85
<i>Provenzano v. Moore</i> , 744 So. 2d 413 (Fla. 1999).....	89
<i>Pura v. State</i> , 789 So. 2d 436 (Fla. 5th DCA 2001).....	11
<i>Ramirez v. State</i> , 651 So. 2d 1164 (Fla. 1995)	84
<i>Rhodes v. State</i> , 547 So. 2d 1201 (Fla. 1989).....	57
<i>Rodriguez v. State</i> , 592 So. 2d 1261 (2nd DCA 1992).....	59
<i>Rodriguez v. State</i> , 609 So. 2d 493 (Fla. 1992)	20
<i>Rogers v. State</i> , 782 So. 2d 373 (Fla. 2001)	47
<i>Rompilla v. Beard</i> , 125 S. Ct. 2456 (2005).....	38, 39
<i>Rosso v. State</i> , 505 So. 2d 611 (Fla. 3rd DCA 1987)	57
<i>Ruiz v. State</i> , 743 So. 2d 1 (Fla. 1999).....	57
<i>Russ v. State</i> , 95 So. 2d 594 (Fla. 1957)	60
<i>Schwab v. State</i> , 969 So. 2d 318 (Fla. 2007)	87
<i>Schwab v. State</i> , 995 So. 2d 922 (Fla. 2008)	86
<i>Skelton v. State of Texas</i> , 795 S.W. 2d 162 (1989).....	90
<i>Spalding v. Dugger</i> , 526 So. 2d 71 (Fla. 1988)	71
<i>Spencer v. State</i> , 615 So.2d 688 (Fla. 1993).....	1

<i>Spencer v. State</i> , 842 So. 2d 52 (Fla. 2003).....	25
<i>Stamper v. State</i> , 576 So. 2d 425 (Fla. 1st DCA 1991).....	21
<i>State v. Coney</i> , 845 So. 2d 120 (Fla. 2003)	9
<i>State v. DiGuilio</i> , 491 So. 2d 1129 (Fla. 1986)	25
<i>State v. Gunsby</i> , 670 So. 2d 920 (Fla. 1996)	7, 10
<i>State v. Hoggins</i> , 718 So. 2d 761 (Fla. 1998)	24, 26
<i>State v. Kokal</i> , 562 So. 2d 324 (Fla. 1990)	62
<i>State v. Marshall</i> , 476 So. 2d 150 (Fla. 1985).....	25
<i>State v. Sireci</i> , 502 So. 2d 1221 (Fla. 1987)	41
<i>Staveley v. State</i> , 744 So. 2d 1051 (Fla. 5th DCA 1999).....	11
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	passim
<i>Strickler v. Greene</i> , 527 U.S. 263 (1999)	47
<i>Taylor v. Crawford</i> , 487 F. 3d 1072 (8th Cir. 2007)	70
<i>Tingle v. State</i> , 536 So. 2d 202 (Fla. 1988)	14
<i>Tompkins v. State</i> , 994 So. 2d 1072 (2008)	87
<i>Trepal v. State</i> , 846 So. 2d 405 (Fla. 2003)	73
<i>Turner v. Louisiana</i> , 379 U.S. 466 (1965).....	60
<i>United States v. Bagley</i> , 473 U.S. 667 (1985)	47
<i>United States v. Cronic</i> , 104 S. Ct. 2039 (1984)	71
<i>United States v. Cronic</i> , 466 U.S. 648 (1984)	51, 52
<i>United States v. Eyster</i> , 948 F. 2d 1196 (11th Cir. 1991).....	58
<i>United States v. Scheer</i> , 168 F.3d 445 (11th Cir. 1999)	51
<i>Vega v. State</i> , 778 So. 2d 505 (Fla. 3rd DCA 2001).....	11

<i>Vela v. Estelle</i> , 708 F. 2d 954 (5th Cir. 1983)	59
<i>Ventura v. State</i> , 673 So. 2d 479 (Fla. 1996).....	62
<i>Walton v. Dugger</i> , 643 So. 2d 1059 (Fla. 1993).....	62
<i>Weatherford v. State</i> , 561 So. 2d 629 (Fla. 1st DCA 1990)	14
<i>Wiggins v. Smith</i> , 123 S. Ct. 2527 (2003).....	38, 43
<i>Williams v. Taylor</i> , 120 S. Ct. 1495 (2000)	38, 45, 50
<i>Young v. State</i> , 739 So. 2d 553 (Fla. 1999)	47

Statutes

Fla. Stat. § 119.07	56
Fla. Stat. § 119.07(2)(a)	56
Fla. Stat. § 119.07(3)(I)(1).....	57
Fla. Stat. § 782.04(2).....	75
Science, State, Justice, Commerce, and Related Agencies Appropriations Act of 2006, P.L. No. 1-9-108, 119 Stat. 2290 (2005).....	63

Other Authorities

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases	10, 24, 37
American Bar Association, Evaluating Fairness and Accuracy in the State Death Penalty Systems: The Florida Death Penalty Assessment Report, September 17, 2006	65
Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, Strengthening Forensic Science in the United States: A Path Forward (2009).....	passim

Rules

Fla. Bar. R. 4-3.5(d)(4)	52, 54
Fla. R. Crim. P. 3.851(e)(1)(D).....	6, 38

Fla. R. Crim. P. 3.851(f)(5)(A)	6
Fla. R. Crim. P. 3.851(f)(5)(A)(i)	6
Fla. R. Crim. P. 3.851(f)(5)(D)	33
Fla. R. Crim. P. 3.852	59, 60, 61
Fla. R. Crim. P. 3.852(f)	56, 57
Fla. R. Crim. P. 3.852(g)	55
Fla. R. Crim. P. 3.852(i)	55
Fla. R. Crim. P. 3.852(i)(2)	60
Constitutional Provisions	
Fla. Const. Art. I § 17	72
Fla. Const. Art. I § 21	54
Fla. Const. Art. II § 3	72
U.S. Const. Amend. V	5, 53, 63, 64
U.S. Const. Amend. VI	passim
U.S. Const. Amend. VIII	passim
U.S. Const. Amend. XIV	5, 53, 63, 64

STATEMENT OF THE CASE

The Circuit Court for the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida, entered the judgments of conviction and sentences of death at issue in this case. Mr. Dennis was found guilty, as charged, of two counts of first degree murder, one count of burglary with an assault or battery while armed, and one count of criminal mischief on October 28, 1998. (T. 5038). After a penalty phase, the jury voted eleven to one in favor of death for both victims, giving their recommendation on December 2, 1998. (T. 5423-5424). A *Spencer*¹ hearing was held on January 22, 1999. (T. 5438-5459). The court followed the jury's recommendation and on February 26, 1999, sentenced Mr. Dennis to death. (T. 5467-5508).

On direct appeal, this Court affirmed the convictions. *Dennis v. State*, 817 So. 2d 741 (2001), *cert. denied*, 537 U.S. 1051 (2002).² A Motion to Recall the Mandate was filed by Direct Appeal Counsel from the Office of the Public Defender - 11th Judicial Circuit, on June 27, 2002. That Motion was denied on October 9, 2002.

Upon receiving the mandate from this Court, the Attorney General's Office properly noticed the Department of Corrections and the State Attorney's Office for the 11th Judicial Circuit (Supp. PC-R 76, 78). The State delayed in sending out

¹ *Spencer v. State*, 615 So.2d 688 (Fla. 1993).

² The facts adduced at trial are outlined in this Court's opinion on direct appeal.

notifications to the appropriate agencies under Fla. R. Crim. P. 3.852(d) (Supp. PC-R. 82-86) and delayed in filing the records in Mr. Dennis's case in its own possession (Supp. PC-R. 102-3). Due to this delay, Mr. Dennis was given an additional 60 days to file his requests for supplemental public records.

On February 25, 2003, pursuant to Fla. R. Crim. P. 3.852, counsel for Mr. Dennis timely filed numerous Demands for Additional Public Records from various state agencies involved in this case. The lower court held hearings on objections to Mr. Dennis's demands and heard argument pursuant to Fla. R. Crim. P. 3.852(i).

On November 25, 2003, Mr. Dennis filed his initial motion for post-conviction relief with request for leave to amend, wherein he alleged eleven claims for relief, including several grounds under each claim. The lower court held a case management conference on April 22, 2004, at which time it granted an evidentiary hearing on three of Mr. Dennis's Rule 3.851 claims: Claim III-ineffective assistance of counsel at the guilt phase of trial, limited to counsel's failure to object to the prosecutor's comments on Mr. Dennis right to remain silent³ and trial counsel's failure to hire a crime scene expert; Claim IV-ineffective assistance of counsel at the penalty phase; and Claim X-the State withheld exculpatory material

³ Mr. Dennis presentation of evidence on this claim was further limited to the question of when Detective Romagni attempted to contact Mr. Dennis after his first interview (PC-R. 968).

in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The lower court summarily denied Mr. Dennis's remaining claims (T. 946-991).

The lower court held an evidentiary hearing on July 13, 14 and 28, 2004. On September 7, 2004, the lower court heard closing argument (PC-R. 1230-1297). On October 4, 2004, the lower court issued a written order denying all of Mr. Dennis's postconviction claims (PC-R. 680). Mr. Dennis timely appealed the circuit court's denial.

On December 17, 2008, this Court issued an order holding that a new postconviction proceeding was warranted in this case and remanded to the trial court for a new proceeding on Mr. Dennis's postconviction motion filed under Fla. R. Crim. P. 3.851. Mr. Dennis filed a supplemental motion for postconviction relief on April 13, 2009. (Vol. 1, T. 55-147). On that same date, Mr. Dennis requested records regarding Florida's lethal injection procedures from the Department of Corrections, Florida Department of Law Enforcement, the Office of the Governor, and the Office of the Attorney General. Those requests were denied.

On June 12, 2009, the lower court issued a written order summarily denying all of Mr. Dennis's postconviction claims. (Vol. 2, T. 297-323). Mr. Dennis timely filed this appeal. (Vol. 2, T. 324-325).

SUMMARY OF THE ARGUMENT

ARGUMENT I: Mr. Dennis was denied the effective assistance of counsel at the guilt phase of trial. Counsel failed to challenge the State's case from the inception by failing to adequately prepare for trial, failing to object to serious errors pre-trial and during the State's case in chief and failing to present evidence. Reversal for an evidentiary hearing is warranted.

ARGUMENT II: Counsel rendered prejudicially deficient performance at the penalty phase of Mr. Dennis's trial. An abundance of mitigation was available, but was never presented because trial counsel did not conduct any investigation into Dennis's background, family or community. With no reasonable tactic or strategy, counsel failed to hire a mental health expert to evaluate Mr. Dennis for mitigation. Reversal for an evidentiary hearing is warranted.

ARGUMENT III: The State had or knew of material impeachment evidence and failed to turn it over to defense counsel. The State was in possession of a memorandum sent to Dr. Valerie Rao detailing the medical testimony required from her at the penalty phase which was tantamount to witness coaching. Had Dr. Rao's prejudicial and inflammatory testimony been impeached as having been coached by the State, the result of the penalty phase would have been different. Reversal for an evidentiary hearing is warranted.

ARGUMENT IV: Mr. Dennis's trial counsel rendered ineffective assistance

due to an actual conflict of interest. As a result of his work load, trial counsel's failed to investigate, prepare and challenge the State's case.

ARGUMENT V: Trial counsel failed to object to the prosecutor's improper examination and comments throughout trial. Had the jury not been subjected to these improper arguments, there is a reasonable probability that the outcome of the trial would have been different.

ARGUMENT VI: Rule 4-3.5(d)(4), Rules Regulating the Florida Bar is unconstitutional because it prevents Mr. Dennis from investigating any claims of jury misconduct, bias or reliance on external influences that may be inherent in the jury's verdict is unconstitutional.

ARGUMENT VII: Mr. Dennis was denied his rights to due process, equal protection and the effective assistance of counsel due to the lower court's denial of public records.

ARGUMENT VIII: Newly discovered evidence establishes that the forensic science used to convict and sentence him to death was neither reliable nor valid. The resulting convictions and sentences violate Mr. Dennis's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution.

ARGUMENT IX: The circuit court erred in denying Mr. Dennis an evidentiary hearing on his claim that Florida's lethal injection statute and the existing lethal injection procedures violate the Eighth Amendment to the United

States Constitution and Article I, Section 17 and Article II, Section 3 of the Florida Constitution.

ARGUMENT X: Mr. Dennis is innocent of first degree murder. The case against Mr. Dennis was circumstantial at best. Taking all of the evidence in a light most favorable to the State, no rational fact finder could find Mr. Dennis guilty of premeditated or felony murder beyond a reasonable doubt.

STANDARD OF REVIEW

The lower court summarily denied Mr. Dennis's numerous allegations of serious deficiencies which singularly and cumulatively undermined confidence in the outcome of Mr. Dennis's capital trial. *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Gunsby*, 670 So. 2d 920 (Fla. 1996). Mr. Dennis sought an evidentiary hearing pursuant to Fla. R. Crim. P. 3.851(e)(1)(D) and Fla. R. Crim. P. 3.851(f)(5)(A) for all claims requiring a factual determination. Pursuant to Fla. R. Crim. P. 3.851(f)(5)(A)(i), an evidentiary hearing must be held whenever the movant makes a facially sufficient claim that requires a factual determination. *See also Amendments to Fla. R. Crim. P. 3.851*, 772 So. 2d 488, 491 n.2 (Fla. 2000) (endorsing the proposition that "an evidentiary hearing is mandated on initial motions which assert . . . legally cognizable claims which allege an ultimate factual basis"). *See also, Allen v. Butterworth*, 756 So. 2d 52, 66-67 (2000); *Gonzales v. State*, 990 So. 2d 1017, 1024 (Fla. 2008). To the extent there is any

question as to whether the movant has made a facially sufficient claim requiring a factual determination, the Court will presume that an evidentiary hearing is required. *Booker v. State*, 969 So. 2d 186, 195 (Fla. 2007).

“Postconviction claims may be summarily denied when they are legally insufficient, should have been brought on direct appeal, or are positively refuted by the record.” *Connor v. State*, 979 So. 2d 852 (Fla. 2007). Factual allegations as to the merits of a constitutional claim as well as to issues of diligence must be accepted as true, and an evidentiary hearing is warranted if the claims involve “disputed issues of fact.” *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996). A court’s decision whether to grant an evidentiary hearing is subject to *de novo* review. *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003).

Mr. Dennis’s rule 3.851 motion pled facts regarding the merits of his claim which must be accepted as true. *Lightbourne v. State*, 549 So. 2d 1364, 1365 (Fla. 1989). When these facts are accepted as true, it is clear that the record does not positively refute Mr. Dennis’s claim and that an evidentiary hearing is required.

ARGUMENT

ARGUMENT I: THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. DENNIS’S CLAIMS THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE

The lower court summarily denied Mr. Dennis’s numerous allegations of

serious deficiencies which singularly and cumulatively undermined confidence in the outcome of the guilt phase of Mr. Dennis's capital trial. *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Gunsby*, 670 So. 2d 920 (Fla. 1996). Because these claims were more than sufficiently pled, and because the files and records do not conclusively demonstrate that Mr. Dennis is not entitled to relief, reversal for an evidentiary hearing is warranted.

1. Mr. Dennis's Right to a Speedy Trial was Violated

In the instant case, trial counsel began in an ineffective manner by waiving Mr. Dennis's right to a speedy trial. Mr. Dennis was arrested on April 30, 1996. The indictment was filed on May 8, 1996, with the arraignment on May 10, 1996. (T. 1-13). At the arraignment the State said they would provide discovery within the 15 day window mandated by Florida Rule of Criminal Procedure 3.220(b). (T. 4). The court set a trial date of August 26, 1996. (T. 5). Mr. Guralnick did not object.

The State's initial discovery response on May 28, 1996 consisted of a witness list with 24 witnesses along with various sworn statements. Amended discovery followed shortly thereafter with a great many more witnesses and statements being added by the prosecution. The initial discovery did not include the report of the lead Detective Thomas Romagni. Det. Romagni did not turn over his report for six to eight months after Mr. Dennis's arrest. (T. 770).

On July 18, 1996, trial counsel requested a defense continuance. (T. 402-413). There was no strategic reason why trial counsel should have taken a defense continuance, or even agreed to a joint continuance. He did not have sufficient time to investigate or review discovery from the prosecution. Trial counsel should have never allowed the court to set such an early trial date or in the alternative he should have requested that the court charge a continuance to the prosecution who had not yet provided full or sufficient discovery.

“A defendant should not have to choose between the right to a speedy trial and the right to discovery within sufficient time to adequately prepare for trial.” *Vega v. State*, 778 So. 2d 505, 506 (Fla. 3rd DCA 2001). *See also Pura v. State*, 789 So. 2d 436, 439 (Fla. 5th DCA 2001) (citing *Staveley v. State*, 744 So. 2d 1051 (Fla. 5th DCA 1999), rev. denied, 760 So. 2d 948 (Fla. 2000)). The State was under an obligation to provide full discovery in a timely manner. Trial counsel should never have sacrificed Mr. Dennis’s right to a speedy trial when the lead detective had failed to timely turn over his report of the investigation.

There is nothing in the record to suggest that trial counsel made a strategic decision in requesting a defense continuance or not requesting that a continuance be charged to the State. The fact remains that counsel did not have enough time to investigate in order to determine whether he needed to take a defense continuance. The decision was uninformed, unnecessary, and counsel was ineffective. *See ABA*

Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.2(B). The lower court states that Mr. Dennis did not allege that he would have been ready for trial at the end of the speedy trial period (PC-R2. 305). However, the issue of trial counsel's readiness are questions for trial counsel at an evidentiary hearing. Mr. Dennis is entitled to an evidentiary hearing.

2. Failure to Adequately Prepare for Trial

Mr. Dennis alleged in his Rule 3.851 motion that trial counsel failed to adequately prepare for trial. Mr. Guralnick was a sole-practitioner who represented Mr. Dennis on a pro-bono basis. (T. 25). When Mr. Guralnick agreed to represent Mr. Dennis in this case he was already representing another capital defendant, Daniel Lugo,⁴ as well as running his practice. Despite his excessive caseload, trial counsel failed to seek the appointment of a second attorney.

Contrary to the lower court's order, Mr. Dennis alleged in his motion, and argued at the case management conference, specific facts with respect to counsel's failure to adequately prepare (PC-R. 44-45)(PC-R2. 374, 378).⁵ Mr. Guralnick

⁴ Mr. Lugo's case preceded Mr. Dennis's in 1998 and took three months to try the guilt phase alone. (T. 566).

⁵ Mr. Dennis alleged during this time the State was unable to take the depositions of the defense witnesses because Mr. Guralnick was unavailable. The State also brought to the trial court's attention the fact that Mr. Guralnick had taken only a small number of depositions of the witnesses in this case and that they planned on calling at least 60 witnesses in the State's case-in-chief. (T. 564). The State's concern regarding Mr. Guralnick's lack of preparedness was so great that it led to

should have sought the assistance of a second qualified attorney to assist him in this case, particularly with respect to his inability to timely conduct discovery, as well as with the investigation and preparation for the penalty phase (PC-R2. 378).

Contrary to the lower court's conclusion that this claim is refuted by the record, the record does not support the conclusion that Mr. Dennis was aware of the need for a second chair attorney and what a second chair attorney could provide in terms of preparing for the penalty phase. The record merely indicates that Mr. Dennis agreed that he had only hired Mr. Guralnick and he was satisfied with his services up to that early stage of the proceedings (R. 1032-34). Mr. Dennis had no information or explanation of the options available to him. The citations by the lower court are merely trial counsel and the judge reiterating Mr. Dennis's uninformed acquiescence.

Trial counsel's failure to hire a second chair attorney, coupled with his responsibilities to another capital defendant and to his solo-practice rendered him ineffective. Because these claims were more than sufficiently pled, and because the files and records do not conclusively demonstrate that Mr. Dennis is not entitled to relief, Mr. Dennis is entitled to an evidentiary hearing.

3. Failure to Object to Improper Bolstering by State Witnesses

Mr. Dennis alleged in his Rule 3.851 motion that trial counsel did nothing to

an improper communication with the original trial judge, who shortly thereafter, *sua sponte*, recused herself. (T. 610-619).

object to the testimony of several key witnesses, all of which was rampant with improper opinions and bolstering of the witnesses by the State (PC-R. 45-55). “The law is well-settled that a witness’s testimony offered to vouch for the credibility of another is inadmissible.” *Weatherford v. State*, 561 So. 2d 629, 634 (Fla. 1st DCA 1990); *See also Capehart v. State*, 583 So. 2d 1009 (Fla. 1991); *Tingle v. State*, 536 So. 2d 202 (Fla. 1988); and *Norris v. State*, 525 So. 2d 998 (Fla. 5th DCA 1988). Trial counsel’s failure to object, and do so adequately when called for, made him ineffective.

Det. Thomas Charles - Det. Charles was a Crime Scene Investigator, tasked with taking photographs of the scene and collecting evidence, both inside and outside the apartment where the bodies were found (T. 3257). During and throughout his testimony, he was never qualified or offered as an expert of any kind (T. 3246-3334). Despite the lack of expert qualification, the prosecution elicited testimony from Det. Charles as if he was an expert in tool mark identification. Without objection from trial counsel, Det. Charles testified to the damage to the tires of Earl Little’s Ford Explorer, particularly with respect to the similarities between puncture marks and the size, shape and type of puncture (T. 3161-62). Trial counsel failed to object to this improper expert opinion testimony.

Additionally, the testimony was an improper bolstering of the subsequent

testimony of toolmark examiner Thomas Quirk. (T. 4467-4507). Det. Charles did not testify about the tires in order to respond to a challenge by trial counsel of Examiner Quirk's testimony. The sole purpose of Det. Charles' tire testimony was to leave the jury with the impression that since one police officer has already testified to these issues, the second officer must be telling the truth. The State elicited an improper, unqualified opinion from him in order to bolster their evidence against Mr. Dennis. Trial counsel was ineffective for failing to object to this testimony.

Det. Charles also gave improper and unqualified "expert" testimony about blood splatter at the crime scene. He improperly testified about angle and direction of blood drops, explained the term "cast off" and opined that smearing was the result of someone's hands (T. 3268-3269, 3290, 3291, 3292). Not only was the testimony improper "expert" opinion by an unqualified witness, the explanation was highly improper and inflammatory, comparing striking a person with a club to "slinging a wet mop" (T. 3291) and inappropriately commenting that there was "some act of violence going on here" (T. 3290). This testimony was inflammatory, improper expert testimony and trial counsel was ineffective for failing to object.

The improper testimony continued when Det. Charles was permitted to give "expert" testimony regarding firearms. Det. Charles explained that he found a small fragment of metal on the floor "the shape and size and the coloring of a

trigger guard.” (T. 3288). This testimony only served to improperly bolster witness Quirk and witness George Borghi’s subsequent testimony about the gun. Again, trial counsel failed to object.

Det. Charles’s improper testimony was only highlighted by trial counsel on cross-examination. During cross, Mr. Guralnik asked Det. Charles’s opinion about blood spatter and the struggle between Mr. Barnes and his assailant(s). (T. 3315-3316). The State objected, arguing that this was speculation and Det. Charles was not a blood splatter expert. (T. 3316). In overruling the State’s objection, Judge Crespo indicated that Det. Charles had “come across as being an expert in this area.” (T. 3316). Despite Judge Crespo’s characterization, Det. Charles was never qualified as an expert in any field. Like Judge Crespo, the postconviction court in denying Mr. Dennis’s claim arrives at the same erroneous conclusion (PC-R2. 307). The record does not support any finding that Det. Charles was qualified as an expert in tool marking and/or blood spatter. Mr. Guralnick continued to elicit improper expert opinion testimony that ultimately culminated in Det. Charles himself stating that he has not been certified as an expert. (T. 3321).

The bulk of Det. Charles’ testimony was a series of improper opinions, given by an unqualified witness (T. 3246 - 3334). Trial counsel was ineffective for not properly objecting to this improper bolstering of the State’s evidence prior to their

actual expert witnesses testimony. There is nothing in the record to suggest a strategy on trial counsel's part for not objecting, nor anything in the record to suggest that trial counsel did not object because he thought there was no valid objection. Because the files and records do not conclusively refute this claim, Mr. Dennis is entitled to an evidentiary hearing.

Det. Juan Sanchez - At trial, the State asked Det. Sanchez if Ms. El-Djeije, the Amoco Station attendant, had identified a photo as the car she had observed in the early morning hours of April 13, 1996. (T. 3546). Trial counsel objected to hearsay and the court overruled the hearsay objection. When the State asked whether she was able to name the type of vehicle she saw, Det. Sanchez responded, "She said it was a Nissan. . .She was very adamant about her identification. (T. 3546-3547). This was improper bolstering of Ms. El-Djeije's testimony and should have been objected to in a contemporaneous manner by trial counsel in order to preserve his pre-trial objections. The lower court improperly determined that this issue was raised on direct appeal. While Mr. Dennis did raise the trial court's error in denying his motion to suppress Ms. El-Djeije identification of the Nissan, *Dennis* 817 So. 2d 759-61, he never raised the improper bolstering of Ms. El-Djeije by Det. Sanchez, nor did he raise counsel's failure to object. Because Mr. Dennis's claim of ineffective assistance of counsel is not procedurally barred and because the record does not conclusively refute trial counsel's ineffectiveness

for failing to object, Mr. Dennis is entitled to an evidentiary hearing.

Joseph Stewart - During the direct examination of Mr. Stewart, the prosecution, over defense hearsay objection, elicited from Mr. Stewart the following:

[Ms. Seff]: Have you been told that there is anything at this point that you could be arrested for?

[Mr. Guralnick]: Objection hearsay.

[The Court]: Overruled.

[Mr. Guralnick]: Question was, have you been told.

[The Court]: All right. Overruled.

[Ms. Seff]: You can answer the question. You have been told at this point that there is anything you can still be arrested for?

[Mr. Stewart]: For lying.

(T. 3628-3629). The appropriate objection was improper bolstering of the witness's own credibility, since it took from the jurors their job of independently weighing his credibility by improperly telling them that Mr. Stewart must be telling the truth or he would be prosecuted. The lower court failed to address the ineffective assistance of counsel claim and merely stated that the "testimony was elicited. . .in anticipation that [Mr. Dennis] would assert Stewart was testifying to avoid being arrested for this case" (PC-R2. 307). The lower court failed to cite to any portions of the record, nor does it provide any legal opinion. There is no suggestion in the record as to trial counsel's strategy for failing to object to this improper testimony. Mr. Dennis is entitled to an evidentiary hearing.

Det. Thomas Romagni - Det. Romagni's testimony only served to

improperly bolster the credibility of himself, Mr. Stewart and many other witnesses. His testimony, as a whole, served to bolster the entire investigation and prosecution against Mr. Dennis.

Det. Romagni was repeatedly asked and answered questions by both the prosecution and trial counsel that caused him to bolster the credibility of Mr. Stewart. Mr. Stewart's testimony was the only evidence that tied Mr. Dennis to the murder weapon. As a result of Det. Romagni's improper testimony, as well as Mr. Stewart's own testimony, the State argued that Mr. Stewart had no motive to lie and continued to vouch for his credibility arguing that the jury could believe what "he told you" (T. 4872-74). Furthermore, the State emphasized Det. Romagni's testimony regarding the credibility of Mr. Stewart arguing that there was no evidence that "anybody felt Joseph Stewart committed this crime" (T. 4877). The prosecutor's improper comments and bolstering of Joseph Stewart persisted in rebuttal (T. 4943-44).

Not only did Det. Romagni lend more credibility to Mr. Stewart's testimony, he introduced irrelevant and highly improper information about how he made his decisions to believe certain people and to disbelieve others (T. 4172). This invaded the province of the jury, improperly tainted their perception of the evidence, and rendered their job of weighing and evaluating the credibility of the witnesses in this case as simply a perfunctory stamp of approval of what Det. Romagni and

multiple other police agencies had already done. “[T]his Court has expressed its concern that error in admitting improper testimony may be exacerbated where the testimony comes from a police officer. *See Rodriguez v. State*, 609 So. 2d 493, 500 (Fla. 1992).” *Martinez v. State*, 761 So. 2d 1074, 1080 (Fla. 2000). Similarly here, the improper bolstering was even more egregious because Det. Romagni was a law enforcement officer. *See also, Stamper v. State*, 576 So. 2d 425, 426 (Fla. 1st DCA 1991). Trial counsel’s failure to object, and do so adequately when called for, rendered his assistance ineffective. Mr. Dennis is entitled to an evidentiary hearing.

4. Irrelevant and Highly Prejudicial Evidence Admitted Without Objection

During the testimony of Det. Poitier, the State elicited that he received a sexual assault kit from the medical examiner’s office and the kit was admitted into evidence without objection by trial counsel. (T. 3367). There was never an allegation of sexual assault made against Mr. Dennis, nor was it charged in the indictment. The lower court misunderstands the significance of this testimony and trial counsel’s failure to object, believing that the negative results of the sexual assault kit make the testimony irrelevant and not prejudicial. However, Mr. Dennis alleged that this information was highly prejudicial because it left the jury with the impression that police and the medical examiner suspected that she had been sexually assaulted. Trial counsel failed to make a motion in limine to exclude this evidence and failed to object to this testimony during the trial. Trial counsel was

ineffective and the testimony only served to further prejudice the jury against Mr. Dennis.

In addition, during the cross-examination of Det. Poitier, trial counsel failed to object to the improper opinion testimony on the ultimate issue of guilt (T. 3376). Det. Poitier opined that, based on his experience, all the evidence pointed to Mr. Dennis. This testimony was not only prejudicial, but was also nonresponsive to counsel's questions regarding the possibility of multiple perpetrators. Mr. Guralnick should have objected. His failure to do so rendered him ineffective. As a result, during the State's re-direct examination of Det. Poitier, the court allowed the witness to further compound the error of his nonresponsive answers by erroneously ruling that trial counsel opened the door to this ultimate opinion of fact about Mr. Dennis' guilt. When asked by the prosecutor if there was any other reason why he believed that Mr. Dennis was the sole assailant, Det. Poitier answered, "The domestic abuse history with the defendant and Ms. Lumpkins." (T. 3379). Counsel failed to object to this hearsay and improper *Williams* Rule evidence. The lower court fails to address this additional allegation of ineffectiveness.

Additionally, the State introduced irrelevant and highly prejudicial testimony through witness Watisha Wallace. (T. 3565-3618). Ms. Wallace was asked whether she and Mr. Dennis purchased guns in her name for Mr. Dennis (T. 3592). This

testimony was irrelevant since the weapon(s) the State was asking about were not the alleged murder weapon, i.e. a shotgun. The State brought this out only to further prejudice the jury against Mr. Dennis and not to rebut any particular defense position.

Trial counsel also failed to object to the testimony regarding Mr. Dennis's use of a cloned cell phone (T. 3804-3809; 3810-3815; 3815-3826; 3820-3821; T. 3875-3880). This testimony was irrelevant and prejudicial. Any testimony regarding Mr. Dennis's use of a cloned cell phone was the equivalent of an uncharged crime coming in to further prejudice the proceedings against Mr. Dennis. The lower court misunderstands Mr. Dennis's allegations, finding that the cell phone records were admissible (PC-R2. 310). However, Mr. Dennis had alleged that he was never charged with possession or use of a cloned cell phone and any information of evidentiary value could have been presented in an alternate manner. This testimony served no purpose in this trial and should have been objected to by trial counsel.

Mr. Dennis should have been adequately represented against the improper and highly prejudicial testimony. To the extent that trial counsel may have opened the door to any of these comments and/or evidence, he was ineffective. In denying postconviction relief, the lower court ignored counsel's ineffectiveness in not objecting and overlooked counsel's duty to preserve the issues for appellate

review. There is nothing in the record to suggest a strategy on trial counsel's part for not objecting to these highly prejudicial and inflammatory evidentiary admissions, nor anything in the record to suggest that trial counsel did not object because he thought there was no valid objection. Because the files and records do not conclusively refute Mr. Dennis's claim, he is entitled to an evidentiary hearing.

5. Improper Comment on the Defendant's Right to Remain Silent

Mr. Dennis alleged below that trial counsel was ineffective for failing to object to improper comments on Mr. Dennis's right to remain silent. The State improperly elicited testimony from Det. Romagni regarding Mr. Dennis' right to remain silent when it elicited testimony that Det. Romagni was not permitted to talk to Mr. Dennis after his initial pre-arrest interview (T. 4223-4224). This Court has made clear the test to be applied when evaluating an improper comment on a defendant's right to remain silent:

Regardless of whether evidence of postarrest silence is introduced in the state's case-in-chief or for impeachment purposes, the same test applies. If the comment is fairly susceptible of being construed by the jury as a comment on the defendant's exercise of his or her right to remain silent, it violates the defendant's right to silence.

State v. Hoggins, 718 So. 2d 761 (Fla. 1998). The State continued its improper comments on Mr. Dennis's right to remain silent during its initial closing argument: "Did he ask one question. Did he ask one question about this woman, not one. Did he ask one question about how it happened. Did he cry. Was he sad.

Did he do anything?" (T. 4880). Again, there was no objection by trial counsel. The most egregious of these improper comments occurred during the State's rebuttal closing argument:

When Detective Romagni recalled his testimony, told the defendant, When I know more I want to call you back to give a statement. He was not permitted to do so.

Detective Romagni never got to take that taped statement or that transcribed statement from the defendant because of the defendant, not because of Detective Romagni because when Detective Romagni was ready to take it.

When he knew the case, when he had the evidence before him, when he knew what he wanted to ask and confront the defendant with, **the defendant all of a sudden was no longer cooperating.**

(T. 4944)(emphasis added). Mr. Guralnick, for a third time, failed to object.

These arguments by the State served to highlight two things: that the defendant exercised his right to remain silent with Det. Romagni and that he chose not to testify at trial. It has been well established that "any comment on, or which is fairly susceptible of being interpreted as referring to, a defendant's failure to testify is error and is strongly discouraged." *Spencer v. State*, 842 So. 2d 52 (Fla. 2003) (citing *State v. Marshall*, 476 So. 2d 150, 153 (Fla. 1985); *see also, e.g., Heath v. State*, 648 So. 2d 660, 663 (Fla. 1994); *State v. DiGuilio*, 491 So. 2d 1129, 1131 (Fla. 1986)). The series of questions and comments either elicited or made by the prosecutor were crafted in such a manner as to leave the impression with the jury that not only did Mr. Dennis not fully cooperate with the police, he was continuing to do so by his failure to testify at trial. The testimony from Det. Romagni also

leaves the impression that Mr. Dennis is obstructing justice as opposed to exercising his constitutional right to remain silent.

The responses of Det. Romagni at trial indicate that he did attempt to contact Mr. Dennis at some point prior to his arrest, but Mr. Dennis refused to speak with the detective (T 4223-24). However, the record is unclear as to when and under what circumstances Det. Romagni attempted to reinitiate his questioning of Mr. Dennis. Mr. Dennis had the right to remain silent when arrested and at trial. *See State v. Hoggins*, 718 So. 2d 761, 771 (Fla. 1998). Det. Romagni and the prosecutor's comments to the jury were improper. The error cannot be deemed harmless given the fact that these comments are susceptible to the interpretation by the jury that Mr. Dennis failed to cooperate with the police and he continued to do so by not testifying at trial. Trial counsel failed to object at any point in time to this information being presented to the jury. To the extent that he opened the door to this information, he was also ineffective.

The lower court tersely cites to case law in determining that the comments were appropriate. This ignores that the record is unclear as to whether Detective Romagni's comments about Mr. Dennis's cooperation were pre- or post-arrest and whether, in fact, Det. Romagni actually made attempts to speak to Mr. Dennis after his initial contact. The lower court further ignores counsel's ineffectiveness in not objecting and overlooks counsel's duty to preserve this issue for appellate review.

There is nothing in the record to suggest a strategy on trial counsel's part for not objecting, nor anything in the record to suggest that trial counsel did not object because he thought there was no valid objection. Mr. Dennis is entitled to an evidentiary hearing.

6. Failure to Investigate Other Suspects

Mr. Dennis alleged in his Rule 3.851 motion that trial counsel failed to investigate and present evidence of other suspects (PC-R. 57-62). It is incumbent upon counsel to conduct independent investigations pertaining to the guilt/innocence phase of trial. ABA Guidelines 11.4.1 (A). Despite having preliminary information regarding other boyfriends, and therefore other persons with a similar jealous motive, trial counsel failed to investigate the information.

The State's theory at trial was that Labrant Dennis killed Timwanika Lumpkins and Marlin Barnes out of jealousy. The State argued that Mr. Dennis's "possessiveness, his jealousy, his selfishness" resulted in the death of these victims (T. 3009). The jury was told that "no other man had the motive, the opportunity, the means, the strength, and the premeditation necessary to carry out these crimes" (T. 3010)(emphasis added). However, this was not the case. The only reason the State could exploit this argument is because the police failed to investigate any other suspects. By his own admission, the lead investigator, Detective Romagni, knew Timwanika Lumpkins had other boyfriends besides Mr. Dennis, yet failed to

investigate these men or their relationships with the victim (T. 273). Additionally, Detective Romagni knew she had sexual relationships with other men (T. 280). Likewise, defense counsel neglected investigating other possible suspects.

Counsel was clearly aware of the relevance of Timwanika's various boyfriends (T. 273, 280). Prior to trial, the State filed a motion in limine to exclude evidence of "sexual relationships between Ms. Lumpkins and any man, including Marlin Barnes, or other football players" (T. 930). Trial counsel took the position that other relationships are relevant particularly given the motive of jealousy being put forth by the State and certainly there could be someone else with a jealousy motive (T. 932-33). The State emphasized the fact that in order to introduce information of other boyfriends or sexual relationships trial counsel would need evidence that someone else killed Timwanika (T. 933). Further, the State argued if the defense had evidence that "a particular man that Ms. Lumpkins had sexual relationships with had expressed jealousy about her, and wasn't going to be with any other man, fine" (T. 934). So, the State is conceding the admissibility and relevance if trial counsel had some evidence. Trial counsel was on notice of the necessity to investigate other relationships of Timwanika Lumpkins. Immediately prior to the start of voir dire, the trial court denied the State's motion to exclude evidence of prior sexual relationships (T. 1031).

Trial counsel's failure to investigate and present evidence of other suspects

is particularly relevant given the defense theory at trial. According to the defense, this was a case of negligent investigation, wholly lacking in any physical evidence linking Mr. Dennis to the crime (T. 3043, 3048). Specifically, counsel told the jury that the police zeroed in on Mr. Dennis and forgot everything else (T. 3043). Counsel repeatedly argued that Ms. Lumpkins “saw other guys” and told the jury “the evidence will show motives of anybody else; the other boys that she saw.” (T. 3062-63)(emphasis added). Yet, he presented no evidence of other men or their motives.

Significant to trial counsel’s failure to investigate other suspects, is the fact that trial counsel was in possession of Ms. Lumpkins’ diary or day planner. Ms. Lumpkins’ diary illustrates the fact that she was involved with various men throughout the end of the year of 1995 and the beginning of 1996. One section of Ms. Lumpkins’ diary provides a calendar for the entire years of 1995, 1996 and 1997 (PC-R. 285). At the top of both pages of this section, Ms. Lumpkins wrote “Menstrual.” On each of the individual months, Ms. Lumpkins seems to have kept track of whom she had slept with on a given date by placing an initial on that date. Some of the initials correspond with more detailed notes in her planner. For example, the initial “R” appears on February 29, 1996 and there is an entry in the weekly planner section which reads “Go see Ray’s workout 12p-3p, at practice field.” Additionally, the initial “L” appears on February 14, 1996 and the weekly

planner details that she went to dinner to celebrate Valentine's Day with Mr. Dennis on that date.

The police reports and the trial record confirm that "Ray" is another football player, Ray Lewis. In addition to the notation about attending "Ray's workout," on February 23, 2003, there is a notation indicating: "(Ray told me how he felt about me) I'm so shocked!!!!!!!" Despite these notations, trial counsel never interviewed Ray Lewis. According to the investigator hired by trial counsel, Mr. Lewis refused to speak to the defense. Trial counsel failed to pursue a deposition through the State and/or the court. Regardless of the fact that Mr. Lewis asserted he was in Lakeland, Florida at the time of the crime, as the lower court pointed out, trial counsel had a duty to investigate the significance of any relationship the victim may have had with Mr. Lewis. Nothing in the record refutes that he failed to do so.

Of importance is the fact that Ms. Lumpkins' appears to have been involved with a third individual the entire month of March 1996, who is unidentifiable from any other entries in her diary. In March 1996, Ms. Lumpkins placed the initial "P" on the dates of March 1st, 15th and 29th. (PC-R. 285). The initial "P" also appears on December 20, 1995.⁶ According to the yearly calendar, Ms. Lumpkins and Mr. Dennis had not been sexually involved since February 14, 1996.

Even if trial counsel was unaware of the relevance of these specific

⁶ Both the week of December 20, 1995 and most of the month of March 1996 are missing from Ms. Lumpkins' weekly planner section of her diary.

individuals upon his receipt of the journal on August 4, 1998, he should have requested a defense continuance in order to have time to digest the information and adequately review it. His failure to request additional time to investigate and gather information regarding these individuals cannot be considered strategic. To the extent that the State failed to timely disclose Ms. Lumpkins' diary, the State rendered trial counsel ineffective. There is nothing in the files and records to suggest a strategy on the part of trial counsel for not conducting a thorough investigation.

Ms. Lumpkins' diary was a significant source of information requiring further inquiry. Further sources were available to explain and confirm the information contained in her diary. For example, Chaka Kahn Williams was Ms. Lumpkins' closest friend and confidant. Ms. Williams was listed as a state witness, but due to trial counsel's ineffectiveness and failure to investigate, he failed to depose her prior to trial. Here, where the State's theory is one of jealousy and control, information that Ms. Lumpkins' was consistently having sexual relations with another man the entire month before her death is significant.

The lower court erroneously concluded that trial counsel was not ineffective because he did present "this information" (PC-R2. 311). The record reveals that trial counsel argued that other boyfriends had a similar jealous motive, but counsel provided no evidence to support this argument to the jury. As a result of his failure

to investigate those persons detailed in Ms. Lumpkins' diary, specifically the unidentified individual she was involved with the entire month preceding her death, trial counsel was ill-equipped to adequately impeach Detective Romagni. Instead, trial counsel simply questioned Detective Romagni if he knew of other men Ms. Lumpkins was involved with and whether he checked their whereabouts. Romagni answered that he knew of others but did not check alibis (T. 4137). Romagni testified that he did not know how many other men Ms. Lumpkins' was seeing at the time she was seeing Mr. Dennis (T. 4138). On re-direct, the State asked Detective Romagni if there was any evidence that "suggested" that anyone other than Mr. Dennis did this (T. 4219-20). Romagni answered "no." Trial counsel again asked if he ever investigated the other men Ms. Lumpkins had dated or had sex with and the answer remained no (T. 4232-33). Yet, counsel provided no such other men to the jury.

At no point in the cross examination regarding other boyfriends did trial counsel question Romagni about his investigation of the diary. Given Romagni's testimony at the *Richardson* hearing pertaining to the discovery of the diary, trial counsel was on notice that Romagni failed to investigate any aspect of the diary. At the *Richardson* hearing, Romagni specifically testified that he merely glanced at the diary and placed it in his case file. He stated that he was looking for leads, but did not see anything pertinent (T. 775). Counsel's ineffectiveness is compounded

by his failure to depose Romagni after the disclosure of the diary and his failure to develop the information contained within the diary at the *Richardson* hearing when he had the opportunity.

Trial counsel was unable to provide the jury with any other suspects due to his lack of investigation. Therefore, the jury was left to believe that his questions regarding other boyfriends were mere speculation. Mr. Dennis was not granted an evidentiary hearing on this fact intensive claim. Because the records and files do not conclusively refute Mr. Dennis's claims of ineffective assistance of counsel, he is entitled to an evidentiary hearing.

8. Failure to hire a crime scene expert

Contrary to the lower court's statement that Mr. Dennis failed "to allege what experts should have been hired, what these experts would have testified about and how this failure prejudiced [Mr. Dennis]," Mr. Dennis's claim was more than sufficiently pled. Mr. Dennis asserted in his Rule 3.851 motion that where trial counsel argued in his opening statement that this was a very bloody scene, there was no evidence to show how many persons committed this crime and "there's no way the person who committed this act could not have had blood on him or brain matter, skin, anything else" (T. 3046), it was imperative for trial counsel to obtain a crime scene expert, crime scene reconstructionist and/or forensic pathologist to provide the jury with the evidentiary support for this argument and to challenge the

unsupported assumptions of the State's case (PC-R. 64). However, because trial counsel failed to hire any experts pertaining to the crime scene, blood spatter, tool marks analysis, or firearms analysis, the state's experts and the unqualified opinion testimony of numerous state witnesses went virtually unchallenged. Evidence that this crime could not have been committed by one person and that the assailants would not have been able to leave the scene without some amount of blood on their persons is exactly the type of evidence that would have supported Mr. Dennis's defense that he did not commit this crime.

The State qualified several experts in its case in chief. Detective Borghi was qualified as an expert in the area of trace evidence and fracture patterns (T. 3849). Borghi was asked to determine if certain metal fragments found at the crime scene originated from the shotgun that was recovered (T. 3855, 3856). Borghi ultimately opined that the two metal fragments originated from the shotgun (T. 3863). On cross examination, trial counsel asked no questions regarding his fracture comparison (T. 3864-65). Yet, the shotgun is exactly what linked Mr. Dennis to the scene.

Criminalist Quirk was qualified as an expert in firearm and tool mark identification (T. 4472). With regards to Quirk, not only did trial counsel not conduct voir dire of this witness' qualifications, but counsel essentially vouched for his qualifications by stating "I know Criminalist Quirk. No Problem" (T. 4472).

Dr. Sam Gulino was qualified as an expert in forensic pathology (T. 4382). Dr. Gulino provided several opinions regarding the events at the crime scene. Dr. Gulino characterized the assailant as “they” indicating multiple assailants, but when asked further about this he stated he did not know if there was more than one assailant (T. 4457-58). Dr. Gulino also opined whether the assailant stayed until victim Barnes bled out testifying that it did not appear so because he was just inside the door and there were no footprints through the blood which was just inside the door (T. 4458). Also, during cross-examination, Dr. Gulino acknowledged it was possible that the assailant would have some blood on his body (T. 4459). Evidence that there was more than one assailant and that there would have been blood on the assailants, is favorable to Mr. Dennis. Although trial counsel was aware of Dr. Gulino’s opinions in this regard, since counsel had deposed Dr. Gulino over a year prior to trial, counsel failed to follow up with a defense expert who could confirm these opinions.

Dr. Gulino testified with regards to Ms. Lumpkins that on her right hand her artificial fingernail extensions were broken on three fingers and there were bruises and lacerations on her hands (T. 4429). The left hand also contained bruising, lacerations and a fractured finger (T. 4432-33). According to Dr. Gulino, these wounds were consistent with defensive wounds (T. 4433). Dr. Gulino explained that the “defensive wounds” are consistent with “purposeful movements intended

to protect oneself against an assault” and were conscious, thinking movements (T. 4434).

Likewise, Gulino testified that the injuries to the arms and hands of Marlin Barnes were consistent with defensive wounds and were reflective that he was conscious of what was happening (T. 44454-46). He further testified that there were no injuries that would have affected his hearing. As a result, the State asked whether it was possible if Timwanika “was down the hallway crying, moaning, would he have the ability, in his condition, being blinded, to hear her down the hallway?” (T. 4446) Dr. Gulino admitted that it would be possible (Id.). This testimony regarding both victims went completely uncontested. Not only did the State rely on this testimony in the guilt/innocence phase, but in the penalty phase as well.

Despite finding that Mr. Dennis made conclusory allegations with respect to the experts that trial counsel should have utilized, the lower court alternatively finds that trial counsel was not ineffective “since all the information was brought out through the State’s experts” (PC-R2. 312). As it often fails to do throughout its order, the lower court fails to cite to any portions of the record for this proposition. *See Fla. R. Crim. P. 3.851(f)(5)(D)*(requiring a circuit court to “mak[e] detailed findings of fact and conclusions of law with respect to each claim, and attaching or referencing such portions of the record as are necessary to allow for meaningful

appellate review.") *See also Mendoza v. State*, 964 So.2d 121 (Fla. 2007). Mr. Dennis did specifically allege what experts trial counsel should have hired to assist in the preparation and presentation of his defense, but rather than appropriately analyzing his specific factual allegations, the lower court dismissed his claim in its own conclusory manner. Because these claims were more than sufficiently pled, and because the files and records do not conclusively demonstrate that Mr. Dennis is not entitled to relief, Mr. Dennis is entitled to an evidentiary hearing.

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

Analysis of an ineffective assistance of counsel claim proceeds under *Strickland v. Washington*, 466 U.S. 668 (1984) , which requires a showing of deficient attorney performance and prejudice. Mr. Dennis alleged both in his Rule 3.851 motion and supported his claims with detailed factual allegations. The lower court's conclusions to the contrary are erroneous and not supported by the record, Mr. Dennis's motion or the arguments presented at the case management conference.

Counsel's highest duty is the duty to investigate, prepare and present the available mitigation. *Wiggins v. Smith*, 123 S. Ct. 2527 (2003); *see also Williams v. Taylor*, 120 S. Ct. 1495 (2000); *Rompilla v. Beard*, 125 S. Ct. 2456 (2005).

Mr. Dennis alleged that counsel did not conduct a reasonable investigation despite his obligation to investigate, prepare and present available mitigation. *Wiggins v. Smith*, 123 S. Ct. 2527 (2003) ; *see also Williams v. Taylor*, 120 S. Ct. 1495 (2000); *Rompilla v. Beard*, 125 S. Ct. 2456 (2005) . Counsel’s decision to forgo any investigation was not strategic, but rather based on inattention and a lack of preparation. The penalty phase record itself demonstrates counsel’s failure to investigate and prepare for the penalty phase.

Trial counsel presented the testimony of three witnesses during the penalty phase: Mr. Dennis’s mother and two grandmothers (T. 5259-84). Their testimony amounted to Mr. Dennis is a nice guy, a good student, a hard worker and loved and cared for his children. No mental health testimony was presented. The only records obtained by trial counsel pertaining to Mr. Dennis’s background, specifically his school records and employment history, were received from the State in discovery. Trial counsel failed to independently obtain any of Mr. Dennis’s records. Here, trial counsel’s failure to pursue any investigation, and the subsequent failure to present mitigation evidence was unreasonable.

The lower court asserts that Mr. Dennis did not allege in his motion what should have been presented but was not presented at the penalty phase. After citing to the terse testimony of Mr. Dennis’s mother and grandmother, the court concludes “[s]ince the evidence was presented, counsel cannot be ineffective for

failing to present it” (PC-R2. 314). While Mr. Dennis’s mother and grandmothers are the same witnesses presented by trial counsel, after thorough investigation, the picture of Mr. Dennis’s life history is quite different from the simplistic good guy theory asserted by trial counsel. The lower court’s erroneous conclusions ignore the specific facts pled in Mr. Dennis’s motion (PC-R. 68-73) and the arguments made at the case management conference (PC-R2. 416-423).

Mr. Dennis set forth in his 3.851 motion that he grew up in the projects of Miami and was shuffled off to live with his paternal grandmother at a very early age until it was convenient for his mother to get him (PC-R. 71). When he was with his mother, they changed residences frequently (Id.). Mr. Dennis’s grandmother received no financial assistance from either of his parents, she had very little income, was taking care of four additional children and received financial assistance through the state (Id.). Mr. Dennis’s parents were more concerned with drinking and doing drugs than participating in his life (PC-R. 70-71). Mr. Dennis’s father only had an occasional relationship with Labrant. However, Michael Dennis’s sexuality was frequently an issue for Mr. Dennis, as he was often teased by neighbors and friends about his father being a homosexual (PC-R. 71). Expert testimony is available to explain the effects of Mr. Dennis’s unstable family life on his adult life and relationships.

Additionally, Mr. Dennis detailed the violent environment that Mr. Dennis

experienced growing up (PC-R. 72). When he was eight (8) years old, Labrant attended a neighborhood block party and saw an unknown man shoot another man in the head at point blank range. Labrant was about 5 yards away from that incident. When Labrant was 22 years old, he was caught in a shoot out, and witnessed his friend get shot in the leg. This instance is independently corroborated by police reports which were available at the time of trial, but which counsel neglected to obtain. Additionally, Labrant himself was the victim of an armed robbery.

Contrary to the lower court's belief, none of this information was presented through the "numerous family members" (PC-R2. 314) at the penalty phase. Furthermore, the record does not bear out that "numerous" family members testified: there were three. Mr. Dennis's background is replete with mitigation, yet trial counsel unreasonably failed to investigate and present it to the jury. Mitigating evidence was available and should have been investigated and presented. *See* ABA Guideline 11.4.1(c).

Additionally, Mr. Dennis is entitled to the competent assistance of mental health experts. *See Ake v. Oklahoma*, 470 U.S. 68 (1985); *State v. Sireci*, 502 So. 2d 1221, 1224 (Fla. 1987). The ABA guidelines recognize that "counsel should secure the assistance of experts where it is necessary or appropriate for . . . presentation of mitigation." ABA Guideline 11.2(B). Yet, trial counsel

failed to hire any mental health and/or mitigation experts to assist at the penalty phase.

The lower court states that Mr. Dennis did not state “what expert should have been called and what the expert would have testified to” (PC-R2. 313), yet acknowledges that Mr. Dennis argued that an expert could have been called to testify about Mr. Dennis’s ability to adapt to prison (Id.). Again the lower court acknowledges that Mr. Dennis “alleges that he was entitled to the assistance of mental health experts to explain the effects of his environment on him,” but complains that Mr. Dennis did not state *who* would have been available or what they would have testified to (PC-R2. 314). Mr. Dennis’s motion and arguments made sufficient allegations to warrant an evidentiary. To the extent the lower court is asserting that Mr. Dennis did not identify an expert by name, this not a requirement for an initial Rule 3.851 motion. Fla. R. Crim. P. 3.851(e)(1)(D) provides that the motion include a “detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought.”

Mr. Dennis provided the factual basis for his claim that trial counsel was ineffective for failing to hire mental health experts by asserting that expert testimony is available to explain the psychological effects of Mr. Dennis’s environment; specifically, the effects of growing up in a violent community. Furthermore, expert testimony is available to show Mr. Dennis’ ability to adapt to

prison and to demonstrate that he would be a model prisoner if given a life sentence (PC-R. 73). Additionally, Mr. Dennis made similar arguments at the case management conference, explaining that experts are available, and were available at the time of Mr. Dennis's trial, to testify to the influences of the violence that surrounded him in Liberty City, Miami (PC-R2. 418) and to testify regarding his overall mental abilities and mental health which all factor into his ability to adapt to prison (PC-R2. 421).

Despite the abundant mitigation discoverable, the record does not suggest any strategic reason for trial counsel limiting his investigation for the penalty phase. *Wiggins*, 123 S. Ct. 2527, 2538 (2003) . The record at trial and below reveal that trial counsel simply did not prepare for the penalty phase as a result of inattention. Instead, trial counsel focused entirely on preparing for the guilt phase of trial.

As a result of trial counsel's inattention, Mr. Dennis's jury heard none of the mitigation now known. While trial counsel argued two statutory mitigators, the crime was committed under the influence of extreme emotional disturbance and the capacity of the defendant to conform his conduct to the requirements of the law was substantially diminished, he offered absolutely no evidence to support them. Instead, he argued that evidence of these statutory mitigators should be derived from the State's theory at trial that this was a crime of passion and rage. As such,

the State was able to emphasize to the jury that there was no evidence offered with respect to these mitigators (T. 5379). The State further downplayed the non-statutory mitigation offered and argued that it should be given little weight (T. 5329-30). Although the lower court, in support of its summary denial of this claim, relies on the trial court's finding that Mr. Dennis was under extreme emotional distress at the time of the crime, the court fails to acknowledge that this mitigator was given "**little or no weight**" by the judge (R. 3262, emphasis added). Had trial counsel conducted an appropriate investigation and hired available mental health experts, the judge and jury would have had no choice but to give Mr. Dennis's extreme emotional distress great weight.

Analysis of prejudice must assume that the jury and judge would have found mitigating factors supported by the evidence. Under *Strickland*, "The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision." 466 U.S. at 695. *Strickland's* prejudice standard requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. A petitioner is not required to show that counsel's deficient performance "[m]ore likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693. The Supreme Court

specifically rejected that standard in favor of a showing of a reasonable probability: "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Strickland*, 466 U.S. at 693. The correct standard is whether unpresented, available evidence "might well have influenced the jury's appraisal of [the defendant's] moral culpability" or "may alter the jury's selection of penalty." *Williams v. Taylor*, 120 S. Ct. at 1515-16. Further, under *Strickland*, prejudice is established when the omitted evidence likely would have affected the "factual findings". *Strickland*, 466 U.S. at 695-96. Due to counsel's omissions, Mr. Dennis's death sentences are not worthy of confidence.

The facts asserted by Mr. Dennis must be accepted as true. *Lightbourne v. State*, 549 So. 2d 1364, 1365 (Fla. 1989). Because the record does not conclusively refute the factual allegations that trial counsel failed to investigate and present mitigation evidence at the penalty phase, Mr. Dennis is entitled to an evidentiary hearing. *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999). *Accord Patton v. State*, 784 So. 2d 380, 386 (Fla. 2000); *Arbelaez v. State*, 775 So. 2d 909, 914-15 (Fla. 2000).

ARGUMENT III: THE LOWER COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON MR. DENNIS'S CLAIM THAT THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE.

Mr. Dennis's Rule 3.851 motion alleged that counsel's ineffectiveness was compounded by the State's willful withholding of relevant impeachment and exculpatory evidence (PC-R. 88-91). *Brady v. Maryland*, 373 U.S. 83 (1963). The State had or knew of material impeachment evidence and failed to turn it over to defense counsel. In order to prove a violation of *Brady*, a claimant must establish that the government possessed evidence that was suppressed, that the evidence was "exculpatory" or "impeachment" and that the evidence was "material." *United States v. Bagley*, 473 U.S. 667 (1985); *Kyles v. Whitley*, 514 U.S. 419 (1995); *Strickler v. Greene*, 527 U.S. 263 (1999). Evidence is "material" and a new trial or sentencing is warranted "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. *Kyles*, 514 U.S. at 433-434; *Hoffman v. State*, 800 So.2d 174 (Fla. 2001); *Rogers v. State*, 782 So. 2d 373 (Fla. 2001); *Young v. State*, 739 So. 2d 553 (Fla. 1999). To the extent that counsel was or should have been aware of this information, counsel was ineffective in failing to discover it and utilize it.

Prior to Mr. Dennis's penalty phase, the State was in possession of a memorandum sent to Dr. Valerie Rao from Assistant State Attorney, Josh

Weintraub detailing the medical testimony required from her at the penalty phase (PC-R. 412-14). The memo went so far as providing Dr. Rao with necessary “terms of art” for the judge and jury to understand (PC-R. 413). Dr. Rao’s testimony at the penalty phase was almost identical to the memorandum. In addition to the memorandum, Mr. Dennis received, through public record disclosure pursuant to Fla. R. Crim. P. 3.852(e)(2), an email confirming Dr. Rao’s receipt of the memorandum (PC-R. 415). The memorandum instructing Dr. Rao specifically how to testify at the penalty phase is particularly important given the fact that she was not the pathologist that visited the crime scene, nor did she perform the autopsies in this case.⁷

Despite its failure to cite to any portion of the record or any case law and its failure to even mention the *Brady* standard, the lower court summarily denied Mr. Dennis’s *Brady* claim. In doing so, the lower court’s characterization of the testimony of both medical examiners is overly simplistic and its ultimate conclusion that either version of testimony supports a finding of heinous, atrocious and cruel ignores that exculpatory and material evidence is evidence of a favorable character for the defense, including impeachment evidence. The memorandum and e-mail demonstrate that the State chose not to rely on Dr. Gulino’s testimony in favor of presenting the inflammatory testimony of Dr. Rao, and relied on Dr. Rao’s

⁷ Dr. Sam Gulino testified in the guilt/innocence phase that he was the associate medical examiner assigned to this case and who performed the autopsies.

testimony during closing argument. Clearly, the State believed Dr. Gulino's testimony was not strong enough to rely on in the penalty phase. Mr. Dennis was entitled to the information which would have shown that Dr. Rao's testimony was coached.

Dr. Rao's testimony was much more inflammatory and speculative. For example, Dr. Gulino was asked if Ms. Lumpkins would know she was being beaten to death and responded that he could not say Ms. Lumpkins would know she was being beaten death, but she would know she was being beaten (T. 4433). When asked the same question, Dr. Rao stated "She probably had a good idea that she was going to die, yes" (T. 5238). Additionally, Dr. Gulino testified that Ms. Lumpkins head injuries were similar to injuries seen in a high speed car crash (T. 4422), but Dr. Rao compares her injuries to having her head run over by a car (T. 5232). These gross overstatements occur throughout Dr. Rao's testimony. (Dr. Rao, T. 5222-5257; Dr. Gulino, T. 4380-4466). In many instances while Dr. Gulino tempered his testimony by stating possibilities, Dr. Rao was affirmative in all her responses. The difference in the testimony of the two doctors is directly the result of the State's instructions and coaching.

Had the defense done their investigation, and the State been forthcoming, the defense could have questioned Dr. Rao regarding her preparation for the penalty phase. Mr. Guralnick was never provided with the State Attorney's memo to

Dr. Rao. Because the State failed to disclose this information, the defense was unable to impeach Dr. Rao with this information. As a result, the State urged the jury to find the aggravating factor of heinous, atrocious and cruel based on the testimony of Dr. Rao:

This defendant as you heard Dr. Rao say and Dr. Gulino during the trial, this defendant beat Timwanika. The injury was so severe it was as if her head was run over by a car, and this is after he has beaten Marlin Barnes 20-25 times in his face and head area.

(T. 5362)(emphasis added). Dr. Gulino did not testify that the injury was equivalent to being run over by a car, this only came from Dr. Rao.

A proper materiality analysis under *Brady* must contemplate the cumulative effect of all suppressed information. Further, the materiality inquiry is not a “sufficiency of the evidence” test. *Kyles*, 514 U.S. at 434. The burden of proof for establishing materiality is less than a preponderance. *Williams v. Taylor*, 120 S. Ct. 1495 (2000) ; *Kyles*, 514 U.S. at 434. Or in other words: “A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict.” *Id.* Rather, the suppressed information must be evaluated in light of the effect on the prosecution’s case as a whole and the “importance and specificity” of the witnesses’ testimony. *United States v. Scheer*, 168 F.3d 445, 452-453 (11th Cir. 1999). Had Dr. Rao’s prejudicial and inflammatory testimony been impeached as having been coached by the State, coupled with the mitigation now alleged, the result of the

penalty phase would have been different.

The lower court conducted no meaningful analysis of Mr. Dennis claim and failed to cite to or attach any portions of the record to refute Mr. Dennis's *Brady* allegations. Because the files and records do not conclusively refute his claim, Mr. Dennis is entitled to an evidentiary hearing.

ARGUMENT IV: MR. DENNIS'S SIXTH AMENDMENT RIGHTS WERE VIOLATED DUE TO TRIAL COUNSEL'S CONFLICT OF INTEREST.

Mr. Dennis alleged below that due to trial counsel's work load,⁸ trial counsel was operating under an actual conflict of interest which adversely affected his representation of Mr. Dennis, in that he failed to investigate, prepare and challenge the State's case. *See* Argument I (2). *See Cuyler v. Sullivan*, 446 U.S. 335, 348-50 (1980); *see also United States v. Cronin*, 466 U.S. 648, 659-61 (1984); *Osborn v. Shillinger*, 861 F. 2d 612, 625-26 (10th Cir. 1988). Mr. Dennis did not knowingly, intelligently, and voluntarily consent to trial counsel's representation in spite of the conflict of interest. As a result, Mr. Dennis was denied his right to a zealous advocate. *See Gideon v. Wainwright*, 375 U.S. 335 (1963).

In such circumstances, "when advocate's conflicting obligations have effectively sealed his lips on crucial matters," "[t]he mere physical presence of an

⁸ Mr. Dennis's guilt determination and penalty phase took place shortly after trial counsel concluded an extremely complex capital trial that took almost four months from voir dire to sentencing. During this time, counsel was also handling many other cases as a sole practitioner.

attorney does not fulfill the Sixth Amendment guarantee.” *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978). Mr. Dennis was deprived of his Sixth Amendment right to counsel because counsel’s conflicting caseload deprived Mr. Dennis of his right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *Cronic*, 466 U.S. at 656. In *Strickland v. Washington*, 466 U.S. 668, 692 (1984) , the United States Supreme Court found “when counsel is burdened by an actual conflict of interest . . . counsel breaches the duty of loyalty, perhaps the most basic of counsel’s duties.”

In addition, trial counsel over the years has made a practice of taking on high profile cases on a pro bono or “defacto” pro bono basis.⁹ This creates an impression that trial counsel has a vested interest in how the publicity of such cases can benefit his practice and is thus a conflict with Mr. Dennis.

Where “a conflict of interest actually affected the adequacy of his representation,” Mr. Dennis “need not demonstrate prejudice in order to obtain relief.” *Cuyler*, 446 U.S. at 349-50.¹⁰ However, in Mr. Dennis’s case, even though no showing of prejudice is required, the record establishes that Mr. Dennis was

⁹ *Pardo v. State*, 563 So. 2d 77 (Fla. 1990). Mr. Guralnick represented Mr. Pardo on this very high profile case on a pro bono basis. Mr. Pardo was accused of nine (9) different homicides, committed on five (5) separate occasions.

¹⁰ In the usual conflict of interest case, prejudice is presumed because a prejudice inquiry would require “unguided speculation.” *Holloway*, 435 U.S. at 491. This is so because “the evil . . . is in what the advocate finds himself compelled to *refrain* from doing.” *Id.* at 490 (emphasis in original).

indeed prejudiced by his attorney's conflict of interest, in that trial counsel failed to adequately challenge the prosecution's case. *See* Argument I (2).

The lower court erred in denying an evidentiary hearing. Because Mr. Dennis's claim was more than sufficiently pled and the files and records do not refute the factual allegations, an evidentiary hearing is warranted on this issue.

ARGUMENT V: TRIAL COUNSEL FAILED TO OBJECT TO THE PROSECUTOR'S IMPROPER EXAMINATION AND COMMENTS THROUGHOUT TRIAL.

The prosecutor's conduct was contrary to the law and prejudiced the jury's consideration of the evidence in violation of the Constitution. The Florida Supreme Court has held that when improper conduct by the prosecutor "permeates" a case, relief is proper. *Garcia v. State*, 622 So. 2d 1325 (Fla. 1993); *Nowitzke v. State*, 572 So. 2d 1346 (Fla. 1990). The improprieties on the part of the State began prior to jury selection as evidenced by the very fact that the original trial judge was forced to recuse herself due to State misconduct.

In voir dire, the State began to pre-try its case by asking whether any members of the jury (or people they knew) had been victims of "either physical or emotional abuse or violence." (T. 2328). The State then asked jurors if they would be able to sit as a juror and "evaluate testimony if you heard that there were prior acts of violence committed on one of the victims in this case by this defendant?" (T. 2332). The State reiterated this question in one form or another several times

(T. 2332-2333, 2334-2335). Trial counsel did not object to these questions and only objected much later in an untimely fashion.

During closing argument, the State improperly commented on Mr. Dennis's right to a trial by jury by saying that, "So because the defendant wanted a jury trial does not mean he is innocent. That is his right." (T. 4822-4823). The State left the jury with the impression that Mr. Dennis was wasting everyone's time (including the members of the jury) by exercising his right to trial. This comment was improper and is in violation of both the Federal and State Constitutions. As the closing argument continued, the State also improperly instructed the jury as to the charge of Second Degree Murder. (T. 4832).

The State also improperly suggested that, "Sometimes people suggest maybe it was a drug deal gone bad or something like that, put out whatever you can." (T. 4837). This statement could only be imputed to the defense and improperly calls into question any representations or argument trial counsel was about to make when he got up to present his closing statement. The State went further along this same vein of improper comments by concluding: "I suggest to you when you listen to his closing, ask yourself does any of this make any sense. Is this just argument for argument sake." (T. 4880). To the extent that trial counsel failed to object, he was ineffective.

The State put on various witnesses to testify to prior bad acts by

Mr. Dennis's against Ms. Lumpkins, in an attempt to prove motive in this case. Though a *William's* Rule Notice was filed by the State, witnesses Robin Gore (T. 4253-85), Patrick McKeithen (T. 4286-4303), Karen Wallace (T. 4304-4313), and Chaka Kahn Williams (T. 4313-4331) were permitted to comment in general that they "knew" of prior acts by Mr. Dennis against Ms. Lumpkins that they were not disclosing, in addition to the prior bad acts they were testifying to. This was improperly elicited by the State and purposely made worse during closing argument when the State argued that the jury got a glimpse into the cycle of violence Ms. Lumpkins lived with for three years (T. 4852-4853). This improper argument allowed the jury to complete the idea that there was more violence between Mr. Dennis and Ms. Lumpkins than what was presented at trial. The most egregious argument occurred when the State speculated why Timwanika continued going back to her "abuser." (T. 4854). This violated the trial court's pre-trial rulings (T. 861-916) and Mr. Dennis's right to a fair trial.

While this Court has permitted counsel to make conclusions regarding the veracity of witnesses, the State's remarks go far beyond simply characterizing the defendant as an "abuser," and is therefore an improper form of argument. *Craig v. State*, 510 So. 2d 857 (Fla. 1987). The comments about Mr. Dennis, paired with the State's comments about seeking justice through his conviction, extended an open invitation to the jury to convict Mr. Dennis for a reason other than his guilt.

Ruiz v. State, 743 So. 2d 1, 6 (Fla. 1999).

The State's improper comments continued during penalty phase closing arguments stating: "You saw the pictures. You can look at them again. My expectation is you won't because they are fixed in everybody's mind that's on this jury" (T. 5359). Even more egregious, the State asked the jury to imagine the fear in Ms. Lumpkins' eyes as the defendant looked at her and smashed in her head (T. 5370). This Court has repeatedly condemned prosecutorial argument that invites the jury to base its decision on such emotions. *See, e.g., King v. State*, 623 So. 2d 483 (Fla. 1993); *Rhodes v. State*, 547 So. 2d 1201 (Fla. 1989); *Garron v. State*, 528 So. 2d 353 (Fla. 1998); *Bertolotti v. State*, 476 So. 2d 130, 134 (Fla. 1985) "[A] prosecutor's concern 'in a criminal prosecution is not that it shall win a case, but that justice shall be done.' While a prosecutor 'may strike hard blows, he is not at liberty to strike foul ones'." *Rosso v. State*, 505 So. 2d 611, 614 (Fla. 3rd DCA 1987). This Court has called such improper prosecutorial commentary "troublesome." *See Bertolotti*, 476 So. 2d at 132.

The cumulative effect of the prosecutor's comments was to "improperly appeal to the jury's passions and prejudices." *See Cunningham v. Zant*, 928 F. 2d 1006, 1020 (11th Cir. 1991). Such remarks prejudicially affect the substantial rights of the defendant when they "so infect the trial with unfairness as to make the resulting conviction a denial of due process." *See Donnelly v. DeChristoforo*, 416

U.S. 647 (1974); *See also United States v. Eyster*, 948 F. 2d 1196, 1206 (11th Cir. 1991). The adversarial process in Mr. Dennis's trial broke down when defense counsel failed to object to any of the improper arguments by the State. Had the jury not been subjected to these improper arguments, there is a reasonable probability that the outcome of the trial would have been different. *See Strickland v. Washington*, 466 U.S. 688 (1984) . Counsel have been found to be prejudicially ineffective for failing to object to improper prosecutorial jury argument. *Vela v. Estelle*, 708 F. 2d 954, 961-66 (5th Cir. 1983).

The lower court failed entirely to address counsel's ineffectiveness for failing to object to the State's improper comments and argument. Ineffective assistance of counsel could not have been raised on direct appeal. This claim was sufficiently pled and the files and records in this case do not conclusively show that Mr. Dennis is entitled to no relief. "A trial court may not summarily deny without attach[ing] portions of the files and records conclusively showing the appellant is entitled to no relief." *Rodriguez v. State*, 592 So. 2d 1261 (2nd DCA 1992). *See also Brown v. State*, 596 So. 2d 1025, 1028 (Fla.1992). Mr. Dennis is entitled to an evidentiary hearing.

ARGUMENT VI: MR. DENNIS IS BEING DENIED HIS CONSTITUTIONAL RIGHTS AND THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE OF THE RULES PROHIBITING MR. DENNIS'S LAWYERS FROM INTERVIEWING JURORS.

Rule 4-3.5(d)(4), Rules Regulating the Florida Bar prevents Mr. Dennis

from investigating any claims of jury misconduct, bias or reliance on external influences that may be inherent in the jury's verdict is unconstitutional. Under the Fifth, Sixth, Eighth and Fourteenth Amendments Mr. Dennis is entitled to a fair trial and sentencing. His inability to fully explore possible misconduct and biases of the jury prevent him from fully showing the unfairness of his trial. Bias may exist that Mr. Dennis can only discover through juror interviews. *Cf. Turner v. Louisiana*, 379 U.S. 466 (1965); *Russ v. State*, 95 So. 2d 594 (Fla. 1957).

On October 9, 1998, after the court released the jury for the day, Juror Reid stayed in the courtroom to discuss a scheduling conflict with the court. Juror Reid had provided the Judge with a letter indicating she had a meeting with the Office of the State Attorney-Child Support Enforcement on October 14, 1998. After some discussion on the record about the nature of Juror Reid's appointment and who she had attempted to contact regarding rescheduling (T. 3558-59), the Judge and the State then went to the Judge's chambers to make any necessary phone calls to resolve the issue (T. 3559). At this point, the proceedings were adjourned. There is no record of what occurred in chambers. Contrary to the lower court's order, there is no record that trial counsel for Mr. Dennis was present or even aware of what was happening in chambers. Therefore, Mr. Dennis cannot know whether the State provided some assistance with Juror Reid's child support issues and whether this created any bias on Juror Reid's part in favor of the State.

The failure to allow Mr. Dennis the ability to interview jurors is a denial of access to the courts of this state under Article I, § 21 of the Florida Constitution. Rule Regulating the Florida Bar 4-3.5(d)(4) is unconstitutional on both state and federal grounds. In the alternative, should this Court uphold Rule 4-3.5(d)(4), an individual who is not restricted by the rule from contacting jurors should be appointed to assist Mr. Dennis in investigating any claims of Juror Reid's bias and the influence such bias may have had on the jury. An evidentiary hearing should follow.

ARGUMENT VII: THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. DENNIS'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES IN VIOLATION OF FLA. R. CRIM. P. 3.852.

Mr. Dennis must obtain all public records in existence which may bear on the issues in this case or risk issues being procedurally barred. *Porter v. State*, 653 So. 2d 375 (Fla. 1995). Mr. Dennis is entitled to the public records. *Muehleman v. Dugger*, 623 So. 2d 480 (Fla. 1993); *Walton v. Dugger*, 643 So. 2d 1059 (Fla. 1993); *State v. Kokal*, 562 So. 2d 324 (Fla. 1990). The delay and/or denial of access to crucial public records in his case results in Mr. Dennis being denied his rights to due process and equal protection of the law. This Court applies the "abuse of discretion" standard when reviewing appeals from denials of requests for public records. *Hill v. State*, 921 So. 2d 579 (Fla. 2006). An obligation rests with the State to furnish requested materials. *Ventura v. State*, 673 So. 2d 479 (Fla. 1996). The

lower court abused its discretion in denying Mr. Dennis access to the records to which Mr. Dennis is entitled.

On February 25, 2003, Mr. Dennis filed numerous supplemental public records demands pursuant to Fla. R. Crim. P. 3.852(g) and (i) from state agencies including Miami-Dade Police Department, Coral Gables Police Department and the Office of the State Attorney, Eleventh Judicial Circuit. (Supp. PC-R. 112-196). Mr. Dennis requested public records documenting proficiency tests and competency practice casework and the credentials of Criminalist Tom W. Quirk and Criminalist T. Wolson from the Miami-Dade Police Department, the main investigating agency in this case. The lower court denied the request, but required that each individual's curriculum vitae be disclosed. The validity of the work performed by each of these individuals was essential to a full investigation of Mr. Dennis's postconviction claims and would have led to the discovery of admissible evidence, especially here where there was extensive evidence and testing.

The lower court denied Mr. Dennis's request for the personnel files of several Coral Gables Police Department officers (Supp. PC-R. 36-38). Based on the hearing, it appears the lower court's denial rested on whether the responding officers were there assisting or in a more direct capacity (*Id.*). However, the files of all the officers requested were necessary for a full investigation of Mr. Dennis

postconviction claims and are reasonably calculated to lead to the discovery of admissible evidence. The Coral Gables officers were the first to respond to the crime scene. Any information in their personnel files demonstrating misconduct or complaints with respect to the officers response in such incidents, would be relevant here. Mr. Dennis is entitled to information which would tend to show whether the integrity of the crime scene was appropriately protected. The lower court erred.

Mr. Dennis also requested the personnel files of four assistant state attorneys based on their involvement in ex parte communications with the original trial judge. The lower court granted the request with respect to Michael Van Zampft and Flora Seff (PC-R 896). However, upon the objection of the State Attorney's Office, this Court agreed to review Ms. Seff's personnel files in camera although not technically exempt by statute (*Id.*). The appropriate procedure requires that any records claimed confidential be sent under seal to the records repository. *See* Fla. R. Crim. P. 3.852(f). Further, where a public record contains some information which is exempt from disclosure, Fla. Stat. § 119.07(2)(a) requires the custodian of the document to delete or excise only that portion or portions of the record for which an exemption is asserted and provide the remainder of the record for examination. Neither Fla. Stat. § 119.07, nor Rule 3.852 provides for exemption of an entire personnel file simply because it is that of an Assistant State Attorney.

Rather, Fla. Stat. § 119.07(3)(I)(1) provides exemptions to public records disclosure for documents containing identifying information (such as home addresses, telephone numbers, and social security numbers) for active and former law enforcement officers, including Assistant State Attorneys, and their family members. In no way should this statutory exemption be construed as protecting all materials in Ms. Seff's personnel file. The lower court subsequently reviewed the personnel file of Ms. Seff in camera and orally pronounced that it found nothing discoverable in relation to Mr. Dennis's case (PC-R. 948). The court made no findings with respect to any valid exemption, nor any specific findings about the documents that were reviewed.

Additionally, the Department of Health and the Department of Corrections claimed exemptions and sealed portions of the records remitted to the Records Repository pursuant to Fla. R. Crim. P. 3.852(f). After delivery of the exempt records (PC-R. 348-49), the trial court reviewed the records in-camera, but denied Mr. Dennis's request for a hearing on the exemptions claimed by each agency (PC-R. 924-25). Mr. Dennis argued that such a hearing on the exemptions, while the judge is reviewing the records, was necessary to make any objections to the court's rulings or to object to the claimed exemption (PC-R. 924). While the State suggested the court could vaguely reference the sealed materials and state the valid exemption in an order (PC-R. 925), the lower court made no such findings

(Supp. PC-R. 380). The lower court's order merely states "there are no discoverable issues and matters contained in said material" (Id.), without any indication as to which agency records it is referring or the exemption being claimed. Without a more specific order and without the benefit of a hearing, Mr. Dennis has been denied access to public records for which no basis has been provided.

Upon remand by this Court for a new postconviction proceeding, on April 13, 2009 Mr. Dennis requested records regarding Florida's lethal injection procedures from the Department of Corrections, Florida Department of Law Enforcement, the Office of the Governor, and the Office of the Attorney General. In denying Mr. Dennis's public records demands regarding lethal injection, the Circuit Court found that:

Counsel for the Defendant stated at the hearing that the agencies have turned over records and that they received the records. Counsel stated that contained in the large stack were websites and other items that do not meet the definition of public records pursuant to Chapter 119 of the Florida Statutes., The remaining half of the large stack contains public records.

(PC-R2. 296). This finding is refuted by the record.

At a hearing to address the lethal injection public records demands, counsel explained that the records obtained in the litigation of a separate case were limited, and that Mr. Dennis's demands requested additional records to which he is entitled. Counsel compiled and indexed copies of all public records provided by the

repository to CCRC-South in all other cases. In total, the repository has provided approximately 1030 pages of lethal injection-related documents to CCRC-South in response to demands in all CCRC-South cases. Approximately 401 pages of the records are nothing more than published material from outside scholarly or scientific sources. Much of this material is duplicated. The records provided contain none of the records that Mr. Dennis sought in his demands. Contrary to the court's ruling, counsel in no way suggested that "the agencies have turned over records and that they have received the records." In fact, as the record clearly demonstrates, the records counsel has in possession demonstrate that the agencies have *not* provided all public records to which Mr. Dennis is entitled.

Given the scope and complexity of the controversies regarding lethal injection, Mr. Dennis believes that the public records provided to the repository cannot possibly be complete, and that State agencies are withholding additional public records to which he is entitled. In addition to the records provided by the repository, Mr. Dennis is aware of public records from several State agencies which were provided directly to postconviction counsel during the Lightbourne litigation. Based on the repository's responses to Mr. Dennis's requests, it appears that those records are not currently at the repository, contrary to the requirements of Fla. R. Crim. P. 3.852.

The court also relied on this Court's ruling in *Marek v. State*,

2009 WL 259356 (May 2009), to deny Mr. Dennis access to public records. The lower court's reliance on *Marek* is misplaced. Mereck did not address requests for public records regarding lethal injection. Rather, *Marek* only addressed whether due process entitled Mr. Mereck to an evidentiary hearing on his lethal injection claims. *Marek v. State*, 8 So. 3d 1123, 1130 (Fla. 2009). In effect, the lower court determined that Mr. Dennis is not entitled to records disclosure because he is not entitled to postconviction relief. This is putting the cart before the horse.

In order to obtain additional public records pursuant to Fla. R. Crim. P. 3.852, a capital defendant must show that:

- (A) collateral counsel has made a timely and diligent search of the records repository;
- (B) collateral counsel's affidavit identifies with specificity those additional public records that are not at the records repository;
- (C) the additional public records sought are either relevant to the subject matter of a proceeding under rule 3.851 or appear reasonably calculated to lead to the discovery of admissible evidence; and
- (D) the additional records request is not overly broad or unduly burdensome.

Fla. R. Crim. P. 3.852(i)(2). The lower court made no findings with regard to whether Mr. Dennis met the requirements of Rule 3.852. The merits of Mr. Dennis's rule 3.851 claims, and whether he is entitled to an evidentiary hearing, are not germane to issues of diligence, specificity or relevance. Mr. Dennis's entitlement to public records and his entitlement to an evidentiary hearing are two distinct inquiries — one governed by a standard set out in rule

3.852, the other governed by a standard set out in rule 3.851 — and the former must necessarily be decided before the latter. The clear meaning of Fla. R. Crim. P. 3.852 is that the relevancy requirement is met if Mr. Dennis demonstrates that the records are relevant to the subject matter of a proceeding under rule 3.851. Rule 3.852 does not require Mr. Dennis to prove the merits of his claim, or the entitlement to an evidentiary hearing, to demonstrate that he is entitled to public records disclosure. In fact, the issue of whether Mr. Dennis is entitled to an evidentiary hearing cannot properly be addressed unless and until Mr. Dennis has been afforded public records disclosure in order to investigate and fully develop his argument. Requiring Mr. Dennis to prove the merits of his claim in order to obtain the public records would completely obviate the purpose of Rule 3.852.

Discovery into the background, training, and qualifications of execution team members is necessary to a complete inquiry into whether a protocol that appears constitutional on its face violates the Eighth Amendment when it is not carried out as written. Discovery in other states has revealed some disquieting facts. In lethal injection litigation in Missouri, for example, it was learned through discovery that the medical doctor responsible for mixing and administering the drugs suffered from dyslexia. The Eighth Circuit upheld Missouri's lethal injection procedures after consideration of, inter alia, the State's promise that the dyslexic doctor would no longer take part in executions. *Taylor v. Crawford*, 487 F. 3d

1072 (8th Cir. 2007). In the California lethal injection litigation, a district court judge concluded that the evidence presented showed that California's protocol and the defendants' implementation of it suffered from a number of critical deficiencies, including inconsistent and unreliable screening of execution team members:

For example, one former execution team leader, who was responsible for the custody of sodium thiopental (which in smaller doses is a pleasurable and addictive controlled substance), was disciplined for smuggling illegal drugs into San Quentin; another prison guard led the execution team despite the fact that he was diagnosed with and disabled by post-traumatic stress disorder as a result of his experiences in the prison system and he found working on the execution team to be the most stressful responsibility a prison employee ever could have.

Morales v. Tilton, 465 F. Supp. 2d 972, 979 (N.D. Cal. 2006).

Collateral counsel has met the requirements of Rule 3.852 to obtain additional public records related to lethal injection. The records sought are relevant to Mr. Dennis's postconviction claims. The circuit court abused its discretion in imposing additional requirements not specified by the Rule, and denying Mr. Dennis's demands for additional public records.

Mr. Dennis was denied his rights to due process and equal protection of the law. The trial court's denial of public records denied Mr. Dennis the full panoply of armaments with which to challenge his conviction and sentence. *Easter v. Endell*, 37 F. 3d 1343 (8th Cir. 1994); *see also Holland v. State*, 503 So. 2d 1250

(Fla. 1987). Mr. Dennis is entitled to effective representation in his capital collateral appeals. *See Spalding v. Dugger*, 526 So. 2d 71 (Fla. 1988). Due to the government's delay and withholding of files and the lower court's denial of public records, the undersigned is precluded from rendering effective assistance. *See United States v. Cronin*, 104 S. Ct. 2039 (1984).

ARGUMENT VIII: MR. DENNIS IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT THE FORENSIC SCIENCE USED TO CONVICT AND SENTENCE HIM WAS NEITHER RELIABLE NOR VALID, THUS DEPRIVING HIM OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

In an amendment upon remand, Mr. Dennis alleged that his conviction and sentence were unreliable due to newly discovered evidence that the forensic science used to convict and sentence him was neither reliable, nor valid (PCR-2. 56-73). In 2006, the National Academy of Sciences formed The Committee on Identifying the Needs of the Forensic Science Community (Committee) to study issues regarding the varied disciplines that form the field of "forensic science." Science, State, Justice, Commerce, and Related Agencies Appropriations Act of 2006, P.L. No. 1-9-108, 119 Stat. 2290 (2005). The end product of the Committee's exhaustive work was a comprehensive report, a prepublication copy of which was made available on February 18, 2009. Committee on Identifying the Needs of the Forensic Sciences Community,

National Research Council, Strengthening Forensic Science in the United States: A Path Forward (2009) (Pre-publication copy) (hereinafter “the NAS Report”). The Committee’s final report constitutes newly discovered evidence that the “scientific” evidence used to convict Mr. Dennis was the result of methods with questionable and untested underlying scientific principles, in violation of Mr. Dennis’s rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.¹¹

Because of the variability that exists across forensic science disciplines (NAS Report at S-5) , the Committee suggests two important questions that should underlie the admission of, and reliance upon, forensic evidence in criminal trials: 1) the reliability of the scientific methodology; and 2) the reliance on human interpretation that can be tainted by error and bias. *Id.* at S-7. The Committee specifically notes that it “matters a great deal whether an expert is qualified to testify about forensic evidence and whether the evidence is sufficiently reliable to merit a fact finder’s reliance on the truth that it purports to support.” *Id.* at S-7.

The Committee detailed many of the problems inherent in various forensic sciences, some of which were evident in the investigation of and presentation of evidence in Mr. Dennis’s case. In an effort to remedy the many flaws, the

¹¹ This Court has recognized that “reports” issued by governmental or other bodies that affect the integrity of a defendant’s trial or penalty phase can constitute newly discovered evidence. See *Trepal v. State*, 846 So. 2d 405, 409-10 (Fla. 2003).

Committee made a number of specific recommendations for improving the many deficiencies within the forensic science community as a whole.¹²

The Committee recommended that the establishment of standard terminology to be used when reporting and testifying about a particular forensic science and establish model laboratory reports for the different disciplines, indicating the minimum information to be included. NAS Report at S-15, 16. The Committee pointed out that many terms are used to describe the degrees of association between evidentiary material and particular people or objects, e.g., “match,” “consistent with,” “identical,” “similar in all respects tested,” and “cannot be excluded as the source of.” *Id.* at S-15. The Committee concluded that “[t]he use of such terms can and does have a profound effect on how the trier of fact in a criminal or civil matter perceives and evaluates scientific evidence.” *Id.* Essentially, the use of varying degrees of terms results in the difference between being convicted or not, as occurred in the instant case.

The testimony at Mr. Dennis’s trial was fraught with such subjective terms, varying in degree of conclusiveness. The most striking and troubling example is with respect to the differing testimony of the two medical

¹² It is important to note, that the American Bar Association’s Death Penalty Moratorium Implementation Project and the Florida Death Penalty Assessment Team similarly criticized Florida’s crime laboratories and medical examiner system. *See* American Bar Association, *Evaluating Fairness and Accuracy in the State Death Penalty Systems: The Florida Death Penalty Assessment Report*, September 17, 2006 at 83.

examiners, Drs. Gulino and Rao. Dr. Gulino testified during the guilt phase of trial. (T. 4414, 4432-33, 4445-46, *c.f.* T. 5230, 5238, 5241, 5245, 5253). Dr. Rao's testimony did not parallel the testimony of Dr. Gulino, but was much more inflammatory and speculative. (T. 4433).

The subjective terms criticized in the NAS Report were also prevalent in the testimony of several detectives at Mr. Dennis's trial (T. 3262, 3288, 3292, 3853, 3855-56, 3863). The use of the terms "match," "same," "consistent with," "originated from," and other similar phrases which are criticized in the Committee's report caused the trial court and the jury to believe the State presented something more than circumstantial evidence against Mr. Dennis during the guilt phase of the trial. As the NAS report warns, the variation in language used by the experts and other police witnesses affected Mr. Dennis's trial judge and jury's perception of the reliability of the science presented.

The Committee urged that "research is needed to address issues of accuracy, reliability, and validity in the forensic science disciplines." NAS Report at S-16. In the instant case, the State relied on both toolmark and firearm identification evidence to connect Mr. Dennis to a knife alleged to have punctured the victim's tires and the shotgun alleged to have been the murder weapon. According to the NAS report, sufficient studies have not been done to understand the reliability and repeatability of the methods, and the "scientific knowledge base for toolmark and

firearms analysis is fairly limited.” Id. at 5-21. Furthermore, toolmark and firearms analysis lacks “a precisely defined process.” Id. at 5-21. Not enough is known about the variability among individual tools and guns to specify how many points of similarity are necessary for a given level of confidence in the result. Id. at 5-21. The accuracy, reliability and validity of the methods used by the State to analyze crime scene evidence were never challenged at Mr. Dennis’s trial.

Similarly, the blood-spatter evidence used against Mr. Dennis has not been subjected to the rigorous research necessary to achieve confidence in this discipline. Bloodstain patterns vary, and their interpretation is not nearly as straightforward as it may seem. NAS Report at 5-38. Bloodstain patterns at crime scenes are often complex. “[A]lthough overlapping patterns may appear simple, in many cases their interpretations are difficult or impossible.” Id. at 5-38 (emphasis added). While scientific studies support some aspects of bloodstain pattern analysis, some “experts extrapolate far beyond what can be supported.” Id. at 5-39). In addition, the Committee notes that the “uncertainties associated with bloodstain pattern analysis are enormous.” Id. at 5-39. Dr. Gulino’s testimony is a clear example of such scientific testimony exceeding the realm of support (T. 4450). Dr. Rao also extrapolated that the smears indicated that the victim attempted to get help (T. 5255). Likewise, Det. Charles drew inflammatory and unsupported conclusions that the blood spatter was an indication that “[t]here’s

some act of violence going on here” (T. 3268-69). None of these witnesses were qualified blood spatter experts. Notwithstanding the fact that courts have routinely admitted such evidence, the NAS Report is newly discovered evidence establishing the vast limitations of pattern evidence.

The Committee recommended that all forensic laboratories and facilities be removed from the administrative control of law enforcement agencies and prosecutor’s offices “[b]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency. NAS Report at S-17. Independence is essential so that the laboratory would be able to “set its own priorities with respect to cases, expenditures and other issues” Id. at 6-1. Such independence was absent in Mr. Dennis’s case as the Miami-Dade Police Department was responsible for all the forensic testing. The State Attorney’s Office’s influence is also evident by the commendations given to Det. Charles and Det. Quirk by Assistant State Attorney Flora Seff for their work in this case.

Next, the Committee recommends that NIFS encourage “research programs on human observer bias and sources of human error in forensic examinations.” Id. at S-18. An example of such research would be “studies to determine whether and to what extent the results of forensic analyses are influenced by knowledge

regarding the background of the suspect and the investigator's theory of the case.”

Id. at S-18.

Mr. Dennis was prejudiced by the bias of the law enforcement officers responsible for gathering and testing the evidence used to convict and sentence him to death. The crime occurred on April 13, 1996. From that date, the police immediately zeroed in on Mr. Dennis and neglected to investigate any other suspects. Mr. Dennis was arrested on April 30, 1996, only weeks after the crime. From that point on, all of the evidence was analyzed with the purpose of linking Mr. Dennis to the crime. By his own admission, the lead investigator Det. Romagni knew Timwanika Lumpkins had other boyfriends besides Mr. Dennis, yet failed to investigate any of these men or their relationships with the victims (T. 273, 280).

The NAS report notes that bias is problematic in police line-ups and acknowledges that an eyewitness presented with a pool of faces might assume the suspect is among them.¹³ *Id.* at 4-8, 4-9. These biases were overwhelming when police presented a vehicle “line-up” to witness Nidia El-Djeije which consisted of one vehicle. Here, the bias was evident in the presentation as well as the identification of the suspect vehicle (T. 3447, 3475, 3470, 3470, 3476). Photographs of various Nissans or other similar cars were not shown. Not only was the identification unreliable and improper, Det. Sanchez's testimony

¹³ This is also driven by the common bias toward reaching closure. (NAS Report at 4-8, 4-9) .

bolstering the witnesses identification was improper. Both demonstrate the bias which pervaded the investigation of Mr. Dennis's case.

Further recommendation suggests that laboratory accreditation and individual certification of forensic science professionals should be mandatory. NAS Report at S-19. "Certification requirements should include, at a minimum, written examinations, supervised practice, proficiency testing, continuing education, recertification procedures, adherence to a code of ethics, and effective disciplinary procedures." *Id.* Personnel records of the testifying Miami-Dade investigators (Borghi, Charles, Quirk) indicate that only limited training or certification occurred in the ten years prior to Mr. Dennis's arrest relating to bloodspatter or toolmark and firearms identification. Annual "refresher training" was attended by the officers. This is particularly troubling where trial counsel failed to conduct voir dire of those detectives who were qualified as experts and allowed other detectives to testify as if they had been qualified as an expert. The NAS Report calls into question whether the witnesses were properly trained in the most up-to-date methods in the forensic science community.

Counsel failed in his duty to attack the questionable testimony that was presented to the jury under the guise of "science" and failed to effectively cross-examine them. *See* Argument I (8). Trial counsel should have known that a *Frye* hearing is required before scientific evidence can be admitted. *See Frye v. United*

States, 293 F. 1013, 1014 (D.C. Cir. 1923); *see also Stokes v. State*, 548 So. 2d 188 (Fla. 1989) (applying *Frye* standard in Florida case); *see also, Ramirez v. State*, 651 So. 2d 1164, 1166-7 (Fla. 1995) (laying out four step test). A *Frye* hearing would have alerted the trial court to the fact firearm and toolmark identification in particular is an unreliable, subjective field which has no commonly accepted practices or standards. The NAS Report further supports the necessity of a *Frye* hearing in regard to the forensic science presented in Mr. Dennis's trial and makes clear that the science was unreliable. The NAS Report, as newly discovered evidence, establishes that the State's evidence was insufficient to meet its burden under *Frye*.

The use of questionable "scientific" evidence, coupled with the lack of standardized reporting and terminology in forensic disciplines, renders both Mr. Dennis's conviction and death sentence unreliable. Under the Eighth Amendment, the death penalty must be imposed fairly, and with reasonable consistency, or not at all. *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (per curiam). The use of "scientific" evidence produced by methods of questionable and untested underlying scientific principles cannot "assure consistency, fairness, and rationality" and it cannot "assure that sentences of death will not be 'wantonly' or 'freakishly' imposed." *Proffitt v. Florida*, 428 U.S. 242, 259-60 (1976). Mr. Dennis's jury was unable to appropriately evaluate the credibility of experts

and the reliability of the science behind bloodstain pattern evidence, toolmarking and firearms evidence and pathology, as well as the reliability of eye-witness identification and pathology. There is no question that errors went unchallenged and uncorrected before Mr. Dennis's jury. Mr. Dennis is entitled to relief from both the conviction and death sentence. At a minimum, because Mr. Dennis set forth very detailed allegations with respect to the questionable forensic science used to convict and sentence him (PC-R2. 56-73), and because the files and records do not conclusively refute his allegations, Mr. Dennis is entitled to an evidentiary hearing.

ARGUMENT IX: THE CIRCUIT COURT ERRED IN DENYING MR. DENNIS AN EVIDENTIARY HEARING ON HIS CLAIM THAT FLORIDA'S LETHAL INJECTION STATUTE AND THE EXISTING LETHAL INJECTION PROCEDURES VIOLATE THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 AND ARTICLE II, SECTION 3 OF THE FLORIDA CONSTITUTION; THE STATUTE AND PROCEDURES CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

Mr. Dennis sought an evidentiary hearing on his claim challenging Florida's lethal injection procedures (PC-R2. 73-90). The circuit court denied Mr. Dennis an evidentiary hearing, relying in part on this Court's decisions in *Schwab v. State*, 995 So. 2d 922 (Fla. 2008), and *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007). The circuit court added that "The U.S. Supreme Court in *Baze v. Rees*, 128 S. Ct. 1520 (2008) found that the Florida protocols were constitutional." (PC-R2. 322). *Baze* made no such finding.

Mr. Dennis is aware of the Florida Supreme Court cases rejecting challenges to lethal injection, *e.g.* *Schwab v. State*, 969 So. 2d 318 (Fla. 2007). Mr. Dennis is also aware that the Florida Supreme Court has rejected the general notion that each litigant is entitled to his own hearing. *See Tompkins v. State*, 994 So. 2d 1072 (2008). Nevertheless, Mr. Dennis seeks an evidentiary hearing at which he would have the assistance of counsel, the opportunity to present evidence and challenge evidence, as well as present evidence that has not been heard in any court in Florida.

A lethal injection challenge involves first a resolution of factual issues, and then second the application of the legal standard, which was most recently enunciated in *Baze v. Rees*, 128 S. Ct. 1520 (2008). Importantly, neither *Baze* nor *Lightbourne* constitute a ruling that regardless of what facts are found by the trier of fact, Florida's lethal injection procedure is constitutional. As such, the circuit court erred in refusing to grant Mr. Dennis an evidentiary hearing on his challenge to Florida's lethal injection procedure in light of the Diaz execution. The proper remedy is to remand so that Mr. Dennis can be provided with the same opportunity that was extended to Mr. Lightbourne - the opportunity to present the evidence supporting his facially sufficient challenge to Florida's lethal injection procedure. This Court should reverse and remand the summary denial of Mr. Dennis's lethal injection claim.

The decision in *Baze v. Rees* turned wholly on Kentucky’s written protocol. While the *Baze* decision addresses some of the questions raised by Mr. Dennis, it by no means forecloses consideration of important questions that *Baze* left open. Among the issues to be decided is whether Florida’s written protocol is “substantially similar” to Kentucky’s. The question of whether Florida’s protocol is substantially similar to Kentucky’s, however, is a question of fact that can only be answered after considering both the similarity of drugs to be used and how Florida’s written protocol will actually be carried out. Significantly, the *Baze* opinion left open the important question of whether a protocol that is constitutional on its face may violate the Eighth Amendment when it is not carried out as written. Florida’s unique history of deviating from written execution protocols reveals the gravity of the question of whether a protocol that is constitutional on its face may violate the Eighth Amendment when it is not carried out as written. *See, e.g., Davis v. Florida*, 742 So. 2d 233 (Fla. 1999); *Provenzano v. Moore*, 744 So. 2d 413 (Fla. 1999).

Now that the high Court has better defined the standards by which an Eighth Amendment method-of-execution challenge may be established, Mr. Dennis seeks the opportunity to litigate and prove his claim.

ARGUMENT X: MR. DENNIS IS INNOCENT OF FIRST DEGREE MURDER

Mr. Dennis is innocent. He was convicted based on purely circumstantial

evidence. Trial counsel was ineffective for not effectively challenging the State's case. The State of Florida was required to prove each and every element of the offenses charged against Mr. Dennis. *In Re Winship*, 397 U.S. 358 (1970). No physical evidence or eyewitnesses linked Mr. Dennis to the crime. The State's case was based on a theory of domestic violence to which there was conflicting testimony. At best, this was a case of second degree murder. However, the State in its closing argument misstated the law pertaining to the requirements for finding a defendant guilty of second degree murder (T. 4832). *See* Fla. Stat. § 782.04(2). Trial counsel was ineffective for failing to object to the State's misstatement of the law. Taking all of the evidence in a light most favorable to the State, no rational fact finder could find Mr. Dennis guilty of premeditated or felony murder beyond a reasonable doubt. Mr. Dennis is also innocent of criminal mischief and burglary with an assault or battery while armed. *Jackson v. Virginia*, 443 U.S. 307 (1979); *See also, Skelton v. State of Texas*, 795 S.W. 2d 162 (1989).

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing Labrant Dennis respectfully requests that this court immediately vacate his convictions and sentences, including his sentence of death and order a new trial and/or sentencing. In the alternative, Mr. Dennis additionally requests that this court remand for a full and fair evidentiary hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first-class postage prepaid to Sandra Jaggard, Assistant Attorney General, Office of the Attorney General, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, Florida 33131, on the 14 day of December, 2009.

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