

IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,161

McARTHUR BREEDLOVE,

Appellant

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

McArthur Breedlove was convicted of first-degree felony murder and the underlying felony of burglary in Dade County, Florida, in March, 1978. By an unrecorded vote, the jury returned a sentencing verdict of death, and Judge Richard Fuller followed the jury's verdict and sentenced Mr. Breedlove to death. This Court affirmed the conviction and sentence on appeal. Breedlove v. State, 413 So. 2d 1 (Fla.), cert. denied, 459 U.S. 882 (1982).

On November 30, 1982, a Rule 3.850 motion for postconviction relief was filed on Mr. Breedlove's behalf by counsel from the Dade County Public Defender's Office, the same office that represented him at trial. In 1983, a death warrant was signed, and the trial court stayed the execution pending resolution of the motion for postconviction relief. The motion was summarily denied on January 4, 1991. This Court affirmed the trial court's order. Breedlove v. State, 580 So. 2d 605 (Fla. 1991).

On November 18, 1991, a second death warrant was signed by Governor Chiles. The Office of the Capital Collateral Representative (CCR) began its representation of Mr. Breedlove on November 25, 1991, after volunteer counsel could not be located. On December 18, 1991, Mr. Breedlove's second postconviction motion was filed. The motion, as well as a request for a stay of execution, was summarily denied by the circuit court (2PCR. 324). This Court affirmed the summary denial of the guilt phase

ineffectiveness claims, but reversed and remanded for an evidentiary hearing regarding penalty phase ineffective assistance of counsel. Breedlove v. Singletary, 595 So. 2d 8, 12 (Fla. 1992). The Court also stayed Mr. Breedlove's pending execution.

An evidentiary hearing was conducted in Dade County Circuit Court on May 5-7, 1992, and an order denying relief was entered on May 26, 1992 (2PC-R. 822-24). Mr. Breedlove appealed (2PC-R. 825). While the appeal was pending, the decisions in Espinosa v. Florida, 112 S. Ct. 2926 (1992), and James v. State, 615 So. 2d 668 (Fla. 1993), were handed down. Because these decisions directly affected the constitutionality of Mr. Breedlove's death sentence, this Court held the instant appeal in abeyance pending resolution of a third Rule 3.850 motion. After the lower court granted Mr. Breedlove's motion and vacated his unconstitutional sentence of death, the State of Florida appealed and this Court, in a sharply divided vote, reversed and reinstated the death sentence, finding the jury instructional error harmless because the heinousness factor was applicable under any definition of its terms, and that the presentation of "some" evidence of "possible" psychological problems did not outweigh the two aggravating circumstances. State v. Breedlove, 655 So. 2d 74, 77 (Fla. 1995). Justices Anstead, Kogan, and Shaw dissented from the reinstatement of the death sentence. Rehearing was denied on June 1, 1995. This appeal is now before the Court.

SUMMARY OF ARGUMENT

No adversarial testing occurred at Mr. Breedlove's capital penalty phase due to ineffective assistance of counsel. The testimony adduced at the evidentiary hearing, consisting of attorney, expert, and lay witness testimony, conclusively establishes that significant statutory and nonstatutory mitigating circumstances were available but never presented to the sentencing jury. The attorney who represented Mr. Breedlove at the penalty phase, Jay Levine, was asked by lead counsel, Eugene Zenobi, shortly before the trial commenced to sit as second chair during the guilt-innocence phase. After the jury returned its guilty verdict on Friday night, Mr. Zenobi requested that Mr. Levine conduct the penalty phase, which was scheduled to begin the following Monday morning. Prior to that Friday night, Mr. Levine had conducted no investigation regarding penalty phase issues. Because he had insufficient time over the weekend, Mr. Levine never spoke with Mr. Breedlove about his background or whether any witnesses would be available to testify to mitigation, never contacted the mental health experts who were going to testify at the penalty phase, never provided the experts with information which they needed, such as police reports, witness statements, and Mr. Breedlove's inculpatory statement to the police, and never obtained any additional information such as school and incarceration records. As a result of the lack of time and his unpreparedness, defense counsel put on the experts cold, and the experts were completely unprepared to respond

effectively to the State's cross-examination. Mr. Levine testified that he had no tactical or strategic reason for failing to investigate; rather, his omissions were the result of being given only a weekend's notice that he would be conducting the penalty phase. Mr. Levine's testimony was unrebutted. Mr. Breedlove further adduced evidence from the mental health experts that they were not contacted by Mr. Levine prior to testifying, and that had they been prepared and provided with the materials they needed, they would have been able to provided corroborated and well-supported testimony regarding significant statutory and nonstatutory mitigating factors as well as effectively respond to the State's cross-examination. Mr. Breedlove also presented the testimony of numerous family friends and acquaintances regarding his horribly abusive upbringing, deprived childhood, longstanding severe drug and alcohol addiction, and intoxication at the time of the offense. None of this evidence was presented because defense counsel was unaware of its existence. The trial court's order denying relief is premised upon a failure to consider any of the evidence presented by Mr. Breedlove, and upon findings which are contrary to the record. Mr. Breedlove's counsel rendered ineffective assistance and, as this Court acknowledged in its prior opinion, a strong presentation of mitigation would have tipped the scales in this case. Prejudice therefore has been established. A resentencing must be ordered.

ARGUMENT

MR. BREEDLOVE WAS DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING AND DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF MR. BREEDLOVE'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.

In its opinion remanding this case for an evidentiary hearing, this Court detailed the allegations contained in Mr. Breedlove's postconviction motion which warranted evidentiary development:

On the other hand, we believe that Breedlove's allegations of ineffectiveness at the penalty phase of his trial are sufficient to require an evidentiary hearing. According to an affidavit of assistant public defender Jay Levine, about two weeks before the trial he had been asked to assist his supervisor by sitting in on the trial as a second chair. When the jury returned a guilty verdict on Friday afternoon, the supervisor insisted that Levine handle the penalty phase over Levine's protest of being unprepared. He had only the weekend to prepare, and there had been no investigation about Breedlove's background. The only defense witnesses were mental health experts, but Levine did not even talk to them until the morning of their testimony.

Breedlove further alleges that counsel failed to furnish the mental health experts with any information concerning his background, the facts of the offense, or his mental status on the night of the homicide. Consequently, the experts were unprepared to respond effectively to the State's cross-examination. Breedlove further asserts that counsel negligently failed to present available evidence of intoxication on the night of the murder which could have been used as a basis to support the experts' testimony.

Breedlove further submitted more than ten affidavits of family and friends who could have testified about Breedlove's abandonment by his alcoholic mother and the severe physical abuse he received at the hands of his stepfather. They also would have testified as to his addiction to alcohol and drugs as well as his mental instability.

The State primarily argues that Breedlove has failed to demonstrate that any prejudice resulted even if counsel was ineffective. However, it must be remembered that Breedlove's victim died from a single stab wound inflicted during the course of a burglary and that Breedlove acquired the weapon only after entering the house. The State conceded at the trial that this was a case of felony murder rather than premeditated murder. A strong presentation of mitigating evidence is more likely to tip the scales in a case where the killing was not premeditated. In the final analysis, we do not believe that the issue of ineffectiveness during the penalty phase can be resolved without an evidentiary hearing.

Breedlove v. Singletary, 595 So. 2d at 12.

At the evidentiary hearing, Mr. Breedlove presented testimony that conclusively established all the allegations contained in this Court's opinion remanding for a hearing, and conclusively established that Mr. Breedlove received the ineffective assistance of his penalty phase counsel. In its order denying relief, the lower court failed to make any findings which comported with the testimony adduced at the evidentiary hearing. For example, regarding deficient performance, the lower court wrote that defense counsel "was not deficient in any way in performing his legal functions in the representation of the defendant" (2PC-R. 823), and that "[t]his Court can only conclude that he made a strategic decision in not presenting them during

the original penalty phase" (2PC-R. 824). Such "conclusions" are totally contrary to the record.

As discussed more fully below, the evidence adduced at the evidentiary hearing conclusively established that defense counsel was informed on a Friday night after the guilty verdict came back that he was to handle the penalty phase beginning the following Monday, that prior to that time no investigation had been conducted by defense counsel, that defense counsel conducted no investigation over the weekend, including contacting the expert witnesses who had evaluated Mr. Breedlove's mental condition, and that counsel had no tactical or strategic reason for these failures. The lower court simply refused to credit in any respect the unrebutted testimony presented by Mr. Breedlove at the hearing which was ordered by this Court. Relief is warranted.

A. THE EVIDENTIARY HEARING.

1. The Evidence Presented at the Evidentiary Hearing Established that Trial Counsel Conducted No Investigation for the Penalty Phases.

At the evidentiary hearing, Mr. Breedlove presented the testimony of attorneys David Finger and Jay Levine. Mr. Finger worked in the Dade County Public Defender's Office in 1978-79 and was assigned to Judge Fuller's courtroom (2PC-R. 841). Assistant Public Defender Jay Levine was also assigned to Judge Fuller's courtroom (*Id.*). Mr. Finger testified that he and Mr. Levine were initially assigned to represent Mr. Breedlove on his first-degree murder charge after they had gone to the jail to interview

him shortly after his arrest (2PC-R. 842).¹ Both Finger and Levine explained to Mr. Breedlove that it was not in his best interest to make any statements to law enforcement (Id.). However, Finger later became aware that Mr. Breedlove did make a statement, so he and Levine went to the jail, and Finger "expressed my anger and told Mr. Breedlove if he didn't want to follow my advice it would be best perhaps if he was represented by somebody else. . . . [and] I told him at this juncture we would not be representing him any more" (2PC-R. 843). Mr. Finger then explained to Mr. Breedlove that his case would be handed over to Eugene Zenobi, the Division Chief (Id.). When he and Mr. Levine discontinued their representation of Mr. Breedlove, they had conducted no investigation into the case (Id.).

Mr. Finger was still working in the Public Defender's Office at the time of Mr. Breedlove's trial. Mr. Finger recalled that shortly before the trial, he was present during a conversation between Mr. Zenobi and Mr. Levine when "Mr. Zenobi asked Mr. Levine if Mr. Levine would help him out, sit with him during the course of the trial and help him with the record of making any objections, basically to help him as a second chair in the case with him. That request was made shortly before the trial of the case" (2PC-R. 844).

¹On cross-examination, Mr. Finger further detailed that he and Levine, although inexperienced with capital murder cases, were assigned to Mr. Breedlove's case because "I didn't think a first degree murder was going to be filed from what I saw in the arrest affidavit" (2PC-R. 847).

Mr. Finger explained that he sat in during portions of Mr. Breedlove's trial, and was present in the courtroom when the guilty verdict came in, which was on a Friday late in the afternoon around 6 or 7 o'clock (2PC-R. 845). After the verdict came in, Mr. Finger testified that he was present during another conversation between Mr. Zenobi and Mr. Levine regarding the penalty phase:

Q. [by Ms. Anderson] Do you recall what Mr. Zenobi said to Mr. Levine?

A. The jury ha[d] been discharged. They were coming back I believe on Monday for the second phase and I distinctly recall the conversation outside of the courtroom. It was courtroom 4-3, right down the hall.

I remember Mr. Zenobi telling Mr. Levine that "I'm kind of depressed," I know he used the word depressed, I'm a hundred percent positive of that. I believe he said "I'm kind of depressed. I would like you to do phase two," and Mr. Levine agreed to do it. I have a distinct recollection of that conversation, as I remember Gene Zenobi saying "I'm depressed."

(2PC-R. 845) (emphasis added).

Jay Levine also testified at the evidentiary hearing. Mr. Levine explained that he was working in the Public Defender's Office in 1978-79 in Judge Fuller's division, and he and David Finger were assigned to Mr. Breedlove's case (2PC-R. 854). Prior to Mr. Breedlove's case, Mr. Levine had never been in front of a twelve (12) person jury, much less conducted a capitol trial (2PC-R. 865). As with Mr. Finger, Mr. Levine recalled that after Mr. Breedlove made a statement to the police, both he and Finger withdrew from the case and "basically dumped" the case on Gene

Zenobi (2PC-R. 856). Prior to handing over the case, he and Finger had done no investigation other than reading the arrest affidavit, which made out only a "w[eak] loitering and prowling" (Id.).

After Mr. Zenobi took over and prior to being asked to assist at the trial, Mr. Levine did no investigation regarding Mr. Breedlove's case (2PC-R. 856-57). While he did handle some routine ministerial matters for Mr. Zenobi when requested to do so,² Mr. Levine emphasized that "[w]hat I didn't do was I didn't participate in the preparation for the defense at all" (Id.).

Mr. Levine testified that at some point before Mr. Breedlove's trial, Mr. Zenobi "asked me if I would sit in with him on the case because it was a first degree murder and the policy was they like to have two attorneys there" (2PC-R. 859). Mr. Levine recalled that he "took notes during the trial . . . [and] didn't participate but I did make arguments at sidebar that I thought were necessary to protect the record" (2PC-R. 860). At that point when Mr. Zenobi had made the request, Mr. Levine had done no investigation (Id.). Mr. Levine did explain that he was present at the hearing on the motion to suppress Mr. Breedlove's

²For example, Mr. Levine was shown some pleadings which he explained were form motions such as requests for a continuance (2PC-R. 857-58). Mr. Levine noted that the signature on the motions was not his, but must have been his secretary who signed for him (2PC-R. 859), and explained that he "did not do any particular investigation of the facts of the case. Those are just flat, straight forms. There were no factual allegations" (Id.).

statement to law enforcement and was "floored" by what occurred when Mr. Breedlove was brought into the courtroom:

Q. [by Ms. Anderson] What happened?

A. Well, Mr. Breedlove was brought out and he nodded at me. I nodded at him and he sits down next to me. He was sitting on my right and it was me and [G]eno. He indicates, he says, "Who's that?" I said, "That's Eugene Zenobi, your lawyer, haven't you met him before?"

He said, "I never seen the man in my life," and I got physically sick, I didn't know what to say. I tried to make him -- I said, "He's been working very hard on your case," but I was trying to say something. I didn't know what to say.

(2PC-R. 860-61).

Mr. Levine also recalled sitting in on the deposition of Mr. Breedlove's mother at the request of Mr. Zenobi (PC-R. 862). During the deposition, which took place just prior to the commencement of the trial, Mr. Levine recalled that Mr. Breedlove's mother was very hostile toward Mr. Zenobi because she had been led to believe that the prosecutors, and not Mr. Zenobi, were in fact the attorneys trying to help her son (2PC-R. 863).

The jury's guilty verdict was returned on a Friday evening, and the penalty phase was to begin the following Monday morning. Mr. Levine explained how he came to be assigned as counsel to conduct the penalty phase that Friday night:

Q. [by Ms. Anderson] Did you conduct the penalty phase of Mr. Breedlove?

A. I did.

Q. How did that come about?

A. After the verdict on Friday evening right outside the courtroom here Gene said, "I'm kind of depressed," I think that's what he said, "I'm kind of depressed, I'm a little depressed," Gene's typical, you know, statement about the verdict.

"I want you to do the penalty phase," and he looked shook up. I didn't think he could do it. I said to him, I said, "Is it all prepared up?" He goes, "Yeah."

I said, "What do we got?" He said, "We got a bunch of doctors." I said, "Are they ready to go?" He said, "Yeah, they are ready to go." I said, "Are the reports in the file?" He said, "Yes, the reports are in the file."

So I took the file home over the weekend and I prepared a death penalty argument.

(2PC-R. 64-65).

Prior to that Friday night, Mr. Levine had never appeared in front of a twelve-person jury, and never conducted a penalty phase (2PC-R. 865). Prior to that Friday night, Mr. Levine had conducted no investigation or preparation for the penalty phase (Id.). Prior to that Friday night, he had never interviewed Mr. Breedlove about his background; his only conversations with Mr. Breedlove were at the jail when he and Finger withdrew, and at the suppression hearing when Mr. Breedlove revealed that he had never met Gene Zenobi. Prior to that Friday night, Mr. Levine did not obtain any school or prior incarceration records regarding Mr. Breedlove because "[i]t was at least seven o'clock Friday evening, maybe later. I did absolutely nothing over the weekend. To this day I don't know what I could have done in that period of time" (2PC-R. 65-66). Prior to that Friday night, Mr.

Levine interviewed no family members about Mr. Breedlove's background because "[p]rior to that time I didn't feel it was my responsibility to do anything. As far as I knew, prior to that time, Gene was going to do the penalty phase, he was doing the whole trial" (2PC-R. 866). There was no tactical or strategic reason for not talking to witnesses or to Mr. Breedlove, or for not gathering records (Id.).

On Monday morning, Mr. Levine filed a form motion requesting a continuance of the penalty phase so that a presentencing investigation could be prepared (2PC-R. 866-67). The motion was denied (Id.). At the penalty phase, Mr. Levine presented only the testimony of the mental health experts (Id.)³. Mr. Levine testified that there was "insufficient time" to speak with any of the experts over the weekend (2PC-R. 869). To the extent that he may have talked to them at all, he may have "grabbed them in the hall and said, 'I'll just take you through your report,' nothing that I could prepare an expert for testifying" (Id.). There was no tactical or strategic reason for not speaking to the experts ahead of time (2PC-R. 869).

Because he had only a weekend's notice that he would be handling the penalty phase and consequently had no time to prepare the mental health experts for their testimony, Mr. Levine

³Exhibit A, introduced into evidence below, was the defense penalty phase witness list, listing the names of the expert witnesses (2PC-R. 867). Eugene Zenobi signed the motion (2PC-R. 868). Mr. Levine had not seen this witness list prior to that Friday night (2PC-R. 869).

recalled that "the cross [examination] was a disaster" (2PC-R. 870). Mr. Levine explained:

I was not involved in the preparation of the penalty phase. Prior to Friday I was provided with nothing. I didn't know [the experts] existed until I asked [G]eno what we have.

I did nothing on cross-examination. It was a slaughter because I remember Dr. Miller particularly because I'm friends with him, it was embarrassing. I asked Levine and Zenobi, I asked them for police reports but they never got back to me.

(Id.). Mr. Levine explained that there was no tactical or strategic reason for not providing the experts with information to prepare for the State's cross-examination, and that the experts "should have had all the information in order to better prepare for direct examination so they would arrive at a diagnosis with all the information. There's no strategic reason for not giving a witness every single thing you know about the case" (Id.).

Without a tactic or strategy, Mr. Levine did not provide the experts with any information about Mr. Breedlove's background because "I was not aware of any. I had no time to prepare any" (2PC-R. 871). If he had such information, he would have provided it to the experts because "it's what they need to know" (Id.). Without a tactic or strategy, Mr. Levine did not provide the expert witnesses with a copy of the other experts' reports, particularly the reports of the State's experts, Drs. Mutter and Jaslow (Id.). Mr. Levine testified that "the reason it wasn't

done and should have been done because I had no time to do it. I didn't know I was going to do the penalty phase" (Id.).

Further, Mr. Levine, without a tactic or strategy, did not present any mitigating circumstances through members of Mr. Breedlove's family because "I wasn't aware whether or not any existed. I asked Gene what we got and he said doctors. Between Friday evening and Monday, I wouldn't have known where to begin. I had my hands full as it was trying to do a death penalty argument and read the doctor's reports" (2PC-R. 872). If he had known ahead of time that he was going to be handling the penalty phase, he would have interviewed Mr. Breedlove about his background, obtained records regarding Mr. Breedlove's background, and interviewed Mr. Breedlove's family members; these steps are "essential" because such information constitutes "significant, non statutory mitigating circumstances" (Id.).

Mr. Levine also testified that, had he known ahead of time that he was going to be handling the penalty phase, he would have provided the mental health experts with family background information, which is "part of the preparation of the penalty phase" (2PC-R. 873). Had he had adequate time, he would also have discussed statutory and nonstatutory mitigating factors with the experts, including the differences between mitigation and competency and sanity (2PC-R. 874). Had he had more than a hurried weekend-to prepare, he would have given the experts "every single thing I had" and would "absolutely" have prepared the witnesses for their cross-examination, as was his practice

(Id.). Mr. Levine recalled that Mr. Breedlove's case is "the only case I've ever been involved in where I was standing on the podium in front of an expert witness that I hadn't done a direct, taken them through the direct and done a practice cross" (Id.). Mr. Levine also explained that he would have discussed the reports by the State's experts with his own mental health experts:

I would also have asked my experts for assistance in preparing their cross-examination. I do that with experts, civil or criminal. If the other side is having an expert, I have the expertise to cross them without the assistance of the expert witness because if it is a matter that I'm not familiar with, I would ask them, "Well, take a look at your report, is there any weaknesses here, any falsity that should be explored on cross?" That I would have done, that's what I should have done, that's what needed to be done.

(Id.).

In terms of the issue of organic brain damage, Mr. Levine testified that at the time of the penalty phase, he did not know anything about organic brain damage, including the kinds of tests that would reveal whether a person suffered from brain damage (2PC-R. 874-75). Although the experts discussed organic brain damage during their testimony, Mr. Levine "didn't have any personal familiarity with it" (2PC-R. 875). Had he known ahead of time that he was going to be handling the penalty phase and that the experts would be discussing brain damage, he would have educated himself on the issue (2PC-R. 876). There was no tactic or strategy for not doing so (Id.).

On Cross-examination, the State attempted to force Mr. Levine to admit that he was an incompetent attorney (2PC-R. 881).⁴ Mr. Levine responded that he was "unprepared as opposed to incompetent. Incompetent suggests I didn't know what to do. I knew what to do but I was not prepared because it was thrust upon me on Friday afternoon" (2PC-R. 883). Mr. Levine also explained on cross-examination why he did not reveal to Judge Fuller in his continuance motion that he was not prepared to proceed that Monday morning:

Q. [by Mr. Rosenberg] Why didn't you explain to the Court, why didn't you tell the judge why you weren't ready?

A. I believe I was required to do that, I didn't. The reason I didn't do it is because at the time we had in the Public Defender's Office a very strong feeling of solidarity. We had an adversarial relationship with the Court. I couldn't bring myself to stand before Judge Fuller and tell him that there was absolutely inadequate preparation, that Mr. Zenobi never interviewed the guy, that there was nothing done, we were absolutely unprepared.

I could only say now my putting the solidarity of the office and friends over my responsibility was wrong. I would write that off to my youth and inexperience. It was

⁴At this time in the State's cross-examination of Mr. Levine, the court expressed confusion about what these proceedings were about. Mr. Breedlove's counsel had objected to the State's questioning Mr. Levine about whether or not he believed himself to be an incompetent lawyer because "[w]hether or not someone was ineffective as legal counsel, that your Honor has to decide" (2PC-R. 881). The court asked whether it was proper to hear Mr. Levine's opinion, and inquired whether he had "to determine if or who was ineffective or is it sufficient if I determine or I make up my mind and don't tell anyone?" (2PC-R. 882). Collateral counsel explained that it would be necessary that the Court make that determination (Id.).

absolutely wrong and I had an obligation, not to Mr. Zenobi and not to the P.D. office, but to Mr. Breedlove. I failed in that obligation.

I had an obligation to tell the Court that I wasn't prepared. I couldn't bring myself to do it because we had a very adversarial relationship and a very solid P.D. Office. There was a united front and I wasn't going to stand up and say this case has been mishandled.

(2PC-R. 884-85).

Mr. Levine also explained on cross-examination that although he sat in for the deposition of Mr. Breedlove's mother, he did not discuss with her anything about Mr. Breedlove's background because "I never saw her, neither did Gene ever see her before that day I recall" (2PC-R. 888-89). Mr. Levine was also shown the deposition of Elijah Gibson, Mr. Breedlove's brother, which indicated that he had been present at some point during that statement (2PC-R. 904). Mr. Levine had no independent recollection of Mr. Gibson's deposition, unlike the mother's deposition, which he specifically recalled because of the "blow up" with the prosecutors (Id.). In fact, there was nothing in the transcript of the deposition that indicated that Mr. Levine "asked any questions or participated in any way" (2PC-R. 906).

The State also questioned Mr. Levine about his penalty phase closing argument in which he made references to Mr. Breedlove's family:

Q. [by Mr. Rosenberg] Page 1457 of the transcript, penalty phase, your closing arguments, your exact words as you argue to the jury.

"You can tell them one **of two** things: I condemned the man to the electric chair, or **no, I voted** for life and you forget what the **prosecutor** asked you'to do.

"The State of Florida does not need his death.

"His Godmother, Virginia Breedlove, the woman who raised him, needs him alive. He will always be her **child"**

Do you remember arguing to the **jury** about some background information you learned from Mr. Breedlove?

A. Yes.

Q. So there is information that you were able to gather through someone concerning this defendant's background prior to going through the death phase?

A. I don't know where I got the name. I know she didn't testify. In fact, I think [prosecutor] **Stelzer** objected and said there's no such testimony.

Q. I'll let you read it.

A. This was my objection, I would like to take a look. I know there was no person Virginia Breedlove that testified at the trial who would have given any background. Where and when I got the information, I don't remember. Maybe this will refresh my recollection. I do remember arguing it.

I do remember making that argument. As to where I got the information and at what point the information came to me, it didn't come to me at anytime where I could contact or even talk to Virginia Breedlove. I never set eyes on a woman named Virginia Breedlove.

(2PC-R. 909-10). On redirect examination, Mr. Levine explained that he made this closing argument in order to invoke sympathy for Mr. Breedlove, but he had no information about Mr. **Breedlove's** life in particular upon which he was basing his

argument (2PC-R. 962). As to whether Mr. Breedlove had a godmother by the name of Virginia Breedlove, Mr. Levine did not recall where that information came from (Id.).⁵ Mr. Levine acknowledged that his closing argument would have been more effective "if I had any evidence to support it" (Id.).

2. **The evidentiary** hearing established that substantial mitigating **evidence** was available for presentation at **the** penalty phase.

As the testimony at the evidentiary hearing demonstrated, substantial evidence of mitigation--both statutory and nonstatutory --was readily available at the time of Mr. Breedlove's penalty phase had trial counsel conducted the necessary investigation and preparation. At the evidentiary hearing, lay witnesses including family members and friends detailed Mr. Breedlove's miserable childhood and his resulting drug abuse. Mental health experts, who had testified at trial but who were wholly unprepared at that time and who had been provided no background information, testified at the evidentiary hearing that background information corroborated and supported their conclusions regarding the existence of mitigating factors. The lay and expert testimony established numerous mitigating factors, and trial counsel's failure to prepare and present this testimony undermines confidence in the outcome of Mr. Breedlove's penalty phase.

⁵In fact, Mr. Breedlove's step-mother was named Virginia Breedlove, not his godmother. This glaring error highlights the fact that, except for those family members who had direct involvement in the guilt phase, Mr. Levine was completely unaware of who Mr. Breedlove's family members were.

a. Lay Testimony

Lay testimony at the evidentiary hearing provided a graphic description of McArthur Breedlove's lifetime of abuse, rejection, abandonment, emotional deprivation and drug addiction. McArthur was born out of wedlock to his eighteen year old mother, Mary Etta, who married Ruby Lee Breedlove when McArthur was about a year old. Ruby Lee and Mary Etta had five more children after their marriage: Arthur Lee, Lester, Evelyn, Ruby Dee and Angel Lee (2PC-R. 981). McArthur's brother, Arthur Lee Breedlove, testified that as a young child, McArthur did not know who his natural father was (2PC-R. 982). Until he was ten or twelve years old, McArthur assumed that Ruby Lee Breedlove was his father (2PC-R. 997-98). The discovery that Ruby Lee was not his father greatly affected McArthur, as Arthur Lee Breedlove testified:

By him thinking he was all family, you know, it was a big difference there and it tore him up because he really thought that my father was his father and it was a big difference there. He didn't consider himself a part of the immediate family at the time.

. . . .

He was thinking that he was--everything was different, we got what he didn't get, you know, and it was one of these things. But he was reared up, in younger stages we all believed we had the same mama and the same father. It was different.

(2PC-R. 997-98). The other children picked on McArthur about having a different father, saying things like, "you don't have

the same father we got, you don't count," and McArthur "would react very hurt" (2PC-R. 998).

McArthur's childhood was further scarred by his mother's chronic alcoholism, which led her to neglect the children and inflict emotional abuse. The way Mary Etta treated McArthur "depend[ed] on which condition she would be in, you know. She was alcoholic and when she was drunk it was a lot of difference" (2PC-R. 983). As Arthur Lee Breedlove testified, the question with Mary Etta was not how much she drank but "How much didn't she drink? It was an every day thing" (Id.). Other witnesses verified Mary Etta's alcoholism (2PC-R. 971 [George Bell], 1025 [Olabell Breedlove]).

When Mary Etta finally told McArthur who his real father was, she told him "[i]n a derogatory way, you know, she would tell him, 'You just a wasted fuck'" (2PC-R. 997). Mary Etta said this to McArthur "[p]lenty occasions when she was drinking" (Id.).

Also perhaps as a result of her alcoholism, Mary Etta neglected the children, Ruby Lee Breedlove, McArthur's stepfather, recalled that he relied on his wife to make sure the children went to school and that the household money went for clothing and food, but that didn't happen (2PC-R. 1218). Ruby Lee explained what he would find when he came home from work:

Q. When you came home and found out that these things hadn't been done, kids hadn't been in school, did it make you angry?

A. Yes, I used to get angry. As a matter of fact, I used to come to the house

and she wasn't there. I asked kids where she was at. They said she's out. I said, "Did you eat, they said, "No, we haven't eat." "Why you haven't?" They says, "Mama hasn't fixed nothing for us."

(2PC-R. 1219).

Arthur Lee explained how Ruby Lee reacted to Mary Etta's drinking and neglect of the children:

Q. How did Ruby Lee react to [Mary Etta's] drinking?

A. He didn't appreciate it all. He didn't allow her to drink. She would only drink when he wasn't around.

Q. How would she disguise it? What would she say or do during the day so he won't know?

A. Well, she would make sure or try to make sure all the bottles are put away and how he would detect it, he comes home and the house wasn't clean and the food wasn't cooked, then all hell would break loose.

(2PC-R. 983-84). As Arthur Lee also explained, McArthur would attempt to deflect Ruby Lee's anger away from Mary Etta:

Q. Was this--how was MrArthur affected by this?

A. I would say he was affected a lot, because if she was in trouble as far as she was drinking, he would get the blame because he would find some way to put it--to get the weight off of her and put it on him or put it on him also.

Q. How would McArthur take the blame?

A. Well, he would find something, you know, a little nothing that he had done, you know, and you know, spill his guts to my father and my father would forget about the drinking part at the time and come after us.

Q. How would Ruby Lee react when he came home and found the dishes weren't done, and the house wasn't clean?

A. Someone had one coming.

Q. What do you mean.

A. Beating, you know, because McArthur and I was next oldest one in the house. He was responsible for the rest of them getting the work done. If they didn't do the work, then it was our responsibility to do it. A lot of times we didn't know something was undone. We got our butts whipped for it, you know.

(2PC-R. 984-85).

Arthur Lee described the beatings that Ruby Lee would inflict:

Q. What kind of instruments would he use as far as these beatings would go?

A. A flat bullwhip.

Q. Anything else?

A. I have gotten beaten with belt buckles, anything that would inflict pain.

Q. Was McArthur also beaten with these instruments?

A. Him more than the rest.

Q. How did McArthur react when Ruby Lee would begin beating Marietta?

A. He would always interfere, he would jump in and *try* to keep the peace. He would also get the shit end of the stick.

Q. What kind of temperament did Ruby Lee have?

A. Very bad temper because I would say because of the type work he was in. He would bring problems from the job home.

* * * *

Q. During this time that McArthur or you were being beaten, what was McArthur's reaction?

A. He would just, he would never talk about it. He would get away to himself, you know, and you could see the hurt, you know, you could see the hurt. It wasn't something that you would just talk about.

Q. How did he react physically?

A. Well, he wouldn't be nothing like, say, like he wanted to fight anybody in the household or anything. I could tell that he was upset, you know, you could tell he was upset.

Q. Were you injured, was McArthur injured?

A. Many times, plenty times, a lot of times it would be--the fact if I see kids today gets beatings and wouldn't cry, we couldn't do that. We had to show tears.

Q. What would happen if you wouldn't cry?

A. You're going to your room were I finish with you.

Q. What would happen if you talked back?

A. You might get the other end of the bullwhip throwed up against you.

Q. What did this bullwhip look like?

A. It was strong, platted up, weaved and four plats and one long stinger at the end.

Q. I'm not sure I know 'what a plat is?

A. Like they plat their hair, something like that.

Q. Did he use this during the time he was married to Marietta?

A. Yes.

Q. Do you know how he came to get the bullwhip?

A. He found it on the job one day.

Q. While he--

A. He was doing construction work, you know, he did a lot of construction work for D.I.C. and this was an outfit that did a lot of remodeling of homes, He found it in one of the homes one day.

Q. You said before that Ruby Lee had a violent temper. What kind of things would set him off besides things Marietta would do?

A. If he happened to come by the house early from work and we're not to school, we miss school, he comes and garbage is running over in the kitchen, you know, or our bed wasn't made up, stuff like that.

Q. So if these household chores weren't done, what would be his reaction?

A. There wasn't no reaction at all. He would just beat you, he would come straight to us. Like I said, we was responsible for the chores to be done.

Q. Would you or McArthur take any steps to intervene between Marietta and Ruby Lee?

A. Many times.

Q. What would be the results of that?

A. He would get what she had coming because we stepped in- and, you know, like that's like trying to overrule him.

Q. What kind of injuries would you have from these beatings?

A. Skin burst where he inflicted upon us. It would break the skin. Plenty of times I've gone to school with blood stains on my butt where I got a beating and it hadn't healed.

(2PC-R.991).

Q. Where would he be beaten?

A. Wherever the belt of bullwhip lands, that's where you get hit. If you stick your head out there, you'll get hit in the head. It all depends.

One thing he definitely didn't tolerate, if he was beating us, we would try to grab it from him, something like that, he would get angry and he would get hit with the handle plenty of times, you know.

Q. How did you hide these things from the people at school?

A. If my arm was--the skin on my arm was broken up, I wear a long sleeved shirt.

Q. What would you do to protect yourself from his beatings?

A. There was things come to mind, get on the bed, anything, you know, he come.

(2PC-R. 991). Ruby Lee confirmed that he beat the children:

Q. When you would punish the children, what type of things would you use to punish them?

A. I used to beat them. I used to punish them by making them stand in the corner with one feet up. Beating ain't too much good. I tried different ways. I let them stand in the corner one feet up. You try different ways of punishing them.

Q. What things did you use as far as when you would hit them, what other type things besides the bullwhip?

A. Used to use my belt sometimes, you know, a switch, I remember couple times I

even used one of the lamp cords, you know what I'm mean?

Q. Extension cord?

A. Yes, I think I remember using that a couple of times. I got the most punishment when I draw back to hit them, I hit my own arm so you quit using them.

Q. When you punished McArthur, he cried?

A. Well, you know, he used to, you know, he used to. Most of the time, he didn't cry, he held it in and afterward he would go in his room.

Q. Would he put on extra clothes to protect himself?

A. Yes, I used to tell them, you know, when they do things they weren't supposed to do, so I told him, "DON't do it," then they break my rule and go anyway. I said, "Okay, Next time you do it, I'm coming back to beat you." I let that slide over and sometimes he go back to do the same thing again. I said, "Okay, when I come back tonight, I'm going to give you a beating." When I came back, they had two or three pairs of pants like padded themselves and so if I whip them it wouldn't hurt them.

I would tell them to put the clothes off and get in their pajamas. That's okay, remember I told you. I would beat them, I would hit them, give them a few lickings.

Q. You wait until it was time to go to bed?

A. Right.

(2PC-R. 1220-21).

When McArthur was about twelve years old, Ruby Lee and Mary Etta divorced. George Bell, a childhood friend of McArthur's, described the effect of the divorce on McArthur:

Well, you could tell the difference after his mother and father broke up, you could tell the difference. He took it mentally, it was a mental disturbing thing to him and he kept everything within him and sometimes he would talk with me about it and every time he talked to me about it like he was getting to a depression stage. He wouldn't let--now he was in the depression the same being. I knew him for quite a bit of time, I knew something was worrying him.

(2PC-R. 968).

Not long after the divorce, Ruby Lee married Virginia, who brought two more children into the household--Olabell and Juanita--making a total of eight children living in the house (2PC-R. 988-89). Although Virginia tried to be a peacemaker, Ruby Lee's beatings of the children continued, and Ruby Lee similarly abused Virginia (2PC-R. 989-90). If McArthur went to visit his mother after the divorce, Ruby Lee "would get angry and the least little thing McArthur may do, that's something the average kid would walk away from, he would get a beating for it" (2PC-R. 994).

Virginia began drinking also, and McArthur would try to help conceal her drinking from Ruby Lee:

Q. Did Ruby Lee continued his violent temper after the marriage?

A. Yes, he did.

Q. Was Virginia one of the victims?

A. She was one of the victims. In fact that also drove her to drink.

Q. She began drinking also?

A. Yes.

Q. To what extent did she begin drinking?

A. Nothing like my mother because she would drink and, you know, like he just didn't tolerate any drinking at all. He would find out about it and he beat up on her.

In fact, **McArthur** disliked it so much he used to take the bottle she would leave around, he would take and hide them if he **was** out in the yard or anything like that and he would see father come up, he had a wolf whistle down the street. He would hear and call in and let her know.

Q. What effect did these beatings have on Virginia?

A. Plenty effect, you know. It didn't change her attitude toward any of us, you now, but she was hurt a lot. She was hurt a lot.

Q. How often did the beatings occur?

A. Whenever he found out she was drinking, you know, anytime he found out she was drinking.

(2PC-R. 989-90).

Virginia's children, Olabell and Juanita, remember the beatings inflicted by Ruby Lee. **Olabell** explained:

Q. What was Ruby Lee like as a disciplinarian in you house?

A. He was very disciplined.

Q. How would he enforce the rules of the house?

A. I don't know when you say enforce.

Q. For example, if something went wrong what would he do?

A. He would punish you, he would punish you or you get a beating for it.

Q. How frequently would the beatings occur?

A. Once a week or twice a week.

Q. What types of things would he use to punish the children?

A. He would use an extension cord.

Q. Anything else?

A. I remember he used a bullwhip.

Q. What was McArthur's reaction to these beatings?

A. He didn't like it, he was very upset, he was hurt.

Q. Would he be injured in these beatings?

A. Yes, he would. He would have knots like where my father would hit him. When he hit him he would have big knots on him where it would break the skin, he had blood too from it.

Q. Did this happened to any of the other children in the family?

A. Yes, it did.

Q. Did it happened to the girls as well as the boys?

A. Girls, not really.

Q. What kind of temper did Ruby Lee have?

A. Had a quick temper.

Q. Why was that?

A. My father had a nervous problem and he was on medication.

Q. Do you know what type of medication?

A. No, I don't.

Q. Who-was he the most violent toward in the family?

A. Who was he most violent towards, I couldn't really say who he was most violent toward.

Q. Mostly the boys?

A. The boys really.

Q. Was he also violent toward your mother?

A. Very.

Q. How would we punish your mother?

A. He would beat her.

Q. Did that happen frequently?

A. Yes, it did.

Q. How would the children react when Virginia was being beat?

A. We was very upset, we didn't like it. We was very hurt. We didn't like it.

Q. Did anyone ever try to intervene?

A. Yes, when we tried to stop my father several times, every time we tried to stop him, he told us to get out of the room. If we didn't get out of the room, he would strike one of us because he said it was between him and my mother, only him.

Q. Did all of these beatings occur in front of the children?

A. Yes, it did.

Q. Was McArthur disrespectful toward Ruby Lee?

A. Never.

Q. Did he fight back during the beatings?

A. Never.

Q. Where would Ruby Lee hit McArthur?

A. Wherever he choose to hit.

Q. All over the body?

A. All over the body.

Q. In the head?

A. Yes, wherever it landed, that's where he got hit.

Q. What would the kids do to protect themselves?

A. My father got ready, when he got ready to beat the boys, they used to go in their room and put on long pants. They used to put on--they had four pairs of pants, they put on two or three shirts, long sleeved shirts to protect their body. They knew they was getting a beating with the extension cord. They know the extension cord can break the skin, they did that to protect themselves.

My father waited until later at night when they got in pajamas, then they got their beating after the layers of clothes were taken off.

(2PC-R. 1020-23). Juanita explained:

Q. How did Ruby Lee treat McArthur?

A. Treated McArthur well, he treated all of us to like he wanted too much out of us and if something didn't go his way, he just beat us. He beat him just as well, he beat us.

Q. He treated all of you the same?

A. All of us the same.

Q. Did he also treat Virginia harshly?

A. Yes.

Q. What would he used to do?

A. If he had a bad day at work, whatever, he takes it out on my mother, he **had** a fight, he hit her and, you know, he just sometime he had a bad day. He had a quick temper.

* * * *

Q. How often did the beatings occur?

A. Often.

Q. Were you ever injured?

A. Yes.

Q. What was the **extent of** those injuries?

A. You have bruises on you with blood, you could have welts on you.

Q. Did these--did you mother have the same injuries?

A. Yes, she did. Those were worse than ours.

Q. What would happen if you attempted to intervene in the fights?

A. You know, for myself, I know he knocked me out once. In anybody else jumped in, he would do the same thing. He would hit them and start beating on them.

Q. What would he use to beat you with?

A. Anything he got his **hands on**, even his **waist** belt, extension cord, he **didn't** care what it **was**, his hand.

Q. Did you **ever** hear any instance occurring with a bullwhip?

A. Yes.

Q. Were you there for these incidents?

A. I know he hit McArthur one time with a whip. One time I know of.

Q. What happened?

A. It was in the living room. I can remember it was in the living room. He started beating McArthur. I know he hit him across the back with it.

Q. Was he injured?

A. Yes, he was.

Q. Was he bloody?

A. Yes.

(2PC-R. 1179-81). Virginia's brother, Henry Washington, also described the beatings inflicted by Ruby Lee:

Q. Would your sister discuss her life with Ruby Lee to you?

A. Yes.

Q. Can you please tell the Court what she spoke about in her life with Ruby Breedlove?

A. Spoke about all abuse that she had to go through with.

Q. Did she go into detail about this kind of abuse?

A. Yes.

Q. What sort of abuse did she talk about?

A. Well, the fighting, arguing and bickering everyday.

Q. Was there physical abuse?

A. Or he beat her plenty times.

Q. Was this often?

A. Yes.

Q. Would she complain about it often?

A. Yes.

Q. You stated that you also know Ruby Lee Breedlove?

A. Right.

Q. Did you ever see your sister bruised?

A. Plenty of times.

Q. Was your sister cut?

A. No, she was never cut, just bruised.

Q. Did your sister drink?

A. Yes.

Q. How much did she drink?

A. She was a heavy drinker.

Q. Did Ruby Lee Breedlove like the fact that his wife drank?

A. No.

Q. Do you know what an effect it had on him when he found out she was drinking?

A. Well, I'm sure it started a lot of them confusion.

Q. What type of confusion?

A. He didn't want a wife that drank.

Q. What would Ruby do when he found out she had been drinking?

A. Mostly they get in an argument and fight and something like that.

Q. Do you know of any abuse directed towards the children?

A. Yes.

Q. Could you please tell the Court about that?

A. My sister used to let me--he used to beat them and choke them and do all kinds of mean things to them.

Q. Which are--would she tell you often?

A. Yes.

Q. Did she talk specifically about beatings directed toward McArthur?

A. Not especially, all the kids.

Q. Were all the kids beaten?

A. Yes.

(2PC-R. 1172-74).

Finally, at about age sixteen, after one last beating, McArthur left Ruby Lee's home. Arthur Lee described what happened:

Q. How old did beatings continue up until, how old?

A. Until McArthur ran away from home. I think he was about fifteen turning sixteen and--

Q. What precipitated that?

A. Last beating he got, if I'm not mistaken, on his back he had a horseshoe, the exact emblem of a horseshoe on his back from that bullwhip.

Q. What was the incident that made--

A. Him not going to school one day.

Q. And how did Ruby Lee find out about it?

A. The school called, they happened to call and he was home. When this call came in, had he not been home when the call came in, my stepmother, Virginia, would have covered it up. She knows what the consequences would have been for McArthur. He happened to be home at the time the call came in.

Q. And how did he go about punishing McArthur?

A. He started beating him in the house with a bullwhip. McArthur ran outside. I was standing here, my mother was like in this position. McArthur run past me, he wasn't turning the corner of the house. My father went with the bullwhip. McArthur had to turn the corner. The bullwhip hit him in the back. He had on a shirt, it tore through the shirt up on his back.

Q. Did it injure him?

A. It did.

Q. What kind of injury?

A. Broke his skin.

Q. Was he bleeding?

A. It was bleeding.

Q. And you saw this personally?

A. Yes, I did.

Q. Had this happened before?

A. Plenty times.

Q. Did these beatings occur in front of the rest of the kids?

A. Yes, it did.

Q. What happened after the bullwhip incident?

A. McArthur left home. He didn't take any clothes, nothing. He just up and left.

Q. How old was he?

A. Sixteen.

(2PC-R. 992-93). Olabell also witnessed this incident:

Q. What events made McArthur leave?

A. When one night McArthur went out and I assume my father didn't want him to go, he went ahead anyway. When he came back, it was sort of late and when McArthur came in, my father was waiting for him. He opened the door. McArthur came in, my father hit him with the bullwhip.

Q. Did this happened in front of you?

A. Yes, it did.

Q. You personally saw it?

A. Yes, my father told me to get out of the room. When we ran back in the room, that's when McArthur and my father had it.

Q. Did this injure McArthur?

A. Yes, it did.

Q. Were you afraid?

A. Yes, I was very afraid. My father hit him with the bullwhip **and you** can hear the screaming. He was screaming, he was saying, "**No** daddy, please daddy, don't do **that,**" After that my father and him, they fought. My mother ran in between and tried to stop them.

Q. What happened after that?

A. McArthur left.

Q. Do you know where he went?

A. No, I don't.

Q. How long was he gone?

A. He never did come back home after that.

(2PC-R. 1023-24).

After leaving home, McArthur went to California (2PC-R. 993). While in California, McArthur began using drugs and alcohol (2PC-R. 994). Records from the Atascadero State Hospital in California indicate that in 1969, mental health professionals believed Mr. Breedlove "would profit from [a] treatment program which was primarily designed for people with addictive disorders. He has become aware of his past dependence on narcotics and feels he needs help" (2PC-R. 647). Those records also indicate that Mr. Breedlove had used "heroin, marijuana, amphetamines and barbiturates," (2PC-R. 658) that he "has been dependant upon and probably addicted to numerous drugs including cocaine and heroin which have been taken mainline in the vein of his left forearm," (2PC-R. 660) and that he "has used amphetamines such as methedrine, barbiturates, such as seconal or red devils, and has also smoked marijuana" (Id.). These records further indicate that Mr. Breedlove was "addicted to cocaine, heroin, methedrine, and barbiturates, which may have given him a temporary psychotic reaction@@ (2PC-R. 661).

Arthur Lee described McArthur's drug use after his return from California:

Q. When did McArthur get into drugs and alcohol?

A. Had to be in the California era, when he went to California.

Q. Did you know what type of drugs he was using?

A. He was doing speedball, cocaine and heroin mixed.

Q. How was he administering?

A. A syringe.

Q. How frequently would he use drugs?

A. Everyday from what I heard.

Q. Did you ever have occasion to actually see him using drugs?

A. Just one time.

Q. When was that?

A. It was after he came back from California. He was in the bathroom and I went to use the bathroom that night and I kept knocking on the door. Finally he opened the door and on the back of the commode there was a bloody syringe.

I confronted him about it and he got mad because I took it, I broke it up and he charged at me and he started crying because that was the first time I ever seen him use drugs.

Q. Now that would have been during what time period?

A. '70, about '72 or '73.

* * * *

Q. Do you know if McArthur ever stopped using drugs?

A. Not that I know of, just when he was incarcerated because he couldn't get it.

* * * *

Q. (By Ms. Backhus) We were talking about McArthur's drug use. What was McArthur's personality like when he was on drugs?

A. One time that I know for a fact he was on drugs, it was a difference in his personality.

Q. What was the difference?

A. He didn't want to be around the family, you know, definitely didn't want to be around the family and he would take to the streets.

Q. What was he like when he was not on drugs?

A. He was just an everyday person, somebody you would love to be around.

(2PC-R. 994-97).⁶

George Bell explained that when McArthur returned from California, he was using drugs and was a different person:

Q. Could you tell the judge what McArthur was like when he returned from **California**?

A. He came back from California, he went out with about three guys from North Miami Beach and he was leaving. To me I thought he was trying to get away from things. When he came back, he was on heavy drugs and talking like we get 'together, you know how guys get together and talk. He used to tell us about angel dust, L.S.D., all kinds of drugs he was on.

We could see the difference, it was like night and day with him, it wasn't something that you couldn't see.

Q. Could you describe a little more fully the differences that you noticed in him when he was on drugs?

⁶Three of **McArthur's** step-siblings, Elijah, Lester and Evelyn, are also drug users who live on the streets (2PC-R.1000). In addition to **McArthur**, four other children from the family have been convicted of felonies (2PC-R. 1001).

A. He always wanted us to laugh, he always was jokeful with us, he always teased with us, he like people to be happy.

When he got drugs in him, he would change, he wouldn't--he got like a little violent, looked like scary to be around him. You wouldn't want to be around him.

Q. You stated just a few moments ago that Mr. Breedlove told you he'd been using L.S.D. and angel dust?

A. Yes, and the horse.

Q. Excuse me?

A. The horse. It's a way of saying another type of drugs.

Q. Are you aware of how he would inject, how he would use the drugs he would use?

A. Yes, I have seen him inject the drugs in the back of his store..

Q. You witnessed him using drugs?

A. Yes, I have witnessed by seeing him myself.

(2PC-R. 973-74).

Olabell also observed a change in McArthur after he returned from California:

Q. Did you see him when he came back from California?

A. Yes, I did.

Q. What was his personality like then?

A. He was very isolated, wouldn't say anything , stayed to himself.

Q. When did you become aware that McArthur was taking drugs?

A. You can look at him and tell that he didn't seem like he was normal. It was just the way he would talk, the way he would look.

Q. Physically he would be looking different?

A. He would like be different, he just didn't say anything.

(2PC-R. 1024).

McArthur's brother, Elijah Gibson, described the extent of **McArthur's** drug abuse:

Q. Was **there a time that McArthur** began using drugs more heavily?

A. Yes.

Q. When did that happen?

A. About two--maybe twd, three months after he returned back from wherever he was.

Q. How often do he use drugs at that time?

A. Every other day.

Q. How much would he use?

A. Maybe \$300 a day.

Q. \$300 a day?

A. Maybe.

Q. What kind of drugs was he using?

A. Heroin and cocaine.

Q. Would that be together or separate?

A. Together.

Q. As time went on, moving farther to the time, who did he live with?

A. His mother.

Q. That is?

A. Marietta Gibson.

Q. He's living in the house with you?

A. Yes.

Q. What time period would that have been?

A. '75, '76, '77.

Q. Did he continue to use drugs when he lived in your house?

A. Yes.

Q. Did his habit get worse as time went on?

A. Yes, it did.

Q. Do you remember when it became the worse?

A. In '75, maybe '75 or '76 when I first seen him get the jones (phonetic), he had shakes.

Q. What was a jones?

A. Like when he couldn't get the drugs he needed, he would get into shaking and sweating.

Q. There is this withdrawal?

A. Yes.

Q. How would he act when that happened?

A. He would not be able to respond at all.

Q. Could he talk?

A. No, he couldn't talk.

Q. Would he have any physical activity?

A. No, just was in the corner shaking.

Q. I didn't hear that?

A. He was just in one spot in the corner shaking.

Q. How many times did this happen?

A. I recall this happening to McArthur at least one time, to the best of my knowledge.

Q. One time when you were there?

A. Yes.

Q. What did you do to help McArthur?

A. Well, my stepfather, which is Mr. Elijah Gibson, he once fronted me money to get the drugs McArthur needed.

Q. How much money was that?

A. Three hundred and maybe \$350 at the most.

Q. What did you do with the money?

A. My brother, Pee-wee, he took me across town. He received the drugs that McArthur needed and he comes back. I'm going to say I shot the whole \$350, \$50 each, fifty dollars a boy, fifty dollars a girl.

Q. Explain to the Court what \$50 a boy is?

A. Fifty dollar heroin and fifty dollars for a pot of cocaine.

Q. Which is which? Boy is?

A. Boy is the heroin and girl is cocaine.

Q. What would happen after you gave it to him?

A. McArthur didn't respond back to normal self again and I realized what he

realized after he need hand, he reached and grabbed them which was the spite and the cocaine.

Q. So when he got better, he reached for more drugs?

A. More drugs.

Q. Was there a time that he ever stopped using drugs that you know of?

A. Yes.

Q. When was that?

A. I think about '70--maybe '76.

Q. How long did he stay off drugs?

A. About six months to a year.

Q. What happened after that?

A. He began all over again back on drugs.

(2PC-R. 1121-24).

Elijah was with **McArthur** for much of the day on which this offense occurred and described **McArthur's** level of drug and alcohol consumption:

Q. Do you remember the night that this murder supposedly occurred?

A. Yes.

Q. Was **McArthur** on drugs that night?

A. Yes, he was.

Q. Did you actually see him take drugs that night?

A. Yes, he was--he was with me half of the day.

Q. What kind of drugs was he taking?

A. Cocaine, heroin.

Q. How many times had he taken drugs that day?

A. Well, to me best knowledge I think he may have been from eight to ten times that day.

Q. Shot up eight to ten times?

A. Yes.

Q. Was he drinking also?

A. Yes, quarts of Budweiser.

Q. Quarts of Budweiser?

A. Yes.

Q. Do you remember what time of day it was?

A. Approximately roundabout seven, about 7:30.

Q. That night?

A. That night.

Q. Did you see McArthur at other times during that evening?

A. Yes, roundabout twelve, about twelve midnight, between twelve and two midnight.

Q. Was he still high at that time?

A. Yes, he was.

Q. Did he still have drugs with him?

A. Yes, he did.

Q. What kind?

A. He had twenty cent pieces of heroin and a twenty cent piece of pot.

* * * *

Q. (By Ms. Backhus) At any time after 1966, did Mr. Arthur stop using drugs that you can remember?

A. No.

Q. He was doing drugs up to the time he was arrested?

A. Yes.

Q. He was doing \$600 a day?

A. Daily.

(2PC-R. 1125-27).

b. Expert **Mental** Health Testimony.

At Mr. Breedlove's penalty phase, the defense presented the testimony of three mental health experts, none of whom had been prepared to testify at the penalty phase nor provided any background information regarding Mr. Breedlove. Two of those experts, Dr. Eli Levy and Dr. Benjamin Center, testified at the evidentiary hearing, Their testimony, as well as a recent evaluation conducted by Dr. Jethro Toomer, established that counsel's deficient performance substantially prejudiced Mr. Breedlove.

Dr. Eli Levy, a clinical psychologist, testified that in 1979 he was asked to evaluate Mr. Breedlove to determine whether or not Mr. Breedlove had the mental capacity to waive his Miranda rights (2PC-R. 1040). At the time he conducted his evaluation, Dr. Levy was not aware he would be asked for any opinions regarding mitigating factors and was not provided any background information regarding Mr. Breedlove (2PC-R. 1043). Between the time of the evaluation and the time of Dr. Levy's testimony,

trial counsel did not discuss the evaluation with Dr. Levy (Id.). Dr. Levy was simply subpoenaed a few days before he testified (Id.). When he testified in 1979, Dr. Levy was not familiar with the mitigating factors contained in Florida's capital sentencing statute, and trial counsel did not explain these factors to Dr. Levy (Id.) .

Dr. Benjamin Center, a neuropsychologist, was similarly unprepared for his testimony in 1979. Dr. Center was asked to perform a neuropsychological evaluation (2PC-R. 1090). At the time of the evaluation, Dr. Center was not aware that he might be asked to provide opinions on mitigating factors (Id.), and was not provided any background information regarding Mr. Breedlove (2PC-R. 1091-92). Between the time of the evaluation and the time of Dr. Center's testimony, trial counsel did not discuss the evaluation with Dr. Center (2PC-R. 1092).

Dr. Levy and Dr. Center both reviewed extensive background materials regarding Mr. Breedlove provided by post-conviction counsel (2PC-R. 1044-47, 1092). Dr. Levy testified that the materials he reviewed are the kind of materials experts in his field customarily rely upon in conducting evaluations and providing opinions (2PC-R. 1048). These materials would have aided Dr. Levy in his 1979 evaluation and testimony regarding Mr. Breedlove (Id.). Dr. Center testified that he uses background information to corroborate and validate his findings (2PC-R. 1093). Indeed, at the evidentiary hearing, the State's expert,

Dr. Mutter, agreed that a mental health expert must have information corroborating a patient's self-report:

Q. So I assume that since you said that a diminished capacity was possible, you believe that drug alcohol intoxication effects a person's mental capacity?

A. It can depending on the degree of intoxication and the severity of impairment produced by it. The only problem that I had was I did not have data regarding blood levels of alcohol or drugs at the time. This is merely a statement made by the defendant which may or may not be true. It would have to be independently validated by blood levels and scientific data or eyewitness at the time of the offense which would attest to how had he behaved at the time of offense or shortly thereafter.

(2PC-R. 1227).

Dr. Levy summarized the information about Mr. Breedlove provided in the background materials:

[T]he information that has been provided to me regarding his family history has had a profound impact in terms of how I see Mr. Breedlove.

As far as his personality, his behavior, basically my conception of him has been one that suggested this individual had experienced a tremendous amount of emotional and mental abuse at a very young age, where basically he had no conception of his natural father, he does not know his natural father.

His natural mother is an alcoholic who was married to his stepfather who assumed his father's role toward him and the natural mother suffered from a serious alcohol problem and basically used her son, her oldest son to try to cover up her own behavior knowing her husband would become raging and violent and abusive of her if he found out she was drinking.

Mr. Breedlove, in my opinion, has been introduced to early substance abuse by his mother and terrible emotional negligence from her. From the point of a psychiatrist looking at him, as a child growing up, Mr. Breedlove never was given the opportunity to develop a sense of safety, a feeling of well-being.

All of us sitting in this room have to be cultivated to become human. We do not become human unless we have a social environment and the ways of mankind are taught--the ways of mankind are given to us in a safe, loving, nurturing environment.

In my opinion Mr. Breedlove has suffered this tremendous emotional abandonment by his natural mother and serious physical and mental abuse by his adoptive father. He was also emotionally abused by his mother primarily giving him a feeling that he was not a worthy, desirable human being to be loved and cared for.

His natural mother has, from my understanding of her, had no emotional, social resources herself. Given the fact she was alcoholic, one would assume she was depressive herself, one would assume she needed a lot of nurturance and support and she couldn't find it. Thus she turns to the bottle to anesthetize her own pain.

Mr. Breedlove's relationship with his adoptive father is very, very difficult. Your Honor, we grow up to become men through identification with a male model, primarily if we have a father who happens to care for us, we learn to identify with our father, to be like him.

As a matter of fact, it's known to psychology that we go, as far as children, to interject taking on the value system of our father and mother and begin to look at ourselves as parents, look at us in an effort to be like that so they love us and accept us.

In a lot of ways Mr. Breedlove, in my opinion, in an effort to be loved by the only

father they have, he was an adoptive father, has interjected into him a lot of violence, a lot of mistreatment so to speak that his adoptive father has imposed on them.

Mr. Breedlove had another loss, his natural mother. His adoptive father and natural mother went through divorce, and the Court awarded custody to the adoptive father at the age of ten. The adoptive father becomes--the description by family members he continues to be abusive of Mr. Breedlove.

There's an abundance of information, at least based on what I am reading, the household was tense and violent, the kids in the household were walking on egg shells, **very** afraid of their own father. He had a tendency of having a bad temper, and being explosive and reactive to any situation.

Mr. **Breedlove continued** to be exposed to this kind of rejection, lack of caring, lack of affection, lack of love.

Virginia, the second adoptive mother to **Mr. Breedlove**, also developed a drinking problem but through admissions of family members, Virginia and his adoptive father had their own issues and their own marital discourse that has further exacerbated his sense of safety, lack of caring and lack of emotional support he could not find anywhere specifically in the relationship with his adoptive parent and natural mother.

The bottom line of Mr. Breedlove's emotional upbringing, your Honor, that he basically had none. He had no emotional cradle through which he could evolve and develop those human qualities that make him feel he is worthwhile and a lovable human being.

Specifically an adult in his life, the adults in his life were punitive, rejecting, see themselves to abuse him in ways that are very inhumane.

As far as I'm concerned, no wonder that **Mr. Breedlove** had poor scholastic performance, no wonder he had dropped out at

the tenth grade, no wonder that at the age of sixteen or seventeen he began taking drugs.

Your Honor, it's very important for the Court to understand that drugs are systematic of an underlying emotional pathology. What I believe Mr. Breedlove was doing, by using drugs, was in a way to anesthetize his sense of pain, the feelings of lack of self worth and self defense.

(2PC-R. 1048-52).

Dr. Levy testified that Mr. Breedlove's drug abuse and mental health problems were understandable based upon his background. Dr. Levy testified that "somebody with this kind of background would seek substance[s] to anesthetize their feelings. I think that the origin of his drug use was his need to try to numb his pain" (2PC-R. 1053). Dr. Levy explained that a person's early life experiences have a profound effect upon the person's later development and behavior (2PC-R. 1054). Thus, as time went by, "[t]he seriousness of [Mr. Breedlove's] emotional disturbance has been heightened and deepened, defense mechanism becomes more intense and he's less and less able to adapt to his environment" (2PC-R. 1056).

Dr. Levy diagnosed Mr. Breedlove as suffering from paranoid schizophrenia, explaining:

Q. What is paranoid schizophrenia?

A. It's a serious emotional disturbance, it's essential feature is the systemized delusions or hallucinations related to single events. Now with him we know what it has been, basically it has to do with his mother where he basically at the time I saw him he was basically hearing voices, his mother's voice saying to him "You

are no good, you are not part of the family, we basically don't want **you.**"

This delusional system, you Honor, has cut across his personality structure. The bottom line of his emotional disturbance is a serious early abandonment, serious lack of nurturing and carrying by an adult, specifically a mother and father.

Q. Can you tell us something about how a paranoid schizophrenic person behaves or they appear to other people?

A. Well, a schizophrenic person is a bright individual, they can function pretty good and they can act in ways that are very deceiving to others.

Your Honor, when you sit down and listen to them, you find them to be--they are delusional, they have a tendency to act at times inappropriately. Their anxiety level can be inappropriate to the situation.

They are hostile and angry, they can act violent in certain situations and their tolerance to stress is nil. They have a difficult time dealing with there social environment. Their coping skills decompensates in no time. Their reality testing can be extremely marginal.

If you put them on moderate treatment, they will have a tendency to be calm, they will act up.

Most of the individuals need to be on medication, the medication helps them to contain some of their inner turmoil and help them deal with the delusional system, help them with functioning if **they are** not--especially if they are using drugs, the tendency is to act up, become extremely probable.

(2PC-R. 1057-58).

Dr. Levy testified that at the time of Mr. **Breedlove's** penalty phase, he was unaware of Dr. Center's neuropsychological

testing or Dr. Center's diagnosis of organic brain damage (2PC-R. 1058). Dr. Levy then explained how the brain damage would interact with the paranoid schizophrenia:

I think it makes him more vulnerable. He is deficient intellectually to process information adequately. Remember this is a known entity, a paranoid schizophrenic. It's a condition. They are people who act, their actions certainly come from their feelings and feelings have a lot to do with the way they process information.

Now that type of individual never learned to process information appropriately. What happened is they have never been nurtured. They are deficient in their processing. That's why they are more prone to inner impulses. The primary impulses exists in all of us. Those of us properly socialized have the ability to process the impulses and are able to mitigate them or channel them in the appropriate direction..

(2PC-R. 1059).

Finally, Dr. Levy testified that based upon his prior evaluation and upon the background information he had been provided his opinion was that at the time of the offense, Mr. Breedlove suffered from an extreme mental or emotional disturbance (2PC-R. 1060). Regarding whether at the time of the offense Mr. Breedlove's capacity to conform his conduct to the requirements of the law was substantially impaired, Dr. Levy testified: "My opinion is that his judgment at the time was substantially impaired given his emotional disturbance and intellectual limitation@' (Id.).

In 1979, Dr. Center conducted neuropsychological testing of Mr. Breedlove. Dr. Center testified that the testing showed Mr.

Breedlove to have "significant brain dysfunction" (2PC-R. 1098). On the Halstead-Reitan neuropsychological battery of tests, Mr. Breedlove "failed eighty percent of the **test**" (2PC-R. 1098). According to this battery of tests, Mr. Breedlove has damage in his frontal lobes which are involved in decision making and controlling behavior, does not do well in the **area** of incidental memory, has difficulty with flexibility between the right and left hemispheres of his brain, does not understand cause and effect, and has impaired judgment (ZPC-R. 1097-99). Overall, the testing showed that Mr. Breedlove suffers from diffuse brain damage, meaning several parts of his brain are damaged (ZPC-R. 1098).

Dr. Center explained, however, that the testing alone, without background information, does not provide a complete picture. For example, Dr. Center explained that only the combination of testing and background information permitted him to conclude that one of the effects of Mr. **Breedlove's** particular kind of brain damage was that Mr. Breedlove would behave impulsively:

Q. Do the results of your testing indicate Mr. Breedlove would behave impulsively?

A. Well, that's not exactly.

Q. Does it tell you that you would need other data to tell you that that particular brain dysfunction, because people may have brain dysfunctions, they all don't act the same way.

A. When I read the other data, there was notations about his impulsivity that were

noted by others. My **inference was one of the behaviors that** came out of **McArthur's** brain dysfunction was impulsivity plus all the experiences that may have taken place as a **child**.

Q. Can you explain what you mean by that?

A. What did he learn, how did he learn to behave as a youngster, what happened to him there which is how we all are. Our early experiences certainly effect what we are going to do later on in our life.

* * * *

Q. Was there other information in the background materials that you **were** provided which helped you to understand the results of your testing?

A. Well, his early life, his formative years, kinds of experiences that he had in terms of how his stepfather, his mother **behaved with him**, indicated to me what he **learned** in terms of how he's going to respond when he got older.

(2PC-R. 1099-1100). Dr. Center also testified that the background information established that prior mental health evaluations showed Mr. **Breedlove's** IQ to be in the dull normal range, **"almost** exactly what he achieved in terms of with me, in terms of the I.Q. **scores"** (2PC-R. 1101). Finally, Dr. Center explained that background information is the only way to distinguish between two people who may have similar brain damage but different histories:

Q. Assuming you have a person like Mr. Breedlove who has his history and his results on the neuropsychological testing, and you have another person who has the **same** results on the neuropsychological testing but a different history, would you expect that kind

of brain damage would result in different behavior in those two people?

A. Yes, it could certainly, there could be different responses. We have that. We have children with brain damage, they don't act the same. We don't have--the population in terms of behavior are not homogeneous in terms of individuals, how they are going to respond. That's going to be determined by their past experience and by the present experience, what's taking place with them. Now if they had good experiences, the brain will function in one way opposed to the bad experiences.

(2PC-R. 1103).

Dr. Center highlighted some of Mr. Breedlove's history as provided in the background materials. Those materials show a history of drug and alcohol abuse (2PC-R. 1103). The materials also showed that while in a state hospital in California, Mr. Breedlove participated in therapy and that he adjusted well while in prison in California (2PC-R. 1104). This information is significant in light of the neuropsychological testing, Dr. Center explained, because "[t]hat was the structured environment that exactly the research experience finds that people with brain damage, when the environment is structured or material is structured that they have to learn, they are able to function more effectively" (Id.). In a structured environment like a hospital or prison, Mr. Breedlove adjusted well because "[h]e didn't have too many decisions to make" (Id.).

Regarding whether at the time of the offense, Mr. Breedlove suffered from an extreme mental or emotional disturbance, Dr. Center testified: "there was brain dysfunction, he was in a

situation where he was committing a crime, he doesn't use good judgment and from the data I read he is very impulsive, so he certainly was in some kind of emotional state that wasn't positive" (2PC-R. 1105). Regarding whether at the time of the offense Mr. Breedlove's capacity to conform his conduct to the requirements of the law was substantially impaired, Dr. Center testified: "He was brain damaged, he was under the influence, as I understand, of alcohol and drugs and he has impulsive behavior, I could say he was emotionally impaired" (2PC-R. 1106).

Finally, at the evidentiary hearing, Mr. Breedlove presented the testimony of Dr. Jethro Toomer, a clinical psychologist who had recently conducted a thorough evaluation and review of background information regarding Mr. Breedlove. Dr. Toomer's psychological testing showed that Mr. Breedlove's behavior "is characterized by a weak, immature and dependent personality, . . . poor impulse control or poor judgment, poor self concept and identification, and generally an all over poor social judgment" (2PC-R. 1137). People with such a profile usually come from a "poor home environment" and have "involvement with drug abuse as part of the overall development" (2PC-R. 1138). A brain damage screening test showed that Mr. Breedlove suffers from brain dysfunction, possibly resulting from a head injury, prolonged substance abuse or a congenital defect (2PC-R. 1138). Another test showed that Mr. Breedlove had

a kind of helpless, a kind of dependent orientation towards life, and toward other people as well as at the same time a measure of distrust and withdrawal with respect to

the interaction with other individuals. There was a strong need of a dependency upon others for emotional gratification, emotional needs, satisfaction but also this distrust that was reflected through what might have called a possible assessment of the motive of others or poor diagnosis of the motive of others.

(2PC-R. 1139). Testing also showed that Mr. Breedlove exhibits "concrete thinking," i.e., "thinking that is very literal, that does not go beyond the literal meaning of the word" (2PC-R. 1140).

Dr. Toomer also reviewed background information regarding Mr. Breedlove and summarized his history:

Q. Can you give us a summary of Mr. Breedlove's history from those materials?

A. Basically the history that is reviewed from a variety of documents including documents of treatment in the California facility, statements contained in mental health reports and what have you, school records, prison records, the profile that emerges is one of an individual with a long standing history of mental problems and mental difficulties. These problems have been diagnosed, given a number of diagnoses they have been recognized for long term by a number of individuals who came in contact with Mr. Breedlove and had the opportunity to evaluate Mr. Breedlove.

Also individuals who were not necessarily in the posture of evaluating Mr. Breedlove also pointed out what they considered to be certain bazaar aspects of behavior over time, certain unusual traits and personality features that go back an extended period of time. All of these documents painted a picture of an individual who was suffering the long term effect of mental dysfunction that has significant impact on his overall behavior.

Did these documents also give you information about Mr. Breedlove's childhood?

A. Yes, there were documents that provided statements from family members as well as statements that were reviewed in evaluations that indicated what Mr. Breedlove had reported regarding his own history and the picture that emerges is one of dysfunction, dysfunctional family unit characterized by abandonment both physical and emotional, a family unit where none of the basic support that we might--that we would expect to be characteristic of the family were not there, where the individual was left to develop emotionally on his own and this was compounded by not only the emotional and physical abandonment but also by emotional and physical abuse on top of the other dimensions.

When you have this kind of a setting, you have a situation where none of the fixtures are in place that provide the individual with the tools to develop, the appropriate coping mechanisms that are needed to function appropriately in society, things that we consider and take for granted such as secondary thinking processes where terms a of how they evaluate consequences, how they assess alternatives, long range decision making and abstract thinking we allude to earlier.

Those basic skills come about as a result of the individual growing up in the nurture of a supportive environment. When those props are not there, then you're going to get the deficit manifested later on down the road which is the situation with Mr. Breedlove.

Q. Did the materials you reviewed reflect that Mr. Breedlove had a longstanding problem with drugs or alcohol abuse?

A. Yes, throughout the documents there was an indication that Mr. Breedlove had a long standing problem with drug abuse that was reflected in the records from the hospital, in evaluation reports, reports from family members and that goes back to an

earlier period in his life when it seems to suggest that the drug abuse came about as a response of his attempts to cope with the dysfunctional nature of the family unit.

(2PC-R. 1140-42).

Based upon the background information, Dr. Toomer concluded that Mr. Breedlove's mental health impairments are long standing in nature and existed at the time of the offense in November, 1978 (2PC-R. 1144). Dr. Toomer testified that at the time of the offense, Hr. Breedlove was suffering from an extreme mental or emotional disturbance (2PC-R. 1144). Mr. Breedlove's organic brain damage, prior diagnoses of mental illness, and history of drug abuse all contribute to that opinion (2PC-R. 1144-45). Dr. Toomer also testified that at the time of the offense, Mr. Breedlove's capacity to conform his conduct to the requirements of the law was substantially impaired (2PC-R. 1145).

Finally, Dr. Toomer refuted the penalty phase testimony of the State's experts that Mr. Breedlove was a sociopath or had an antisocial personality disorder. Dr. Toomer explained that such a diagnosis cannot be made without a review of a person's entire history and that such a review of Mr. Breedlove's history demonstrates that he does not suffer from an antisocial personality disorder:

Q. Did you review the 1979 report and testimony of Dr. Mutter and Jaslow?

A. Yes, I did.

Q. Are you aware that Dr. Mutter and Dr. Jaslow concluded Mr. Breedlove was a sociopath?

A. Yes, I was that in their evaluation.

Q. Is a sociopath a particular diagnosis?

A. Yes, it is in the DSN-3R diagnostic category.

Q. Is it the same thing as being anti-social?

A. Yes, sometimes the terms are used interchangeably, anti-social personality disorder and sociopath are used interchangeably.

Q. Your evaluation and review of the materials, is Mr. Breedlove anti-social, does he have an anti-social personality disorder?

A. I don't believe that's supported by the documents I have seen.

Q. Is the materials in the background of documents which would contradict that diagnosis?

A. I believe so, yes.

Q. Can you tell us what that is?

A. Well, I think that first of all, care has to be taken in terms of the notions of the anti-social personality disorder or the anti-social individual. A lot of times the notion is if a person violates a certain norm or standard, they are called anti-social. An action is considered anti-social. That is the norm.

There are a number of factors that come into play before you can render that diagnosis. Number one, first the anti-social personality disorder by definition is life long. The anti-social personality disorder is diagnosed at age eighteen--well, it varies, some theoretical orientation is sixteen, others it's eighteen.

The idea is that the anti-social personality disorder is life long. You find

prior to that in the early years a diagnosis of conduct disorder, so before age sixteen or eighteen depending upon the orientation.

You have a diagnosis of conduct disorder. Then you have a diagnosis of anti-social personality disorder. The other factor that comes into place is that the anti-social personality disorder, one probably easy way of describing it is that the claim is that individuals who are anti-social who have this disorder have a conscience.

In other words, the impulses are primitive so they don't have any control mechanism. As a result what you have is you have this pervasive pictures of behavior that violates the norm. That is what you have with the anti-social disorder.

With Mr. Breedlove you don't have that. You have periods, you have gaps during his life when he successfully; quote unquote, was able to abide by certain norms and the standard. What you have there, from a--sociologically speaking is you have a sense of ego control trying to emerge in lieu of just the basic primitive instinct that you have when you talk about the anti-social personality disorder. You do have this kind of pervasive all or none kind of violation of norms.

The other factor that comes into play is that when you look at the description of Mr. Breedlove by other people, you see individuals speak of--you see individuals speak of the fact that there is a conscience, that the individual expressed remorse, the individual expressed caring, there was a certain range of emotions that are expressed that you don't find in the history or pictures or profile in your traditional anti-social disorder.

You have to be--I think you have to be careful in rendering that diagnosis because if a person violates certain norms does not mean a person is suffering from an anti-social personality disorder. It is more complicated than that.

(2PC-R. 1146-48).

Q. Material you reviewed contained information that Mr. Breedlove responded to therapy when he was in the California state hospital?

A. The reports from the hospital indicate that he participated in and adjusted well to therapy and that he was cooperative in terms of his dealing with others while there.

Q. What does that tell you about whether or not Mr. Breedlove has an anti-social personality disorder?

A. That's an example of what I indicated earlier with respect to the attempt of ego strength attempting to break through.

This is an example of what I related earlier. I would not diagnose, I do not believe it is appropriate for Mr. Breedlove to be diagnosed an anti-social personality disorder.

* * * *

Q. (By Ms. Anderson) Doctor, did the materials you reviewed contain information that Mr. Breedlove was physically abused and experienced rejection when he was a young child?

A. The documents that I reviewed, including statements from family members, indicate that abandonment and rejection were a part of the individuals developmental history.

Q. Does that information shed any light on whether or not Mr. Breedlove has an anti-social personality disorder?

A. That is one of the diagnostic considerations in terms of rendering a diagnosis of the anti-social personality disorder. Usually the issue of abuse or neglect is not necessarily a factor. so I would not--that's another instance where I

would not diagnose him a anti-social personality disorder, no.

Q. You testified that from your psychological testing, as Dr. Center reviewed, Mr. Breedlove has organic brain damage?

A. Yes.

Q. Does that existence of brain damage shed any light on whether or not Mr. Breedlove has an anti-social personality disorder?

A. No, the two are unrelated. If a person has organically dysfunction, he cannot be diagnosed as anti-social personality.

Q. Why is that?

A. By virtue of what you're talking about. If you're talking about someone who has brain damage or what have you, that would preclude the diagnosis of an anti-social personality disorder. The diagnosis means you must rule out organicities in order to render that diagnosis.

(2PC-R. 1162-65).

B. MR. BREBDLOVB WAS DENIED THE EBBECTIVE ASSISTANCE OF COUNSEL.

The record of the evidentiary hearing unquestionably establishes that Mr. Breedlove was denied the effective assistance of counsel at his capital penalty phase proceeding. Trial counsel's performance was deficient, and the deficiencies prejudiced Mr. Breedlove. See Strickland v. Washington, 466 U.S. 668 (1984). The record clearly demonstrates that because he only had a weekend's notice that he was going to be handling the penalty phase, Mr. Levine failed to investigate and thus discover substantial mitigation evidence. There was no tactical or

strategic reason for failing to investigate; this constitutional duty was not carried out because the responsibility of handling the penalty phase was thrust upon Mr. Levine with less than 72 hours notice. Had Mr. Levine had sufficient time to engage in a reasonable investigation into Mr. Breedlove's background, such evidence would have been discovered, would have been presented, and would have made a difference. This Court recognized in its opinion remanding for a hearing that "[a] strong presentation of mitigating evidence is more likely to tip the scales in a case where the killing was not premeditated." Breedlove v. Singletary, 595 So. 2d at 12. However, as the unrebutted testimony established, Mr. Levine never spoke to Mr. Breedlove about his background, never contacted any family members to see what information they possessed in terms of mitigating circumstances, and never sought or obtained any background materials regarding Mr. Breedlove. Over that weekend between the guilt and penalty phase, Mr. Levine read the experts' reports and prepared his arguments. He did nothing else.

Mr. Levine also failed to adequately prepare his experts for their testimony, and in fact did not contact them at all prior to their testimony except for possibly a hurried exchange in the courthouse hallway before they were called to testify. The State did not fail to capitalize on the fact that it knew that Mr. Levine had only a weekend to prepare. Because they had no independent corroborative documents to substantiate their findings, and because they were unprepared to testify, the

defense mental health experts were destroyed on **CROSS-** examination. At the penalty phase, after Dr. Benjamin Center's direct examination, which consisted of five (5) pages of transcript,⁷ the State brought out before the jury the fact that Dr. Center was not a medical doctor and was in no position to offer a medical opinion as to whether Mr. Breedlove suffers from brain damage (R. 1329),⁸ and that Mr. Breedlove knew the difference between right and wrong as well as the nature and consequences of the act of murder (R. 1331).⁹ When asked whether he knew of "anything in Mr. Breedlove's background that would prevent him from saying 'No' to a criminal act" (R. 1332), Dr. Center told the jury "I don't know" (Id). The State then cross-examined Dr. Center on his lack of awareness that Mr. Breedlove had provided an inculpatory statement to the police:

Q. [by Mr. Godwin] Doctor, in forming your opinion as to Mr. Breedlove's personality problems, emotional problems, I believe you characterized them, did you have an opportunity to read over the confession that he gave in this case?

⁷See R. 1324-1329.

⁸At the evidentiary hearing, the State's own expert, Dr. Mutter, conceded that neuropsychological testing, such as that performed by Dr. Center, is an appropriate method of diagnosing organic brain damage (2PC-R. 1229-30). Of course, at the penalty phase, Mr. Levine's lack of preparation and lack of knowledge about organic brain damage prevented him from bringing out this significant fact.

⁹As Dr. Toomer testified at the evidentiary hearing, this sanity test does not mean that a person has no mental health disabilities deserving of recognition as mitigation (2PC-R. 1145-46). Again, Mr. Levine was unprepared for this line of questioning.

A. No.

Q. This confession dated 11/21/78, some fifteen days after the crime?

A. No.

Q. Would you know whether or not, in the confession, he attempted to minimize or down-play his part in this crime?

d o Would I know if he would attempt to

Q. Would you know whether or not he did attempt to do that in his confession?

MR. LEVINE: Objection.

He has not read it.

THE COURT: Sustained.

(R. 1332) (emphasis added). The prosecutor continued to expose Dr. Center's lack of corroborative background to the jury:

Q. [by Mr. Godwin] Did you talk to any police officers who spoke to Mr. Breedlove in this case?

A. No, sir.

Q. Did you talk to his mother in this case, if YOU recall?

A. His mother did call me on the phone.

Q. Did YOU talk to his mother and his brother?

A. No. I didn't know he had a brother.

Q. Did YOU ask his mother or his brother about his behavior immediately after the crime, the night he returned home?

A. No. I posed no questions whatsoever to them concerning the case.

(R. 1332-33) (emphasis added). The prosecutor further uncovered Dr. Center's lack of information concerning Mr. Breedlove's psychiatric history in California:

Q. Did you have an opportunity to check into Mr. Breedlove's prior background in California?

A. No, sir.

Q. Do you know what psychiatric treatment, if any, he received in California?

A. No, I do not.

(R. 1336).

After Dr. Eli Levy's penalty phase direct examination, which consisted of approximately 11 transcript pages of testimony," the State began by pointing out that, as with Dr. Center, Dr. Levy was not a medical doctor and did not go to medical school, whereas Drs. Mutter and Jaslow, the experts who would testify for the State, did go to medical school (R. 1349-50). The State also pointed out that Dr. Mutter "has testified many, many times in the courts and the criminal courts of Dade County" but for Dr. Levy, "[t]his is the first time" (R.1351). The prosecutor then completely tore apart Dr. Levy's direct testimony by exposing his complete lack of background information, a situation which Dr. Levy attributed directly to the inaction of Mr. Breedlove's defense counsel:

Q. You made some mention about having some knowledge of Mr. Breedlove's activities in California. Is that correct?

¹⁰See R. 1338-1349.

A. Yes.

Q. Did you ever examine a v of the police reports from the incident:: in California that the defendant was involved in?

A. I asked for from the public defender's office to send me all the information on Mr. Breedlove. I have not received that kind of information.

Q. You mean Mr Levine and Mr Zenobi did not provide you with the information about these California incidents?

MR. LEVINE: I will object.

We have not been provided with the police reports, and he deliberately refused, and we had a pre-trial hearing on this, Judge. This was denied us.

MR. STELZER: Most respectfully, this is untrue.

THE COURT: Go ahead.

Q. Is it not a fact that you have never looked at any of the reports of what Mr. Breedlove did in California?

A. True.

Q. You do not know then that he has been convicted of two counts of assault with intent to commit rape and robbery with an assault on somebody inside, do you?

A. No.

Q. You do not know any of the results of any of the tests that were administered to him at the time he committed these crimes in California, do you?

A. True.

Q. You do not know then that he was sentenced to one to twenty years and five to life for those different crimes he committed?

A. No.

Q. You do not know then that he was absolutely not declared insane or impaired back in California.

A. True.

Q. Did you look at any of the police reports in this case, the reports of the Dade County Public Safety Department Homicide Section?

A. No.

Q. Did you look at any of the statements, sworn statements, of witnesses in this case, who observed the defendant's behavior around the time he committed this crime?

A. No,

Q. Did you look at the confession or statement that the defendant gave in this case to see what type of mental attitude he may have had when he committed this murder?

A. No.

Q. were you aware of the fact that in order to keep himself from being caught, the defendant stated that he wore socks on his hands to keep from leaving fingerprints in this case?

A. No.

Q. Were you aware that in an effort to conceal himself and escape this crime, he stole a bicycle from a twelve year old child and rode it off after he committed the murder?

A. No.

Q. Were you aware that in order to keep the police from finding any blood on his clothing, immediately after the murder he took a razor blade and hacked off his pants and threw the remainder of his pants in a Demvsev Dumpster to get rid of them?

A. No.

MR. LEVINE: Objection as irrelevant for the purposes of what this witness is offered for.

He is testifying as to the results of psychological tests, The State Attorney knows that is his field of expertise.

THE COURT: Overruled.

Q. Were you aware that in order to escape detection, he took one of the watches or both of the watches he stole in this case and sold them to a junkie or dope fiend, as he refers to them, up in Hallandale or Hollywood, Florida?

A. No.

Q. Are you aware that when amroached by the police some three days after committing this murder, the defendant further attempted to conceal his involvement in this crime by aivina the police a phoney name?

A. No.

(R. 1351-55) (emphasis added).

The jury was also informed through the State's cross examination that defense counsel did not follow up on Dr. Levy's recommendation for a neurological examination of Mr. Breedlove:

Q. In order to determine the actual existence of any neurological impairment, should such impairment exist, that opinion would have to be given by a neurological specialist who is a doctor, a physician, correct?

A. Very true. I made that recommendation in my report.

Q. You recommended to Mr. Zenobi and Mr. Levine that they should seek a neuroloaical study of the defendant?

A. True.

Q. Do you have any indication thst they went ahead and got a neurological study done of this defendant?

A. No.

(R. 1358-59) (emphasis added). The prosecutor left no doubts in the minds of the jurors who was responsible for this appalling lack of information to corroborate Dr. Levy's findings:

Q. Certainly in order to assess his behavior at the time this happened, you would have wanted to see as many accounts as possible of his behavior at the time he did this, would you not?

A. Given I did not have this kind of information, I had to go on what I have. What I have is a human being who is in front of me, and I have been hired by the public defender's office to examine him and give my expert opinion.

Q. You were hired by the public defender's office to come in here today, and that is Mr Zenobi and Mr. Levine.

A. Yes.

Q. They were the ones that did not provide you with these documents that may have assisted you in forming your opinion.
Is that risht, sir?

A. It looks that way.

(R. 1355-56) (emphasis added).

After the direct examination testimony of Dr. Lloyd Miller, which consists of 8 transcript pages," the prosecutor immediately launched into an attack on Dr. Miller's failure to be provided with any materials regarding Mr. Breedlove:

CROSS EXAMINATION

¹¹**See** R. 1365-1373.

BY MR. STELZER:

Q. Hello, Dr. Miller. How are you today?

A. Good afternoon.

Q. Do you remember speaking to me on the telephone about this case within the last two weeks?

A. I believe a week ago Friday.

Q. Do you remember a week ago Friday I told you if there was any report, any document, any piece of the defendant's background, anything whatsoever that I or the State Attorney's office could do to assist you in reaching an opinion in this case, that you should not hesitate to call us and we would provide you with every piece of documentation that either Mr. Zenobi or Mr. Levine did not provide you with?

A. I remember.

Q. Did Mr. Levine or Mr. Senobi ever provide you with any of the police reports in this case?

A. I don't believe so.

Q. Did they ever provide you with any of the statements of any of the witnesses in this case?

A. No, they didn't.

Q. Did they ever provide you with a copy of the defendant's confession in this case?

A. No.

Q. Did they provide you with copies of the documents relating to the defendant's post convictions in California?

A. No.

Q. Did they give you any psychiatric reports from when the defendant was examined.

after being convicted of two counts of assault with intent to commit rape and burglary with assault?

A. No.

Q. Dr. Miller, you never called me and asked me if I could provide those things, did you?

A. No, sir. May I explain why not?

Q. You sure can.

A. I went to my office either Saturday or Sunday this vast weekend-d got a subpoena on this case.

I had not anticipated testifying, so I received the subpoena just through the mail under the door, The next working day is this mornina. I am sittina around the house waiting. I had no idea I would be called today to come to court. I got a Call at ten o'clock this morning.

(R. 1373-75) (emphasis added). The prosecution's cross-examination continued in a similar vein as with Drs. Center and Levy:

Q. [by Mr. Stelzer] would you have liked to have had an opportunity to be provided those documents Mr. Godwin and I offered to let you see, to assist you in reaching an opinion?

A. Any material that is pertinent would be useful to look at.

Q. were you aware of the fact that the defendant wore socks on his hands to keep from leaving fingerprints in this case?

A. No.

Q. Were you aware that in order to escape from the house, he stole a bicycle from a few houses down?

A. This is the only part of the case I had contact with him. He said he was arrested for stealing a bicycle.

Q. The defendant denied any further involvement in the offense and said he was arrested for stealing a bicycle?

A. You are quoting from my report?

Q. Yes.

A. Yes. Then I totally said that.

Q. Did you know that the defendant had cut off the bloody section of his pants and thrown the remainder in a dempsey dumpster so that the police could not get it?

A. No, sir.

Q. Do you know he had given a phoney name to the police a couple of days later?

A. No.

Q. Do you know he took the jewelry he stole from the house of the victim in this case and pawned it to a junkie up in Hollywood?

A. I didn't know that.

Q. This is stuff that would be valuable to YOU in assisting YOU in making a diaanosis, would it not?

A. It would be valuable in assisting me in rendering an opinion as to his mental condition at the time he was charged with those aativities.

(R. 1375-76) (emphasis added). The prosecution repeatedly pointed out to the jury that Dr. Miller could not render an adequate opinion as to Mr. Breedlove's mental condition at the time of the offense, and Dr. Miller finally explained that "[i]t is all hypothetical with respect to my opinions, but within

reasonable medical certainty, it is impossible for me to tell the defendant's mental condition at the time of the offense with respect to extreme disturbance or substantial impairment, given no further materials" (R. 1385).

During its penalty phase closing argument, the prosecution also capitalized on the lack of preparation displayed by the defense experts. After dismissing the mental health evidence presented by Mr. Breedlove as "a lot of mumbo jumbo" (R. 1433), the prosecutor argued:

Those other psychologists [who testified for the defense], they can give whatever tests they want, but as to the question of how somebody was acting and did not know what was going on, or was he completely out of his mind at the time he did it, you cannot tell that without knowing how the person acted, and nobody the defense hired to come in here and try to persuade you that these factors apply, none of those veovle looked at the defendant's confession, None of those veovle looked at the police reports. None of them looked at the reports from the doatoxa in California who declared him whatever they declared him,

* * * *

I submit to you, despite what you heard, the opinions of the court appointed experts, Dr. Jaslow and Dr. Mutter, were clear and unequivocal. Thoae were the veovle who looked at all the backsrouad material and made an intelligent devision.

(R. 1435; 1437) (emphasis added).

Mr. Levine testified that there was no tactical or strategic reason for not providing the experts with the necessary materials or for not fully preparing them for their testimony. Because he only had the weekend, he was unable to obtain records or

conference with the experts. Except for a possible hurried exchange in the hallway outside the courtroom, Mr. Levine did not contact the experts over the weekend, a fact corroborated by the testimony of the **experts** at the evidentiary hearing. There is certainly nothing reasonable about issuing a subpoena to a mental health expert by shoving the subpoena in his mailbox on a weekend day, then never even calling the expert to discuss his testimony before putting him on the stand at a capital penalty phase.

Making initial preparations for a capital penalty phase during the weekend between the guilt and penalty phases, and consequently failing to conduct any investigation into possible mitigating circumstances, is objectively unreasonable attorney performance when no strategic reason has been offered for this failure. Blanco v. Sinsletarv, 943 F. 2d 1477, 1503 (11th Cir. 1991). See also Deaton v. Dugger, 635 So. 2d 4 (Fla. 1994); He' e' v. State, 620 So. 2d 171 (Fla. 1993); Phillips v. State, 608 So. 2d 778 (Fla. 1992); Mitchell v. State, 595 So. 2d 938 (Fla. 1992); State v. Lara, 581 So. 2d 1288 (Fla. 1991) Stevens v. State, 552 So. 2d 1082 (Fla. 1989); Bassett v. State, 451 So. 2d 596 (Fla. 1989). Failure to provide mental health experts with adequate materials to substantiate their findings and to prepare their testimony before putting them on the stand likewise constitutes objectively unreasonable attorney performance. Blanco, 943 F. 2d at 1503; Deaton, 635 So. 2d at 8-9. See also Brown v. State, 644 So. 2d 52, 54 (Fla. 1994) (death sentence affirmed because testimony of defense mental health expert was

contradicted by state's expert and defense expert "admitted that he had no independent source for his assessment of the defendant other than information provided by the defendant himself").

Regarding deficient performance, the lower court wrote:

Counsel during the penalty phase was not deficient in any way in preparing his legal functions in the representation of the defendant. On the contrary, the transcript indicates that Jay Levine, Esq., was well prepared and argued many legal issues and had case citations to support his legal arguments. He took depositions of the defendant's mother and step brother several days prior to the original penalty phase. **This Court can only conclude** that he made a **strategic** decision in not presenting them during **the** original penalty phase.

(2PC-R. 823-24) (emphasis added). The court's findings are totally contrary to the testimony at the evidentiary hearing as well as the record from trial. The court wrote that Mr. Levine was not deficient "in any way" but did not explain how a weekend's preparation for the penalty phase was not unreasonable performance. The court also failed to even mention Mr. Levine's unrebutted testimony that other than preparing his arguments and reading the doctors' reports, he did no investigation. He did not speak to his client. He did not speak to his client's family. He did not speak to the experts. The court's order does not discuss this unrebutted testimony.

As support for his finding that Mr. Levine was not deficient "in any way," the court wrote that Mr. Levine was "well prepared" (R. 823). This is contradictory to Mr. Levine's testimony that he "knew what to do but I was not prepared because it was thrust

upon me on Friday afternoon" (2PC-R. 883). The court also wrote that Mr. Levine "took depositions" of Mr. Breedlove's mother and brother. This finding is totally contrary to the record. Mr. Levine sat in during these depositions; he did not "take" the depositions. Because these depositions related only to guilt phase issues, Mr. Zenobi conducted the questioning. During the 45 page deposition of Mary Ellen Gibson, Mr. Breedlove's mother, Mr. Levine spoke only during the "blow up" that he discussed at the evidentiary hearing when Mrs. Gibson explained that she was under the impression that the prosecutors were the defense attorneys. See Deposition of Mary Ellen Gibson at 38-40. Mr. Levine asked no questions of Mrs. Gibson regarding this case. As for the deposition of Mr. Breedlove's brother, Elijah Gibson, this statement was taken by Mr. Zenobi and, again, Mr. Levine sat in. During Mr. Gibson's 28 page deposition, Mr. Levine asked not one question. Thus, not only is the lower court's finding that Mr. Levine "took" the depositions of Mary Gibson and Elijah Gibson totally contrary to the record,* the court's finding in no way explains Mr. Levine's lack of preparation for the penalty

*Perhaps the lower court's obvious unfamiliarity with the record is explained by the statement in his order reflecting that he only read "significant portions of the transcript of the original file" (R. 823). The court was required to read the entire record, not just portions of the record. The lower court evidently did not believe that the depositions of Mary Gibson and Elijah Gibson were "significant" enough to read prior to using them to deny Mr. Breedlove relief, for had the court read them, it would have discovered that Mr. Levine did not take those depositions. The court had access to these depositions because they were made part of the record below. See 2PC-R. 757-811 (Deposition of Mary Ellen Gibson); 2PC-R. 167-95 (Deposition of Elijah Gibson).

phase. In fact, that Mr. Levine knew that Mr. Breedlove had a mother and a brother in Miami only highlights his failure to pick up the telephone and call them over that weekend.

After setting forth these factually erroneous findings, the lower court wrote that "[t]his Court can only conclude that [Mr. Levine] made a strategic decision in not presenting them [Mary Gibson and Elijah Gibson] during the original penalty **phase**" (R. 824). Such a conclusion, like the previous findings, are totally contrary to the record and to Mr. Levine's unrebutted testimony. Mr. Levine explicitly testified that prior to that Friday night, he interviewed no family members about Mr. Breedlove's background because "[p]rior to that time I didn't feel it was my responsibility to do anything, As far as I knew, prior to that time, Gene was going to do the penalty phase, he was doing the whole trial" (2PC-R. 866). There was no tactical or strategic reason for not talking to witnesses or to Mr. Breedlove (Id.). The court's finding that it "can only" conclude that Mr. Levine had a strategy reflects the court's failure to listen to and account for his unrebutted testimony. Presumably when this Court remanded for a hearing, it contemplated that the lower court would listen to the testimony and base its findings on what was presented at the hearing. This did not occur in Mr. Breedlove's case. Having a hearing and ignoring the evidence is not better than not conducting the hearing at all.

The lower court also wrote that "[a] significant thrust of defense counsel's argument is that the doctors who testified in

the penalty phase did not have all of the information concerning defendant's background. The Court finds this argument to be without merit" (R. 824). Again, this conclusion reflects a complete failure by the lower court to acknowledge the testimony adduced at the hearing, as well as the any of the CROSS-examination by the prosecution at trial. As detailed above, the prosecution successfully managed to eviscerate the defense penalty phase case by pointing out to the jury that the experts had not been provided with any information about Mr. Breedlove and that the fault for this rested with defense counsel. The lower court failed to explain how Mr. Levine acted reasonably, or how the experts had all the information they needed, when all the experts admitted that they had been provided with no police reports, no witness statements, no records from California, and most significantly, not one of the defense experts was aware that Mr. Breedlove had made a statement to the police, much less were provided with the statement. The lower court failed to explain how counsel's actions in not providing this statement to his penalty phase experts was reasonable, given the entire thrust of the defense "theory" at the penalty phase was Mr. Breedlove's state of mind at the time of the offense. The lower court's order is deficient. Mr. Breedlove's counsel provided ineffective assistance.

Counsel's failures also prejudiced Mr. Breedlove. In its opinion remanding for an evidentiary hearing, this Court effectively determined that, assuming the allegations concerning

Counsel's performance were proven at an evidentiary hearing, prejudice would have accrued to Mr. Breedlove at the penalty phase:

The State primarily argues that Breedlove has failed to demonstrate that any prejudice resulted even if his counsel was ineffective. However, it must be remembered that **Breedlove's victim** died from a single stab wound inflicted during the **course** of a burglary and that Breedlove **acquired** the weapon only after **entering** the house. **The State conceded** at the trial that this was a case of felony murder rather than premeditated murder. A strong presentation of mitigating evidence is more likely to tip **the scales** in a case where the killing was not premeditated.

Breedlove v. State, 595 so. 2d at 12 (emphasis added).

As demonstrated at the evidentiary hearing, there was un rebutted evidence of Mr. Breedlove's physically and emotionally abusive background which counsel, without a tactic or strategy, did not present to the jury. There was un rebutted evidence of Mr. Breedlove's longstanding history of severe drug and alcohol abuse which counsel, without a tactic or strategy, did not present to the jury. There was also corroborated and substantiated evidence of Mr. Breedlove's longstanding mental health problems and of the existence of two statutory mental health mitigating factors. As this Court noted, this evidence, clearly mitigating, would likely have "tipped the scales" in this case of a conceded felony murder.

As with its analysis of deficient performance, the lower court's prejudice analysis is erroneous because it failed again to take into account any of the evidence presented below, in

contradiction to this Court's mandate. First, the court's order **clearly** indicates that it only considered in its prejudice analysis the nonstatutory family history evidence which had not been presented at the original penalty phase, ignoring the prejudicial effect of the disastrous cross-examination of the defense experts by the State. The evidence presented below concerning Mr. Breedlove's abusive background was unrebutted, not "alleged child abuse of the defendant" as characterized by the lower court. The lower court was not free to ignore the unrebutted evidence presented by Mr. Breedlove in terms of assessing the prejudice prong. See Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1991) ("**when** a reasonable quantum of uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved").

The court found no prejudice because **"the** aggravating circumstances outweighed this mitigating circumstance" (2PC-R. 824) (emphasis added). Mr. Breedlove did not present evidence of only one mitigating circumstance, but rather adduced overwhelming evidence of various statutory and nonstatutory mitigating circumstances, none of which are discussed in the lower court's order. For example, in terms of nonstatutory mitigation, circumstances, Mr. Breedlove presented unrebutted testimony that he was intoxicated at the time of the offense. Numerous opinions from this Court, ignored by the lower court, have recognized that a history of substance abuse and evidence of intoxication at the

time of the offense establish valid mitigation. Downs v. State, 574 So. 2d 1095, 1099 (Fla. 1991) (**drinking** at time of offense and history of drug and alcohol abuse); Buford v. State, 570 So. 2d 923, 925 (Fla. 1990) (**history** of drug and alcohol abuse; intoxication at time of offense); Cheshire v. State, 568 So. 2d 908, 911 (Fla. 1990) ("**some** evidence" of intoxication at time of offense); Carter v. State, 560 So. 2d 1166, 1168 (Fla. 1990) (**history** of drug abuse; "possibility" of intoxication at time of offense); Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988) (**intoxication** at time of offense); Hansbrough v. State, 509 so. 2d 1081, 1086 (Fla. 1987) (**history** of drug abuse); Amazon v. State, 487 So. 2d 8, 13 (Fla. 1986) ("**inconclusive** evidence" that defendant had taken drugs night of offense; stronger evidence of a history of drug abuse); Buckrem v. State, 355 So. 2d 111, 113 (Fla. 1978) (**drinking** on night of offense).

Mr. Breedlove also presented un rebutted evidence of a longstanding history of severe drug and alcohol abuse. This Court has long held that this evidence constitutes a mitigating circumstance. Savage v. State, 588 So. 2d 975 (Fla. 1991); Cooper v. State, 581 So. 2d 49 (Fla. 1991); Downs v. State, 574 So. 2d 1095 (Fla. 1991); Carter v. State, 560 So. 2d 1166 (Fla. 1990); Pentecost v. State, 545 So. 2d 861 (Fla. 1989); Masterson v. State, 516 So. 2d 256 (Fla. 1987); Hansbrough v. State, 509 so. 2d 1081 (Fla. 1987).

Mr. Breedlove also presented un rebutted evidence of his severely abusive childhood and background, including neglect,

poverty, and abuse. While the lower court ignored this evidence, this Court has repeatedly recognized childhood abuse as valid mitigation. Holsworth, 522 So. 2d at 354 ("childhood trauma"); Hansbrough, 509 So. 2d at 1086 (difficult childhood); Amazon v. State, 487 So. 2d 8, 13 (Fla. 1986) (defendant raised in negative family setting); see also Campbell v. state, 571 so. 2d 415, 419 n. 4 (Fla. 1990)("[v]alid nonstatutory mitigating circumstances include . . . [a]bused or deprived childhood").

When defense counsel, without a strategy, fails to present available evidence of unrebutted and compelling mitigation to a penalty phase sentencing jury, prejudice is established, See Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992) (prejudice established by "strong mental mitigation" which was "essentially unrebutted"); Mitchell v. State, 595 So. 2d 938, 942 (Fla. 1992) (prejudice established by expert testimony identifying statutory and nonstatutory mitigation and evidence of brain damage, drug and alcohol abuse, and child abuse); State v. Lara, 581 So. 2d 1288, 1289 (Fla. 1991) (prejudice established by evidence of statutory mitigating factors and abusive childhood); Bassett v. State, 541 So. 2d 596, 597 (Fla. 1989) ("this additional mitigating evidence does raise a reasonable probability that the jury recommendation would have been different"). The evidence presented at Mr. Breedlove's hearing is identical to that which established prejudice in these cases, and Mr. Breedlove is similarly entitled to relief, particularly where this Court has found that a strong presentation of mitigation in this case would

likely have tipped the scales in favor of life. Under these circumstances, prejudice has been established. A resentencing must be ordered.

CONCLUSION

On the basis of the argument presented herein, and on the basis of what was submitted to the Rule 3.850 trial court, **McArthur** Breedlove respectfully submits that he is entitled to relief from his unconstitutional death sentence, and to all other relief which the Court deems just and proper.

I HEREBY CERTIFY **that** a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on August 30, 1995.


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