



IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA, FIRST DISTRICT  
CASE NO. 10-4650

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**CRIMINAL SPECIALIST INVESTIGATIONS, INC.**  
Petitioner,

v.

**STATE OF FLORIDA**  
Respondent(s).

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On Writ of Certiorari to the  
4th Judicial Circuit of Duval County  
Case No.: 2006-CF-018283

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Brief *Amicus Curiae* of Florida Capital Resource Center Inc.  
In Support of Petitioner

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Terence M. Lenamon  
Fla. Bar No. 970476  
100 N. Biscayne Blvd., Suite 3070  
Miami, FL 33132  
(305) 373-9911  
(786) 425-2380 Fax  
*Counsel for Florida Capital Resource  
Center, Inc.*

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**STATEMENT OF INTEREST OF**  
**AMICUS CURIAE FLORIDA CAPITAL RESOURCE CENTER, INC.**

Florida Capital Resource Center, Inc. (“FCRC”) provides free high quality legal resources for capital defense attorneys and their teams in the State of Florida. FCRC’s mission is to continuously improve the effectiveness of capital defense in Florida through information sharing, education, and training while reducing costs.

FCRC’s interest in this matter arises because the role of the mitigation specialist is integral in the defense of capital crimes. Effective counsel requires mitigation, and effective mitigation is a time-consuming endeavor requiring a special set of skills. Using a mitigation specialist not only decreases costs to tax payers, but frees the attorneys to focus on legal aspects of death penalty cases.

FCRC supports the Petitioner because affirmance of the trial court’s order would have far-reaching and negative impacts on capital litigation and would almost certainly increase costs while decreasing the quality of representation.

**SUMMARY OF THE ARGUMENT**

The Petition for Writ of Certiorari should be granted, and the decision of the lower court reversed because to deny payment to Petitioner departs from the essential requirements of law. First, mitigation evidence in death penalty cases is required to provide Constitutionally required individualized sentencing. Second, gathering mitigation evidence and use of a mitigation specialist is a well-defined standard for Constitutionally effective assistance of counsel. Last, a mitigation

specialist's role requires diverse skills in performing an integral defense function.

## ARGUMENT

### I. MITIGATION IS REQUIRED BY THE EIGHTH AMENDMENT'S MANDATE FOR INDIVIDUALIZED SENTENCING IN CAPITAL CASES.

Mitigating evidence is “anything shown by believable evidence that, in fairness or in the totality of the defendant’s life or character, extenuates or reduces the degree of moral culpability for the crime committed or that reasonably serves as a basis for imposing a sentence less than death.” *Crook v. State*, 813 So. 2d 68, 74 (Fla. 2002). The importance of mitigation investigations flows from the Eighth Amendment’s requirement that there be an individualized determination as to whether death is the appropriate penalty in any given case. *See* U.S.C. Amend. 8; *Kansas v. Marsh*, 548 U.S. 163, 174 (2006)(“The use of mitigation evidence is a product of the requirement of individualized sentencing.”); *Tennard v. Dretke*, 542 U.S. 274, 275 (2004)( “The Eighth Amendment requires that the jury be able to consider and give effect to a capital defendant’s mitigating evidence.”).

Florida’s statutory scheme for capital punishment reflects these Constitutional concerns for individualized sentencing. Florida’s current statutory scheme allows presentation of a wide range of mitigating circumstances, while limiting the uncontrolled use of aggravators. *See* Fla. Stat. § 921.141.

In addition to individualized sentencing requirements, presentation of mitigation evidence is key to Florida’s constitutional requirement of proportionality review by

the Florida Supreme Court in all death penalty cases. *See Barnes v. State*, 29 So. 3d 1010, 1025 (Fla. 2010). A proportionality review requires that court to thoughtfully and deliberately consider the totality of circumstances in a particular case, and to compare it with the circumstances in other capital cases. *See id.* Lack of mitigation evidence “makes it difficult, if not impossible, for this Court to adequately compare the aggravating and mitigating circumstances in this case to those present in other death penalty cases.” *Id.* Without mitigation, the Florida death penalty framework becomes unconstitutionally unsound.

## II. EFFECTIVE ASSISTANCE OF COUNSEL IN DEATH PENALTY CASES REQUIRES MITIGATION EVIDENCE AND MITIGATION SPECIALISTS.

The Sixth Amendment’s right “to have the Assistance of Counsel for his defence” is the right to have effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984). Florida jurisprudence is unambiguous that effective assistance of counsel in death penalty cases requires mitigation:

“An attorney has a duty to conduct a **reasonable investigation**, including an investigation of the defendant's background, for possible mitigating evidence.” *Rose v. State*, 675 So.2d 567, 571 (Fla.1996) (quoting *Porter v. Singletary*, 14 F.3d 554, 557 (11th Cir.1994)); see also *State v. Lewis*, 838 So.2d 1102, 1113 (Fla.2002) (“[T]he obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated-this is an integral part of a capital case.”); *Ragsdale v. State*, 798 So.2d 713, 716 (Fla.2001). “The failure to do so ‘may render counsel's assistance ineffective.’ ” *Rose*, 675 So.2d at 571 (quoting *Bolender v. Singletary*, 16 F.3d 1547, 1557 (11th Cir.1994)). “The principal concern, as recognized by the United States Supreme Court, is not whether a case was made for mitigation but whether the ‘investigation supporting counsel's decision not to introduce mitigating

evidence ... was itself reasonable ‘ from counsel's perspective at the time the decision was made.’ *Holland v. State*, 916 So.2d 750, 757 (Fla.2005) (quoting *Wiggins v. Smith*, 539 U.S. 510, 523, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)).

*Stein v. State*, 995 So.2d 329, 339 (Fla. 2008) (emphasis added).

“Reasonable investigation” is defined by professional standards as set forth by the American Bar Association (ABA). The ABA standards are recognized as the guiding measure for effective assistance of counsel. *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003).

The ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (2003) [hereinafter “ABA Guidelines”] provides well-defined norms for all aspects of representation in capital cases, including the composition of the defense team. The ABA Guidelines clearly require a defense team composed of at least one mitigation specialist. ABA Guidelines 10.4(C)(2)(a).

### III. THE ROLE OF A MITIGATION SPECIALIST IS SPECIALIZED AND REQUIRES DIVERSE SKILLS.

The role of the Mitigation Specialist on a death penalty case is broad. It includes identification, location and retrieval of all records regarding the client ever generated, *as well as* all records regarding all immediate and extended family members. These include but are not limited to:

- Birth certificate and hospital birth records and/or all individuals who have knowledge of the client’s birth

- All medical records, including private physicians, clinics and hospitals. These include, emergency room records, all lab reports, x-rays, EEG's, CT scans, ECG's, PET scans, MRI's, medications logs, nurse and physician notes, immunizations and all pathology reports
- All school records, including transcripts, health records, standardized testing, attendance, special education testing and/or classes, disciplinary action for every school attended, including adult education and vocational schools, GED, college and Job Corp
- All social service records, including food stamps, AFDC, WIC, welfare, counseling records, referrals, and medical and mental health treatment, records associated with adoption agencies and foster homes, including placement and discharge reports, progress reports, and medical, educational, mental health, and intellectual evaluation
- All juvenile records, including public defender and state attorney files, pre-trial intervention, community service records, juvenile detention records, to include all medical, educational and intellectual evaluations, treatment plans, field and progress, notes and referrals, and court files
- All adult criminal records, including police, sheriff and FBI records; jail and prison records to include all psychological, educational and medical evaluations and notes, daily progress notes, disciplinary reports, work assignments,



classifications reports, participation in all vocational, educational, religious and honor programs, religious reports and visitation logs; all court records; all public defender and state attorney files

- All probation and parole records, including presentence investigations and sentencing reports, field notes, family and social history information, conditions of supervision and violations, and conditions of release from supervision
- All employment records, including applications, attendance, job assignments and performance evaluations, medical and psychological evaluations, relocations, pay records
- All psychological and psychiatric records, including community mental health clinics, private doctors and counselors, hospitals and substance abuse facilities, to include intake evaluations, treatment interventions, all medication logs, physician and nurse progress notes, referrals, and discharge reports
- All military records, including all locations of assignment, rank and job duty, attendance, medical records, special commendations, disciplinary records

In addition to obtaining records, the Mitigation Specialist must conduct comprehensive interviews with the client and as many individuals as possible who have known the client. These include all:

- family members, both immediate and extended
- friends, neighbors, landlords in all locations the client has ever lived

- teachers, counselors and coaches
- church members, Sunday School teachers, pastors
- co-workers and employers
- wives, ex-wives, girlfriends and ex-girlfriends
- physicians, nurses and technicians
- mental health and social services personnel
- military peers and superiors
- probation and parole officers
- past attorneys
- police and sheriff, DOC guards, pastors and counselors

For several reasons, locating and interviewing lay witnesses, especially family members, is a sensitive endeavor which requires exceptional time, patience and skill. A primary reason is that, as with the client, family members may similarly suffer from multiple impairments, including mental retardation, mental illness and substance abuse. In addition, there are usually problems obtaining the trust of the witnesses, in many cases lay witnesses are initially suspicious of talking to anyone about the client because it is assumed that the purpose is to incarcerate or in other ways hurt their loved one. Others are reluctant to reveal possibly painful and embarrassing facts regarding family history to a stranger. Consequently a significant amount of time must be spent not only effectively evaluating and

overcoming various impairments, but also in demonstrating one's sincere commitment to assisting the client. The limitations of witnesses, combined with the length of time between childhood and the time of the offense or post-conviction investigation, necessitates that lay witnesses be interviewed on more than one occasion in order to obtain valid and reliable data.

The interviewing of lay witnesses should be done in person whenever it is possible. The sensitive nature involved in interviewing lay witnesses who have personal knowledge and connections with the defendant require in person interviewing. The National Association of Criminal Defense Lawyers has stated that, “[w]itnesses should always be interviewed in person. The information needed in mitigation is simply not disclosed to strangers over the telephone. Full disclosure comes only in person with great patience, no matter how skilled the interviewer.”

The kinds of information the Mitigation Specialist in a death penalty case must identify and present to the attorney include, but are not limited to:

- Fetal and birth trauma, including prenatal malnutrition, prenatal exposure to alcohol, drugs and toxins, maternal medical conditions, such as diabetes, liver and thyroid disorders and toxemia, and complications of delivery such as anoxia
- Early developmental history, including ages at which important developmental

tasks such as walking and talking were mastered

- Early physical health of client, including chronic illnesses, high fevers, traumatic injuries, infectious diseases, nutritional status; whether medical attention was available and, if so, the nature and extent of any intervention
- Evidence of early signs of mental illness or deficiencies, including mental retardation, pervasive developmental disorders and major mental illnesses such as schizophrenia or bipolar disorder; onset and course of adolescent or adult mental illness; treatments, including self-medication
- Educational history, including when and where client attended school, the presence of any learning disorders, special education and referrals for additional assistance
- History, nature and extent of mental, physical and/or sexual abuse, including isolation and shunning, scapegoating, beatings and burnings, having to watch repeated abuse of loved ones
- History and course of drug addiction, including who introduced client to various drugs and toxins and means of self-medication
- Nature of relationships with parents and significant others, including whether or not client knew parents, the degree of bonding and trust present, presence or abandonment and betrayals by parents
- Residential history, including foster homes, juvenile settings, moves due to

evictions; complete investigation into each institution, especially evidence of mental, physical and sexual abuse

- Presence or absence of necessary support systems within the family, school, and community; presence or absence of advocates
- Presence or absence of client skills and means by which to build a sense of self esteem and personal competence
- Nature and extent of poverty, including substandard living conditions, including periods of starvation or malnutrition, lack of heat, medical attention, clothes
- Number and nature of traumatic life events, including loss, injury or illness of significant others, victim or witness of extreme violence, chronic or acute physical/sexual abuse, loss of home or prolonged hospitalization
- Health history, including major accidents and head injuries, infections, hospitalizations, out patient care, chronic untreated conditions, medical treatment received in institutions
- Nature of work experiences, including childhood jobs to help support family; necessity to quit school in order to support family; number and nature of jobs; ability to perform/master tasks; willingness to perform tasks assigned; job related injuries/illnesses; exposure to toxins
- Juvenile and adult criminal history, especially the presence and nature of influence of co-defendants; experiences with law enforcement, juvenile

detention centers, courts, parole and probation, prisons, and work release programs, especially in regard to rape, inmate violence and violence and abuse perpetrated by the institution

- Military history, including location and nature of combat experience, exposure to toxins, nature of job assignments, special training, commendations, indications of PTSD
- Religious and spiritual experiences and activities
- Nature of significant relationships, including family friends, spouses, ex-spouses and co-defendants and the effects of these relationships and/or the loss of the relationships of the client
- Physical and mental health histories of parents and other family members; school histories of same, employment history of same

It is essential that, whenever possible, the Mitigation Specialist should triangulate data; that is, obtain data from more than one source and, preferably, more than one type of source, in order to assure valid and reliable information. For example, a head injury and the effects of the trauma should be documented by all those who witnesses the injury and its aftermath, as well as by medical records and the medical personnel who treated the client. This is essential in order that experts' evaluation the client can draw accurate conclusions about the effects of the injury on the client's perception, judgment and behavior.

The Mitigation Specialist is responsible for summarizing and analyzing documents and interview data, and for organizing and presenting the information to the attorney and to experts. This is an ongoing and time-intensive task which requires special skill and experience and which requires skill and experience and which generally is not within the purview of the attorney or other experts. Essential elements of this organization are preparation of *chronologies* and *genograms*.

Chronologies, which constitute a distillation of thousands of pages of documents and interview data, are comprehensive, linear, documented summaries of all major conditions and live events and the effects of these events on the client. These annotated time lines provide a framework by which both attorneys and experts can come to organize, assimilate, and understand critical events and the effects of those experiences on the perception, judgment and behavior of the client. While records and interview summaries generally involve between 2,000 and 5,000 pages of documents and interview data, the chronology usually consists of 100-page linear distillation of the information contained within the documents.

Genograms, also a distillation of massive amounts of data, are pictorial representation of patters of influences, including family histories of medical, psychological and social dysfunction. Major documented themes of inherited impairments and patterns of dysfunction are indicated with codes representing the

various themes. Genograms include a minimum of three generations of historical patterns and include such themes as mental retardation, organic dysfunction, seizure disorders, mental illness, family violence, traumatic events, chronic alcoholism and substance abuse, suicide, poverty, criminal history, lack of social support systems, and physical, mental and sexual abuse. This pictorial representation is essential to accurately identifying not only the number and nature of the influences over which the client had little control, but also illustrating the *cumulative effect* of such influences, for it is never any one factor or impairment which results in social dysfunction and ineffectualness, but rather the cumulative effects of these factors. In short, it is not that the client is impaired; it is that the number and magnitude of impairments are more than he can effectively cope with given inherent disabilities and lack of necessary support systems and role models.

Once the life history is near complete (the mitigation investigation is an ongoing, cyclical process that continues up until and throughout the capital trial and sentence proceedings at the trial level), the Mitigation Specialist is responsible for selecting a team of experts that can best address the special impairments of the client and themes inherent in any given case. These experts, who are responsible not only for evaluating the client, but also for effectively presenting their findings to the jury and/or judge, must include, at a minimum, a medical doctor with expertise in psychiatry and a working knowledge in the area of neurology, a



neuropsychologist, and a social worker. A medical doctor is essential because medical causes of behavior are often misdiagnosed as psychological problems, a practice which is prohibited by the American Psychiatric Association. For example, a diagnosis of a personality disorder is prohibited when an organic condition, mental retardation or a major mental illness is present. *See generally* Diagnostic and Statistical Manual III (American Psychiatric Association, 3d ed. Rev. 2000); Robert L. Taylor, *Distinguishing Psychological from Organic Disorders* (Springer Pub. Co. , 2d ed., 1990). Generally, the appropriate types of physicians are psychiatrists, as they have expertise in the area of *behavioral implications* of major mental illness and neurological dysfunction.

The services of neuropsychologists are required because it is they who perform objective testing that indicates the presence of neuropsychological deficits. Psychiatrists are not trained nor qualified to conduct such testing, although they must have neuropsychological test results in order to complete their evaluations and render valid and reliable conclusions.

Social workers, who conduct social assessments, are uniquely qualified to ascertain cause and effect relationships between significant dysfunction in the relationships of the client to his social environment and subsequent impairment in social skills, judgment and behavior. Social workers have special expertise in the use and interpretation of genograms and are able to explain the cumulative effects

of patterns and influences

It is important to underscore that none of the experts can render valid and reliable conclusions in the absence of comprehensive life history data. *See Comprehensive Textbook of Psychiatry, Kaplan & Sadock (Lippincott Williams & Wilkin, 7th ed. 2009)* Hence, the need for the comprehensive mitigation investigation.

The findings of these experts often indicate the need for additional diagnostic studies necessary to complete the mental health evaluation. For example, if neurological dysfunction is indicated by history and neurological screening, additional tests such as CT scans, MRI's, EEG's may be necessary to ascertain the specific nature and extent of impairment and the behavioral implications of the impairment. Similarly, if the client is retarded, it will be necessary to employ the services of a special education expert in order to explain the implications of these extreme mental limitations on perception, judgment and behavior.

As a result of the long standing involvement in and commitment to the case, her interpersonal communication and counseling skills, and her comprehensive understanding of all facets of the case, another prominent role the Mitigation Specialist plays involves assessing whether the best resolution of the case is to negotiate a plea.

Mitigation Specialist require special knowledge and skill in the areas of

collecting hard-to-find records, interviewing impaired clients and witnesses, mental illness, grief reactions and loss, and mediation and negotiation. A competent mitigation specialist generally has some training in the area of forensics and mental health issues as well as basic investigative skills. Usually, those individuals who are competent mitigation specialists have background in general criminal cases and have worked on numerous capital cases.

Mitigation investigations routinely require between 200 and 500 hours of uninterrupted intensive work over a period of six months to two years, depending on the complexity of the case, accessibility of family members and other lay witnesses, the nature and extent of the impairment of the client, and the availability of expert witnesses. It is critical that the second chair begin work on the case as early as possible in the preparation. A competent mitigation investigation cannot be performed in the absence of adequate time and resources and must be an integral part of the defense of the attorney's effectiveness is seriously and often fatally compromised.

### **CONCLUSION**

Upholding the trial court's decision to not pay a mitigation specialist reasonable rates for undisputedly successful work not only violates constitutional guarantees of effective assistance of counsel but has a chilling effect on all capital litigation in the State. The Petitioner performed her duties as a mitigation specialist by

thoroughly and competently performing records collection and forensic social work. The work helped secure life sentences. The attorneys supported her billing, and the Justice Administrative Commission did not dispute the billing. The lower court's denial of that billing violates the essential requirements of law as well as professional standards.

For all the reasons set out above, the Petition for Writ of Certiorari seeking to vacate order of the trial court should be affirmed, and the order of the trial court reversed.

Respectfully submitted,  
s/Terence M. Lenamon  
Terence M. Lenamon  
Fla. Bar No. 970476  
100 N. Biscayne Blvd., Suite 3070  
Miami, FL 33132  
(305) 373-9911  
(786) 425-2380 Fax  
*Counsel for Florida Capital Resource Center, Inc.*

### **CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a copy of the foregoing has been sent via U.S. Mail, to Christian Lake Esq., Justice Administrative Commission, P.O. BOX 1654, Tallahassee, FL 32302 this 8th day of September, 2010.

s/Terence M. Lenamon  
A T T O R N E Y

### **CERTIFICATE OF COMPLIANCE AND AS TO FONT**

The undersigned certifies that the forgoing was typed using Times New Roman, font size 14.

s/Terence M. Lenamon  
A T T O R N E Y