IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,963

MARC JAMES ASAY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal is from the denial of Marc Asay's motion for postconviction relief by Circuit Court Judge L. P. Haddock, Fourth Judicial Circuit, Duval County, Florida. This proceeding challenges both Mr. Asay's conviction and his death sentence. References in this brief are as follows:

"R. __." The record on direct appeal to this Court.

"PC-R. __." The instant postconviction record on appeal.

"Supp. PC-R. __." Supplemental postconviction record.

"PC-T. __." Transcribed postconviction proceedings.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Asay lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Asay, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND FACTS

Marc James Asay was indicted for two counts of first degree murder on August 20, 1987, in Duval County, Florida (R. 11). On September 26, 1988 trial commenced. The state's theory at trial was that Mr. Asay was the trigger person causing the death of two individuals relying heavily upon a theory that Mr. Asay was motivated by racial animus. He was convicted September 29 (R. 182-1081). The jury recommended death by votes of 9-3 on both counts (R. 143-44) and the trial court imposed the sentence of death on both counts (R. 156-59). Mr. Asay appealed his convictions and sentences, which were affirmed. Asay v. State, 580 So. 2d 610 (Fla. 1991). He filed a Florida Rule of Criminal Procedure 3.850 motion on March 15, 1993 (PC-R. 1-63). An amended motion was filed November 24, 1993 (PC-R. 89-193). On February 12, 1996, the trial court held a Huff hearing, (PC-T. 364-434) and March 19, 1996 the court entered an order denying relief on some claims and granting an evidentiary hearing on Mr. Asay's ineffective assistance of counsel during the guilt and penalty phases and ineffective assistance of counsel for not presenting the defense of voluntary intoxication (Supp. PC-R. 65-71).

At the evidentiary hearing, appellant's trial counsel, Raymond David could not recall how many times he visited Mr. Asay prior to trial (PC-T. 570). He stated he may have gone to the jail once, that he did not like going preferring to see his clients in the chute (PC-T. 570). The only time Mr. David talked

with Mr. Asay's collateral counsel was when he turned over his files (PC-T. 498). Mr. David had, however, spoken with the state attorney and discussed the claims in Mr. Asay's 3.850 motion (PC-T. 498). Although, Mr. David could not recall if he turned any of the files over to the state (PC-T. 500), it was established in fact Mr. David turned some of Mr. Asay's files over directly to the state rather than Mr. Asay's collateral counsel (PC-Tr. at 581-85). According to Mr. David, race was an "inescapable issue" during Mr. Asay's trial and the state focused on the fact that the two victims were black (PC-T. 506).[1] According to the State's theory, the racial aspect of the case provided a motive for Mr. Asay that the only other person present, Bubba O'Quinn, did not have (PC-T. 506). The racial testimony that permeated the state's case developed through an alleged jailhouse confession to Thomas Gross (PC-T. 507).[2] Mr. David stated the "gist" of his argument regarding Gross was he was receiving more for his testimony than he admitted to and "nobody does something for nothing" (PC-T. 511). Mr. David stated that he had no evidence that Gross received an additional benefit for his testimony or that his testimony was in any way untruthful. When asked if he would have presented evidence that Mr. Gross' statements were not true, Mr. David responded "obviously I would have" (PC-T. 511).

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[1]The case materials are not entirely clear that both victims were indeed black.

[2]Mr. David recalled that Mr. Gross testified at trial that Marc Asay referred to the victims as "niggers" (PC-T. 507-08). Mr. Gross also focused on the racial aspect of Mr. Asay's tattoos (PC-T. 508).

If Mr. David knew that the state attorney, Bernie de la Rionda, had told Mr. Gross what to say he would have presented that to the jury (PC-T. 511-12). Mr. David would have informed the jury that Mr. de la Rionda told Mr. Gross it was important to use the word "nigger" and to discuss Mr. Asay's tattoos (PC-T. 513). Most importantly, Mr. David would have disclosed to the jury that Mr. de la Rionda made additional promises to Mr. Gross and threatened to prosecute him for perjury if his testimony differed from his deposition (PC-T. 513, 515). Mr. David testified if the allegations against Mr. de la Rionda were true, he would consider Mr. de la Rionda's conduct interference with his defense (PC-T. 517).

Besides Gross, Robbie Asay and Bubba O'Quinn were the most important witnesses for the state (PC-T. 555-57). Mr. David testified that along with Gross, Robbie Asay and O'Quinn brought the racial issue to the forefront of the case (PC-T. 557). Therefore it was important to impeach these witnesses and attack their credibility (PC-T. 557-58). Mr. David admitted that the primary method of impeaching a witness is through inconsistent statements (PC-T. 561). However there were several inconsistencies that he did not question O'Quinn about (PC-T. 561-69, 593-600).[3] Specifically, it was important to impeach

[3]Mr. Asay's counsel was prohibited from examining the full depth of the inconsistencies that were not revealed at trial (PC-T. 602). Mr. Asay's counsel proffered notes detailing the inconsistencies in O'Quinn's statements, which Mr. David failed to expose at trial (PC-T. 602-05; Defense Exhibit G). The court gave Mr. de la Rionda the opportunity to "clear up" the inconsistencies by proffering any material he thought would

O'Quinn's testimony of how he and Mr. Asay arrived at the second shooting and to show that O'Quinn's account of the events leading up to the shootings was inaccurate (PC-T. 598-99). Mr. David admitted that these inconsistencies would have been valuable to Mr. Asay's defense (PC-T. 599). Mr. David testified that he would have wanted to prove witnesses were not being truthful. However, there were several inconsistencies that Mr. David did not question state witnesses Danny and Charlie Moore about (PC-T. 608-14).[4] When asked if he attempted to challenge Danny or Charlie Moore's testimony, Mr. David responded he didn't "recall that" but "in closing argument it was addressed" (PC-T. 612). Mr. David testified that, before Mr. Asay's case, he had never presented a penalty phase to a jury (PC-T. 501). Mr. David retained an investigator and provided him with instructions as to what he felt were the material aspects of Mr. Asay's case (PC-T. 502-03). To develop penalty phase mitigation the investigator contacted Mr. Asay's mother (PC-T. 504). However, Mr. David could not remember whether the he contacted her before or after the guilt phase verdict or whether he contacted any other

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clarify the statements, (PC-T. 604-05), however Mr. de la Rionda never refuted the inconsistencies proffered by Mr. Asay's counsel.

[4]Mr. Asay's counsel was again prevented from fully exploring the inconsistencies of the Moore cousins with Mr. David. (PC-T. 613-15). Mr. Asay's counsel again proffered notes detailing the inconsistencies in the Moore cousins' statements (PC-T. 614-15; Defense Exhibit H).

mitigation witnesses (PC-T. 504).[5] Mr. David admitted there was substantial mitigation evidence regarding Mr. Asay which was not presented but was relevant to the penalty phase (PC-T. 517-22). For example, Marc Asay was a neglected child (PC-T. 517). Marc was physically and sexually abused and aware that his siblings were receiving the same abuse (PC-T. 518-19). Marc's mother was verbally abusive to her children and blamed them for the abuse received from their father (PC-T. 520-21). Marc was continually exposed to acts of violence throughout his life (PC-T. 521-22). Marc's biological father was eventually replaced by a step-father who also physically, verbally, and emotionally abused Marc (PC-T. 522). Mr. David read the life history contained in Mr. Asay's 3.850 motion, and acknowledged that it constituted nonstatutory mitigation (PC-T. 520-23). However, he described the evidence as a "double-edged sword" (PC-T. 522). Mr. David testified he was afraid such evidence would have "opened doors," however, he was never aware of the true extent of abuse suffered by Mr. Asay (PC-T. 524-25). At the time of Mr. Asay's penalty phase, the only information Mr. David knew regarding Mr. Asay's childhood was that it "had not been a great one," and there were problems with Mr. Asay's mother leaving the children alone for lengths of time (PC-T. 525-26). Mr. David admitted that his investigation failed to reveal most of the mitigation evidence presented in Mr. Asay's 3.850 motion (PC-T. 527). He stated that the investigation

[5]Specifically, Mr. David could not recall whether his investigator talked to Joey Asay, Tina Logan, or Dee Fox for the purpose of developing penalty phase mitigation (PC-T. 505).

apparently failed because Mr. David "found it difficult to get anything from [Mr. Asay's] mother of any worth" (PC-T. 527). At the penalty phase of Mr. Asay's trial, Mr. David presented Dr. Ernest Miller (PC-T. 537). Evidence was presented Mr. Asay consumed alcohol the night of the offense (PC-T. 537). Mr. David however, only presented Dr. Miller with hypotheticals to generally explain the impairment caused by alcohol (PC-T. 537; R. 1014-18). Dr. Miller never examined Mr. Asay. Dr. Miller was the only mental health expert that testified in Mr. Asay's trial (R. 410-1031). Mr. David did not request the assistance of any other mental health expert (PC-T. 546).[6] As a lay person, Mr. David was aware of the damage huffing inhalants can have on the brain (PC-T. 539). If he had known that Mr. Asay huffed inhalants in prison he would have wanted his mental health expert to be aware of that fact (PC-T. 539). Mr. David also agreed that evidence of childhood abuse should be given to a mental health expert (PC-T. 539). Despite the fact that Mr. Asay's prior counsel consulted with Dr. Vallely, Mr. David never contacted him (PC-T. 546). Mr. David was not aware what, if any, information was provided to Dr. Vallely, the only mental health expert that examined Mr. Asay (PC-T. 540).

On cross examination, Mr. David explained that he relied heavily upon his investigator (PC-T. 634). The investigator spoke with Mr. Asay and Mr. Asay's mother, however Mr. David

[6]Mr. Asay's prior counsel did receive the assistance of Dr. James Vallely (PC-T. 546).

stated neither were helpful (PC-T. 639-42). Mr. David thought Mr. Asay's mother would highlight what was needed from the family (PC-T. 672). On redirect, Mr. David testified he originally did not think Mr. Asay's mother would be a witness, however, when a penalty phase became necessary he talked with Mr. Asay's mother (PC-T. 684). Mr. Asay's mother did not reveal the facts presented in Mr. Asay's 3.850 motion (PC-T. 685). Mr. David had no reason for failing to conduct a more thorough penalty phase investigation; his only justification was that he "gave this case to [his] investigator" (PC-T. 693-94). Mr. David was also questioned extensively about the contents of Dr. Vallely's report despite having no recollection of ever seeing the report (PC-T. 645, 647-49). On redirect Mr. David stated the report indicated Dr. Vallely attached no significance to Mr. Asay's personal history (PC-T. 680). The report also stressed Mr. Asay was deceptive and manipulative, however, the report did not indicate whether Dr. Vallely spoke with any one other than Mr. Asay. Nonetheless, Dr. Vallely had a general distrust of Mr. Asay (PC-T. 681-82). Mr. David admitted that it would have been helpful if Dr. Vallely had received corroborating information (PC-T. 682-83).

Dr. Barry Crown, an expert in neuropsychology, testified that he evaluated Marc Asay for postconviction counsel (PC-T. 706). His evaluation consisted of the administration of a battery of neuropsychological tests and a clinical interview (PC-T. 706). Before conducting his examination of Mr. Asay, Dr.

Crown also reviewed extensive background materials on Marc Asay's life (PC-T. 706)(See Defendant's Composite Exhibit #4 [3 volumes]). Based upon the results of the neuropsychological tests, Dr. Crown concluded that Marc Asay had significant neuropsychological impairments (PC-T. 708). Dr. Crown emphasized that his conclusions were "specifically in the area of neuropsychology" and explained that his conclusions, based upon the test results, were consistent with the background materials he was provided and the clinical interview he conducted (PC-T. 708-09). Dr. Crown explained how Marc's neuropsychological impairments manifested themselves (PC-T. 709). Marc has trouble with his ability to solve problems, or "language-based critical thinking," which is basically "the ability to figure things out" (PC-T. 709). Marc has difficulty with attention, concentration, and "conceptual flexibility, the ability to shift smoothly from one idea to another" and has "difficulty understanding the long-term consequence of his immediate behavior." Dr. Crown found his ability to self assess was a problem area (PC-T. 710).
Marc's problem-solving capacities equaled a 14 year old, his ability to visualize something and use that to solve problems equaled a child of 8 years, 7 months, his ability to accomplish intentional tasks roughly equated a child 7 years, 5 months old and his capacity to listen, comprehend, and understand equaled 9 years, 6 months (PC-T. 710). Marc's ability to concentrate on something in the face of interference is roughly half the expectation that we would have given someone who has even a

limited formal schooling background as Mr. Asay (PC-T. 710). He administered a visual motor sequencing test which is the most sensitive to neuropsychological impairment, or organicity, and this was Marc's lowest score (PC-T. 710-11).

Dr. Crown focused on dominant hemisphere problems, but Marc also suffers from nondominant hemisphere problems (PC-T. 711). Marc's nonverbal skills, accomplishing a task visually that he just completed verbally, are significantly impaired, his sensory motor capacities are impaired to the extent that Dr. Crown noted mild to significant bilateral tremors (PC-T. 711). Overall, Marc's impairments reflect problems in "Functional Unit 3" or "executive functions" (PC-T. 711). "Executive functions relate to the parts of the brain that in layman's terms figure things out and tell us what to do and tell us how to do them. They run our thought patterns. They run our interactions with others. They direct our interpersonal relationships" (PC-T. 711).

Dr. Crown determined that Mr. Asay met the criteria for two statutory mitigating factors: extreme mental and emotional duress and the inability to conform his conduct to the requirements of the law (PC-T. 712). Dr. Crown based this conclusion on the fact that Marc "has considerable neuropsychological impairment which . . . deprives him of the ability to figure things out" and results in arriving at erroneous conclusions (PC-T. 712-13). "In addition, stress and lack of structure exaserbate [sic] the situation, making it more difficult for him to figure things out, to get a clear picture. Not only does stress do this, but also

drugs or alcohol also have a significant effect on this processing" (PC-T. 713). The first part of Marc's brain to deteriorate was the frontal lobe, which controls emotions, concentration, attention, mental flexibility, reasoning, and judgment (PC-T. 713). The frontal area of Marc's brain is "impaired even in the best of circumstances and in the worst of circumstances an unstructured, stressed environment with exposures to substances, alcohol and drugs, it would be worse" (PC-T. 713). As a result of Marc's frontal lobe damage his capacities are significantly diminished (PC-T. 713). Marc's neuropsychological impairment is significant and "provides regular distortions in his perception of the world and his ability to deal with it" (PC-T. 719). These impairments existed at the time of the offense (PC-T. 722-23). There was nothing in Marc's records that "suggest any form of neuropsychological compromise since he has been incarcerated" (PC-T. 723)(emphasis added). Several aspects of Marc's life supported his test results and buttressed the findings. For example, Dr. Crown testified that the background material he was provided indicated Marc had a problem with huffing inhalants, which is significant in terms of organic brain damage (PC-T. 706). Another important aspect of Marc's life that contributed to his organic brain damage is that as a young child he would often drink alcohol to the point of passing out (PC-T. 720). The frontal lobe does not fully develop until after adolescence, therefore, "substance abuse, particularly alcohol, which is a toxin, certainly significantly

relates to the test findings even standing alone" (PC-T. 721). Another factor contributing to Marc's neuropsychological impairment was being stung by a swarm of bees as a child, which has a neurotoxic effect on young children. Furthermore, Marc soiled his pants until the age of 8 or 9, a significant factor indicative of neurodevelopmental problems (PC-T. 720).

On cross examination Dr. Crown was questioned regarding the significance of Marc's attack by a swarm of bees in his evaluation (PC-T. 743-44). He clarified that it was not the most significant factor in his evaluation and that the bee stings "in and of itself taken in isolation" was not of much importance (PC-T. 744). The bee attack was one factor that showed Marc had been exposed to neurotoxins at a young age (PC-T. 744). Other neurotoxins he was exposed to were the various inhalants (PC-T. 745). However, no "specific substance, thing, date, or event . . . is causily related to Mr. Asay being what he is and doing what he did" (PC-T. 747).

Huffing inhalants played a role in Marc's neuropsychological impairment. Neurotoxins move through the temporal area of the brain to the frontal areas and "stays there and begins to kill brain cells" (PC-T. 746). "Inhalants are neurotoxins that have a permanent effect at the time of use" (PC-T. 745). Therefore, the fact that Marc stopped huffing inhalants when he left prison "would have had no effect" (PC-T. 745). Dr. Crown was also questioned about several aspects of Marc's life. For example, when asked whether he had inquired into his abusive childhood, he

explained that it was not important from a neuropsychological perspective (PC-T. 740)(emphasis added). Certain aspects of his life may be important for a psychological evaluation but have no bearing on whether he suffers from neuropsychological impairment (PC-T. 751-52). Dr. Crown did not review trial transcripts because the actual facts of the crime are not relevant to neuropsychological functioning (PC-T. 751). Additionally, Dr. Crown did not discuss Marc's tattoos during his interview because such details had no bearing on neuropsychological damage (PC-T. 753-54). Marc had problems with self assessment (PC-T. 758), however there were no indications of malingering (PC-T. 749).

Dr. Faye Sultan, a clincal psychologist, testified, as an expert in assessment and treatment of victims and perpetrators of physical and sexual abuse (PC-T. 783, 805-807). Dr. Sultan examined Mr. Asay in November of 1993 to determine whether there were psychological factors present in 1986 and 1987 that influenced his behavior at that time (PC-T. 785-86). Dr. Sultan met with Marc for 5 hours, conducted psychological tests, and examined extensive background packets (PC-T. 786)(See Defendant's Composite Exhibit #4). Marc had undergone psychological testing before Dr. Sultan administered her tests, the results from the previous testing were roughly consistent with her own (PC-T. 787-88). He scored in the low average range in intellectual capacity (PC-T. 787). The score alone was "not particularly revealing" (PC-T. 787). What was important was that his scores on the subtests demonstrated wide variability between his strengths and

weaknesses (PC-T. 787). Specifically, he scored very poorly on his ability to concentrate, to maintain attention, to focus on a particular task, to discriminate against interferences, and to stay on task (PC-T. 787-88). His overall test-taking style was very impulsive (PC-T. 788). "[Marc] was not able to take time and think through an answer" (PC-T. 788). His impulsivity level was significant, which made an actual determination of intellectual ability difficult (PC-T. 788). In addition to the psychological testing, Dr. Sultan relied on three volumes of background materials (PC-T. 789). Dr. Sultan reviewed school records showing multiple admissions in different schools up to the seventh grade (PC-T. 790). Beyond the 7th grade there are no school records because Marc did not attend often (PC-T. 790).

Dr. Sultan also examined Marc's Department of Corrections (DOC) Records from Texas and Florida (PC-T. 791). His Texas records indicated several instances where he was intoxicated by alcohol or by "sniffing some inhalant," such as paint thinner or gasoline (PC-T. 791). He was in segregation for part of 1984, most of 1985, and the beginning of 1986 (PC-T. 792). He immediately reached out for help when he was released from segregated housing (PC-T. 792). In 1986, a psychologist in the Texas DOC described Marc as a "young man who is concerned and frightened about his living situation" (PC-T. 792). In general population he "experienced a lot of fright and concern and asked for help almost immediately, and that was quite significant to me that he would deteriorate so quickly" (PC-T. 792). In the Texas

DOC records there are several instances where Marc was assaulted by other inmates (PC-T. 793). In 1982, he was kicked in the testicles and hit in the jaw (PC-T. 793). Another report has the unit psychologist noting that Marc grew up in prison (PC-T. 793), and a reference to black inmates attempting to dominate him (PC-T. 793). The Texas DOC records frame a picture of Marc's life from the time he was 16 or 17 to the time he was 20 (PC-T. 794). Dr. Sultan testified that he was still a "very, very young man" and was still in the process of "forming his adult personality" (PC-T. 794). He was quite threatened while in prison and inhaled substances in a compulsive way, which was "much, much, much more usage than the average person who would engage in that sort of behavior" (PC-T. 794). His behavior demonstrated a "deteriorating psychological condition or an inability to cope with the stresses of incarceration" (PC-T. 794). He spent a considerable amount of time in prison and was not able to handle the stress of the environment (PC-T. 794). While in prison in Florida, Marc was diagnosed as having a treatable mental illness (PC-T. 796). Florida DOC personnel requested information about his social history, but he was not forthcoming with his family history (PC-T. 796). Dr. Sultan testified that a lack of self-reporting is common among people with severe childhood abuse histories (PC-T. 796). "There are several notations throughout [Florida DOC] records that Mr. Asay denies any family history of psychiatric problems or abuse" (PC-T. 796). He was eventually

diagnosed with a depressive disorder and administered anti-depressant medication, to which he responded well (PC-T. 796).

Dr. Sultan reviewed the psychological records of Marc's biological father, Otto Asay, because Marc had contact with Otto in his early childhood and the records were relevant in determining the environmental conditions under which he was raised during his early years (PC-T. 798). Certain mental illnesses are genetic and the records assisted in determining whether Marc was especially vulnerable to mental illness (PC-T. 798). Otto Asay was a serious alcoholic and suffered from paranoid ideations (PC-T. 799). Otto's father was also a severe alcoholic who died when Otto was five years old from an alcohol related disease (PC-T. 799). Dr. Sultan testified that this information is significant because Marc is at least a third generation alcoholic. "There is a very, very strong genetic component of alcoholism and it was very significant . . . that Mark[7] Asay's grandfather and his father were both diagnosed as having alcoholism" (PC-T. 799-800). In addition to being an alcoholic, Otto Asay suffered from a "deep psychological disturbance" (PC-T. 798). "[Otto] is described on his first admission [to a veteran's hospital] as having homicidal thoughts. He is described throughout his psychiatric records as infantile and highly manipulative, as unable or unwilling to maintain employment or support his children" (PC-T. 799). One of Otto's

[7]The Record on Appeal incorrectly refers to Marc Asay as "Mark" Asay.

psychiatric records during this time stated: "The patient's great glibness and manipulative efforts give the impression of a character disorder; underlined grandiosity and extreme defensiveness make one wonder about paranoid tendencies" (PC-T. 800). In a psychological test, Otto "is described as experiencing the world as a hard and barren place from which one has to extricate what anyone can without any sense of responsibility" (PC-T. 800). In the 1960s Otto suffered from paranoid delusions. Otto was "diagnosed as having a passive aggressive personality which is manifested by tension, immaturity, inadequacy dependency, insecurity, schizoid features, schematic preoccupation, sexual inadequacy, persecutory tends and saddistic [sic] tendencies" (PC-T. 800). Otto was depressed, drinking excessively, had suicidal thoughts and a past history of suicide attempts (PC-T. 801). He was taking anti-depressant and anti-psychotic medication (PC-T. 801). Dr. Sultan explained: "[w]hat is particularly important to me is that at this point during which Mr. Asay is admitted within the hospital system that he is screaming and yelling at home, that he is beating his children with the buckle of his belt, and that he is leaving marks on their bodies. . . . <u>This is the point at which Mark Asay is born</u>" (PC-T. 801)(emphasis added). Dr. Sultan explained the significance of Otto's hospital records (PC-T. 802). Marc spent the first five years of his life in "an environment of extreme chaos and violence" (PC-T. 802). Otto was drunk almost all of the time and he was physically abusive to his children (PC-T.

802-03). Marc was in the Asay home when Otto was the "most deteriorated" (PC-T. 803). During this time, Otto was deteriorating into psychotic thinking; he was having hallucinations and bizarre fantasies (PC-T. 803). Dr. Sultan testified the family conditions during Marc's formative years "would result in [a] very severe personality disturbance" (PC-T. 804).

Dr. Sultan spent 5 hours interviewing Marc Asay (PC-T. 810). Most of this time was spent discussing his childhood history (PC-T. 810). However, he was very hesitant to speak about his childhood experiences. Dr. Sutlan testified that one of the reasons obtaining records is so important is that based on her knowledge of the materials contained in the background packets, she was "able to poke and prod quite a bit", eventually Marc reluctantly discussed his childhood; although, he was still very guarded in his description of his childhood experiences (PC-T. 810-11). He acknowledged there was some physical abuse, but he minimized the extent of the abuse (PC-T. 812). He described himself as a "very lonely boy who basically hid under the house and kept his toys under the house, and tried to spend as much time away from the house as he could" (PC-T. 812). Marc admitted being raped for the first time when he was ten or eleven years old (PC-T. 812). Around the same time Marc started having sex with older men for money (PC-T. 813). Marc became very confused about his sexual activity. He knew that he was being exploited by older men who would have sex with him, but he was unsure of

his role in these encounters (PC-T. 812-13). Dr. Sultan testified that at this point in his life Marc "thought his pattern was set for life" (PC-T. 813). Dr. Sultan also reviewed affidavits from Marc's family members (PC-T. 813)(See Defendant's Composite Exhibit #4, at tab 18). Dr. Sultan testified that there was some disparity regarding the extent of abuse Marc reported in the household and that which his family members relayed (PC-T. 813-14). Dr. Sultan explained that "[v]ery often the most intense victim of abuse or neglect . . . is the least accurate reporter of the abuse." Severe abuse survivors often become protective of their abusers, therefore, the disparity between Marc's self-reporting and the family members description of the abuse did not strike Dr. Sultan as unusual (PC-T. 814). From family affidavits Dr. Sultan learned that Marc was an unwanted child and this was "a constant fact of daily life" (PC-T. 814). Hitting, beating, and cursing was part of day-to-day life in his household (PC-T. 814). Marc's stepfather, Harry Baumgartener, administered terrible and extensive beatings on his stepchildren. "Most of the children described his treatment of them as torture" (PC-T. 814). There are reports of Harry pointing guns at the children (PC-T. 816). Harry also beat the children with a board or with his belt until he was physically too tired to continue the beatings (PC-T. 816). Marc's mother reported that for 30 days in a row Harry would lie Marc across two chairs and beat him with a board all over his body (PC-T. 816). The children were deprived of food, the refrigerator in

their home was padlocked, their stepfather counted the pieces of bread, if the children took any they were beaten (PC-T. 814-815). The background materials revealed that Marc's sisters were sexually abused by Otto as well as Harry (PC-T. 815). When Marc's sister told their mother, Veronica, about the sexual abuse, Veronica told her that "she should kill herself so that her step-father could no longer harm her." His mother was extremely manipulative and Marc was especially vulnerable to his mother's manipulation because "he struggled the hardest of all the children for her love and approval" (PC-T. 816). Marc's mother exploited him in many ways. She allowed him to be exploited by older men because he gave her the money that the men gave him for sexual favors (PC-T. 816). All of the children were "critically injured from having been exposed to the childhood environment they were exposed to, and they all view Mark Asay's injuries as the most severe" (PC-T. 817). Dr. Sultan testified that among the abuse survivors she evaluated, Marc's abuse ranked among the most severe. When asked how she would rank the pervasiveness of the abuse he suffered Dr. Sultan replied:

> When abuse takes one form, sometimes the individual has a chance to develope [sic] coping skills, adaptive skills in other arenas. In Mr. Asay's case, the abuse that we are talking about is emotional abuse, sexual abuse, physical abuse, witnessing physical violence toward his siblings, witnesses physical abuse of his mother, witnessing sexual abuse of his sisters; that combination of abuse coupled with all of the abuse that he experienced outside of his home in terms of being sexually exploited by neighborhood men and older boys would make the abuse he experienced extremely pervasive, perhaps <u>in the highest five percent of the cases that I have reviewed.</u>

(PC-T. 822)(emphasis added).

Dr. Sultan's evaluation of Marc revealed long-standing mental health impairments that, to a reasonable degree of psychological certainty, existed at the time of the offense in 1987 (PC-T. 817). At the time of the offense, Marc suffered "from both organic and psychological disturbance that was significant and debilitating" (PC-T. 818). Dr. Sultan believed that "for psychological and for organic reason [Marc] was unable to conform his conduct to the standards of the law" (PC-T. 818). Dr. Sultan also established the following non-statutory mitigating factors: "Mr. Asay was the victim of severe childhood emotional, physical and sexual abuse. Mr. Asay has an extensive history of alcoholism. Mr. Asay suffers from organic damage, brain damage that may significantly influence his capacity for judgement [sic] and for reasoning" (PC-T. 819).

On cross examination Dr. Sultan was asked if, from her reading of Marc's DOC records, she was aware of incidents where he was the aggressor (PC-T. 829-30). Dr. Sultan was aware of Marc's huffing and did remember non-violent incidents he initiated, however, there were no records indicating that he was the aggressor in any violent altercation in which he was involved (PC-T. 830-31). Dr. Sultan explained that many of the reports indicate that he was a participant but did not indicate that he was the aggressor (PC-T. 830). Dr. Sultan described a disciplinary report "in which [Marc] is found with his pants pulled down below his knees and there is an older, larger man on

top of him and . . ." at which point the attorney general interrupted her testimony (PC-T. 830). When asked whether she was aware of the circumstances of the crime, Dr. Sultan stated that she had reviewed incident accounts and DOC records that detailed the offense (PC-T. 834-35). Dr. Sultan testified that while Marc suffers from a psychological disability and also an organic condition that causes cognitive disability, he is capable of planning, however, Dr. Sultan clarified this by stating "I would need to know what kind of plan you're talking about or what kind of goal you're asking about achieving" (PC-T. 835). When asked whether Marc's impairment "ebbs and flows," Dr. Sultan explained that his organic impairment is permanent, but that his behavior may vary depending upon his psychological conditions (PC-T. 840-41). Dr. Sultan was aware of many specifics of the trial and the facts of the case (PC-T. 835, 841-42). Dr. Sultan believed that neuropsychological exams should take into account outside factors, but that the norm is that those factors are not taken into consideration in a neuropsychological evaluation (PC-T. 847). A neuropsychologist's job is to determine whether areas of the brain are "injured or disturbed or malfunctioned" (PC-T. 846). Organic damage to the brain is cellular and exists regardless of his psychological condition (PC-T. 841).

During a court inquiry, Dr. Sultan was asked about Marc's memory up to the time he was five (PC-T. 856). Dr. Sultan testified that he never specifically told her that he did not have any memories before the age of five; "[Marc] simply was not

able to recount to me any of his life with his biological father" (PC-T. 856). When asked whether he could remember an attack by a swarm of bees when he was three years old, Dr. Sultan stated: "It's possible that Mr. Asay could have remembered an extraordinary traumatic event like the one that you are describing which he didn't tell me about and not really have remembered anything or chose to tell me anything about his relationship with his biological father" (PC-T. 857). On further redirect examination Dr. Sultan acknowledged that he could have learned of the incident from his siblings (PC-T. 857).

Marc's older brother, Joseph Asay, grew up in the same household with Marc. Joseph described their stepfather, Harry, a man that could be set off by anything and that he hit and kicked the boys in the head or "wherever he made contact" (PC-T. 860-61). Harry's weapon of choice was "a two by four if possible" (PC-T. 860). Joseph testified that Harry had a drinking problem and became more violent when he drank (PC-T. 861). The boys' encounters with Harry ranged from punchings to beatings to Harry pulling a gun on Joseph when Joseph did not clean Harry's chickens (PC-T.861-62). Joseph testified that their mother was the same kind of parent that Harry was, except "she didn't hit us with boards or nothing" (PC-T. 863-64). Instead Marc's mother smacked, hollered, and cursed them (PC-T. 864). Harry along with Marc's mother called the boys "every name from son of a bitch to bastard . . . motherfucker, everything, any name you can think of" (PC-T. 885). The only reason Marc's mother wanted her

children living with her was for child support that Otto sent. However, the children never saw any of it (PC-T. 884). Marc's mother used the money to support herself and Harry (PC-T. 884). The children were given beans and rice while the adults ate steak, chicken, or whatever they wanted (PC-T. 864). Joseph described how Harry kept a lock on the refrigerator, the children were forbidden from getting a bite to eat when they felt hungry. If they did manage to get food without permission, they were beaten (PC-T. 864). When Harry got in trouble with the law the family took a trip west to evade the F.B.I. (PC-T. 862-63). The F.B.I. caught up with him in Oklahoma City, the family went to Jacksonville and Harry turned himself in (PC-T. 863). When Harry left prison he moved back in with the family (PC-T. 866). He still had a drinking problem, was stopped for one too many DUI's and the family went on the run again so Harry's parole would not be revoked (PC-T. 867). Joseph explained how the family wound up in Georgia, Harry became very sick, and when Harry was sick he was even more violent. "Harry was very violent, period. Harry drank every day of his life . . . in a sense it was his way of making us hate him so we didn't feel sorry for him when he died" (PC-T. 865-66). Joseph testified: "I didn't like the man because of how mean he was. Matter of fact, I hated him" (PC-T. 866). While in Georgia, the family lived in a neighborhood where if somebody "wanted something, they had to steal it . . ." Joseph started stealing while they there and continued to do so until Harry reported him to the authorities (PC-T. 868). Marc's

siblings Robbie and Shari also started stealing at this time. While Marc was very young, he was taken along for the ride (PC-T. 869). Joseph testified that sometimes their parents knew that they were stealing and "it didn't bother them" (PC-T. 869). Marc's mother divorced Harry, and Marc, his mother, Joseph, and Robbie moved to back to Jacksonville (PC-T. 869). Their mother provided no discipline for the boys and the boys ran the streets (PC-T. 870). At the age of 12 Marc began drinking heavily and doing drugs (PC-T. 874). The boys began hustling and engaging in sexual activities for money. A friend of Joseph's introduced them to older men and the men "would take us to parties and get us high and drunk and in exchange, we'd let them do oral sex on us" (PC-T. 871). Marc was only twelve years old when this began and this behavior continued until he went to prison (PC-T. 871). Despite this early exploitation, on cross examination, Joseph testified that Marc did not have any negative feelings about gay men, if fact, his best friend was gay (PC-T. 896-97). The Asay children received no guidance at home during this time. The boys were not going to school and no one supervised them (PC-T. 871-72). Marc's mother knew that he was becoming a male prostitute at the age of 12, yet she never tried to stop him or even tell him what he was doing was improper (PC-T. 872). Besides the older men that would pay Marc for sex, the only friends he had were thieves (PC-T. 873). The boys would steal anything that their friends lined up or "anything that wasn't tied down" (PC-T. 873). When Joseph turned 18, he had Marc confess to crimes that

Joseph had committed because Marc was still a juvenile (PC-T. 874-875). Marc's mother never tried to intervene and teach her children to be law abiding citizens (PC-T. 873-74). In fact, Marc's mother held the money the boys made from stealing (PC-T. 873). When asked if his mother ever tried to stop him, Joseph responded: "Mama never tried to stop us from nothing. I mean, she didn't go right out and say get that for me, but she never cared what us kids did. You know, I don't know what mama's problem was . . . We just did what we wanted to do" (PC-T. 874). When asked why Marc turned out the way he did, Joseph responded: "He didn't have the proper home. He didn't have the proper love . . ." (PC-T. 880). Marc never had anybody to protect him from the violence and abuse in his home or to steer him in the right direction (PC-T. 878). "The people we hung around with were not good people. We just had nobody to show us, you know, and Mark just wasn't dealt a fair hand in life. I wasn't either, but somebody picked me up out of the gutter, and that's what Mark needed as well" (PC-T. 881). Joseph admitted he had many problems with the law, and the only reason, in his opinion, he was not where Marc is today is because he met his wife (PC-T. 877-78). Joseph felt that if Marc would have had a positive influence in his life he would not have turned out the way he did (PC-T. 878) The influence that Marc did have in his life was his girlfriend Beth, a prostitute who encouraged Marc's drug habit (PC-T. 879). Joseph visited Marc while he was incarcerated in Texas and learned that he had been beaten by inmates and had his

teeth knocked out (PC-T. 876). After Marc got out of prison, Joseph tried to help him. Joseph had straightened out his own life and thought he might be able to show Marc the "good road" (PC-T. 876). When asked what happened, Joseph responded "something went wrong", he tried to get Marc help from his parole officer, however the parole officer simply ignored Joseph's plea for help and once again Marc was left to his own devices with nobody to offer guidance or control (PC-T. 876-877). Joseph was never contacted by Marc's trial lawyers (PC-T. 882). If he had been contacted in 1987, he would have testified (PC-T. 882).

On cross examination Joseph was asked how, growing up in the same household, he turned out differently than Marc (PC-T. 895). Joseph admitted his own time in jail had done a lot to straighten him out and he didn't want to go back (PC-T. 895-96). However, when asked why he had never killed anybody Joseph explained: "I can't say that I would not kill anybody. I ain't been put in that position yet" (PC-T. 891). Joseph explained that in the Asay household they learned to settle things with violence or whatever it took (PC-T. 902).

Tina Logan, Marc's older sister by 7 years, grew up in the same household (PC-T. 921-23). Tina testified that when Marc was 4 years old their mother put Otto in a mental hospital and Harry moved in (PC-T. 924). Tina described a man who dominated the household and controlled every aspect of their lives. If there was food in the house, it was Harry's. Harry ate steak while the children ate beans and rice. Harry placed a lock on the

refrigerator to keep the children out and counted each piece of bread (PC-T. 924-25). Harry beat the children, often with a belt (PC-T. 925). Tina described a beating she received for breaking a faucet: "He sent me in the room for about an hour and then he comes in and as a ten-year old, I can sit back and say was probably 20 minutes worth of beating. He beat me until he could not beat me any more. He was physically out of breath, and was physically unable to beat me" (PC-T. 925-26). Harry beat the other children in the same fashion and she told of Harry taking the children into another room and that screaming and crying could be heard coming out (PC-T. 926). When Harry moved in with the family, Marc began soiling his pants. This continued until Marc was 12 years old (PC-T. 939-40). Tina described Harry's actions upon finding out that Marc had soiled his pants: "He would rub it in his face. He would beat him. He would put his head in the toilet. I mean, there was all kinds of things that Harry would do to him" (PC-T. 940)(emphasis added). Harry beat the boys more than he beat the girls and he beat Marc more than the other boys "[b]ecause Mark didn't fit his expectation of what Mark should have been" (PC-T. 927). Tina explained that the other children backed down from Harry, but Marc was young and outspoken and hadn't learned to back down. "The more abuse [Marc] got, the more Mark tried to fight to keep his independence, and Mark wound up getting more and more beatings" (PC-T. 939). When asked if Marc received the brunt of the beatings from Harry, Tina simply replied: "Mark, yeah. Harry

hated Mark" (PC-T. 928). From the time Marc was 4, Harry called him a thief. Harry considered Marc a thief because he ate food that was in the house (PC-T. 927). Everything in the house was Harry's and if they ate something, it was considered stealing (PC-T. 927). Harry would also call Marc a "son of a bitch" and a "bastard". Marc's mother was present during the beatings, yet did nothing to stop them (PC-T. 926). She would go into the kitchen so she "didn't have to deal with it" (PC-T. 926). Tina testified that there was no way her mother could not have known what was going on; "there were screams begging him to stop" (PC-T. 926-27). Harry's abuse also consisted of sexually molesting Tina (PC-T. 928). Harry's sexual abuse began when she was 10 years old and continued until she got married and moved out of the house at age 14 (PC-T. 928-29). When she told her mother about the abuse her mother did nothing. Tina explained "[our mother] told me it was the way I dressed and I deserved whatever I got" (PC-T. 929). Tina described the violence in the Asay home to be as common as Harry beating their mother in front of the children for something as minor as a frying pan being dirty (PC-T. 929). Marc's mother then turned her anger on the children. Tina recalled that when her brother Joey had taken 20 cents from her brother, their mother lined up Tina, Joey, and Dee and beat them "one right after the other" (PC-T. 930). Tina finally told their mother that she took the 20 cents so their mother would stop the beating (PC-T. 930). When Harry became sick he took the family for a trip west (PC-T. 932). Harry was dying of emphysema

but he lived longer than expected and suffered (PC-T. 932-33). Tina explained that the "more he suffered, the more he made us suffer" (PC-T. 933). Harry ordered the children to enjoy the trip; if they didn't they were beaten (PC-T. 931). Towards the end of the trip, Harry proclaimed that "he was going to make [the children] hate him before he died" (PC-T. 933). When asked if she hated Harry, Tina responded: "Oh, yes I did. Definitely I hated him" (PC-T. 933). While the family was out west Harry ran up thousands of dollars on a credit card and the F.B.I. was looking for him (PC-T. 933). Harry used Marc's name, who was only 6 years old, and thought because he was dying nobody would be responsible for his debts (PC-T. 933-34). Harry turned himself in and went to prison for a year, he returned with his severe drinking problem and things went back to the way they were (PC-T. 934-35). Harry drank every day or at least every other day and was even more verbally and physically abusive (PC-T. 935-36). When Marc returned from imprisonment in Texas, Tina noticed a drastic change (PC-T. 936). He had always been a kid at heart, but when he came home from Texas he was hardened and very angry (PC-T. 936). His time in the Texas prison coupled with his household environment of abuse, completely absent of any sort of affection, (PC-T. 930) had finally taken its toll. Marc never had anybody to protect him from the abuse he received so he learned to react to situations the same way Harry did (PC-T. 931). "He would fight out and lose control the same way Harry and mama did" (PC-T. 931). He was drinking heavily, taking

drugs, and spiraling out of control (PC-T. 936). Nobody reached out to try and help him (PC-T. 937). When Marc returned from Texas their mother "wanted him to make everything in her life right as far as moneywise, as far as us kids loving her again, as far as fixing her house, as far as everything. Mark was responsible for mama" (PC-T. 938). When asked if this was a lot of pressure for Marc to be under, Tina replied: "Oh, yes. Yes, it is. I mean, he can't make us love her again. There is nothing he can do in his life to make us love her again. The hatred I have for my mother, he can't change, but he tried. The hatred all of us have for her, he can't change, but he tried. And when he tried and couldn't do it, he felt like he was a failure. So he'd get drunk and abusive to try to make things right and he couldn't" (PC-T. 938). When asked how she grew up in the same household as Marc but managed not to wind up on death row, Tina stated that she had turned her anger on herself. She tried to commit suicide four times (PC-T. 942). The last time Tina tried to commit suicide she tried to contact Marc "[b]ecause he was the one who would know how I was feeling" (PC-T. 943). The lower court then limited Tina's testimony regarding her first suicide attempt (PC-T. 946-50). Tina testified that the one person to blame for all the pain and hurt in their household was their mother (PC-T. 944). When asked how she felt about her mother, Tina said: "I hate my mother. I hate what she's let happen to me. I hate what she's done to me. I deal with it every week in counseling. I hate her. I hate her" (PC-T. 941-

42). Tina attempted to contact Marc's trial lawyer and left a message for him. Nevertheless, she never heard from Marc's lawyer (PC-T. 944-45). She would have testified in 1987, had she been asked (PC-T. 944-45).

Eudene Mary Fox (Dee) testified to being Marc's older sister by 10 years (PC-T. 964). Dee lived with her father, Frank Lear, until she was 12, when she moved in with her mother and all of the children were living in the household at this time (PC-T. 964). The lower court limited Dee's testimony to a very narrow time period. (PC-T. 965-67). Dee returned to her father's house when she was 15, however, the court would not allow her to explain why she had to leave her mother's house (PC-T. 971). While Dee lived with her mother, Otto lived in the house and he never showed any affection toward his boys. Dee and her sister Gloria were the primary caretakers of Marc (PC-T. 969). It was very difficult for her to care for 5 small children. Her mother never gave her guidance on how to raise them (PC-T. 973). Marc's mother did very little to take care of him (PC-T. 969). Dee was never contacted in 1987 to testify at Marc's trial (PC-T. 976).

Gloria Dean, Marc's older sister by 14 years, testified she also grew up in the same household (PC-T. 980-81). Gloria was Marc's primary caretaker when he was born because their mother "didn't want nothing to do with him when he was born" (PC-T. 982). For the first 4 years of Marc's life his mother never took care of him, Gloria did (PC-T. 983). Marc's mother would, however, provide the discipline in the house and would often whip

him with a belt (PC-T. 985). The lower court limited Gloria's testimony regarding the treatment Marc received when he was born (PC-T. 981-82). According to Gloria, Otto "left the house often because . . whenever things got too much for him or he got caught doing something he shouldn't have been doing, he had a very bad habit of just up and disappearing and two or three weeks later he might call home and say, I'm in a VA hospital . . ." (PC-T. 986). When Otto left the house Marc's mother became more hateful. Marc's mother "liked to date and she did" (PC-T. 986). When Otto was away she brought home men that she dated (PC-T. 987). However, the lower court ruled that the testimony regarding how Marc's mother changed when Otto left was irrelevant and struck the testimony (PC-T. 986). Gloria witnessed her mother beat Marc (PC-T. 988). As Marc got older his mother turned the beatings over to Harry and the beatings worsened. Marc received the brunt of Harry's beatings because Harry didn't like him (PC-T. 988-89). The lower court prohibited Gloria from testifying about the beatings she received (PC-T. 985). When asked why Harry didn't like Marc, Gloria responded: "I don't know if it was because he was little or he had problems when he was little controlling his bowels and things like that, and Harry didn't like that. He always thought he could [control his bowels] if he wanted to" (PC-T. 889). <u>When Marc would soil his pants Harry would wipe his face in it and make him go clean his pants</u>" (PC-T. 990)(emphasis added). As the boys got older Harry got rougher (PC-T. 990). Gloria testified that Harry "punched one brother in the mouth . .

. he's whipped Joey, he's whipped Robby, he's whipped Mark." (PC-T. 990.) Harry was a very heavy drinker who became more violent when he drank, (PC-T. 990) and became even more violent when he discovered he was dying. Harry wanted "to make everybody hate him because he knew he was dying, and he didn't want anybody to mourn him when he died . . . [Harry] did everything in his power to our family to make us hate him. And he told us that. He said, I want you to hate me. I'm doing this so you will hate me . . ." (PC-T. 990-91). Harry and Marc's mother fought a lot in front of Marc and threw things at each other (PC-T. 995-96). The violence was pervasive (PC-T. 998). Gloria testified: "[t]here was a lot of [violence], all the time from the time I can remember" (PC-T. 998). Neither Harry, Otto, or Marc's mother provided him with any emotional support (PC-T. 992-93). When asked why she did not end up on death row, Gloria stated: "Because I might as well be there. I've got plenty of scars from my childhood from my father and my mother. And if I would have done what I told my father I was going to do to him one time, I think I would be sitting right there with Mark" (PC-T. 997). Mr. David never contacted her before Marc's trial in 1987, and that if she had been asked she would have testified (PC-T. 998-99).

Robbie Asay testified at the evidentiary hearing to being Marc's older brother and that they grew up in the same household. Harry was very abusive (PC-T. 1005). "He'd beat us a lot. He'd drink a lot. And when he got to drinking a lot, he'd beat us with

belts" (PC-T. 1005). Harry was drunk most of the time and when he was he beat the boys for no reason at all other than to beat them (PC-T. 1006). Harry was "very crude" to everybody in the household (PC-T. 1010). Harry would beat everyone, including Marc's mother (PC-T. 1007). One time Harry even pulled a gun on Marc's older brother Joseph (PC-T. 1007-08). Like Marc's other siblings, Robbie explained that Marc received the brunt of Harry's abuse (PC-T. 1006). "It was one of the situations where with a stepfather and stepson, and Harry never liked Mark. He was very abusive towards Mark, you know, always accusing him of stealing and humiliating us". Harry belittled Marc from the time he was 5 years old; "thief" was his favorite name for Marc (PC-T. 1010). The family moved around quite a bit because Harry was running from the law (PC-T. 1008). The family arrived in Jacksonville, but by this time Harry was very sick. When Harry got sick, things got worse for Marc (PC-T. 1011). Robbie testified that when the family moved back to Jacksonville "Harry really got to abusing Mark real bad . . ." (PC-T. 1011). The boy living next door stole things because he knew Harry would blame Marc (PC-T. 1012). Marc was only 11 years old at the time (PC-T. 1011). Marc didn't have any place to go to escape the violence in the household and nobody to protect him from the beatings he endured from Harry (PC-T. 1008-11). When asked if their mother had ever tried to stop Harry's abuse, Robbie answered "[i]f she did, she would have probably got beat herself . . . how can she stop something when a man is drunk like that" (PC-T. 1010-11).

When Marc came home from Texas he had a drinking problem. Robbie explained that "he just wasn't the same Mark" (PC-T. 1014). Robbie believed that Marc had a mental problem when he returned from Texas (PC-T. 1014). Robbie testified that Marc drank when he came back from Texas and that the night of the murders he had taken drugs (PC-T. 1014). However, no one had ever asked him whether Marc had taken any drugs the night of the murders (PC-T. 1014).[8]

Postconviction counsel then presented Johnny Sharp, an African-American inmate who served time with Marc at Tomoka Correctional Unit (PC-T. 1129-30). Mr. Sharp testified he and Marc had a consensual sexual relationship (PC-T. 1129-36). Prison officials knew of the relationship and objected because it was interracial, however the relationship continued (PC-T. 1131-34). On one occasion, prison officials caught them and Marc was locked up, yet he still continued his relationship with Mr. Sharp (PC-T. 1134-35). Mr. Sharp established that Marc associated with black inmates while he was in prison in Florida (PC-T. 1130). During the 1 year period that Mr. Sharp knew Marc, he estimated that Marc had friendly relationships with approximately 150 black inmates (PC-T. 1137). Mr. Sharp never saw Marc demonstrate any signs of racism (PC-T. 1130).

On cross examination Mr. Sharp admitted he did not see any racist tattoos on Marc and explained that if he had displayed a

[8]Robbie Asay was present during the offenses but was not charged.

racist attitude he would have run into problems (PC-T. 1148-49). Mr. Sharp testified that he had never seen him have a confrontation with any black inmates and that Marc seemed more at ease around black inmates. Any racist attitude displayed by Marc would have surprised Mr. Sharp (PC-T. 1163-64).

On redirect Mr. Sharp stated that he judges a man by his conduct and Marc's conduct was not racist (PC-T. 1181). He was not hateful towards blacks or homosexuals (PC-T. 1182). Racist conduct would not be consistent with Mr. Sharp's experiences with him (PC-T. 1182-83). During a court inquiry Mr. Sharp testified that Marc hung out with people of all races and that he didn't express any fear of black inmates while around Mr. Sharp (PC-T. 1194-95). Mr. Sharp did not observe Marc huffing any substances (PC-T. 1196-97). Mr. Sharp explained that he was not around him all the time. He was already in prison when Mr. Sharp arrived, and they met 3 to 4 months later (PC-T. 1191, 1193). Mr. Sharp testified he and Marc were primarily together when they were engaging in their sexual relationship, occurring between 10 and 20 times over the course of 1 year (PC-T. 1170). In addition to their relationship, Marc and Mr. Sharp engaged in conversation (PC-T. 1170). Mr. Sharp was not contacted before Marc's trial, and had he been asked he would have testified (PC-T. 1137).

The lower court then admitted the depositions of David Hunter, Douglas Stephens, and Joe Collins.

David Hunter was Marc's cell partner at Beto One Unit, in the Texas DOC and was Marc's good friend (PC-R. 288). Conditions

were difficult for Marc in prison (PC-R. 288-89). He was "a little blond haired blue-eyed kid, really, and a lot of people took advantage of him." Because he was so young he was targeted by other inmates. Mr. Hunter stated that black inmates often played "homosexual games" with Marc and tried to take his money (PC-R. 289-90). For example, the black inmates in the laundry would give him extra tight clothes to wear (PC-R. 291). The harassment Marc suffered in prison went much deeper than the clothes he had to wear. Black inmates would play "grab games" with him and put their hands on him and mess with him sexually (PC-R. 292). They also whistled at him when he was in the hallway and generally gave him a hard time to try and "draw [Marc] out and away from everybody else so they could do what they wanted to do with him" (PC-R. 293). Marc also had numerous physical encounters with black inmates (PC-R. 293). Mr. Hunter saw him jumped and beaten by black inmates (PC-R. 293). Mr. Hunter explained that black inmates did "a lot of stuff to [Marc] that shouldn't have happened" (PC-R. 293). This was not the treatment that every inmate received in prison. The black inmates "specifically just gave [Marc] a hard time" (PC-R. 293). Mr. Hunter tried to stay very close to Marc and protect him, he also tired to bring in other white people to protect him from the abuse he received in prison (PC-R. 294). Marc was approached by different organizations in prison, such as the Aryan Nation and the Ku Klux Klan, that offered protection if Marc would join (PC-R. 294-95). However, to Mr. Hunter's knowledge, Marc never

joined a racist organization (PC-R. 295). Mr. Hunter was aware of Marc's tattoos but stated he never witnessed Marc participate in gang activities (PC-R. 295-97). Mr. Hunter testified that although the harassment Marc received in prison did not completely stop after Marc got his tattoos a lot of the treatment disappeared (PC-R. 297). Marc would associate with people in gangs, and the gangs were known for their violence (PC-R. 297). This diverted attention away from Marc, or as Mr. Hunter stated, "you could say [Marc] hanging around them kind of like took everybody's eyes off of him" (PC-R. 297). Marc was not aggressive, even though he was treated horribly in prison and the people he associated with had a reputation for being violent. He was a "laid back person type of person" who tried to get along with everybody (PC-R. 289). Mr. Hunter testified that he had never witnessed Marc start a fight or take any kind of aggressive action toward any inmate (PC-R. 297-98). Mr. Hunter witnessed Marc abusing controlled substances "as an escape from what was going on" (PC-R. 298). Mr. Hunter testified that they would huff "glue, gas, paint thinner, whatever we could get our hands on" (PC-R. 298). Their huffing eventually became uncontrollable (PC-R. 298-99). By the time Mr. Hunter left Beto One Unit Marc was completely consumed with huffing; he was huffing substances all the time, almost every day (PC-R. 299). "All [Marc] wanted was the bag, that is all he cared about was getting that bag and getting something to huff, that is all he wanted" (PC-R. 300). Marc's huffing eventually started affecting him and changed his

attitude (PC-R. 300). He "became more aggressive towards anybody that wanted to mess with him (PC-R. 300). He also experienced mood swings (PC-R. 300). Mr. Hunter described the mood swings: "You never know what is going to happen. One minute you are best friends, the next minute you are arguing and fighting, and then, five minutes later you are friends again" (PC-R. 300). Despite all of Marc's experiences in prison, Mr. Hunter never knew him to utter disparaging racial comments or exhibit a racist attitude (PC-R. 300-01). Mr. Hunter testified that he was never contacted at the time of Marc's trial, and that he would have testified if asked (PC-R. 301-02).

On cross examination Mr. Hunter admitted that he had white pride and swastika tattoos (PC-R. 304). He associated with gang members, but he was not a member of any racist gangs (PC-R. 308-09). Mr. Hunter believes in segregation (PC-R. 321) and has made racial comments (PC-R. 311). However, on redirect and recross examination, Mr. Hunter explained that he had used the same language when talking about white inmates that he had when he talked about black inmates (PC-R. 323-24).

Douglas Stephens was also incarcerated at the Beto One Unit in the Texas Department of Corrections (Stephens Depo. 6)[9]. Mr. Stephens testified that "[i]t was all out war" between the white inmates and the black inmates at Beto One (Stephens Depo. 7). If a white inmate was not a "standup white boy" then that inmate

[9]The Stephens deposition is not paginated in the manner as the other materials in the record on appeal.

needed protection (Stephens Depo. 7). The weaker white inmates at Beto One "just didn't have a chance" (Stephens Depo. 7-8). Mr. Stephens described Marc as a young, good looking, weak inmate (Stephens Depo. 7). During his stay at Beto One, Marc was frightened for his life; he was scared about being raped and being beaten up (Stephens Depo. 7). He was constantly harassed by black inmates at Beto One (Stephens Depo. 8). Black inmates would whistle at him, holler at him, make sexual remarks toward him, and throw things at him (Stephens Depo. 8). Mr. Stephens testified that on one occasion Marc "was beat up real bad," and the beating was severe enough that he should have received medical attention, however, he was so scared that he would not go to the infirmary (Stephens Depo. 8). After Marc was beaten up, Mr. Stephens told him that the Aryan Brotherhood, of which Mr. Stephens was a member, would provide him protection (Stephens Depo. 9). Mr. Stephens emphasized that he offered Marc protection, not the Aryan Brotherhood (Stephens Depo. 13). The Aryan Brotherhood did not want to offer Marc protection because Marc would not prove himself. Mr. Stephens stated: "I seen Mark get in a fight, but all he done was protect hisself [sic]. He wouldn't initiate. And that's what the Brotherhood requires, I mean, for you to stand up and do what you got to do, and Mark wouldn't do that. I don't know what it was about the little dude, man. I just felt sorry for him" (Stephens Depo. 13-14). Even though Marc did not become a member of the Aryan Brotherhood (Stephens Depo. 12-13) he did receive protection, but he had to

stop associating with black inmates (Stephens Depo. 9). Mr. Stephens stated: "Mark, he wanted to get along with everybody, but when [the Aryan Brotherhood] protects somebody, you can't do that. . . I had a hard time convincing Mark of that." Mr. Stephens also talked Marc into letting himself be tattooed (Stephens Depo. 10). Mr. Stephens testified that he put the tattoos on him so that everybody would know that he had protection, however, he did not put the Aryan Brotherhood patch, a symbol of membership, on him (Stephens Depo. 10). Marc was still occasionally harassed by black inmates after he was tattooed (Stephens Depo. 11). Marc would want to talk to the black inmates and work out their differences through nonviolent means, but because he was receiving protection he was not supposed to talk with black inmates (Stephens Depo. 11). Mr. Stephens stated, "we took over then because we had done put the word out that . . . nobody was going to mess with Mark (Stephens Depo. 11). Mr. Stephens witnessed Marc huffing inhalants while he was in Beto One (Stephens Depo. 11). He would huff "paint, glue, anything he could get a hit of" to escape from the reality of what his life had become in Beto One (Stephens Depo. 11-12). For a three to four month period he would huff inhalants every day and would often pass out (Stephens Depo. 12). For example, once when Marc was mixing cement, other workers found him passed out from huffing inhalants in the cement shed (Stephens Depo. 12). He was eventually transferred to another job so he would not be around inhalants (Stephens Depo. 12-13). Nobody could get Marc

to stop huffing and when he was transferred he would get other people to bring inhalants to him (Stephens Depo. 13).

On cross examination Mr. Stephens testified that he witnessed black inmates make sexual remarks and harass Marc (Stephens Depo. 19-20). Mr. Stephens testified that he, himself, belonged to the Aryan Brotherhood and had an Aryan Brotherhood and other racial tattoos (Stephens Depo. 15). Mr. Stephens admitted that he used disparaging remarks when discussing the black inmates at Beto One (Stephens Depo. 19). Mr. Stephens heard Marc use disparaging remarks on occasion, but testified that he didn't like to refer to blacks in a derogatory manner because it "didn't do nothing but cause trouble" (Stephens Depo. 20).

Joe Collins met Marc Asay when he was a psychologist at the Beto One Unit (PC-R. 335). When Marc first came to the prison he sent a request to talk with Mr. Collins, and even though he had no diagnosable mental illnesses at the time, he was afraid and was having trouble with other prisoners (PC-R. 337). He was a frail, good-looking kid who was not aggressive (PC-R. 337-38). The prison was full of predators and Marc needed help (PC-R. 338). When Marc was in prison the racial tensions were high and gang activity was creating real problems in the prison (PC-R. 338). Mr. Collins and Marc spoke several times because Marc was having problems with black inmates in prison, (PC-R. 339) and these problems occurred on several occasions (PC-R. 340). After one such occasion Marc came to see Mr. Collins and he had "been

severely beaten; really as good a whooping as I've seen." He "was black, blue, eye was cut, lip was cut, he'd really been beaten; and he told me that this was done by black inmates" (PC-R. 340). Marc did not initiate confrontations with the black inmates, Marc's conflicts "were just troubles that he had from the normal predators in the black population that wanted his money, his shoes, his body, so forth" (PC-R. 340). To protect himself from the abuse he received in prison, he "aligned himself with some of the stronger, stand-up white boys" (PC-R. 341). However, he was not a gang member and he did not participate in gang activity (PC-R. 341). Mr. Collins explained that Marc was a good prisoner and was not a disciplinary problem (PC-R. 340). Marc "just wanted to make it" (PC-R. 340). He described Marc as "a prisoner that stood out in my mind as someone who was just trying to make it in our system, someone conscientious, someone that I had sort of adopted, someone that I'd helped and became associated with professionally. This probably happened less that five times in my career" (PC-R. 363). Marc was a chronic inhalant abuser while he was in prison; it "was a vice that he couldn't resist" (PC-R. 341-42). Mr. Collins, as a psychologist, and later as assistant warden, was in the infirmary often and had access to Marc's records (PC-R. 342). There were several entries in Marc's psychiatric record concerning his inhalant abuse (PC-R. 342).

On cross examination Mr. Collins testified that he usually saw Marc two to three times a week (PC-T. 345). He remembered

Marc because he was one of the few prisoners that stood out in his mind (PC-R. 347). When asked if Marc got along with the black inmates, Mr. Collins stated that it wasn't a matter of getting along; Marc was afraid (PC-R. 349-50). Mr. Collins also remembered that he "was an inhalant abuser, and when he could get something to inhale, to get high, he would do that" (PC-R. 356). Mr. Collins stated that at the time of Marc's trial his records were retired, and once Marc was out of the system he would not have had access to his records (PC-R. 361-62). Mr. Collins stated that he was not contacted at the time of Marc's trial and he would have testified (PC-R. 342).

Postconviction counsel rested (PC-T. 1206). The testimony collateral counsel presented went unrefuted, as the State did not present any witnesses (PC-T. 1206). The only evidence the State admitted was Dr. James Vallely's report and notes (PC-T 643-47) and Thomas Gross' sworn statement, deposition, and trial testimony (PC-T. 1090-91).[10]

Written closing arguments were submitted and the lower court entered its Order Denying Motion for Postconviction Motion on April 23, 1997 (PC-R. 262-75).

SUMMARY OF THE ARGUMENT

Marc Asay was an unwanted, unloved child who was brutally physically and emotionally abused. As a child, Marc had his faced rubbed in his own excrement as punishment for soiling his

[10]Although Thomas Gross' statement, deposition, and trial testimony was taken into evidence, it was introduced through proffer (PC-T. 1091).

pants. As a preteen, Marc was used by older men for sex. As a young adult he suffered brutality in the Texas prison system. As a defendant in the judicial system, he was denied rudimentary constitutional rights to which he was entitled. The lower court's bias against Mr. Asay prevented him from receiving a fair trial, sentencing and postconviction proceeding. The lower court's bias infected Marc's trial, sentencing, and the instant proceedings. At the evidentiary hearing the lower court refused to hear critical testimony. When the lower court did allow testimony, its presentation was limited. The lower court also erroneously summarily denied many of Mr. Asay's postconviction claims. Mr. Asay was also denied the effective assistance of counsel during both the guilt and penalty phase of his trial.

ARGUMENT I

MR. ASAY WAS DENIED A FAIR AND IMPARTIAL TRIBUNAL THROUGHOUT HIS PROCEEDINGS IN VIOLATION OF HIS DUE PROCESS RIGHTS. HE HAS BEEN DENIED HIS RIGHTS TO A FULL AND FAIR ADVERSARIAL TESTING AND HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING FLORIDA LAW.

A. The Lower Court's Order Denying Motion for Post-Conviction Relief should be reversed and the matter remanded for a new evidentiary hearing because the lower court erroneously denied Mr. Asay's legally sufficient motion to disqualify Judge Haddock from the 3.850 proceeding.

Judge L. P. Haddock presided over Mr. Asay's trial and postconviction proceedings. Prior to Mr. Asay's evidentiary hearing collateral counsel filed a Motion to Disqualify Judge (PC-R. 75). Collateral counsel detailed the grounds for disqualification, one of which occurred during jury selection,

due to the following exchange that took place between the state attorney, a venireperson, and Judge Haddock:

> MR. de la RIONDA: Would you follow the law? If you didn't find any aggravating factors which would deal the the merit of the death penalty, could you sentence -- say, I'm not recommending death, if there was not aggravating factors whatsoever, in accordance with the jury's --
>
> ***
>
> A VENIREMAN: Again, I haven't heard what's been said yet, but again, as I say, I guess I have such strong feelings about it, if I feel like it's premeditated, I just don't see any reason what could be mitigating circumstances when you premeditate it. I mean, when you though about it at the time and went out -- I mean, I understand there can be a great deal going on through a person's mind, but if you have time to think about something like this, you realize how wrong it is, and that it's not your responsibility to take this life, and there are other ways to solve problems -- and, like I say, it's just something about it, I'm very opposed to, like I say, paying for somebody to sit in a jail and rot for years and years and years and years and years.
>
> ***

(And thereupon a bench conference was had out of the hearing of the jury as follows:)

> [**JUDGE HADDOCK**]: I think what we ought to do is let him off the jury, but put him on the Supreme Court.

(R. 350-351)(emphasis added).

The literal import of Judge Haddock's statement is that he, like the venireman, favored the death penalty for any premeditated murder. The venireman was removed from the panel for his inability to follow the law, however Judge Haddock continued to preside over Mr. Asay's trial despite the fact that he demonstrated his bias by virtually agreeing with the venireperson in that any first degree murder would result in the

death penalty. This sentiment is against Florida law as dictated by this Court.[11] Judge Haddock's clear bias did not end with that statement however. Judge Haddock reiterated his bias in favor of the death penalty (before the state rested its case):

> THE COURT: The First District Court of Appeals won't hear the appeal in this case if there is a first degree conviction of murder, but I think that still -- find that case for me, I haven't read it in years, this issue hasn't come up in a long time.

(R. 740)(emphasis added). Judge Haddock's comments were made before the state rested its case. Judge Haddock's bias is clear. It is well settled that the only appeals from first degree murder convictions not heard by the district courts of appeal are those in which the death penalty is imposed. See Fla. Stat. 921.141(4) (1997). At that moment, Judge Haddock exposed his predetermined opinion that Mr. Asay's case was going to be heard by this Court, to wit: death would be the result. Judge Haddock's statement revealed that he had already determined that he would sentence Mr. Asay to death before the state presented its entire case, before Mr. Asay presented his case, and before the presentation of any facts that may have mitigated the sentence. In reaching the conclusion that death was the appropriate sentence, Judge Haddock necessarily predetermined that Mr. Asay was guilty. Mr. Asay was denied the rudimentary right to have his case heard before a neutral, unbiased judge. Instead, Judge Haddock determined that Mr. Asay was guilty and that he would sentence

[11]Mr. Asay's trial attorney failed to raise this issue at trial and was ineffective for failing to do so. See, Argument IV.

him to death - shockingly, before all of the evidence was presented. Allegations of such predeterminations on the part of the trial judge are legally sufficient grounds to support a motion to disqualify. See, Ziegler v. State, 452 So. 2d 537 (Fla. 1984); Porter v. State, No. 90101, 1998 WL 716699 (Fla. Oct. 15, 1998).

As further grounds, Mr. Asay's Motion to Disqualify Judge noted the following from the Judge Haddock's Order of Discharge and Payment of Attorney's Fees, where the he concluded:

> This placed the Court in the same position as it was when the Defendant was first charged, and the Judge again gave a great amount of time and consideration to choice of counsel who had to be an attorney with extensive knowledge and experience and someone willing to represent an unsympathetic, discordant and uncongenial Defendant and at the same time endure the wrath and hostility of the victim's parents and friends

(PC-R. 78)(emphasis added). Judge Haddock's own words that he looked hard for an attorney to represent Mr. Asay, whom he described as "unsympathetic, discordant and uncongenial" in and of themselves was proof that Judge Haddock was biased against Mr. Asay from the very start.

The Motion to Disqualify Judge also asserted ex parte communication between the trial judge and Mr. Asay's trial counsel. Allegations of ex parte communications on the part of the trial judge are legally sufficient grounds to support a motion to disqualify. Ex parte communications concerning a matter before a court violates the concept and appearance of impartiality and may rise to the level which would require disqualification of the judge. Love v. State, 569 So. 2d 807

(Fla. 1st DCA 1990); Martin v. Carlton, 470 So. 2d 875 (Fla. 1st DCA 1985). See also, The Code of Judicial Conduct, Canon 3(b)(7); Barwick v. State, 660 So. 2d 685, 692 (Fla. 1995).

Judge Haddock denied the motion stating that it was "not legally sufficient, and states no grounds upon which recusal should or could be based." (PC-T 84). The ultimate inquiry when ruling upon a motion to disqualify is "whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial." Rogers v. State, 630 So. 2d 513, 515 (Fla. 1993) (quoting Livingston v. State, 441 So. 2d 1083, 1087 (Fla. 1983)). This determination must be based solely on the alleged facts. A judge "shall not pass on the truth of the facts alleged." Fla. R. Jud. Admin. 2.160(f).

In Judge Haddock's Order Determining Issues to Be Heard at Evidentiary Hearing, however he expanded upon his reasons for not recusing himself. The judge noted that the recusal issue was again raised in Mr. Asay's 3.850 motion, and stated that "the entire theory underlying this claim is the defendant's 'belief' that when the court wrote the words 'victim's parents and friends', it really meant 'the defendant's family and friends'. Such an imaginary, speculative, and indeed preposterous proposition cannot be the basis for recusal of the trial judge in a 3.850 motion." By virtue of this statement, Judge Haddock addressed the truth of the allegation in the Motion to Disqualify Judge which is improper. These statements in and of themselves are sufficient grounds for recusal. See Cave v. State, 660 So.

2d 705 (1995)(when a judge looks beyond the mere legal sufficiency and attempts to refute charges, that basis alone establishes grounds for disqualification); see also Leverritt & Assoc. v. Williamson, 698 So. 2d 1316 (Fla. 2d DCA 1997); Edwards v. State, 689 So. 2d 1251 (Fla. 4th DCA 1997).

The facts alleged in Mr. Asay's Motion to Disqualify Judge demonstrated that Mr. Asay reasonably feared that he could not receive a fair evidentiary hearing from Judge Haddock. The Motion to Disqualify Judge should have been granted. Instead Judge Haddock continued to preside over Mr. Asay's postconviction proceedings. As demonstrated in the next section, Mr. Asay's fear that Judge Haddock would be biased and that he would not receive a fair hearing came true.

B. Judge Haddock erroneously denied Asay's 3.850 claim that he was in fact biased against him at trial.

In Mr. Asay's 3.850 motion counsel raised the issue that Judge Haddock was biased against Mr. Asay during his trial (PC-T. 97-101). Unlike the standard employed in determining a motion to disqualify where the judge shall not pass on the truth of the facts alleged, this claim required proof that the allegations were in fact true, and that Judge Haddock was actually biased in the underlying trial and sentencing.

Judge Haddock found the claim was procedurally barred (PC-T. 66), even though the issue could not be raised on direct appeal because trial counsel had not moved to recuse Judge Haddock. The files and records in Mr. Asay's case by no means show that Mr. Asay was entitled to "no relief" and certainly not

"conclusively". Hoffman v. State, 571 So. 2d 449 (Fla. 1990); Lemon v. State, 489 So. 2d 923 (Fla. 1986). In fact, the record proof established through Judge Haddock's own words that he was biased against Mr. Asay. This is why Mr. Asay's Motion to Disqualify Judge was proper and Judge Haddock committed reversible error in the first instance by refusing to grant it. Judge Haddock repeated the error when he summarily denied Mr. Asay's postconviction claim that he was biased. Mr. Asay was entitled to show collateral proof outside the trial records as to whether Judge Haddock had predetermined his sentence and whether he had participated in ex parte discussions that actually biased him against Mr. Asay. Proper proof of the truth of the allegations would have required Judge Haddock to be a witness in the proceedings, which was impossible given his refusal to disqualify himself. The only avenue available for raising this claim was in Mr. Asay's 3.850 motion. "In the Florida sentencing scheme, the sentencing judge serves as the ultimate factfinder. If the judge was not impartial, there would be a violation of due process. The law is well established that a fundamental tenet of due process is a fair and impartial tribunal." Porter, No. 90101, 1998 WL at *4 (quoting Marshall v. Jerrico, Inc., 446 U.S. 238 (1980)). Mr. Asay is entitled to prove that Judge Haddock was biased and that the bias violated his due process rights.

C. Judge Haddock's bias against Mr. Asay permeated the entire case as reflected in Judge Haddock's Order Denying Relief on Mr. Asay's Postconviction Motion.

As demonstrated in sections A and B above, Judge Haddock was biased against Mr. Asay from jury selection through postconviction proceedings. Judge Haddock's bias against Mr. Asay is demonstrated throughout his Order Denying Motion for Postconviction Relief.

Judge Haddock's Order Denying Motion of Postconviction Relief demonstrates the extent to which Mr. Asay was denied a full and fair evidentiary hearing through Judge Haddock's own words regarding Mr. Asay's ineffective assistance of counsel claim:

> Mr. David is an extremely experienced and talented criminal defense lawyer who was and is well able to weigh the value of such potential testimony against the high price of losing the second closing.

(PC-R. 265)(emphasis added).

Judge Haddock vouched for Mr. David when he stated that Mr. David is a "talented criminal defense lawyer who was and is well able . . . ." Judges simply are not allowed to vouch for a witness. Mr. David was a witness. Judge Haddock relied upon his own opinion regarding Mr. David's talent and ability. Consequently, Mr. Asay was not given a fair opportunity to present his ineffective assistance of counsel claim before an impartial and neutral judge. Judge Haddock was under a duty to evaluate the claim and evidence presented on the basis of 1) was there deficient performance and 2) if so, was Mr. Asay prejudiced. Instead, Judge Haddock used his own "evidence" that Mr. David "was and is well able" and "talented".

Judge Haddock's Order Denying Motion for Postconviction Relief further demonstrates his bias against Mr. Asay. In discussing witness Johnny Sharp Judge Haddock stated:

> The witness Johnny Sharp provided one of the most bizarre and amusing, albeit useless moments of courtroom experience that the undersigned has ever observed.

(PC-R. 266).

Johnny Sharp, was a witness who could have testified at trial in order to rebut the State's theory that the offense was racially motivated and that Mr. Asay deserved death. Mr. Sharp testified that he had a sexual relationship with Mr. Asay. Judge Haddock described the relationship in his order as "promiscuous and perverted" (PC-R. 266)(emphasis added). Judge Haddock's characterization of the consensual homosexual relationship between Mr. Sharp and Mr. Asay as "perverted" goes well beyond that of a judge deciding a case on the merits and law.

Unfortunately, due to judicial bias, the lower court's rulings are now tainted by a cloud of impropriety.

ARGUMENT II

MR. ASAY WAS DENIED A FULL AND FAIR EVIDENTIARY HEARING AND THEREBY DENIED HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH AND EIGHTH AMENDMENTS AND CORRESPONDING FLORIDA LAW BECAUSE OF THE LOWER COURT'S REFUSAL TO CONSIDER RELEVANT ADMISSIBLE EVIDENCE AT MR. ASAY'S EVIDENTIARY HEARING.

Post conviction litigation is governed by principles of due process. Teffeteller v. Dugger, 676 So. 2d 369 (Fla. 1996); Holland v. State, 503 So. 2d 1250 (Fla. 1987). These

constitutional principles guarantee Mr. Asay a right to present a full and fair defense. See Lewis v. State 591 So. 2d 922, 925 (Fla. 1991); Roberts v. State, 510 So. 2d 885, 892 (Fla. 1987). Mr. Asay was deprived of this constitutional right throughout his evidentiary hearing.

A. Mr. Asay was denied a full and fair evidentiary hearing because the lower court erred in refusing to consider the testimony of Thomas Gross recanting his trial testimony and alleging that the State Attorney assisted and coerced the fabrication and presentation of false testimony.

Thomas Gross was a critical witness in the guilt phase of Mr. Asay's trial. The lower court refused to allow collateral counsel to present either Thomas Gross' complete recantation of his testimony or his allegations that the State Attorney induced and participated in the fabrication and presentation of the testimony.

In his 3.850 motion Mr. Asay alleged that at trial the State "called one witness whose only purpose was to portray Mr. Asay as a racist and whose testimony the State knew to be wholly false, misleading, and in exchange for undisclosed benefit," in violation of Giglio v. United States, 405 U.S. 150 (1972) and Brady v. Maryland, 373 U.S. 83 (1963)(PC-R. 140; Claim XI). The motion identified Gross, citing the pages of the record where he testified. At the Huff hearing, collateral counsel specifically mentioned the Giglio and Brady violation and stated that the allegation was a statement of fact which Mr. Asay could prove if given the opportunity (PC-R. 395).

Collateral counsel was never given the chance to prove Gross lied at trial with the knowledge and assistance of the State Attorney because the lower court refused to grant a hearing on this issue. In its Order Determining Issues to be Heard at Evidentiary Hearing, the lower court denied the claim stating that it raised "issues of inflammatory and improper prosecutorial arguments and conduct," which had previously been decided on direct appeal (PC-R. 69; denial of claim XI). It is true that issues concerning inflammatory evidence and comments were raised on direct appeal; however, there was never an issue on direct appeal that Gross' testimony, including the inflammatory comments, were false and made with the prodding of the State who knew they were false.

Recantations are properly presented in collateral hearings. State v. Spaziano, 692 So. 2d 1742 (Fla. 1997). The issue whether Gross' testimony was false, misleading and procured in exchange for unknown benefit was not raised on direct appeal and was not procedurally barred. On the merits, the allegations, if true, constitute a due process violation of the worst kind.

Government misconduct which violates the constitutional due process right of a defendant requires dismissal of criminal charges. See Anderson v. State, 574 So. 2d 87 (Fla. 1991); State v. Glosson, 462 So. 2d 1082 (Fla. 1985). Government misconduct resulting in a distortion of the fact-finding process is an adquate ground for dismissal. State v. Nessim, 587 So. 2d 1344 (Fla. 4th DCA 1991). Further, prosecutorial misconduct occurs

when law enforcement influences, biases and injects information into the testimony of a witness through its pretrial interviews. Mathews v. State, 44 So. 2d 664, 669 (Fla. 1950); Coleman v. State, 491 So. 2d 1206 (Fla. 1st DCA 1986); Lee v. State, 324 So. 2d 694 (Fla. 1st DCA 1976); see also Fla. R. Regulating Fla. Bar 4-3.3(a) ("A lawyer shall not knowingly: . . . (4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.")

At Mr. Asay's evidentiary hearing, collateral counsel proffered the testimony of Thomas Gross. Gross would have testified that Mr. Asay never confessed to him while they were in jail together (PC-T. 1057). Mr. Asay showed Gross newspaper articles and told Mr. Gross what the police were saying he did (PC-T. 1057). Gross saw this as an opportunity to benefit himself, because he was facing charges. He had his attorney contact the state attorney and relay that he had information regarding Mr. Asay's case (PC-T. 1057).

Gross met with the state attorney, Bernie de la Rionda, and told him what he had read in the articles and what information the police had relayed to Mr. Asay (PC-T. 1958). Mr. de la Rionda then showed Gross pictures of Mr. Asay's tattoos, specifically the white pride and swastika (PC-T. 1058). Gross and Mr. Asay previously discussed Mr. Asay's tattoos, however, they never talked about the tattoos that Mr. de la Rionda pointed out to Gross (PC-T. 1058).

Mr. Gross would have testified that Mr. de la Rionda helped him fabricate his testimony (PC-T. 1058). Mr. de la Rionda smiled and winked at Mr. Gross while asking him "Mark Asay told you that he shot some niggers, didn't he" and "[n]ow, you're sure that Asay related to you that he is prejudiced, didn't he?" Mr. de la Rionda emphasized the words "didn't he", Mr. Gross followed his lead and replied yes (PC-T. 1058-59). Mr. Gross rehearsed his testimony with the state attorney who reworded his answers so they were more inflammatory and damaging to Mr. Asay (PC-T. 1059-60). For example, Mr. de la Rionda told Gross to look directly at the jury and say "Mark Asay said I shot them niggers" (PC-T. 1059-60).

Marc Asay never confessed to Thomas Gross (PC-T. 1060). Mr. Asay never even uttered a racial comment in his presence (PC-T. 1060). However, Gross was facing charges and the state attorney promised him that he could get his sentence reduced (PC-T. 1060). Therefore, Gross took advantage of Mr. Asay and formed a partnership with the state attorney; the goal being to convict Mr. Asay of first degree murder (PC-T. 1060).

Mr. Gross gave a sworn statement in October of 1987 (PC-T. 1060). After giving the sworn statement Gross decided not to testify against Mr. Asay, because he knew that his statement was a lie, and refused to give a deposition (PC-T. 1060). Mr. de la Rionda then told Gross that if he did not testify willingly he would force him to get on the stand and if he changed his testimony he would be prosecuted for perjury (PC-T. 1061). Gross

felt threatened by Mr. de la Rionda so he decided to testify falsely against Mr. Asay (PC-T. 1061).

While coaching Gross' testimony, the state attorney showed Mr. Gross a picture of one of the victims in Mr. Asay's case and told Gross that one of the victims was shot in the chest with a .25 caliber gun and that the bullets partially caved in the man's chest (PC-T. 1061-62). Gross was also shown a crime scene photo from another homicide case Mr. de la Rionda was prosecuting and was told that the state might need a confession in that case (PC-T. 1062).[12] Mr. de la Rionda told Gross that he would try and place Gross in a cell with the defendant from the other homicide case and that Gross should come forward, like he did in Mr. Asay's case, and announce the defendant confessed to the crime (PC-T. 1062).

At the evidentiary hearing, collateral counsel specifically recounted Thomas Gross' allegations and asked the lower court to reconsider its summary denial of the claim (PC-T. 477-89). Despite hearing allegations of the worst possible type of governmental misconduct that could not have been raised on direct appeal, the lower court refused to consider the claim (PC-T. 489). The issue was not procedurally barred; accordingly, the matter should be remanded for an evidentiary hearing on this issue.

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[12]The proffer of Thomas Gross' testimony described the crime scene in detail (PC-T. 1063). Mr. Asay's counsel also proffered a drawing, done by Mr. Gross, of the crime scene (PC-T. 1064; Defense Exhibit J).

B. Mr. Asay was denied a full and fair evidentiary hearing because the lower court erroneously refused to consider the Gross recantation in connection with the claim that trial counsel was ineffective for failing to investigate or prepare for the examination of Thomas Gross and that substantial evidence existed that demonstrated his testimony was false, misleading, and unreliable.

Thomas Gross' testimony was also relevant to the guilt phase ineffective assistance of counsel claim that was the subject of the evidentiary hearing. Collateral counsel alleged that trial counsel was ineffective for failing to investigate or prepare for the examination of Mr. Gross[13] and substantial evidence existed that demonstrated his testimony was false, misleading, and unreliable (PC-R. 17-18; Claim IV). Mr. Asay's 3.850 motion also alleged that "[u]nder sixth amendment principles, it matters not whether counsel's failing is the result of his own deficient performance or the product of external forces which tie counsel's hands and constrain his performance" (PC-R. 102.; Claim IV).

At the evidentiary hearing, trial counsel, Mr. David, stated that the "gist" of his argument to discredit Thomas Gross was that he was receiving more for his testimony than he admitted and "nobody does something for nothing" (PC-T. 511). Mr. David also stated that he did not have any evidence that Thomas Gross received an additional benefit for his testimony or that his testimony was in any way untruthful.

If Mr. David knew that the state attorney had told Gross what to say he would have presented that to the jury (PC-T. 511-

[13] Collateral counsel also included the names of Bubba O'Quinn, Charles Moore, Danny Moore, and Robert Asay.

12). Mr. David would have informed the jury that Mr. de la Rionda told Gross it was important to use the word "nigger" and to discuss Mr. Asay's tattoos (PC-T. 513). Most importantly, Mr. David would have disclosed to the jury that Mr. de la Rionda made additional promises to Gross and threatened to prosecute him for perjury if his testimony differed from his deposition (PC-T. 513, 515). However, Mr. David could not present any of this to the jury because the state attorney did not disclose this information (PC-T. 511-13).

The information that the state attorney did not disclose to Mr. David was critical because Gross was one of the state's most important witnesses. The state used Gross to establish racism as a motive and to testify that Mr. Asay received his tattoos in prison (PC-T. 514). The fact that Mr. Asay had previously been in prison was damaging information that Mr. David tried to keep out of the trial (PC-T. 514). In fact, one of the reasons Mr. Asay did not take the stand was to keep information regarding his prior incarceration away from the jury (PC-T. 514).

The information the state attorney did not disclose would have allowed Mr. David to effectively impeach Gross' testimony and would have benefited Mr. Asay's case (PC-T. 515). The information would also have hurt the state's case by diminishing Mr. de la Rionda's credibility (PC-T. 515-16). Mr. David testified that, if the allegations against Mr. de la Rionda were true, he would consider Mr. de la Rionda's conduct interference with his defense (PC-T. 517).

In deciding whether to allow Mr. Gross' testimony in connection with the ineffective assistance of counsel claim, the lower court was concerned with whether state interference could render trial counsel ineffective. After hearing argument on the issue, the lower court erroneously agreed with the state's position that state conduct could not render counsel ineffective. The court stated that Mr. Gross' testimony did not relate to "a proper issue that could be raised under [Asay's] ineffective assistance of counsel claim" (PC-T. 1044). The lower court's refusal to hear and consider the testimony of Thomas Gross was error. Brady, 373 U.S. 83; Giglio, 405 U.S. 150; Strickland v. Washington, 468 U.S. 668 (1984).

C. The trial court improperly quashed the subpoena duces tecum for state attorney files that would have corroborated Thomas Gross' testimony thereby denying Mr. Asay a full and fair evidentiary hearing to which he is entitled.

The proffer of Mr. Gross' testimony showed that after helping him fabricate his testimony against Mr. Asay, the prosecutor sought Gross' help in another murder case. Mr. de la Rionda informed Mr. Gross that he was working on another murder case where he might need a jail house confession. He was going to attempt to place Gross in the cell of the defendant and informed Gross that he should come forward and proclaim that the defendant confessed to him. To aid him in this endeavor, Mr. de la Rionda showed Gross pictures of the crime scene. Collateral

counsel proffered a drawing, done by Gross, of the crime scene (Defendant's Exhibit J).[14]

At Mr. Asay's evidentiary hearing collateral counsel served a subpoena duces tecum on the prosecutor to obtain records that would document whether the crime scene Gross described existed. The State objected to the subpoena because it called for the state attorney to testify. Without hearing argument on the duces tecum portion of the subpoena the lower court quashed the subpoena in its entirety (PC-T. 447-76).

Collateral counsel filed a public records request pursuant to Chapter 119, Florida Statutes and Brady v. Maryland, on the Jacksonville State Attorney's Office (Supp. PC-R. 76-78). This request asked for access to homicide cases prosecuted or investigated by their office between June 1, 1987 and December 31, 1988. Collateral counsel sent two follow up requests, all with no response (Supp. PC-R. 80, 82). As the State never responded to Mr. Asay's public records request, collateral counsel filed a Motion to Compel Disclosure of Documents Pursuant to Chapter 119, Florida Statutes on September 3, 1996 (Supp. PC-R. 72-83). The motion was never ruled upon.

On March 6, 1997 counsel filed a Motion to Compel pursuant to Chapter 119, Florida Statutes and Florida Rule of Criminal Procedure 3.852 (PC-R. 214-24). The motion alleged that the Jacksonville State Attorney's Office still had not complied with Mr. Asay's public records request. Again, this motion has never

[14]Subsequent Motions to Compel have never been ruled upon.

been ruled upon. This was error and the matter should be remanded to the trial court.

The records Mr. Asay requested would have corroborated Thomas Gross' testimony. The intimate details recounted at the evidentiary hearing through proffer regarding the crime scene could only have originated from the state attorney's office. Yet, Thomas Gross was privy to these details. Mr. Asay is entitled to these records. This Court has held that capital post-conviction defendants are entitled to Chapter 119 records disclosure. Mordenti v. State, 711 So. 2d 30 (Fla. 1998); Ventura v. State, 673 So. 2d 479 (Fla. 1996); Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993); Muehleman v. Dugger, 623 So.2d 480 (Fla. 1993); State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990). See also Mendyk v. State, 592 So. 2d 1076 (Fla. 1992).

D. Mr. Asay was denied a full and fair evidentiary hearing because the lower court limited the mitigation testimony. This was error.

All of Marc's siblings testified about the physically, verbally, and emotionally abusive household where Marc Asay was raised. Each sibling recounted similar horrors and added some of their own. Yet, the lower court and this Court are not aware of the full extent of the abuse Marc suffered because the lower court limited the mitigation testimony of Marc's siblings.

The lower court refused to hear Tina Logan's testimony that when she was fourteen and Marc was seven she attempted suicide for the first time (PC-T. 946). Harry, the childrens'

stepfather, was molesting Tina (PC-T. 947). Tina testified that she did not know how to stop the sexual abuse and her mother would not stop it, so she tried to kill herself. Despite living in the household at the time, going to the hospital to visit Tina, and Tina's testimony that Marc knew about the suicide attempt, the judge ruled that the testimony was irrelevant and struck it from the record (PC-T. 946-50).

Marc's other sister, Dee Fox, lived with her biological father for the first years of her life. However, the lower court prohibited from her recounting what her life was like and whether she had any contact with her mother during the first few years of her life (PC-T. 965). When Dee was twelve and Marc was two, she moved in with her mother and lived in the same household as Marc. Dee testified that her mother was not home very much at this time, and that Marc's biological father, Otto Asay, sexually molested her and Gloria (PC-T. 966). However, the lower court struck this testimony. Dee eventually left her mother's house and returned to her father, however, the lower court would not let her explain why she had to leave her mother's household (PC-T. 971).

For the short period of time that Dee lived in the household she raised Marc because their mother was never home. When Marc was a teenager he left his mother's house and resided with Dee (PC-T. 974-75). The lower court refused to allow Dee to explain why Marc left his mother's house and lived with her and her husband (PC-T. 976).

Because Marc's mother did not want anything to do with him when his was born, Gloria Dean, Marc's older sister, cared for him when he was an infant (PC-T. 981-82). However, the lower court prohibited Gloria from testifying about how their mother treated Marc when he was born and the neglect he received from her (PC-T. 981-83). The lower court commented that Marc could not know "who was changing his diaper," and ruled the testimony was irrelevant (PC-T. 983). Therefore, the court did not consider that Marc's mother never wanted him, that she was rarely at home when he was an infant, and that she abrogated her responsibilities to care for Marc to her daughters. Most importantly, the lower court deemed irrelevant that Marc was robbed of the special bond between a mother and her newborn child.

Gloria also described the beatings the children received from their mother and their father. Marc was out of diapers by this time, so the lower court considered the beatings inflicted upon Marc. The court did not however allow Gloria to testify about the beatings she received (PC-T. 985) even though the children were living under the same roof and were aware of the abuse being inflicted upon each other. The lower court also precluded Gloria from explaining how her mother changed when her stepfather left the home. The lower court deemed Gloria's testimony regarding her mother's increased rage and absence irrelevant (PC-T. 986). The sentencing jury and this Court are entitled, and indeed required, to consider all evidence of

mitigation where death is the ultimate penalty. Lockett v. Ohio, 438 U.S. 586 (1978).

E. Mr. Asay was denied a full and fair evidentiary hearing because the lower court refused to consider evidence of inconsistent statements made by key state witnesses in conjunction with Mr. Asay's claim of ineffective assistance of counsel.

During the evidentiary hearing, postconviction counsel attempted to demonstrate that Mr. Asay's trial counsel was ineffective because he failed to cross examine key state witnesses with available inconsistent statements. The lower court prohibited postconviction counsel from presenting this evidence. Postconviction counsel proffered notes establishing the inconsistencies that trial counsel failed to use at trial (PC-T. 602-605, 613-615).

The lower court erred in limiting Mr. Asay's counsel from establishing this claim. Accordingly, Mr. Asay was denied his right to a full and fair evidentiary hearing.

ARGUMENT III

THE TRIAL COURT ERRED IN DENYING MR. ASAY'S INEFFECTIVE ASSISTANCE OF PENALTY PHASE COUNSEL CLAIM. MR. ASAY HAS BEEN DENIED A FULL ADVERSARIAL TESTING AND HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING FLORIDA LAW.

Unless a sentencer can consider "compassionate and mitigating factors stemming from the diverse frailties of humankind," a capital defendant will be treated not as a unique human being, but rather as a "faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). This is

exactly what happened to Marc Asay. Compelling evidence of who he was and where he came from, was never presented at trial.

A. Trial counsel did not conduct an adequate investigation for Mr. Asay's penalty phase.

Before Mr. Asay's case, appellant's trial counsel never presented a penalty phase to a jury (PC-T. 501). At Mr. Asay's penalty phase, trial counsel presented the testimony of two witnesses: Dr. Earnest Miller (a psychiatrist who never examined Marc Asay) testified regarding the effect alcohol has on a normal person (R. 1014-18); and Mr. Asay's mother testified that Mr. Asay was a decent person[15] (R. 1023-31).

At the time of Mr. Asay's penalty phase, the only information trial counsel knew regarding Mr. Asay's childhood was that it "had not been a great one," and that there were problems with Mr. Asay's mother leaving the children alone for lengths of time (PC-T. 525-26). Trial counsel did hire an investigator who contacted Mr. Asay's mother. Yet, trial counsel could not remember whether the investigator contacted her before or after the guilt phase verdict or whether the investigator contacted <u>any</u> other mitigation witnesses (PC-T. 504). Each witness at the evidentiary hearing testified that they had not been contacted by Mr. David at the time of the trial. In fact Tina Logan, Marc's sister, testified that she tried to contact Mr. David, however, he never returned her call (PC-T 944-45).

[15] Trial counsel also introduced letters, that Mr. Asay had drawn roses on, to the jury (R. 1028).

If Mr. David had contacted Mr. Asay's siblings or done a competent investigation he would have uncovered a wealth of mitigation. While fully set forth in The Statement of the Case and Facts, Mr. Asay's collateral investigation revealed that Marc Asay was an unwanted child who was brutally physically abused as a child. Child abuse is a mitigating factor. See, Jackson v. State, 704 So. 2d 500, 506-507 (Fla. 1998); Chandler v. State, 702 So. 2d 186, 200 (Fla. 1997);Boyett v. State, 688 So. 2d 308, 310 (Fla. 1997); Strausser v. State, 682 So. 2d 539, 540 at n. 3, 542 (Fla. 1996); Campbell v. State, 571 So. 2d 415 (Fla. 1990) Marc's parents never showed any affection to him and were emotionally abusive. Emotional abuse is an accepted mitigating circumstance. See, Pomeranz v. State, 703 So. 2d 465, 472 (Fla. 1997); Hunter v. State, 660 So. 2d 244, 254 (Fla. 1995);Turner v. State, 645 So. 2d 444, 448 (Fla. 1994). His stepfather chained the refrigerator and would beat him if he ate a piece of bread. Hunger, deprivation, and malnutrition are accepted mitigating circumstances. See, Hall v. State, 614 So. 2d 473, 478 (Fla. 1993);Jones v. State, 580 So. 2d 143, 146 (Fla. 1991);Stevens v. State, 552 So. 2d 1082, 1085, 1085 at n. 8 (Fla. 1989) Marc grew up in a neighborhood where if "you wanted something you had to steal it." Growing up impoverished is an accepted mitigating circumstance. See, Foster v. State, 614 So. 2d 455, 461 (Fla. 1993);Maxwell v. State, 603 So. 2d 490, 492 (Fla. 1992); Meeks v. Dugger, 576 So. 2d 713, 716 (Fla. 1991). As a young boy Marc was used by older men who would get him drunk in exchange for sexual

favors. Mr. Asay had an extensive history of alcoholism and regularly "huffed" inhalants while in prison. History of alcohol, substance, and inhalant abuse is an accepted mitigating circumstance. See, Mahn v. State, 714 So. 2d 391 (Fla. 1998);Morgan v. State, 639 So. 2d 6, 14 (Fla. 1994);Knowles v. State, 632 So. 2d 62 (Fla. 1994); Clark v. State, 609 So. 2d 513, 516 (Fla. 1992). Mr. Asay was born to a father who suffered mental illness. Trial counsel admitted at the evidentiary hearing that collateral counsel uncovered substantial mitigation evidence that was not presented but was relevant to the penalty phase (PC-T. 517-22). Mr. David also admitted that his investigation had not revealed most of the mitigation evidence alleged in Mr. Asay's 3.850 motion and presented at the evidentiary hearing (PC-T. 527).

The lower court described the Asay family as one "at war with itself, committing domestic violence and inflicting permanent damage to one another at an early age." (PC-R. 273). The lower court then rejected their testimony because a "competent attorney would have believed there were risks involved," and "the lengthy passage of time since this childhood abuse occurred"[16] coupled with "the fact that none of the

[16] The time factor relied upon by the trial court is exaggerated. Mr. Asay was exposed to brutality from the day he came into this world. This abuse continued throughout his young adulthood and followed him into prison. Mr. Asay was twenty-three (23) years old when the offense was committed.

siblings have become murderers,[17] indicates the sentencer could quite well have found no significant weight to be attached to the testimony." (PC-R. 273).

However, in Phillips v. State, 608 So. 2d 778 (Fla. 1992), this Court held that while time factor may make the evidence "less compelling," it "does not change the fact that it was relevant, admissible evidence that should have been presented to the jury" and "[i]t cannot be seriously argued that the admission of the evidence could have in any way affirmatively damaged Phillips' case." Id. at 782. The evidence established at the evidentiary hearing was relevant, admissible evidence that should have been presented to Mr. Asay's jury. Further, trial counsel's argument is the same as that which this Court admonished in Phillips: Mr. David argued that the mitigation evidence may have damaged Marc's case. Despite having no knowledge of the evidence at the time of trial, Mr. David attempted to describe the evidence as a "double-edged sword" (PC-T. 522). This Court has consistently held that residual or lingering doubt "is not an appropriate matter to be raised in mitigation during the penalty phase proceedings of a capital case." Rose v. State, 675 So. 2d 567, 573 n.5 (Fla. 1996) (citing King v. State, 514 So. 2d 354 (Fla. 1987); Aldridge v. State, 503 So. 2d 1257 (Fla. 1987); Burr

[17] The lower court's reliance on the fact that none of Mr. Asay's siblings have committed murder should not be given any credence. Mitigation evidence of childhood abuse does not hinge on the types of crimes committed by the defendant's siblings. To find that horrors described by Marc Asay's siblings do not carry much weight because his brothers and sisters have not committed murder simply does not make sense and has no basis in law.

v. State, 466 So. 2d 1051 (Fla. 1985). Mr. David's statement stems from a lack of knowledge of the law and an inadequate understanding of how to conduct a penalty phase.

The lower court found that a competent attorney would have believed that there were risks involved with presenting this type of evidence. The lower court failed to address the fact that at the time of Mr. Asay's penalty phase, trial counsel did not know the evidence existed. Trial counsel cannot say that in hindsight he would not have presented the evidence. There can be no strategic decision attached to trial counsel's decision because the decision was never made. See Heiney v. State, 620 So. 2d 171, 173 (Fla. 1993) ("Heiney's lawyer in this case did not make decisions regarding mitigation for tactical reasons. Heiney's lawyer did not even know that mitigating evidence existed.")

Trial counsel is under a duty to independently investigate, evaluate, and present all statutory and nonstatutory mitigation in a capital case. Rose, 675 So. 2d at 570-72; Heiney, 620 So. 2d 173; Stevens v. State, 552 So. 2d 1082, 1087-88 (Fla. 1989); State v. Michael, 530 So. 2d 929 (Fla. 1988); Porter v. Singletary, 14 F.3d 554, 557 (11th Cir. 1994). Failure to investigate available mitigation constitutes deficient performance. Rose, 675 So. 2d at 570-72; Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995); Deaton v. Dugger, 635 So. 2d 4 (Fla. 1993); Heiney, 620 So. 2d at 173; Phillips, 608 So. 2d 782-83; Mitchell v. State, 595 So. 2d 938 (Fla. 1992); Lara v. State, 581 So. 2d 1288 (Fla. 1991); Stevens, 552 So. 2d at 1087-88; Bassett

v. State, 541 So. 2d 596 (Fla. 1989). Furthermore, "caselaw rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them. Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991).

At the evidentiary hearing, trial counsel may very well have been afraid that the mitigation evidence would "open doors" (PC-T. 524). Mr. David would not have been obligated to present this evidence at trial if, after a reasonable investigation, he determined that the evidence would do more harm than good. However, before Mr. David could make such a decision he first had to investigate because such a "decision must flow from an informed judgment." Harris v. Dugger, 874 F.2d 756, 763 (11th Cir. 1989)(emphasis added); see also Heiney, 620 So. 2d at 173, 174 (without an investigation counsel cannot weigh the alternatives available). Mr. David's job was to go through those doors and find out what was on the other side. His failing was that he did not even know the "doors" existed.

Trial counsel's investigation purportedly failed because he "found it difficult to get anything from [Mr. Asay's] mother of any worth" (PC-T. 527). Despite trial counsel's misgivings regarding Mr. Asay's mother, he decided that she would highlight what was important in the penalty phase, and he did not want to parade one hundred witnesses into court (PC-T. 672). However, this is no excuse for not talking to a single other mitigation witness. There was no reason for not conducting an adequate

penalty phase investigation in Mr. Asay's case; trial counsel merely stated that he "gave this case to [his] investigator" (PC-T. 693-94).

The lower court found that trial counsel presented a number of nonstatutory mitigating factors in spite of uncooperativeness from Mr. Asay and his mother[18] (PC-R. 272). Like trial counsel, the lower court is able to rationalize trial counsel's completely ineffective investigation because Mr. Asay's mother was not as helpful as trial counsel would have liked. Furthermore, the lower court dismissed the testimony of Mr. Asay's siblings regarding the physical and mental abuse he suffered because his siblings did not come forward with this information in 1988 and neither Mr. Asay nor his mother volunteered the information (PC-R. 273).

Contrary to the lower court's contention, Mr. David cannot blame Mr. Asay, or Mr. Asay's family, for his deficiencies. Even a defendant's desire to not present any mitigation evidence does not terminate an attorney's constitutional duties during the penalty phase. See Blanco v. Singletary, 943 F.2d 1477, 1502 (11th Cir. 1991); Deaton, 635 So. 2d at 7-9. Lawyers must not blindly follow the decisions of their clients because, while the decision to use mitigating evidence is the client's, "the lawyer first must evaluate potential avenues and advise the client of

[18] Interestingly, despite the court's insistence that trial counsel presented a number of nonstatutory mitigating factors, the only mitigating factor the same court found at the time of trial was the defendant's age, which was not accorded much weight (R. 160-62).

those offering potential merit." Blanco, 943 F.2d at 1502; see also Tafero v. Wainwright, 796 F.2d 1314, 1320 (11th Cir. 1986); Eutzy v. Dugger, 746 F. Supp. 1492, 1499 (N.D. Fla. 1989); Koon v. Dugger, 619 So. 2d 246 (Fla. 1993).

Mr. Asay's case is similar to several cases where postconviction relief has been granted because of deficient performance of penalty phase counsel. In Rose v. State, this Court remanded for a new sentencing because Mr. Rose received ineffective assistance of penalty phase counsel. Rose grew up in poverty, was emotionally abused, neglected throughout childhood, was a slow learner with a low IQ, had suffered head trauma, and had been diagnosed as schizoid. Rose, 675 So. 2d at 571. A psychologist also established statutory and nonstatutory mitigating factors. Id. This Court examined the reasons asserted by Rose's trial counsel for failing to conduct an investigation and noted that: counsel had never handled a capital case;[19] counsel was unfamiliar with the concept of aggravating and mitigating factors;[20] and counsel failed to investigate Rose's background and obtain relevant records.[21] Id. at 572.

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[19] While Mr. David had handled capital cases before, he never conducted a penalty phase.

[20] Trial counsel in Rose argued an "accidental death" theory akin to a claim of residual or lingering doubt. Similarly, Mr. David testified that the problem with the mitigating evidence collateral counsel uncovered was how to present it and try to convince the jury that the defendant did not do anything (PC-T. 522).

[21] Mr. David also failed to investigate Mr. Asay's background and did not obtain school, hospital, prison, and other relevant records, which collateral counsel's mental health

In State v. Lara, the trial attorney representing Mr. Lara was handling his first capital case and devoted ninety percent of his time to the guilt phase. The attorney did not investigate the defendant's background and did not properly utilize mental health experts. Lara, 581 So. 2d at 1290. The only person to testify at Lara's penalty phase was his aunt who briefly testified that Lara's father treated him badly and beat him a lot.[22] Id. at 1289. At a postconviction evidentiary hearing, Lara presented the testimony of eight background witnesses and mental health testimony that established compelling mitigation that should have been presented to the jury. Id.

The only thing that Mr. Asay's jury knew about him was that his mother thought he was a good and helpful boy. They were also presented with the effects alcohol has on the average person. Collateral counsel presented the testimony of nine lay witnesses and two mental health experts that established significant statutory and nonstatutory mitigation. The jury never knew Marc Asay. They should have known about the horrors he suffered throughout his life.

Mr. Asay has established deficient performance under Strickland v. Washington, and this Court's precedent. The above identified acts or omissions of penalty phase counsel were

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experts relied upon in their evaluations (Defendant's Exhibit #4).

[22] Compare the testimony of Mr. Asay's mother: Mr. Asay's mother generally testified that Marc was a good person and did not hint at the atrocities he suffered as a child and young adult.

deficient and outside the range of professionally competent assistance. See Baxter v. Thomas, 45 F.3d 1501 (11th Cir. 1995).

B. Trial counsel failed to develop and present significant statutory and nonstatutory mental health mitigation.

Arguably the most glaring deficiency in trial counsel's performance was his failure to obtain mental health mitigation.

Trial counsel's failure to present mental health testimony is inextricably linked to his failure to investigate. When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background, see, e.g., O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984), and to assure that the client is not denied a professional and professionally conducted mental health evaluation. See Mason v. State, 489 So. 2d 734 (Fla. 1986); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984).

The only mental health expert trial counsel consulted was Dr. Ernest Miller. During Mr. Asay's trial, evidence came in that Mr. Asay had consumed alcohol the night of the offense (PC-T. 537). Mr. David presented Dr. Miller with hypotheticals and Dr. Miller explained the impairment caused by alcohol consumption (PC-T. 537; R. 1014-18). Dr. Miller never examined Marc (R. 1014-18) and was the only mental health expert that testified at trial (R. 410-1031). Trial counsel did not request the assistance of any other mental health expert (PC-T. 546).

Counsel prior to Mr. David did retain the services of Dr. Vallely, who evaluated Mr. Asay. However, trial counsel never contacted him (PC-T. 540-46). Therefore, trial counsel did not

know whether he had been provided any background materials, or whether it would be necessary to obtain this information so Dr. Vallely could do a thorough evaluation. At the evidentiary hearing trial counsel assumed he had Dr. Vallely's report at the time of trial, but had no recollection of it (PC-T. 645, 647-49), and he did not remember receiving Dr. Vallely's notes (PC-T. 644). The notes indicated that Mr. Asay informed him that he was abused, had huffed inhalants while in prison, and had been beaten by black inmates (PC-T. 545). Dr. Vallely also suspected Mr. Asay may have been raped (PC-T. 545). However, none of this information is contained in Dr. Vallely's report (PC-T. 544).

Mr. David stated that Dr. Vallely's report indicated he attached no significance to Mr. Asay's personal history (PC-T. 680). The report also stressed that Mr. Asay was deceptive and manipulative. However, the report does not indicate that Dr. Vallely spoke with anybody besides Mr. Asay and indicates that Dr. Vallely had a general distrust of Mr. Asay and his representations (PC-T. 681-82). Mr. David admitted that it would have been helpful if Dr. Vallely had received corroborating information (PC-T. 682-83).

Dr. Vallely's evaluation was inadequate. Mr. David testified that he considered the report negative and the trial court found he was entitled to rely on the report and made a reasonable decision that it would not be helpful. Yet, Mr. David never spoke with Dr. Vallely. If he had, he would have known that a wealth of mitigating evidence existed, the shortfallings

of Dr. Vallely's report, and that he should supply Dr. Vallely with additional information.

Collateral counsel presented the corroborating information at the evidentiary hearing that Mr. David acknowledged would have been helpful. Trial counsel should have uncovered this information. At the evidentiary hearing, collateral counsel presented the testimony of two experts who were provided with the background information necessary to do a competent evaluation of Marc Asay. Both established significant mental health mitigating factors. Dr. Sultan's findings are fully set forth in the Statement of the Case and Facts.

The lower court determined that Dr. Sultan's testimony was of "minimal impact" (PC-R. 271). This decision was based in part because Dr. Sultan testified that Mr. Asay had the ability to plan. However, Dr. Sultan clarified this by stating "I would need to know what kind of plan you're talking about or what kind of goal you're asking about achieving" (PC-T. 835). The lower court also dismissed her testimony because Dr. Sultan was unfamiliar with the circumstances of the case, (PC-R. 271) despite Dr. Sultan's testimony that she reviewed incident accounts and DOC records that detailed the offense (PC-T. 834-835).

The lower court also found that Dr. Sultan's statement that Mr. Asay was a "nonintellectual racist boggles the mind" (PC-R. 271). In so doing, the court chose to ignore Dr. Sultan's explanation of the term. During cross examination Dr. Sultan

testified that she discussed racism with Mr. Asay, and explained that he was very confused about his feelings towards African-Americans (PC-T. 850). Dr. Sultan believed that Mr. Asay had an "internal moral sense that people should be treated equally regardless of their ethnic background," however, he also "had personal experiences throughout his incarceration of being repeatedly harassed and victimized sexually and physically by black men" (PC-T. 850). These conflicting feelings resulted in a lot of rage against African-Americans "that didn't fit with [Mr. Asay's] intellectual idea of how he should feel" (PC-T. 850) When asked whether she would consider Marc a racist, Dr. Sultan responded: "No, Mark Asay is not an intellectual racist. He doesn't have a creed of honor or code of ethics in which he could support the ideas of discrimination against a minority group. I believe he has a lot of anger and rage based on his own personal experiences." (PC-T. 850.)

In addition to her evaluation, Dr. Sultan requested a neuropsychological examination of Mr. Asay because during her evaluation she noticed signs that Mr. Asay suffered from organic impairment (PC-T. 786). Dr. Crown determined that Marc Asay met the criteria for two statutory mitigating factors: extreme mental and emotional duress and inability to conform conduct to the requirements of the law[23] (PC-T. 712). The lower court dismissed Dr. Crown's testimony stating that Dr. Crown had ignored the

[23] Dr. Crown's conclusions are fully explained in the Statement of the Case and Facts.

facts of the crime (PC-R. 270). However, the lower court ignored both Dr. Sultan's and Dr. Crown's explanation of the purpose of a neuropsychological examination. The lower court mischaracterized Dr. Crown's testimony stating Dr. Crown had been overwhelmed by Mr. Asay's inhalant abuse and being attacked by a swarm of bees (PC-R. 270). When questioned about the bee attack, Dr. Crown testified that by itself the attack was not of much importance, but merely showed that Mr. Asay had been exposed to neurotoxins at a young age (PC-T. 744). Furthermore, Dr. Crown's conclusions were based on the results of the neuropsychological tests, which were consistent with the background materials he was provided and his clinical interview.

Both Dr. Crown and Dr. Sultan reviewed Dr. Vallely's report. Unlike Dr. Sultan and Dr. Crown, Dr. Vallely relied exclusively on Marc's self-report. There is no reference in the report or his notes that he spoke to any family member or tried to establish family history or background (PC-T. 805).[24]

A simple consultation with Dr. Vallely could have put trial counsel on notice that a plethora of mitigation existed, that Dr. Vallely's report was inadequate, or that he should supply Dr. Vallely with additional information. Trial counsel acknowledged Dr. Vallely should have been provided crucial corroborating information regarding Mr. Asay's history. That information existed; Mr. David failed to discover it. Dr. Vallely should

[24] Dr. Sultan was not allowed to offer her opinion whether a mental health expert with the materials she received could reach Dr. Vallely's diagnosis (PC-T. 805-07).

have been provided with this information, this information should have been given to trial counsel's own mental health expert, and most importantly the information should have been before the jury when it decided whether Mr. Asay should live or die.

The above identified acts or omissions of penalty phase counsel were deficient and outside the range of professionally competent assistance. See Baxter, 45 F.3d 1501. Deficient performance under Strickland v. Washington, and this Court's precedent has been established.

C. Mr. Asay was prejudiced by trial counsel's deficient performance.

Despite trial counsel's ineffective attempt at establishing mitigation during the penalty phase, the jury voted 9-3 on both counts. Mr. Asay only needed the vote of three additional jurors to save his life.

Trial counsel's deficient performance prejudiced Mr. Asay under Strickland v. Washington, which requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694 (1984). Confidence in the outcome is undermined when the court is unable "to gauge the effect" of counsel's ommissions. Michael, 530 So. 2d at 930. Prejudice is established when trial counsel's deficient performance deprives the defendant of a "reliable penalty phase proceeding." Deaton, 635 So. 2d at 9.

The overwhelming mitigation developed and presented by collateral counsel could not and would not have been ignored had it been presented to Mr. Asay's sentencers. Compare the mitigating factors established by the trial court: the defendants age (23), which was not given much weight. If counsel had presented the mitigation evidence that was readily available to him, the jury would have heard expert and lay testimony establishing two powerful mental health statutory mitigating factors and numerous nonstatutory mitigating factors.

Prejudice is established under such deficient performance. See Rose, 675 So. 2d at 573; Hildwin, 654 So. 2d at 107; Phillips, 608 So. 2d at 783; Lara, 581 So. 2d at 1289; Bassett, 541 So. 2d at 597. Had trial counsel conducted an investigation of the available mitigation information and made reasonable decisions about the presentation of mitigation, and advanced Mr. Asay's right to an appropriate penalty phase mental health evaluation, there is a reasonable probability that the outcome of the proceedings would have been different. Baxter, 45 F.3d at 1501; Loyd v. Whitley, 977 F.2d 149 (5th Cir. 1992); Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988); Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988); Magill v. Dugger, 824 F.2d 879, 889-90 (11th Cir. 1987); Elledge v. Dugger, 823 F.2d 1439, 1444-45 (11th Cir. 1987); Blake v. Kemp, 758 F.2d 523, 531 (11th Cir. 1985).

The question is whether there is a reasonable probability that, absent the errors, the outcome would have been different.

A close reading of Strickland provides an additional tool that provides a clear measure to determine prejudice. Strickland explained:

> . . . the appropriate test for prejudice finds it roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution.

Strickland, 466 U.S. at 694 (citing United States v. Agurs, 427 U.S. 97, 104, 112-13).

Assume the State had the responsibility to provide mitigation evidence to the defense. Posit that all the information the State disclosed was the mitigation actually offered by trial counsel at Mr. Asay's penalty phase. It seems clear that there would be a Brady violation if the prosecution had in its possession all the mitigation evidence actually obtained by collateral counsel but did not divulge it. Applying a familiar standard, predictably this Court would have determined the mitigation evidence sufficiently material to require disclosure. Since the prejudice standard has its roots in the same test, Mr. Asay's additional mitigation evidence would have been sufficiently material to create a reasonable probability that, absent the ineffectiveness of counsel in presenting inadequate mitigation, the outcome would have been different respecting the imposition of the death penalty. Common sense dictates that Mr. Asay's additional mitigation evidence was important and there is a reasonable probability it would have changed the jury's decision.

In Penry v. Lynaugh, Justice O'Connor re-affirmed "the principle that punishment should be directly related to the personal culpability of the criminal defendant," in capital cases. Penry v. Lynaugh, 492 U.S. 302, 304 (1989). And she stated: "Rather than creating a risk of unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a 'reasoned moral response to the defendant's background, character, and crime.'" Id. at 327. Trial counsel's ineffectiveness prevented the jury from making this "reasoned moral response," to his prejudice.

ARGUMENT IV

THE TRIAL COURT ERRED IN DENYING MR. ASAY'S INEFFECTIVE ASSISTANCE OF GUILT PHASE COUNSEL CLAIMS. MR. ASAY HAS BEEN DENIED A FULL ADVERSARIAL TESTING, HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING FLORIDA LAW.

A. A full adversarial testing did not occur during the guilt phase of Mr. Asay's trial.

"A fair trial is one which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." Strickland, 466 U.S. at 685.

1. Trial counsel was ineffective in failing to move to disqualify Judge Haddock during the trial.

In Ragsdale v. State, 720 So. 2d 203 (Fla. 1998), this Court found the trial judge's "coarse" way of stating a claim had no merit did not constitute judicial bias. The Court did, however, caution judges that they "must refrain from making comments that

might cause a litigant to fear that the neutrality to which the litigant is entitled has been compromised." Id. at 207. If such comments are made during trial, counsel may move for a recess to file a motion to disqualify.

The neutrality to which Mr. Asay was entitled was compromised by the comments made by the trial judge. They intimated that he favored the death penalty for any premeditated murder and that the judge had already made up his mind as to Mr. Asay's sentence. The judge's predisposition toward the death penalty robbed Mr. Asay of his most precious constitutional right. See, Porter, No. 90101, 1998 WL at *6.

Trial counsel should have moved to recuse Judge Haddock; his failure to do so was deficient and prejudicial. The performance was deficient because the judge's comments constituted legally sufficient grounds for recusal. The failure to so move was prejudicial because it left Mr. Asay's trial and sentencing in the hands of a judge who on the record intimated he had already formed a death sentence decision. The lower court erred in summarily denying this claim of ineffective assistance of counsel.

2. Trial counsel did not vigorously and effectively pursue or argue a reasonable doubt strategy at trial.

At the evidentiary hearing, Mr. David testified that he felt Mr. Asay's case was not a first degree murder case and that he pursued a reasonable doubt strategy at trial (PC-T. 665-67). The key to such a strategy is impeaching key witness testimony and questioning credibility. The failure to impeach key witnesses

may constitute ineffective assistance of counsel. See Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1983), after remand, 799 F.2d 1442 (11th Cir. 1986); see also LaTulip v. State, 645 So. 2d 552 (Fla. 2d DCA 1994); Porter v. State, 626 So. 2d 268 (Fla. 2d DCA 1993); Richardson v. State, 617 So. 2d 801 (Fla. 2d DCA 1993); Williams v. State, 673 So. 2d 960 (Fla. 1st DCA 1996).

Bubba O'Quinn was the state's star witness, he was present at both shootings, and was the only person that testified that he witnessed Marc Asay commit the murders. Mr. David admitted that it was important to impeach O'Quinn and attack his credibility (PC-T. 557-58). However, counsel was ineffective for failure to question O'Quinn about prior inconsistent statements (PC-T. 561-69, 593-600). Specifically, it was important to impeach O'Quinn's testimony of how he and Mr. Asay arrived at the second shooting and to show that O'Quinn's account of the events leading up to the shootings was inaccurate (PC-T. 598-99). Mr. David admitted that there were inconsistencies between O'Quinn's statements and that they could have been of value to Mr. Asay's defense, (PC-T. 599) however, Mr. David did not explore them.

The lower court prohibited collateral counsel from examining the full depth of the inconsistencies that were not pursued at trial. (PC-T. 602.) However, collateral counsel did proffer notes detailing the inconsistencies Mr. David overlooked in O'Quinn's statements (PC-T. 602-605; Defense Exhibit G). Mr. David testified that he would have wanted to prove that other witnesses were not being truthful in their testimony. However,

there were several inconsistencies in the Moore cousins' testimony that he did not explore (PC-T. 608-14). Danny and Charlie Moore testified that Asay told them of his involvement in the case and sought their help in changing the appearance of his truck (R. 646-715). When asked if he attempted to challenge Danny or Charlie Moore's testimony with their prior inconsistent statements, David responded that he didn't "recall that" but that "in closing argument it was addressed." (PC-T. 612.)

Once again, the lower court prevented Mr. Asay's counsel from fully exploring the inconsistencies of the Moore cousins with Mr. David. (PC-T. 613-15.) However, Mr. Asay's counsel did proffer notes detailing the inconsistencies in the Moore cousins' statements (PC-T. 614-15; Defense Exhibit H).

During the hearing, the state was worried about reconciling the inconsistencies collateral counsel had raised (PC-T. 604). According to the state, many of the inconsistencies were not inconsistent at all because they were cleared up later either at trial or in the statement itself (PC-T. 605). The court gave the state the opportunity to "clear up" the inconsistencies by proffering any material he thought would clarify the statements, (PC-T. 604-05), however the state never took the lower court up on its offer and never refuted the inconsistencies proffered by Mr. Asay's counsel. Despite the state's failure to present any evidence "clearing up" the inconsistencies, the lower court found that collateral counsel had not shown what different information would have been elicited (PC-R. 264). The court further found

that collateral counsel did not make a "showing of any damage which could have been done to the State's case" by exploring the inconsistencies (PC-R. 264). To the contrary, collateral counsel did establish significant inconsistencies in the witnesses statements. Especially the state's main witness Bubba O'Quinn. Years after the trial witnesses themselves are not needed to establish what they "might" have said at the trial if they were questioned about the inconsistencies. The inconsistent statements speak for themselves. The deficient performance derives from the fact that they were never presented to the jury and the jury was unable to effectively weigh the witnesses' credibility. Finally, contrary to the lower court's ruling, these inconsistencies were not "minor." See Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1983), after remand, 799 F.2d 1442 (11th Cir. 1986) (finding counsel ineffective for failing to impeach two witnesses with prior inconsistent statements). If trial counsel's strategy was reasonable he should have explored these inconsistencies. Trial counsel also failed to effectively argue on behalf of Mr. Asay. Although Mr. David testified at the evidentiary hearing that he either misspoke when stated that the state proved its case beyond a reasonable doubt or that it was a typographical error, Mr. David's entire argument served to aid the State's case.[25]

[25] A typographical error would call into question the reliability of transcript.

3. Trial counsel was ineffective for not utilizing a voluntary intoxication defense, which was established by the facts of the case.

At the evidentiary hearing, Mr. David testified that at trial he "argued . . . it was Bubba O'Quinn who did the firing rather than Mr. Asay" (PC-T. 507). Yet Mr. David also testified that he was in an "ethical dilemma" regarding his trial defense because Mr. Asay allegedly confessed to his investigator[26] (PC-T. 643). Mr. David stated that he could not call "any witnesses on Mr. Asay's behalf . . . because I knew he committed the crime" (PC-T. 643). However, counsel's ethical dilemma did not stop him from arguing at trial that Bubba O'Quinn was the murderer (R. 815-49, 904-25) even though he claimed to know that was false (PC-T. 643).

Mr. David went beyond trying to establish reasonable doubt, he blamed O'Quinn. If Mr. David actually knew that O'Quinn did not commit the murders and he argued that he did, Mr. David asserted a known falsehood to the court and jury. Based upon his own testimony, the strategy simply does not make ethical or logical sense. He could not call witnesses on Mr. Asay's behalf, -because he knew he knew their testimony would be false, yet he argued that someone else did the crime even though he knew that argument was false. How can one be an ethical dilemma while the other is not? What is even more perplexing is the facts of the crime did establish an ethical defense. Numerous witnesses

[26] Mr. Asay does not admit that he confessed to trial counsel's investigator.

testified that Marc was under the influence of alcohol the night of the murders. Accordingly, he would have been entitled to an instruction on voluntary intoxication. Gardner v. State, 480 So. 2d 91 (Fla. 1995). Furthermore, trial counsel did attempt to utilize this defense in the penalty phase when he asked his mental health expert about the effects of alcohol on a normal person. Mr. David testified that he chose not to pursue a voluntary intoxication defense at trial because he had "never seen it work" (PC-T 657). Yet, based on his testimony at the evidentiary hearing, other than simply trying to attack the state's case and establish reasonable doubt (without actively blaming another person), it was the only viable defense available to him.

Voluntary intoxication is an affirmative defense that essentially requires a defendant to admit, or concede if there is a lack of memory, some involvement in the offense. If Mr. Asay actually admitted his involvement in the crimes to Mr. David's investigator, which of course Mr. Asay does not now admit ever occurred, then voluntary intoxication was a viable defense. O'Quinn testified that he had between 9 to 11 beers the night of the murder (R. 491-95). While he was not counting how much Marc Asay had to drink he roughly had the same amount to drink (R. 514-15). Robbie Asay also testified that he, Marc, and O'Quinn had a lot to drink the night of the murders (R. 553-56). In response to a hypothetical question, trial counsel's penalty phase mental health expert testified that the amount of alcohol

consumed the night of the murders would impair a person's judgment, their ability to reason, rationalize, and to engage in controlled corrective behavior (R. 1017). Given this information at the guilt phase, a jury could have believed that Marc Asay's intoxication negated the specific intent necessary for first degree premeditated murder. Based upon his own testimony, Mr. David's trial strategy was not ethical or reasonable. His performance was deficient because he did not pursue this ethical and viable defense, supported by the facts of the case. The deficiency prejudiced Asay.

B. Trial counsel was ineffective for failing to investigate and rebut the State's racial motive for the murders.

Mr. David was deficient in his handling of the racial issues he was confronted with in Mr. Asay's trial. According to Mr. David, race was an "inescapable issue" during the trial and the state focused on the fact that the two victims were black (PC-T. 506). The racial motive advanced by the prosecution developed mainly through an alleged jailhouse confession to Thomas Gross (PC-T. 507). Marc Asay was denied a full and fair hearing on this issue because the lower court would not allow Thomas Gross to testify and recant his trial testimony. Thomas Gross would have established that state interference rendered trial counsel ineffective in rebutting the State's theory regarding motive for the homicides. Mr. David stated that had Mr. Gross' allegations been true he would have wanted to know and would have utilized the information at trial. However, Mr. David could not present testimony that racial motivations for the crime were fabricated

because the state attorney tied his hands by engaging in misconduct and failing to disclose this information (PC-T. 511-13). This information would have allowed Mr. David to effectively impeach Gross' testimony and would have benefited Asay's case (PC-T. 515). The information would also have hurt the state's case by diminishing Mr. de la Rionda's credibility (PC-T. 515-516). Faced with this damaging, albeit fabricated, evidence of racial animus, it was incumbent upon competent counsel to take measure to counteract the allegations. Mr. David did nothing, despite there being a wealth of readily available evidence to refute the allegations of racism. At the evidentiary hearing collateral counsel presented evidence that countered and explained the prosecutor's racial arguments. Johnny Sharp, an African-American inmate, testified that he had a sexual relationship with Mr. Asay and that Mr. Asay was not a racist. Two other inmates testified that Marc Asay received his racist tattoos for protection because he was being beaten by black inmates. A psychologist from the prison in Texas where Mr. Asay served a sentence corroborated that black inmates gave Mr. Asay trouble.

The lower court found that "[c]ollateral counsel failed to make any showing whatsoever that any attorney, no matter how skilled, would have had any way of keeping the issue of race or racial hostility from being brought out in this trial" (PC-R. 264). The lower court vouched for trial counsel and stated that he "is an extremely experienced and talented criminal defense

lawyer, who was and is well able to weigh the value of such potential testimony against the high price of losing the second closing" (PC-R. 265).[27] The court found there was a negative aspect to the testimony from the Texas inmates and former warden and psychologist at the Texas prison.[28]

In regard to Johnny Sharp's testimony the court stated that it was "one of the most bizarre and amusing, albeit useless, moments of courtroom experience that the undersigned has ever observed" (PC-R. 266). The court believed that the "promiscuous and perverted sexual relationship" between Mr. Asay and Mr. Sharp would not have been relevant or admissible at the time of trial (PC-T. 266). The lower court then created a strategy for the State: "Sharp's testimony might have allowed the State to argue very effectively in closing that guilt or shame over [Mr. Asay's] resorting to homosexual relationships in prison may have motivated him to hate blacks as a symbol and reminder of his past degradation" (PC-T. 266). Despite the court's concentration on the negative aspects of the evidence collateral counsel presented and its contention that Mr. Asay was degraded when he engaged in a "perverted" homosexual relationship, trial counsel should have

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[27] Compare David's second closing where he argued that the racial slurs testified to were generic terms and that Mr. Asay's tattoos were to protect himself in prison (R. 905-06.) to the testimony of Joe Collins, Douglas Stephens, David Hunter, and Johnny Sharp.

[28] The former warden and psychologist did testify, however, that at the time of Mr. Asay's trial he would not have had access to Mr. Asay's records and could not testify about any disciplinary problems. Despite the courts ruling, the negative aspect of Collins' testimony was never established.

known this information and considered it at the time of trial. The real issue is how effective Mr. David was in obtaining information to counter the state's argument that the murders were racially motivated. Just as with the mitigation evidence presented, Mr. David was unaware at the time of trial that evidence existed that would have rebutted the State's theory of racial motivation. "[I]n a capital case the attorney's duty to investigate all possible lines of defense is strictly observed." Coleman v. Brown, 802 F.2d 1227, 1233 (10th Cir. 1986). Mr. David was not under an obligation to present this evidence. He was, however, under an obligation to find it, weigh its advantages and disadvantages, and make an informed decision regarding its use. The time to make the decision was at trial, counsel cannot be presented with evidence at an evidentiary hearing and proclaim that in hindsight he would not have used it. The information collateral counsel obtained was equally available to Mr. David at the time of the trial, but he failed to adequately investigate Mr. Asay's background and uncover the information. "An attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 569 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 466 U.S. 903 (1980). Mr. David's performance was deficient under Strickland v. Washington. The importance of whether Mr. Asay was a racist cannot be overestimated. Evidence of racism reflected poorly on Mr. Asay's character and inflamed the jury. Had the information been

presented to the jurors, they would have been free to decide whether Mr. Asay was a racist; whether the crimes were racially motivated; and whether the motivation behind Mr. Asay's tattoos was racial animosity. Unfortunately, Mr. David's ineffectiveness left the jury no opportunity to reach an informed and contrary conclusion regarding the allegations of racial animus. There is a reasonable probability that had Mr. David presented available evidence that Mr. Asay was not a racist, the result of Mr. Asay's capital trial would have been different.[29] The lower court's conclusion that evidence to rebut the State's character evidence to show racial motive would not have been admissible at the guilt phase is erroneous. At the time of Mr. Asay's trial, Chapter 90.405(1) and (2) (Fla. Stats. 1987) provided for the methods of proving character through reputation evidence and that when character or a trait of a person is an essential element of a charge, claim or defense, specific instances of conduct may be used. In Mr. Asay's case, the State relied so heavily on Mr. Asay's alleged racism as a motive for him to commit the crime that Mr. Asay would have been entitled to present this evidence.

ARGUMENT V

THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. ASAY'S MERITORIOUS CLAIMS. AS A RESULT, MR. ASAY HAS BEEN DENIED HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING FLORIDA LAW.

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[29]Had the jury rejected the State's racial motive, but nevertheless convicted Mr. Asay, the probability of life recommendations would have been enhanced.

The lower court erroneously denied Mr. Asay an evidentiary hearing on several claims. Mr. Asay was entitled to an evidentiary hearing unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986); State v. Crews, 477 So. 2d 734, 735-37 (Fla. 1986); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Mason v. State, 489 So. 2d 734, 735-37 (Fla. 1986). Further, a court must "attach to its order the portion or portions of the record conclusively showing that a hearing is not required." Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990). The files and records in this case do not conclusively rebut Mr. Asay's allegations and the lower court failed to attach anything from the record or files demonstrating that Mr. Asay is not entitled to relief. Although several of Mr. Asay's claims alleged ineffective assistance of counsel the lower court ruled they were procedurally barred or meritless, and that Mr. Asay could not use his 3.850 motion to relitigate issues (PC-R. 65-71; Claims VIII, X, XIV, XVII, and XVIII). In claims V and VI the trial court stated that no objection was raised at trial and the claim could not be raised on direct appeal, yet the court held that the claims were procedurally barred (PC-R. 67). Ineffective assistance of counsel claims are properly raised under Rule 3.850. Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1987). The Sixth Amendment requires that criminal defendants be provided effective representation. See Strickland, 466 U.S. at 668.

Counsel "has a duty to bring such skill and knowledge as will render the trial a reliable adversarial testing process." Id. at 688. The only way a criminal defendant can assert his rights is through counsel, therefore, counsel must know the law, make proper objections, assure that jury instructions are correct, examine witnesses adequately, present evidence, and file motions raising relevant issues. Ineffective assistance of counsel claims based upon trial counsel's failure to object do not frustrate the preservation of error rule because a defendant claiming ineffective assistance must satisfy the standards articulated in Strickland. Kimmelman v. Morrison, 477 U.S. 365, 373-75 (1986); Hardman v. State, 584 So. 2d 649 (Fla 1st DCA 1991); Menendez v. State, 562 So. 2d 858 (Fla. 1st DCA 1990). An ineffectiveness claim based on counsel's failure to timely raise an issue in a distinct Sixth Amendment Claim with a "separate identit[y]" and "reflect[s] different constitutional values" from the underlying claim that counsel failed to preserve. Kimmelman, 477 U.S. at 375. Mr. Asay's counsel failed to effectively represent Mr. Asay at every stage of his trial. The claims in Mr. Asay's 3.850 motion are not procedurally barred. They are ineffective assistance of counsel claims cognizable under Rule 3.850. The lower court erred in its summary denial on these claims. The lower court dismissed Claim I, which alleged that public records compliance was incomplete. Given the fact there remain two Motions to Compel Disclosure that have not been ruled upon, this issue should be remanded to the trial court (see also Argument

II(C)). Claim VII attacked the constitutionality of Florida's aggravating factors statute. Mr. Asay's jury did not receive adequate guidance on the application of aggravating factors. The judge merely read list of aggravating factors without providing crucial limiting instructions to the jury. See, e.g., Green v. State, 583 So. 2d 647, 652-53 (Fla. 1991);Songer v. State, 544 So. 2d 1010 (Fla. 1989); Zant v. Stephens, 462 U.S. 862, 876 (1983). The vagueness and overbreadth of Florida's aggravating factors statute was not adequately channeled and limited. Mr. Asay should have been granted a hearing on this claim. Claims II and III alleged lower court bias against Mr. Asay throughout his proceedings, that trial counsel was ineffective for not seeking recusal, and that the judge should not preside over Mr. Asay's 3.850 motion. The court found the issue should have been raised on direct appeal. Because the issue was not preserved at trial this issue could not be raised on direct appeal. Likewise, the ineffective assistance of counsel claim is not being used to circumvent a procedural bar. Mr. Asay should have been given an opportunity to prove these claims. Claim IX alleged the sentencing judge failed to consider the same mitigating factors as the jury. The motion specifically alleged mitigating factors that the judge did not find. The lower court found this was not a proper subject for a 3.850 motion and procedurally barred. However, the judge's actions at sentencing deprived Mr. Asay of the individualized sentencing required by the Eighth and Fourteenth Amendments. See Zant, 462 U.S. 862, 879-80 (1983);

Eddings v. Oklahoma, 455 U.S. 104, 110-12 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). The lower court should have granted a hearing on this issue. Claim XV alleges the trial court prevented Mr. Asay from presenting mitigating evidence and deprived him of a reliable sentencing and effective assistance of counsel. During Mr. Asay's penalty phase he attempted to introduce evidence that he was not a racist and was of good character. The court did not allow the evidence because he was not going to allow the state to present evidence during the penalty phase that the killings were racially motivated. First, during the guilt phase the state argued that the crimes were racially motivated. Because the jury could consider this in the penalty phase, Mr. Asay should have been afforded the opportunity to rebut the State's motive for the crimes. Second, the evidence also showed Mr. Asay's good character, which is a mitigating factor and should have been considered by the jury. Even though the claim alleged the trial court denied Mr. Asay effective assistance of counsel, the lower court found the claim was procedurally barred. This is the proper subject of a 3.850 motion and Mr. Asay should have been granted a hearing on this issue. Claim XII alleged trial counsel did not provide him with a competent psychiatrist in violation of Ake v. Oklahoma, 470 U.S. 68, 83 (1985). The mental health expert trial counsel retained was not given any background information and never examined Mr. Asay. Had trial counsel conducted a thorough investigation into Mr. Asay's background he would have discovered classic mitigation. This

evidence should have been presented to Mr. Asay's mental health expert and the jury. A competent mental health expert could have conclusively established statutory mitigation and presented substantial nonstatutory mitigation. The lower court found the claim was "facially insufficient, conclusory, and fail[ed] to set forth grounds for relief." Mr. Asay set forth sufficient facts entitling him to 3.850 relief. See Ragsdale v. State, 720 So. 2d 203, 208-09 (Fla. 1998). Claims XI and XIX allege prosecutorial misconduct in violation of Giglio v. United States, 405 U. S. 150 (1972) and Brady v. Maryland, 373 U.S. 83 (1963). At the Huff hearing collateral counsel stated that the two claims should be combined and considered as one. The lower court denied the claim (PC-R. 69) but never addressed the Giglio allegation. Denial of Claim XX (cummulative error) was error Kyles v. Whitley, 514 So.2d 419 (1995); State v. Gunsby, 670 So.2d 920 (1996). The cummulative effect of the errors is compelling.

CONCLUSION

A new trial and sentencing proceeding is warranted. At the very least, this Court should remand the matter to the lower court for a full and fair evidentiary hearing.

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 April 5, 1999.

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